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

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)

I.T.A. No. 3476/Mum/2019
(Assessment Year 2016-17)

State Bank of India (Successor to State Bank of Travancore), Financial Reporting & Taxation, 3rd Floor, Corporate Centre, Madam Cama Road, Nariman Point, Mumbai-400 021 **PAN : AAACS8577K / AAGCS9120G**	vs	The Assistant Commissioner of Income-tax – 2(2)(1), Mumbai
APPELLANT		**RESPONDENT**

I.T.A. No. 3574/Mum/2019
(Assessment year : 2016-17)

DCIT – 2(2)(1), Mumbai	vs	State Bank of India (Successor to State Bank of Travancore), Financial Reporting & Taxation, 3rd Floor, Corporate Centre, Madam Cama Road, Nariman Point, Mumbai-400 021 **PAN : AAACS8577K / AAGCS9120G**
APPELLANT		**RESPONDENT**

Assessee represented by	Shri Ketan Ved & Shraddha A. Jain
Department represented by	Shri Vinay Sinha – CIT DR

Date of hearing	19/10/2022

Date of Pronouncement	___/10/2022

O R D E R

PER OM PRAKASH KANT (AM):

These cross appeals by the assessee and the Revenue are directed against order dated 25/03/2019 passed by the Learned Commissioner of Income-tax (Appeals)-5, Mumbai [in short the Ld. CIT(A)] for Assessment Year 2016-17.

2. The grounds raised by the assessee reproduced as under:-

Disallowance u/s 14A
1. The CIT(A) erred in confirming the disallowance by invoking clause (iii) to sub-rule (2) to Rule 8D r.w.s 14A to the extent of 0.5% of average investments even when the investments are held as stock-in-trade.
Without prejudice to the above if at all any disallowance has to be made under that section, same cannot be more than the sum relating to prorate expenditure incurred by treasury department as per regular method of accounting followed and suo-moto disallowed by appellant.
Addition as per rule 6EA
2. The CIT(A) erred in confirming charging to tax unrealised interest of Rs. 2.41 crore in respect of borrower accounts classified as Non performing accounts under RBI directions even when collecting principal itself is uncertain and no income can be said to accrue therefrom.
2.1 The CIT(A) ought to have allowed the sum of Rs. 5.26 crore which was taxed in earlier year since in current year these amounts have been credited to P & L a/c or have satisfied the requirements of the said Rule.
Taxability of income from exchange houses
3. The CIT (A) erred in not excluding income from exchange houses maintained in UAE and Oman aggregating to Rs 12.40 crore overlooking the fact said exchanges constituted associated enterprises within the Article 7 read with Article 9 of the respective DTAA with India according to which said income is not exigible to tax in India.
Taxability of amount credited to P & L a/c in respect of bankers cheque
4. The CIT(A) erred in confirming charging to tax the amount un-encashed bankers cheque written back in P & L account based on RBI direction, even when such write-back did not obviate liability to buyers of bankers cheques as and when demanded.
Disallowance u/s 36(l)(viii)
5. The CIT(A) erred in confirming the method adopted by AO in arriving at profit derived from eligible business for deduction u/s 36(l)(viii) by apportioning the income as against the correct method is apportioning common expenditure between specified business and others, has been correctly done by the appellant.
Disallowance u/s 36(l)(vii)
6. The CIT(A) erred in directing the AO while computing eligible deduction u/s 36(l)(vii) to follow a particular method of arriving at the balance in provision for bad and doubtful debts account whereby the AO is directed to omit any debit balance that might arise as balance in provision account. Such omission is not prescribed under the said section.

Disallowance of provision for LFC/HTC and sick leave

7. The CIT(A) erred in confirming the disallowance expenditure by way provision for LFC/HTC and sick leave invoking sec 43B of the Act, even when such expenditures are not covered by said section.

Disallowance of expenditure on community services banking

8. The learned CIT(A) erred in disallowing a sum of Rs 1.59 crore as being in the nature of CSR expenditure covered by the proviso to section 37(1) whereas appellant bank is not governed by a mandatory requirement of CSR expenditure and said sum were paid as a business exigency to promote appellant's image and goodwill among stakeholders.

Disallowance of provision for leave encashment

9. The CIT(A) failed to note that provisions of section 43B are not applicable to provision for leave encashment as upheld in a number of judicial decisions and accordingly no disallowance is warranted.

Recovery in respect of bad debts written off

10. The CIT(A) erred in confirming the taxing of recovery in respect of bad debts written off which was not allowed *as* deduction by erroneously relying on the decision of Karnataka High Court in the case of Pragathi Grarnin Bank (91 taxmann.com 343) without appreciating that in that case the issue was on taxability of write back of excess provision for bad and doubtful debts and which was also decided in favour of assessee.

Enhancement of income by disallowing interest paid on bonds

11. The CIT(A) erred in making an enhancement of assessed income, travelling beyond the subject-matter of the assessment and assessing a new sources of income. The suo moto disallowance of Rs 28.63 crore being interest paid on amount borrowed by issuing Innovative Perpetual Debt Instruments is not an issue discussed in the assessment order nor mentioned in the return of Income.

11.1 Without prejudice to above, the CIT(A) erred in re-characterising funds raised through issue of debt instruments as share capital and further wrongly extrapolating interest payments as dividend and disallowing interest paid on the debt raised."

3. The grounds raised by the Revenue are reproduced as under:

1." *Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) was right in directing to delete BPI without appreciating the fact that the HIM category of Securities are long term securities held till maturity and forming a part of investment and not a stock in trade hence BPI on HTM Securities is a capital outlay and hence not an allowable deduction?*

"Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) was right in directing to delete Broken Period Interest without considering the decision of honourable Supreme Court in the case of Vijaya Bank Ltd. V/s Addl. CIT (1991) 187 ITR 547 (S.C) wherein it is held that BPI is a part of capital outlay for acquisition of securities and hence not an allowable deduction?

" Whether on the facts and in the circumstances of the case whether the Ld. CIT(A) was correct in law in deleting the disallowance made under Rule 8D(2)(ii) in view of the recent decision of the Hon'ble Supreme Court in the case of Avon Cycle Ltd (Civil appeal No. 1423/2015) wherein the disallowance under section Rule 8(D)(2)(ii) in case of mixed use of funds was upheld?.

"Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in relating loss on account of depreciation of securities of HTM category without appreciating that no depreciation is to be provided for investment classified under the HTM category. ?"

"Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) was correct in holding that the entire loss on sale of assets to ARCs is allowable as a deduction in the current year, ignoring the fact that RBI guidelines that apply in consonance with the provisions of the Income Tax Act mandate that such loss be apportioned in four quarters ?

"Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) was correct in holding that loss on sale of assess *to ARCS is an allowable deduction when the assets sold to ARCs actually belong to the NPA category and any loss incurred on the sale of the same is hit by provisions of 36(1)(vii) of the Act and can be claimed under the provisions of 36(1)(vii) of the Act only?*
"Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) was right in directing to deleting the disallowance made out of provision made for resettlement, memento on retirement and silver jubilee award expenses without appreciating the fact that the same are not incurred only & exclusively for the purpose of business?"

"Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) was right in directing to delete the additions made on account of accrued interest without appreciating the fact that as per the provision u/s 5 of the I. T. Act the total Income of a person includes all income which has accrued to him during such period.

"Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) was right in directing to delete the additions made on account of accrued interest without appreciating the fact that as per the mercantile system of accounting in accordance with the provision u/s 145 of the IT Act the total income of a person includes all income which has accrued to him during such period?"

4. The assessee also raised two additional grounds, which are reproduced as under:

"Additional Ground No. 1 : Order passed on a non-existent entity is bad in law

1. *On the facts and in the circumstances of the case and in law, the appellant submits that the assessment order passed by the assessing officer is bad in law as it is passed on a non-existent entity, viz., the State Bank of Travancore (SET), which entity has ceased to exist as on the date of the assessment order on account of its merger with the State Bank of India with effect from 1 April 2017 as a result of the Government of India Notification no. 128 dated 22.02.2017, thereby rendering the entire assessment proceedings void ab initio against the non-existent entity.*

Additional Ground No. 2 : Deduction in respect of education cess

> *2. On the facts and in the circumstances of the case and in law, the appellant submits that a deduction in respect of the education cess on the income-tax paid during the year be allowed while computing its income chargeable to tax."*

5. The additional Ground No.2 raised by the assessee was not pressed and therefore same is dismissed as infructuous.

6. Regarding the additional ground of completing assessment on the non-existing entity, same is purely legal ground and no fresh investigation of facts is required therefore, after hearing of the parties, same was admitted in view of the decision of the Hon'ble Supreme Court in the case of National thermal Power Co 229 ITR 383 (SC).

7. Addressing the additional ground, the Learned Counsel of the assessee submitted that after filing return of income on 28/11/2016 , the erstwhile entity i.e. M/s State Bank of Travancore merged with State Bank of India with effect from 01/04/2017 by way of Gazette notification (supra). Subsequent to the amalgamation, the case of the assessee was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short the Act) was issued in the name of erstwhile State Bank of Tavancore only and assessment was also completed on 24/03/2018 on the erstwhile entity only. The Learned Counsel submitted that the fact of amalgamation was duly informed to the Assessing Officer and he has also duly noted in the first para of the assessment order. Therefore according to the Learned Counsel of the assessee, the assessment has been completed by the Assessing Officer on non-existent entity, which is void ab initio in view of the decision of the Hon'ble Supreme Court in the case of **PCIT Vs Maruti Suzuki India Ltd (2019) 416 ITR 613(SC)**. The Learned Counsel also relied on the ITAT Mumbai Bench decision in the case of State Bank of India (successor

to erstwhile state Bank of Indore) in **ITA Nos. 277 to 280/Mum/2022 and State Bank of India (successor to State Bank of Bikaner and Jaipur) in ITA No. 2875/Mum/2019.**

8. The Learned DR, on the other hand, submitted that in view of the decision of the Hon'ble Supreme Court in the case of PCIT Vs Mahagun Realtor Private Limited [2022 SCC OnLine SC 407] wherein it is held that in the process of amalgamation, the business of the erstwhile entity is taken over by the amalgamated entity and thus the old entity is not destroyed. He submitted that in the instant case also facts are identical, thus ratio in the case of Maruti Suzuki India Private Limited (supra) is not applicable over facts of the case.

9. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The coordinate bench of the Tribunal in the case of state Bank of India (successor to erstwhile state Bank of Indore)(supra), wherein the Bench relied on the earlier decision in the case of the Sate Bank of India (successor to erstwhile state Bank of Bikaner & Jaipur) in ITA Nos. 277 to 280, 365, 411 & 412/Mum/2022, held as under:

> 24. Considered the rival submissions and material placed on record, we observe that on similar circumstances in which "State Bank of Bikaner and Jaipur" merged with the "SBI", the Coordinate Bench following the decision of the PCIT v. Maruti Suzuki India Ltd., [2019] 416 ITR 613 (SC) in ITA.No. 2875/Mum/2019 for the A.Y. 2016-17 dated 25.04.2022 held that Assessment Order passed in the name of the erstwhile company is void ab-initio and quashed the same. While holding so the Coordinate Bench held as under: -
>
> > "2. Assessee filed Additional grounds of appeal objecting passing of the assessment order on a non-existing entity, hence it is void ab initio under Rule 11 of I.T. Rules, 1963. Since the additional ground raised by the assessee is legal ground which goes

to the root of the case, accordingly, this additional Ground No. (i) is admitted for adjudication.

3. At the time of hearing, it is brought to our notice that Assessing Officer has observed in its Assessment Order that the erstwhile State Bank of Bikaner and Jaipur was a public sector banking company, as per the order GSR 156(E) dated 22.02.2017 notified vide the Gazette of India No. 128 dated 22.02.2017 the erstwhile State Bank of Bikaner and Jaipur has been acquired by/amalgamated into M/s. State Bank of India w.e.f 01.04.2017. Subsequently this case was selected for scrutiny and statutory notice u/s. 143(2) were issued and served on the assessee. Ld.AR brought to our notice that even though Assessing Officer has observed that State Bank of Bikaner and Jaipur is merged with M/s. State Bank of India still he passed an order in the name of the non existing entity. In this regard he relied on the decision of the Hon'ble Supreme Court in the case of PCIT v. Maruti Suzuki India Ltd., [2019] 416 ITR 613 (SC).

4. On the other hand, Ld.DR relied on the orders passed by the Assessing Officer.

5. Considered the rival submissions and material placed on record, we observed that the Assessing Officer has clearly understood and recorded that the erstwhile company State Bank of Bikaner and Jaipur was acquired by/amalgamated into M/s. State Bank of India w.e.f 01.04.2017 still he passed the Assessment Order in the erstwhile company. As held in the PCIT v. Maruti Suzuki India Ltd., (supra) the Hon'ble Supreme Court had decided the issue in favour of the assessee by observing as under: -

> "Held, dismissing 'the appeal, (i) that the income sought to be subjected to the charge of tax for the assessment year 2012- 13 was the income of the erstwhile entity (S) prior to amalgamation. The consequence of the scheme of amalgamation approved under section 394 of the Companies Act, 1956 was that the amalgamating company ceased to exist. It could not thereafter be regarded as a person under section 2(31) of the Act against which assessment proceedings could be initiated or an order of assessment. Notice under section 143(2) was issued on September 26, 2013 to the amalgamating company, 5, which was followed by a notice to it under section 142(1). Prior to the date on which the jurisdictional notice under section 143(2) was issued, the scheme of amalgamation had been approved on January 29, 2013 by the High Court under the Companies Act, 1956 with effect from April 1, 2012. The Assessing Officer had assumed jurisdiction to make an assessment in pursuance of the notice under section 143(2). The notice was issued in the name of the amalgamating company in spite of the fact that on April 2, 2013, the amalgamated company M had addressed a communication to the Assessing Officer intimating the fact of amalgamation. On these facts, the initiation of assessment proceedings against an entity which had ceased to exist was void ab initio.

6. Respectfully following the above said decision, we hold that the Assessment Order passed in the name of the erstwhile company is void ab initio.

> Accordingly, assessment order passed is quashed. The other grounds raised by the assessee are not adjudicated."

> 25. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2016-17, we observe that Ld.DR has raised certain objections that (a) assessee has filed Form No. 35 in the erstwhile company name, we observe that the appeal cannot be filed before Learned Commissioner of Income Tax (Appeals) without following the Name/PAN mentioned in the Assessment Order . Therefore, this argument is misplaced. (b) With regard to other arguments on filing the return of income in erstwhile bank name and not surrendering the PAN, the return of income was filed at the time when the merger scheme was not approved by Hon'ble High Court. With regard to surrender of PAN this has relevance when the whole business is merged with the new company and what is relevant is not existence of the PAN, the relevance is how the Assessing Officer treats the non existing company in the Assessment Order particularly when it is brought to his notice of the facts. Considering the above discussion, we allow the additional ground (i) raised by the assessee. The other grounds raised by the assessee are not adjudicated and hence kept open."

10. In above decision, the Coordinate Bench has followed the decision in the case of PCIT Vs Maruti Suzuki India Private Limited(supra).

11. As far as the decision in the case of Mahagun Realtor private Limited (supra), relied upon by the Learned DR is concerned, we find that in said case, the fact of amalgamation was not intimated to the Assessing Officer and assessment and appellate proceedings were participated in the capacity of erstwhile entity and therefore Hon'ble Supreme Court rejected quashing of assessment as assessment on non-existent entity. The relevant finding of the Hon'ble Supreme Court is reproduced as under:

> *41. In the light of the facts, what is overwhelmingly evident- is that the amalgamation was known to the assessee, even at the stage when the search and seizure operations took place, as well as statements were recorded by the revenue of the directors and managing director of the group. A return was filed, pursuant to notice, which suppressed the fact of amalgamation; on the contrary, the return was of MRPL. Though that entity ceased to be in existence, in law, yet, appeals were filed on its behalf before the CIT, and a cross appeal was filed before ITAT. Even the affidavit before this court is on behalf of the director of*

MRPL. Furthermore, the assessment order painstakingly attributes specific amounts surrendered by MRPL, and after considering the special auditor's report, brings specific amounts to tax, in the search assessment order. That order is no doubt expressed to be of MRPL (as the assessee) - but represented by the transferee, MIPL. All these clearly indicate that the order adopted a particular method of expressing the tax liability. The AO, on the other hand, had the option of making a common order, with MIPL as the assessee, but containing separate parts, relating to the different transferor companies (Mahagun Developers Ltd., Mahagun Realtors Pvt. Ltd., Universal Advertising Pvt. Ltd., ADR Home Décor Pvt. Ltd.). The mere choice of the AO in issuing a separate order in respect of MRPL, in these circumstances, cannot nullify it. Right from the time it was issued, and at all stages of various proceedings, the parties concerned (i.e., MIPL) treated it to be in respect of the transferee company (MIPL) by virtue of the amalgamation order – and Section 394 (2). Furthermore, it would be anybody's guess, if any refund were due, as to whether MIPL would then say that it is not entitled to it, because the refund order would be issued in favour of a non-existing company (MRPL). Having regard to all these reasons, this court is of the opinion that in the facts of this case, the conduct of the assessee, commencing from the date the search took place, and before all forums, reflects that it consistently held itself out as the assessee. The approach and order of the AO is, in this court's opinion in consonance with the decision in Marshall & Sons (supra), which had held that:

> *"an assessment can always be made and is supposed to be made on the Transferee Company taking into account the income of both the Transferor and Transferee Company."*

42. Before concluding, this Court notes and holds that whether corporate death of an entity upon amalgamation per se invalidates an assessment order ordinarily cannot be determined on a bare application of Section 481 of the Companies Act, 1956 (and its equivalent in the 2013 Act), but would depend on the terms of the amalgamation and the facts of each case.

43. In view of the foregoing discussion and having regard to the facts of this case, this court is of the considered view, that the impugned order of the High Court cannot be sustained; it is set aside. Since the appeal of the revenue against the order of the CIT was not heard on merits, the matter is restored to the file of ITAT, which shall proceed to hear the parties on the merits of the appeal- as well as the cross objections, on issues, other than the nullity of the assessment order, on merits. The appeal is allowed, in the above terms, without order on costs."

12. Thus, respectfully following the decision of Co-ordinate Bench of Tribunal (supra), the assessment made on non-existent entity is quashed as void ab initio. The additional ground No. 1 raised by the assessee is accordingly allowed. The remaining grounds raised by the assessee are rendered only academic and therefore same are dismissed as infructuous.

13. The grounds raised in the appeal of the revenue are also rendered infructuous .

14. In the result, the appeal of the assessee is allowed, whereas the appeal of the revenue is dismissed.

Order pronounced in the open court on this ____ day of October, 2022.

(SANDEEP SINGH KARHAIL)	(OM PRAKASHRI. KANT)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai, दिनांक/Dated: /10/2022
Dragaon Legal / Pavanan, Sr.PS

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

		Date	Initial	
1.	Draft dictated on	26/10		Sr.PS
2.	Draft placed before author	27/10		Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			
11.	Dictation Pad is enclosed	Yes		