IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, HON'BLE ACCOUNTANT MEMBER

ITA NO.6788/MUM/2016 (A.Y: 2010-11)

A.C.I.T– 16(1) Room No. 439, Aayakar Bhavan, M.K. Road, Mumbai-400 020	*v.*	M/s. Zee Entertainment Enterprises Ltd., [Successor entity of M/s. ETC Network Ltd.,] 18th Floor, A Wing, Marthon Futurex N.M. Joshi Marg, Lower Parel Mumbai – 400 013 **PAN: AAACZ 0243 R**
(Appellant)		**(Respondent)**

C.O. No. 74/MUM/2018
[ARISING OUT OF ITA NO.6788/MUM/2016 (A.Y: 2010-11)]

ETC Network Ltd., [Now merged with M/s. Zee Entertainment Enterprises Ltd.,] 18th Floor, A Wing, Marthon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai – 400 013 **PAN: AAACZ 0243 R**	*v.*	A.C.I.T– 16(1) Room No. 439, Aayakar Bhavan, M.K. Road, Mumbai-400 020
(Appellant)		**(Respondent)**

Assessee by	**:**	**Shri Jay Bhansali**
Department by	**:**	**Shri Rajeev K. Gubgotra**
Date of Hearing	**:**	**06.03.2019**
Date of Pronouncement	**:**	**15.05.2019**

O R D E R

PER C.N. PRASAD (JM)

1. This appeal and cross objection are filed by the Revenue and assessee against the order of the Learned Commissioner of Income Tax (Appeals)-4, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 09.08.2016 for the Assessment Year 2010-11.

2. Revenue in its appeal raised following effective grounds: -

> *"1. Whether on the facts, in the circumstances of the case and as per law, the Ld. CIT(A) has erred in directing to delete the disallowance u/s. 40(a)(ia) rws 194J in respect of 'Carriage Fees/Channel Placement fees' and failing to appreciate that the payments made for use/right to use of 'process' are 'royalty' as per Explanation 6 to section 9(l)(vi) hence such payments are covered u/s. 194J of the Income-tax Act, 1961.*
>
> *2. Whether on the facts, in the circumstances of the case and as per law, the Ld. CIT(A) has erred in directing to delete the disallowance u/s. 40(a)(ia) rws 194J of 'Carriage Fees/Channel Placement fees', whereas the jurisdictional ITAT, Mumbai 'L' Bench, in its order dated 28.03.2014 in the case of **ADIT-(IT)-2(2), Mumbai Vs Viacom 18 Media Pvt. Ltd** has confirmed that the payments made for use/right to use of 'process' are 'royalty' in terms of the Income-tax Act, 1961.*
>
> *3. Whether on the facts, in the circumstances of the case and as per law, the Ld. CIT(A) has erred in directing to delete the disallowance u/s. 40(a)(ia) placing reliance on the decision of Calcutta High Court dated 10.12.2012 in CIT Vs S.K.Tekriwal [2014] without appreciating that the Honble Kerala High Court in its judgment dated 20.07.2015 in the case **of CIT-1, Kochi Vs PVS Memorial Hospital Ltd. [2015] 60 taxmann.com 69 (Kerala)** has decided the issue in favour of the Department after discussing in detail the judgment in the case of CIT Vs S.K.Tekriwal (supra)."*

3. Assessee in its cross objection raised the following effective grounds: -

> *"1. The AO erred in law and facts in framing the assessment order under section 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") in the name of ETC Networks Limited without appreciating that the said entity stood dissolved consequent to its merger with Zee Entertainment Enterprises Limited w.e.f. 31.03.2010. The AO failed to appreciate that assessment order on a non-existing company is invalid and liable to be quashed.*

2. The AO failed to appreciate that a party cannot be called upon to perform an impossible act i.e. to comply with a provision not in force at the relevant time but introduced later by retrospective amendment and therefore the assessee could not be made liable to deduct tax under section 194J holding the carriage fees to be in nature of royalty with reference to Explanation 6 to section 9(1)(vi) introduced vide Finance Act, 2012 not in force at the relevant time;

3. Assuming without admitting, the carriage fees is in the nature of royalty in terms of Explanation 6 to section 9(1)(vi) and liable to deduction of tax under section 194J, the AO failed to appreciate that disallowance of carriage fees under section 40(a)(ia) can be made only if the carriage fees are held to be royalty in terms of Explanation 2 to section 9(1)(vi)."

4. Since the assessee in its cross objection has raised the very validity of the Assessment Order passed by the Assessing Officer in the name of M/s. ETC Networks Limited, which entity stood dissolved and merged with M/s. Zee Entertainment Enterprises Limited w.e.f 31.03.2010 and therefore the assessment made by the Assessing Officer in the name of M/s. ETC Networks Limited., the non-existing company is illegal bad in law and void abinitio.

5. Briefly stated the facts are that, the assessee company M/s. ETC Networks Limited filed its return of income on 30.10.2010 for the A.Y. 2010-11 declaring income of ₹.8,68,42,725/-. Subsequently, by letter dated 07.02.2011 the assessee through its Authorized Representative submitted that assessee company "M/s. ETC Networks Limited" is merged with "M/s. Zee Entertainment Enterprises Limited" w.e.f 31.03.2010 and the assessee company is no longer in existence and the assessee along with these letters furnished copy of scheme of arrangement and Hon'ble

Bombay High Court order approving the scheme and requested the Assessing Officer to transfer the case records to ACIT, Range - 11(1) where the successor company i.e. M/s. Zee Entertainment Enterprises Limited was assessed to tax under PAN: AAACZ0243R. Subsequently, the case was selected for scrutiny by issue of notice u/s. 143(2) of the Act on 25.08.2011. In the course of the assessment proceedings by letter dated 22.11.2012 the assessee company once again brought to the notice of the Assessing Officer that pursuant to Composite Scheme of Amalgamation and Arrangement approved by the Board of Directors and Shareholders and sanctioned by the Hon'ble Bombay High Court on 16.07.2010, the company is amalgamated with its holding company M/s. Zee Entertainment Enterprises Limited with effect from the appointed date i.e. 31.03.2010. It was also brought to the notice of the Assessing Officer that education business undertaking is demerged with M/s. Zee Learn Limited w.e.f. 01.04.2010. Copy of Scheme of Arrangement sanctioned by the Hon'ble High Court of Mumbai was furnished before the Assessing Officer. Subsequently, when the Assessing Officer by letter dated 20.12.2012 required the assessee to provide the detailed note on the business activities carried on during the previous year in different segments of business and in response to this letter the assessee by letter dated 11.01.2013 submitted that the assessee has not discontinued any

business activities during the year. The assessee company has merged with M/s. Zee Entertainment Enterprises Limited w.e.f. 31.03.2010 as already sated at Point No. 8 of letter dated 22.11.2012. The Assessing Officer however completed the assessment u/s. 143(3) of the Act on 22.03.2013 in the name of M/s. ETC Networks Limited by making various disallowances u/s. 40(a)(ia) of the Act.

6. Assessee preferred appeal before the Ld.CIT(A) challenging the order of the Assessing Officer, questioning the validity of the Assessment Order passed on M/s. ETC Networks Limited and also the disallowance made by the Assessing Officer u/s. 40(a)(ia) of the Act on merits. The Ld.CIT(A) rejected the contention of the assessee that assessment made by the Assessing Officer on a non-existent company is not valid for the reason that the assessee filed return of income in the name of M/s. ETC Networks Limited and the assessment was rightly made by the Assessing Officer in the name of M/s. ETC Networks Limited. On merits the Ld.CIT(A) deleted the disallowances made u/s. 40(a)(ia) of the Act. Against this order, both the Revenue as well as the assessee filed appeal and cross objection respectively.

7. Learned Counsel for the assessee referring to letters dated 07.02.2011 and 22.11.2012 submitted that the assessee has given notice

of discontinuance u/s. 176 of the Act to the Assessing Officer informing that assessee company M/s. ETC Networks Limited has merged with M/s. Zee Entertainment Enterprises Limited. A copy of Scheme of Arrangement sanctioned by the Hon'ble High Court w.e.f 31.03.2010 was also furnished and requested to transfer the case records to ACIT, Range-11(1) where the successor company i.e. M/s. Zee Entertainment Enterprises Limited was assessed to tax. Learned Counsel for the assessee submitted that however the Assessing Officer completed the assessment on M/s. ETC Networks Limited on 22.03.2013 u/s. 143(3) of the Act which was non-existent company. Therefore, the assessment made by the Assessing Officer is bad in law and Assessment Order is liable to be quashed.

8. Reliance is placed on the following decisions: -

(i) Westlife Development Ltd *v. Pr.CIT [ITA.No. 688/Mum/2016 dated 24.06.2016]*

(ii) *ACIT v.* Neha Enterprises Ltd [ITA.No. 3666/Mum/2015 and CO.No. 249/Mum/2017 dated 20.12.2017.

(iii) *Pr.CIT v. Maruti Suzuki India Ltd [397 ITR 691]*

(iv) *Hewlett Packard (I) (P) Ltd. v.* ACIT [2006 (4) TMI 514-ITAT Delhi].

9. Ld. DR vehemently supported the orders of the Assessing Officer.

10. We have heard the rival submissions, perused the orders of the authorities below. Facts as narrated above clearly shows that the assessee has given notice of discontinuance u/s. 176 of the Act even before the issue of notice u/s. 143(2) of the Act by the Assessing Officer selecting the return for scrutiny assessment. Even in the course of the assessment proceedings by letter dated 22.11.2012 and 11.11.2013 it was brought to the notice of the Assessing Officer that the assessee company has merged with M/s. Zee Entertainment Enterprises Limited. Therefore, the Assessing Officer was made aware of the fact that the assessee company was merged with M/s. Zee Entertainment Enterprises Limited prior to the completion of assessment. However, the Assessing Officer chose to complete the assessment in the name of the M/s. ETC Networks Limited which is a non-existent company as the said company was merged with M/s. Zee Entertainment Enterprises Limited by Scheme of Amalgamation which was approved by the Hon'ble High Court, Mumbai w.e.f 31.03.2010.

11. The question as to whether the assessment made on a non-existent company is valid, came up before the Delhi Tribunal in the case of Hewlett Packard (I) (P) Ltd *v.* ACIT (supra) Wherein it has been held as under: -

> *"9. The question whether after dissolution of a company and after the intimation of such dissolution with the ROC an assessment can be made on dissolved company or not had come up for consideration in several decisions. In*

the case of CIT, Madras vs. Express Newspapers Ltd. (supra) the question was as to when a company whose name has already been struck off the Rolls of the Registrar of Companies pursuant to voluntary liquidation on 12.4.48 and which company filed a Return of Income on 3.1.48 and assessed to tax by order of Assessing Officer on 28.2.50, such an order of assessment was valid. The Court held as follows.

> *To answer that question, it is first necessary to consider whether the assessment on the basis of the return was valid. The Id. counsel for the assessee urged that the assessment could not be held to be invalid for the mere reason that the Free Press Company was not in existence on the date of assessment, and that the rules of abatement of suits under the Civil Procedure Code would not apply to assessment proceedings under the Income Tax Act, as the ITO was not a Court; and that, even if it were to be held that the rules as to abatement would apply to such proceedings, the enquiry in this case having been concluded on April 3, 1948, the company then being in existence, the assessment would be valid on the principle recognized in Order 22, rule 6, of the Civil Procedure Code. We agree that the rules as to abatement laid down by the Civil Procedure Code will not apply to the proceedings before the ITO. But the principle of representation applicable to regular suits and proceedings under the Civil Procedure Code would well apply to such proceedings vide Alfred vs. ITO. That apart, the existence of an assessee is essential for an assessment. There cannot be an assessment of a non-existent person. The definition of the word "assessee" in section 2(2) would obviously apply only to a living person. The rule contained in Order 22, rule 6, cannot, therefore, apply to the assessment proceedings. The assessment in the instant case was made long after the Free Press Company was struck off from the register of the companies, and it could not be valid,*

10. In the case of Birla Cotton Spinning and Weaving Mills Ltd. vs. CIT 123 ITR 354 (Mad.), the Hon'ble Delhi HC was dealing with a case where proceedings were initiated and orders of assessments made on Amalgamating Companies, which cease to exist. An order of assessment was made on companies which ceased to exist after the date of dissolution of Amalgamating Company without the process of winding up. One of the Hon'ble Judges held as follows :

> *"Therefore, the position would be that the orders passed under section 23A(1) by the ITO purportedly against these companies were invalid orders of assessment. However, the validity of the orders would have no effect on these companies since they did not exist at the time of the orders. In a case, where an assessee exists and the order of assessment is null and void for some reason, the assessee would be aggrieved and would and should file an appeal to get rid of the invalid order. But where the assessee is non-existent and consequently can have no against the assessment order there is no question of its preferring any appeals against the said order. The appeals preferred before the AAC in the first instance and thereafter before the Appellate Tribunal purportedly on behalf of these companies were manifestly incompetent appeals. It does not need much argument to say that an appeal preferred by a non-existing person must be treated as non-existent. In other words, there were no appeals at all, in the eye of law, before the AAC or before the Appellate Tribunal. Consequently, there could be no competent reference to this court out of the orders passed by the Tribunal on such appeals,"*

11. The decision of the Delhi Bench of ITAT in the case of Impsat (P) Ltd. vs. ITO -91 ITD 354 (Del) = (2004-TIOL-119-ITAT-DEL) also supports the plea of the Assessee. The facts of the said case were that an assessee, a limited company

was incorporated to implement a project in the country, in collaboration with the foreign company. The assessee received some money from a foreign collaborator in Assessment Year 1995-96 and 1996-97. The assessee due to heavy losses abandoned the project. The collaborators thought it fit to waive refund of the share application money and wrote a letter dated 24.10.2000 waiving their claims. The assessee companies name was struck off the Register by the ROC on 18.9.2001 pursuant to an application by the assessee under section 560 of the Companies Act, 1956. The assessee however, later in point of time, filed a ROI for Assessment Year 2001-02 declaring loss. The revenue treated the waiver of share application money by the foreign collaborator as giving rise to a casual and non recurring income in the hands of the assessee. In the appeal before the Tribunal one of the question that arose for consideration was as to whether a company whose name was struck off the Register by ROC under section 560 of Companies Act, 1956 and therefore, stood dissolved, could be assessed to tax after dissolution? The Tribunal held that existence of the person sought to be taxed at the point of making the assessment is a condition for the validity of the assessment. The Tribunal referred to the decision of the Hon'ble Bombay High Court in the case of Patiala State Bank, In Re 9 ITR 95 (Bom) wherein it was held that tax is not imposed on income generally. It is imposed on the income of a person, natural or artificial, as defined in section 3. The Tribunal thereafter, referred to the various provisions in the Income-tax Act, 1961, for initiating proceedings for assessment of income in the case of death of different assessees. In the case of a company which is in liquidation the provisions of section 178 of the Act providing for assessment in the hands of a liquidator, was referred to. The Tribunal then referred to the distinction in law between liquidation and winding up and ultimately concluded that there was no provision under the Income-tax Act to assess a company which is dissolved and that there was a lacunae in the Act in this regard. The Tribunal ultimately held that the order of assessment passed on the assessee company was a nullity.

12 In view of the legal position as laid down in the aforesaid decisions, it is clear that the assessment made in the present case in the name of HP India after the date of its dissolution is not valid. The fact that this company filed a return of income is not of any consequence. The order of assessment was made on 25.2.2005. As on this date HP India as an entity did not exist. The assessment is therefore held to be invalid and is cancelled.

13. In a case of amalgamation where one entity takes over the business of two other entities, the same would be a case of succession to business, otherwise on death and therefore the provisions of Sec. 170 of the Act would apply. The provisions of Section 170 reads as follows:

> *"170. SUCCESSION TO BUSINESS OTHERWISE THAN ON DEATH.*
>
> *no provision in the Act by which the Assessing Officer can proceed to assess the income of a predecessor in business (i.e. the Amalgamating Company) in the hands of a successor in business (i.e. the Amalgamated Company) however, one exception is provided by Sec. 170(2) where a predecessor is not found, successor can be assessed for a period comprising of previous year in which succession took place up to the date of succession and the previous year preceding such previous year. It is for the revenue to initiate appropriate proceedings against the right person in accordance with law. For the present case we may observe that the assessment framed against HP India is liable to be held as invalid in law.*

14. We therefore hold that the assessment in the name of H.P.India is null and void and the assessment is therefore held to be invalid and is cancelled. In view of the decision on this preliminary issue the other issues raised by the assessee are not taken up for consideration."

12. The Hon'ble Jurisdictional High Court in the case of Jitendra Chandralal Navlani & Anr *v.* UOI in Writ Petition No.1069 of 2016 vide order dated 08.06.2016 observed as under: -

> *"3. On receipt of the reopening notice, the Chartered Accountant of the erstwhile M/s. Addler Security Systems Pvt. Ltd., had originally accepted the same but immediately thereafter by letter dated 5th May, 2015 pointed out that the company M/s. Addler Security Systems Pvt. Ltd. is no longer in existence as it has been dissolved. Consequent thereto, the Assessing Officer has also issued a notice under Section 142(1) of the Act to one of the petitioner who was the Director of erstwhile M/s. Addler Security Systems Pvt. Ltd. (since dissolved). In response, the Director of the erstwhile M/s. Addler Security Systems Pvt. Ltd., pointed out that the company has already been dissolved and it is no longer in existence. Notwithstanding the above, the Assessing Officer by an order dated 28th March, 2016 has passed the impugned order framing the assessment in case of M/s. Addler Security Systems Pvt. Ltd. (since dissolved) for Assessment Year 200809.*
>
> *4. Normally we would not have entertained a petition as an alternative remedy to file an appeal is available to the petitioners. However, prima facie, the impugned notice has been issued in respect of a non existing entity as M/s. Addler Security Systems Pvt. Ltd., which stands dissolved, having been struck off the Rolls of the Registrar of Companies much before its issue. Consequently, the assessment has been framed also in respect of the nonexisting entity. This defect in issuing a reopening notice to a non-existing company and framing an assessment consequent thereto is a issue which goes to the root of the jurisdiction of the Assessing Officer to assess the non-existing company. Thus, prima facie, both the impugned notice dated 24th March, 2015 and the Assessment Order dated 28th March, 2016, are without jurisdiction.*

13. The Coordinate Bench of this Tribunal in the case of ACIT *v.* M/s. Neha Enterprises in ITA.No. 366/Mum/2015 and C.O No. 249/Mum/2017 dated 20.12.2017 held as under: -

> *"6. We have heard the rival submissions, perused the orders of the authorities below. and the case laws relied on. It is an undisputed fact that the assessee firm was converted into a private limited company on 20.02.2008 and the notice for re-opening of the assessment for the Assessment Year 2007-08 was issued on 27.02.2012 in the name of the firm which was non-existent as on the date of issue of notice under notice 148 of the Act. In other words, the proceedings were initiated by the Assessing Officer on a non-existent firm which is null and void. In the case of ACIT v. M/s DLF Cyber City Developers Limited (supra) the Delhi Tribunal held as under: -*
>
> > *"13. In our opinion, the ratio of the above decision of Hon'ble Jurisdictional High Court would be squarely applicable to the case of the assessee. It is a settled law that the partnership firm and the company are separate juridical persons. Under the Income-tax Act also, they are assessed separately. Chapter IX of the Companies Act permits the conversion of the partnership firm into company and, on such conversion, the partnership firm ceases to exist and the company comes*

into existence. This incident has taken place on 1st March, 2006 and therefore, from 2nd March, 2006, DLF Cyber City firm is no more in existence. Notice under Section 148 was issued on 18th August, 2008, i.e., the date on which the partnership firm was not in existence. Hon'ble Jurisdictional High Court in the above mentioned case has held that the assessment in the hands of dead person would be clearly void. The aforesaid observation would be squarely for the issue of notice under Section 148 in the name of dead person. Therefore, respectfully following the above decision, we hold that the issue of notice under Section 148 in the name of a dead person is void. It is not much relevant whether the Assessing Officer was aware or not with regard to dissolution of the firm. However, we may point out that the Revenue is at liberty to take appropriate action in accordance with law in the hands of the successor company in the light of the observations of Hon'ble Jurisdictional High Court at paragraph 18 of the report which is also reproduced by us at paragraph 12 above."

7. The Hon'ble Delhi High Court in the case of Spice Entertainment Ltd v. CIT in ITA.No. 475 and 476 of 2011 dated 03.08.2011 considered as to whether the assessment made on a non-existent person is valid or not; and a situation where the assessment made in the name of a company which had been framed and it had been dissolved with the amalgamating company will be null and void or not. The Hon'ble High Court by considering various decisions on the issue including provisions of section 292B held that the assessment made on a non-existent person is null and void observing as under: -

"3. In this backdrop, the question that arises for consideration is as to whether the assessment in the name of a company which had been amalgamated and had been dissolved with the said amalgamating company will be null and void or whether framing of assessment in the name of such a company is a mere procedural defect which can be cured. The appeals were, thus, finally 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?"*

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 liability, before the dissolution or not thereafter.*
>
> *Generally, where only one Company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganization 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 shareholders of each blending Company become substantially the shareholders in the Company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new Company, or by the transfer of one or more undertakings to an existing Company. Strictly amalgamation does not cover the mere acquisition by a Company of the share capital of other Company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See 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 292B of 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."*

14. The issue again cropped up before the Court in CIT Vs. Harjinder Kaur (2009) 222 CTR 254 (P&H). That was a case where return in question filed by the assessee was neither signed by the assessee nor verified in terms of the mandate of Section 140 of the Act. The Court was of the opinion that such a return cannot be treated as return even a return filed by the assessee and this inherent defect could not be cured inspite of the deeming effect of Section 292B of the Act. Therefore, the return was absolutely invalid and assessment could not be made on a invalid return. In the process, the Court observed as under:

> *"Having given our thoughtful consideration to the submission advanced by the learned Counsel for the appellant, we are of the view that the provisions of Section 292B of the 1961 Act do not authorize the AO to ignore a defect of a substantive nature and it is, therefore, that the aforesaid provision categorically records that a return would not be treated as invalid, if the same "in substance and effect is in conformity with or according to the intent and purpose of this Act". Insofar as the return under reference is concerned, in terms of Section 140 of the 1961 Act, the same cannot be treated to be even a return filed by the respondent assessee, as the same does not even bear her signatures and had not even been verified by her. In the aforesaid view of the matter, it is not possible for us to accept that the return allegedly filed by the assessee was in substance and effect in conformity with or according to the intent and purpose of this Act. Thus viewed, it is not possible for us to accept the contention advanced by the learned Counsel for the appellant on the basis of Section 292B of the 1961 Act. The return under reference, which had been taken into consideration by the Revenue, was an absolutely invalid return as it had a glaring inherent defect which could not be cured in spite of the deeming effect of Section 292B of the 1961 Act."*

15. Likewise, in the case of Sri Nath Suresh Chand Ram Naresh Vs. CIT (2006) 280 ITR 396, the Allahabad High Court held that the issue of notice under Section 148 of the Income Tax Act is a condition precedent to the validity of any assessment order to be passed under section 147 of the Act and when such a notice is not issued and assessment made, such a defect cannot be treated as cured under Section 292B of the Act. The Court observed that this provisions condones the invalidity which arises merely by mistake, defect or omission in a notice, if in substance and effect it is in conformity with or according to the intent and purpose of this Act. Since no valid notice was served on the assessee to reassess the income, all the consequent proceedings were null and void and it was not a case of irregularity. Therefore, Section 292B of the Act had no application.

16. When we apply the ratio of aforesaid cases to the facts of this case, the irresistible conclusion would be provisions of Section 292B of the Act are not applicable in such a case. The framing of assessment against a non-existing entity/person goes to the root of the matter which is not a procedural irregularity but a jurisdictional defect as there cannot be any assessment against a 'dead person'.

17. The order of the Tribunal is, therefore, clearly unsustainable. We, thus, decide the questions of law in favour of the assessee and against the Revenue and allow these appeals."

14. It is also noted that Hon'ble Calcutta High Court in the case of I.K. Agencies Pvt Ltd *v.* CIT [347 ITR 664] as well as Hon'ble Karnataka High Court in the case of CIT *v.* Intel Technology Pvt Ltd [380 ITR 272] also followed the view taken by Hon'ble Delhi High Court in the case of Spice Infotainment Ltd 247 CTR 500 (Delhi) and held that framing of assessment against non-existing entity/person would go to root of matter and was not mere procedural irregularity, but a jurisdictional defect and there could not be any assessment against a dead person. The decision of the Hon'ble Delhi High Court has been affirmed by the Hon'ble Supreme Court in the case of CIT *v.* Spice Enfotainment Ltd in Civil Appeal No. 285 of 2014 and batch dated 02.11.2017.

15. Apparently in the case before us, assessment proceedings having been initiated against non-existing company even after amalgamation of assessee company with another company were illegal, and thus order passed under such proceedings is without jurisdiction and null & void.

16. In the circumstances, we hold that the assessment made u/s. 143(3) of the Act in the name of the assessee company M/s. ETC Networks Limited which was a non-existent company as on the date of completion of assessment is null and void and accordingly the Assessment Order is quashed. Since, we hold that the Assessment Order itself is null and void

the other contentions/grounds raised by the assessee as well as the Revenue will not survive.

17. In the result, assessee's cross objection is allowed on validity of assessment as indicated above and the Revenue' appeal is dismissed as infructuous.

Order pronounced in the open court on the 15th May, 2019

Sd/-	Sd/-
(N.K. PRADHAN)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 15/05/2019
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum