

**Analysis of decision of
Hon'ble Delhi High Court**

{Proceedings initiated u/s 148 of the Income Tax Act, 1961 against a dead person is bad}

IN THE HIGH COURT OF DELHI
AT

NEW DELHI

W.P.(C) 3258/2020

Savita Kapila, Legal heir of Late Shri. Mohinder Paul Kapila
(Petitioner)

{Through: Mr. Siddharth Ranka and Mr. Mishal Johri, Advocates}

vs.

Assistant Commissioner of Income Tax, Circle 43(1), Delhi
(Respondent)

{Through: Mr. Zoheb Hossain, Sr. Standing Counsel for respondent}

Reserved on : 24th June, 2020

Date of Decision: 16th July, 2020

CORAM

Hon'able Mr. Justice Manmohan
Hon'able Mr. Justice Sanjeev Narula

Per - Hon'able Manmohan, J:

Issue

Present writ petition was filed seeking a direction to the respondent to quash the notice dated 31st March, 2019 issued to the deceased-assessee (father of the petitioner) under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act, 1961") and all the consequential proceedings emanating therefrom including orders dated 21st November, 2019 and 27th December, 2019 passed by the respondent.

Salient Facts of the case

- | | | |
|----|-----------------------|---------|
| 1. | Previous year | 2011-12 |
| 2. | Assessment year | 2012-13 |
| 3. | Source if information | 26AS |

4. **Information**

(i)	Cash deposit in bank account of assessee	Rs. 10,00,000/-
(ii)	Time Deposit	Rs. 11,05,586/-
(iii)	Other receipts	Rs. 25,414/-
5.	Other facts	Return u/s 139(1) or 139(4) was not filed
6.	Date of death of assessee	21.12.2018
7.	Proceedings	Section 147/ 148
8.	Date of issue of notice u/s 148(1)	31.3.2019
9.	Notice issued in the name of	The deceased Mohinder Pal Kapila
10.	Deceased survived by	Two sons, Two daughters
11.	Notice served on the deceased	No, it could not be served as he was already deceased
12.	Subsequent notices issued to deceased but neither served on the deceased nor on any legal heir.	22.8.2019 18.9.2019
13.	Legal heir (LH) Savita Kapila was traced Through telephone number obtained from bank and death certificate filed online on	15.10.2019
14.	SNC issued in the name of deceased through LH	25.11.2019
15.	Proceedings transferred on PAN of LH	27.12.2019
16.	Assessment order passed	27.12.2019
17.	Section under with assessment framed	144
18.	Assessment framed on the PAN of	LH
19.	Income Assessed	Rs. 21,31,000/-
20.	Demand raised	Rs. 14,19,060/-

**Law discussed and relied upon in the judgment of
Hon'ble Delhi High Court**

Issuance of a notice u/s 148(1) of the Act is the foundation for reopening of an assessment. The sine qua non for acquiring jurisdiction to reopen an assessment is that a valid notice u/s 148(1) should be issued to and served upon a correct person and not to a dead person.

- (1) **Sumit Balkrishna Gupta vs. Asstt. Commissioner of Income Tax, Circle 16(2), Mumbai & Ors., (2019) 2 TMI 1209 (Bombay High Court)**

“requirement of issuing notice to a correct person and not to a dead person is not merely a procedural requirement but is a condition precedent to the impugned notice being valid in law.”

- (2) **Chandreshbhai Jayantibhai Patel vs. The Income Tax Officer, 2019 (1) TMI 353 (Gujarat High Court)**

“the question that therefore arises for consideration is whether the notice under Section 148 of the Act issued against the deceased assessee can be said to be in conformity with or according to the intent and purposes of the Act. In this regard, it may be noted that a notice under Section 148 of the Act is a jurisdictional notice, and existence of a valid notice under Section 148 is a condition precedent for exercise of jurisdiction by the Assessing Officer to assess or reassess under Section 147 of the Act. The want of valid notice affects the jurisdiction of the Assessing Officer to proceed with the assessment and thus, affects the validity of the proceedings for assessment or reassessment. A notice issued under Section 148 of the Act against a dead person is invalid, unless the legal representative submits to the jurisdiction of the Assessing Officer without raising any objection.”

**Notice in the name of deceased is invalid,
therefore, subsequent proceedings are bad in law**

- (3) **Braham Prakash vs. ITO 2004 (9) TMI 49 (Delhi)**

“.....These notices appear to have been issued in consequence of the order dt. 25th Feb., 2002 pursuant to a notice issued under Section 148 of the Act. But, we find that the notice under Section 148 was issued in the name of Sheesh Ram when he was no more. In other words, it was a notice issued to a dead person. Obviously, the notice could not have been served upon the deceased. Moreover, there is nothing on record to show that the notice under Section 148 was served on the petitioner either.

.....As such, it is clear that notice under Section 148 was neither served on the original assessed nor on the deemed assessed. Therefore, the subsequent proceedings are bad in law as there is breach of the principles of natural justice as well as the mandatory provisions contained in Section 148. The principle of audi alterem partem ought to have been followed by the Revenue.

On this ground, we quash the notice of demand.....”

**No notice u/s 148 of the Act was ever issued upon the petitioner during the period of limitation u/s 149 of the Act.
Consequently
the proceedings against petitioner (legal heir) are barred by limitation**

Savita Kapila, Legal heir of Late Shri. Mohinder Paul Kapila vs. ACIT, Circle 43(1), Delhi (Delhi High Court – the instant case}

“Also, no notice under Section 148 of the Act, 1961 was ever issued to the petitioner during the period of limitation and simply proceedings were transferred to the PAN of the petitioner, who happens to be one of the four legal heirs of the deceased assessee vide letter dated 27th December, 2019. Therefore, the assumption of jurisdiction qua the Petitioner for the relevant assessment year is beyond the period prescribed and consequently, the proceedings against the petitioner are barred by limitation in accordance with Section 149(1)(b) of the Act, 1961. “

In Smt. Sudha Prasad vs. Chief Commissioner of Income Tax, (2005) 275 ITR 135 (Jharkhand) the petitioner had challenged the assessment order and demand notice only. Neither non-issuance of notice was challenged nor the issue of proceedings being barred by limitation was raised or decided. Consequently, the said judgment is inapplicable to the present case and is therefore, of no help to the revenue.

Invocation of provisions of Section 159 of the Income Tax Act, 1961

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Section 159 of the Act, 1961 applies to a situation where proceedings are initiated / pending against the assessee when he is alive and after his death the legal representative steps into the shoes of the deceased assessee.

(4) **Vipin Walia vs. ITO 2016 (2) TMI 524 (Delhi)**

Section 159 of the Act would not apply to the facts of the present case inasmuch as the said provision would be applicable in those situations wherein the proceedings had been initiated / pending against an assessee when he / she was alive and after their death their legal representatives had stepped into their shoes.

(5) **Alamelu Veerappan vs. The Income Tax Officer, Non Corporate Ward 2(2), Chennai, 2018 (6) TMI 760 (Madras High Court)**

“In such circumstances, the question would be as to whether Section 159 of the Act would get attracted. The answer to this question would be in the negative, as the proceedings under Section 159 of the Act can be invoked only if the proceedings have already been initiated when the assessee was alive and was permitted for the proceedings to be continued as against the legal heirs.

The factual position in the instant case being otherwise, the provisions of Section 159 of the Act have no application.”

(6) **Rajender Kumar Sehgal vs . ITO 2018 (12) TMI 697 (Delhi)**

“In Rajender Kumar Sehgal (supra), a Coordinate bench of this Court has held that this court is of the opinion that the absence of any provision in the Act, to fasten revenue liability upon a deceased individual, in the absence of pending or previously instituted proceeding which is really what the present case is all about, renders fatal the effort of the revenue to impose the tax burden upon a legal representative.”

**Jurisdictional notice issued
in the name of amalgamating ceased to exist**

(7) **Pr. Commissioner of Income Tax vs. Maruti Suzuki India Limited, (2019) 416 ITR 613 (SC)**

“Courts had quashed notices sent to non-existent entities, as in all such cases the information of such non-existence was available with the Assessing Officer prior to the issuance of notice. In support of his submission, he relied upon the decision in the case of Pr. Commissioner of Income Tax v. Maruti Suzuki India Limited, (2019) 416 ITR 613 (SC), wherein the Supreme Court had rendered the proceedings null and void on the basis of the following observation -

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”.

**Assessment set aside for
de novo assessment instead of quashing the notice
{Contended on behalf of respondent, but not accepted by the Court}**

- (8) **Smt. Sudha Prasad vs. Chief Commissioner of Income Tax,
(2005) 275 ITR 135 (Jharkhand)**

“the Court had set aside the proceedings for de novo assessments instead of quashing the same, on account of Revenue’s bona fide mistake since notice was issued to a dead person out of ignorance of assessee’s death, which was not intimated to the Revenue. “

**There is no statutory obligation upon the legal heirs
to intimate the department
the death of assessee**

- Savita Kapila, Legal heir of Late Shri. Mohinder Paul Kapila vs. ACIT, Circle
43(1), Delhi (Delhi High Court – the instant case)}**

“This court is of the view that in the absence of a statutory provision it is difficult to cast a duty upon the legal representatives to intimate the factum of death of an assessee to the income tax department. After all, there may be cases where the legal representatives are estranged from the deceased assessee or the deceased assessee may have bequeathed his entire wealth to a charity. Consequently, whether PAN record was updated or not or whether the Department was made aware by the legal representatives or not is irrelevant. “

“Legal heirs are under no statutory obligation to intimate the death of the assessee to the revenue. “

- (9) **Alamelu Veerappan vs. The Income Tax Officer, Non Corporate Ward 2(2),
Chennai, 2018 (6) TMI 760 (Madras High Court)**

“nothing has been placed before this Court by the Revenue to show that there is a statutory obligation on the part of the legal representatives of the deceased assessee to immediately intimate the death of the assessee or take steps to cancel the PAN registration.”

- (10) **Pr. Commissioner of Income Tax vs. Maruti Suzuki India Limited,
(2019) 416 ITR 613 (SC)**

*“35. In this case, the notice under Section 143(2) under which jurisdiction was assumed by the assessing officer was issued to a **non-existent company**. The*

assessment order was issued against the amalgamating company. This is a substantive illegality and not a procedural violation of the nature adverted to in Section 292B. xxxx xxxx xxxx xxxx

*39. 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 Entertainments** on 2 November 2017. The decision in **Spice Entertainments** 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 Entertainments**.*

Invocation of Section 292B of the Income Tax Act, 1961

Savita Kapila, Legal heir of Late Shri. Mohinder Paul Kapila vs. ACIT, Circle 43(1), Delhi (Delhi High Court – the instant case)

“This Court is of the opinion that issuance of notice upon a dead person and non-service of notice does not come under the ambit of mistake, defect or omission. Consequently, Section 292B of the Act, 1961 does not apply to the present case.”

(11) Skylight Hospitality LLP vs. Assistant Commissioner of Income Tax, Circle-28(1), New Delhi, (2018) 405 ITR 296 (Delhi)

“notice was issued to Skylight Hospitality Pvt. Ltd. instead of Skylight Hospitality LLP. In that factual context, this Court had observed -

“Noticeably, the appellant having received the said notice, had filed without prejudice reply / letter dated April 11, 2017. They had objected to the notice being issued in the name of the company, which had ceased to exist. However, the reading of the said letter indicates that they had understood and were aware, that the notice was for them. It was relied and dealt with by them.”

The Supreme Court while dismissing the SLP had also observed -

“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 Income Tax Act.”

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*“In any event, Section 292B of the Act, 1961 has been held to be inapplicable viz-a-viz notice issued to a dead person in **Rajender Kumar Sehgal** (supra), **Chandreshbhai Jayantibhai Patel** (supra) and **Alamelu Veerappan** (supra). In all the aforesaid cases, the judgment of **Skylight Hospitality** (supra) had been cited by the revenue.”*

Invocation of Section 292BB of the Income Tax Act, 1961

Savita Kapila, Legal heir of Late Shri. Mohinder Paul Kapila vs. ACIT, Circle 43(1), Delhi (Delhi High Court – the instant case}

“the applicability of Section 292BB of the Act, 1961 has been held to be attracted to an assessee and not to legal representatives.”

(12) Rajender Kumar Sehgal vs. ITO 2018 (12) TMI 697 (Delhi).

“the petitioner had merely uploaded the death certificate of the deceased-assessee online and had in fact neither filed a return on behalf of the deceased-assessee nor submitted to the jurisdiction of the assessing officer and had not even waived the requirement of Section 148 of the Act. Consequently, according to him, provisions of Section 292BB of the Act were not attracted to the present case.

Section 292BB of the Act, 1961 is applicable to an assessee and not to a legal representative. Further, in the present case one of the legal heirs of the deceased assessee, i.e. the petitioner, had neither cooperated in the assessment proceedings nor filed return or waived the requirement of Section 148 of the Act, 1961 or submitted to jurisdiction of the Assessing Officer. She had merely uploaded the death certificate of the deceased assessee.”

(13) Commissioner of Income Tax-VIII, Chennai vs. Shri M. Hemanathan, 2016 (4) TMI 258 (Madras High Court)

“In the case on hand, the assessee was dead. It was the assessee's son, who appeared and perhaps cooperated. Therefore, the primary condition for the invocation of Section 292BB is absent in the case on hand.

Section 292BB is in place to take care of contingencies where an assessee is put on notice of the initiation of proceedings, but who takes advantage of defective notices or defective service of notice on him.

It is trite to point out that the purpose of issue of notice is to make the noticee aware of the nature of the proceedings. Once the nature of the proceedings is made known and understood by the assessee, he should not be allowed to take advantage of certain procedural defects. That was the purpose behind the enactment of Section 292BB.

It cannot be invoked in cases where the very initiation of proceedings is against a dead person. Hence, the second contention cannot also be upheld.”

(14) *Rajender Kumar Sehgal vs . ITO 2018 (12) TMI 697 (Delhi)*

“If the original assessee had lived and later participated in the proceedings, then, by reason of Section 292BB, she would have been precluded from saying that no notice was factually served upon her. When the notice was issued in her name- when she was no longer of this world, it is inconceivable that she could have participated in the reassessment proceedings, (nor is that the revenue's case) to be estopped from contending that she did not receive it. The plain language of Section 292BB, in our opinion precludes its application, contrary to the revenue's argument.”

<p style="text-align: center;">Alternative statutory remedy in writ proceedings</p>
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(15) *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others, (1998) 8 SCC 1*

“Alternative statutory remedy does not operate as a bar to maintainability of a writ petition in at least three contingencies

- (i) where the writ petition has been filed for the enforcement of any of the **Fundamental Rights**, or*
- (ii) where there has been a violation of the principles of natural **justice**, or*
- (iii) where the order or notice or proceedings are wholly **without jurisdiction** or the vires of an Act is challenged.”*

(16) *Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I Calcutta and Another, AIR 1961 SC 372*

“An assessment order has been passed and it is open to challenge by way of an appeal, does not denude the petitioner of its right to challenge the notice for assessment if it is without jurisdiction. If the assumption of jurisdiction is wrong, the assessment order passed subsequently would have no legs to stand. If the notice goes, so does the order of assessment. It is trite law that if the Assessing Officer had no jurisdiction to initiate assessment proceeding, the mere fact that subsequent orders have been passed would not render the challenge to jurisdiction infructuous.

“27.It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the **High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction.** Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

28. Mr Sastri mentioned more than once the fact that the Company would have sufficient opportunity to raise this question viz. whether the Income Tax Officer had reason to believe that underassessment had resulted from non-disclosure of material facts, before the Income Tax Officer himself in the assessment proceedings and if unsuccessful there before the appellate officer or the Appellate Tribunal or in the High Court under Section 66(2) of the Indian Income Tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.

29. In the present case the Company contends that the conditions precedent for the assumption of jurisdiction under Section 34 were not satisfied and come to the court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under Article 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons...”

***Individual affairs are conducted and business decisions
are made in the expectation of consistency, uniformity and certainty.
To detract from those principles is neither expedient nor desirable***

**(17) Pr. Commissioner of Income Tax vs. Maruti Suzuki India Limited,
(2019) 416 ITR 613 (SC)**

Supreme Court speaking through Hon’ble (Dr.) Justice Dhananjaya Y. Chandrachud has succinctly observed as under:-

“40. We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of **certainty in tax litigation.** The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in **uncertainty and displacement of settled expectations.** There is a significant value which must attach to observing the requirement of **consistency and certainty.** Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable.”

Conclusion and judgment

To conclude, the arguments advanced by the respondent are no longer *res integra* and have been consistently rejected by different High Courts including this jurisdictional Court. In view of consistent, uniform and settled position of law, to accept the submissions of the respondent would amount to unsettling the 'settled law'.

Keeping in view the aforesaid, the present writ petition is allowed and the impugned notice dated 31st March, 2019 and all consequential orders / proceedings passed / initiated thereto including orders dated 21st November, 2019 and 27th December, 2019 are quashed.

Disclaimer

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*By CA. Rajiv Kumar Jain
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1.8.2020*