आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 63/Ind/2021
Assessment Year: 2009-10

A.C.I.T., Central-2, Indore	**बनाम/** Vs.	M/s. Keti Construction (India) Limited, Indore.
(Revenue / Appellant)		(Assessee / Respondent)
PAN: AABCK 5930 D		
Revenue by	Shri Ashish Porwal, Sr. DR	
Assessee by	Shri Ajay Tulsian, CA	
Date of Hearing	09.05.2023	
Date of Pronouncement	07.08.2023	

आदेश /O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 23.09.2020 passed by learned Commissioner of Income-Tax (Appeals)-III, Indore ["Ld. CIT(A)"], which in turn arises out of assessment-order dated 30.12.2016 passed by learned ACIT(Central)-2, Indore, ["Ld. AO"] u/s 147 read with 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2009-10, the revenue has filed this appeal on following ground:

> *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition of Rs. 2,79,25,000/- made on account of unexplained cash credits u/s 68 of the Income-tax Act, 1961 introducing unaccounted money in the regular books by way of share application money."*

2. Heard the learned Representatives of both sides at length and case-records perused.

3. The registry has informed that that the present appeal was required to be filed on 15.03.2021 after a delay of 82 days and therefore time-barred. The Ld. DR prayed that the delay has occurred due to Covid-19 Pandemic. The Ld. DR further placed reliance on the order of Hon'ble Supreme Court in **Suo Motu Writ Petition (C) No. 3 of 2020 read with Misc. Applications**, by which suo motu extension of the limitation-period for filing of appeals w.e.f. 15.03.2020 under all laws has been granted and hence there is no delay in fact. We confronted the Ld. AR who agreed to the submission of Ld. DR. In view of this, the appeal is proceeded with for hearing, there being no delay.

4. Briefly stated the facts leading to appeal are such that the assessee is a company engaged in the business of civil construction and BOT contracts. The return of relevant AY 2009-10 was originally filed u/s 139 and the same was processed u/s 143(1). Thereafter, a search u/s 132 was carried upon assessee on 05.05.2011 in pursuance of which the assessment was re-made u/s 153A read with section 143(3) vide order dated 20.03.2014. However, subsequently, the department conducted another search in the case of one Praveen Kumar Jain of Mumbai wherein it was noted that Praveen Kumar Jain was an entry provider through his paper companies floated for this purpose. It was further observed that the assessee-company has also taken accommodation from concerns of Praveen Kumar Jain during the previous year 2008-09 relevant to AY 2009-10 through share application moneys. Based thereon, the AO issued notice u/s 148 on 28.03.2016 to re-open assessment of assessee. In response, the assessee filed return of income on 30.04.2016. Finally, the AO completed assessment vide order dated 30.12.2016 u/s 147 after making an addition of Rs. 2,79,25,000/- u/s 68 treating the share application moneys received by assessee as unexplained cash credit. Aggrieved, the assessee carried matter in first appeal and

succeeded. Now, the Revenue has come in this appeal before us assailing the order of first appellate authority.

5. During the course of hearing before us, Ld. AR for assessee took lead in arguments so as to put forward certain legal contentions decided by CIT(A) in assessee's favour. The contentions submitted by Ld. AR are three-fold as detailed below:

(i) Firstly, it is contended that the assessee company, namely, "Keti Construction (India) Limited was incorporated on 08.03.1999 by two family groups, viz. (i) Garg family, and (ii) Jakhetia family. Later, with effect from 01.04.2009, KCIL got demerged into two companies vide order of Hon'ble High Court of Madhya Pradesh dated 23.04.2010. The new companies are (i) Keti-T construction (India) Limited, and (ii) Keti-KJ Construction India Limited; the former company went to Garg family and the later went to Jakhetia family. This way, the assessee company ceased to exist w.e.f. 01.04.2009 due to demerger approved by Hon'ble High Court, copy of order of High Court is filed at Page No. 130 to 163 of Paper-Book. Then, the Ld. AR submitted that the AO issued notice u/s 148 to assessee on 28.03.2016 to set in motion the proceedings involved in present case when the assessee-company was not in existence on 28.03.2016. Ld. AR then carried us to the reasons recorded by AO in the case of assessee (Paper-Book Page No. 70) as well as in the case of new company, Keti-T Construction (India) Limited (Paper-Book Page No. 71) before issuing notices u/s 148. These reasons are scanned and re-produced for an immediate reference:

Name of the assessee	:	M/s Keti Construction (India) Ltd. Vidhyadeep, 15/3, Manoramaganj Indore
PAN-	:	AABCK 5930 D
A.Y.	:	2009-10

Reasons recorded under section 148(2) of the Income Tax Act, 1961.

Action U/s 132 of the Income Tax Act 1961 was conducted on one Praveen Kumar Jain by the Investigation wing, Mumbai. During Search it was found that Praveen Kumar Jain is an entry provider and provides entry through his bogus paper concern floated by him for this purpose. Praveen Kumar Jain also admitted this fact u/s 132(4) of the Act. The relevant part where Praveen Kumar Jain admitted this fact and gave details of his bogus paper concern is enclosed herewith for your kind reference as annexure A.

During post search enquiries by the investigation wing, Mumbai in the case of Praveen Kumar Jain, it is found that M/s Keti Construction (India) Ltd., company of Keti/Kalyan group, Indore has received bogus entries of Rs.2,30,00,000/- from companies of Praveen Kumar Jain. Details of transactions are also enclosed herewith as annexure B.

In view of facts found during the search action in the case of Praveen Kumar Jain it is clear that the share application money and share premium money being shown by M/s Keti Construction (India) Ltd. is nothing but its own unaccounted money routed through bogus paper concerns of Praveen Kumar Jain. Therefore, I have reason to believe that the income of M/s Keti Construction (India) Ltd. has escaped assessment of Rs. 2,30,00,000/- within the meaning of u/s 147 of the Act. Accordingly assessment for A.Y. 2009-10 is required to be reopened and notice u/s 148 is hereby issued to the assessee company M/s Keti Construction (India) Ltd. for A.Y. 2009-10.

(P.S. TILWANI)
Asstt. Commissioner of Income Tax (Central)-2,
Indore.

ARORA BANTHIA & TULSIYAN TRUE COPY INDORE

(71)

Name of the assessee	:	M/s Keti-T Constructions (India) Ltd. Vidhyadeep, 15/3, Manoramaganj Indore
PAN-	:	AADCK6123A
A.Y.	:	2009-10

Reasons recorded under section 148(2) of the Income Tax Act, 1961.

Action U/s 132 of the Income Tax Act 1961 was conducted on one Praveen Kumar Jain by the Investigation wing, Mumbai. During Search it was found that Praveen Kumar Jain is an entry provider and provides entry through his bogus paper concern floated by him for this purpose. Praveen Kumar Jain also admitted this fact u/s 132(4) of the Act. The relevant part where Praveen Kumar Jain admitted this fact and gave details of his bogus paper concern is enclosed herewith for your kind reference as annexure A.

During post search enquiries by the investigation wing, Mumbai in the case of Praveen Kumar Jain, it is found that M/s Keti Construction (India) Ltd., has received bogus entries of Rs.2,30,00,000/- from companies of Praveen Kumar Jain. Details of transactions are also enclosed herewith as annexure B.

It is pertinent to mention here that M/s Keti Construction (India) Ltd. has demerged into two companies M/s Keti- KJ Constructions (India) Ltd. and M/s Keti-T Constructions (India) Ltd. by the order of Hon'ble High Court, Indore Bench (M.P) on 23/04/2010. These two companies have taken over assets and liabilities of M/s Keti Construction (India) Ltd.

In view of facts found during the search action in the case of Praveen Kumar Jain it is clear that the share application money and share premium money being shown by M/s Keti Construction (India) Ltd. is nothing but its own unaccounted money routed through bogus paper concerns of Praveen Kumar Jain. Therefore, I have reason to believe that the company M/s Keti Construction (India) Ltd. has escaped assessment of Rs.2,30,00,000/- within the meaning of u/s 147 of the Act. Since company M/s Keti Construction (India) Ltd. has demerged into two companies M/s Keti- KJ Constructions (India) Ltd. and M/s Keti-T Constructions (India) Ltd, both companies are hereby reopened for assessment proceedings for A.Y. 2009-10. I therefore, have reason to believe that income of the assessee company M/s Keti-T constructions (India). Ltd has escaped assessment within the meaning of section 147 of the Act. Accordingly assessment for A.Y. 2009-10 is required to be reopened and notice u/s 148 is hereby issued to the assessee company M/s Keti-T constructions (India). Ltd for A.Y. 2009-10.

(P.S. TIWANI)
Asstt. Commissioner of Income Tax (Central)-2,
Indore

ARORA BANTHIA & TULSIYAN
TRUE COPY

Reading these reasons line by line, Ld. AR demonstrated that the AO has himself recorded that (i) the assessee company has demerged into two companies, M/s Keti-T construction (India) Limited and M/s Keti-KJ Construction (India) Limited by the order of Hon'ble High Court dated 23.04.2010; and (ii) The two companies have taken over assets and liabilities of assessee. Thus, Ld. AR contended that despite being aware of the fact that there had been demerger of assessee-company long-back vide order of High Court dated 23.04.2010; that two companies had already come into existence; and that the new companies had taken over all assets and liabilities of assessee-company, Ld. AO issued notice u/s 148 and re-opened assessment of assessee-company (alongwith re-opening of assessments of new companies). Ld. AR strongly contended that issuance of notice to non-existent assessee-company despite having knowledge, is an action of AO which is illegal and void-ab-initio. Ld. AR submitted that in several decisions, it has been held that an assessment made on a non-existent person is null and void. To support his submission, Ld. AR placed reliance on certain judicial pronouncements, mainly the decision of Hon'ble Supreme Court in the case of **PCIT Vs. Maruti Suzuki India Limited 416 ITR 613**. Other decisions referred by Ld. AR are:

(a) Sarswati Industrial Syndicate Ltd. (1990) 186 ITR 278 (SC)

(b) Spice Infortainment Ltd. (SC) Civil Appeal No. 285 of 2014

(c) Spice Entertainment Ltd., ITA No. 465 and 476 of 2011 order dated 03.08.2011 (Delhi HC)

(d) CIT vs. Indu Surveyors & Loss Assessors Pvt.Ltd. in ITA 366/2013 dt. 15.10.2015 (Delhi HC)

(e) Atos India Pvt. Ltd vs. DCIT in IT (TP) No. 1806/ Mum/2017 dt. 11.08.2020 (ITAT Mumbai)

(ii) Secondly, it is contended that while framing assessment, the AO issued notice u/s 148 as well as u/s 142(1) but did not issue any notice u/s 143(2). Therefore, for this reason also, the assessment framed u/s. 143(3) read with section 147 is invalid.

(iii) Thirdly and lastly, it is contended that the impugned share application money of Rs. 2,90,25,000/- for which the AO made addition was transferred by assessee to Keti-KJ Construction India Ltd., one of the new companies belonging to Jakhetia Group as is evident from the Balance-sheet specifically prepared for giving effect to demerger (Paper-Book Page No. 95), the details of share capital (Paper-Book Page No. 103) and post-demerger Balance-Sheet of Keti-KJ Construction India Limited (Paper-Book Page no.193). Ld. AR went on submitting that the impugned share application money was brought by the members/relatives/concerns of Jakhetia family and accordingly transferred to Keti-KJ Construction India Ltd, the new company of Jakhetia family. Therefore, the moneys brought by Jakehtia family had gone to the new company of Jakhetia family and in this process, the assessee is not a beneficiary at all. Ld. AR submitted that it is a basic principle of income-tax that real income must be taxed in the hands of right person. In the present case, the assessee-company has not retained money at all and just passed on whatever received, therefore no benefit or income has reached to assessee. Being so, addition cannot be made in the hands of assessee.

6. Ld. AR submitted that the CIT(A) has accepted all of the above contentions in his order which is very much correct; therefore his order must be upheld.

7. Per contra, Ld. DR for the Revenue strongly supported assessment-order and requested to uphold the same.

8. We have considered rival submissions of both sides and perused the facts of case in the light of applicable judicial rulings and provisions of law.

9. In **PCIT Vs. Maruti Suzuki India Limited 416 ITR 613** relied upon by Ld. AR, the Hon'ble Supreme Court had a case where the assessing-authority issued a jurisdictional notice to the old company (amalgamating company) despite knowing the fact of amalgamation. The Hon'ble Supreme Court held the action of authority as invalid by observing in concluding para thus:

> *"33 In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Enfotainment on 2 November 2017. The decision in Spice Enfotainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Enfotainment."*

10. Thus, the assessee's case can be said to be covered by the aforesaid decision in **Maruti Suzuki** relied upon by Ld. AR. But at this stage, we should also take note of the recent decision dated 05.04.2022 of Hon'ble Supreme Court in **PCIT Vs. Mahagun Realtors (P) Ltd. 443 ITR 194 (SC)** which though was not referred to by either side. In this recent decision which too have a wide publicity in online media, the Hon'ble Supreme Court analysed several other decisions including its earlier decision in **Maruti Suzuki** and came to hold against assessee and in favour of revenue i.e. the assessment made by department on old company was valid. But a careful reading of judgement shows that the Hon'ble Supreme Court noted certain distinguishing features as well and therefore one can infer that the decision

in **Maruti Suzuki** is not done away with. These paras are re-produced below:

> *"33. There is no doubt that MRPL amalgamated with MIPL and ceased to exist thereafter; this is an established fact and not in contention. The respondent has relied upon Spice and Maruti Suzuki (supra) to contend that the notice issued in the name of the amalgamating company is void and illegal.* ***The facts of present case, however, can be distinguished from the facts in Spice and Maruti Suzuki on the following bases****.*
>
> *34. Firstly, in both the relied upon cases, the assessee had duly informed the authorities about the merger of companies and yet the assessment order was passed in the name of amalgamating/non-existent company. However, in the present case, for AY 2006-07, there was no intimation by the assessee regarding amalgamation of the company. The ROI for the AY 2006-07 first filed by the respondent on 30.06.2006 was in the name of MRPL. MRPL amalgamated with MIPL on 11.05.2007, w.e.f. 01.04.2006. In the present case, the proceedings against MRPL started in 27.08.2008- when search and seizure was first conducted on the Mahagun group of companies. Notices under Section 153A and Section 143(2) were issued in the name MRPL and the representative from MRPL corresponded with the department in the name of MRPL. On 28.05.2010, the assessee filed its ROI in the name of MRPL, and in the 'Business Reorganization' column of the form mentioned 'not applicable' in amalgamation section. Though the respondent contends that they had intimated the authorities by letter dated 22.07.2010, it was for AY 2007-2008 and not for AY 2006-07. For the AY 2007- 08 to 2008-2009, separate proceedings under Section 153A were initiated against MIPL and the proceedings against MRPL for these two assessment years were quashed by the Additional CIT by order dated 30.11.2010 as the amalgamation was disclosed. In addition, in the present case the assessment order dated 11.08.2011 mentions the name of both the amalgamating (MRPL) and amalgamated (MIPL) companies.*
>
> *35. Secondly, in the cases relied upon, the amalgamated companies had participated in the proceedings before the department and the courts held that the participation by the amalgamated company will not be regarded as estoppel. However, in the present case, the participation in proceedings was by MRPL which held out itself as MRPL."*

11. It is also noteworthy that the recent decision of Hon'ble Supreme Court in **Mahagun Realtors** has been analysed by ITAT, Pune Bench in **DCIT Vs. Barclays Global Service Centre Private Limited, ITA No. 46/Pun/2021, order dated 02.01.2023** wherein the ITAT has observed and held as under:

"16. Subsequently, even the Hon'ble Supreme Court in the case of ***PCIT vs. Mahagun Realtors (P.) Ltd., 443 ITR 194 (SC)*** *considering the conduct of the assessee that no intimation by the assessee regarding the amalgamation of the company and the original return of income was not even revised, though the time was available after the amalgamation and the assessee company had fully held it itself as an assessee before all forums, held that the assessment made in the name of amalgamating company is valid in law. On perusal of the decision of the Hon'ble Supreme Court in the case of Mahagun Realtors (P) Ltd. (supra), it can be discerned that the decision was rendered based on the conduct of the assessee before all the forums. The Hon'ble Supreme Court itself had observed vide para 33 of the said decision that the facts in the cases of Maruti Suzuki India Ltd., Spice Enfotainment Ltd. referred supra were distinguishable. What weighed with Hon'ble Supreme Court in arriving at the conclusion reached is that the assessee had deliberately mislead the Department by not informing the Assessing Officer as well as the CIT(A) the factum of amalgamation. Thus, it is clear that the decision in the Mahagun Realtors (P.) Ltd. (supra) was rendered in the peculiar facts of that case. The Hon'ble Supreme Court had not expressly overruled its earlier decision, rendered in the case of Maruti Suzuki India Ltd. (supra) (A decision rendered by Bench of three Judges). The Hon'ble Supreme Court had not laid down a proposition that even if the factum of amalgamation was brought to the notice of the AO, still an assessment can be made in the name of the amalgamating company. In our considered opinion, this decision is not an authority of proposition, that an assessment can be made in the name of non-existing entity, even though the Assessing Officer was put on notice of factum of amalgamation.*

17. In the present case, it is undisputed position that the factum of the amalgamation was put to notice of the AO. This fact made a lot of difference not to apply the ratio of the decision in the case of Mahagun Realtors (P.) Ltd. (supra). The Hon'ble Supreme Court in the case of Padmusundara Rao (Dead) & Ors. Vs. State of T.N. & Ors. (Civil Appeal Nos.2226 of 1997 and 2058 of 2002) held that the Courts should not place reliance on the decision without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. One additional or different fact may

make a world of difference between conclusions in two cases. The relevant observation of the Hon'ble Supreme Court in the case of Padmusundara Rao (Dead) & Ors. (supra) is as under :-

> *"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington Vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."*

18. The Hon'ble Supreme Court in the case of CIT vs. Sun Engineering Works Pvt. Ltd. 198 ITR 297 (SC) vide para 37 observed as under :-

> *"37. ..... . It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a latter case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India [1971] 3 SCR 9 this Court cautioned:*
>
> *"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."*

19. In the light of above discussion, we are of the considered opinion that the decision of the Hon'ble Supreme Court in the case of Mahagun Realtors (P.) Ltd. (supra) cannot be interpreted to mean that even in the case where the factum of amalgamation was put to the notice of AO, still the assessment made in the name of amalgamating company i.e. non-existing company is valid in law.

20. The fact situation of the present case squarely falls within fact situation of the cases of Maruti Suzuki India Ltd., Spice Enfotainment Ltd. referred supra and the decision of the Hon'ble Bombay High Court in the case of Alok Knit Exports Ltd. vs. DCIT, 446 ITR 748 (Bom.) and Teleperformance Global Services Pvt. Ltd. vs. ACIT, 435 ITR 725 (Bom.).

21. Therefore, we have no hesitation to hold that the assessment order passed by the Assessing Officer in the name of non-existing entity is null and void ab initio. Accordingly, we hereby quash the assessment order.

22. In the result, the Cross Objection filed by the assessee stands allowed.

12. Thus, the ITAT Pune, having analysed the decision in **Mahagun Realtors** vis-a-vis **Maruti Suzuki**, has held that if the AO is aware of the non-existence of assessee-company on account of amalgamation and yet issues notice to non-existent assessee, the action of AO would be invalid. The assessee's case is on a better footing yet. Firstly, the reasons recorded by AO themselves speak that the AO was very much aware of the demerger having taken place under the order of High Court. Secondly, the AO has categorically noted that all assets and liabilities of assessee had been taken-over by new companies. Thirdly, the AO issued notices u/s 148 not only to the assessee-company but also to the new companies for the very same item of escapement i.e. share application money. Therefore, in these circumstances, we do not have any valid reason to deviate from the interpretation and conclusion taken by Hon'ble ITAT, Pune Bench which is resting upon the decision of Hon'ble Supreme Court in **Maruti Suzuki** and also taking into account the effect of **Mahagun Realtors**.

13. In view of above discussions and for the reasons stated therein, we are persuaded to hold that the proceeding conducted by AO in present case were not valid. Therefore, we quash the assessment-order passed by AO. Since we have quashed AO's order on the first contention raised by Ld. AR itself, it would be unnecessary to go into other contentions; hence we refrain from dealing with them while keeping open.

14. Resultantly, this appeal of revenue is dismissed.

Order pronounced in the open court on 07.08.2023..

sd/-	sd/-
(VIJAY PAL RAO)	(B.M. BIYANI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Indore
Dated : 07.08.2023
CPU/Sr. PS

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore