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IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of Decision: 06.02.2018**

+ ITA 135/2018

PR.COMMISSIONER OF INCOME TAX-6 Appellant
Through: Mr. Rahul Chaudhary, Sr. Standing
Counsel with Mr. Sanjay Kumar, Jr. Standing
Counsel for Income Tax Deptt.

versus

NOKIA SOLUTIONS & NETWORK INDIA PVT LTD
(FORMERLY KNOWN AS, NOKIA SIEMENS NETWORK PVT
LTD) Respondent

Through: Ms. Rashmi Chopra with
Ms. Manasvini Bajpai, Advs.

CORAM:**HON'BLE MR. JUSTICE S. RAVINDRA BHAT****HON'BLE MR. JUSTICE A. K. CHAWLA****S. RAVINDRA BHAT, J.(ORAL)**

1. The Revenue is aggrieved by the order of the ITAT which concluded that the assessment made in that case, was in respect of a company that had ceased to exist. It urges that in the facts of this case the ruling of this Court in *Spice Entertainment Ltd. v. Commissioner of Income Tax* 247 CTR 500 (Del.) is inapplicable.

2. The assessee – M/s Nokia Siemens Network Pvt. Ltd. (hereafter referred to as “the old company”) had filed its returns for A.Y. 2006-07 on 29.11.2006. Return was processed under Section



143(1) of the Income Tax Act, 1961 (hereafter referred to as “the Act”) on 27.06.2007. However, the returns were selected for scrutiny and notice was issued under Section 143(2) of the Act on 12.10.2007. In the meanwhile, pending proceedings of amalgamation before the Karnataka High Court, an order was made on 09.01.2009, by virtue of which, the old company merged with Nokia Solutions & Network India Pvt. Ltd. i.e. the respondent in this case. The orders of the lower authorities show that communications were addressed by the respondent, for transfer of tax files in the jurisdictional office of the old company to the new company’s jurisdictional officer on account of the merger. Apparently, the respondent addressed a letter to the PRO and other tax authorities on 25.05.2009. In these circumstances, notice was issued to the old company (by then non-existent) under Section 142(1) of the Act on 10.08.2009. Since international transactions were involved, the AO referred the matter to the Transfer Pricing Officer based on whose report a draft assessment order was made on 29.12.2009. The dispute resolution panel made its recommendations/returned findings on 20.09.2010 and a final assessment was framed on 28.10.2010 – but in the name of the old company. It was in these circumstances that the respondent preferred an appeal to the ITAT and urged an additional ground that the assessment was framed in the name of a non-existing entity. The ITAT considered that this was a fresh or additional ground and remitted the matter to the DRP for examination of this ground on 16.04.2014 by its order (hereafter referred to as “the



remand order”). On 26.02.2016, the DRP returned a finding that the assessments were framed in the name of the non-existing entity but proceeded to direct the AO to frame the assessment in the name of the respondent which was complied with and a final assessment order was made on 29.04.2016 in the name of the respondent/assessee.

3. The respondent/assessee appealed to the ITAT urging that the ruling in *Spice Entertainment Ltd. (supra)* squarely applied since the proceedings, to start with, culminating in the assessment order of 28.10.2010 were a nullity and that in the circumstances the DRP’s directions could not have resulted in an order, based upon the proceedings that were a nullity. The ITAT accepted these arguments holding that the law declared in *Spice Entertainment Ltd. (supra)* squarely applied.

4. The Revenue argues that the respondent/assessee did not demur when the matter was remitted for consideration by the DRP and that the question of jurisdiction or the order being a nullity was urged before the ITAT, in the first round of proceedings for the first time. In the circumstances, when the DRP considered the facts, it concluded that the assessment originally framed was in respect of a non existing entity. Given the changed circumstances and subsequent development, it could not have directed the framing of an assessment in favour of a non existing company and therefore directed the AO to frame it in the name of the respondent/assessee, which it did. It is also contended that the DRP rendered express findings that the proceedings before it – in



the earlier round before the Tribunal were in continuation of the assessment proceedings and that framing final assessment, after remitting in the name of the respondent/assessee, was justified in law. It was submitted that in these circumstances the facts here are entirely different from the facts that the Court had to consider in *Spice Entertainment Ltd. (supra)* and all other tests that followed it.

5. The assessee, which is represented on advance notice, urges that the DRP could not have directed assessments to be completed in the manner that it did, given that the remand order of the ITAT was confined to only requiring it to render findings as to whether the assessment originally framed was in respect of a non existing entity. It was submitted that the DRP exceeded its remand and consequently the ITAT was justified in holding that *Spice Entertainment Ltd. (supra)* applied.

6. It is evident from the narration of facts that in the first instance the assessment was conducted in the name of a non existing entity. The DRP to whom the matter was directed by the first remand of the ITAT, was not directed to, in turn, require the AO to “better” the original incurable illegality and here the DRP clearly did that. The fact that the matter was remitted at the instance of the assessee who did not question the remand *ipso facto* does not, in any manner, further the Revenue’s contentions. The Revenue had also urged that even in the first place when the assessee approached the DRP, the name of the old entity was invoked and that consequently it cannot now say that the assessment was a nullity. This Court is of the opinion that the



ruling in *Spice Entertainment Ltd. (supra)* is categorical, in that, if the assessment is concluded in favour of a non existing entity, then notwithstanding Section 292B, the position does not improve. Applying *Spice Entertainment Ltd. (supra)*, this Court had in *Commissioner of Income Tax v. Dimension Apparels Pvt. Ltd. (2015) 370 ITR 288* also held that the position taken or urged by the assessee cannot be held against it if the primary jurisdiction does not exist i.e. to conclude an assessment in the name of a non existing entity.

7. In these circumstances, having regard to the legal position established by the authorities, the Court is of the considered view that the Revenue's arguments are not merited; no question of law arises. The appeal is dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

FEBRUARY 06, 2018

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