IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri Ravish Sood, Judicial Member
and Shri N.K.Pradhan, Accountant Member

ITA No.8793/Mum/2011
(Assessment Year: 2005-06)

Ingram Micro India Private Ltd. (Now known as Ingram Micro India Ltd.), Gate No. 1A, Godrej Industries Complex, Pirojshanagar, Vikroli (East), Mumbai- 400 079 PAN – AABCS9516P	Vs.	Deputy Commissioner of Income-Tax, OSD II, Central Range-7, Aaykar Bhavan, Maharshi Karve Road, Mumbai – 400 020
(Appellant)		**(Respondent)**

Appellant by: Shri J.D. Mistry &
Ms. Jasmine Amalsadwala, A.Rs
Respondent by: Shri Awungshi Gimson, D.R
Date of Hearing: 03.04.2019
Date of Pronouncement: 19.06.2019

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the Assessing Officer (for short 'A.O') under Sec. 153A/143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'I-T Act'), dated 31.10.2011. The assessee being aggrieved with the order passed by the A.O has raised before us the following grounds of appeal:

> "This Appeal is against the Order u/s.143(3)/153A r.w.s.144C(13) of the Act dated October 31, 2011, of the Deputy Commissioner of Income Tax, Central Range 7, OSD II, Mumbai, in pursuance of the directions of the Hon'ble Dispute Resolution Panel II, Mumbai (DRP) and relates to the Assessment Year 2005-2006.
> 1. The Assessing Officer and the learned DRP erred in making an adhoc disallowance of 5% of the total staff welfare expenses, aggregating to Rs.4,79,537/-, incurred by the Appellant. Having regard to the facts and

circumstances of the case, the Appellant submits that the disallowance is unwarranted and requires to be deleted.

2. The Assessing Officer and the learned DRP erred in disallowing commission payments, aggregating to Rs. 1,62,05,703/- on the ground that confirmations had not been filed by the Appellant before the Assessing Officer and that the confirmations filed before the DRP were not relevant or material. Having regard to the facts and circumstances of the case, the Appellant submits that the commission paid he allowed as a deduction as claimed by the Appellant in its Return of Income.

3. The Assessing Officer erred in observing that the process of amalgamation of the Appellant Company with Tech Pacific (India) Ltd. was not completed and in holding that the Appellant Company had not filed its returns of income for Assessment Year 2006-07 onwards.

4. The Assessing Officer erred in not granting credit for tax deducted at source aggregating to Rs.15,34,052/-, without assigning any reasons for the non-grant of such credit.

5. The Appellant submits that the Assessing Officer erred in calculating interest under Section 234A(3) of the Act. Having regard to the facts and circumstances of the case, and the provisions of law, the Appellant submits that the Assessing Officer be directed to recalculate the said interest.

6. The Appellant submits that the Assessing Officer erred in calculating interest under Section 234B of the Act. Having regard to the facts and circumstances of the case, and the provisions of law, the Appellant submits that the Assessing Officer be directed to recalculate the said interest.

7. The Appellant submits that the Assessing Officer erred in calculating interest under Section 234C of the Act. Having regard to the facts and circumstances of the case, and the provisions of law, the Appellant submits that the Assessing Officer be directed to recalculate the said interest.

8. The Appellant objects to the action of the Assessing Officer in initiating penalty proceedings under section 271(1)(c) of the Act.

The Appellant craves leave to add to, alter or amend the above Grounds of Appeal as and when advised."

Apart there from, the assessee has also assailed the validity of the assessment order passed by the A.O under Sec. 153A/143(3) r.w.s. 144C(13) by raising the following 'additional ground of appeal':

> "The Assessing Officer and the learned Dispute Resolution Panel erred in passing the assessment order under Sec. 143(3) and the Directions under Sec. 144C(5) of the Act respectively on a non-existent entity. The action of the Assessing Officer and the learned Dispute Resolution Panel is therefore bad in law and requires to be quashed."

2. We shall first advert to the admissibility of the 'additional ground of appeal' raised by the assessee before us. As is discernible from the

aforesaid ground raised by the assessee before us, we find that the validity of the assessment framed by the A.O and, the directions issued by the Dispute Resolution Panel-1, Mumbai (for short 'DRP') has been assailed before us, on the ground, that as the same has been passed on a non-existent entity, therefore, the same are bad in law and requires to be quashed. The ld. Departmental representative (for short 'D.R') objected to the application filed by the assessee for admission of the aforesaid additional ground of appeal. As the aforesaid additional ground of appeal raised by the assessee involves purely a question of law based on the facts available on record, therefore, the same pursuant to the judgement of the **Hon'ble Supreme Court** in the case of **National Thermal Power Company Ltd. Vs. CIT (1996) 229 ITR 383 (SC)** is admitted.

3. Briefly stated, the assessee viz. M/s Ingram Micro India Pvt. Ltd. (hereinafter referred to as 'IMIPL') was during the year under consideration engaged in trading of computer software and computer peripherals both domestically and abroad. The assessee had filed its return of income on 30.06.2006, declaring its total income at Rs.15,68,26,750/-. Subsequently, as per the scheme of amalgamation sanctioned by the Hon'ble High Court's of Bombay and Karnataka, the assessee company was amalgamated into Tech Pacific (India) Limited w.e.f 01.01.2005. Thereafter, the assessee filed a revised return of income for a period of 9 months ended 31.12.2004 on 14.10.2008, declaring its total income at Rs.12,36,75,606/-.

4. Search and seizure/survey action under Sec. 132/133A were carried out at the business premises of the assessee on 06.09.2007. As is discernible from the assessment order, in the course of the search and survey proceedings certain incriminating documents were impounded/seized, which revealed that the foreign associates of the

assessee having Permanent Establishment (for short 'PE') in India, were though earning substantial taxable income, however, no taxes were being paid by them. Apart there from, the said incriminating documents revealed that the assessee had claimed bogus purchase expenses by resorting to accommodation entries. It was also established from the seized/impounded papers that M/s Ingram Micro, USA had acquired shares of Tech Pacific Holdings Ltd. for 730 million Australian dollars on 10.11.2004. Accordingly, the A.O was of the view that as the takeover of Tech Pacific Holding India Ltd. by M/s Ingram Micro Inc. USA involved takeover of Tech Pacific Holding India Ltd., which was a company registered in India, therefore, the same had resulted into a transfer of assets of an Indian company and, as a result thereof, the capital gains arising there from was taxable in India by treating M/s Tech Pacific (India) Ltd. as an agent of Tech Pacific Holding Ltd., i.e the transferor.

5. The assessee in response to the notice issued under Sec. 153A filed its return of income on 14.10.2008, declaring its total income at Rs.12,36,75,606/- as per the normal provisions of the I.T Act. The A.O while framing the assessment made a reference to the Transfer Pricing Officer (for short 'TPO') under Sec. 92CA(1) of the I-T Act. The TPO vide his order passed under Sec. 92CA(3), dated 26.10.2010 proposed certain adjustments viz. (i) adjustment towards 'Arms Length Price' (for short 'ALP') of the corporate guarantee given by the assessee for the benefit of its Associate Enterprise (for short 'AE') viz. Tech Pacific (India) Exports Pte. Ltd. (for short 'TPIEPL'): Rs. 44,02,635/-; and (ii) adjustment towards mark-up @ 1% as regards value addition in respect of reimbursement of expenses: Rs.79,613/-. Accordingly, the TPO proposed an upward adjustment of Rs. 44,82,248/-.

6. The A.O after receiving the order passed by the TPO under Sec. 92CA(3), dated 26.10.2010 passed a draft assessment order under Sec. 153A/143(3) r.w.s. 144C(1), dated 30.12.2010. The A.O while passing the aforesaid order inter alia made certain disallowance of expenses viz. (i) disallowance out of staff welfare and other welfare expenses of Rs. 9,59,074/-; and (ii) disallowance of commission expenditure of Rs.2,25,96,858/-. Accordingly, the A.O after making the aforesaid disallowance proposed to assess the income of the assessee company at Rs.15,63,35,670/-.

7. The assessee being aggrieved with the aforesaid disallowances proposed by the A.O, vide his draft assessment order, therein filed objections before the DRP. As regards the adhoc disallowance of Rs.9,59,074/- i.e 10% of the aggregate staff welfare expenses, as was proposed by the A.O, it was observed by the DRP, that the A.O had sought to carry out the said disallowance because the assessee could not support the same on the basis of any documentary evidence. In the backdrop of the fact, that the A.O had failed to place on record sufficient material which would justify disallowance of 10% of the total staff welfare expenses, the DRP followed the view taken by the CIT(A) in the assesses own case for the preceding years and directed the A.O to restrict the disallowance to 5% of the total staff welfare expenses. Insofar, the disallowance of commission expenditure of Rs.2,25,96,858/- was concerned, it was observed by the DRP, that though the assessee had filed names and addresses of the respective parties to whom the commission was paid, however, as it had failed to substantiate the authenticity of the said expenditure by furnishing the confirmations or PAN numbers of the said parties, therefore, the A.O had disallowed the aforesaid expenditure in entirety. The DRP after considering the observations of the A.O in the backdrop of the details which were submitted by the assessee in support of its aforesaid claim

of expenditure observed, viz. (i) that, the commission expenditure was incurred by the assessee wholly and exclusively for the purpose of its business which was dictated by business needs and was allowable; (ii) that, the fact that the assessee had deducted tax at source on the aforesaid commission payments substantiated the genuineness of the said expenditure; (iii) that, the commission paid by the assessee was not high in relation to the sales made during the year; (iv) that, the names and addresses of the parties to whom commission was claimed by the assessee to have been paid was furnished with the A.O; and (v) that, the details along with the PAN numbers of the dealers to whom commission in excess of Rs.1 lac was paid were furnished by the assessee in the course of the DRP proceedings. Accordingly, in the totality of the facts and circumstances of the case, it was observed by the DRP, that there was no scope to make any adhoc disallowance of the commission expenditure, as was so done by the A.O. However, at the same time, the DRP directed the assessee to furnish with the A.O within a weeks time from the date of its order the confirmations from all the parties to whom commission of Rs.1 lac and above was paid during the year. Accordingly, the DRP on the basis of his aforesaid observations directed the A.O to disallow the commission expenditure of Rs. 1 lac and above, in respect of which no confirmation was furnished by the assessee.

8. The A.O after receiving the order passed by the DRP under Sec. 144C(5), dated 23.09.2011 passed the assessment order under Sec.153A/143(3) r.w.s 144C(13), dated 31.10.2011. On the basis of the directions of the DRP, the A.O inter alia carried out certain disallowances viz. (i) disallowance of 5% of staff welfare expenses : Rs.4,79,537/-; and (ii) disallowance out of commission expenditure :Rs.1,62,05,703/- and assessed the income at Rs.14,03,60,850/-.

9. The assessee being aggrieved with the order passed by the A.O has carried the matter in appeal before us. The ld Authorized Representative (for short 'A.R') for the assessee, at the very outset of the hearing of the appeal adverted to the 'additional ground of appeal', wherein the assessee had assailed the validity of the assessment order passed by the A.O and also, the directions given by the DRP vide its order passed under Sec.144C(5), dated 23.09.2011. It was averred by the ld. A.R, that as the aforesaid order/directions were passed/given in the name of the assessee viz. M/s Ingram Micro India Pvt. Ltd., which was non-existent at the time of passing of the said respective orders, thus, the same being unsustainable in law were liable to be quashed on the said count itself. It was submitted by the ld. A.R, that based on the scheme of amalgamation sanctioned by the Hon'ble High Court's of Bombay and Karnataka the assessee company viz. M/s Ingram Micro India Pvt. ltd. was amalgamated into M/s Tech Pacific (India) Ltd. w.e.f 01.01.2005. It was submitted by him that the Hon'ble High Court of Bombay had, vide its order dated 10.03.2006, and the Hon'ble High Court of Karnataka had, vide its order dated 24.09.2008 approved the scheme of amalgamation, which as per the aforesaid orders was effective w.e.f 01.01.2005. Further, it was submitted by the ld. A.R, that the aforesaid scheme of amalgamation was filed with the registrar of companies on 28.10.2008, and the scheme had became effective from that date. It was submitted by the ld. A.R, that as on 13.05.2009 the amalgamated company viz. M/s Tech Pacific (India) Ltd. had changed its name to M/s Ingram Micro India Ltd. Accordingly, in the backdrop of the aforesaid facts, it was submitted

by the ld. A.R, that the assessment order passed by the A.O under Sec.153A/143(3) r.w.s 144C(13), dated 31.10.2011 in the name of the amalgamating company viz. M/s Ingram Micro India Pvt. ltd. was

legally invalid and unsustainable in the eyes of law. In order to fortify his aforesaid contentions, the ld. A.R has taken us through the relevant records viz. (i) the order of the Hon'ble High Court of Karnataka, dated 17.01.2008, (Page 13 'APB'); (ii) the order of the Hon'ble High Court of Bombay, dated 10.03.2006 (Page 1 of 'APB'); (iii) receipt of 'Ministry of Corporate Affaires', dated 22.10.2008; and (iv) fresh certificate of incorporation that was issued consequent to change of the name of the assessee to M/s Tech Pacific (India) Ltd., dated 13.05.2009. It was further submitted by the ld. A.R, that the DCIT (OSD-II), Central Range-7, Mumbai was the A.O of the amalgamated company viz. M/s Tech Pacific (India) Ltd.. On the basis of the aforesaid facts, it was submitted by the ld. A.R, that both the assessment order passed by the A.O and the order passed by the DRP under Sec.144C(5), dated 23.09.2011 were passed in the name of a wrong entity viz. M/s Ingram Micro India Pvt. Ltd. It was submitted by the ld. A.R, that the assessee in its objections filed with the DRP had specifically brought it to its notice, that based on the scheme of amalgamation sanctioned by the Hon'ble High Courts of Bombay and Karnataka, the assessee company had amalgamated into Tech Pacific (India) Pvt. Ltd. w.e.f 01.01.2005. The ld. A.R submitted, that despite having been put to notice, the DRP had passed the order in the name of the amalgamating company viz. M/s Ingram Micro India Pvt. ltd., which was no more in existence as on the date of issuance of such directions. Further, the ld. A.R also took us through the submissions which were filed before the DRP, which revealed, that the fact pertaining to the scheme of amalgamation and also, the orders passed

by the Hon'ble High Court's of Mumbai and Karnataka were furnished with the A.O during the course of the assessment proceedings. In the backdrop of the aforesaid facts, it was averred by the ld. A.R, that as

the assessment in the present case was framed on the dissolved/amalgamating company, therefore, the same was invalid and liable to be struck down on the said count itself. In support of his aforesaid contention the ld. A.R relied on certain judicial pronouncements viz. (i) CIT-III Vs. Dimension Apparels (P) Ltd. (2015) 370 ITR 288 (Del); and (ii) Spice Entertainment Limited Vs. Commissioner of Service Tax (ITA No. 475 & 476 of 2011, dated 03.08.2011) (Del). It was submitted by the ld. A.R, that in the aforementioned judicial pronouncements the Hon'ble High Court's had observed, that an assessment framed in the hands of a dissolved/amalgamating company i.e a non-existent entity, being a jurisdictional defect could not be cured under Sec. 292B and, is liable to be struck down as being invalid. It was further submitted by the ld. A.R, that the 'Special Leave Petition' (for short 'SLP') filed by the revenue against the aforesaid judgment of the Hon'ble High Court of Delhi in the case of Spice Entertainment (supra), had thereafter been dismissed by the Hon'ble Supreme Court in SLP (C) No. 29956 of 2015 (Arising out of Civil Appeal No. 285 of 2014, dated 02.11.2017). In order to buttress his aforesaid contention that the assessment was framed by the A.O under Sec. 153A/143(3) r.w.s 144C(13), dated 31.10.2011 in the hands of the amalgamating company viz. M/s Ingram Micro India Pvt. Ltd., which had ceased to exist, it was submitted by the ld. A.R that the PAN No. i.e "AABCS9516P" referred in the assessment order was that of the amalgamating company i.e M/s Ingram India Pvt. Ltd. On the basis of his aforesaid contentions, it was submitted by the ld. A.R that the aforesaid assessment framed

by the A.O on a non-existent entity, as per the settled position of law, could not be sustained and was liable to be struck down. The ld. A.R further placed his contentions as regards the merits of the case. The

ld. A.R took us through a reply dated 27.10.2010 that was filed by the assessee with the A.O, wherein the complete details of the parties to whom commission expenses in excess of the amount of Rs.1 lac was paid during the year were furnished [(Page 123) of the assesses 'Paper book' (for short 'APB')]. It was submitted by the ld. A.R, that the assessee had furnished the complete names along with the respective addresses of the aforementioned parties, pursuant whereto in case of any doubts, it was open for the A.O to have made necessary verifications. Apart there from, it was claimed by the ld. A.R, that the fact that tax at source was deducted from the aforesaid commission expenses further substantiated the veracity of the said expense. It was submitted by the ld. A.R, that the PAN numbers of the aforesaid parties were also furnished by the assessee with the DRP during the course of the proceedings before him. On the basis of the aforesaid facts, it was claimed by the ld. A.R that now when the complete details of the parties to whom commission was paid by the assessee during the year were placed on record, therefore, it was not permissible on the part of the A.O/DRP to have drawn adverse inferences as regards the veracity of the said expenses and, disallow the same. In support of his aforesaid contention the ld. A.R relied on certain judicial pronouncements viz. (i) Mether & Platt (India) Ltd. Vs. CIT (1987) 168 ITR 493 (Cal); (ii) CIT Vs. M/s National Rayon Corporation Ltd. (1992) 193 ITR 744 (Bom); (iii) Swastic Textile Company Pvt. Ltd. VS. CIT (1984) 150 ITR 155 (Guj); and (iv) VIP Industries Ltd. Vs. IAC (1991) 36 ITD 70 (Bom) (TM). It was vehemently submitted by the ld. A.R that now when the DRP had accepted that the expenses incurred by the

assessee towards commission paid was genuine and was incurred wholly and exclusively for the purpose of the business of the assessee,

therefore, there was no reason for him to have disallowed any part of the said expenditure.

10. Per contra, the ld. Departmental Representative (for short 'D.R') submitted, that no infirmity did emerge from the assessment order passed by the A.O. In fact, it was submitted by the ld. D.R, that the TPO while passing the order under Sec. 92CA(3), dated 26.10.2010, had correctly referred to the assessee viz. M/s Ingram Micro India Ltd. [formerly known as M/s Tech Pacific (India) Ltd]. It was submitted by the ld. D.R, that the assessment framed in the case of the assessee would not be rendered invalid due to its amalgamation, as the tax liability accrued prior to such amalgamation. In support of his aforesaid contention the ld. D.R relied on the judgment of the Hon'ble High Court of Calcutta in the case of CIT, Central-1 Vs. Shaw Wallace Distilleries Ltd. (2016) 386 ITR 14 (Cal). Also, reliance was placed by him on the order of the ITAT, "C" Bench, Bangalore in the case of GE Legal Systems (India) Pvt. Ltd. Vs. ACIT Circle-1(2), Bangalore [IT (TP)A. No. 563/Bang/2016, dated 21.04.2017]. Apart there from, it was submitted by the ld. D.R. that the final assessment order passed by the A.O under Sec. 153A/143(3) r.w.s 144C(13), dated 31.10.2011 was in the name of the correct entity i.e "M/s Ingram Micro India Ltd.". Insofar the case laws which were relied upon by the counsel for the assessee were concerned, it was submitted by the ld. D.R that the same were distinguishable on facts and would not assist the case of the assessee. On merits, the ld. D.R relied on the orders of the lower authorities. It was submitted by him, that as the assessee had failed to substantiate the veracity of the commission expenses and also the staff welfare expenses, therefore, the lower authorities had rightly carried out the disallowance of the said expenses.

11. The ld. A.R rebutting the contentions advanced by the counsel for the revenue submitted, that it was an admitted fact that the A.O/DRP were well aware of the amalgamation process. It was also submitted by him, that the fact that the scheme of amalgamation was sanctioned by the Hon'ble High Court's of Bombay and Karnataka, based on which the assessee company was amalgamated into Tech Pacific (India) ltd. w.e.f 01.01.2005, was duly brought to the notice of the A.O/DRP by the assessee. As regards the contention advanced by the ld. D.R, that the final assessment order under Sec. 153A/143(3) r.w.s 144C(13), dated 31.10.2011 was correctly passed by the A.O in the hands of the right entity viz. "M/s Ingram Micro India Ltd.", it was submitted by the ld. A.R that the said contention was factually incorrect. It was submitted by the ld. A.R that the "PAN Number" as was discernible from the final assessment order viz. "AABCS9516P", clearly revealed that the assessment was framed in the hands of the amalgamating company i.e M/s Ingram Micro India Pvt. Ltd.

12. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and, the material available on record. Admittedly, as per the scheme of amalgamation filed before the Hon'ble High Courts of Bombay and Karnataka, the assessee company viz. M/s Ingram Micro India Pvt. Ltd. was proposed to be amalgamated into Tech Pacific (India) Ltd. Subsequently, the Hon'ble High Court of Bombay vide its order dated 10.03.2006, and the Hon'ble High Court of Karnataka vide its order dated 24.09.2008 had approved the scheme of amalgamation, which as per the aforesaid orders was to be effective from 01.01.2005. Further, the scheme was filed with the registrar of company on 28.10.2008, and the same had became effective from the said date. On 13.05.2009 the amalgamated company viz. Tech Pacific (India) Ltd. had changed its name to Ingram Micro India Ltd. As is discernible from the orders of the lower

authorities, we find, that the assessee had vide is letter dated 14.10.2008 submitted before the A.O, that the scheme of amalgamation of the assessee company viz. Ingram Micro (India) Pvt. ltd., a company incorporated in Bangalore, was approved by the Hon'ble High Court of Mumbai, vide its order dated 10.03.2006 and, by the Hon'ble High Court of Karnataka, vide its order dated 17.01.2008. Accordingly, it is a matter of fact borne from the records, that the A.O much prior to the passing of the draft assessment order by him under Sec. 153A/143(3) r.w.s. 144C(1), dated 30.12.2010, was well aware of the fact that the assessee company was amalgamated into Tech Pacific (India) Ltd., which thereafter was known as Ingram Micro India Ltd. Apart there from, we find that the assessee in its objections filed with the DRP, had also specifically brought the fact that pursuant to the scheme of amalgamation sanctioned by the Hon'ble High Courts of Bombay and Karnataka, the assessee company was amalgamated into Tech Pacific (India) Ltd. w.e.f 01.01.2005. Accordingly, we are of the considered view, that both the A.O as well as the DRP were well conversant of the fact that the assessee company viz. Ingram Micro India Pvt. Ltd. had pursuant to the scheme of amalgamation sanctioned by the Hon'ble High Courts of Bombay and Karnataka, amalgamated into Tech Pacific (India) Ltd. w.e.f 01.01.2005.

13. We shall in the backdrop of the aforesaid facts, now proceed with to adjudicate the validity of the assessment framed by the A.O, vide his order passed under Sec.153A/143(3) r.w.s. 144C(13), dated 31.10.2011 in the name of the amalgamating assessee company viz. Ingram Micro India Pvt. ltd., which admittedly was non-existent on the date of passing of the aforesaid order. Before proceeding further, we may herein observe, that as per the facts discernible from the records and, culled out by us hereinabove, there can be no escape from the

fact that the A.O much prior to the framing of the assessment was put to notice by the assessee, that based on the scheme of amalgamation sanctioned by the Hon'ble High Courts of Bombay and Karnataka, the assessee company viz. Ingram Micro India Pvt. Ltd. was amalgamated into Tech Pacific (India) Ltd. w.e.f 01.01.2005. Interestingly, we find that despite the fact that the TPO on a reference made by the A.O under Sec. 92CA(1), had passed his order under Sec. 92CA(3), dated 26.10.2010 in the name of the amalgamated company viz. "M/s Ingram Micro India Ltd. (formerly known as M/s Tech Pacific India Ltd.)", holding "PAN No. AABCT1296R", however, the A.O still chose to proceed with and frame the assessment in the hands of the amalgamating company viz. M/s Ingram Micro India Ld. (PAN No. AABCS9516P), wherein the latter as observed by us hereinabove was on the date of passing of the assessment order a non-existent entity. Accordingly, as observed by us hereinabove, the A.O in the case before us cannot claim that the fact that the assessee had amalgamated into Tech Pacific (India) Ltd. was not to his notice.

14. We shall now in the backdrop of the aforesaid facts dwell upon the validity of the assessment framed by the A.O in the hands of the amalgamating company viz. M/s Ingram Micro India Pvt. ltd., which as observed by us hereinabove, was non-existent on the date of framing of the assessment by the A.O. We find that the **Hon'ble High Court of Delhi** in the case of **Spice Entertainment Ltd. Vs. Commissioner of Service Tax (ITA No. 475 & 476 of 2011, dated 03.08.2011)** had after extensively deliberating on the aspect as regards the validity of an assessment framed upon the amalgamating/dissolved company, had observed, that on amalgamation, the amalgamating company ceases to exist in the eyes of law. Accordingly, the Hon'ble High Court by drawing support from the judgment of the **Hon'ble Supreme Court** in the case of **Saraswati**

Industrial Syndicate Ltd. Vs. CIT (1990) 186 ITR 278 (SC), had observed, that the assessment upon a dissolved company is impermissible, as there is no provision in Income-Tax to make an assessment thereupon. In fact, it was observed by the Hon'ble High Court, that once it was found that the assessment was framed in the name of a non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Sec. 292B of the I-T Act. The High Court while concluding as hereinabove, had observed as under :

> "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:
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> > "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(l) 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.
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> > 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."

15. Further, we find that the **Hon'ble High Court of Delhi** in the case of **PCIT-6, New Delhi Vs. Maruti Suzuki India Ltd.**, had also taken a similar view. In the said case, it was observed by the Hon'ble High Court, that where during the pendency of the assessment proceedings the assessee company was amalgamated with another company and, thereby lost its existence, therein an assessment order passed subsequently in the name of the said non-existent entity being without jurisdiction would be liable to be struck down. Also, the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Micron Steels (P) Ltd.**, had concluded, that completion of assessment under Sec. 153C in the hands of an assessee company which had already amalgamated into another company would tantamount to completion of assessment in respect of a non-existent company, which was unsustainable in law and was not curable under Sec.292B. Adopting a similar view, the **Hon'ble High Court of Karnataka** in the case of **CIT, Central Circle, Banglore Vs. Intel Technology India (P) Ltd. (2016) 380 ITR 272 (Kar)**, had observed, that assessment in the name of a company which had amalgamated with another company would be null and void. Further, it was observed by the Hon'ble High Court that framing of an assessment in the name of a non-existent entity was not a procedural irregularity which could be cured under Sec.292B. Also, the **Hon'ble High Court of Gujarat** in **Takshashila Realities (P) Ltd. Vs. DCIT, Circle-4(1) (2017) 77 taxman.com 160 (Guj)**, had observed, that once the scheme of amalgamation was sanctioned, the amalgamating company would not be in existence and therefore, re-assessment notice could not be issued against original amalgamating company for any prior year. Apart there from, the Hon'ble High Court in its earlier judgment in the case of **Khurana Engineering Ltd. Vs. DCIT (OSD)-1**

(2014) 364 ITR 600 (Guj), had concluded, that assessment proceedings could not be resorted to in the case of an amalgamated company after the date of amalgamation. We also find that the **Hon'ble High Court of Bombay** in the case of **Jitendra Chandralal Navlani Vs. Union of India (2016) 386 ITR 288 (Bom)**, while deliberating on the validity of a notice issued under Sec. 148 in respect of a non-existing entity and the assessment order framed consequent to the said notice, held that both were without jurisdiction. Apart there from, we find that a similar view had also been taken by the ITAT, Mumbai in certain orders viz. (i) Siemens Technology Services Pvt. Ltd. Vs. ACIT, Mumbai (ITA No. 6313/Mum/2012, dated 16.11.2016); (ii) M/s Instant Holdings Ltd. Vs. ACIT, Circle-6 (1), Mumbai (ITA No. 4593/Mum/2011, dated 09.03.2016); and (iii) M/s West Life Development Ltd. Vs. Pr. Commissioner of Income Tax-5, Mumbai (ITA No. 688/Mum/2016, dated 15.06.2016). In the aforementioned cases, the Tribunal had observed that the assessment in the name of a company which had been amalgamated with the other company would be null and void.

16. We thus in the backdrop of our aforesaid deliberations and, respectfully following the aforesaid judicial pronouncements are of the considered view, that as the assessee in the case before us viz. M/s Ingram Micro India Pvt. ltd., based on the scheme of amalgamation sanctioned by the Hon'ble High Courts of Bombay and Karnataka, was amalgamated into Tech Pacific (India) Ltd. w.e.f 01.01.2005 (which thereafter had changed its name to Ingram Micro India Ltd. w.e.f 13.03.2009), therefore, the assessment framed by the A.O under Sec. 153A/143(3) r.w.s 144C (13), dated 31.10.2011 in the name of the assessee company, which as on the date of the framing of such assessment was a non-existent entity, cannot be sustained and is liable to be vacated on the said count itself. Before parting, we may

herein observe, that as is borne from the records, the assessee had duly brought the fact that the assessee company based on the scheme of amalgamation sanctioned by the Hon'ble High Courts of Bombay and Karnataka was amalgamated into Tech Pacific India Ltd. w.e.f 01.01.2005 to the notice of both the A.O and the DRP. In fact, a perusal of the order passed by the TPO under Sec. 92CA(3), dated 26.10.2010 in the name of the amalgamated company viz. "M/s Ingram Micro India Ltd. (formerly known as M/s Tech Pacific India Ltd.) (PAN No. AABCT1296R)", in itself proves to the hilt, that the department was well conversant of the fact that the assessee company had amalgamated into Tech Pacific (India) Ltd. w.e.f 01.01.2005, which thereafter had w.e.f 13.05.2009 changed its name to "Ingram Micro India Limited". Accordingly, in terms of our aforesaid observations and, the settled position of law, we are unable to persuade ourselves to uphold the assessment framed by the A.O in the hands of the assessee, i.e an entity which was non-existent as on the date of framing of such assessment and, thus quash the assessment framed by the A.O. The "**Additional ground of appeal**" raised by the assessee is allowed.

17. We though have quashed the assessment framed by the A.O, however, for the sake of completeness, we shall now advert to the contentions advanced by the assessee as regards the merits of the

case. Briefly stated, the A.O in his draft assessment order passed under Sec.153A/143(3) r.w.s 144C(1), dated 30.12.2010, had inter alia proposed certain disallowances of expenses viz. (i) adhoc disallowance of Rs. 9,59,074/-i.e @10% of the aggregate of the staff welfare expenses ; and (ii) disallowance of the entire commission expenditure of Rs. 2,25,96,858/-. The DRP while disposing off the objections filed by the assessee adopted the view that was taken by

the CIT(A) in the assesses own case for the preceding years and, directed the A.O to restrict the adhoc disallowance of staff welfare expenses to 5% of the total expenses booked under the said head of expense. As regards the disallowance of the entire commission expenditure that was proposed by the A.O, the DRP observed viz. (i) that, the commission expenditure was incurred by the assessee wholly and exclusively for the purpose of its business, which was dictated by the business needs and was allowable as deduction in principle; (ii) that, the fact that the assessee had deducted tax at source on the aforesaid commission payments substantiated the genuineness of the said expenditure; (iii) that, the commission paid by the assessee was not high in relation to the sales made during the year; (iv) that, the names and addresses of the parties to whom commission was claimed by the assessee to have been paid was furnished with the A.O; and (v) that, the details along with the PAN Numbers of the parties to whom commission in excess of Rs. 1 lac was paid was furnished by the assessee in the course of the DRP proceedings. Accordingly, in the totality of the facts and the circumstances of the case, it was observed by the DRP, that there was no scope to make any adhoc disallowance of the commission expenditure, as was so done by the A.O. However, at the same time, the DRP directed the assessee to furnish with the A.O within a weeks time from the date of its order the confirmations from all the parties to whom commission of Rs.1 lac and above was paid during the year. Further, the DRP directed the A.O to disallow the commission expenditure of Rs.1 lac and above, in respect the parties for which no confirmation was thereafter furnished by the assessee before him.

18. We shall first advert to the adhoc disallowance of Rs. 4,79,537/ out of staff welfare expenses that was made by the A.O/DRP. As observed by us hereinabove, the DRP drawing support from the view

taken by the CIT(A) in the assesses own case for the preceding years, had scaled down the disallowance to 5% of the total staff welfare expenses, as against the disallowance of 10% of the said expenses that was proposed by the A.O. As is discernible from the assessment order, the A.O had resorted to an adhoc disallowance of the staff welfare expenses, for the reason, that the full details of the said expenses were not furnished by the assessee. Accordingly, it was observed by the A.O, that in the absence of supporting documentary evidence the veracity of the claim of such expenses was not open for verification. It is the claim of the ld. A.R, that the A.O while proposing the aforesaid disallowance had neither called upon the assessee to furnish any further details in support of the aforesaid claim of expenditure, nor afforded a sufficient opportunity of being heard to the assessee on the said aspect. In fact, it is submitted by the ld. A.R, that the aforesaid disallowance was proposed absolutely at the back of the assessee. The ld. D.R could not rebut the aforesaid contention so advanced by the counsel for the assessee.

19. We have perused the order passed by the A.O, and find, that he had proposed the aforesaid disallowance of staff welfare expenses, for the reason, that the assessee had failed to place on record supporting documentary evidence to substantiate the veracity of his aforesaid claim of expenditure. However, we find that there is no whisper in the order of the A.O that the assessee in the course of the assessment proceedings had failed to comply with his directions to place on record any specific documentary evidence in support of his aforesaid claim of expenditure. Apart there from, the details of the expenses whose genuineness were being doubted by the A.O is also not discernible from the assessment order. In our considered view, the disallowance that was proposed by the A.O in his draft assessment order passed Sec.153A/143(3) r.w.s 144C(1), dated 30.12.2010 is also not

supported by any cogent reasoning which could persuade us to accept the same. In case, the A.O was not satisfied with the veracity of the aforesaid expenses, then he remained under a statutory obligation to have called upon the assessee to place on record the necessary supporting documentary evidence, which we find was never done by him. Apart there from, we find that the A.O has not even pointed out the details of the expenses which the assessee had failed to furnish with him. Further, the DRP loosing sight of the fact that the aforesaid adhoc disallowance of expense proposed by the A.O was not backed by any logical reasoning, had however, straightway transposed the view taken by the CIT(A) in the assesses own case for the preceding years and, restricted the disallowance to 5% of the total staff welfare expenses. Be that as it may, as the aforesaid disallowance made by the A.O/DRP falls short of a reasoned order, therefore, we are unable to persuade ourselves to accept the same. Accordingly, as the disallowance of 5% of the staff welfare expenses made by the A.O/DRP is devoid and bereft of any basis, therefore, the same cannot be sustained and is vacated. The **Ground of appeal No. 1** is allowed.

20. We shall now advert to the disallowance of the commission expenditure of Rs.1,62,05,703/- made by the A.O/DRP. As is

discernible from the records, the assessee had during the year under consideration debited Rs.2,25,96,858/- towards commission expenditure, which comprised of viz. (i) commission paid to various parties in excess of an amount of Rs.1 lac per party: Rs. 1,62,05,703/- ; and (ii) commission paid to parties below an amount of Rs.1 lac per party: Rs.62,91,155/-. In the course of the assessment proceedings, the assessee furnished details as regards the names, addresses and the amount of commission paid to various parties during the year. The A.O declined to accept the aforesaid claim of expenditure raised by the

assessee for multiple reasons viz. (i) that, the assessee had failed to furnish the confirmations from the concerned parties; (ii) that, the PAN Numbers of the parties were not furnished by the assessee; (iii) that, the assessee had failed to satisfy the nature of services rendered by the parties to the assessee ; (iv) that, no details regarding quantum of business procured by the said parties was furnished by the assessee; and (v) that, no details as to whether there was any written agreement between the assessee and the aforesaid parties on the basis of which commission was paid to them was provided by the assessee. Accordingly, the A.O not being satisfied with the aforesaid claim of commission expenditure raised by the assessee proposed to disallow the same in his draft assessment order passed under Sec. 153A/143(3) r.w.s 144C(1), dated 30.12.2010. On objections filed by the assessee, the DRP observed that there was no scope to make an adhoc disallowance of the commission expenditure, as was so done by the A.O. However, at the same time, the DRP directed the assessee to furnish with the A.O the confirmations from all the parties to whom commission of Rs.1 lac and above was paid during the year. In fact, the DRP on the basis of his aforesaid observations directed the A.O to disallow the commission expenditure of Rs. 1 lac and above, in respect of those parties whose confirmation was not furnished by the assessee. As the assessee was unable to furnish the confirmations of the parties to whom commission of Rs.1 lac and above, was paid, therefore, the A.O disallowed commission expenditure of Rs.1,62,05,703/-.

21. We have perused the orders of the lower authorities in context of the issue under consideration. Our indulgence has been sought by the assessee to adjudicate, as to whether, the A.O is right in law and the facts of the case in disallowing the commission expenditure of

Rs.1,62,05,703/-. We find that the DRP in context of the aforesaid disallowance of commission expenditure, had observed as under :

> "6.3 DRP has considered the AO's observation and findings and the details submissions filed by the assessee. The DRP is of the view that the commission payments are incurred wholly and exclusively for the purpose of business, dictated by business needs and allowable as deduction in principle, as TDS also was made on such payments as application. The commission paid is not high in relation to the sales made during the year. The names and addresses were furnished earlier to the A.O and such details alongwith PAN of dealers where commission payments exceeded Rs.1,00,000/- is now furnished (a copy of the same is enclosed to this order of DRP). Considering the totality of facts and circumstances of the case, there is not scope to disallow the commission payments, in an ad hoc manner as was done by A.O. The assessee should now furnish confirmation from all the parties where commission paid is Rs. One lakh and above, within a week from the receipt of directions/order of DRP sue motto, Thereafter, A.O can disallow commission paid in respect of parties from whom no confirmation was furnished. In respect of commission payments below Rs. One lakh in each case there is no need to disallow claim without verification as assessee furnished all the relevant details. Hence, the disallowance as proposed by the A.O is not approved. A.O is directed to modify/restrict the disallowance as per directions given herein above."

A perusal of the aforesaid observations reveals that, the DRP was convinced that as the commission expenditure was wholly and exclusively incurred by the assessee for the purpose of its business, therefore, the same was not liable to be disallowed. However, the DRP after so concluding, had directed the assessee to file with the A.O the confirmations from the parties to whom commission of Rs. 1 lac and above was paid during the year, failing which the same was to be be disallowed by the A.O. We may herein observe, that the aforesaid observations of the DRP regarding the genuineness and allowability of the commission expenditure and, conclusion therein arrived at by him are not found to be befitting. In our considered view, the satisfaction recorded by the DRP that the commission expenditure was incurred by the assessee wholly and exclusively for the purpose of its business, was sufficient for allowing the assesses claim of the said expenditure. Be that as it may, we shall advert to the sustainability of the aforesaid disallowance made by the A.O/DRP on merits. As is discernible from the order of the DRP, the assessee in order to dispel any doubt as regards the authenticity of its claim of expenditure as regards

commission exceeding Rs. 1 lac that was paid by it during the year, had thus, in the course of the proceedings before him furnished the name and addresses, PAN details, amount of commission paid, amount of TDS etc., pertaining to the parties to whom such commission was paid, as under :

Particulars	Address	Amount (Rs.)	TDS
A Team Computers	S.K.s. Buildings, Perundurai Road, Erod,	110,124	6,178
Acme Digitek Solutions Pvt. Ltd.	Rohit Bhawan, II Floor, 4, Sapru Marg, Lucknow-226001	124,237	6,491
Axis Computech & Peripherals	G-28, Lajpat Nagar-II, New Deli- 110024	165,472	9,260
C.I. Infotech (P) Ltd.	K-33A, Green Park Main, New Delhi-110003	172,691	8,901
Cinthamani Computers	15/2A, Raja Badhar Street, T. Nagar, Chennai 600017	567,9800	31,859
Computer Marketing & Allied Services	17A Cross, 20th Main, First R Block, West of Chord Road, Rajajinagar, Bangalore – 560010	142,542	7,840
Computer Technologies Pvt. Ltd.	C/O Anand Steel Centre, Ghat No. 2347, Ganesh Park Opp. Talera Warehousing, Wagholi, Pune	284,172	14,604
Creative Infotech Solutions Pvt. Ltd.	Hirabhai Patel House, Opp. Post Office, Patel Falia, Surat- 395 000	383,128	20,030
Dreamquest Infotech Pvt. ltd.	A-1, Live In Style Apts, # 12, Pottery, Richards Town Bangalore-560,005	184,505	9,618
Excelict Consulting	B-2, Harsh Bihar, Off Dhole Patil Road, Aundh, Pune 411007	177,994	9,985
Exelan Networking Technologies	20, Taylors Road, Kilpauk, Chennai 600010	1,426,135	80,006
Fourth Dimension Technologies P. Ltd.	New #9, Old# 5 Srirangam Avenue, 53, Pantheon Road, Egmore, Chennai, 600 008.	131,876	6,803
Frontier Business Systems Pvt. ltd.	18/10, Cunnigham Road, Banglore-560 052	`1,185,539	60,897
Global Systems	SCO-3021-22, Sector 22-D, Chandigarh, 160024	129,587	7,127
Infonet Solutions	8E, Dhandapani Street, 2 Floor, T. Nagar, Chennai- 600 017	168,432	8,715
Interface Connectronics Pvt. ltd.	54/1, Sarder Patrappa Road, Bangalore 560 002	329,798	17,242
Lalani Computer Systems	59, Janmaboomi Marg, 2 Floor, Fort, Mumbai-400 001	110, 773	6,093
Mega Trends Ltd.	102, Mahalingapuram Main Road, Chennai-600034	162,648	8,458
Micro World	E-2/171, Arera Colony, Bhopal- 462016	910,689	51,090
Microcare Computers Pvt. ltd.	Flat No. 101, 104-106, First Floor, Ratna Complex, Nagarjuna Nagar, Ameerpet, Hyderabad-500 073	1,812,507	100,251
Omega Systems	Sampat Nivas, Nr. Dongar Baba Mandir, Mumbai Agra Road, At Post Vilholi, Nasik	2,018,779	111,033
Quadra Systems	992, Diwanara Palaya, HMT Main Road, Gokul Extension, Bangalore- 560054	786,641	44,131
Radius Systems Pvt. Ltd.	245-A, I Floor, Sant Nagar, East of Kailash, New Delhi- 110 065	170,000	8,712
Satva Open Systems	Ambika Complex-3 Floor, Arcot Road, Kodambakkam, Chennai- 600 024	981,635	54,177
Simi Enterprises	103, B-104, Sagar Shopping Centre, 76, J.P. Road, Andheri (W), Mumbai- 400 024	158,000	8,690
System Tech Inc.,	"S.T House", D. N. Ramaiah Layout, R.M. Guttahalli, Bangalore- 560 020	1,576,555	86,298
Targus Technologies Pvt. ltd.	J-107, South Extension Part-1, New Delhi-110 049.	469,126	24,422
Tayal Software Consultancy Services	Sushma Nikunj, O/S Surajpole Udaipur-313 001	260, 110	14,292

Tricad Solutions	B-3, Basement, 4/24 East Patel Nagar, New Delhi- 110008	237,120	13,302
Trident Enterprises	31, Mg Marg, Behind Roop Laxmi Garments, Civil Lines, Allahabad	123, 515	6,794
Value Point Systems Pvt. Ltd.	#239, R.M.V. Extension, Opp CPR I Sadashi Vanagar, Bangalore- 560 080	357,863	18,537
Vidur & Co. Pvt. Ltd.	35/F2 Sanjayplace, Agra 282002	243,276	12,718
Wysetek Systems Technologists P. Ltd.	6-7, Udyog Mandir, Off Pitambar, Lane Mahim, Mumbai- 400 016	142, 334	7,295

As can be gathered from the aforesaid information that was furnished by the assessee, we find, that the complete details of the parties to whom commission of Rs. 1 lac and above was paid during the year, along with their respective addresses, amount of commission paid and, the TDS on the said respective payments was furnished by the assessee with the A.O. At this stage, we may herein observe, that the payments made by the assessee to the abovementioned parties for the period ended 31.12.2004, pertained to a period of about 7 years ago in context of the date of passing of the assessment order by the A.O under Sec. 153A/143(3) r.w.s. 144C(13), dated 31.10.2011. Accordingly, we find force in the contention advanced by the ld. A.R, that keeping in view the aforesaid substantial time gap of 7 years, it was practically not possible on its part to have obtained the confirmations of the said parties. In our considered view, now when

the assessee had furnished complete details along with income tax credentials viz. PAN Numbers of the aforesaid parties with the lower authorities, therefore, merely for the stand alone reason that the confirmations of the said parties for transactions pertaining to a period relating to 7 years ago were not filed by the assessee with the A.O, would not justify disallowance of the commission expenditure so claimed by it. Interestingly, we find that on the basis of similar details filed by the assessee in respect of the parties to whom commission below Rs. 1 lac per party, aggregating to Rs. 62,91,155/-, was paid, the claim of the assessee towards commission expenditure to the said

extent was accepted by the DRP. In fact, we find that the order of the DRP allowing the assesses claim of commission expenditure of Rs. 62,91,155/- without any qualification, had been accepted by the revenue and had not been assailed any further. In our considered view, if on the basis of the same set of documentary evidence the A.O/DRP had accepted the assesses claim for commission expenditure of Rs. 62,91,155/-, then there could have been no justifiable reason for the said authorities to have adopted a different yardstick for considering the allowability of the balance commission expenditure of Rs. 1,62,05,703/-. As a matter of fact, as can be gathered from the DRP order, though the assessee had furnished with it the PAN details of the parties to whom commission of Rs. one lac and above was paid during the year, however, no such details were ever filed as regards the remaining parties. Accordingly, we are of the considered view, that keeping in view the aforesaid facts, it would not have been permissible for the lower authorities to have adopted an inconsistent approach while considering the allowability of the commission paid by the assessee to various parties. Apart there from, our view that failure on the part of an assessee to file the confirmations of parties on account

of substantial time gap that had lapsed since the date of transaction entered into by the assessee with them, cannot on the said stand alone basis justify drawing of adverse inferences as regards the veracity of such claim of expenditure raised by the assessee, is fortified by the judgment of the **Hon'ble High Court of Calcutta** in the case of **Mather & Platt (India) Ltd. Vs. CIT (1987) 168 ITR 493 (Cal)**. In the aforementioned case, one of the ground which had weighed in the minds of the A.O while disallowing the assesses claim of commission expenditure, was that the summons issued under Sec.131 to the agents after expiry of a period of 4 years from the date

when the transactions were entered by the assessee with them, were returned back by the postal authorities with the remarks 'not known'. On the basis of the aforesaid facts, it was observed by the revenue authorities that the assessee had failed to discharge the onus as regards establishing the identity of the agents to whom the commission was paid. On appeal, it was observed by the Hon'ble High Court, that in the backdrop of the evidence placed on record by the assessee, it would be unreasonable to hold that the assessee had failed to establish the identity of the commission agents, for the reason, that the said persons were not found available at their respective addresses after an expiry of a period of 4 years from the date of the transactions under consideration. Now, in the case before us, it is an admitted factual position, as is discernible from the order of the DRP and, had not been assailed by the revenue before us viz. (i) that, the commission expenditure was incurred by the assessee wholly and exclusively for the purpose of its business, which was dictated by business needs and was allowable; (ii) that, the fact that the assessee had deducted tax at source on the aforesaid commission payments substantiated the genuineness of the said expenditure; (iii) that, the commission paid by the assessee was not high in relation to the sales made during the year; (iv) that, the names and address of the parties, to whom commission was claimed by the assessee to have been paid was furnished with the A.O and (v) that, the details along with the PAN numbers of the dealers to whom commission in excess of Rs. 1 lac was paid was furnished by the assessee in the course of the DRP proceedings, therefore, we are of the considered view, that the genuineness of the aforesaid commission expenditure and, the fact that the said expenditure was incurred wholly and exclusively for the purpose of the business of the assessee, admittedly stands established beyond any scope of doubt. Apart there from, we are also of the

considered view, that now when on the basis of similar details filed by the assessee the commission expenditure of less than Rs. 1 lac per party, aggregating to Rs. 62,91,155/-, had been accepted by the A.O/DRP, therefore, a different yardstick could not have been adopted by them for verifying the veracity of the balance commission expenditure of Rs.1,62,05,703/-. On the basis of our aforesaid observations, we are of a strong conviction that now when the assessee had placed on record substantial material to substantiate the genuineness and veracity of the commission expenditure, which has already been accepted by the DRP while disposing off the objections of the assessee, therefore, there was no justifiable reason for disallowing the aforesaid commission expenditure of Rs. 1,62,05,703/-. Accordingly, we vacate the disallowance of commission expenditure of Rs, 1,62,05,703/- made by the A.O. The **Ground of appeal No. 2** is allowed.

22. The assessee has also assailed before us the order of the A.O on the ground that the latter had erred in not granting credit for tax deducted at source of Rs.15,34,052/-. As the said contention of the assessee cannot be summarily accepted and, requires to be verified, therefore, we restore the issue to the file of the A.O. The A.O is directed to make necessary verifications and, in case the aforesaid claim of the assessee is found to be in order, then a consequential effect to the same shall be given. The **Ground of appeal No. 4 is allowed** for statistical purposes.

23. Insofar the **Ground of appeal No. 5 to 7** are concerned, the assessee has assailed the charging of interest under Sec. 234A(3), 234B and 234C of the I.T Act. As we have already quashed the assessment framed by the A.O under Sec. 153A/143(3) r.w.s

144C(13), dated 31.10.2011, therefore, the said grounds of appeal having been rendered as infructuous, are therefore dismissed.

24. The appeal filed by the assessee is disposed off in terms of our aforesaid observations. Before parting, we may herein observe, that though we have quashed the assessment framed by the A.O under Sec. 153A/143(3) r.w.s 144C(13), dated 31.10.2011 on the ground of lack for jurisdiction itself, however, our observations recorded in context of the merits involved in the present appeal are only for the sake of completeness and, in order to avoid multiplicity of litigation at any stage.

25. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 19.06.2019

Sd/-	Sd/-
(N.K. Pradhan)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 19.06.2019
Ps. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**