

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
MS KAVITHA RAJAGOPAL, HON'BLE JUDICIAL MEMBER**

ITA NO.662/MUM/2022 (A.Y: 2017-18)

Vodafone Idea Limited {Erstwhile Known as Aditya Birla Telecom Limited} Birla Centurion, 10 th Floor Plot No. 794, B Wing Pandurang Budhkar Marg Worli, Mumbai – 400030 PAN: AAACB2100P	v.	PCIT – Circle 5 Room No. 515, 5 th Floor Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee Represented by	:	Shri J. D. Mistry Shri Madhur Aggarwal & Shri Ninad Patade
Department Represented by	:	Shri Achal Sharma
Date of Hearing	:	07.09.2022
Date of Pronouncement	:	01.12.2022

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the assessee against the order of the Learned Principal Commissioner of Income Tax, Mumbai-5 [hereinafter in short "Ld. Pr.CIT"] dated 26.03.2022 for the A.Y.2017-18 passed u/s.263 of the Income-tax Act, 1961 (in short "Act").

2. Brief facts of the case are, assessee M/s. Aditya Birla Telecom Limited (erstwhile name of the assessee) filed its return of income on 28.09.2017 declaring total income of ₹.127,63,86,997/-. The case was selected for scrutiny through CASS. The assessee, i.e., M/s. Aditya Birla Telecom Limited merged into M/s. Vodafone Idea Limited. The assessment was completed u/s.143(3) of the Act on 05.12.2019 assessing the total income of assessee at ₹.134,10,75,282/-.

3. Ld. Pr.CIT, Mumbai -5 while perusing the assessment records, he observed that the assessee company in the guise of reduction of capital, sold shares held by it in Indus Towers Ltd to P5 Asia Holdings Investments (Mauritius) Ltd for ₹.25,41,30,00,000/-. However, Ld.Pr.CIT observed that no capital gain tax was paid on the said transaction. The assessee company has shown the profit on above amount of ₹.1380 crores as Other Comprehensive Income but has not credited the same in its profit and loss account, arisen due to the sale of the said shares. The Assessing Officer during assessment has not enquired and examined the said transaction. According to him, it is evident that assessment order passed u/s. 143(3) of the Act dated 05.12.2019, is erroneous in so far as it is prejudicial to the interest of revenue, within the meaning of Section 263 of the Act. Accordingly, he issued notice

u/s.263 of the Act on 01.03.2022 through ITBA, thereby providing assessee the opportunity of being heard.

4. In response to the above notice, the assessee company vide letter dated 07.03.2022 submitted as under: -

"We refer to the notice dated 01 March 2022 ("the Notice") issued under section 263 of the Act by your goodself to VIL (copy enclosed as Annexure 1) proposing revisionary proceedings against the assessment order dated 05 December 2019 ("assessment order" or "impugned order) passed by the Assistant Commissioner of Income Tax-5(2)(2), Mumbai ("learned AO") under section 143(3) of the Act

A copy of the assessment order is enclosed as Annexure 2

As per the notice issued under section 263, your goodself is of the view that the impugned order dated 05 December 2019 is erroneous so far as it is prejudicial to the interests of the revenue on account of the following

3. *On perusal of the records, it is observed that the company in the guise of reduction of capital, sold its own shares in Indus Towers Ltd to P5 Asia Holdings Investments (Mauribus) Ltd for Rs.25,41,30,00,000 However, no capital gain tax was paid on the said income. The assessee company has shown the above amount of Rs. 1380 crores as Other Comprehensive Income but has not related the same in its profit and loss account, arisen due to the sale of the said shares.*

4. *Therefore, it is clear that the assessment order passed u/s.143(3) dated 05. 12.2019 is erroneous in so far as it is prejudicial to the interest of revenue, within the meaning of Sec 263 of the Act. Hence, it is proposed to revise the aforesaid order u/s 263 of the Act.*

In this connection, we wish to submit our detailed submission in response to your Notice as under: -

1. *Background*

1. *The brief facts in respect of the above issues are outlined below*

1.1 *The Assessee is the successor of the erstwhile Aditya Birla Telecom Limited which got merged into Vodafone Idea Limited vide Ahmedabad NCLT order dated 13 November 2018 with appointed date as 01 April 2018. The assessee has intimated to the Learned Assistant Commissioner of Income Tax - 5(2)(2) the details relating to amalgamation of ABT into VIL vide letter dated 04 February 2019*

1.2 *The Assessee filled its return of income for AY 2017-18 on 28.09 2017 declaring a total income of IN 127,63 86,997/ The case was selected for scrutiny under CASS and the assessment was completed u/s 143(3) of the Act on 05.12.2019 ("assessment order) assessing total income of IN 134,10,75,282/-*

1.3. *The Assessee has not accepted the additions made in the impugned order and has filed an appeal before the Honble Commissioner of Income (Appeals) wherein, inter alia, the Assessee has challenged the validity of the assessment order. Copy of the appeal filed is enclosed as Annexure 3.*

1.4 *During the course of assessment proceedings, the learned AO issued Notice u/s 142(1) of the Act dated 31 January 2019 and the assessee through its submission dated 04 February 2019 filed(sic) details along with the financial statements for the year ended 31 March 2017 - which includes Note 19 on capital reduction along with Note 7 and Note 29 which providing details on non-current investments and its movements. Copy of the financial statements is enclosed as Annexure 4.*

1.5 *The AO further issued Notice U/s 142(1) of the Act dated 12 October 2019 (copy of Notice is enclosed as Annexure 5) and enquired amongst other items about the capital reduction of equityshares (page no 2 of the Notice dated 12 October 2019).*

1.6 *The Assessee through its submission dated 11 November 2019 had made detailed submission on the capital reduction of its equity shares and distribution of 4.85% of shares held in Indus Towers Limited ("Indus) to P5 Asia Holdings Investments (Mauritius) Ltd ("PS") (copy enclosed as*

Annexure 6). The relevant extracts of the same are reproduced as under: -

Capital reduction of equity share and distribution of 4.8596 Indus stake to P5

The Company held 16% equity stake in Indus at 7,330.B crore as on 31 March 2015, which was fair valued at INR 8,383.76 crore as on 31 March 2016

On adoption of IND AS, the Company opted for accounting policy of fair valuing Investment in joint venture through Other Comprehensive income (OCI) in accordance with INS AS 109 and resultantly, as on 01 April 2015 Indus investments were fair valued by an additional amount of IN 38.31 crore-Indus investments held by the Company were therefore recorded at IN 7,369 07 crore. as on 01 April 2015

During FY 2015-16 as well, investments held by the Company in Indus were fair valued and recorded at INR 8,383.75 crore (as on 31 March 2016) by way of corresponding credit to OCI by IN1,014.69 crore.

During FY 2016-17, the Company cancelled equity share capital held by P5 under a Court approved scheme for capital reduction and distributed thereof

(i) 57,794 equity shares of Indus (representing 4.85% equity stake in Indus) to P5 on 31 January 2017; and

(i) INR 455 crore to PS on 1 February 2017.

A copy of the Court Scheme is attached herewith in Annexure 4. The overall movement for investments in Indus is tabulated below.

1.6.1. Further, the overall movement in the investments in Indus were also shared as part of the submission dated 11 November 2019.

1.1.1 A copy of the Bombay High Court order dated 14 December 2016 approving the Capital reduction Scheme was also enclosed as Annexure 4 to the submission dated 11 November 2019 (copy enclosed as Annexure 7).

1.1. Post considering the detailed submission on the capital reduction and the details submitted during the course of proceedings, the learned AO passed an assessment order dated 05 December 2019

1. *Our detailed submissions*

B.1 The proposed proceedings under section 263 of the Act needs to be dropped in view of the following

1.8 As indicated above, during the course of assessment proceedings, the learned AO has done a detailed examination of the following documents/information submitted during the assessment proceedings

(a) Financial statements filed through the submission dated 04 February 2019- refer Note 19 to the financial statements provides details of the capital reduction scheme and the distribution of Indus shares to P5 along with Note 7 and Note 29 which providing details on non-current investments and its movements

(b) Notice dated 12 October 2019 with specific queries and assessee made submission dated 11 November 2019 which provides complete details of the court approved capital reduction and thereby distribution of Indus shares to P5 along with movement of non-current investments being shares held in Indus

(c) Copy of the Bombay HC Order dated 14 December 2016

It is therefore clear that learned AO has examined the above documents relating to reduction of capital by the company and did not arrive at any adverse conclusions in passing the assessment order dated 05 December 2019

1. in view of the above, the assessee submits that the proceedings u/s 263 of the Act needs to be dropped as

i) Twin conditions of assessment order being erroneous so far as it is prejudicial to the interest of the revenue is not satisfied in the present case

(ii) Assessment Order in the present case cannot be regarded as erroneous, since the learned AO had done detailed inquiries on the issues sought to be revised u/s 263 of the Act and there was a proper application of mind on the part of AO

(iii) The fact that the Order does not discuss this specific issue does not necessarily lead to the conclusion that the Order was passed without making any inquiries or verification as such, and

(iv) Assessment order in the present case cannot be deemed to be erroneous as the same does not even fall within the purview of Explanation 2 to section 263 of the Act.

We have elaborated each of the above with relevant judicial precedents in Annexure 8

Without prejudice to the above,

B.2 The proposed revision is not justified on merits:

B.2.1 Distribution to shareholders on capital reduction does not give rise to capital gains in the hands of the company

3. In the revisionary notice u/s 263, it has been alleged that in the guise of reduction of sharecapital, the assessee has sold its own shares held in Indus to P5 and no capital gain tax has been paid by the assessee. Further, it is alleged that the assessee company has shown the above amount of IN 1380 crores as Other Comprehensive Income but has not related the same in its profit and loss account, arisen due to the sale of the said shares.

4. In this regard, the assessee refers to the detailed submissions filed during the course of assessment proceedings and submits that it has not undertaken any transaction for sale of shares held in Indus as alleged in the notice. During FY 2016-17, it had distributed 4 85% shares held in Indus to P5 under a Bombay High Court approved scheme of capital reduction.

5. The rationale for the scheme was to facilitate direct equity holding by P5 in Indus, instead of the indirect holding held presently through the assessee which is also evidence from the fact that ABTL was a holding company holding investments only in Indus and thus derived its value entirely from investments in Indus

5.1 Without prejudice to our submission in para B 1 on the validity of the proceedings, with regard to the alleged contention of sale of shares held in Indus and the capital gains tax implications on distribution of Indus shares under the court approved capital reduction scheme, the assessee submits as under

5.1.1. The distribution to the shareholders pursuant to capital reduction cannot be regarded as sale or transfer under

section 2(47) of the Act and hence, such distribution does not result in levy of capital gains tax in the hands of the assessee.

5.1.2 Reliance in this regard is placed on the ratio of Supreme Court ruling in the case of CIT Vs. Madurai Mills Co. Ltd. (1973) 89 IT 45 (SC) where the question was whether the distribution of assets of a company in liquidation amounted to a sale, exchange, relinquishment or transfer within the terms of section 128 of the Indian Income-tax Act, 1922, so as to give rise to capital gains to the shareholders of the company therefrom. The Supreme Court held as under

"The act of each of the liquidators in distributing the assets of the company which had gone into voluntary liquidation did not result in the creation of new rights. It merely entailed recognition of legal rights which were in existence prior to the distribution. A liquidator is only a trustee in the sense beneficially to the company and passes into his custody, to be applied by him as directed by the statute. When a shareholder receives money representing his share on distribution of the net assets of the company in liquidation, he receives that money in satisfaction of the right which belonged to him by virtue of his holding the shares and not by operation of any transaction which amounts to sale, exchange, relinquishment or transfer. In the circumstances, it could not be held that the assessee-company was liable to pay tax on capital gains as contemplated by section 128 of the 1922 Act

5.1.3. The above principle has now been enshrined in section 46(1) of the Act, which provides that distribution of its assets by a company to its shareholders upon liquidation shall not be regarded as transfer by the company for the purposes of the Act

514 Therefore, the Act now itself envisages that the company cannot be said to have transferred any asset on account of distribution to its shareholders at the time of liquidation

5.1.5 The aforesaid principle enshrined in section 46(1) of the Act shall also be applicable to cases involving distribution of its assets by a company to its shareholders pursuant to capital reduction and thus, such distribution does not result in any

transfer and not capital gains tax implications arises for the distributing company

5.1.6 Attention at this juncture is invited to the jurisdictional Bombay High Court ruling in the case of Commissioner of Gift-tax v. CawasyJehangir Co. (P) Ltd. (1977) 106 ITR 390 (Bombay). wherein the Bombay High Court relied on the Apex Court decision in the case of Madurai Mills (supra) and held that distribution of its assets by a company to its shareholders upon reduction of its capital cannot amount to transfer The relevant extract of the decision is reproduced as under

"It is true that a company is, in law, a separate legal entity from its shareholders, but when the assets of the company are distributed amongst its shareholder, either on a reduction of capital or in the course of the winding-up of that company, new rights are not created so as to amount to a transfer of property, an ingredient which is implicit in the very concept of transfer, as clearly appears. from the decision of the Supreme Court in Madurai Mills' case. What happens on a reduction of the share capital of a company is much the same as what happens in the case of the winding-up of a company, as in Madura Mills' case in so far as what the shareholders get is only what they are entitled to by the very fact of their being shareholders of that company, and such a transaction cannot amount to a transfer.

5.1.7 In this regard, we wish to submit that it is a well settled principle that the principles upheld by the High Court in a particular State are binding on all the authorities under the superintendence of that State and they cannot ignore it, either by initiating or deciding the matters before them. Reliance in this regard is placed on the following precedents

- *CIT VGM Stainless Steel Pvt. Ltd. 263 ITR 255 (SC);*
- *UOI v Kamlakshi Finance Corporation Ltd AIR 1992 SC 711,*
- *Bank of Baroda v H.C. Shrivastva 122 Taxman 330 (Bombay);*
- *Agarwal Warehouse and leasing Ltd v CIT 257 TR 235 (Madhya Pradesh).*
- *Commissioner of Income-tax, Bhopal vs. Raison Industries Ltd (2007) 207 CTR 201 (SC);*

- *HDFC Bank Ltd. Vs. DCIT (2016) 383 ITR 529 (Bombay)*
- *Reliance Infrastructure Ltd Vs DCIT (2016) 76 taxmann.com: 238*
- *Bank of Baroda vs. HCShrivatsava(2002) 175 CTR 663 (Bombay)*
- *K Subramanian vs. Siemens India Ltd. (1983) 36 CTR 197 (Bombay),*
- *Kaira District Co-operative Milk Producers Union Ltd, V/S DCIT (2016) 386 ITR 633 (Gujarat).*

it is submitted that since the above judgment has been rendered by the jurisdictional Bombay High Court it is binding on this issue.

B.2.2 In any case, distribution of shares on capital reduction cannot be considered as 'sale' by the Company

51.8 Without prejudice to the above, the Notice states that "that the company in the guise of reduction of capital, sold its own shares in Indus Towers Ltd to P5 Asia Holdings Investments(Mauritius) Ltd.

It is submitted that the distribution of shares on capital reduction cannot be considered as transaction of "sale of shares. Attention in this regard is drawn to the Supreme Court ruling of Motors & General Stores (P) Ltd. [1967] 66 ITR 692 (SC) wherein was held that

It is clear, therefore, that both under the Sale of Goods Act and the Transfer of Property Act, sale is a transfer of property in the goods or of the ownership in immovable property for money consideration

Therefore, in order for a transaction to be considered as a 'sale, there must be a sum of money which is paid by the buyer to the seller. In the current situation, there is no consideration in monetary terms which the Assessee company has received on reduction of its capital. Hence, it is submitted that same cannot be termed as 'sale. Therefore, it is submitted that the assessee has not undertaken any transaction for sale of Indus shares during AY 2017-18. Similar, principle has been upheld by courts in the following rulings

- *CIT v. Dewas Cine Corp (1968) 68 ITR 240 (SC)*
- *Calcutta Electric Supply Corporation Ltd v. CIT (1951) 19 IT 406 (CAL)*

B.2.3 In any case, the computation mechanism fails as there is no consideration accruing or receivable by the Assessee Company on capital reduction

5.1.9 In any case, even where the distribution to a shareholder is to be considered as a transfer under section 2(47) of the Act, in order to attract the charge of tax as capital gains under section 45 of the Act read with section 48 of the Act consideration must be received or must accrue to the assessee as a result of such transfer. There must be an element of consideration for the transfer and then only would it be considered as transfer eligible to capital gains tax

Without prejudice to our submission above that there is no 'transfer in the present case as held by the Hon ble Bom HC in the case of Cawasji Jehangir Co. (P) Ltd. (supra), it is submitted that no consideration accrued to or received by the assessee for distribution of Indus shares to P5 pursuant to capital reduction scheme. Hence, the computation mechanism under section 48 of the Act falls resulting into no capital gains tax implications under section 45 of the Act. Therefore, the distribution of Indus shares to P5 cannot be subject to levy of capital gains tax in the hands of assessee.

Reference could be made to the ratio of the following judicial precedents in support of the above:

- 1. CIT vs. Texspin Engg & Mfg Works (2003) 263 ITR 345 (Bom HC);*
- 2. Sadanand S. Varde vs. State of Maharashtra 274 IT 609 (Bom HC),*
- 3. Oudh Sugar Mills Limited vs. ITO (1990) 35 ITD 76 (Mum, ITAT),*
- 4. Credit Suisse (International) Holding AG, In re 24 taxmann.com 224 (AAR- New Delhi)*
- 5. Hoechst GmbH, In re (2007) 289 ITR 312 (AAR- New Delhi);*
- 6. Dana Corporation (2010) 321 ITR 178 (AR-New Delhi),*
- 7. Banca Sella SpA, In re (2016) 387 ITR 358 (AAR New Delhi)*

B.2.4 Erroneous reference to accounting entry in the Notice

5.1.10. Additionally, the notice alleges that the assessee company has shown the above amount of Rs.1380 crores as Other Comprehensive Income but has not related the same in its profit and loss account, arisen due to the sale of the said shares is completely erroneous

In this regard, the assessee submits that the amount recorded in the financial statement at Note 14(d) of IN 1380 crores represent Net fair value gain on the investments in equity instruments at FVTOCI Also, the Note 29 to the financial statements provides the movement in non-current investments through FVTOCI

The fair value recognition of financial instruments (investments in Indus shares) is recognized in terms of INDAS 109 which requires the assessee to re-measure its investments of fair value at each reporting date ie. 31 March 2017 in the case under consideration. Therefore, it is submitted That the gains of IN 1380 crore represents Net fair value gain on the investments in equity instruments at FVTOCI and it is not a taxable income by any stretch of imagination

1. Our prayer

In view of our aforesaid submissions, the relevant facts and the legal position, we wish to summarise as under. The revisionary proceedings proposed u/s 263 of the Act for AY 2017-18 is bad in law and requires to be dropped as:

1. Twin conditions of assessment order being erroneous so far as it is prejudicial to the interest of the revenue is not satisfied in the present case,

2. Assessment Order in the present case cannot be regarded as erroneous, since the learned AO had done detailed inquiries on the issues sought to be revised u/s 263 of the Act and there was a proper application of mind on the part of AO

3. The fact that the Order does not discuss this specific issue does not necessarily lead to the conclusion that the Order was passed without making any inquiries or verification as such; and

4. Assessment order in the present case cannot be deemed to be erroneous as the same does not even fall within the purview of Explanation 2 to section 263 of the Act.

7 In any case, the distribution of shares by the Company to its shareholder pursuant to court approved scheme of capital reduction cannot be regarded as "transfer or (sale) under section 2(47) of the Act and hence, such distribution does not result in levy of capital gains tax in the hands of the Company The above principal is upheld by the SC and jurisdictional Bombay HC which is binding in this case

We trust the above clarifies the issue and your goodself will drop the proposed revisionary proceedings. Should you require any further information or clarifications, we would be happy to provide the same. We also request your goodself to allow us a further opportunity of personal hearing in the matter."

5. After considering the submissions of the assessee, Ld. Pr.CIT observed that P5 Asia Holdings Investments (Mauritius) Ltd, was the shareholder of the Assessee Company and it was holding 30.31% of the equity shares in the Assessee Company. The Assessee Company in turn was holding 16% in Indus Towers Ltd. Thus, P5 Asia Holdings Investments (Mauritius) Limited was holding 4.85% shares in Indus Towers Ltd indirectly through the Assessee Company. He observed that as per Balance-sheet as on 31.3.2017, the Assessee Company has other investments that include mutual funds of ₹.7,67,17,22,000/-. As a 'Scheme of Arrangement approved by the Hon'ble High Court, the Assessee Company has cancelled the shares held by P5 Asia Holdings Investments (Mauntius) Ltd and transferred to them 4.85% shares of Indus Towers Ltd. out of its own holdings and also paid ₹.455 cores purportedly the value of other assets as per valuation of the Assessee Company proportionately related to the holding of P5 Asia Holdings Investments (Mauritius) Ltd. Ld. Pr.CIT observed that, in effect, the Assessee Company has transferred 4.85% shares out of 16% shares

held in Indus Towers Ltd. including the value of other assets and paid ₹.455 crores in cash.

6. Further, he observed that capital asset has been transferred by the Assessee Company but capital gain has not been computed in Return of income. Although, in the books, ₹.1380 crores has been credited as "Other Comprehensive Income and which is not considered in the Computation of Book Profit also for the purposes of Section 115JB of the Act as it has been credited below the line. Further, he observed that this transaction has been completed on the basis of Hon'ble High Court order, but the Valuation Report for arriving at the sum of ₹.455 crores payable to P5 Asia Holdings Investments (Mauritius) Ltd encompassing the entire transaction has not been furnished to demonstrate how the transaction has been valued. The Valuation Report has not been furnished during the 263 proceedings and it was not furnished before the Hon'ble High Court also while seeking the approval of the 'Scheme of Arrangement'.

7. With the above observation, Ld. Pr.CIT held that the Assessing Officer has not conducted any inquiry regarding taxability of the capital gain and hence, the assessment is erroneous and also prejudicial to the

interest of revenue. Further, he observed that as per amended law, Explanation 2 clause (a) under section 263(1) of the Act, any assessment made without conducting requisite enquiry and verification by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of revenue. Accordingly, he directed the Assessing Officer to reframe the assessment order denovo after conducting necessary enquiry and verification as warranted on facts of the case and also after giving due opportunity of being heard to assessee before passing the Assessment Order.

8. Aggrieved, assessee preferred appeal before us raising initially various grounds of appeal. However, subsequently assessee has filed revised grounds of appeal which are reproduced below: -

"Grounds of appeal

1:0 Re: Validity of the Order passed u/s. 263 of the Income-tax Act, 1961:

1:1 On the facts and in the circumstances of the case and in law, the impugned Order dated 26 March 2022 passed u/s. 263 of the Income-tax Act, 1961 ["the Act"] is without jurisdiction, illegal, bad in law and void-ab-initio.

Without prejudice to the above,

1:2 On the facts and circumstances of the case and in law, the Principal Commissioner of Income-tax ["PCIT"] has erred in passing the Order dated 26 March 2022 u/s. 263 of the Act.

1. 2. 1 On the facts and circumstances of the case and in law, the Hon'ble PCIT has erred in holding that the Order dated 05 December 2019 passed by the Assistant Commissioner of Income-

tax 5(2)(2) [ACIT of the "learned AO"] u/s. 143(3) of the Act was erroneous in so far as it is prejudicial to the interests of revenue.

1.2.2 On the facts and circumstances of the case and in law, the Appellant submits that the Order passed by the ACIT is neither erroneous nor prejudicial to the interest of the revenue and hence the revision of the same by the PCIT u/s. 263 of the Act is unwarranted and bad in law.

1.2.3 On the facts and circumstances of the case and in law, the PCIT erred in holding that the learned AO failed to conduct all necessary inquiries as warranted on the facts of the case; Assessment Order in the present case cannot be regarded as erroneous, since the AO had done inquiry on the issues sought to be revised u/s. 263 and there was a proper application of mind on the part of the AO.

1.2.4 The PCIT failed to appreciate the fact that merely because the Order does not discuss this specific issue does not necessarily lead to the conclusion that the Order was passed without making any inquiries or verification as such.

1.2.5 The PCIT passed the revisionary Order on the issues disregarding binding judicial precedents.

1.2.6 Without prejudice to the above, different view adopted by the PCIT does not render order of the AO as 'erroneous'.

1.2.7 The PCIT has erred in failing to comply with the requirement of section 263 and hence, the impugned Order passed is void-ab-initio

1:3 On the facts and in circumstances of the case and in law, the Order of the PCIT directing the AO to re-examine the issue and reframe the assessment order denovo needs to be struck down.

1:4 The impugned Order dated 26 March 2022 passed by the PCIT u/s. 263 of the Act is bad in law since it seeks to revise the Order dated 05 December 2019 passed u/s. 143(3) of the Act which Order being passed on a non-existent entity is therefore bad in law, invalid and non-est.

1:5 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, the Order dated 05 December 2019 passed by the AO u/s. 143(3) of the Act was invalid and non-est and hence the same could not be revised u/s. 263 of the Act.

The Appellant craves leave to add, alter, amend, substitute and/or modify in anymanner whatsoever all or any of the foregoing grounds of appeal at or before thehearing of the appeal.”

9. At the time of hearing, Ld. AR of the assessee briefly explained the facts in the present case and pressed the grounds raised in revised grounds of appeal No. 1.4 and 1.5 before us and with regard to other grounds of appeal, he briefly explained the issues involved, however, has not pressed these grounds at this stage. He vehemently submitted that the Assessment Order passed by the Assessing Officer u/s. 143(3) of the Act which is being passed on a non-existing entity which itself is invalid and non-est order, the same order cannot be revised. He further submitted that the assessee is pressing collateral proceedings before us, he submitted that the proceedings completed under section 143(3) itself is bad and the same order cannot be subject matter of revision hence the revisional order passed u/s 263 of the Act can be challenged before the appellate authority in the collateral proceedings. This aspect of challenge is appreciated by the Hon'ble Jurisdictional High Court in the case of Westlife Development Ltd., v. Pr.CIT in Income Tax Appeal No 1168 of 2017. (copy of the same is placed on record). Therefore, he proceeded to make the submissions in Ground No. 1.4 and 1.5 elaborately as under.

10. Ld. AR submitted that the original assessment passed u/s. 143(3) was completed in the erstwhile name of the assessee i.e., M/s. Aditya Birla Telecom Limited which is a non-existing entity at the time of passing of the Assessment Order. In this regard, he brought to our notice Page No. 1 of the Assessment Order to indicate that Assessing Officer has passed the Assessment Order in the name of the erstwhile name of the company. Further, he brought to our notice Page No. 276 of the Paper Book which is the letter addressed by the assessee to the Assessing Officer dated 04.02.2019 in which assessee has informed the Assessing Officer that merger is effective on the 30.11.2018 and the appointed date of the merger is April 1st, 2018. Assessee also enclosed the relevant merger scheme along with the letter addressed to the Assessing Officer.

11. Further, he brought to our notice Page No. 59 of the Paper Book which is notice issued u/s. 142(1) of the Act dated 12.10.2019 in which the Assessing Officer has addressed the notice to the assessee with the erstwhile name of the company. Further, he brought to our notice Page No. 60 of the Paper Book which is the annexure to the same notice issued by the Assessing Officer u/s. 142(1) of the Act in which Assessing Officer himself address the assessee with the actual name of the

assessee i.e., M/s. Vodafone Idea Limited and Assessing Officer asked the assessee to furnish various information and he also submitted that the Assessing Officer himself asked various question relating to the merger in the same annexure to the notice u/s. 142(1) of the Act. Further, he brought to our notice Page No. 62 of the Paper Book in which assessee replied to the Assessing Officer dated 11.11.2019 in which assessee has specifically submitted a detailed note on the scheme of amalgamation along with the change of name.

12. With the above submissions, Ld. AR submitted that the Assessing Officer has passed the Assessment Order in the erstwhile name which is not in existence and passed the Assessment Order in the name of the non-existing company even though he is aware of the fact. Therefore, the decision of the Hon'ble Supreme Court in the case of Pr.CIT *v.* Maruti Suzuki India Limited [2019] 416 ITR 613 is squarely covered. Ld.AR submitted that the facts in the present appeal is similar to the facts in the Maruti Suzuki case (supra) and it clearly indicates that order passed by the Assessing Officer is illegal in terms of its jurisdiction and null and void in the eyes of law.

13. Further, he submitted that the appeal filed by the assessee is against the order passed u/s. 263 of the Act and Ld. Pr.CIT has invoked the provisions of section 263 of the Act in order to revise the Void and non-est order and the assessee can challenge the proceedings u/s. 263 before the ITAT with the limited purpose of examination whether the collateral proceedings have been initiated on a valid legal platform or not and for examining the validity of assumption of jurisdiction to initiate the collateral proceedings. He submitted that the similar issue was arisen before the Coordinate Bench in the case of Westlife Development Ltd., v. Pr.CIT [2017] 88 taxmann.com 439 (Mumbai) and brought to our notice the ratio in the above said order. He submitted that the Coordinate Bench has held that the assessee should be permitted to challenge the validity of the order passed u/s. 263 of the Act on the ground that the impugned Assessment Order was non-est and we hold accordingly. Further, he brought to our notice that the Coordinate Bench has discussed in details the various aspects of the validity of the Assessment Order passed u/s. 143(3) of the Act and subsequent proceedings initiated u/s. 263 of the Act and finally they held that the impugned order passed u/s. 263 of the Act by the Ld.Pr.CIT is also null

in the eyes of law. Therefore, they have quashed the order passed u/s.263 of the Act.

14. Further, he brought to our notice order of the Hon'ble Bombay High Court in which Hon'ble High Court upheld the views of the ITAT in the same case Westlife Development Ltd (supra) and he prayed that facts in the present appeal is exactly similar and the ratio of the above decision should be upheld in the present case also.

15. On the other hand, Ld. DR opposed the submissions of the Ld. AR and submitted that the Assessing Officer has issued notice u/s. 143(2) of the Act prior to the date of amalgamation. Further, he submitted that even the notice u/s. 142(1) was issued by the Assessing Officer considering the fact that he has issued in the old name due to constraint in the operation, he explained that Assessing Officer cannot modify PAN which is entered/filed in the return of income and also from the initiation of the assessment proceedings till the same is completed. Therefore, at the stage of assessment, migration of PAN is not possible, that is the reason, Assessing Officer has mentioned the old name in body of the notice and in the annexure to the same notice Assessing Officer has rightly used the existing name of the assessee.

16. Further, he brought to our notice Form No.35 which is filed by the assessee before CIT(A) in which assessee itself filed the appeal in Form No. 35 using the erstwhile name. Therefore, it clearly indicates that assessee is aware of the fact and preferred appeal in the old name of the erstwhile name of the assessee before the Ld.CIT(A). Further, he submitted that assessee also did not surrender the PAN. Therefore, assessee cannot take a hyper-technical issue in the appellate proceedings.

17. Further, Ld DR submitted that the assessee relied in the case of Pr.CIT v. Maruti Suzuki India Limited (supra). However, he submitted that several developments happened subsequently. Therefore, he relied on the following case laws in the form of paper book: -

S.No.	Particulars of the document filed	Page Nos
1.	Copy of Judgment of Hon'ble Madras High Court in the case of M/S Mando Automotive India Pvt. Ltd. in w.p. No. 2779 of 2017	1 to 10
2.	Copy of Judgment of Hon'ble Supreme Court in the case of PCIT vs. Mahagun Realtors (P) Ltd. - 443 ITR 194 (SC)	11 to 31
3	Copy of Judgment of Hon'ble Supreme Court in the case of ACIT Vs. Vahanvati Consultants (P) Ltd. — 138 taxmann.com 52 (SC)	32 to 34
4	Copy of Judgment (Digest) of Hon'ble Supreme Court in the case of Kartikeya V. Sarabhai vs. CIT - 228 ITR 163 (SC)	35 to 36
5	Copy of Judgment (Digest) of Hon'ble Supreme Court in the case of CIT vs. G. Narasimhan - 236 ITR 327 (SC)	37 to 39
6	Copy of Judgment of Hobbles Madras High Court in the case of CGT vs. td.- India co. (P) Ltd. 149 ITR 548 (Madras)	40 to 43
7	Copy of Judgment of Hon'ble Madras High Court in the case of CIT vs. Kasturi Estate (P). Ltd.- 228 ITR 376 (Madras)	44 to 48

S.No.	Particulars of the document filed	Page Nos
8	Copy of Judgment of Hon'ble Bombay High Court in the case of Jeevan Investment & Finance (P) Ltd. Vs. CIT 88 taxmann.com 552 (Bombay)	49 to 52
9	Copy of Judgment of Hon'ble Bombay High Court in the case of CIT Vs. Ballarpur Industries Ltd.85 taxmann.com 10(Bombay)	53 to 55
10	Article on the tax implications of the reduction of share capital in Bombay Chartered Accountants Society Reference	56 to 60

18. Ld.DR brought to our notice Para No. 20 of the case M/s.Mando Automotive India Pvt. Ltd. (supra) and submitted that it was held the Assessment Order was passed by the Assessing Officer as per law. Similarly, the Hon'ble Supreme Court held that the assessment passed in the erstwhile name of the company is proper. He relied heavily on the above cases and submitted that the order passed by the Assessing Officer is proper, however Assessing Officer has not made proper enquiry and investigation before completing the assessment. He vehemently argued that the revision order passed by the Ld.PCIT is also as per law wherein it was highlighted that the Assessing Officer has not properly investigated the issue highlighted in the Order, it squarely falls within the ambit of Explanation 2(a) of the sec. 263 provisions.

19. In the rejoinder, Ld. AR objected to the submissions of the Ld.DR that the Assessment Order is passed based on the system driven. He brought to our notice body of the notice issued by the Assessing Officer

wherein Assessing Officer himself raised several issues about the merger. Therefore, the argument of the Ld. DR is not as per the facts on record. Further, he objected to the submissions of the Ld.DR that assessee itself has filed the appeal before the Ld.CIT(A) in the erstwhile name, in this regard he submitted that, the appeal proceedings before the First Appellate Authority is designed by the revenue such a way that assessee can file the appeal only in the name of the assessee and PAN mentioned in the Assessment Order. Therefore, the department has to properly modify the systems then only assessee will be able to initiate the appeal proceedings properly before First Appellate Authority and it is the revenue which has to modify the system which is not as per the Act. Further, he brought to our notice Page No. 20 of the Paper Book wherein assessee also filed an annexure to the Form No 35 wherein assessee has mentioned proper name of the assessee and addressed the same issue before the Ld.CIT(A). Therefore, assessee has properly complied with the formalities.

20. With regard to the case law relied by the Ld. DR, he submitted that in the case of M/s. Mando Automotive India Pvt. Ltd. (supra) wherein Hon'ble High Court observed that assessee deliberately mislead the Income-tax department by filing the return on the date which is

subsequent to the date in which the assessee company has already merged with the petitioner company. Therefore, he submitted that in the above case the assessee has misled the Assessing Officer as well as the court. Therefore, the above case is distinguishable to the facts of the present case, from the initiation of the assessment proceedings assessee has been continuously informing the Assessing Officer the proper facts on record.

21. With regard to the Mahagun Realtors (P) Ltd case (supra), he brought to our notice Para No. 3 of the order to highlight that even in this case, the assessee has misguided the Assessing Officer by giving wrong information in their return of income, in particular column No. 27 of the Form wherein the assessee has to specify the business reorganization etc., (in the case of amalgamated company) it is specifically asked to mention the name of the amalgamating company. However, the assessee has mentioned as "not applicable". Further, he brought to our notice Para No. 33 of the order wherein the Hon'ble High Court has observed that this is an established fact and not in contention, the respondent has relied upon Spice and Maruti Suzuki (supra) to contend that the notice issued in the name of the amalgamating company is void and illegal, the facts of the present case, however, can

be distinguished from the facts in Spice and Maruti Suzuki (supra) on the following basis. Wherein they have distinguished the facts in the cases of Spice and Maruti Suzuki (supra) and established that the assessee has misguided the Assessing Officer by filing wrong information in the return of income. He submitted that this case also distinguishable to the facts in the present case.

22. With regard to ACIT *v.* Vahanvati Consultants (P.) Ltd., (supra) he brought to our notice Page No. 33 and pointed that the Hon'ble Bombay High Court has decided the issue in favour of the assessee that the mistake on mentioning erstwhile name of the company cannot be modified by applying section 292BB of the Act. Therefore he submitted that all the cases relied by the Ld.DR are factually distinguishable from the decision of the Pr.CIT *v.* Maruti Suzuki India Limited (supra). However, he submitted that the facts in the Pr.CIT *v.* Maruti Suzuki India Limited (supra) are identical to the facts in the present case. Therefore, he relied on the submissions made by him that the order passed in the erstwhile name of the company is bad in law and the revision order passed by the Ld PrCIT is equally bad in law.

23. Considered the rival submissions and material placed on record, we observe from the submissions of both the parties that the Assessing Officer has passed the final Assessment Order in the name of the M/s.Aditya Birla Telecom Limited (erstwhile name) even though the Assessing Officer was well aware of the fact the erstwhile company was merged with the assessee company w.e.f 30th November, 2018 with the appointed date of merger was April 1st, 2018. It is brought to our knowledge that Assessing Officer has issued several notices and enquired about the merger and discussed in detail about the merger in the various notices issued by him as well as in the assessment order. However, at the same time it is also brought to our notice that annexure to the above said notices in which Assessing Officer himself has used the existing name of the assessee and collected the various information relating to the merger. It clearly shows that assessee has brought to the notice of the Assessing Officer the real fact that the assessment which the Assessing Officer finalized is of the existing company i.e. Vodafone Idea Limited. In our considered view, the fact that the Aditya Birla, erstwhile name, is non-exist at the time of passing of the order by the Assessing Officer and Assessing Officer also aware of the fact of merger, therefore, the fact in the present appeal are exactly similar to

the facts in the case of Pr.CIT v. Maruti Suzuki India Limited (supra). Therefore, the ratio of the Pr.CIT v. Maruti Suzuki India Limited (supra) is equally applicable in the present case.

24. At the time of hearing, Ld. DR brought to our notice the decision in the case of M/s. Mando Automotive India Pvt. Ltd. (supra) and PCIT vs. Mahagun Realtors (P) Ltd. (supra) and wherein the facts are distinguishable to the facts in the present case and facts in the Maruti Suzuki case. In the case of M/s. Mando Automotive India Pvt. Ltd. (supra) and PCIT vs. Mahagun Realtors (P) Ltd. (supra) the erstwhile assessee misrepresented and actually filed the wrong informations in order to misguide the revenue. Accordingly, the Hon'ble Supreme/High Court has decided the issue against the assessee. However, the facts in the present case are not similar to the facts in the case of M/s.Mando Automotive India Pvt. Ltd. (supra) and PCIT vs. Mahagun Realtors (P) Ltd. (supra). Therefore, the ratio in the above said cases cannot be applied in the present case. It clearly indicates that Assessing Officer has passed the Assessment Order in the name of the non-existing entity. Therefore, the Assessment Order passed by the Assessing Officer itself is non-est, void and bad in law.

25. Considering the fact that the original Assessment Order passed by the Assessing Officer is bad in law, whether the collateral proceeding initiation u/s. 263 of the Act also be bad in law. It is brought to our notice that in the case of Westlife Development Ltd., v. Pr.CIT (supra) wherein the Coordinate Bench has addressed this issue and decided as under: -

"9.5. We have carefully gone through the facts of the case and submissions made by both the sides before us. We have also gone through the legal position in this regard. It is noted by us that this issue is no more res integra. All the arguments made by the Ld. CIT-DR have already been addressed by many Courts. The judgements relied upon by Ld. Counsel are directly on this issue and squarely covers these issues.

9.6. In addition to that, it is noted that interestingly, Hon'ble Bombay High Court recently decided identical issue in its judgment in the case of Jitendra ChandralalNavlani&Anr vs UOI in writ petition No. 1069 of 2016 vide order 8th June, 2016 as under:

"On receipt of the reopening notice, the Chartered Accountant of the erstwhile M/s. Addler Security Systems Pvt. Ltd., had originally accepted the same but immediately thereafter by letter dated 5th May, 2015 pointed out that the company M/s. Addler Security Systems Pvt. Ltd. is no longer in existence as it has been dissolved. Consequent thereto, the Assessing Officer has also issued a notice under Section 142(1) of the Act to one of the petitioner who was the Director of erstwhile M/s. Addler Security Systems Pvt. Ltd. (since dissolved). In response, the Director of the erstwhile M/s. Addler Security Systems Pvt. Ltd., pointed out that the company has already been dissolved and it is no longer in existence. Notwithstanding the above, the Assessing Officer by an order dated 28th March, 2016 has passed the impugned order framing the assessment in case of

*M/s. Addler Security Systems Pvt. Ltd. (since dissolved)
for Assessment Year 2008-09.*

4. Normally we would not have entertained a petition as an alternative remedy to file an appeal is available to the petitioners. However, prima facie, the impugned notice has been issued in respect of a non existing entity as M/s. Addler Security Systems Pvt. Ltd., which stands dissolved, having been struck off the Rolls of the Registrar of Companies much before its issue. Consequently, the assessment has been framed also in respect of the non-existing entity. This defect in issuing a reopening notice to a non-existing company and framing an assessment consequent thereto is an issue which goes to the root of the jurisdiction of the Assessing Officer to assess the non-existing company. Thus, prima fade, both the impugned notice dated 24th March, 2015 and the Assessment Order dated 28th March, 2016, are without jurisdiction." (emphasis supplied).

9.7. Further, recently, the co-ordinate bench of hAT Mumbai decided identical issue in the case of M/s GenesysWorldeye Ltd in ITA No.473/Mum/2012 order dated 03-06-2016 in which one of us (AM) was a party. The relevant part of this order is reproduced hereunder:

"4.8. In our view, this argument of the Ld. DR is also not in accordance with law. The assessment is to be made by the AO in accordance with law. The jurisdiction to frame the assessment order upon a particular person can be made by the AO in accordance with the law only. The jurisdiction to frame an assessment can neither be conferred nor can it be taken away by an assessee or any other person from the AO on the basis of their consent or otherwise. If the assessment orders are framed on the basis of consent or objection of the assessee 's alone then it would give rise to a chaotic situation. Thus, it is for the AO to carefully determine his jurisdiction to make an assessment in a lawful manner upon the appropriate person and the obligation to do so rest solely upon the shoulders of the AO which he is

obliged to fulfil by following due process of law. There is no estoppel against law. If an assessment order is framed without the authority of law, then, the same would be nullity in the eyes of law, as no tax can be collected without the authority of law, as has been clearly laid down in Article 265 of our constitution.

4.9. It is noted by us that all these issues and arguments have already been dealt with and this entire controversy has already been put to rest by various courts in their judgments. Hon'ble Delhi High Court in the case of Spice Infotainment Ltd (Supra) has analysed this entire controversy in detail and held that assessment order passed under such circumstances would be nullity in the eyes of law. The relevant observations of the Hon'ble High Court in the said case are very useful to deal with this controversy and the same are reproduced hereunder for the sake of ready reference:

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

"In the light of the discussions made above, we, therefore, hold that the assessment made by the AO, in substance and effect, is not against the non-existent amalgamating company. However, we do agree with the proposition or ration decided in the various cases relied upon by the learned counsel for the assessee that the assessment made against non-existent person would be invalid and liable to be struck down. But, in the present case, we find that the assessment, in substance and effect, has been made against amalgamated company in respect of assessment of income of amalgamating company for the period prior to amalgamation and mere omission to mention the name of amalgamated company alongwith the name of amalgamating company in the body of assessment against the item "name of the assessee" is not fatal to the validity of assessment but is a procedural defect covered by Section 292B of the Act. We hold accordingly."

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

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

"The question is whether on the amalgamation of the Indian Sugar Company with the appellant Company, the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41(1) of the Act. The amalgamation of the two companies was effected

under the order of the High Court in proceedings under Section 391 read with Section 394 of the Companies Act. The Saraswati Industrial Syndicate, the transferee Company was a subsidiary of the Indian Sugar Company, namely, the transferor Company. Under the scheme of amalgamation the Indian Sugar Company stood dissolved on 29th October, 1962 and it ceased to be in existence thereafter. Though the scheme provided that the transferee Company the Saraswati Industrial Syndicate Ltd. undertook to meet any liability of the Indian Sugar Company which that Company incurred or it could incur, any liability, before the dissolution or not thereafter.

Generally, where only one Company is involved in change and the rights of the 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 amounts to amalgamation. When two companies are merged and are so joined, as to form a third Company or one is absorbed into one or

blended with another, the amalgamating Company loses its entity."

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

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

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

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

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

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

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

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

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

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

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

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

4.10 This judgment was subsequently followed by another detailed judgment by Hon'ble Delhi High Court in the case of CIT v. Dimension Apparels Pvt. Ltd. (supra) wherein all the arguments which have been made before us by the Ld. DR have been dealt with by the Hon'ble High Court and it was held that framing of the assessment order upon a non-existing person was a jurisdictional defect and not merely a curable procedural defect, and thus nullity in the eyes of law.

4.11 *In view of all these facts as have brought before us and the judgments brought before us and in the absence of any contrary judgment having been brought before us, we find that impugned assessment order is nullity in the eyes of law and the same is hereby quashed, and thus additional grounds raised by the assessee are allowed. Since we have allowed the appeal of the assessee on the additional grounds, we do not find it necessary to go into grounds raised on merits and therefore, these are treated as infructuous."*

9.8 *It is also noted that Hon'ble Calcutta High Court in the case of I.K. Agencies Pvt Ltd, supra as well as Honble Karnataka High Court in the case of CIT vs Intel Technology Pvt Ltd 380 ITR 272 (Karnatka) also followed the view taken by Hon'ble Delhi High Court in the case of Spice Infotainment Ltd 247 CTR 500 (Delhi) and held that framing of assessment against non-existing entity/person would go to root of matter and was not mere procedural irregularity, but a jurisdictional defect and there could not be any assessment against a dead person. Thus, apparently, assessment proceedings having been initiated against non-existing company even after amalgamation of assessee company with another company were illegal, and thus order passed under such proceedings without jurisdiction and null & void.*

9.9 *During the course of hearing, no contrary judgement was brought to our notice by the Ld. CIT-DR. It was fairly stated that as on date this issue was covered in favour of the assessee in view of the judgments as discussed above. In these facts and circumstances and the clear position of law coming out from above discussed judgments of Hon'ble Bombay High Court, Delhi High Court, Calcutta High Court and Karnatka High Court, we find that the impugned assessment order having been passed in the hands of WLPL i.e. a non est entity at the time of passing the said assessment order was null & void in the eyes of law.*

10. *If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the non est assessment order: Having decided the aforesaid two issues, the next issue that is to be decided by us is about the validity of order passed u/s 263 by the Ld. CIT seeking to revise the assessment order which was nullity in the eyes of law.*

10.1 *We have discussed in detail in earlier part of our order that an invalid order cannot give birth to legally valid proceedings. It is*

further noticed by us that some of the judgments relied upon by the Ld. Counsel have already addressed this issue. This issue has also been decided by the co-ordinate bench (Delhi Bench of Tribunal) in the case of Krishna Kumar Saraf vs CIT (supra). The relevant part of the order is reproduced below:

"17. There is no quarrel with the proposition advanced by Id. DR that the proceedings u/s 263 are for the benefit of revenue and not for assessee.

18. However, u/s 263 the Id. Commissioner cannot revise a non est order in the eye of law. Since the assessment order was passed in pursuance to the notice U/S 143(2), which was beyond time, therefore, the assessment order passed in pursuance to the barred notice had no legs to stand as the same was non est in the eyes of law. All proceedings subsequent to the said notice are of no consequence. Further, the decision of Hon'ble Madras High Court in the case of CIT Vs. Gitsons Engineering Co. 370 ITR 87 (Mad) clearly holds that the objection in relation to non service of notice could be raised for the first time before the Tribunal as the same was legal, which went to the root of the matter.

19. While exercising powers u/s 263 Id. Commissioner cannot revise an assessment order which is non est in the eye of law because it would prejudice the right of assessee which has accrued in favour of assessee on account of its income being determined. If Id. Commissioner revises such an assessment order, then it would imply extending/ granting fresh limitation for passing fresh assessment order. It is settled law that by the action of the authorities the limitation cannot be extended, because the provisions of limitation are provided in the same.

20. In view of above discussion, ground no.3 is allowed and revision order passed u/s 263 is quashed."

10.2 It is further noticed by us that similar view has been taken by Chandigarh Bench of the Tribunal in the case of Steel Strips Ltd (supra).

11. Thus, after taking into account all the facts and circumstances of the case, we find that in this case, the original assessment order passed u/s 143(3) dt 24-10-2013 was null & void in the eyes of law as the same was passed upon a non-existing entity and, therefore, the Ld. CIT could not have assumed jurisdiction under the law to make revision of a non est order and, therefore, the impugned order passed u/s 263 by the Ld.CIT is also nullity in the eyes of law and therefore the same is hereby quashed.

12. Since we have quashed the impugned order passed u/s 263 by Ld. CIT on jurisdictional ground, we do not find it necessary to deal with, at this stage, other legal aspects and issues raised on merits of the impugned order.”

26. Further, we observe that the Hon'ble Jurisdictional High Court also dismissed the appeal of the revenue against the decision of the Coordinate Bench in the Westlife Development Ltd., v. Pr.CIT (supra).

27. Therefore, respectfully following the above said decision, we hold that the order passed u/s. 263 of the Act is equally bad in law considering the fact that we already held that the original assessment order passed u/s. 143(3) is bad in law and an order passed which is not proper and non-est, the same order cannot be the subject matter of the revision u/s. 263 of the Act. Respectfully following the decision of the Coordinate Bench in the case of Westlife Development Ltd., v. Pr.CIT (supra) we are inclined to quash the revision order passed u/s. 263 of the Act and accordingly, ground raised by the assessee in Ground Nos.

1.4 and 1.5 are allowed and at the same time, other ground raised by the assessee are kept open at this stage. Accordingly, appeal filed by the assessee is partly allowed.

28. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 01st December, 2022

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Mumbai / Dated 01/12/2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum