IN THE INCOME-TAX APPELLATE TRIBUNAL "H" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND

SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 4395/Mum/2016 (Assessment Year 2008-09)

DCIT-14(2)(1) 432, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai 400020	Vs.	M/s Idea Cellular Ltd. (Successor to M/s. Spice Communications Ltd.), 5th Floor, East Wing, Windsor Off. CST Road, Kalina, Near Vidya Nagari, Kalina, Santacruz (West), Mumbai 400 098 **PAN – AAGCS6070H**
Appellant		Respondent

Appellant by : Ms. Pooja Swaroop with Shri M.K. Singh (DR)

Respondent by : Ms. Krupa Gandhi with Vidhi Doshi (AR)

Date of Hearing : 05.09.2019

Date of Pronouncement : 18.09.2019

ORDERUNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. The appeal by revenue is directed against the order ld. Commissioner of Income-Tax (Appeals)-8, Mumbai [for short the ld. CIT(A)] dated 28th March 2016 for Assessment Year 2008-09. The revenue has raised the following grounds of appeal:

   1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that reopening of assessment was not valid without appreciating that the assessee was served with the notice had filed its return and had participated in the assessment proceedings without challenging the validity of notice."

2. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in considering that the AO had not applied his mind on the issue and had not given any finding as to the allowability or otherwise of the said expenses in the original assessment."

2. Brief facts of the case are that the assessee is a Limited Company engaged in providing telecommunication services, filed its return of income for relevant Assessment Year on 30.10.2007 declaring total loss at Rs. 23,89,63,799/-. The assessment was completed under section 143(3) on 24 December 2009. Thereafter, the case was reopened under section 147 by issuing notice under section 148 on 26th of March 2013. The following regions were recorded:

" During the A-Y 2008-09, the assessee company as per the terms of the agreement entered into by the then management of Spice Communications Ltd, out of total 875 sites, 747 sites had been transferred in FY 2007-08 to SREI Infrastructures P Ltd. SREI infrastructure Ltd in turn has transferred these asset to Quipoo telecom Infrastructure Ltd. Further, the assessee company has taken the same towers on operating lease as per infrastructure provisioning agreement from Quipoo Telecom Infrastructure Ltd ("Quipoo"). The company accounted lease expenses under the head network operating expenses and the same claimed revenue expenditure. The company has paid the lease rent of ₹ 4 84681432/-during the A-Y 2008-09 to Quipoo as operating lease.

On going through the above arrangements, it is evident that the assets were never actually transfer to SREI Infrastructure P Ltd as the control of the assessee company onset assets was always there. In fact, the whole scheme of transfer is nothing but,

camouflage to make a believe arrangement. At such the expenses incurred by the assessee company in the name of a rent expenses on account of said assets to Quipoo cannot be considered as allowable as per the provisions of section 37 (1) of the Income tax Act. As such, the whole lease rent of Rs.48,46,81,432/-is required to be added back to the total income of the assessee company for the AYs 2008-09.

In view of the above, I have region to believe that income amounting to ₹ 48,46,81,432/-had escaped assessment in the hands of Spice Communications Ltd for AY 2008-09 within the meaning of section 147 of IT Act..

3. The assessee filed its reply to the notice under section 148, vide its reply dated 10th February 2014. In the reply the assessee stated that the assessment was completed under section 143(3) on 27th of December 2010. Subsequently, the assessing officer vide order under section 154 rectified the assessed income to adjust brought forward losses and unabsorbed depreciation, thereby computing the revised taxable income. The assessee further inform the assessing officer that vide letter dated 7th June 2011, it was intimated that jurisdiction of their case has been transferred from New Delhi to Mumbai with DCIT, Circle 3(2), Mumbai owing to the merger with Idea Cellular Ltd, by order under section 127 passed by learned Commissioner of Income tax Delhi-III, New Delhi vide F.No. CIT-III/Del/Centralisation /2010-11/3589 dated 28.03.2011 4. The assessee further stated that return of income filed on 31st March 2009 may be treated as written in response to the notice

under section 148. The assessee also further stated that they have disclosed all relevant transaction of sale and lease back allowability, made not only in Audited financial statement but even the tax Audit Report. The assessing officer pass the original order having known the foregoing facts of the transaction and accepting the transaction of operating lease and thus allowing the deduction of lease rent. The assessee further stated that proceeding under section 147 can be made only if the assessing officer has "reason to believe" that income chargeable to tax has escaped assessment. The expression reason to believe, postulate bonafide belief that income has escaped assessment in any assessment year and the existence of objective reasons for that belief. The foregoing expression does not mean a purely subjective satisfaction of the AO or pretence based on suspicion and conjecture, but must be believe held in good faith and founded on material that it is not irrelevant or arbitrary. The assessee also objected the reopening on the ground that, all the facts pertaining to the issue under reopening were available with the assessing officer in the original assessment completed under section 143(3). There is no fresh tangible material on record to form an opinion that some income has escaped assessment. Reopening in the absence of any fresh material coming to the notice of assessing officer is illegal and ought to be struck down. The assessee relied on various case laws.

4. The reply of assessee was not accepted by assessing officer. The assessing officer rejected the objection filed by the assessee vide order date 18th February 2014. The assessing officer proceeded to make the reassessment and required certain details from the assessee vide show cause through order sheet entry dated 10th February 2014. The assessee furnished the details of transfer of asset to SREI Infrastructure agreement and accounting treatment, detail as to how the assets were physically transferred to SREI, detail of lease of towers/sites taken from Quipoo with copy of agreement and amount of lease and details of break in service provided due to handing over of the possession of towers /sites to SREI. The assessing officer after going through the records and submission by assessee, concluded that assessee was not able to substantiate its claim that assets were actually transferred to SREI Infrastructure P Ltd by way of any supporting document and the assessment completed under section 143(3) was reopened on the basis of information that the assessee had transferred site to SREI Infrastructure P Ltd, which were not actually handed over and the control continued to be with it. The same sites were taken on lease by the assessee from Quipoo and lease rent was claimed as revenue expenditure under the head "network operating expenses". The whole scheme being in the nature of a camouflage. Thus the re-assessment was valid. The assessing officer disallowed a sum of ₹9,17,42,400/- paid as

lease rent to Quipoo and added back to the total income of assessee in reassessment order passed under section143(3) read with section 147 on 27th March 2014.

5. Aggrieved by the reassessment order and the additions made therein the assessee filed appeal before learned Commissioner (Appeals). Before learned Commissioner (Appeals) the assessee challenged the validity of the reassessment as well as the additions made therein. The assessee also challenged the action of assessing officer that reassessment order was passed in the name of non-existing assessee. The learned Commissioner (Appeals) held that assessing officer reopened the assessment on mere change of opinion and decided to review expenses earlier claimed by assessee, scrutinised by assessing officer and allowed in the original assessment. The assessing officer has not revealed any tangible material that made him the reopening of the assessment and relied on the information document and submission available in the original assessment. The learned Commissioner (Appeals) also held that business of assessee was transferred to a successor and that the assessing officer has not followed the provision of section 170(2) of the Act and held that the reopening is bad in law. Aggrieved by the order of learned Commissioner (Appeals) the revenue has filed pageant appeal before this tribunal.

6. We have heard the submission of learned departmental representative (ld. DR) for the revenue and learned authorised representative (ld. AR) of the assessee and perused the material available on record. The ld. DR for the revenue submits that the action of assessing officer was not based on mere change of opinion. The ld. DR submits that the facts of merger of assessee with Idea Cellular were not brought to the notice of assessing officer. The learned DR for the revenue strongly relied upon the finding of assessing officer.

7. On the other hand, the ld. AR of the assessee submits that the assessment was made on a non-existent entity; therefore, the assessment is null and void. The learned AR further submits that the assessing officer was inform in writing while filing response to the notice under section 148 vide its reply dated 10th February 2014, which was duly received and acknowledged by assessing officer on 19th February 2014 that the assessee has been merged with Idea Cellular Ltd. The assessing officer despite informing about the merger of Spice Communication Ltd with Idea Cellular passed the order in the name of non-existing entity. The reassessment order passed on non-existing entity is null and void. It was submitted that assessment on non-existing entity is jurisdictional defect, which is not a mere irregularity and is not curable. In support of his submission the learned AR of the assessee relied upon the following decisions:-

- Spice Entertainment Ltd Versus CIT (ITA 475 of 2011& 476 of 2011) dated 3 August 2011'
- Jitendra Chanderlal Navlani & others Vs UOI 386 ITR 288 (Bombay High Court),
- Rustagi Engineers Udyog P.Ltd Versus DCIT (67 taxmann.com 284 Delhi High Court),
- PCIT Versus Maruti Suzuki India Ltd (85 taxmann.com 330) Delhi High Court),
- Westlife Development Ltd versus DCIT (ITA 688/Mum/2016) (Mumbai tribunal),
- Silverline Trading Company Ltd Versus PCIT (ITA No. 66633/Mum/2017) (Mumbai tribunal),
- Shell India Markets Private Limited Versus ACIT ITA No. 772/Mumbai/2013,
- Instant Holding Ltd Versus ACIT (ITA No. 4593 and 4748/Mumbai 2011) (Mumbai tribunal),
- Chanderapur Ferro Alloy Plant Steel Authority India Ltd Versus DCIT (ITA No. 7601 and 7602/Mum/2013) Mumbai tribunal,
- Siemans Technology Services Private Limited Versus ACIT (ITA No. 61 3/Mumbai 2012), Mumbai tribunal,
- ACIT Versus ADR Home Decor (P) Limited (61 taxmann.com 243) Delhi tribunal and
- Akzo Noble Chemicals (India) Ltd versus DCIT ITA No. 1225/Pun/2015 Pune tribunal.

8. In alternative submission the learned AR for the assessee submits that reopening based on mere change of opinion is bad in law. The learned AR submits that no new tangible material came to the notice of assessing officer. The assessing officer reopened the assessment on the basis of information available in the assessment record, on the basis of which assessment order under section143 (3) was passed. The assessing officer nowhere in the reasons recorded/ mentioned that any tangible material came to his notice for making belief for reopening of the case. In support of his submission the learned AR of the assessee relied upon the decision of Supreme Court in CIT Versus Kalvinator of India Ltd

(2010) 320 ITR 561 (SC), Idea Cellular Versus DCIT (2008) 301 ITR 407 (Bombay High Court), OHM Stock Brokers. Ltd versus CIT (351 ITR 443) (Bombay High Court), GKN Sinter Metal Ltd versus ACIT (WP No.2639 of 2007) (Bombay High Court), German Remedies Ltd versus DCIT 285 ITR 26 (Bombay High Court), Aroni Commercials Ltd versus JCIT 362 ITR 403 (Bombay High Court) and Plus Paper food Pac Ltd versus ITO 374 ITR 485 (Bombay High Court).

9. In other alternative submission the learned AR submits that merely because there is no discussion of the issue in the assessment order under section 143(3), it does not mean that assessing officer has not applied his mind. The learned AR for the assessee submits that the assessee furnished all details during the original assessment. The assessing officer applied his mind and passed the assessment order by making various additions including disallowance of lease rental. Thus, merely non-discussion of the issue does not mean that the assessing officer has not applied his mind. In support of his submission the learned AR of the assessee relied upon the decision of Supreme Court in CIT versus Kalvinator of India limited 256 ITR 1 (Delhi High Court), Idea cellular versus DCIT (supra) Aroni Commercials Ltd versus DCIT (supra) ACIT versus Rolta India Ltd [2011] 132 ITD 98(Mumbai).

10. The learned AR of the assessee finally submitted that on similar set of Mumbai tribunal in Instant Holding Ltd versus ACIT (supra) also held

that when before finalisation of assessment, it was brought to the notice of assessing officer that assessee stood amalgamated with another company in term of scheme of amalgamation approved by the High Court, the assessing officer still passed the order in the name of non-existing entity, the error on the part of assessing officer is liable to be construed as a jurisdictional defect which goes to the root of the matter and as such the assessment order is liable to be set-aside. The same order was further followed by Mumbai bench in Chanderpur Ferro Alloys Plant versus DCIT (supra) and again Siemens Technology Services Private Limited versus ACIT (supra).

11. We have considered the submission of the parties and perused the material available on record. Ground No. 1 relates to validity of reopening. The crux of the submission of the ld. AR for the assessee is that the reassessment order was passed against the non-existent company despite the fact that the amalgamation was of Spice Communication Ltd with was brought to the notice of the assessing officer. We have noted that the assessing officer issued notice under section 148 dated 26.03.2013 in the name of "***M/s Spice Communication Ltd, -------, New Delhi"***. The assessee in response to the notice under section 148 filed its detailed objection vide reply dated 10.02.2014, which is duly acknowledged by assessing officer, copy of the reply/ objection is filed on record at page umber 39 to 53 of the

paper book (PB). In the said reply the assessee specifically stated that the assessee has been merged with Idea Cellular Limited and that the assessing officer vide its letter dated 7th June 2011 has informed them about the transfer of jurisdiction from New Delhi to Mumbai. We have also seen the copy of the letter dated 07.06.2011 issued by DCIT Cir-9(1), New Delhi, to Spice Communication Ltd, wherein it has been clearly written " ***To Principal Officer Spice Communication Ltd (Now merged with Idea Cellular) ----- NOIDA."*** These facts clearly proves that the fact that Spice Communication Ltd was merged with Idea Cellular Ltd was available on record when the reassessment was dated 27.03.2014 was passed. We have further noted that the ld Commissioner (Appeals) in para 5.7.2 has clearly held the assessing officer was aware of the fact that of amalgamation of Spice Communication with Idea Cellular Ltd with effect 01.03.2010 under the scheme of merger duly approved by Hon'ble Delhi High Court and Gujarat.

12. The coordinate bench of Mumbai Tribunal in Instant Holding Ltd (supra) (authored by ld. V.P.) while referring the decision of Hon'ble Delhi High Court in Spice Entertainment Ltd (supra) held as under:-

> 7. We have carefully considered the rival submissions. The crux of the controversy in the present appeal revolves around the validity of the action of the Assessing Officer in finalizing the assessment order on 19.12.2008 in the name of ITICL, a company which was non-existent as on that date, since it stood amalgamated with IHL w.e.f. 1.4.2007 and stood dissolved and struck-

off from the records of the Registrar of Companies on 5.2.2008 consequent to the scheme of amalgamation approved by the Hon'ble Bombay High Court on 14.12.2007.

8. In the case of Spice Infotainment Ltd. (supra), the facts were that a return was filed for Assessment Year 2002-03 on 30.10.2002 by M/s. Spice Corp Ltd., i.e., the amalgamating company. Subsequently, vide order dated 11.2.2004 passed by the Hon'ble High Court, the said company stood amalgamated with M/s. MCorp Private Ltd., i.e., the amalgamated company w.e.f. 1.7.2003. The return so filed was picked up for scrutiny assessment vide notice u/s. 143(2) of the Act dated 18.10.2003 in the name of M/s. Spice Corp Ltd., i.e., the amalgamating company. In the course of assessment proceedings, the factum of M/s. Spice Corp Ltd. having been dissolved as a result of amalgamation with M/s. MCorp Private Ltd. was brought to the notice of the Assessing Officer. However, the Assessing Officer vide order dated 28.3.2005 passed u/s. 143(3) of the Act framed the assessment on M/s. Spice Corp Ltd., i.e., the amalgamating company. In this factual background, the plea raised by the assessee before the Hon'ble High Court was that the assessment was framed against a non-existing entity as M/s. Spice Corp Ltd. had already amalgamated with M/s. MCorp Private Ltd., and therefore, the assessment order dated 28.3.2005 suffered from a jurisdictional defect. In that case, the Tribunal had taken a view that the action of the Assessing Officer in framing assessment in the name of M/s. Spice Corp Ltd. even after the said entity stood dissolved consequent upon its amalgamation with M/s. MCorp Private Ltd. w.e.f. 1.7.2003 was a mere procedural defect. In this background, the Hon'ble Delhi High Court formulated 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?"

9. The Hon'ble Delhi High Court after referring to the judgement of the Hon'ble Supreme Court in the case of (i) Saraswati Industrial Syndicate v. CIT, 186 ITR 278 and (ii) General Radio and Appliances Co. Ltd. v. M.A. Khader (1986) 60 Comp Case 1013 held that framing of assessment against a non-existing entity goes to the root of the matter, which did not constitute a procedural irregularity but a jurisdictional defect. Accordingly, it answered the aforesaid questions of law in favour of the assessee and against the Revenue and allowed the stand of the assessee.

10. Similarly, even in the case of Intel Technology India Pvt. Ltd. (supra) the Hon'ble Karnataka High Court has reached to a similar conclusion. In the case before the Hon'ble Karnataka High Court, one M/s. SSS Ltd. stood amalgamated with Intel Technology India Pvt. Ltd. w.e.f. 1.4.2004; prior to that, it filed a return of income on 28.11.2003 for Assessment Year 2003-04 and an assessment order was passed on 27.3.2006 in the name of the predecessor amalgamating company, i.e., M/s. SSS Ltd. This assessment order was sought to be challenged on the ground that as on 27.3.2006, i.e., the date of passing of assessment order, the said concern had ceased to exist upon its amalgamation with the successor company. In this factual background, the Hon'ble Karnataka High Court, following the judgement of the Hon'ble Delhi High Court in the case of Spice Infotainment Ltd. (supra), answered the following questions of law in favour of the assessee and against the Revenue.

> "(1) Whether the Tribunal was correct in holding that the order passed by the Assessing Officer on M/s Software & Silicon Systems India Pvt. Ltd., after being intimated about the merger with M/s Intel Technology India Pvt. Ltd., was without jurisdiction against the said company and null and void ?
>
> (2) Whether the Tribunal was correct in holding that the provisions of section 292B of the Act will not make the assessment valid as a defect/omission to incorporate the name of M/s Intel Technology India Pvt. Ltd., in the assessment order as the same is not in substance and effect in confirmative with or according to the intend and purpose of this Act ?

(3) Whether the Tribunal has to examine the matter on merits and record finding on the controversy raised before it both by the revenue as well as the assessee in their separate appeals ?"

11. To the similar effect are the judgements of the Hon'ble Delhi High Court in the case of Dimensions Apparel Pvt. Ltd. and Micra India Pvt. Ltd. (supra). Apart therefrom, the judgement of the Hon'ble Calcutta High Court in the case of I.K. Agencies (P) Ltd. v. Commissioner of Wealth Tax, 347 ITR 664 also supports the proposition sought to be canvassed by the assessee before us. In sum and substance, it is safe to deduce that an order of assessment made on an entity which is otherwise non-existent on the date of such assessment is invalid.

12. Factually speaking, in the present case the aforesaid proposition applies on all fours, as before the finalization of the impugned assessment on 19.12.2008, it was brought to the notice of the Assessing Officer that ITICL stood amalgamated with IHL w.e.f. 1.4.2007 in terms of a scheme of amalgamation approved by the Hon'ble High Court vide order dated 14.12.2007. In our considered opinion, the aforesaid error on the part of the Assessing Officer is liable to be construed as a jurisdictional defect which goes to the root of the matter and such an assessment order is liable to be set-aside. We hold so. At this point, we may take note of the argument set up by the Revenue, which is to say that the amalgamating company, i.e., ITICL was in existence throughout the previous year relevant to assessment year under consideration, and therefore, the order passed in the name of the amalgamating company, i.e., ITICL was a valid assessment. The aforesaid reason has prevailed with the CIT(A) also to reject the plea of the assessee. In our considered opinion, the aforesaid argument of the Revenue deserves to be repelled considering the ratio of the judgement of the Hon'ble Delhi High Court in the case of Spice Infotainment Ltd. (supra). A reading of the judgement of the Hon'ble Delhi High Court in Spice Infotainment Ltd. (supra) reveals that a similar position was canvassed by the Revenue, but the Hon'ble High Court held that the assessment order passed in the name of the erstwhile company was void and such a defect cannot be treated as a procedural defect. In our considered

opinion, the stand of the Revenue as well as the CIT(A) on this aspect is clearly untenable having regard to the aforesaid discussion.

13. In the result, we set-aside the action of the Assessing Officer in framing the assessment against ITICL on 19.12.2008 as the said company was non-existent as it stood amalgamated with IHL w.e.f. 1.4.2007, following the scheme of amalgamation approved by the Hon'ble Bombay High Court on 14.12.2007."

13. The Hon'ble Delhi High Court in PCIT Vs Maruti Suzuki India Ltd (supra) held that where during the pendency of assessment proceedings, the assessee company was amalgamated with another company and thereby lost its existence, assessment order passed subsequently in name of said nonexistent entity would be without jurisdiction and deserved to be set aside.

14. Further, Hon'ble Bombay High Court in Jitendra Chandralal Navlani Vs UOI (supra) held that notice issued under section 148 in respect of non-existent entity and assessment order framed consequent to such notice were without jurisdiction.

15. In view of the aforesaid facts and circumstances of the present appeal and ratio of various decision of Delhi High Court, Bombay High Court and Mumbai Tribunal as refereed above, we set aside the reassessment order dated 27.03.2014 passed under section 143(3) rws 147 as the same was passed against the non-existent entity amalgamated with Idea Cellular Ltd. w.e.f.28.02.2010. Hence, we affirms the order of ld Commissioner (Appeals).

16. As we have allowed the ground No.1 of the appeal on legal issues, which goes to the root of the matter and the assessment has been set-aside as invalid, the discussion on the other grounds of appeal has become academic.

17. ---------- ----------

18.-In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 18/09/2019.

Sd/-	**Sd/-**
G.S. PANNU	**PAWAN SINGH**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Mumbai, Date: 18.09.2019
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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4.The concerned CIT
5. DR "H" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai