

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

WRIT PETITION NO.679 OF 2016

Siemens Limited,
a Company incorporated under
the provisions of the Companies
Act, 1956 and having is registered
office at 130, Pandurang Budhkar
Marg, Worli, Mumbai-400 018.

... Petitioner

Versus

1. The Deputy Commissioner of
Income tax-8(2)(1), Mumbai having
her office at Room No.624,
6th Floor, Aayakar Bhavan, M.K. Marg,
Mumbai-400 020.

2. The Principal Commissioner of Income
tax-8, Mumbai, having his office at
Room No.24, 6th Floor, Aayakar Bhavan,
M.K. Marg, Mumbai-400 020.

3. The Union of India,
Through the Secretary,
Department of Revenue,
Ministry of Finance,
North Block,
New Delhi-110 001.

... Respondents

* * *

Mr. Nitesh Joshi i/b Mr. Atul K. Jasani for petitioner.

Mr. Suresh Kumar a/w Ms. Anna Saldanha & Mr. Pritish Chatterjee
for respondents.

* * *

**CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, J.J.**

DATE : 3rd MARCH 2023

: J U D G M E N T :

Per DHIRAJ SINGH THAKUR, J.

1. The Petitioner challenges the notice dated 30th March 2015 issued under Section 148 of the Income Tax Act, 1961 (“the Act”) for the Assessment Year 2008-09 *inter alia* on the ground that the same was issued in the name of a non-existing entity.

2. Briefly stated the material facts are as under :

A notice under Section 148 of the Act came to be issued by the assessing officer to M/s Morgan Construction Company (I) Private Limited (M/s. Morgan Construction), seeking to reopen the assessment for the assessment year 2008-09 on the ground that the assessing officer had ‘reason to believe’ that the income chargeable to the tax for the said assessment year had escaped assessment within the meaning of Section 147 of the Act.

3. In response to the said notice, a communication dated 10th April 2015 was addressed to the Assessing Officer by the Petitioner (Siemens Limited) objecting to the said notice and demanded the reasons for the reopening of the said assessment. The said reasons

consequently came to be furnished to the Petitioner herein, whereafter detailed objections were filed to the reopening of the assessment by the Petitioner. One of the main objection raised was that M/s.Morgan Construction had ceased to exist with effect from 1st October 2011 on account of its merger with Siemens Limited, the Petitioner herein. The Assessing Officer was reminded that the factum of merger of the said company with the Petitioner had been intimated vide communication dated 17th September 2012, and, therefore, it was urged that the jurisdictional notice under Section 148 of the Act having been issued against a non-existing entity was, thus, unsustainable in law.

4. Objections raised by the Petitioner were rejected by the Assessing Officer on the following grounds :

- (i) that the reopening was valid and justified as the notice under Section 148 of the Act was for the Financial Year 2007-08, when the company, i.e. Morgan Construction Company (I) Private Limited was very much operational.
- (ii) that even after the intimation was given to the assessing officer on 17th September 2012 regarding merger, the said company had discontinued its PAN, which was still active.

- (iii) that on receipt of the notice under Section 148 of the Act, the assessee (Morgan Construction Company (I) Private Limited had not objected to the notice being invalid, but instead vide communication dated 10th April 2015 had not sought the reasons for reopening and therefore had tacitly accepted the notice under section 148 of the Act, whereafter the assessee would have no *locus standi* to state that the notice was invalid, especially, in view of the provisions of Section 292B of the Act.

5. Mr.Joshi, learned counsel for the Petitioner urged that the entire approach adopted by the Assessing Officer was misplaced and erroneous in law after having accepted the fact that the company, i.e., M/s.Morgan Construction had amalgamated with the Petitioner. It is stated that the factum of amalgamation of the company had been brought to the notice of the Assessing Officer as early as on 17th September 2012 and, therefore, there was no legal basis for the respondents to have issued a notice under section 148 in the name of such a company. Reliance in this regard was placed upon the Apex Court judgment in the case of ***Principal Commissioner of Income Tax, New Delhi Vs. Maruti Suzuki India Limited***¹.

1 [2019] 107 taxmann.com 375 (SC)

6. The stand of the Respondents, on the other hand, is nothing but a reiteration of the stand of the revenue as is reflected in the Order dated 18th January 2016 disposing of the objections raised by the assessee to the issue of the notice under Section 148.

7. Mr. Suresh Kumar, learned Counsel appearing for the Revenue tried to urge although feebly that mentioning the name of M/s. Morgan Construction as an assessee in the notice under Section 148 even if issued against a non-existing company could not be said to be invalid in law in terms of Section 292B of the Act. Reliance in this regard was placed upon the judgment in the case of ***Skylight Hospitality LLP Vs. Asstt. Commissioner of Income Tax***².

8. We have heard learned Counsel for the parties.

9. The legality of a notice issued against a non-existing company is no longer *res-integra* and has been held to be clearly untenable in view of the Apex Court judgment in ***Saraswati Industrial Syndicate Ltd. v/s. CIT***³, wherein the following principles were formulated:

“5. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of

2. 405 ITR 296

3. 186 ITR 278 (SC).

arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: *Halsbury's Laws of England* (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."

10. In the case of *Spice Entertainment Ltd. V/s. CST* ⁴, a Division Bench of the Delhi High Court held that once the factum of amalgamation of a company had been brought to the notice of the Assessing Officer, despite which the proceedings are continued and an order of assessment passed in the name of a non-existing company, the order of assessment would not merely be a procedural defect but would render it void. It was also held that participation in the proceedings by the amalgamated company would have no

4. 2012 (280) ELT 43 (Delhi)

effect since there could be no estoppel against law. The aforementioned judgment of the Delhi High Court was followed in a number of judgments which were challenged before the Apex Court in a batch of civil appeals, the lead appeal being Spice Entertainment which appeals were dismissed and the view expressed by the Delhi High Court affirmed.

10 Recently, the Apex Court in the case of ***Principal Commissioner of Income Tax, New Delhi V/s. Maruti Suzuki India Ltd.***⁵ reiterated the aforementioned principles and held as under:

“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 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***.

5. [2019] 107 taxmann.com 375 (SC).

11. The contention of Mr.Kumar is that notice issued under section 148 in the name of a non-existing company, i.e., M/s.Morgan Construction could be treated to be merely a clerical error capable of being corrected under section 292 B of the Act. Reliance was also placed upon the judgment of the Apex Court in in *Sky Light Hospitality LLP* (supra).

Section 292B envisages *inter alia* that no return of income, assessment, notice, summons or other proceeding, shall be deemed invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding, if it is in substance and effect in conformity with or according to the intent and purpose of the Act.

However, in our opinion, the facts of the present case are distinguishable from the facts contained in the judgment relied upon by Mr.Kumar. In the said case, notice under section 147/148 was issued in the name of Sky Light Hospitality Pvt. Ltd. which had ceased to exist, on account of conversion into an LLP, i.e., Sky Light Hospitality, an LLP, which had taken over and acquired the rights and liabilities of Sky Light Hospitality Pvt. Ltd. The Court, based upon substantial evidence on record, came to a conclusion that issuance of notice in the name of the company that had ceased to exist was a mistake, inasmuch as the tax evasion report, 'the

reasons to believe' recorded by the Assessing Officer as also the PAN number reflected in the documents was that of ***Sky Light Hospitality LLP***, which would thus attract section 292 B of the Act.

12. As against that, in the present case, there is no such material brought on record which would have furnished a basis to believe that the notice was, in fact, intended to be issued in the name of Siemens Limited and not 'M/s. Morgan Construction Company (I) Private Limited'. On the other hand, apart from the fact that notice under section 148 was issued in the name of a non-existent company, even the reasons recorded for initiating reassessment proceedings under section 148 made a reference only to the said company and did not make any reference to the petitioner, i.e., Siemens Limited. Not only this, even the approval granted by the Joint Commissioner of Income Tax, Mumbai, on 30th March 2015, contained the name of M/s.Morgan Construction. The facts of the present case are, therefore, quite different from the one which were before the Court in ***Sky Light Hospitality LLP*** (supra) and, therefore, there would be no basis to apply the provisions of section 292B of the Act to the facts and circumstances of the present case, based upon, the aforementioned decision.

13. Applying the ratio of the aforementioned judgments to the facts of the present case, it can be seen that not only had Morgan Construction amalgamated with the petitioner but the factum of such amalgamation had been intimated to the Assessing Officer on 17th September 2012. The company post amalgamation having ceased to exist, the jurisdictional requirement of service of notice as envisaged under section 148 of the Act could never have been fulfilled rendering the proceedings unsustainable in law.

14. For the reasons mentioned above, the petition is allowed.

The impugned notice issued under section 148 dated 30th March 2015 as also the impugned order dated 18th January 2016 disposing the objections, are quashed.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)

RAJESH
VASANT
CHITTEWAN

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