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

WRIT PETITION NO. 3247 OF 2019

Alok Knit Exports Limited
(M/s. Nirvan Holdings Pvt. Ltd.) ....Petitioner

V/s.

The Assistant Commissioner of
Income Tax Circle 7(2)(2) & Ors. ...Respondents

Mr. Dharan V. Gandhi for Petitioner.
None for Respondents.

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATED : 15th DECEMBER 2021

P.C. :

1. Petitioner is impugning notice dated 31st March, 2019 issued under Section 148 of the Income Tax Act, 1961 (the Act) for A.Y. 2012-13 and the order dated 9th November, 2019 disposing of objections.

2. Apart from various other grounds raised, the primary ground on which petitioner has contested this notice and the order impugned is that notice has been issued to non existing entity and even the impugned order has been passed against the non existing entity. Mr. Gandhi submitted that the Assessing Officer has in fact even tried to justify his issuing notice against non existing entity.

3. The notice issued under Section 148 of the Act and the order disposing the objections have been issued to Nirvan Holdings Pvt. Ltd. This

company merged with Alok Knit Exports Limited (Petitioner herein) pursuant to order dated 10th May, 2013 passed by this court sanctioning the scheme of amalgamation of Nirvan Holdings Pvt. Ltd., as transferor company and Alok Knit Exports Limited as transferee company with appointed date of 1st April, 2012. By a letter dated 17th July, 2013 petitioner addressed a communication to the Deputy Commissioner of Income Tax, Mumbai about this amalgamation and stated that the said amalgamation has become effective on 5th July, 2013 on filing of documents in that regard with the Registrar of Companies. With the said letter, petitioner also forwarded copy of the order dated 10th May, 2013 passed by the Bombay High Court sanctioning the scheme of amalgamation, acknowledged copy of Form No.21 filed with the Registrar of Companies and the Pan Card. Pan Card was surrendered with a request to cancel the same. Thereafter, the assessment order dated 19th November, 2014 for A.Y. 2012-13 came to be passed where the name of the assessee is shown as Nirvan Holdings Pvt. Ltd. (now known as Alok Knit Exports Pvt. Ltd.). Though, technically name of the assessee can be stated to be incorrectly mentioned because there is no change of name but the amalgamation of Nirvan Holdings Pvt. Ltd., with Alok Knit Exports Limited. Still it does not amount to a serious defect and at the same time not the subject matter of the challenge in this petition. We only mention this because the department as well as the Assessing Officer who issued the impugned notice and the order impugned would have been aware about the factual position of Nirvan Holdings Pvt. Ltd., being a non existing entity with effect from 5th July, 2013 and in any way when the assessment order for A.Y. 2012-13 was passed on 19th November, 2014.

4. Notwithstanding the above, the Assessing Officer without perusing the file (and we say this because otherwise he would not have issued the notice in the name of Nirvan Holdings Pvt. Ltd.) issued the impugned notice dated 31st March, 2019 under Section 148 of the Act. Petitioner after receiving the reasons for re-opening filed its objections vide its letter dated 16th June, 2019 in which the first ground raised was that notice issued under Section 148 of the Act is bad in law as the same was issued in the name of non-existent person. Petitioner gave the background as noted earlier in this order and also relied on certain judgments passed by the various High Court. Dismissing the objections by the impugned order dated 9th November, 2019 the Assessing Officer Mr. Eknath G. Abhang has justified issuance of notice in the name of Nirvan Holdings Pvt. Ltd.

According to said Mr. Abhang, we take his name because it is the same officer who has filed the affidavit in reply taking a different stand, the assessee had received notice under Section 148 of the Act on 31st March, 2019 in the name of Nirvan Holdings Pvt. Ltd., and assessee has also filed response to notice dated 24th April, 2019 in the name of Nirvan Holdings Pvt. Ltd., only as well as under the same Pan and also forwarded the income earned by Nirvan Holdings Pvt. Ltd., only as was assessed in the original assessment order. According to the said Assessing Officer, the objections raised by assessee was not acceptable as assessee is taking dual stand which itself is bad in law. We have to note that the Assessing Officer is incorrect in his observations since in the communication dated 24th April, 2019 on the top is mentioned Nirvan Holdings Pvt. Ltd. (now known as Alok Knit Exports Pvt. Ltd.) and at the bottom it is mentioned for Alok Knit Exports Pvt. Ltd. (Successor of Nirvan Holdings Pvt. Ltd.). Moreover, this person ignores a fact that there has been amalgamation pursuant to the sanction of scheme by this court, Pan Card of Nirvan Holdings Pvt. Ltd., has been surrendered for cancellation and even the assessment order for A.Y. 2012-13 reflects that Nirvan Holdings Pvt. Ltd., does not exist.

5. Strangely, in the affidavit in reply the said Mr. Abhang sings a different tune. His belligerence is converted to meekness and he says although the notice under Section 148 of the Act mentions the name of earlier merged entity (Nirvan Holdings Pvt. Ltd.), this error could be corrected under Section 292B of the Act.

6 The Apex Court in ***Principal Commissioner of Income Tax V/s. Maruti Suzuki India Ltd.***[1] 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 amalgamation, the notice is

1. (2019) 416 ITR 613 (SC)

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 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.*

7. We have to also note that the said Assessing Officer in the affidavit in reply says that the PAN of the old entity (Nirvan Holdings Pvt. Ltd.) was existing when he issued the notice under Section 148 of the Act. But he ignores the fact that PAN Card was surrendered way back in 2013 by Nirvan Holdings Pvt. Ltd., with a request to cancel the same. Just because respondents have failed and neglected to do their duty cannot be used to justify incorrect act against petitioner.

8. The quotation in ***Maruti Suzuki India Ltd.*** (supra) quoted above would squarely apply to this case at hand. In the case at hand as well, the undisputed fact is that respondent has invoked jurisdiction of issuance of 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 Nirvan Holdings Pvt. Ltd., had ceased to exist. For reasons mentioned above, we state that Respondent No.1 was aware that Nirvan Holdings Pvt.

Ltd. has ceased to exist. The stand now taken in the affidavit in reply is nothing but an after thought. We would have expected Respondent No.1 and Mr. Abhang to have atleast applied his mind and looked for documents which were already on file to see whether Nirvan Holdings Pvt. Ltd., existed before issuing notice under Section 148 of the Act. Respondents' records would have indicated that Nirvan Holdings Pvt. Ltd. had ceased to exist. Therefore, the stand of Respondent No.1 today taken as afterthought that it was an error which could be corrected under Section 292B of the Act is not acceptable to this court.

9. 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 31st March, 2019 ("Exhibit D") and the subsequent Order dated 09th November, 2019 ("Exhibit I").*

10. Petition disposed.

11. CIT (Judicial), Mumbai is directed to hand over copy of this order to Mr. Eknath G. Abhang, Assistant Commissioner of Income Tax, who had issued the impugned notice as well as the order and filed affidavit in reply, for information.

(AMIT B. BORKAR, J.) **(K.R. SHRIRAM, J.)**

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