

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
 (समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 1543/Kol/2013
Assessment Year: 2008-09

M/s. Brolly Dealcom LLP (formerly M/s. Brolly Dealcom Pvt. Ltd.) (PAN: AAKFB6608B)	Vs.	Income-tax Officer, Wd-5(4), Kolkata.
Appellant		Respondent

Date of Hearing	03.01.2019
Date of Pronouncement	01.02.2019
For the Appellant	Shri A. K. Tulsian, FCA & Sri P. Jhunjhunwala, ARs
For the Respondent	Shri A. K. Singh, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of the Ld. CIT-II, Kolkata passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 28.03.2013 for AY 2008-09.

2. At the outset itself it has been brought to our notice that this is second round of litigation before this Tribunal. During the first round, the Tribunal had tagged this appeal also with similar appeals filed by different assessee’s against identical impugned orders passed by Ld. CIT u/s. 263 of the Act and thereafter dismissed the appeal of the assessee without adjudicating the specific ground raised by this assessee an LLP which is the successor-in-interest (from 19.01.2011) of the dissolved Private Limited Company that it

was not given an opportunity to be heard by the Ld. Pr. CIT during the proceedings under section 263 of the Act wherein the impugned order was passed; And so according to the assessee, which is an LLP is that since the impugned order was passed by Ld. Pr. CIT without affording an opportunity of hearing was, therefore, bad in law for violation of natural justice. In order to buttress this legal challenge it was pointed out that the show cause notice was issued by Ld. Pr. CIT to the erstwhile assessee company's address which was before May 17, 2010 after which it has changed to address at Princep Street and continued in the same address after the assessee company got converted to an LLP on 19.01.2011. According to the assessee, after conversion to an LLP it's address was at Princep Street address and since has not received any notice about the proceedings u/s. 263 of the Act because of which it was not aware of the revisional proceeding itself so, it did not get an opportunity of hearing before the Ld. Pr. CIT before passing the impugned order. So the assessee in the first round of appeal before the Tribunal had raised a ground against the impugned order of Pr. CIT u/s. 263 stating that it was passed without affording an opportunity to assessee LLP is bad in law, which ground was not adjudicated by the Tribunal. And as stated earlier, the Tribunal dismissed the appeal of assessee along with other tagged appeals of other assessee's. Against the dismissal of it's appeal by the Tribunal, the assessee preferred an appeal before the Hon'ble High Court, wherein the Hon'ble High Court was pleased to set aside the order of the Tribunal passed in the first round dated 10.08.2015 against this assessee and remanded the appeal back to the Tribunal to decide specifically as to whether there was a violation of natural justice against the assessee LLP before passing of the impugned order u/s. 263 by the Pr. CIT. Therefore, the assessee is now before us.

3. We have perused the material available on record. We note that in the first round the Tribunal has passed a common order in the case of M/s. Brolly Dealcom Pvt. Ltd. in ITA No. 1543/Kol/2013 dated 10.08.2015 wherein the Tribunal was pleased to dismiss the appeal of the assessee along with seven appellants challenging similar orders of the Ld. Pr.

CIT. Against the impugned order of the Tribunal dated 10.08.2015, the assessee preferred an appeal before the Hon'ble High Court wherein the Hon'ble High court was pleased to pass an order in ITA No. 25 of 2018, GA No. 450 of 2017 dated 07.05.2018 wherein the Hon'ble High Court remanded the matter back to this Tribunal with the following observation and specific direction as infra:

" The Court : The limited question which impresses this Court is whether the arbitral tribunal could have upheld the commissioner's order under Section 263 of the Income Tax Act, 1961 without addressing the appellant's challenge thereto on the ground that the appellant had not been served any notice prior to such order being made and that the appellant was not afforded any opportunity of hearing before the commissioner passed the relevant order.

Several other technical points are raised, which may not be worthy of consideration.

It is not in dispute that the commissioner's order under Section 263 of the Act pertains to an assessment regarding a limited liability company for the assessment year 2008-09. It is also not in dispute that subsequent to such assessment year and prior to the commissioner's order being passed on March 28, 2013, the relevant company was dissolved upon its assets and liabilities being taken over as a going concern by the appellant herein as a limited liability partnership. There can be no doubt that upon the assets and liabilities of a business entity being taken over by another as a going concern, the previous liabilities of the original entity fasten on to the subsequent entity. It can also not be disputed that if a particular assessing officer and a relevant commissioner had jurisdiction over the original entity, such authorities would continue to have jurisdiction to reopen the matter pertaining to previous assessment years when the entity was in existence. The objections raised on such grounds do not appear to be worthy of any further consideration.

However, what is of importance is that even though a previous notice under Section 263 of the Act is not a sine qua non for the jurisdiction to be exercised thereunder by the commissioner, the provision mandates an opportunity of hearing to be afforded to the assessee. In the present case, upon the assessee company being dissolved, such opportunity of hearing ought to have been given to the present appellant, particularly, since it appears that the present appellant kept the authorities informed of the company being dissolved upon the appellant limited liability partnership taking over its business, assets and liabilities as a going concern.

It is evident from a letter dated May 6, 2013, issued by the appellant herein to the relevant commissioner that the appellant did not have any prior knowledge of the commissioner reopening the matter or intending to pass any order under Section 263 of the Act. While it appears that the order of the commissioner referred to a notice dated March 18, 2013 and such notice remaining unattended to and a further notice informing the assessee of a fresh hearing on March 18, 2013, it is not clear from the commissioner's order under Section 263 of the Act as to whether the present appellant was served the original notice or made aware of the subsequent date of hearing.

A point was squarely taken before the tribunal in course of the challenge to the commissioner's order passed under Section 263 of the Act that no opportunity was afforded to the appellant prior to the order being passed by the commissioner.

It appears that the tribunal dealt with a bunch of matters and disposed of the same by a lead order. Though the order impugned herein records that the facts in every case were looked into, the order impugned does not expressly address the specific point raised by the appellant herein before the tribunal that the appellant assessee as the successor-in-interest of the original assessee had no notice or knowledge of any hearing fixed by the commissioner prior to the commissioner passing the order under Section 263 of the Act.

It is possible that in the wake of the many matters involving the same issue, this special feature of the matter escaped the attention of the tribunal. However, it was imperative for the appellate tribunal to address the issue since a previous opportunity of hearing is necessary to be afforded to an assessee before an order under Section 263 of the Act can be made by a commissioner.

Accordingly, on the limited aspect as to the violation of the principles of natural justice, the order impugned cannot be sustained in so far as it pertains to company Brolly Dealcom Pvt. Ltd. which has been taken over as a going concern by the appellant herein. In other words, the appellate tribunal has to satisfy itself as to whether the appellant herein as the successor-in-interest of Brolly Dealcom Pvt. Ltd. had notice of the hearing under Section 263 of the Act. If there is sufficient material that the original assessee and the present appellant carried on business at the same premises and notice was served at such premises, it will not do for the appellant to feign ignorance by merely stating that the noticee was erroneously addressed to a defunct entity.

ITA No. 25 of 2018 and GA No.450 of 2017 are disposed of by setting aside the order impugned dated August 10, 2015 in so far as it concerns Brolly Dealcom Pvt. Ltd. for the appellate tribunal to apply its mind to the limited issue indicated hereinabove and pass a fresh reasoned order.

There will be no order as to costs.”

4. The Hon'ble High Court by the aforesaid order has remanded to us a limited question as to whether there is violation of the principles of natural justice qua the LLP which is the Successor-in-Interest of the M/s. Brolly Dealcom Pvt. Ltd. before the Ld. Pr. CIT passed the order u/s. 263 of the Act. In other words, whether the LLP was served with a notice of sec. 263 proceedings or made aware of the said proceedings or is it feigning ignorance of the said proceedings before the Pr. CIT. This is what we have to find out as directed by the Hon'ble High Court. In order to adjudicate this issue let us first look at the addresses of Private Limited Company and that of the LLP. For that we have gone through the record produced by the Ld. CIT, DR of the Commissioner's file in respect of the section 263 order. We have perused the same. We note that the Private Limited Company prior to its conversion was in the name and style of M/s. Brolly Dealcom Pvt. Ltd. and the address is shown in the impugned 263 order of the Ld. Pr. CIT is 16, G. C. Avenue, Kolkata-700 013. Whereas, in respect to the address of LLP, the Ld. AR drew our attention to page 7 of the new paper book as well as to the page 1 of the old paper book which is the copy of the certificate of registration of conversion of the Private Limited Company to LLP dated 19.01.2011 wherein we note that it is the Form 19 as per Rule 32(1), Certificate of Registration on Conversion of M/s. Brolly Dealcom Private Limited to M/s. Brolly Dealcom LLP, LLP Identity No. AAA-3449 which has been certified as registered pursuant to sec. 58(1) of the Limited Liability Partnership Act, 2008 on 19.01.2011 which has been signed by the Registrar wherein we note the address is recorded as M/s. Brolly Dealcom LLP, P-103, Princep Street, 3rd floor, Room No. 24, Kolkata, West Bengal-700072.

5. Our attention was drawn to page no. 38 of the new paper book as well as to page 10 of the old paper book filed during the first round, which we note is the copy of the letter dated 16.04.2012 filed before the AO intimating about the change in status of M/s. Brolly Dealcom Pvt. Ltd. to M/s. Brolly Dealcom LLP and the change of PAN and also the change of address of the LLP. For ready reference the same is reproduced below:

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BROLLY DEALCOM LLP
(FORMERLY BROLLY DEALCOM PRIVATE LIMITED)
P-103 Princeep street, 3rd Floor, Room no 24, Kolkata-700072

Date: 16.04.2012

To
The Income Tax officer
Ward 5(4)
Kolkata

Dear Sir,

Reg: Intimation about change in address and change in status.
Earlier PAN: AADCB1699Q
Present PAN: AAKFB6608B

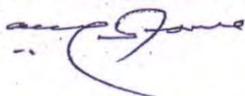
With reference to above this is to intimate you that our address has been changed and our present address is P-103 Princeep street, 3rd Floor, room no 24, Kolkara-0700072.

Further this is intimated that, with the approval of Registrar of companies, we have changed our status from Private limited company to 'limited liability partnership' i.e. LLP. We are attaching with this a copy of the certificate of registration on conversion of our company to LLP issued by Registrar of companies, west Bengal. Presently we are governed under the provisions of LLP and we are assessed to income tax act with ITO ward 37(4) Kolkata. Our present PAN is AAKFB6608B. We are attaching with this a copy of the PAN Card of LLP for your kind perusal and record.

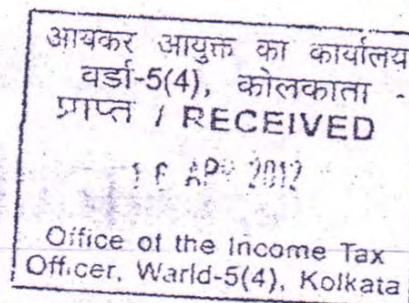
We request to take a note of the above stated change in status and henceforth make all future correspondence etc at our aforesaid address.

Thanking you y
Yours sincerely

For Brolly Dealcom LLP



Authorised Signatory



6. From a perusal of the aforesaid letter dated 16.04.2012 filed before the ITO, Wd-5(4), Kolkata it is evident that the assessee had intimated about the change of address and change in status and specifying the earlier PAN as well as the present PAN which is evident from the letter itself (supra). We also note that the income tax return of the LLP for assessment year 2011-12, filed by the assessee LLP on 24.09.2011, under its new PAN AAKFB6608B mentioning the Princep Street address as aforesaid. With the aforesaid background, we note from the perusal of the documents in the Commissioner's file that the show cause notice (*first notice*) was sent on 18.03.2013 to the Principal Officer of *M/s. Brolly Dealcom Pvt. Ltd., 16, G. C. Avenue, Kolkata-700 013* as well as to *9/1, R. B. C. Road, Kolkata-700 028* directing the assessee to be present on 25.03.2013. Thereafter, the reminder was sent on 25/26.03.2013 directing the assessee to appear on 28.03.2013 which was also sent to *M/s. Brolly Dealcom Pvt. Ltd., 16, G. C Avenue, Kolkata-700 013 and 9/1, R. B. C. Road, Kolkata-700 028* and we note that the AO in the original assessment order dated 30.04.2010 and the Ld. CIT has passed the 263 order on 26.03.2013 in the address given of *M/s. Brolly Dealcom Pvt. Ltd., 16 G. C. Avenue, Kolkata-700013* and further we note that the original assessment order dated 30.04.2010 and in the Show Cause Notice issued by Ld. Pr. CIT before passing the impugned order has addressed it to another address also i.e. *9/1, R. B. C. Road, Kolkata-700028*.

7. However, the Ld. CIT, DR justifying the action of Id CIT, and contending that assessee was served with the notice, drew our attention to the Show Cause Notice of Ld. Pr. CIT and contended that it was delivered to *M/s. Brolly Dealcom Pvt. Ltd.* on 20.03.2013. According to him, it is evident from a perusal of the tear off acknowledgment slip available in the file wherein the date and seal of *M/s. Brolly Dealcom Pvt. Ltd.* is seen to have been affixed and written on the tear off acknowledgment slip (hereinafter the first tear off slip). Further, the Ld. CIT, DR drew our attention to the Power of Attorney signed by the Director of *M/s. Brolly Dealcom Pvt. Ltd.* authorizing *G. K. Tulsian & Co., Chartered Accountant* which is also seen placed in the folder of Ld. Pr. CIT, which facts, according to Ld. CIT,

DR, goes on to show that the company was served notice and pursuant to the same, the company had appointed the aforesaid Chartered Accountants. And also he drew our attention to another 'tear off slip' wherein the seal of Private Ltd. Company (all in capital letters) signed by the erstwhile director of dissolved company (hereinafter the second tear off slip) Shri Sushanta Kumar Parida, his mobile number and date 31.03.2013 is written. Therefore, according to him, the assessee company has been served notice and in that process the assessee was knowing about the sec. 263 proceeding. Per contra, our attention was drawn by Id AR, to the affidavit filed by erstwhile director of M/s. Brolly Dealcom Pvt. Ltd. from which it is discerned that the earlier Chartered Accountant who used to audit the company telephonically informed him about the order passed by the Ld. CIT u/s. 263 of the Act and he had signed the Power of Attorney authorizing the M/s. G. K. Tulsian & Co. (earlier Chartered Accountant of the Pvt. Limited Company) only for the purpose of collecting the impugned order passed by Ld. CIT u/s 263 of the Act and that authorization by POA, according to Ld. AR, in no way can be construed to say that Show Cause Notice of the hearing u/s. 263 of the Act was served upon the successor-in-interest the LLP which entity was never in the know-how about any action taken by the dissolved company and that too when the POA was given after the passing of the impugned order and, therefore, the Ld. AR stressed that no opportunity of hearing was given to the successor-in-interest before the Ld. CIT passed order u/s 263 of the Act. So, according to Ld. AR no notice was served upon the LLP which was functioning from a registered address at Princep Street and even if for argument sake if the erstwhile director of dissolved company has endorsed as receiving the impugned order and affixed the seal of the company which is non-est in the eyes of law in no manner can be construed as service of notice to the successor-in-interest LLP which is a different entity functioning at P-103, Princep Street, 3rd floor, room No. 24, Kolkata-72. And the Ld. AR drew our attention to the impugned order of the Ld. Pr. CIT passed u/s. 263 dated 28.03.2013, wherein it was pointed out that the Ld. Pr. CIT has specifically noted in the cause title in column No. 9 that none appeared and has recorded that no submission has been filed by the assessee and thus it was brought to our notice that the Ld. Pr. CIT has not

said anything about any submission made by the AR/assessee in the order passed u/s. 263 of the Act.

8. We on a perusal of the “tear off acknowledgment slip” (wherein date of 20.03.2013 which we term it as ‘First tear off acknowledgement’) shown by the Ld. CIT, DR, we note that though it was a “tear off Acknowledgment slip” there is neither any [g.i.r] number, name nor address of Assessee (no name of private ltd company or LLP) is written on it; further, there is neither any information as to who received it, nor on what date it was served; moreover, there is no mention about what was served like notice, order etc. So, the “tear of acknowledgment slip” is found “blank” except a seal of Brolly Dealcom Pvt. Ltd. (wherein we note that in the seal except the words B,D,P L all are small letters) and a scribbling of date written as 20.03.2013, which does not in any way gives the impression that the Show Cause Notice which is addressed to company’s earlier address at G.C. Avenue dated 18.03.2013 have been served upon the LLP at its address at Princep Street, it is only a blank “tear of acknowledgment slip” with a seal and date, which doesn’t even convey that the staff of dissolved private limited company received the SCN on 20.03.2013. Moreover, the erstwhile director of company on sworn affidavit has denied the receipt of SCN on 20.03.2013, which fact has not been controverted by the Revenue by adducing any affidavit of process-server of the department of serving the SCN on 20.03.2013 to the company and most important explaining as to why is the “tear of acknowledgment slip.” was with a seal of company and date written on it and remaining portion was left blank. So, with the ‘First tear off acknowledgement slip’ we are not persuaded to accept that the private limited company or the LLP received the SCN on 20.03.2016.

9. Coming to second tear off slip dated 31.03.2013 signed by erstwhile director of dissolved company evidences the collection of impugned order passed on 28.03.2013 which means the ex-director collected the impugned order of Pr. CIT after four days of passing of that order, is in no way help the Revenue to contend that the assessee was brought to notice

regarding the section 263 proceeding before Pr. CIT, so that it could have participated in the said proceedings *and about the second tear off slip we will discuss in detail later in this order.*

10. In order to find an answer to the question remanded to us by the Hon'ble High Court, we have also carefully gone through the records maintained by the Ld. Pr. CIT and we could not find from a perusal of the order sheet or from the order of Ld. Pr. CIT passed u/s. 263 of the Act any notice being issued in the address of the LLP which is P-103, Princep Street, 3rd floor, Room No. 24, Kolkata, West Bengal-700072. We note that the Successor-in-Interest of the erstwhile dissolved Pvt. Ltd. Company had duly informed the AO i.e. ITO, Ward-5(4) on 16.04.2012 (supra) about the change in address and change in status and also referred in the letter, the earlier PAN as well as the present PAN and there is a seal of the ITO, Ward-5(4) endorsing having received the same on 16.04.2012 and the return of income for AY 2011-12 was filed by the LLP reflecting the new PAN as well as Princep Street address filed on 24.09.2011. And according to the file of Ld. Pr CIT the first notice was issued on 18.03.2013 to two addressees at G C. Avenue and to R B. C Road and not the Princep Street address of LLP.

11. We also note that in the department's file, two copies of the Show Cause Notice issued by Pr. CIT dated March 25/26, 2013 of which one we note is the office copy and other is a photo copy. In the original office copy and photocopy we note it is addressed to the Private Limited Company at G. C. Avenue as well as R.B.C. Road. We note that the Princep Street address is not mentioned below the name/caption of the company. However, a careful perusal of the photocopy of the Show Cause Notice, at the bottom of the Show Cause Notice, we note a scribbling which is illegible hand written which portion reads "*P-103, Princep Street, Kol-72*" and a signature with an endorsement which is legible "*Received*" dated 26.03.2013, Mobile No. 9078152601 and staff. For better understanding and appreciation the photocopy of the Show Cause Notice with the aforesaid endorsement

which is the trump card of the Revenue to suggest that notice has been served at the Princep Street address is reproduced below:


**OFFICE OF THE COMMISSIONER OF INCOME TAX, KOL-II, KOLKATA,
AAYAKAR BHAWAN, P-7, CHOWRINGHEE SQUARE KOLKATA - 700069**

No.CIT, Kol-II/Kol/Showcause/2012-13/ 10113

Dated: 25.03.2013

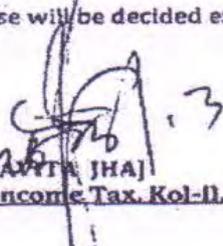
To
The Principal Officer,
M/s. Brolly Dealcom (P) Ltd. 16, G.C. Avenue,
Kolkata-700 013,
9/1, RBC Road,
Kolkata-700 028

Sub: Showcause Notice - matter regarding.

[AADCB1699Q]

Ref: No.CIT, Kol-II/U/s.263/2012-13/9685 dated-18.03.2013

Your case was fixed for hearing on 25.03.2013. However, there was no compliance on that date. You are given one more opportunity of being heard by appearing on 28.03.2013 at 04:00 P.M., failing which the case will be decided ex-parte.


[KAVITA JHA]
Commissioner of Income Tax, Kol-II, Kolkata.



Certified to be true copy

By:
BROJIT MITRA
BROJIS DAS
Joint Section Officer
P. O. No. 2, Revenue
P. O. No. 2, Kolkata

Received
No. 2107/2017
9078252601
Shabbir
D 103 Princep Street
101-72-

12. Assailing the scribbling on aforesaid photocopy of Show Cause Notice, the Ld. AR wondered and pointed out the infirmities on it to show that it was an afterthought action to wriggle out of the conundrum the department has fallen into, for not being vigilant and to escape from its sheer negligence's has ventured to do such things to create at least a doubt that the notice was served in Princep Street address. According to Ld. AR, if the said communication was infact sent to Princep Street, that address should have appeared below the name/caption of the addressee. According to him, if the Princep Street address was found out after the said notice was prepared, the *G.C. Avenue and R.B.C. Road addresses* should have been struck off and the Princep Street address should have been incorporated which is not the case. The Ld. AR pointed out that in the Princep Street address there is *no mention of room number* or as to *which floor is not written* (i.e. Room No. 24, 3rd floor) which fact itself brings out the folly that this scribbling was an after- thought to cover their mistake in addressing to earlier addresses (G. C. Avenue and R.B.C Road), which is apparent. As far as the signature and mobile number of the purported recipient who has described himself/herself as "*staff*" the Ld. AR pointed out that the signature of the recipient is not identifiable, since it does not pertain to any staff employed by the LLP or to even know person of partner of the LLP. And the designation "*staff*" under the anonymous signature is, to say the least is vague and it was pointed out that there is no receiving seal of the LLP. It was brought to our notice that in the affidavit filed on behalf of one of the partners of the LLP states that the author of the acknowledgment appearing in the bottom half of the photocopy of the communication dated March 25/26, 2013 could not be identified. It is asserted in the affidavit that *such hand writing and signature is not of any person working for LLP* at Room No. 24, 3rd Floor, P-103, Princep Street, Kolkata-700072. The Ld. AR pointed out that since the partner of LLP is familiar with the employees hand writing and signature he would be able to easily identify the signature and the hand writing of his staff but since it was not of his employees, he asserted this fact. It is further asserted in the affidavit by the partner of LLP that neither the notice dated March 18, 2013 nor the notice dated March 25/26, 2013 was served on any person connected or employed with the

LLP and, therefore, the order passed by Ld. Pr. CIT u/s. 263 dated March 28, 2013 was passed without affording any opportunity to the LLP. Moreover, it was brought to our notice that Shri Sushanta Kumar Parida, ex- Director of the dissolved/defunct Private Limited Company has also stated in the affidavit that the author of the aforesaid acknowledgement could not be identified by him. It was brought to our knowledge that several attempts were made to dial the mobile phone number mentioned in the endorsement, but the voice message they got every time was that the phone is switched off. Shri Sushanta Kumar Parida, Ex-Director has stated that neither the notice dated March 18, 2013 nor the notice dated March 25/26, 2013 was served upon the company and the order dated March 28, 2013 under section 263 was passed without affording any opportunity. It was pointed out to us that the revenue has not controverted the statements made in the said two affidavits which have been filed before us. Moreover, we note that the Revenue is harping heavily on the two *Acknowledgement tear off slip* to contend that the notice/order has been served upon the company at G. C. Avenue on 20.03.2013, then the *question arises as to where is the tear off slip of the department on which the receipt of notice could have been endorsed with signature of the receiver at princep street along with seal of LLP*, rather than scribbling incomplete address and signature of an anonymous person, which does not inspire confidence as to serving of reminder letter dated 25/26.03.2013 at princep street address of LLP. This failure of not having the tear off slip on the file of Pr. CIT makes the scribbling of Princep Street to be non-genuine and cannot in anyway controvert the sworn affidavit of partner of LLP and ex director of company. Moreover, the erstwhile director of company and partner of LLP, on sworn affidavits has denied the receipt of the reminder notice dated 25/26.03.2013 fixing the case on 28.03.2013, which fact has not been controverted by the Revenue by adducing any affidavit of process-server of the department of serving the SCN on 26.03.2013 to the LLP/company at its prince street and most important explaining as to why is the “tear of acknowledgment slip.” was not used while serving of notice which reflects complete proper address, along with the recipients seal of LLP/company and date written on it and details of who received it. So, in the absence of complete ‘tear off

acknowledgement slip' as discussed, we are not persuaded to accept that the private limited company or the LLP received the reminder SCN dated 25/26.03.2016 at its proper prince street address.

13. On behalf of the revenue, reliance has been placed on two more documents to prove service of notice. One of the documents relied upon by the revenue is a *tear off acknowledgement slip* mentioning the name of the company with address at G.C. Avenue for the purpose of service of the order dated March 28, 2013 under section 263. The said tear off acknowledgement slip bears the seal (unclear) but the name of company is all in capital letter (which is different from the seal on the first acknowledgment tear off dated 20.03.2013 wherein all letters are not capital) of the company and is signed by Shri Sushanta Kumar Parida on March 31, 2013 as Director [herein after referred as second tear off acknowledgement slip]. The question before us is as to whether any notice of hearing was served before the impugned order was passed on 28.03.2013 and not about service of the order. The company had its registered office at G.C. Avenue till October 8, 2009. From October 9, 2009 the registered office was at 9/1, R.B.C. Road thereafter from 17.05.2010 it shifted its office to Room No. 24, 3rd floor, P-103, Princep Street, Kolkata-700072. After converting as an LLP its registered office continued at Room No. 24, 3rd Floor, P-103, Princep Street, Kolkata-700072 which is the registered office reflected in the Certificate of Registration of LLP. Shri Sushanta Kumar Parida in his affidavit has stated that after shifting, no person at the old address was authorised to receive any communication addressed to the company. Explaining how the erstwhile director of company has collected the impugned order on 31.03.2013, Shri Udaya Kumar Senapati [partner of C.A] in his affidavit has stated that on or about March 30/31, 2013, a telephone call was received at the office of G.K. Tulsyan & Co. from the Kolkata Ward 5(4) of the Income Tax Department under the jurisdiction of the Commissioner of Income Tax, Kolkata II that a representative of the company should attend the Income Tax Department along with the company's seal to collect copy of the order under section 263. And pursuant to that direction, he accordingly

informed Shri Sushanta Kumar Parida. And Shri Sushanta Kumar Parida in his affidavit has corroborated this fact and that upon being informed by Shri Udaya Kumar Senapati, he attended the Income Tax Department and informed the concerned officer that the company was no longer in existence and was converted into a limited liability partnership in January, 2011 and that he was no longer a director of the company. Upon insistence of the officer concerned, he received the impugned order and acknowledged receipt on the tear off acknowledgement slip. We note that the revenue has not controverted the aforesaid assertions made by Shri Udaya Kumar Senapati and Shri Sushanta Kumar Parida in the sworn affidavits filed before us, which was their consistent stand in the first round of litigation before us and the Hon'ble High Court, so we accept the explanation given in the affidavits for the reasons supra.

14. Coming to the Power of Attorney executed by Shri Sushanta Kumar Parida as director of the company in favour of Shri Udaya Kumar Senapati and Shri S. Karmakar of M/s. G.K. Tulsyan & Co., Chartered Accountants. Shri Sushanta Kumar Parida in his affidavit has stated that the said Power of Attorney was signed by him with the company's seal and made over to M/s G K. Tulsyan & Co. subsequent to the receipt of the order under section 263 dated March 28, 2013, so that the said Chartered Accountant firm was empowered to approach the office of the Commissioner of Income Tax, Kolkata II to ascertain the circumstances under which the order dated March 28 2013 was passed ex parte. Shri Udaya Kumar Senapati, Partner of M/s G.K. Tulsyan & Co. (Chartered Accountant) in his affidavit has also corroborated this fact. The explanation given by the Ld. AR of adopting such course of action despite dissolution of the company was because the Income Tax Department noticing that the impugned order was passed against the Private Limited Company insisted that Power of Attorney from company with company's seal affixed on it to C.A be given, then only they would be permitted to pursue on the queries in respect of the impugned order ex-parte passed against M/s. Brolly Dealcom Private Limited. We note that in the order dated March 28, 2013 passed by the Commissioner under section

263 it is expressly recorded that none appeared and that there was no compliance from the part of assessee and so the order was being passed ex parte. It is thus clear to us that the Power of Attorney was not filed in course of the proceedings under section 263 and the stand of the ex-director of company and which was corroborated by the CA in the sworn affidavits that it was executed after receipt of the order under section 263 for the purpose of making enquiries in the office of the Commissioner is necessarily is to be drawn as correct in the facts and circumstances analysed supra and the department has failed to controvert this facts discussed above.

15. Having regard to the aforesaid facts, there is nothing to show that the communication dated March 25/26, 2013 was sent to or delivered or handed over to anybody at Room No. 24, 3rd Floor, P-103, Princep Street, Kolkata-700072. The person who affixed his signature acknowledging receipt of the communication dated March 25/26, 2013 is unidentified and there is nothing to show that the acknowledgement receipt scribbled in respect of the communication dated March 25/26, 2013 is of any person/authorised person of the company or LLP.

16. As per section 282 of the Act, notice may be served by post, by approved courier service or in such manner as provided under the Code of Civil Procedure, 1908 for the purpose of service of summons. The other provisions of section 282 regarding service in the form of electronic record or by any other means specified in the rules is not material in the instant case. Rule 127 came into effect much later on December 2, 2015. It is not the case of the Department that the notice was sent by post or by any approved courier service. Thus, the question is whether service was made in the manner as provided under the Code of Civil Procedure, 1908. In respect of suits by or against a Corporation, Order 29 rule 2 of the Code of Civil Procedure provides that subject to any statutory provision regulating service of process, where the suit is against a Corporation, the summons may be served on the Secretary or on any Director or other Principal Officer of the Corporation or by leaving it or

sending it by post addressed to the Corporation at the registered office or if there is no registered office then at the place where the Corporation carries on business. Where the suit is by or against a firm, Order 30 rule 3 of the Code of Civil Procedure provides that summons shall be served either upon anyone or more of the partners or at the principal office at which the partnership business is carried on upon any person having, at the time of service, the control or management of the partnership business there. If the matter is looked at reference to the company which was converted into LLP on January 19, 2011, there is nothing to show that any notice was served on any Secretary or Director or Principal Officer or that any notice was left at or sent by post to the registered office viz. Room No. 24, 3rd Floor, P-103, Princep Street, Kolkata-700072. If the matter is looked at with reference to LLP, there is nothing to show that any notice was served upon any partner or upon any person having the control or management of the partnership business at Room No. 24, 3rd Floor, P-103, Princep Street, Kolkata-700072. In the facts and circumstances of the instant case, it cannot at all be said that any notice was served in the manner as provided under the Code of Civil Procedure.

17. It is clear that there has been violation of the principles of natural justice because no opportunity whatsoever was afforded to the appellant before the order under section 263 was passed. Care was not taken to find out from the records that the company since has converted into a limited liability partnership on January 9, 2011 was thus not in existence and so notice of hearing should have been given to Room No. 24, 3rd floor, P-103, Princep Street, which was the address of the LLP. Care was also not taken to even ascertain the last known address of the company which were available in the records. The notices to the company were not sent to or served at the last known address of the company viz. Room No. 24, 3rd Floor, P-103, Princep Street, Kolkata-700072, from where the LLP was also functioning from January 9, 2011. Thus, we find that the appellant had no notice of the proceedings under section 263. In such circumstances, the order dated March 28, 2013 passed under section is bad in law.

18. The following case laws were brought to our notice :

(i) Hon'ble Supreme Court of India in case of Sona Builders vs Union of India & Ors. In 251 ITR 197

"Purchase of immovable property-Opportunity of being heard- Fair market value- Notice of hearing gave only five days to the parties to respond which included the weekend-Same inadequate-Notice alleged that the apparent consideration of the transaction was low as compared to sale instances mentioned therein-No copy of any document relating to the sale instance was furnished by the Appropriate Authority to the appellant-transferee along with the notice or at any time whatsoever-There was gross breach of the principles of natural justice on both counts-Matter cannot be remanded to the Appropriate Authority-Impugned order quashed"

(ii) Hon'ble High Court of Calcutta, in the case of Ramendra Nath Ghosh vs CIT in 66 ITR 414

"Revision - Opportunity of being heard-Notice-Where notice sent by post was served long after the date of hearing and the service by affixture was effected at a house which was not the residence of the assessee and the company occupying the said house with which the assessee was connected had gone into liquidation before the affixture, proper opportunity of hearing cannot be said to have been afforded to the assessee"

(iii) Hon'ble High Court of Madras in the case of Kiran Machines vs ITO in 203 CTR 574

"Section 282, of the Income-tax Act, 1961, read with order V, rule 20, of the Code of Civil Procedure, 1908 - Service of notice - General - ITO issued a show-cause notice to assessee and proposed to disallow interest of certain sum - Assessee gave no reply to said notice - ITO, thereafter, passed an assessment order by levying tax thereon - Thereafter, ITO served a notice of personal hearing under section 282 on Chartered Accountant of assessee by affixing assessment order along with it at place of business of assessee which was not functional - Assessee contended that no opportunity was given to him to support his claim and if notice had been served on him personally, he would have appeared and submitted his objections, hence, proceedings should be quashed - Whether since ITO had not recorded satisfaction in his order before causing service of notice by affixture and further, as per order V, rule 20 of 1908 Code, ITO could have ordered paper publication if address of assessee was not known, in said circumstances, it could be said that no proper notice had been served on assessee and there was denial of principle of natural justice to assessee as he was not able to effectively

participate in assessment proceedings and put forth his objection - Held, yes - Whether, therefore, impugned proceedings of ITO were liable to be quashed - Held, yes"

(iv) Hon'ble High Court of Allahabad in the case of CIT vs Dr. Ajay Prakash in 226 Taxman 71

"Section 292BB, read with sections 148 and 282 of the Income-tax Act, 1961 - Notice - Deemed to be valid in certain circumstances (conditions precedent) - Assessment year 1998-99 - Assessing Officer issued notice to assessee under section 148 - Assessee did not appear in proceedings - Assessing Officer considered service to be sufficient are thereafter made various additions - Tribunal noted that no ice was sent on wrong address and person alleged to be a employee of assessee was not authorized to receive notice - Tribunal thus opined that presumption of service of notice under section 292BB would not be attracted - Accordingly, additions made in reassessment proceedings were deleted - Whether finding recorded by Tribunal being a finding of fact, no substantial question of law arose therefrom - Held, yes [Para 7] [In favour of assessee]"

(v) Hon'ble High Court of Madras in the case of Green Power Realtors Pvt. Ltd. vs DCIT 216 Taxman 169

"Section 143 of the Income-tax Act, 1961 - Assessment - Issue of notice [Time of issue of notice - Assessment year 2005-06 - Whether, revenue authority has to afford an opportunity of hearing to assessee in accordance with law, before proceeding to pass an assessment order - Held, yes - Whether, therefore, where notice under section 143(2) was dispatched to assessee only after date fixed for hearing, there was denial of reasonable opportunity of hearing to assessee and, in such a case, impugned order passed by revenue authority was not sustainable as it violated principles of natural justice - Held, yes [Para 8] [In favour of assessee]"

(vi) Hon'ble High Court of Delhi; in the case of CIT vs Rajesh Kumar Sharma in 311 Taxman 235

"Notice -Service by process server/speed post-Validity of service-Notice under s. 148 was received by L, an employee of the assessee-There is nothing to suggest that L was in any manner authorised to receive any summons on behalf of the assessee-Thus, it cannot be held that the receipt of notice by L amounted to service of notice on the assessee- Notice was also sent to the assessee by speed post but the same was not correctly addressed-Revenue has not discharged the burden of showing that the envelope was addressed to the correct person but the receipt prepared by the Postal

Department was incomplete-Contention of the Revenue that the envelope was not returned with any remark to the effect that it was undelivered and thus it must be presumed that it was actually served upon the assessee cannot be accepted because of the categorical stand of the assessee that he has not received the notice- Such a presumption could be made only if the notice was despatched to the correct address- Also, the fact that the assessee presented himself before the AO does not advance the case of the Revenue-Assessee appeared before the AO in response to a notice under ss. 142(1) and 143(2) and not pursuant to the notice under s. 148-Moreover, assessee entered appearance and filed his return under protest making it abundantly clear that he has not received the notice under s. 148- Therefore, there was no valid service of notice unders.148"

(vii) The Cuttack Bench of Tribunal in the case of Prahalad Moharana vs ACIT in [2018] 69 taxmann.com 354

"Section Assessment 143 of the Income-tax Act, 1961 - Assessment - Issue of notice (notice under section 143(2) - Assessment year 2009-10 - Where service of notice was made on a wrong person, who was not related to assessee, service of notice was not valid and assessment so made to be quashed [In favour of assessee]"

(viii) The Delhi Bench of Tribunal in the case of Shri Chetan Gupta vs ACIT in 144 ITD 344

"Reassessment-Notice-Non-service of notice u/s 148-For valid assumption of jurisdiction to frame a reassessment, a proper and valid service of notice u/s 148 on a sessee is mandatory requirement; violation thereof will result in quashing of the reassessment proceedings-Assessee had demonstrated that notice was issued sent at an address different than one mentioned in his return of income-Department also admits that notice was served not on assessee but on one V who according to AO was a responsible person working for group entities of assessee's family and this amounts to a proper service on assessee- Assessee's contention that V was neither his employee nor his authorized agent, remains uncontroverted-Department failed to demonstrate that notice u/s. 148 was served on assessee for A.Y. 2001-02-In absence of a valid service of notice u/s. 148 on assessee reassessment proceedings for AY 2001-02 quashed-Assessee's appeal allowed"

(ix) The Jodhpur Bench of Tribunal in the case of Banwarilal Bhartiya vs ITO in 4 SOT 311

"Section 144 read with section 143(2), of the Income-tax Act, 1961 - Best judgment assessment - Whether assessment made under section 144 without proper service of notices under sections 142(1) and 143(2) in violation of principles of natural justice cannot be said to be valid assessment - Held, yes - Whether where notice under section 143(2) was neither sent at assessee's address at Jaipur nor served upon him, assessment order framed by Assessing Officer under section 144 in violation of principles of natural justice was to be declared as bad in law and liable to be quashed - Held, yes"

(x) The Amritsar Bench of the Tribunal in the case of Rajan Chopra vs DDIT in 165 ITD 361

"Section 184, read with section Consequences of failure to deduct or pay 201, of the Income-tax Act, 1961 and section 18 of the Partnership Act, 1932 - Firm - Assessed as such (Liability of Partners) – Assessment year 2006-07 - Whether notice to a firm is to be issued through a partner in his capacity as a partner of firm, and not as an individual - He d, yes - Whether a notice served on a partner in his individual capacity for his omission as a partner of his firm is not a notice in eye of law - Held, yes - Partnership firm, in which assessee was a partner, purchased land from an NRI, but failed to deduct tax at source on payment made to him - Assessing Officer issued notices under section 201(1) and 201(1A) to one of partners of firm i.e., assessee in his individual capacity - Whether such notices were void ab initio - Held, yes [Para 4] [In favour of assessee]"

19. In the light of the aforesaid facts and circumstances, we note the gist of case that assessee's status from a private Limited Company has been converted to LLP on 19.01.2011 and thereby the Private Limited Company was dissolved upon its assets and liabilities being taken over as a going concern by the appellant herein as a Limited Liability partnership in the name and style of M/s. Brolly Dealcom LLP. After the conversion on 19.01.2019, the Private Limited Company is no longer existing in the eyes of law and is non est in the eyes of law as a corporate entity from 19.01.2011. This fact has been brought to the notice of the ITO, Ward-5(4) who was the AO of the erstwhile Private Limited Company (M/s Brolly Dealcom Pvt. Ltd.) (PAN: AADCB1699Q) by letter dated 16.04.2012 which has been received by the said AO on 16.04.2011[supra]. The first show cause notice of Pr. CIT is

dated 18.03.2013 which is addressed to the private Limited Company in the address 16, G. C. Avenue, Kolkata-700 013 as well as 9/1, R. B. C. Road, Kolkata-700 028 and the reminder is sent after seven days on 25/26.03.2013 and the impugned order of Ld. CIT u/s. 263 was passed on 28.03.2013 not in the address of the present LLP. The scribbling on the Photostat with the incomplete address, wherein the Room No. 24, 3rd floor was not mentioned in the address of Princep Street and the fact that there was no tear off acknowledgment slip for the delivery if any of the notice at Princep address cumulatively goes on to show that no notice was delivered to the proper address at prince street; And we note that the first tear off acknowledgement is blank except seal and dated 20.03.2013 with no name or signature or address and second tear off is only at the most evidences collection of the impugned order after passing of the said order and not before that; and likewise Power of Attorney to Chartered Accountants were after the passing of the impugned order and thus and both the tear off acknowledgement slips and Power of Attorney to Chartered Accountants shown to us from the file of Pr. CIT in no way advance the case of the revenue to show that notice of the proceedings u/s. 263 of the Act is conveyed to the successor-in-interest the LLP at the proper address of the dissolved company/LLP at prince street. Thus, we find that no notice of the sec 263 proceeding has been brought to the knowledge of the assessee [dissolved company] at its last proper address of the dissolved company at prince street thereby it could have been said that successor-in-interest LLP had knowledge about the proceedings going on before the ld Pr CIT u/s 263 of the Act or before the impugned order was passed by the Ld. Pr. CIT u/s. 263 of the Act. Despite department knowing the last proper address of dissolved company at Princep street no notice was issued to its proper address or successor-in-interest LLP and, therefore, no opportunity of hearing was given to the assessee before passing the order u/s. 263 of the Act. So since there was denial of reasonable opportunity of hearing to assessee there is a violation of natural justice and, therefore, the impugned order of the Ld. CIT u/s. 263 of the Act is held to be fragile for violation of natural justice as held by Hon'ble Supreme Court in CIT vs Amitabh Bachan

Civil Appeal no. 5009 of 2016, and therefore cannot be sustained. So, therefore, the appeal of the assessee is allowed.

20. In the result, appeal of assessee is allowed.

Order is pronounced in the open court on 1st February, 2019.

Sd/-

(Dr. A. L. Saini)
Accountant Member

Sd/-

(A. T. Varkey)
Judicial Member

Dated: 1st February, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – M/s. Brolly Dealcom LLP (formerly M/s. Brolly Dealcom Pvt. Ltd.), Shri S. K. Parida, C/o, G. K. Tulsyan & Co., 4, Gangadhar Babu Lane (4th floor), Kolkata-12.
- 2 Respondent – I.T.O. Ward-5(4), Kolkata
- 3 CIT - II, Kolkata.
- 4 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Assistant Registrar