

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.2742 OF 2019

Alok Knit Exports Limited)
(M/s. Niraj Realtors & Shares Pvt. Ltd.)
(PAN : AAACN3983A) now merged with)
M/s. Alok Knit Exports Limited), a company)
incorporated under the Companies Act, 1956)
and having its office at 3rd Floor, Tower B,)
Peninsula Business Park, G.K. Road, Lower)
Parel, Mumbai – 400 013)
PAN : AACCA8337K)Petitioner

V/s.

1. The Deputy Commissioner of Income Tax)
Circle 6 (1) (1), Room No.563B, 5th Floor,)
Aayakar Bhavan, M.K. Road, Mumbai – 400)
020)
2. The Principal Commissioner of Income)
Tax – 6, Aayakar Bhavan, M.K. Road,)
Mumbai – 400 020)
3. The Union of India)
Through the Secretary, Ministry of Finance,)
Government of India, North Block, New)
Delhi – 110 001)Respondents

Mr. Dharan V. Gandhi for petitioner.
Mr. Nirmal C. Mohanty for respondents.

**CORAM : K.R.SHRIRAM, &
ABHAY AHUJA, JJ
DATED : 10th AUGUST 2021**

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.)

1 Petitioner is impugning a notice no.ITBA/AST/S/148/2018-
19/1015547197(1) dated 30th March 2019 issued by respondent no.1 under
Section 148 of the Income Tax Act, 1961 (the Act) for the Assessment Year

2012-2013 and the subsequent order [Letter No.ITBA/AST/F/17/2019-20/1017795202(1)] passed on 5th September 2019 rejecting the objections raised by petitioner.

2 By a notice dated 30th March 2019 issued under Section 148 of the Act, respondent no.1 informed Niraj Realtors and Shares Pvt. Ltd. (Niraj Realtors) that he has reasons to believe that Niraj Realtors' income chargeable to tax for the Assessment Year 2012-2013 has escaped assessment within the meaning of Section 147 of the Act. Niraj Realtors was called upon to deliver a return in the prescribed form for the said Assessment Year. The reasons required to be given for re-opening under Section 148 of the Act was provided by respondent no.1 to Niraj Realtors almost six weeks later by a communication dated 17th May 2019. The reasons, opens with admission of the fact that Niraj Realtors had merged in and was known as Alok Knit Exports Pvt. Ltd. and had e-filed its return of income tax for the Assessment Year 2012-2013 on 30th September 2012.

3 On receipt of these reasons, petitioner, by its objection dated 16th June 2019 brought to the notice of respondent no.1 that the notice issued under Section 148 of the Act was bad in law as the same was issued in the name of a non-existent person. In the objection, copy whereof is at Exhibit "H" to the petition, petitioner had also listed various judicial pronouncements on which they were relying upon to make their submission that the notice issued was bad in law. Apart from that, petitioner had also

raised various other objections with which we do not propose to go into at this stage because the Court felt, if the Court comes to a conclusion that the notice, that was issued under Section 148 of the Act, was bad in law, the same having been issued in the name of non-existent person, the other objections would only be academic. We should note that this objection dated 16th June 2019 has been signed and submitted by Alok Knit Exports Pvt. Ltd. (successors of Niraj Realtors). In their objections, petitioner once again brought to the notice of respondent no.1, though respondent no.1 was aware, that Niraj Realtors had merged with petitioner and for the Assessment Year 2011-2012 for re-opening of assessment of Niraj Realtors, the Assessing Officer had infact issued notice in the name of Alok Knit Exports Pvt. Ltd. A copy of the notice issued under Section 148 of the Act for the Assessment Year 2011-2012 in the name of petitioner as successors of Niraj Realtors alongwith reasons for issuing the notice under Section 148 of the Act is also annexed to the petition. Respondent no.1, however, rejected the objections raised by petitioner that the notice issued under Section 148 of the Act in the name of a non-existent person was bad in law. The reasons for rejection, for ease of reference and better understanding, are reproduced hereinbelow :

“.....

3. The above objections are being dealt hereunder :

3.1. With regard to the notice u/s. 148 to be bad in law as the same is issued in the name of non-existent person, the

year in consideration is A.Y. 2012-13 and during the said year, the name of the assessee was Niraj Realtors and Shares Pvt. Ltd. under PAN AAACN3983A and the information received is with regard to obtaining of accommodation entries by the assessee viz. M/s. Niraj Realtors and Shares Pvt. Ltd. and not M/s. Alok Knit Exports Pvt. Ltd. The assessee company had merged recently and the information is prior to the date of merger and hence the notice has been issued in the name of M/s. Niraj Realtors and Shares Pvt. Ltd. Now that the assessee company has got merged with M/s. Alok Knit Exports Pvt. Ltd., it is pertinent to mention here that with the acquisition and the corresponding due diligence, i.e., making realization of a merger or acquisition, after having identified and evaluating, all aspects with respect to opting of an asset or a liability transaction, a full takeover viz a phased merger takes place which is bylaw the accounting principle followed under merger or acquisition and that all assets and liabilities are taken care of by the new company and any liability including Income Tax Liability arising out of any previous year is undoubtedly the liability to be taken care of by the new company.

3.2. Further, the PAN Query Data base shows that the PAN AAACN3983A as active and not inactive, which also signifies the notice issued in the name of the earlier company does not become bad in law.

.....”

4 One of the ground for rejecting the objection is that the PAN Query Data base showed that PAN AAACN3983A of Niraj Realtors was active and not inactive which according to Assessing Officer signifies that the notice issued in the name of Niraj Realtors does not become bad in law. Annexed to the petition at Exhibit “A” is a copy of the letter dated 17th July 2013 addressed to the Deputy Commissioner of Income Tax, Circle – 7 (1) from Niraj Realtors where Niraj Realtors has informed Deputy Commissioner of Income Tax that this Court, vide its order dated 10th May 2013, has sanctioned the scheme of amalgamation of Niraj Realtors with petitioner with appointed date of 1st April 2012. A copy of the said order

was also forwarded alongwith the original PAN card with request to cancel the same. Therefore, for respondent no.1 to say that even the PAN number was active and that signifies the notice issued in the name of Niraj Realtors does not become bad in law is incorrect. In his conclusions, respondent no.1 has stated that the assessee company, i.e., Niraj Realtors, had merged recently with petitioner and when merger takes place, all assets and liabilities are taken care of by the new company and any liability including income tax liability arising out of any previous year is undoubtedly the liability to be taken care of by the new company. Notwithstanding this conclusion and being aware that Niraj Realtors had merged into petitioner and for the Assessment Year 2011-2012 respondent no.1 having issued notice under Section 148 of the Act to petitioner for the dues of Niraj Realtors, still respondent no.1 persisted with issuing the notice for the Assessment Year 2012-2013 under Section 148 of the Act to Niraj Realtors, a non-existent company.

5 Mr. Mohanty appearing for respondents submitted that it was a human error which could be corrected under Section 292B of the Act. According to Mr. Mohanty human errors and mistakes cannot and should not nullify proceedings which were otherwise valid and no prejudice has been caused. Mr. Mohanty, relying upon the judgment of the Delhi High Court in *Sky Light Hospitality LLP V/s. Assistant Commissioner of Income*

Tax¹, submitted that that was the effect and mandate of Section 292B of the Act. Mr. Mohanty also relied upon the order passed by the Apex Court when *Sky Light Hospitality (supra)* was escalated to the Apex Court (***Sky Light Hospitality LLP V/s. Assistant Commissioner of Income Tax***²). These do not help Mr. Mohanty's case. This cannot be a general preposition as the Apex Court has expressly stated "In the peculiar facts of this case, we are convinced that wrong name given in the notice was merely a clerical error which could be corrected under Section 292B of the IT Act (emphasis supplied)".

6 The Apex Court in its recent judgment on this subject in ***Principal Commissioner of Income Tax V/s. Maruti Suzuki India Ltd.***³ considered the judgment of *Sky Ligh Hospitality (supra)* of the Apex Court and said that the Apex Court has expressly mentioned that in the peculiar facts of that case wrong name given in the notice was merely a clerical error. The Apex Court in *Maruti Suzuki India Ltd. (supra)* has also observed that what weighed in the dismissal of the Special Leave Petition were the peculiar facts of that case. The Apex Court has reiterated the settled position that the basis on which jurisdiction is invoked is under Section 148 of the Act and when such jurisdiction was invoked on the basis of something which was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of

1. (2018) 405 ITR 296 (Delhi)

2. (2018) 92 taxmann.com 93 (SC)

3. (2019) 416 ITR 613 (SC)

amalgamation, the notice is bad in law. The Apex Court has held as under :

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 Entertainment on 2 November 2017. The decision in Spice Entertainment 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 Entertainment.

7 This quotation squarely applies to this case at hand. In the case at hand as well, the indisputable fact is respondent no.1 has invoked jurisdiction by issuing notice under Section 148 of the Act to an entity that had ceased to exist. This is notwithstanding the fact that respondent no.1 was aware that Niraj Realtors had ceased to exist. Respondent no.1, as noted earlier, we say was aware because the notice under Section 148 of the Act was issued for the Assessment Year 2011-2012 in the name of petitioner for re-opening the assessment of Niraj Realtors. Infact even the reasoning dated 6th July 2018 for re-opening of the Assessment Year 2011-2012 starts with the following :

“The M/s. Niraj Realtors & Shares Pvt. Ltd. (PAN : AABPS7071E) now merged with M/s. Alok Knit Exports Private Limited (PAN : AACCA8337K) is an Assessee of this charge.”

8 The stand now taken in the affidavit in reply and submissions of Mr. Mohanty is nothing but an afterthought by respondent after having committed a fundamental error. We would have expected respondent no.1 to have atleast applied his mind and looked for documents which were already on file to see whether Niraj Realtors existed before issuing notice under Section 148 of the Act. Respondents' records would have indicated that Niraj Realtors ceased to exist and his predecessor/colleague has issued notice for the Assessment Year 2011-2012 alongwith the reasoning in the name of petitioner.

9 Therefore, the stand of respondent today that it was an error which could be corrected under Section 292B of the Act is not acceptable to this Court. Mr. Mohanty submitted that when respondent filled up the form for recording the reasons and initiating proceedings under Section 148 of the Act and for obtaining the approval on 29th March 2019, he has mentioned in the form in the column name and address of the assessee as M/s. Niraj Realtors and Shares Pvt. Ltd. now merged in and known as M/s. Alok Knit Exports Pvt. Ltd. In our view, that itself should have made respondent no.1 realise that when a company is merging into another company that merging company ceases to exist. Infact the Principal Commissioner of Income Tax, who is supposed to have approved the initiating of proceedings under Section 148 of the Act, also should have brought to the notice of or guided respondent no.1 that the notice ought to

be issued in the name of petitioner and not Niraj Realtors which ceased to exist.

10 In the circumstances, we allow the petition in terms of prayer clause – (a), which reads as under :

(a) that this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction, calling for the records of the petitioner's case and after going into the legality and propriety thereof, to quash and set aside the said notice dated 30th March 2019 (Exhibit "D") and the subsequent Order dated 05th September 2019 (Exhibit "I").

Petition disposed.

11 All to act on authenticated copy of this order.

(ABHAY AHUJA, J.)

(K.R. SHRIRAM, J.)