IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-2' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

SA No. 910/DEL/2018
&
ITA No. 7684/DEL/2018
[A.Y 2014-15]

Vedanta Ltd. [Successor to Cairn India Ltd] DLF Atria Building, Jacaranda Marg N Block, DLF City Phase II Gurgaon, PAN: AACCS 7101 B	Vs.	The A.C.I.T Circle-26(1) New Delhi
(Applicant)		(Respondent)

Assessee By : Shri Ajay Vohra, Sr. Adv
Department By : Shri H.K. Choudhary, CIT-DR

Date of Hearing : 29.01.2019
Date of Pronouncement : 04.02.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is directed against the order dated NIL framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] pertaining to A.Y 2014-15.

2. Vide Ground No. 1, the assessee has challenged the legality of the order being passed by the Assessing Officer on a non-existing entity and is, therefore, illegal and void ab initio. Since this ground goes to the root of the matter, we heard the representatives of both the sides at length on this issue and have carefully perused the orders of the authorities below.

3. Facts on record show that the assessment order was framed in the name of Vedanta Ltd formerly known as Cairn India Ltd. At the very outset, we have to mention that Vedanta was never known as Cairn India Ltd. The fact is that, Cairn India Ltd is an amalgamated company, which has seized to exist in the eyes of law pursuant to amalgamation with Vedanta Ltd.

4. The Assessing Officer referred the matter to the TPO who framed the TP order in the name of Cairn India Ltd. No doubt, the return of income was filed in the name of Cairn India Ltd on 30.11.2014. Thereafter, Cairn India Ltd amalgamated with Vedanta Ltd by the Scheme of Amalgamation, which was approved on 23.03.2017 and the scheme of arrangement was made effective from 01.04.2016. During

the course of TP assessment proceedings itself on 25.04.2017, the scheme of arrangement and amalgamation of Cairn India Ltd with Vedanta Ltd was intimated to the TPO.

5. The ld. DR vehemently stated that the assessee never objected before the DRP. It is the say of the ld. AR that of the ld. DR that although the TPO's order is in the wrong name but the DRP has corrected the mistake and, therefore, no adverse inference should be drawn.

6. We do not find any force in the contention of the ld. DR. While raising the objection before the DRP at ground No. 11.2.1, the assessee had specifically taken the following objection :

> *"That on the facts and in the circumstances of the case and in law, the order passed by the TPO u/s 92CA of the Act on a non existing entity Cairn India Ltd which was relied upon by the Assessing Officer while passing draft assessment order u/s 144C of the Act is void ab initio."*

7. The DRP, while dismissing the objection raised by the assessee at clause 10.2 of its order, held as under:

> *"Since the factual matrix of the case remains the same, the TPO is directed to follow the directions of the DRP in assessee's own case [Cairn India Ltd predecessor of the assessee] in A.Y 2013-14. The Assessing Officer/TPO is further directed to rectify the order incorporating the correct name and PAN of the assessed entity."*

8. The specific objections and findings of the DRP demolishes the contention of the ld. DR.

9. Similar issue arose in the case of Spice Entertainment and the matter travelled upto the Hon'ble High Court of Delhi and the Hon'ble High Court in ITA No. 475 and 476 of 2011 had the occasion to consider the following facts:

> *"For the previous year relevant to the assessment year 2002-03, Spice Corp Ltd. (hereinafter referred to as the amalgamating company) filed its return of income on 30th*

October, 2002 declaring „NIL" income. Subsequently, vide order dated 11th February, 2004, passed by this Court, the said company stood amalgamated with M/s MCorp Private Limited (hereinafter referred to as the amalgamated company) with effect from 1st July, 2003. The aforesaid return was selected for scrutiny and notice dated 18th October, 2003 was issued by the Assessing Officer under Section 143 (2) of the Act in the name of "Spice Corp. Ltd.", the amalgamating company. The factum of Spice Corp Ltd, having been dissolved, as a result if its amalgamation with MCorp Private Limited was duly brought to the notice of the Assessing Officer vide letter dated 2nd April, 2004. Despite the aforesaid, the Assessing Officer, vide order dated 28th March, 2005 passed under Section 143 (3) of the Act, framed the assessment on Spice Corp Ltd, the amalgamating Company. The aforesaid assessment order dated 28th March, 2005 was appealed against by MCorp Global Pvt. Ltd. (erstwhile MCorp Pvt. Ltd) before the Commissioner of Income-Tax (Appeals), inter alia, on the ground that the same was bad in law and void ab initio, the assessment having been framed upon and in the name of a non-existent entity. The CIT (A), however, rejected the aforesaid ground, though on merits, the appeal was allowed and all additions/disallowances were deleted.

2. Aggrieved by the deletion of the additions/disallowances, the Revenue carried the matter in further appeal to the Tribunal. The appellant also filed cross objections, assailing the order of

the CIT (A) on the ground that the assessment order, having been passed in the name of Spice Corp Ltd., a non-existent entity, was bad in law and void ab-initio."

10. The Hon'ble High Court admitted and heard on the following questions of law:

"(i) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the action of the Assessing Officer in framing assessment in the name of "Spice Corp Ltd", after the said entity stood dissolved consequent upon its amalgamation with Mcorp Private Limited w.e.f 01.07.2003, was a mere "procedural defect"?

(ii) whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that in view of the provisions of section 292B of the Act, the assessment, having in substance and effect, been framed on the amalgamated company which could not be regarded as null and void?"

11. The relevant findings of the Hon'ble High Court read as under:

4. The rationale given by the Tribunal, giving it to be a mere procedural defect is summed up as under:-

(i) Spice Corporation Ltd. (the amalgamating company) was an income tax assessee in the status of a company incorporated under the provisions of Companies Act, 1956.

(ii) The amalgamating company was in existence during the relevant assessment year, 2002-03 and 2003-04.

(iii) The return of income for these assessment years were filed on 30th November, 2002 and on 30th October, 2003 respectively by M/s Spice.

(iv) The scheme of amalgamating was sanctioned much subsequently on 11th February, 2004 by the High Court.

(v) The return filed by M/s Spice was selected for scrutiny and notices were issued. Pursuant thereto, the amalgamated company i.e. the appellant appeared and participated in the proceedings. Even the assessment orders were challenged by the appellant/amalgamated company. Thus, the appellant accepted that the assessment proceedings in respect of the assessment of Spice for the period prior to its amalgamation are being taken up against the appellant and it is the appellant which felt aggrieved of the assessment order and preferred appeal. The order was thus in substance and in fact, against the appellant/amalgamated company. The mere omission on the part of the AO to mention the name of the appellant/amalgamated

company in place of M/s Spice was, therefore a procedural defect covered by the provisions of section 292B of the Act.

5. According to the Tribunal, if the Spice was non-existent, there was no reason for the amalgamation company to represent the same or to feel aggrieved against the said order and preferred appeal and get the same decided on merits. In other words, any appeal preferred by a non-existence person must also be treated as non-est. All these acts of the appellants/ amalgamated company clearly show that it had been constantly treated the assessment made against the appellant in respect of the assessment of amalgamated company. Further, no prejudice is caused to the assessee merely because in the body of the assessment order name of the amalgamated company is not shown.

6. On the aforesaid reasoning and analysis, the Tribunal summed up the position in para 14 of its order which reads as under:-

"In the light of the discussions made above, we, therefore, hold that the assessment made by the AO, in substance and effect, is not against the non-existent amalgamating company. However, we do agree with the proposition or ration decided in the various cases relied upon by the learned counsel for the assessee that the assessment made against non-existent person would be invalid and liable to be struck down. But, in the present case, we find that the assessment, in substance and effect, has been made against amalgamated company in respect of assessment of

income of amalgamating company for the period prior to amalgamation and mere omission to mention the name of amalgamated company alongwith the name of amalgamating company in the body of assessment against the item "name of the assessee" is not fatal to the validity of assessment but is a procedural defect covered by Section 292B of the Act. We hold accordingly."

7. The aforesaid line of reasoning adopted by the Tribunal is clearly blemished with legal loopholes and is contrary to law. No doubt, M/s Spice was an assessee and as an incorporated company and was in existence when it filed the returns in respect of two assessment years in questions. However, before the case could be selected for scrutiny and assessment proceedings could be initiated, M/s Spice got amalgamated with MCorp Pvt. Ltd. It was the result of the scheme of the amalgamation filed before the Company Judge of this Court which was dully sanctioned vide orders dated 11th February, 2004. With this amalgamation made effective from 1st July, 2003, M/s Spice ceased to exist. That is the plain and simple effect in law. The scheme of amalgamation itself provided for this consequence, inasmuch as simultaneous with the sanctioning of the scheme, M/s Spice was also stood dissolved by specific order of this Court. With the dissolution of this company, its name was struck off from the rolls of Companies maintained by the Registrar of Companies.

8. A company incorporated under the Indian Companies Act is a juristic person. It takes its birth and gets life with the incorporation. It dies with the dissolution as per the provisions of the Companies Act. It is trite law that on amalgamation, the amalgamating company ceases to exist in the eyes of law. This position is even accepted by the Tribunal in para-14 of its order extracted above. Having regard this consequence provided in law, in number of cases, the Supreme Court held that assessment upon a dissolved company is impermissible as there is no provision in Income-Tax to make an assessment thereupon. In the case of Saraswati Industrial Syndicate Ltd. Vs. CIT, 186 ITR 278 the legal position is explained in the following terms:

"The question is whether on the amalgamation of the Indian Sugar Company with the appellant Company, the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41(1) of the Act. The amalgamation of the two companies was effected under the order of the High Court in proceedings under Section 391 read with Section 394 of the Companies Act. The Saraswati Industrial Syndicate, the trans free Company was a subsidiary of the Indian Sugar Company, namely, the transferor Company. Under the scheme of amalgamation the Indian Sugar Company stood dissolved on 29th October, 1962 and it ceased to be in existence thereafter. Though the scheme provided that the transferee Company the Saraswati Industrial Syndicate Ltd. undertook to meet any liability of the Indian Sugar Company which that Company

incurred or it could incur, any liaiblity, before the dissolution or not thereafter.

Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of 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 share holders of each blending Company become substantially the share holders 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 Halsburys Laws of England 4th Edition Vol. 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."

9. The Court referred to its earlier judgment in General Radio and Appliances Co. Ltd. Vs. M.A. Khader (1986) 60 Comp Case 1013. In view of the aforesaid clinching position in law, it is difficult to digest the circuitous route adopted by the Tribunal holding that the assessment was in fact in the name of amalgamated company and there was only a procedural defect.

10. Section 481 of the Companies Act provides for dissolution of the company. The Company Judge in the High Court can order dissolution of a company on the grounds stated therein. The effect of the dissolution is that the company no more survives. The dissolution puts an end to the existence of the company. It is held in M.H. Smith (Plant Hire) Ltd. Vs. D.L. Mainwaring (T/A Inshore), 1986 BCLC 342 (CA) that "once a company is dissolved it becomes a non-existent party and therefore no action can be brought in its name. Thus an insurance company which was subrogated to the rights of another insured company was held not to be entitled to maintain an action in the name of the company after the latter had been dissolved".

11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said „dead person". When notice under Section 143 (2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the

name of the appellant on record. Instead, the Assessing Officer made the assessment in the name of M/s Spice which was non existing entity on that day. In such proceedings and assessment order passed in the name of M/s Spice would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law.

12. Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292Bof the Act. Section 292B of the Act reads as under:-

"292B. No return of income assessment, notice, summons or other proceedings furnished or made or issue or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reasons of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceedings is in substance and effect in conformity with or according to the intent and purpose of this Act."

13. The Punjab & Haryana High Court stated the effect of this provision in CIT Vs. Norton Motors, 275 ITR 595 in the following manner:-

"A reading of the above reproduced provision makes it clear that a mistake, defect or omission in the return of income, assessment, notice, summons or other proceeding is not sufficient to invalidate an action taken by the competent authority, provided that such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the provisions of the Act. To put it differently, Section 292B can be relied upon for resisting a challenge to the notice, etc., only if there is a technical defect or omission in it. However, there is nothing in the plain language of that section from which it can be inferred that the same can be relied upon for curing a jurisdictional defect in the assessment notice, summons or other proceeding. In other words, if the notice, summons or other proceeding taken by an authority suffers from an inherent lacuna affecting his/its jurisdiction, the same cannot be cured by having resort to Section 292B."

12. Accordingly, the questions of law were decided in favour of the assessee and against the revenue and the appeals were allowed. Similar ground was taken by the Hon'ble High Court of Delhi in the case of Dimension Apparels Pvt. Ltd 370 ITR 288 wherein the Hon'ble High Court held that assessment on a company, which has been dissolved/amalgamated u/s 391 and 394 of the Companies Act 1956 is

invalid and further held that framing assessment on a non-existing entity is a jurisdictional defect which cannot be cured u/s 292B of the Act.

13. The Hon'ble High Court of Delhi in the case of Maruti Suzuki India Ltd 397 ITR 681, after considering the judgment of the court in the case of Spice Infotainment 247 CTR 500 held as under:

> "11.2 The two questions framed by this Court in Spice Infotainment (supra) were as under:
>
> "(i) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the action of the Assessing Officer in framing assessment in the name of "Spice Corp Ltd", after the said entity stood dissolved consequent upon its amalgamation with Mcorp Private Limited w.e.f. 01.07.2003, was a mere "procedural defect"?
>
> (ii) whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that in view of the provisions of section 292B of the Act, the assessment, having in substance and effect, been framed on the amalgamated company which could not be regarded as null and void?"

11.3 This Court, in Spice Infotainment (supra) discussed and noted the following observations in the decision of the Supreme Court in Saraswati Industrial Syndicate (supra):

"Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of 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 share holders of each blending Company become substantially the share holders 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 Halsburys Laws of England 4th Edition Vol. 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."

11.4 The Court in Spice Infotainment (supra) thereafter held as under:

"11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said "dead person. When notice under section 143 (2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the appellant on record. Instead, the Assessing Officer made the assessment in the name of M/s Spice which was non existing entity on that day. In such proceedings and assessment order passed in the name of M/s Spice would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law.

11.5 Consequently, the aforesaid two questions were answered in favour of the Assessee and against the Revenue.

12. Even thereafter the Revenue has repeatedly brought the said issue before this Court in a large number of cases where, in more or less identical circumstances, the AO had passed the assessment order in the name of the entity that had ceased to

exist as on the date of the assessment order. In many of these cases, as in the present case, the AO, after mentioning the name of the Amalgamating Company as the Assessee, mentioned below it the name of the Amalgamated Company. Illustratively the cases are:

(i) CIT v Micra India (P) Ltd. (2015) 231 Taxman 809 (Del);

(ii) CIT v. Micron Steels (P) Ltd. [2015] 372 ITR 386 (Del)

(iii) CIT v. Dimensions Apparels (P) Ltd. [2015] 370 ITR 288 (Del)

(iv) BDR Builders & Developers Pvt. Ltd. v. ACIT (Decision dated 26th July 2017 passed by this Court in W.P.(C) No. 2712 of 2016)

13. The question whether, for the purposes of Section 170 (2) of the Act, the defect of passing the assessment order in the name of an non-existent entity is a mere irregularity was answered by this Court in CIT v. Dimensions Apparels (P) Ltd. (supra), where in paras 6 and 7 it was held as under:

"6. Sections 170(1) and 170(2) of the Act do not assist the revenue in their case. The revenue does not contest that in a case of amalgamation, the predecessor (being a dissolved company) "cannot be found". Consequently, Section 170(2) applies. This provision clarifies that where the predecessor cannot be found, "the assessment of the income of

the previous year in which the succession took place up to the date of the succession and of the precious year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor." (Emphasis Supplied)

7. The revenue seems to argue that the assessment is justified because the liabilities of the amalgamating company accrue to the amalgamated (transferee) company. While that is true, the question here is which entity must the assessment be made on. The text of Section 170(2) makes it clear that the assessment must be made on the successor (i.e., the amalgamated company)."

14. The submission that under Section 292B of the Act, the successor-in- interest is precluded from raising an objection if it has participated in the assessment proceedings was negative in Spice Infotainment (supra) where it was held: "...once it is found that the assessment is framed in the name of a non-existent entity it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292-B of the Act."

15. On the issue of participation, the Court CIT v. Dimensions Apparels (P) Ltd. (supra) observed:

"22. On the last contention, i.e with respect to participation by the previous assessee, i.e the amalgamating company (which ceases to exist), again Spice (supra) is categorical; it was ruled on that occasion that such participation by the amalgamated

company in proceedings did not cure the defect, because "there can be no estoppel in law." Vived Marketing Servicing Pvt. Ltd., (supra) had also reached the same conclusion."

16. The legal position having been made abundantly clear in the above decisions, the Court has no hesitation in answering the question framed in the negative, i.e. in favour of the Assessee and against the Revenue."

14. Considering the aforementioned judicial decisions of the Hon'ble Jurisdictional High Court of Delhi, we have no hesitation in holding that the assessment order and the order of the TPO are non est. Since the foundation has been removed, the super structure must fall.

15. This ground is allowed on the legal principle. Accordingly, we do not find it necessary to dwell into the merits of the case.

16. Since the appeal of the assessee is allowed, the stay petition becomes otiose.

17. In the result, the appeal of the assessee in ITA No. 7684/DEL/2018 is allowed.

The order is pronounced in the open court on 04.02.2019.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 04th February, 2019

VL/

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