IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
MS. MADHUMITA ROY, JUDICIAL MEMBER

ITA Nos.1362, 1363 & 1367/Bang/2013
Assessment Years: 2004-05, 2005-06 & 2007-08

Trishul Buildtech Infrastructure Pvt. Ltd. No.9 Ali Askar Road Off. Cunningham Road Bangalore 560 052 **PAN NO : AADCT3672P**	**Vs.**	JCIT (OSD) Central Range Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri A. Shankar, Senior Counsel
Respondent by	:	Dr. G. Manoj Kumar, D.R.

Date of Hearing	:	21.09.2023
Date of Pronouncement	:	26.10.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

These appeals by assessee are directed against common order dated 16.8.2013 of CIT(A)-6, Bangalore relating to assessment years 2004-05, 2005-06 & 2007-08.

2. The assessee came in appeal before this Tribunal on earlier occasion. The Tribunal disposed of these appeals vide order dated 20.2.2015 dismissing the appeals of the assessee. Against this assessee went in appeal before the Hon'ble Jurisdictional High Court of Karnataka, raising following grounds in ITA Nos.371 to 373/2015 of Hon'ble High Court:

a) *Whether the notice issued and assessment order passed in the erstwhile partnership firm was no more in existence (substantial question of law at Para 22 of the modified and additional substantial questions of law)?*

b) *Whether the assessment order passed is without jurisdiction as the assessment order is passed by an officer who had no jurisdiction (Substantial question of law at Para 23 & 24 of the modified and additional substantial questions of law)*

c) *Whether the assessment u/s 153A of the Act is invalid in law as neither any incriminating material was found during the course of search nor any addition was made on the basis of materials seized in the course of search of the appellant (substantial question of law at Para 25 of the modified and additional substantial questions of law)?*

d) *Whether the order passed under section 153A of the Act is bad in law as the additions are made based on the material seized in the course of search of persons other than the appellant and the assessment ought to have been made under section 153C of the Act (substantial question of law at Para 26(i) and 26(iii) of the modified and additional substantial questions of law)?*

e) *Whether the search in the case of the appellant is not a valid search and the conditions contemplated under section 132 of the Act have not been complied with (substantial question of law at Para 26(ii) of the modified and additional substantial questions of law)?*

f) *Whether the addition made of a sum of Rs.11,50,000/- for the AY 2004-05 and Rs.2,14,50,000/- for AY 2005-06 u/s 69C of the Act is unsustainable in law and the presumption under section 292 C of the Act is not applicable (substantial question of law at Para 26(iv), 27, 28 & 29 of the modified and additional substantial question of law)?*

2.1 The Hon'ble High Court vide common order dated 12.9.2022 in ITA Nos.371/2015 c/w ITA Nos.372/2015 & 373/2015 for the AYs 2004-05, 2005-06 and 2007-08 respectively, set aside the order of this Tribunal dated 20.2.2015 in ITA Nos.1362, 1363 and 1367/Bang/2013 and remanded the file back to this Tribunal for fresh consideration of all the issues raised in these appeals. Hence, these appeals came for hearing once again before this bench.

3. Facts narrated in earlier order of the Tribunal are that the assessee is a partnership firm. There was a search and seizure operation carried out by the authorities u/s. 132 of the Income-tax Act, 1961 [hereinafter referred to as "the Act"] in the case of the

assessee on 20.11.2009. Simultaneous search proceedings u/s. 132 of the Act were also carried out in the case of M/s. Gold Finch Hotels Group. Mr. K. Prakash Shetty [hereinafter referred to as "K.P. Shetty] was one of the partners of the assessee and was also a partner in other group entity companies. One Mr. Vijay Bhat, Manager of K.P. Shetty, was also searched on 20.11.2009. In his residential premises, a bunch of diaries were found and seized. Those were marked as A/UB/2 of the seized material. The diaries contained recording of receipts and payments from and to various persons. The transactions so recorded were mostly cash transactions, besides some cheque transactions.

3.1 In post search proceedings, Mr. Vijay Kumar, Manager of the assessee was examined. In his statement, he admitted that the writing in the diaries was written by him and one Ms. Indira, Office Assistant. The writings in the diaries were made as told by Mr. K.P. Shetty and Smt. Asha P. Shetty, another partner of the assessee and other seniors of Trishul Developers (the assessee). The questions and answers in this regard is reproduced for better appreciation of facts:-

> *"Q.No.3: I am showing you the pages 1 to 167 of the seized material marked A/VB/2 which was seized from your residence during the course of search proceedings under section 132 on 20.11.2009. Please go through the seized material and explain the contents of the seized material?*
>
> *Ans.: I have gone through the pages 1 to 167 of the seized material marked A/VB/2. These are the diaries most of which are written by me except pages 1 to 47 which were written by Miss Indira, office assistant.*
>
> *These pages contains the cheque and cash transactions written by me as told by Mr. Prakash Shetty, the Managing Director, Smt. Asha P Shetty and sometimes by the other seniors of Trishul Developers.*
>
> *I am not aware of the details of the transactions and only Mr. Prakash Shetty is aware of it. I had written what was told by the Mr. Prakash Shetty."*

3.2. The Assessing Officer noticed that most of the transactions in the diaries were by cash and not accounted in the regular books of account.

3.3 During the course of another statement recorded from Mr. Vijay Kumar B on 17.12.2009, he has stated that he has written the transactions on the instructions received by him from Mr. K Prakash Shetty and he has also stated that these cash transactions pertains to M/s Trishul Developers. When he was asked to explain the cash transactions, he stated that he has written the transactions on the instructions given by Mr. K Prakash Shetty and that he can only explain these transactions. The relevant portion is reproduced as follows:

> *"Q.No.4: Please explain the transaction written in these diaries from page numbers 48 to 167?*
>
> *Ans.: I am not able to explain the transactions written in the diaries at pages 48 to 167. Mr. K Prakash Shetty, Managing Director can only explain the transactions.*
>
> *Q.No.5: Can you identify the transactions and the persons who had asked you to write these transactions in the diaries?*
>
> *Ans.: I cannot directly identify the transactions and the seniors who had instructed me to write the transactions. But these have been written on the instructions of the Managing Director Mr. Prakash Shetty and other senior managers.*
>
> *Q.No.6: Who had told you to keep these diaries at your residence?*
> *Ans.: These diaries were kept in my residence as we had shifted our corporate office from Sadashiv Nagar.*
>
> *Q.No. 7: Who has written the pages 1 to 47?*
>
> *Ans.: Ms Indira, office assistant, has written the pages 1 to 47 of the seized material which is a pocket diary. She has written this pocket diary on my instructions. Whatever my Managing Director Mr. K Prakash Shetty had instructed me orally was instructed by me to Ms Indira and she had written the same in this pocket diary."*

3.4. Later, Mr. Prakash Shetty was confronted with the seized material marked A/VB/2 and also with the statement recorded from Mr. Vijay Kumar. Mr. Prakash admitted that the diaries and the

notebooks in the seized material marked A/VB/2 have been written by his employees. The relevant portion is reproduced as under:

> *"Q.No.3: I am showing you the seized material marked A/VB/2 which was seized from the residence of Shri. Vijay Kumar B during the course of search proceedings under section 132 on 20.11.2009 at his residence. Please go through the seized material and explain the contents of the seized material?*
>
> *Ans.: I have seen the seized material marked A/VB/2 which was seized from the residence of Shri. Vijay Kumar B on 20.11.2009. The seized material contains hand written pocket diaries written by Mr. Vijay Kumar B, Vice President (Infrastructure) of Goldfinch Hotels group and Ms Indira, office assistant. The entries in these pocket diaries are written by them. I will go through the diaries after taking Xerox copies and come back with detailed explanation as far as directly connected to my business income.*
>
> *Q.No.4: lam showing you the statement recorded from Mr. Vijay Kumar B(Vijay Bhat,) wherein he has stated that these diaries are written by him on your instructions and also on the instructions of his seniors. Please go through the statement and comment on it?*
>
> *Ans.: I have gone through the statement of Mr. Vijay Bhat and I have to go through the diary and which all entries which I had told, I will come and explain all the entries in two days."*

3.5. Subsequently. Mr. K Prakash Shetty filed a letter dated 02.02.2010admitting undisclosed income pertaining to certain cash payments made by him for purchase of lands, interest payments to some persons, etc. which were found written in the above seized material marked as A/VB/2. The undisclosed income had been offered in the hands of M/s Trishul Developers and Prakash Shetty. The annexure I filed at the time of post search proceedings pertaining to undisclosed income is as below: -

ANNEXURE-I

Amount offered in the hands of Trishul Developers is as follows:

Page No of seized material A/VB/2	Name of the party	Rs. in Crores	Asst. Year
165	Abdul Wahab (Veerasandra Property)	2.20	2006-07
161	Keshava Reddy	1.15	2006-07
Various folios	Ram Prakash	2.00	2009-10
	Total	5.35	

Amount offered in my own hands are as follows:

Page No of seized material A/VB/2	Name of the party		Rs. in Crores	Asst. Year
70 & 72	Techno art Rau		1.00	2009-10
93	Sambaiah		0.10	2009-10
85 & 90	Rajesh		1.40	2009-10
148	Rakesh Batra		0.50	2006-07
132, 133	Sunil Hospitality		0.36	2008-09
157	Deejay Farm		0.12	2009-10
147	Classic Builders		0.10	2006-07
156	Denkanikote		0.40	2006-07
Separate Statement produced	Interest paid to			
	Laloo	0.77		
	Vinod Bansilal	0.10		
	Ashok	0.03		
	Avinash	0.06		
	Lakshman	0.11		
	Soni	0.06		
	Total		**5.11**	

3.6. The AO was of the view that the transactions in the diaries seized and marked as A/VB/2 contained receipts totaling to Rs.56,00,51,300 and total payments of Rs.88,24,82,425. The assessee has however chosen only a few selected items and offered income from those items to tax. According to the AO, this was unacceptable in the absence of any explanation by the assessee with regard to the entries in the seized diaries in respect of which assessee did not make any declaration of income.

3.7. There was a search carried out at Mangalore in the premises of one Mr. Prasad Kumar Shetty [hereinafter referred to as "Prasad Kumar"], who is the brother-in-law of K.P. Shetty. Prasad Kumar was involved in purchase of lands for the group concerns. In the course of search proceedings in the premises of Motel Infrastructure Pvt. Ltd., certain diaries were found and seized from the cabin of Prasad

Kumar. These diaries were marked as A/TD/34, 35 and A/TD/36. Prasad Kumar was examined at the time of search and in his statement, he admitted that the diaries were written by him. Later on, a statement u/s. 131 of the Act was recorded from him on 13.4.2010. In the statement, he admitted that seized diary contains entries of cash payments and that payments were made on instructions from head office of Trishul Developers (assessee). The instructions were given by directors by K.P. Shetty and cash for payments were also accounted by the head office. The relevant questions & answers read as under: -

> *"Q.No.:4: I am showing you the seized material marked as A/TD/35 dated 20.11.2009 seized from the office of M/s Trishul Developers, Mangalore during the search proceedings. Please go through is state who has written this diary?*
>
> *Ans.: 1 have gone through the seized material marked as A/TD/35 dated 20.11.2009. This diary has been written by me.*
>
> *Q.No.5: Please go through the page number 1 to 6 of the diary marked A/TD/35 and explain the contents of these pages?*
> *Ans.: I get instructions through phone from the staff at the head office of by the head office at Bangalore to make payments to various persons. Accordingly, I make the payments and the same are written by me in this diary. However, I do not remember the exact nature of these payments. I do not know the details of the persons to whom the payments are made and in what context.*
>
> *Q.No. 6: Who gives you the instructions to make the payments?*
> *Ans.: I used to get calls from the various persons working in the corporate office of M/s Trishul Developers. They used to tell me about the instructions given by the Managing Director to pay or receive money from various persons at Mangalore. I acted upon the instructions to receive or pay the amount."*

3.8 Page 2 of the seized material marked as A/TD/34 contains a receipt account of a total sum of Rs.10,13,68,000 during the F.Ys. 2008-09 and 2009-10 as under: -

F.Y.2008-09: Rs. 1,90,00,000/-
F.Y.2009-10: Rs. 8,23,68,000/-

3.9 During the statement recorded from Mr. Prasad Kumar, he was asked to explain the cash receipt in this page. He stated that the cash receipts of Rs.10.13,68,000 were received from the head office of M/s Trishul Developers, Bangalore and that it has been paid to various persons as their instructions. His statement is reproduced hereunder:-

> *"Q.No.32: The pages 1 and 2 contains total receipts of Rs. 10,13,68.000/-. Please explain the nature of these receipts and state what you did with that amount. It is also noted that no names are also written against the receipts shown on page 2. Can you state from whom these amounts were received?*
>
> *Ans.: All these amounts of Rs.10,13,68,000/- as mentioned in pages 1 and 2 were received from the head office of M/s Trishul Developers, Bangalore, by cash and paid to various persons as per their instructions. The head office people use to tell me that the instructions were given by the MD. I do not know the nature of these payments."*

3.10 When confronted with the seized material during the course of recording of statement from Mr. K.P. Shetty and asked to explain the entries, he has stated that except for a few entries, he does not know other entries, persons or the transactions.

3.11 In the above background, a reconciliation statement was prepared on the basis of entries in the said diaries during the post search investigations. The said reconciliation prepared contains both receipts and payments. The total receipts as per this is Rs.56,00,51,000 and total expenditure is Rs.88,24,82,425.

3.12 The AO issued a show cause notice dated 9.12.11 asking the assessee to explain the entries in the seized material. The assessee filed a reply disowning knowledge of the seized material. Reply by the assessee is extracted in page 7 of the assessment order. Apart from disowning the entries in the seized diaries, the assessee also submitted that the entries are mere scribblings and they do not result

in any income. The assessee also pleaded that the persons who wrote the diary should alone explain the entries.

3.13 The AO, however, rejected the reply filed by the assessee and held as follows: -

> *"8. The above contentions made by the assessee are not acceptable. It is a fact that certain diaries were found and seized in the residential premises of the manager of Shri. Prakash Shetty and also in the Mangalore premises managed by his brother-in-law as stated earlier. The diary entries were discussed during the course of search proceedings. The assessee has admitted certain entries present in the diaries and has admitted undisclosed income of Rs. 10.46 crores for various years in the hands of M/s Trishul Developers and in the hands of Shri. K Prakash Shetty. However, a total reconciliation of the diary entries during the search proceedings revealed that the total receipts were of 56,00,51,300/- and total payments were of 88,24,82,425/-.*
>
> *9. During the course of assessment proceedings, the diary entries were verified and it was found that only a few entries have been admitted by the assessee group. The circumstantial evidence and preponderance of probability suggests that the assessee has had numerous transactions which are in the nature of receipts and payments.*
>
> *10. In view of the facts and the circumstances of this case and the type of diary entries available, it would be fair and reasonable to compute the difference in the receipts and payments and bring the same to tax. Accordingly, the following undisclosed incomes are being brought to tax:*

A.Y.	*Undisclosed Income brought to tax*	*Admitted earlier*
2004-05	*Rs.11 1,50,000/-*	
2005-06	*Rs.2, 14,00,000/-*	
2006-07	*NIL*	*Rs.3,35,00,000/-*
2007-08	*NIL*	
2008-09	*Rs. 2,40,26,395/-*	
2009-10	*Rs.16,80,01.030/-*	*Rs.2,00,00,000/-*
2010-11	*Rs. 1,28,97,250/-*	
Total	*Rs. 22,76,24,675/-*	*Rs.5,35,00,000/-*

3.14 Accordingly, undisclosed income was determined for A.Ys. 2005-06, 2006-07 & 2007-08 as per table given above.

4. First, we consider the first ground in these appeals with regard to the issue of notice to erstwhile partnership firm, though the said partnership firm was no more in existence and consequently framing of assessment orders for these assessment years.

5. The ld. Senior counsel submitted as follows:

1. **The notice issued and assessment order passed in the erstwhile partnership firm is bad in law as the partnership firm was no more in existence.**
   a) He submitted that the search proceedings were conducted on 20.11.2009 during which the status of the assessee was that of a partnership firm operating under the name of M/s.Trishul Builders (hereinafter referred to as the erstwhile partnership firm).
   b) The business of the erstwhile partnership firm was taken over by the assessee i.e, M/s.Trishul Buildtech Infrastructure Pvt. Ltd. on 01.02.2010, on an as is where is basis. All assets and liabilities of the partnership firm were fully taken over by the assessee company. It was a case of succession of business from the firm to the company.
   c) The AO issued notice dated 25.04.2011 under section 153A of the Act in the name of "M/s.Trishul Developers" i.e., in the name of the erstwhile partnership firm and the assessment order also was passed under the name of M/s.Trishul Developers which was not in existence. Copies of the notices issued under section 153A of the Act for the assessment year 2004-05, 2005-06 and 2007-08 are kept on record at assessee's paper book page no.30 to 32.

d) He submitted that the assessee contended before the CIT(A) that the notice u/s 153A issued on 25.04.2011 and assessment order dated 30.12.2011 in the name of the erstwhile partnership firm which is a non-existent entity is bad in law and deserves to be quashed.

e) The CIT(A) in Para 6 of its order noted that the return of income in response to the notice u/s 153A of the Act were filed in the name of the erstwhile partnership firm and signed by the partner after the takeover by the company. The CIT(A) held that the mere omission of not mentioning M/s. Trishul Developers now M/s. Trishul Buildtech Infrastructure Pvt. Ltd. in the notices issued and the assessment order, do not negate the proceedings so made and that the same was in accordance with section 170(1) of the Act and such mistake is curable under section 292B of the Act.

f) The CIT(A) further held that the provisions of section 170(2) is not applicable in the assessee's case as it is not a case of when the erstwhile entity cannot be found as the erstwhile partnership firm as filed return of income and its successor has received and understood the notices.

g) The Tribunal upheld the above view of the CIT(A) in the first round of proceedings before it. The Hon'ble High Court has based on the recent decision of the Hon'ble High Court in the case of Logica Private Limited v. ACIT in ITA No. 1008/2017 dated 01.08.2022 and the decision of the Hon'ble Supreme Court in the case of PCIT v. Maruthi Suzuki India Ltd. (2019) 107 taxmann.com 375 (SC) has remanded the matter to this Hon'ble Tribunal for reconsideration.

h) He submitted that the provisions of section 170(2) of the Act alone is applicable in the facts and circumstances of the case as it is only the successor-in-interest, M/s. Trishul Buildtech Infrastructure (P) Ltd. which could have been validly assessed to income tax even in respect of period when the erstwhile partnership firm was in existence. The company has taken over all the assets and liabilities of the erstwhile partnership firm and its business as a whole. The firm ceases to exist from that date.

i) He submitted that the Respondent issued notice dated 25.04.2011 under Section 153A of the Act on the erstwhile partnership firm which was not in existence. It is submitted that the very issuance of notice and initiation of proceedings on an assessee that is not in existence invalidates the very notice and all further subsequent assessment proceedings and the same are void ab initio. It is immaterial whether the return of income was filed in the status of a "firm" or "private limited company' in response to an invalid notice and mere filing of the return of income in the status of a "firm" does not cure the defect and validate all subsequent assessment proceedings.

j) He further submitted that framing of the assessment in the name of the non-existent partnership firm goes to the root of assumption of valid jurisdiction by the Respondent and the same is not a mere irregularity which can be cured by section 292B of the Act.

k) The Ld. Senior Advocate placed reliance on the following decisions:

   a) PCIT v. Maruthi Suzuki India Ltd (2019) 416 ITR 613 (SC)

b) PCIT v. M/s. Quantech Global Services Ltd. in ITA No. 439 of 2018 dated 04.02.2021 (Kar.)

c) Logica Pvt. Ltd. v. ACIT in ITA No. 1008 of 2017 dated 01.08.2022

d) eMudhra Ltd v. ACIT (2020) 117 taxmann.com 550 (Kar)

e) CIT v. Intel Technology (India) Pvt Ltd (2016) 380 ITR 272 (Kar.)

f) Teleperformance Global Services (P) Ltd v. ACIT (2021) 435 ITR 725 (Bom.)

g) Takshashila Realities (P.) Ltd. v. DCIT (2017) 77 taxmann.com 160 (Guj.)

h) Rustagi Engineering Udyog (P.) Ltd. v. DCIT (2016) 382 ITR 443 (Del.)

i) Gayatri Microns Ltd. v. ACIT (2020) 114 taxmann.com 318 (Guj.)

j) BDR Builders & Developers (P.) Ltd. v. ACIT (2017) 397 ITR 529 (Del.)

k) Alok Knit Exports Ltd v. DCIT (2021) 130 taxmann.com 457 (Bom)

l) Spice Infotainment Ltd. v. CIT (2012) 247 CTR 500 (Del.), SLP dismissed in C.A. No. 285 of 2014 dated 02.11.2017

m) ACIT v. Neha Enterprises in ITA No. 3666/Mum/2015 dated 20.12.2017 (Mum. – Trib.)

n) CIT v. Norton Motors (2005) 275 ITR 595 (P & H)

l) He submitted that the notice issued u/s 153A of the Act and the order passed on the erstwhile partnership firm is akin to issuing the notice and concluding assessments on a dead person which is impermissible under the Act. Reliance is placed on the following decisions –

i) ITO v. Durlabhbhai Kanubhai Rajpara (2020) 114 taxmann.com 481 (Guj.), SLP dismissed reported in 114 taxmann.com 482 (SC)

ii) Chandreshbhai Jayantibhai Patel v. ITO (2019) 101 taxmann.com 362 (Guj.)

iii) Savita Kapila v. ACIT (2020) 426 ITR 502 (Del.)

iv) Bharti Harendra Modi v. ITO (2019) taxmann.com 389 (Guj.)

v) Urmilaben Anirushasinhji Jadeja v. ITO (2020) 420 ITR 226 (Guj.)

vi) Sumit Balkrishna Gupta v. ACIT (2019) 414 ITR 292 (Bom.)

m) He also placed reliance on the decision of the Hon'ble Supreme Court in the case of ITO v. Ch. Atchaiah (1996) 218 ITR 239 (SC) wherein it has been held that income has to be assessed in the hands of the right person and assessing the same in the hands of the wrong person does not exonerate assessing the same income in the hands of the right person. Therefore, it is essential that income has to be assessed and taxed in the hands of the right person which in the instant case is the succeeding company. The assessment on the wrong person is invalid in law.

n) He drew our attention to the provisions of section 170(1) and 170(2) of the Act are reproduced below –

> *"Succession to business otherwise than on death.*
>
> *170. (1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession,—*

(a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;

(b) the successor shall be assessed in respect of the income of the previous year after the date of succession.

(2) Notwithstanding anything contained in sub-section (1), when the predecessor cannot be found, the assessment of the income of the previous year in which the succession took place up to the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of this Act shall, so far as may be, apply accordingly."

o) He submitted that the erstwhile partnership firm can be found and therefore the provisions of section 170(2) of the Act are not applicable is perverse. The erstwhile partnership firm ceased to exist w.e.f from 01.02.2010. The return filed by the erstwhile partnership firm cannot lead to a conclusion that the erstwhile partnership firm is still in existence. Once the partnership firm is converted into a company is ceases to exist from that date and it cannot be said that the partnership firm can be found subsequent to the date of conversion which in the instant case is 01.02.2010. It is only the partners of the firm that can be found and not the partnership firm.

p) He submitted that the assessee has filed return of income in the name of the company M/s. Trishul Developers and Infrastructures Pvt. Ltd. for the AY 2010-11 on 14.10.2010. He Also drew our attention to the said copy of return filed before the department on 14.10.2010, which is placed on record at page no.35 of the assessee's paper book. In the financial statements for the year ended 31.03.2010, M/s. Trishul Buildtech & Infrastructures Pvt. Ltd. i.e., the assessee has

categorically stated that the company was incorporated on 01.02.2010 under Part XI of the Companies Act and that all the properties movable and immovable belonging to the partnership firm vests in the company by operation of law.

q) According to him, the assessee has filed appeal against the assessment order before the CIT(A) in its capacity as a successor in interest. Copy of the Form 35 of the assessment year 2007-08 is kept on record in assessee's paper book page nos.36 & 37. He submitted that the CIT(A) ought to have appreciated the same and not held that the assessment order passed in the name of the erstwhile partnership firm is valid. He placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT v. Kanpur Coal Syndicate (1964) 53 ITR 225 (SC) wherein it held that the CIT(A)'s power are co-terminus with that of the AO and that the CIT(A) can do what the AO can do and also direct the AO to do what the AO failed to do.

r) He also drew our attention stating that even the jurisdictional notice issued under section 143(2) dated 09.08.2011 for the impugned assessment years is in the name of the erstwhile partnership firm which is bad in law and therefore the entire proceedings are void ab initio. Copies of the notices issued under section 143(2) of the Act dated 09.08.2011 for the A.Y. 2004-05, A.Y. 2005-06 and dated 23.08.2011 for the A.Y. 2007-08 for the impugned assessment years are kept on record in assessee's paper book at pages nos.63 to 65.

s) He submitted that the following clearly indicate that the assessee has intimated to the AO regarding the conversion of the partnership firm to company -

   i) The assessee has vide letter dated 12.08.2011 for the assessment year 2008-09 clearly stated that

the letter is from M/s. Trishul Buildtech Infrastructures Pvt. Ltd. (for erstwhile firm Trishul Developers). Copy of the letter dated 12.08.2011 is kept on record at assessee's paper book page no. 33.

ii) Similarly vide another letter dated 10.11.2011, the assessee has in the signatory details portion stated "for M/s. Trishul Buildtech Infrastructures Pvt. Ltd. (formerly known as Trishul Developers) is kept on record at assessee's paper book page no.34.

iii) In the financial statements for the year ended 31.03.2010, M/s. Trishul Buildtech & Infrastructures Pvt. Ltd. i.e., the assessee has categorically stated that the company was incorporated on 01.02.2010 under Part XI of the Companies Act and that all the properties movable and immovable belonging to the partnership firm vests in the company by operation of law. The assessee filed return of income for the AY 2010-11 on 14.10.2010.

t) He further submitted that the mere fact that the assessee has responded to notice and participated in the assessment proceedings alone would not make any difference as the issuance of the notice and assessment were not in accordance with the provisions of law. It is a settled position of law that consent does not confer jurisdiction and consequently mere filing of return of income in the name of the erstwhile partnership firm does not validate the invalid jurisdiction of the AO. The assessee places reliance on the following decisions-

i) Bhandari Metals v. State of Karnataka ILR 2004 Kar 2025

ii) CIT v. V. Mr. P. Firm, Muar [1965] 56 ITR 67 (SC)

iii) Pullangode Rubber Produce Co. Ltd v. State of Kerala (1973) 91 ITR 18 (SC)
iv) Nirmala L. Mehta v. A. Balasubrimaniam CIT (2004) 269 ITR 1 (Bom.).

6. On the other hand, the ld. D.R. relied on the order of ld. CIT(A) and submitted that as far as provisions of section 170(1) of the Act, if there is succession in the business of assessee, the predecessor has to be assessed in respect of income of the previous year in which succession took place up to the date of succession. The admitted factual position in present case is that the conversion of Trishul Developers, a partnership firm converted as a Limited Company by name "Trishul BuildTech Infrastructure Pvt. Ltd." on 1.2.2010, therefore, the assessment years involved herein are 2004-05, 2005-06 & 2007-08, only Trishul Developers will have to be assessed as per return of income filed by the assessee. The provisions of section 170(2) of the Act cannot be invoked for the simple reason that erstwhile firm filed the return of income and was very much available. Section 170(2) of the Act is attracted only in case where the predecessor "cannot be found". As such, he submitted that the assessee has no case on this issue and this ground is to be dismissed.

7. We have heard the rival submissions and perused the materials available on record. There was search u/s 132 of the Act in the case of K. Prakash Shetty, M/s. Gold Finch Hotel Group & Others, Bangalore on 20.11.2009. Subsequently, the case was centralized. Notice u/s 153A of the Act was issued to M/s. Trishul Developers (Partnership firm) on 25.4.2011 in response to which assessee filed return of income on 9.8.2011 at Rs.34,14,530/- for the assessment year 2004.05 on 9.8.2011. Same is the position for the other assessment years. Notie u/s 143(2) of the Act dated 9.8.2011 was served and the assessment has been concluded u/s 153A r.w.s. 143(3) of the Act in the name of M/s. Trishul Developers on 30.12.2011. Now the contention of ld. A.R. is that as on date of

passing the assessment order on 30.12.2011, there was no surviving firm M/s. Trishul Builders and the business of this firm was taken over by new assessee M/s. Trishul Buildtech Infrastructure Pvt. Ltd. on 1.2.2010, on an as is where is basis. All the assets & liabilities of the said erstwhile firm were entirely taken over by the new company M/s. Trishul Buildtech Infrastructure Pvt. Ltd. (present assessee). Thus, there was succession of business of erstwhile firm by new company M/s. Trishul Buildtech Infrastructure Pvt. Ltd. and consequently issued notices u/s 153A, 143(2) & 143(3) of the Act. Thereafter, framing assessment order in the name of erstwhile firm M/s. Trishul Developers is having no legal sanctity and as such, it is invalid assessment order in all these 3 assessment years. There was no existence of M/s. Trishul Developers, a partnership firm at the relevant point of time of passing the assessment orders in these assessment years.

7.1 In this regard, we would like to take a note of the position of law laid down by the Hon'ble Supreme in the case PCIT Vs. Maruti Suzuki India Limited reported in 416 ITR 613. The facts in this case are that Suzuki Motors Corporation, and Maruti Suzuki India limited (in short MSIL) constituted a joint venture with shareholding of 70% and 30%. Such joint venture was incorporated as Suzuki Motor India Ltd. Subsequently w.e.f. 8.6.2005 its name was changed to SPIL. On 28.11.2012 SPIL has filed its return of income. Upto this date no amalgamation had taken place. On January 29, 2013 a scheme for amalgamation of SPIL and MSIL was approved by the Hon'ble High Court w.e.f. 1.4.2012. The terms of approval scheme provided that all liability and duties of the transferor company shall stand transferred to the transferee company. On scheme being coming into effect, the transferor company was to stand dissolved without winding up. The scheme stipulated that the order of amalgamation will not be construed as an order granted exemption from the

payment of stamp duty or taxes, or any other charges, if any payable in accordance with law. The AO has initiated the assessment proceedings by issuance of notice under section 143(2) on 26.9.2013 followed by a notice under section 142(1) of the Act to the amalgamating company. MSIL participated in the assessment proceedings of erstwhile amalgamating entity i.e. SPIL through its authorized representative and officers. The assessment was framed. Thereafter during the appellate proceedings before the Tribunal the assessee took an objection that final assessment order was passed on 31.10.2016 in the name of SPIL which was amalgamated with MSIL. The assessee took an objection that the assessment order has been passed in the name of company which ceased to exist and therefore, the assessment order is void ab initio. This plea of the assessee was accepted by the Tribunal. This order of the Tribunal was upheld by the Hon'ble High Court. Ultimately issue travelled upto Hon'ble Supreme Court. While taking cognizance of the submissions, and the proposition laid down in various High Courts' decisions, the Hon'ble Supreme Court made the following observations:

> *"19. While assessing the merits of the rival submissions, it is necessary at the outset to advert to certain significant facets of the present case:*
> *(i) Firstly, the income which is sought to be subjected to the charge of tax for AY 201213 is the income of the erstwhile entity (SPIL) prior to amalgamation. This is on account of a transfer pricing addition of Rs. 78.97 crores;*
> *(ii) Secondly, under the approved scheme of amalgamation, the transferee has assumed the liabilities of the transferor company, including tax liabilities;*
> *(iii) Thirdly, the consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist. In Saraswati Industrial Syndicate Ltd., (supra) the principle has been formulated by this Court in the following observations: "5. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or re-organisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each*

blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: Halsbury's Laws of England (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."
(iv) Fourthly, upon the amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated or an order of assessment passed;
(v) Fifthly, a notice under Section 143 (2) was issued on 26 September 2013. To the amalgamating company, SPIL, which was followed by a notice to it under Section 142(1);

(vi) Sixthly, prior to the date on which the jurisdictional notice under Section 143 (2) was issued, the scheme of amalgamation had been approved on 29 January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012;

(vii) Seventhly, the assessing officer assumed jurisdiction to make an assessment in pursuance of the notice under Section 143 (2). The notice was issued in the name o f the amalgamating company in spite of the fact that on 2 April 2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation. In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was void ab initio.

20. In Spice Entertainment, (supra) a Division Bench of the Delhi High Court dealt with the question as to whether an assessment in the name of a company which has been amalgamated and has been dissolved is null and void or, whether the framing of an assessment in the name of such company is merely a procedural defect which can be cured. The High Court held that upon a notice under Section 143 (2) being addressed, the amalgamated company had brought the fact of the amalgamation to the notice o f the assessing officer. Despite this, the assessing officer did not substitute the name o f the amalgamated company and proceeded to make an assessment in the name of a non-existent company which renders it void. This, in the view of the High Court, was not merely a procedural defect. Moreover, the participation by the amalgamated company would have no effect since there could be no estoppel against law :

"11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said 'dead person'. When notice under Section 143 (2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of

the appellant on record. Instead, the Assessing Officer made the assessment in the name of M/s Spice which was non existing entity on that day. In such proceedings an 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. "

Following the decision in Spice Entertainment, (supra) the Delhi High Court quashed assessment orders which were framed in the name of the amalgamating company in:

(i) Dimension Apparels (supra);
(ii) Micron Steels; and (supra)
(iii) Micra India (supra).

21. In Dimension Apparels, (supra) a Division Bench of the Delhi High Court affirmed the quashing of an assessment order dated 31 December 2010. The Respondent had amalgamated with another company and thus, ceased to exist from 7 December 2009. The Court rejected the argument of the Revenue that the assessment was in substance and effect in conformity with the Act by reason of the fact that the assessing officer had used correct nomenclature in addressing the Assessee; stated the fact that the company had amalgamated and mentioned the correct address of the amalgamated company. It was the Revenue's contention that the omission on the part of the assessing officer to mention the name of the amalgamated company is a procedural defect. The Delhi High Court rejected this contention. In doing so, it relied on the holding in Spice Entertainment, (supra) where the High Court expressly clarified that "the framing of assessment against a non-existing entity/person" is a jurisdictional defect. The Division Bench also relied on the holding in Spice Entertainment (supra) that participation by the amalgamated company in proceedings does not cure the defect as "there can be no estoppel in law," to affirm the quashing of the assessment order.

22. In Micron Steels, (supra) a notice was issued to Micron Steels Pvt Ltd (original assessee) after it had amalgamated with Lakhanpal Infrastructure Pvt Ltd. A Division Bench of the Delhi High Court upheld the setting aside of assessment orders, noting that Spice Entertainment (supra) is an authority for the proposition that completion of assessment in respect of a non-existent company due to the amalgamation order, would render the assessment a nullity.

23. In Micra India, (supra) the original assessee Micra India Pvt. Ltd had amalgamated with Dynamic Buildmart (P) Ltd. Notice was issued to the original assessee by the Revenue after the fact of amalgamation had been communicated to it. The Court noted that though the assessee had participated in the assessment, the original assessee was no longer in existence and the assessment officer did not the take the remedial measure of transposing the transferee as the company which had to be assessed. Instead, the original assessee was described as one in existence and the

order mentioned the transferee's name below that of the original assessee. The Division Bench adverted to the judgment in Dimension Apparels (supra) wherein the High Court had discussed the ruling in Spice Entertainment (supra). It was held that this was a case where the assessment was contrary to law, having been completed against a non-existent company. "

7.2 Hon'ble Supreme Court thereafter took note of the judgment in the case of Sky Light Hospitality Vs. ACIT, 259 taxman 390 (SC). This judgment was pressed in service by the Revenue to point out that if an order was framed in accordance with law in the name of amalgamating company, then it would amount to mistake, defect or omission which is curable under section 292B of the Income Tax Act. Hon'ble Supreme Court has dealt with this judgment and explained its impact. Hon'ble Supreme Court ultimately upheld the judgment of Hon'ble Delhi High Court in the case of Maruti Suzuki (supra) and held that assessment order passed subsequently in the name of non-existing company would be without jurisdiction and a nullity. Concluding paragraph of the judgment are worth to note which reads as under:

"33. In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Enfotainment (supra) on 2 November 2017. The decision in Spice Enfotainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Enfotainment (supra).

34. We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011- 12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and

certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable."

7.3 In the case of Emerald Company Ltd., ITAT Kolkata Bench in ITA No.428/Kol/2015 for the AY 2010-11 vide order dated 13.1.2016 has also dealt with similar situation after making reference to judgment of the Hon'ble Delhi High Court in the case of CIT Vs. Dimension Apparels P. Ltd., 370 ITR 288 (Del) as well as decision of Hon'ble Delhi High Court in the case of Spice Entertainment Ltd. The ITAT has also made reference to the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Intel Technology Ltd. P. Ltd., 380 ITR 272 (Kar.). The Tribunal has held that action under section 263 is a jurisdictional action against an assessee. In the case of a company, the ld. Commissioner was required to issue a show cause notice against a juridical person contemplated in section 2(31) of the Income Tax Act and if a juridical person ceases to exist then it would not be construed as a person within the meaning of section 2(31) against whom any action can be taken. The Commissioner would not assume proper jurisdiction and such type of defect would not be cured with help of section 292B of the Act, because it is not a procedural irregularity which could be cured. We also note that this Tribunal in the case of Snowhill Agencies Pvt. Ltd. Vs. Pr. CIT bearing ITA No. 1775/AHD/2019 vide order dated 21-1-2020 involving identical facts and circumstances has decided the issue in favour of the assessee.

7.4 Further, Delhi Bench of Tribunal in the case of HCP Petrochem Pvt. Ltd. through IP India Pvt. Ltd. in ITA No.2308/Del/2016 for the AY 2012-13 vide order dated 13.12.2017 taken a similar view and held that assessment order was not tenable for having been framed in the name of non-existent company by placing reliance on the judgement of Hon'ble Supreme Court in the case of Maruti Suzuki India Ltd. cited (supra).

7.5 Further, the Hon'ble Karnataka High Court in the case of eMudhra Ltd. cited (supra), wherein held that "where assessing officer issued notice u/s 148 of the Act to non-existing company, it was substantive illegality and not procedural violation of nature adverted to in section 292B of the Act, hence, not curable" by observing as under:

> *"While arriving at such a decision, the Hon'ble Apex Court has taken note of Section 292-B of the Act also, which is apposite to refer to and the same reads as under;*
>
> > *"292B. No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provision of this Act shall be invalid or shall be deemed to be invalid merely by reason 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 proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act."*
>
> *The jurisdiction assumed by the Assessing Officer to issue notice under Section 148 of the Act to non-existing company is substantive illegality and not the procedural violation of the nature adverted to in Section 292-B of the Act. The substantive defective notice issued against a non-existing company is not curable. On this ground alone, without adjudicating upon the other issues raised by the petitioner inasmuch as the limitation aspect, change of opinion, non-existence of tangible material and non-failure on the part of the assessee disclosing full and true material facts need not be examined. Without going into these aspects, the writ petition requires to be allowed on the ground of issuance of notice under section 148 of the Act to the non-existing company.*
>
> *12. Hence, Notice dated 28-3-2018 issued under section 148 of the Act, at Annexure-A, the order overruling the objections of the petitioner dated 29-11-2018 at Annexure-B and Notice dated 11-12-2018 issued under section 142(1) of the Act at Annexure-S are quashed."*

7.6 Further, Hon'ble Karnataka High Court in the case of CIT Vs. Intel Technology India (P) Ltd. cited (supra), wherein held as follows:

"7. In the present case also, the proceedings had been initiated against a non-existing company/SSS Limited even after the amalgamation of the said company with M/s. Intel Technology India Pvt. Ltd. We do not see any good ground to differ with the said judgement of the Delhi High Court.

8. Accordingly, for the reasons given in the judgement of the Delhi High Court in the case of Spice Infotainment Ltd. (supra), these appeals are dismissed and we decide the substantial questions of law in favour of the assessee and against the revenue."

7.7 The Hon'ble Gujarat High court in the case of Takshashila Realties (P) Ltd. cited (supra) held as under:

"Once scheme for amalgamation was sanctioned, amalgamating-company would not be in existence and therefore, reassessment notice could not be issued against original amalgamating-company for any prior year."

7.8 Further, Mumbai Bench of Tribunal in the case of Neha Enterprises in ITA No.3666/Mum/2015 & CO 249/Mum/2017 for the assessment year 2017-18 vide order dated 20.12.2017 held as under:

"*6. We have heard the rival submissions, perused the orders of the authorities below. and the case laws relied on. It is an undisputed fact that the assessee firm was converted into a private limited company on 20.02.2008 and the notice for re-opening of the assessment for the Assessment Year 2007-08 was issued on 27.02.2012 in the name of the firm which was non-existent as on the date of issue of notice under notice 148 of the Act. In other words, the proceedings were initiated by the Assessing Officer on a non-existent firm which is null and void. In the case of ACIT v. M/s DLF Cyber City Developers Limited (supra) the Delhi Tribunal held as under: -*

"13. In our opinion, the ratio of the above decision of Hon'ble Jurisdictional High Court would be squarely applicable to the case of the assessee. It is a settled law that the partnership firm and the company are separate juridical persons. Under the Income-tax Act also, they are assessed separately. Chapter IX of the Companies Act permits the conversion of the partnership firm into company and, on such conversion, the partnership firm ceases to exist and the company comes into existence. This incident has taken place on 1st March, 2006 and therefore, from 2nd March, 2006, DLF Cyber City firm is no more in existence. Notice under Section 148 was issued on 18th August, 2008, i.e., the date on which the partnership firm was not in existence.

Hon'ble Jurisdictional High Court in the above mentioned case has held that the assessment in the hands of dead person would be clearly void. The aforesaid observation would be squarely for the issue of notice under Section 148 in the name of dead person. Therefore, respectfully following the above decision, we hold that the issue of notice under Section 148 in the name of a dead person is void. It is not much relevant whether the Assessing Officer was aware or not with regard to dissolution of the firm. However, we may point out that the Revenue is at liberty to take appropriate action in accordance with law in the hands of the successor company in the light of the observations of Hon'ble Jurisdictional High Court at paragraph 18 of the report which is also reproduced by us at paragraph 12 above."

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

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

"(i) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the action of the Assessing Officer in framing assessment in the name of "Spice Corp Ltd", after the said entity stood dissolved consequent upon its amalgamation with Mcorp Private Limited w.e.f 01.07.2003, was a mere "procedural defect"?
(ii) whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that in view of the provisions of section 292B of the Act, the assessment, having in substance and effect, been framed on the amalgamated company which could not be regarded as null and void?"

4. The rationale given by the Tribunal, giving it to be a mere procedural defect is summed up as under:

(i) Spice Corporation Ltd. (the amalgamating company) was an income tax assessee in the status of a company incorporated under the provisions of Companies Act, 1956.

(ii) The amalgamating company was in existence during the relevant assessment year, 2002-03 and 2003-04.

(iii) The return of income for these assessment years were filed on 30th November, 2002 and on 30th October, 2003 respectively by M/s Spice.

(iv) The scheme of amalgamating was sanctioned much subsequently on 11th February, 2004 by the High Court.

(v) The return filed by M/s Spice was selected for scrutiny and notices were issued. Pursuant thereto, the amalgamated company i.e. the appellant appeared and participated in the proceedings. Even the assessment orders were challenged by the appellant/amalgamated company. Thus, the appellant accepted that the assessment proceedings in respect of the assessment of Spice for the period prior to its amalgamation are being taken up against the appellant and it is the appellant which felt aggrieved of the assessment order and preferred appeal. The order was thus in substance and in fact, against the appellant/amalgamated company. The mere omission on the part of the AO to mention the name of the appellant/amalgamated company in place of M/s Spice was, therefore a procedural defect covered by the provisions of section 292B of the Act.

5. According to the Tribunal, if the Spice was non-existent, there was no reason for the amalgamation company to represent the same or to feel aggrieved against the said order and preferred appeal and get the same decided on merits. In other words, any appeal preferred by a non-existence person must also be treated as non-est. All these acts of the appellants/ amalgamated company clearly show that it had been constantly treated the assessment made against the appellant in respect of the assessment of amalgamated company. Further, no prejudice is caused to the assessee merely because in the body of the assessment order name of the amalgamated company is not shown.

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

"In the light of the discussions made above, we, therefore, hold that the assessment made by the AO, in substance and effect, is not against the non-existent amalgamating company. However, we do agree with the proposition or ration decided in the various cases relied upon by the learned counsel for the assessee that the assessment made against non-existent person would be invalid and liable to be struck down. But, in the present case, we find that the assessment, in substance and effect, has been made against amalgamated company in respect of assessment of income of amalgamating company for the period prior to amalgamation and

mere omission to mention the name of amalgamated company alongwith the name of amalgamating company in the body of assessment against the item "name of the assessee" is not fatal to the validity of assessment but is a procedural defect covered by Section 292B of the Act. We hold accordingly."

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

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

"The question is whether on the amalgamation of the Indian Sugar Company with the appellant Company, the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41(1) of the Act. The amalgamation of the two companies was effected under the order of the High Court in proceedings under Section 391 read with Section 394 of the Companies Act. The Saraswati Industrial Syndicate, the trans free Company was a subsidiary of the Indian Sugar Company, namely, the transferor Company. Under the scheme of amalgamation, the Indian Sugar Company stood dissolved on 29th October, 1962 and it ceased to be in existence thereafter. Though the scheme provided that the transferee Company the Saraswati Industrial Syndicate Ltd. undertook to meet any liability of the Indian Sugar Company which that Company incurred or it could incur, any liability, before the dissolution or not thereafter.

Generally, where only one Company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganization or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending Company become substantially the shareholders in the Company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new Company, or by the transfer of one or more undertakings to an existing Company. Strictly amalgamation does not cover the mere acquisition by a Company of the share capital of other Company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See Halsburys Laws of England 4th Edition Vol. 7 Para 1539. Two companies may join to form a new Company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third Company or one is absorbed into one or blended with another, the amalgamating Company loses its entity."

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

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

11. *After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said dead person. When notice under Section 143 (2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the appellant on record. Instead, the Assessing Officer made the assessment in*

the name of M/s Spice which was non existing entity on that day. In such proceedings and assessment order passed in the name of M/s Spice would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law.

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

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

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

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

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

absolutely invalid and assessment could not be made on a invalid return. In the process, the Court observed as under:

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

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

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

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

8. This decision of the Hon'ble Delhi High Court has been affirmed by the Hon'ble Supreme Court in CIT v. Spice Infotainment Ltd. in Civil Appeal No. 285 of 2014 and other batch of appeals by order dated 02.11.2017 by dismissing the special leave petition filed by the Revenue by holding that there is no reason to interfere with the impugned judgment. Therefore, respectfully following the said decision of the Hon'ble Supreme Court and the Hon'ble Delhi High Court, we hold that the reassessment framed pursuant to notice u/s. 148 in the name of the assessee firm which was non-existent as on the date of issue of notice is null and void. Since we held that the re-assessment order itself is null and void the other contentions/grounds raised by the assessee and the Revenue in both the appeals will not survive.

9. In the result, assessee's Cross objection is allowed and Revenue's appeal is dismissed."

7.9 Further, Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Norton Motors cited (supra) held as under:

"13. A reading of the above reproduced provision makes it clear that a mistake, defect or omission in the of income, assessment, notice, summons or other proceeding is not sufficient to invalidate an ¯c taken by the competent authority, provided that such return of income, assessment, notice, 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 facts of the case in hand show that the Commissioner of Income-tax had issued notice to the assessee proposing to cancel the registration of firm on the ground of error in the allocation of shares among the partners, but no notice was issued under section 158 read with sections 187 and 67 of the Act proposing to change the share allocation among the partners and the assessee did not get an opportunity to make representation in this regard. Therefore, the Commissioner of Income-tax did not have the jurisdiction to direct modification of the order passed by the Income-tax Officer under section 158 of the Act and the der passed by him cannot be sustained by relying on section 292B of the Act. As a corollary to this, we hold that the Tribunal did not commit any illegality by setting aside his order."

7.10 Further, Hon'ble Supreme Court in the case of ITO Vs. Durlabhbhai Kanubhai Rajpara cited (supra) held that "where High

Court set aside reassessment proceedings on ground that notice not valid u/s 148 of the Act which could not be issued against a dead person, SLP filed against the said order was dismissed."

7.11 The Hon'ble Gujarat High court in the case of Bhupendra Bhikalal Desai cited (supra) held as under:

"Notice issued under section 153C against dead person is unenforceable in law; in such case revenue cannot contend that as they have no knowledge about death of assessee, they are entitled to plead that notice is not defective."

7.12 Further, Hon'ble Delhi High Court in the case of Savita Kalipa cited (supra) held as under:

"In absence of statutory provision, a duty cannot be cast upon legal representatives to intimate factum of death of assessee to department and, thus, where Assessing Officer issued a notice to assessee under section 148 after his death and, in such a case, it could not have been validly served upon assessee, said notice being invalid, was to be quashed."

7.13 The Hon'ble Supreme Court in the case of CIT vs. Jai Prakash Singh reported in 219 ITR 737 held that "an omission to serve or any defect in the service of notices provided by procedural provisions does not efface or erase the liability to pay tax where such liability is created by distinct substantive provisions, any such omission or defect may render the order irregular-depending upon the nature of the provision not complied with but certainly not void or illegal".

7.14 The Hon'ble Madras High Court in the case of Commissioner of Income-tax Vs. Anaimugan Transports (P) Ltd. reported in 215 ITR 553 has observed that a person authorized by law to make an order may make a right order as well as a wrong order. Even a superior officer who has found that the order has been wrongly made by any authority subject to its appellate or revisional jurisdiction, cannot take away the very doing of the act by him, even they have found that the order was not sustainable. The Hon'ble High Court has expressed its concern that no honest

taxpayer should be asked to pay more, but no one else should be allowed to escape tax by taking recourse to questionable methods.

7.15 Further, the Hon'ble Karnataka High Court in the case of CIT Vs. Intel Technology India Pvt. Ltd. reported in (2015) 57 Taxmann.com 159 (Kar.) wherein held as under:

> *"6. .....it is contended that the facts of the present case are similar, if not identical, to the facts in the case of Spice Infotainment Ltd. (supra) wherein the Delhi High Court has, after considering the various provisions of the Income Tax Act as well as certain decisions of the Apex Court and other High Courts, clearly held that the framing of assessment against the non-existing entity person goes to the root of the matter which is not a procedural irregularity, but, a jurisdictional defect and as there cannot be any assessment against the dead person.*
>
> *7. In the present case also, the proceedings had been initiated against a not existing company/SSS Limited even after the amalgamation of the said company with M/s Intel Technology India Pvt. Ltd. We do not see any good ground to differ with the said judgment of the Delhi High Court.*
>
> *8. Accordingly, for the reasons given in the judgment of th? Delhi High Court in the case of Spice Infotainment Ltd. (supra), these appeal' are dismissed and we decide the substantial questions of law in favour of the assessee and against the revenue. "*

7.16 Further, the Coordinate Bench of Bangalore Tribunal in the case of ACIT Vs. Arshed Properties & Investments P. Ltd. reported in 62 Taxmann.com 340, wherein held as under:

> *"17. The next issue is with regard to applicability of provisions of section 292BB of the Act. It is clearly - m the statutory provisions that these provisions only insulate the AO from the proof of service of notice u/s 143(2) of the Act. It does not in any way insulate the AO from default in issuing notice u/s. 143(2) within the period of limitation contemplated therein. When the records show that there was no issue of notice u/s. 143(2) within the period of limitation prescribed under the said proviso, the Revenue cannot take advantage of the provisions of section 292BB. In other words, "issue of notice" and "service of notice" are two different aspects and what is covered by section 292BB is only "service of notice". on-issue of notice u/s. 143(2) within the period of limitation would not be covered under the ambit of section 292BB of the Act. The decision of the Tribunal in the case of Amithi Software Technologies (P.) Ltd. (supra) referred to in the earlier part of this order clearly supports the plea of the assessee*

in this regard. We therefore hold that assessment proceedings are invalid for the reason that notice u/s. 143(2) had not been issued and served within the time limit prescribed by those provisions. Accordingly, the order of assessment is annulled. In view of the conclusions on the preliminary issue raised in the Cross Objection, we are of the view that there is necessity to go into the merits on the issues raised by the Revenue in its appeal.

18. Accordingly, the appeal by the Revenue is dismissed, while the Cross Objection by the assessee is allowed."

7.17 Further, the ld. Sr. advocate referred to section 170(2) of the Act and submitted that where the predecessor cannot be found in the assessment of the income of the previous year in which succession took place after the date of the succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor. In the present case, the erstwhile partnership firm is to exist w.e.f. 1.2.2010. The return filed by the erstwhile partnership firm cannot lead to a conclusion that the erstwhile partnership firm is still in existence. Once the partnership is converted to a Company, the firm is ceased to exist from that date and it cannot be said that the partnership firm can be found subsequent to the date of conversion of firm into Private Limited Company after that conversion took place i.e. from the date 1.2.2010. It is only the partners of the firm that can be found and not the partnership firm. Being so, the assessment to be framed in the name of successor only and not in the name of erstwhile partnership firm. In our opinion, this proposition is supported by various judgements as cited above and also by the following decisions and the claim of assessee that assessment made on the non-existent entity is null and void and liable to be quashed:

"1. The Supreme Court in Saraswati Industrial Syndicate Ltd. Vs CIT, reported in 1991 AIR 70, 1990 SCR Supl. (1) 332, held that "after the amalgamation of the two companies the transferor company ceased to have any entity and amalgamated company acquired a new status and it was not possible to treat

the two companies as partners or jointly liable in respect of their liabilities and assets."

2. Delhi High Court in 52 taxmann.com 356 [2014] held that it (becomes) incumbent upon the Income Tax Authorities to substitute the successor in place of the said ' dead person'. Such a defect cannot be treated as procedural defect.... 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."

3. Karnataka High Court in 57 taxmann.com 159 [2015] held that "Assessment in name of company which had been amalgamated with other company would be null and void and framing of assessment in name of non-existent entity is not a procedural irregularity which can be cured under section 292B."

4. Delhi High Court again in 57 taxmann. 163 [2015] held that "since assessee had amalgamated with transferee-company, notice ought to have been sent to latter, and since such notice had not been issued to transferee-company, entire proceedings were a nullity."

7.18 We are also very conscious about the latest decision of Hon'ble Supreme Court in the case of Principal CIT Vs. Mahaguna Realtors Pvt. Ltd. reported in 443 ITR 194 (SC), wherein held as follows:

"Amalgamation was known to 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 Decor 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, 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 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."*

(para 41)

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.

(para 42)

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. Revenue's appeal allowed.
(para 43)

Conclusion:

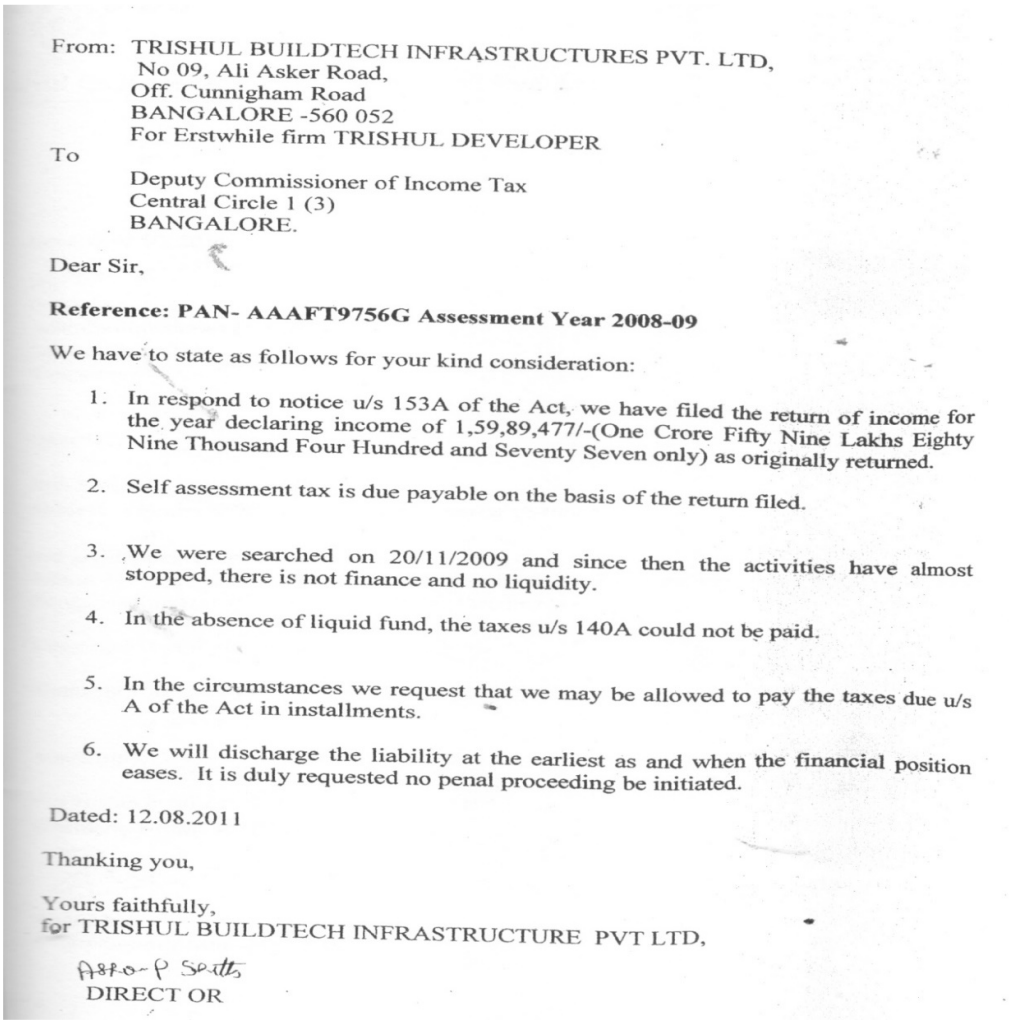
Whether corporate death of an entity upon amalgamation per se invalidates an assessment order ordinarily cannot be determined on a bare application of Section 481 of Companies Act, 1956 (and its equivalent in 2013 Act), but would depend on terms of amalgamation and facts of each case."

7.19 Thus, the facts of present case before us could be distinguished from the facts of the case before Hon'ble Supreme Court in the case of Mahagun Realtors Pvt. Ltd. cited (supra) on following basis:

a) The business of erstwhile partnership firm was taken over by M/s. Trishul Buildtech Infrastructure Pvt. Ltd. on 1.2.2010 and all the assets & liabilities of the erstwhile partnership firm was duly taken over by present assessee.
b) The notice u/s 153A of the Act was issued to the erstwhile firm M/s. Trishul Developers on 25.4.2011, notice u/s 143(2) of the Act was issued on 9.8.2011 and assessment

order was passed on 30.12.2011. in the name of erstwhile partnership firm.

7.20 It has been brought on record by assessee that there was a conversion of partnership firm to company vide letter dated 12.8.2011 for the assessment year 2008-09, which reads as follows:



From: TRISHUL BUILDTECH INFRASTRUCTURES PVT. LTD,
No 09, Ali Asker Road,
Off. Cunnigham Road
BANGALORE -560 052
For Erstwhile firm TRISHUL DEVELOPER

To
Deputy Commissioner of Income Tax
Central Circle 1 (3)
BANGALORE.

Dear Sir,

Reference: PAN- AAAFT9756G Assessment Year 2008-09

We have to state as follows for your kind consideration:

1. In respond to notice u/s 153A of the Act, we have filed the return of income for the year declaring income of 1,59,89,477/-(One Crore Fifty Nine Lakhs Eighty Nine Thousand Four Hundred and Seventy Seven only) as originally returned.
2. Self assessment tax is due payable on the basis of the return filed.
3. We were searched on 20/11/2009 and since then the activities have almost stopped, there is not finance and no liquidity.
4. In the absence of liquid fund, the taxes u/s 140A could not be paid.
5. In the circumstances we request that we may be allowed to pay the taxes due u/s A of the Act in installments.
6. We will discharge the liability at the earliest as and when the financial position eases. It is duly requested no penal proceeding be initiated.

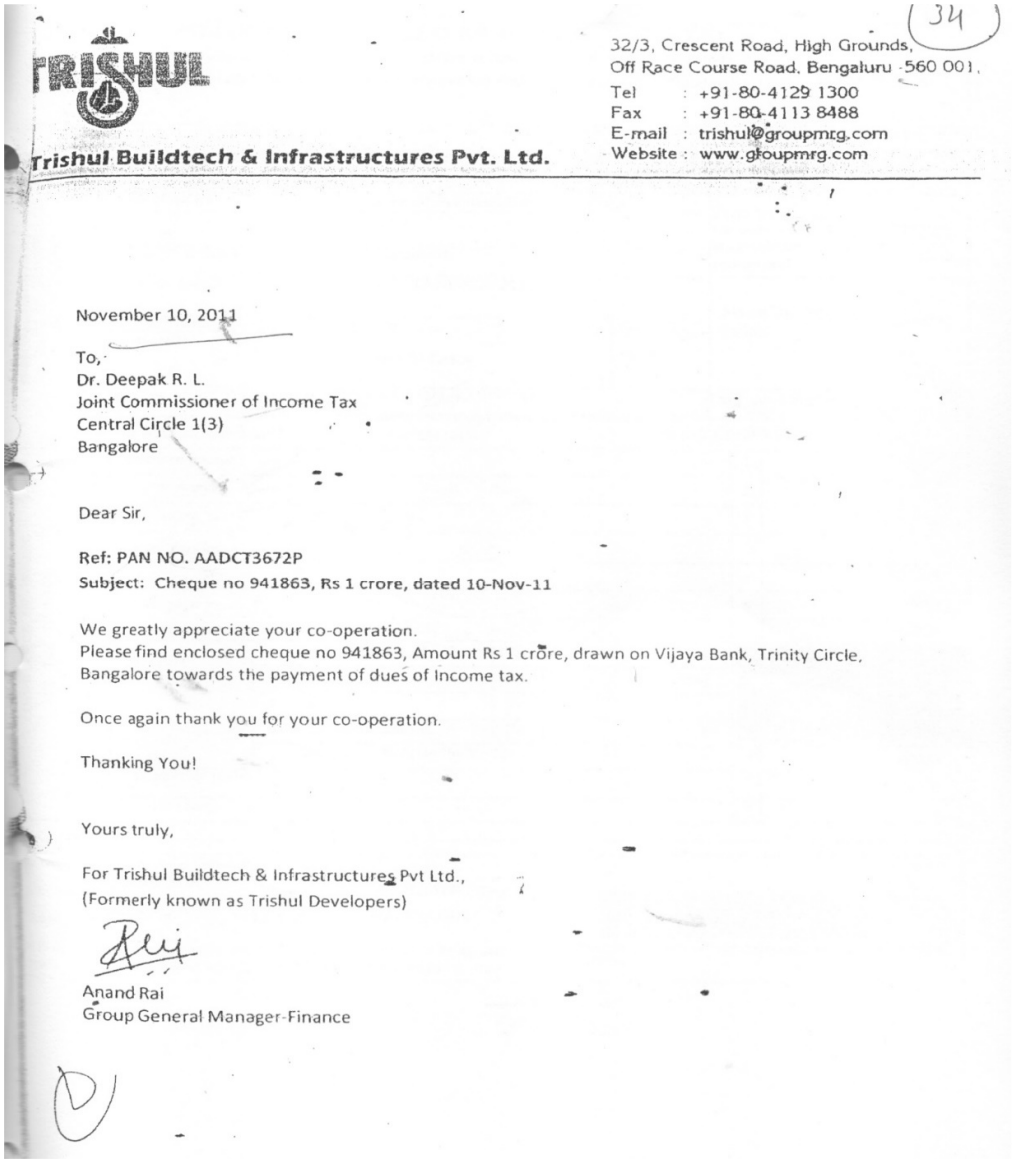
Dated: 12.08.2011

Thanking you,

Yours faithfully,
for TRISHUL BUILDTECH INFRASTRUCTURE PVT LTD,

DIRECT OR

7.21 Further, vide letter dated 10.11.2011, it was intimated to the JCIT, Central Circle-1(3), Bangalore with regard to payment of tax and there the assessee mentioned the assessee as Trishul Buildtech & Infrastructures Pvt. Ltd. (formerly known as Trishul Developers). The said letter reads as follows:



(34)

TRISHUL

Trishul Buildtech & Infrastructures Pvt. Ltd.

32/3, Crescent Road, High Grounds,
Off Race Course Road, Bengaluru -560 001.
Tel : +91-80-4129 1300
Fax : +91-80-4113 8488
E-mail : trishul@groupmrg.com
Website : www.groupmrg.com

November 10, 2011

To,
Dr. Deepak R. L.
Joint Commissioner of Income Tax
Central Circle 1(3)
Bangalore

Dear Sir,

Ref: PAN NO. AADCT3672P
Subject: Cheque no 941863, Rs 1 crore, dated 10-Nov-11

We greatly appreciate your co-operation.
Please find enclosed cheque no 941863, Amount Rs 1 crore, drawn on Vijaya Bank, Trinity Circle, Bangalore towards the payment of dues of Income tax.

Once again thank you for your co-operation.

Thanking You!

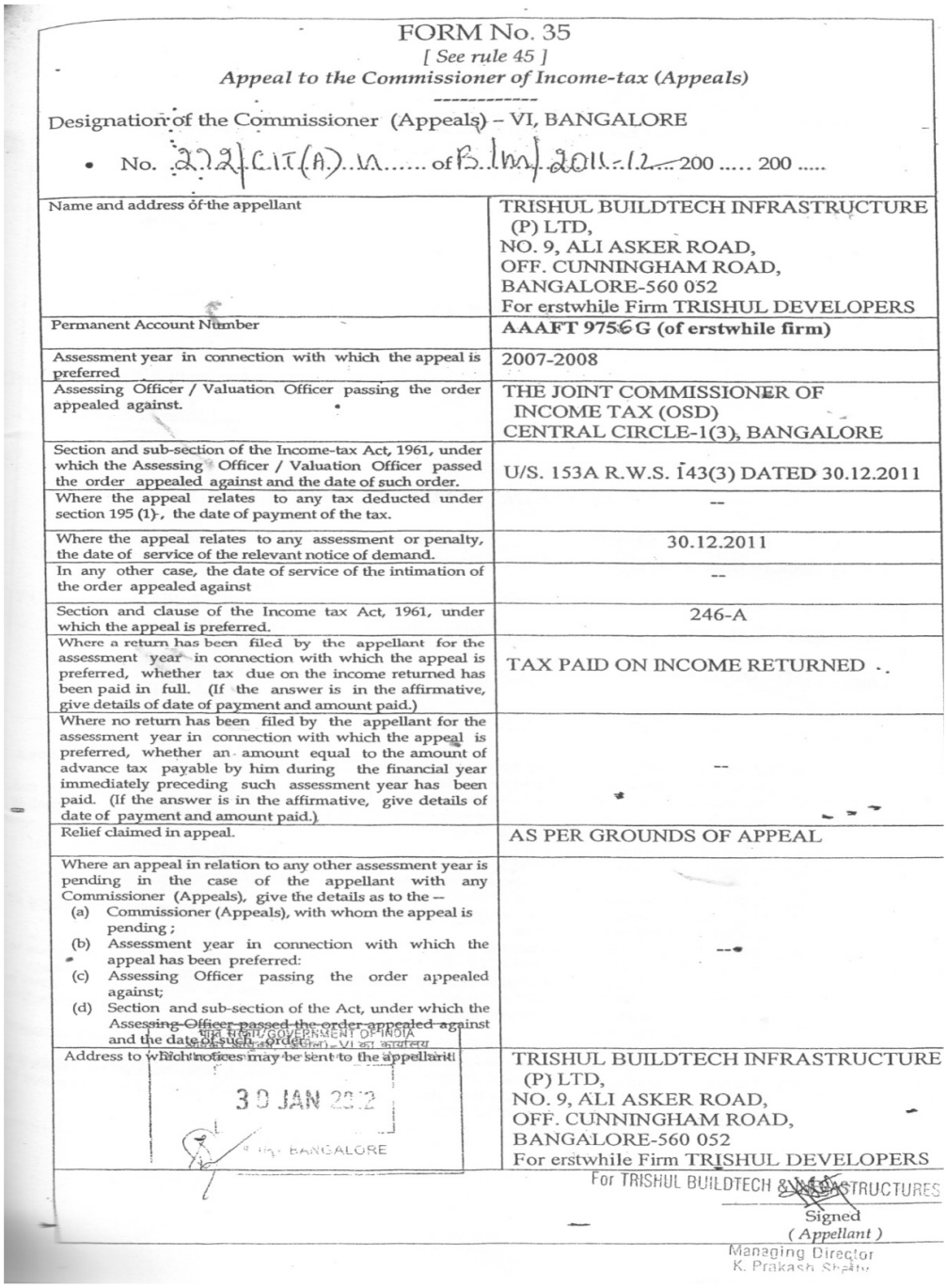
Yours truly,

For Trishul Buildtech & Infrastructures Pvt Ltd.,
(Formerly known as Trishul Developers)

Anand Rai
Group General Manager-Finance

7.22 Further, in the financial statement for the year ended 31.3.2010, M/s. Trishul Buildtech & Infrastructures Pvt. Ltd. i.e. present assessee has categorically stated that the company was incorporated on 1.2.2010 under Part-XI of the Companies Act that all the properties movable & immovable belonging to the partnership firm vests in the company for operation of law and the assessee has filed the return of income of Trishul Buildtech & Infrastructures Pvt. Ltd. for the assessment year 2010-11 on 14.10.2010 vide acknowledgement no.170549231141010.

7.23 Further, the assessee filed appeals against the assessment orders before the ld. CIT(A) in its capacity as a successor in interest in the name of M/s. Trishul Buildtech & Infrastructures Pvt. Ltd. as follows:



FORM No. 35

[See rule 45]

Appeal to the Commissioner of Income-tax (Appeals)

Designation of the Commissioner (Appeals) – VI, BANGALORE

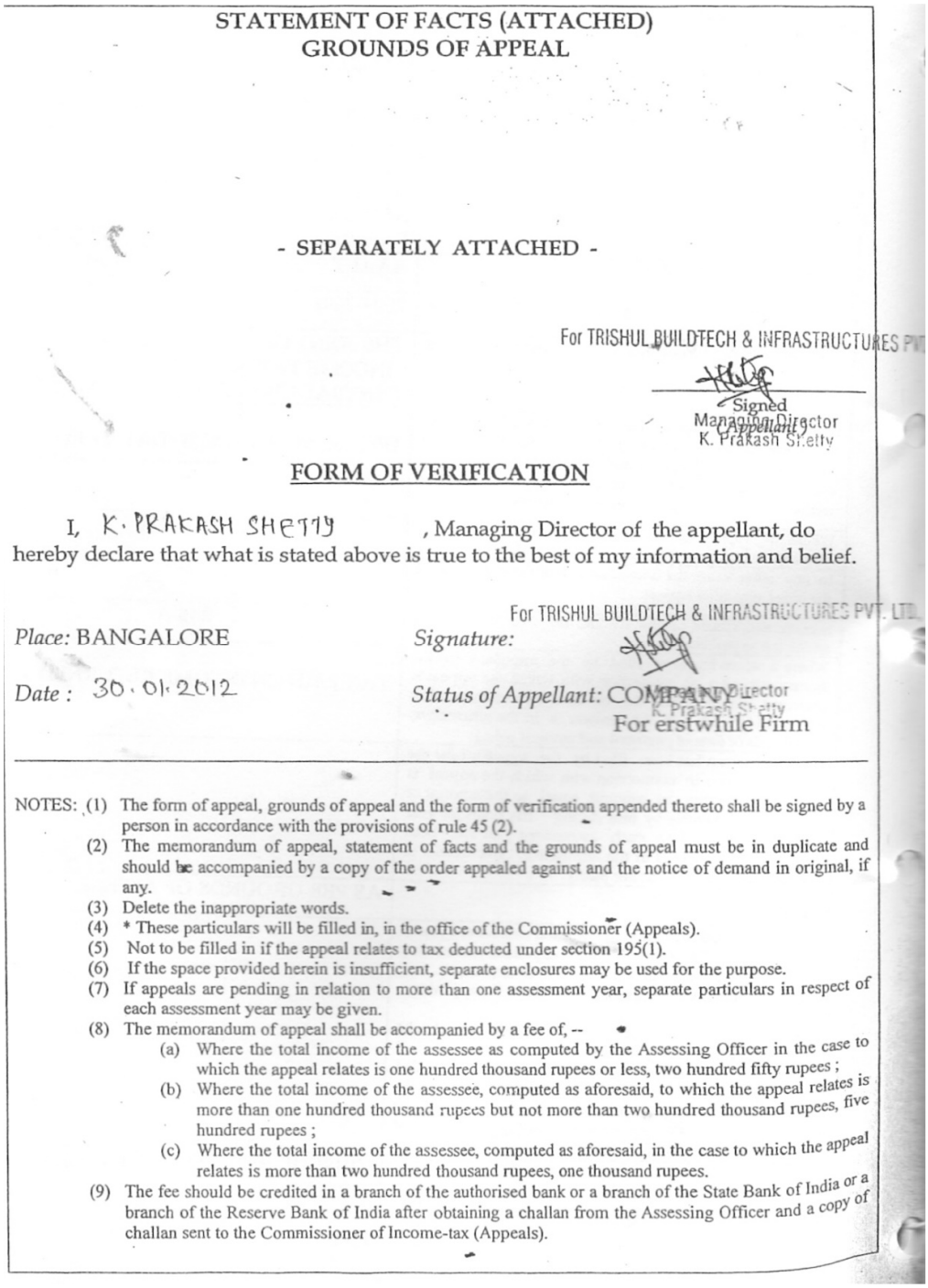
- No. 222/CIT(A)-VI/..... of B.lm/2011-12 200 ..... 200 .....

Name and address of the appellant	TRISHUL BUILDTECH INFRASTRUCTURE (P) LTD, NO. 9, ALI ASKER ROAD, OFF. CUNNINGHAM ROAD, BANGALORE-560 052 For erstwhile Firm TRISHUL DEVELOPERS
Permanent Account Number	**AAAFT 9756 G (of erstwhile firm)**
Assessment year in connection with which the appeal is preferred	2007-2008
Assessing Officer / Valuation Officer passing the order appealed against.	THE JOINT COMMISSIONER OF INCOME TAX (OSD) CENTRAL CIRCLE-1(3), BANGALORE
Section and sub-section of the Income-tax Act, 1961, under which the Assessing Officer / Valuation Officer passed the order appealed against and the date of such order.	U/S. 153A R.W.S. 143(3) DATED 30.12.2011
Where the appeal relates to any tax deducted under section 195 (1), the date of payment of the tax.	--
Where the appeal relates to any assessment or penalty, the date of service of the relevant notice of demand.	30.12.2011
In any other case, the date of service of the intimation of the order appealed against	--
Section and clause of the Income tax Act, 1961, under which the appeal is preferred.	246-A
Where a return has been filed by the appellant for the assessment year in connection with which the appeal is preferred, whether tax due on the income returned has been paid in full. (If the answer is in the affirmative, give details of date of payment and amount paid.)	TAX PAID ON INCOME RETURNED
Where no return has been filed by the appellant for the assessment year in connection with which the appeal is preferred, whether an amount equal to the amount of advance tax payable by him during the financial year immediately preceding such assessment year has been paid. (If the answer is in the affirmative, give details of date of payment and amount paid.)	--
Relief claimed in appeal.	AS PER GROUNDS OF APPEAL
Where an appeal in relation to any other assessment year is pending in the case of the appellant with any Commissioner (Appeals), give the details as to the -- (a) Commissioner (Appeals), with whom the appeal is pending ; (b) Assessment year in connection with which the appeal has been preferred: (c) Assessing Officer passing the order appealed against; (d) Section and sub-section of the Act, under which the Assessing Officer passed the order appealed against and the date of such order.	--
Address to which notices may be sent to the appellant	TRISHUL BUILDTECH INFRASTRUCTURE (P) LTD, NO. 9, ALI ASKER ROAD, OFF. CUNNINGHAM ROAD, BANGALORE-560 052 For erstwhile Firm TRISHUL DEVELOPERS

भारत सरकार/GOVERNMENT OF INDIA
आयकर आयुक्त (अपील)-VI का कार्यालय
30 JAN 2012
BANGALORE

For TRISHUL BUILDTECH & INFRASTRUCTURES

Signed
(Appellant)
Managing Director
K. Prakash Shetty



STATEMENT OF FACTS (ATTACHED)
GROUNDS OF APPEAL

- SEPARATELY ATTACHED -

For TRISHUL BUILDTECH & INFRASTRUCTURES PVT

Signed
Managing Director
K. Prakash Shetty
Appellant

FORM OF VERIFICATION

I, K. PRAKASH SHETTY , Managing Director of the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

For TRISHUL BUILDTECH & INFRASTRUCTURES PVT. LTD.

Place: BANGALORE *Signature:*

Date : 30.01.2012 *Status of Appellant:* COMPANY

Managing Director
K. Prakash Shetty
For erstwhile Firm

NOTES: (1) The form of appeal, grounds of appeal and the form of verification appended thereto shall be signed by a person in accordance with the provisions of rule 45 (2).
(2) The memorandum of appeal, statement of facts and the grounds of appeal must be in duplicate and should be accompanied by a copy of the order appealed against and the notice of demand in original, if any.
(3) Delete the inappropriate words.
(4) * These particulars will be filled in, in the office of the Commissioner (Appeals).
(5) Not to be filled in if the appeal relates to tax deducted under section 195(1).
(6) If the space provided herein is insufficient, separate enclosures may be used for the purpose.
(7) If appeals are pending in relation to more than one assessment year, separate particulars in respect of each assessment year may be given.
(8) The memorandum of appeal shall be accompanied by a fee of, --
(a) Where the total income of the assessee as computed by the Assessing Officer in the case to which the appeal relates is one hundred thousand rupees or less, two hundred fifty rupees ;
(b) Where the total income of the assessee, computed as aforesaid, to which the appeal relates is more than one hundred thousand rupees but not more than two hundred thousand rupees, five hundred rupees ;
(c) Where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than two hundred thousand rupees, one thousand rupees.
(9) The fee should be credited in a branch of the authorised bank or a branch of the State Bank of India or a branch of the Reserve Bank of India after obtaining a challan from the Assessing Officer and a copy of challan sent to the Commissioner of Income-tax (Appeals).

7.24 Thus, from the above evidence, it is to be seen that revenue was duly informed about the conversion of partnership firm M/s. Trishul Developers into company by name M/s. Trishul Buildtech & Infrastructures Pvt. Ltd. However, in the case of Mahaguna Realtors Pvt. Ltd. cited (supra), the ld. AO or ld. CIT(A) was not

informed about the amalgamation. Even when search & seizure operation was carried out, the Director of MIPL (and MRPL, which had ceased to exist) clearly held that both entities exist; what is more, surrender of specific amounts relatable to MRPL; activities, for a past period, were made.

7.25 In the case of Mahaguna Realtors Pvt. Ltd. cited (supra) on 28.5.2010, that assessee filed return of income u/s 153A of the Act for assessment year 2006-07 in the name of MRPL. Further, upon sanction of amalgamation scheme, the amalgamated company stood disallowed without winding up, in terms of section 394 of the Companies Act, 1956. When search & seizure of the Mahaguna Group took place, no indication was given about the amalgamation. But in the present case, the conversion of partnership firm into Private Limited Company was came in effect from 1.2.2010 and the search was taken place on 20.11.2009 i.e. before the conversion. Informing the department about conversion is impossible since conversion took place subsequent to search action took place.

7.26 In the present case, conversion of partnership firm into Private Limited Company was within the knowledge of the ld. AO, before passing the assessment order on 30.12.2011 as the conversion took place on 1.2.2010 as the assessee through various correspondence mentioned the fact of conversion of firm into Trishul Buildtech & Infrastructures Pvt. Ltd. as discussed in earlier para. Being so, in our opinion, the judgement of jurisdictional High Court in the case of Logica Pvt. Ltd. cited (supra) is directly on the issue, which is in favour of the assessee, where the Hon'ble High Court followed the judgement of Hon'ble Supreme Court in the case of Maruti Suzuki India Ltd. cited (supra) by observing as under:

"7. The undisputed facts of this case are, information about amalgamation was brought to the notice of the Assessing Officer by communication dated 16.01.2009 and it has been acknowledged on 23.01.2009. The draft order has been passed by the Assessing Officer on 16.12.2009 i.e., 11 months after the intimation. The amalgamated Company has filed objection before the DRP. The ITAT allowing the appeal in part has directed to frame the assessment order in the name of amalgamated company. Thus, the fact remains that despite being brought to the notice, the Assessing Officer has passed the order in the name of amalgamating Company.

8. In Maruti Suzuki India Ltd., (supra), it is held that there is a value which the Court must abide by in promoting the interest of certainty in the tax litigation. We may record that the decision in CIT New Delhi Vs. M/s. Spice Enfotainment Ltd.," has been upheld dismissing the Civil Appeal filed by CIT. Similarly, the order passed by this Court in Intel Technology India (P) Ltd. (supra) was also challenged before the Hon'ble Apex Court and the same has also been dismissed in Civil Appeal No.6581 of 2015."

7.27 Further, Hon'ble jurisdictional High Court while setting aside this legal issue in assessee's own case to the file of Tribunal for reconsideration in ITA Nos.371 to 373/2015 vide judgement dated 12.9.2022, it was made clear that judgement of Hon'ble Supreme court in the case of Mahagun Realtors Pvt. Ltd. cited (supra) is not applicable and noted the various distinguishing factors as below:

"11. With regard to the other questions of law, the Revenue has placed reliance on Mahagun Realtors Private Limited. In that case, the Apex Court has recorded in para 41 that though 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.

Further, in para 43, it is noted that having regard to the facts of that case, the order passed by the High Court was not sustainable. We may record that a similar contention was raised in Logica Private Limited vs. Assistant Commissioner of Income Tax and Another. After adverting to

the Authority in Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki India Limited, this Court has held that notice was necessary. In the case on hand, records disclose that the appeal had been filed by the private limited company. Therefore, on facts, the authority Mahagun Realtors Private Limited does not lend any support to the Revenue's case."

7.28 Further, recently Coordinate Bench of Mumbai in the case of India Medtronic Private Limited in ITA No.1339/Mum/2021 & ITA No.583/Mum/2022 for the assessment years 2016-17 & 2017-18 vide order dated 25.8.2023 considered the applicability of judgement of Hon'ble Supreme Court in the case of Mahagun Realtors Pvt. Ltd. cited (supra) vis-à-vis Maruti Suzuki India Ltd. cited (supra) and passed detailed order as below:

"10. We have heard both the parties at length on the legal issue and also perused the relevant finding given in the impugned order. As noted above, by the scheme of amalgamation of IMPL and CHIPL was approved by NCLT w.e.f. 26/08/2016. From the appointed date CHIPL had ceased to exist as it was merged with IMPL and therefore, any proceedings thereof should have been continue or any order which should have been passed was to be in the name of M/s. India Medtronic Pvt. Ltd. The way and manner in which various authorities of the department were intimated about this fact of merger has been elaborated and discussed in detail hereinabove and also sequence of events which has been incorporated above. From the sequence, it could be seen that, here right from various notices issued u/s. 143(2), 142(1), TPO's order, draft assessment order, ld. DRP order and the final assessment order have been passed in the case of M/s. Covidien Healthcare India Pvt. Ltd. despite being aware of the merger with IMPL and informed from time to time on several occasions. It has also been brought on record before us that this Tribunal while deciding the issue in assessee's own case for A.Y.2014-15 has passed the order dated 27/01/2023 wherein the Tribunal dealing with similar situation had quashed the entire assessment proceedings as the draft assessment order was issued in the name of non-existing entity. ITBA portal system came in 2017 vide instruction dated 03/02/2017, however, when assessee had intimated about the merger and the PAN of IMPL, then it was incumbent upon the ld. AO as well as the departmental authorities to correct the PAN in the ITBA portal. Department cannot take the plea that assessment order in correct name and PAN could not be made because of the system failure or failure to update the ITBA portal and therefore, all the consecutive assessment orders and various other orders could not have been passed in the name of new entity with its PAN and it was constrained to pass the assessment order in the name of non-existing entity with the old PAN. If the department can make changes in 11/04/2023 after direction of the Tribunal, then, the same should have been done much before when assessee kept on intimating before the ld. AO at various stages. Very strangely even when the ld. DRP gave a categorical direction that final assessment order should be passed in the correct name but yet DRP itself has passed the direction in the name of non-existing entity. The ld. AO despite

categorical direction still did not make the change in the ITBA system and proceeded to pass the assessment order in the name of non-existing entity i.e. M/s. Covidien Healthcare India Pvt. Ltd. This cannot be the manner in which the assessment order could have been passed nor any consequential demand notice raising the demand could have been passed in the case of non-existing entity.

11. At this point it would be relevant to refer to the judgment of Marti Suzuki India Ltd supra which the issues and the observations of the Hon'ble Apex Court can be summarized in the following manner:-

- *The issue whether notice issued/ assessment framed against an amalgamating/ non-existent entity post amalgamation is valid was decided by the Hon'ble Supreme Court in the landmark judgment of Maruti Suzuki (Supra). The facts of the said case were as follows:*

a) Assessee - Suzuki Power-train India Limited (SPIL), was a joint venture between Suzuki Motor Corporation (SMC) and Maruti Suzuki India Ltd (MSIL).

b) SPIL filed return declaring certain taxable income, which was processed u/s 143(1).

c) Subsequently, SPIL (Amalgamating Company) was amalgamated with 'MSIL' (Amalgamated Company) with effect from 1-4-2012 under Court orders on ***29.01.2013.***

d) MSIL intimated to the AO on ***2.04.2013.***
e) Notice under section 143(2) dated 26.09.2013 was issued to SPIL, non-existent entity.
f) Thereafter, MSIL participated in assessment proceedings of SPIL.
g) The assessment order under section 143(3), read with section 144C (1) of the Act was passed in the name of ***"SPIL (amalgamated with MSIL)".***

> The assessee argued before the tax/ appellate authorities that an assessment order passed in the name of a non-existent entity was void ab initio, since after amalgamation, the amalgamating company ceases to exist. Tax Department was of the view that since name of both the entities were mentioned in the order, the assessment order cannot be declared as invalid.

> Before the Apex Court, the main contentions of the Revenue were as follows:

(a) Names of both amalgamating and amalgamated company was mentioned in the assessment order;

(b) Even otherwise, the mistake is curable u/s 292B

(c) Assessment and subsequently appeal was represented by Amalgamated company and no prejudice is caused to the parties;

(d) In Spice, the final order only referred to the name of nonexistent entity without any reference to the amalgamated company;

(e) Even as per decision in Spice, if the order is passed on the resulting company the same shall not be void - hence in present case since both the names were mentioned it cannot be regarded as a jurisdictional defect;

(f) Draft assessment order and the final assessment order referred to both the names;

(g) In case of Spice, doctrine of merger with the judgment of SC shall not apply.

- *The main contentions of the Assessee were as follows:*

a) Upon a scheme of amalgamation being sanctioned, the amalgamated company is dissolved without winding up, in terms of Section 394 of the Companies Act 1956. The amalgamating company ceases to exist in the eyes of law;

b) The amalgamating company cannot thereafter be regarded as a "person" in terms of Section 2(31) of the Act against whom assessment proceedings can be initiated and an assessment order passed by relying on Saraswati Industrial Syndicate Ltd. vs. CIT [1990] 186 ITR 278 (SC);

c) The jurisdictional notice under Section 143(2) of the Act, pursuant to which the assessing officer assumed jurisdiction to make an assessment was issued in the name of SPIL, a nonexistent entity and was invalid. Hence the initiation of assessment proceedings against a non-existent entity was void ab initio.

d) Reliance was placed on CIT vs. Intel Technology India (P.) Ltd. [2016] 380 ITR 272 (Kar.), Pr. CIT vs. Nokia Solutions & Network India (P.) Ltd. 402 ITR 21 (Delhi), Spice Entertainment (supra), BDR Builders & Developers (P.) Ltd. vs. Asstt. CIT 397 ITR 529 (Delhi), Rustagi Engineering Udyog (P.) Ltd. vs. Dy. CIT 382ITR 443 (Delhi), Khurana Engineering Ltd. vs. Dy. CIT [2014] 364 ITR 600 (Guj), Takshashila Realties (P.) Ltd. vs. Dy. CIT [2017] 77 taxmann.com 160 (Guj.), Alamelu Veerappan vs. ITO 257 Taxman 72 (Mad.).

e) The order passed by the TPO in the name of SPIL, a nonexistent entity was invalid in the eyes of the law;

f) SPIL ceased to be an "eligible assessee", in terms of section 144C(15) (b) of the Act. Consequently, there was no requirement to pass a draft assessment order/reference to DRPetc.;

g) The final assessment order dated 31 October 2016 is beyond limitation in terms of Section 153(1) read with Section 153 (4) of the Act.

h) The assessment framed in the name of the amalgamating Company is invalid [refer: Spice Entertainment vs. CIT, CIT v. Dimension Apparels (P.) Ltd. [2015] 370 ITR 288 (Delhi); affirmed by Hon'ble Apex Court vide Civil Appeal No. 3125 of 2015, CIT v. Micron Steels (P.) Ltd. 372 ITR 386 (Delhi), CIT v. Micra India (P) Ltd. 231 Taxman 809 (Delhi)].

i) Assessment framed in the case of a non-existent entity is non-est in the eyes of law [refer: Pr. CIT vs. BMA Capfin Ltd. [2018] 100 taxmann.com 329 (Delhi) (Revenue's SLP dismissed against the same in Pr. CIT vs. BMA Capfin Ltd. [2018] 100 taxmann.com 330/[2019] 260 Taxman 89 (SC)]

- ***The Apex Court after taking into consideration submissions of both sides held as follows:***

a) Under the approved scheme of amalgamation, the transferee assumed the liabilities of the transferor company, including tax liabilities;

b) The consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist by relying on the judgment of Saraswati Industrial Syndicate Ltd vs. CIT *(Supra).*

c) Upon the ***amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act against whom assessment proceedings can be initiated or an order of assessment passed;***
d) Prior to the date on which the jurisdictional notice under Section 143(2) was issued, the scheme of amalgamation had been approved on 29th January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012;
e) Assessing officer 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 inspite of the fact that on 2nd April 2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation.
f) Initiation of assessment proceedings against an entity which had ceased to exist was void ab initio.

g) The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation.
h) Participation in the proceedings by MSIL in the circumstances cannot operate as an estoppel against law.

12. Subsequently, various Court/Tribunals followed the law laid down by the Hon'ble Apex Court in Maruti Suzuki Ltd (Supra) and quashed the assessments framed in the name of non-existent entities.

13. At the time of hearing, the ld. DR has also made reference to the judgment of the Hon'ble Supreme Court in the case of ***Mahagun Realtors Pvt. Ltd****. reported in* ***443 ITR 194****, wherein on the facts of that case, the Hon'ble Apex Court has held that assessment proceedings initiated and concluded in the name of non-existing entity is valid and in that case Hon'ble Apex Court has distinguished its earlier judgment of Maruti Suzuki India Ltd. Therefore, it would relevant to discuss the facts in the case of M/s. Mahagun Realtors Pvt. Ltd. which is as under:-*

i. The original return of MRPL was filed under Section 139(1) on 30.06.2006.
ii. The order of amalgamation was dated 11.05.2007 - but made effective from 01.04.2006. It contained a condition - Clause 220-whereby MRPL's liabilities devolved on MIPL.

iii. The original return of income was not revised even though the assessment proceedings were pending. The last date for filing the revised return was 31.03.2008, after the amalgamation order came into operation.
iv. A search and seizure proceeding was conducted in respect of the Mahagun group, including the MRPL and other companies.
v. When search and seizure of the Mahagun group took place, no indication was given about the amalgamation.
vi. A statement made on 20.03.2007 by Mr. Amit Jain, MRPL's managing director, during statutory survey proceedings under Section 133A, unearthed

discrepancies in the books of account, in relation to amounts of money in MRPL's account. The specific amount admitted was 5.072 crores, in the course of the statement recorded.

vii. The warrant was in the name of MRPL. The directors of MRPL and MIPL made a combined statement under Section 132 of the Act, on 27.08.2008.

viii. A total of Rs. 30 crores cash, which was seized- was surrendered in relation to MRPL and other transferor companies, as well as MIPL, on 27.08.2008 in the course of the search operation, when a statement of Mr. Amit Jain was recorded under Section 132 (4) of the Act.

ix. Upon being issued with a notice to file returns, a return was filed in the name of MRPL on 28.05.2010. Before that, on two dates, i.e., 22/27.07.2010, letters were written on behalf of MRPL, intimating about the amalgamation, but this was for AY 2007-08 (for which separate proceedings had been initiated under Section 153A) and not for AY 2006-07.

x. The return specifically suppressed - and did not disclose the amalgamation (with MIPL) - as the response to Query 27(b) was "N.A".

xi. The return - apart from specifically being furnished in the name of MRPL, also contained its PAN number.

xii. During the assessment proceedings, there was full participation -on behalf of all transferor companies, and MIPL. A special audit was directed (which is possible only after issuing notice under Section 142). Objections to the special audit were filed in respect of portions relatable to MRPL.

xiii. After fully participating in the proceedings which were specifically in respect of the business of the erstwhile MRPL for the year ending 31.03.2006, in the cross objection before the ITAT, for the first time (in the appeal preferred by the Revenue), an additional ground was urged that the assessment order was a nullity because MRPL was not in existence.

xiv. Assessment order was issued - undoubtedly in the name of MRPL (shown as the assessee, but represented by the transferee company MIPL).

xv. Appeals were filed to the CIT (and a cross-objection, to ITAT) - by MRPL "represented by MIPL".

xvi. At no point in time - the earliest being at the time of search, and subsequently, on receipt of notice, was it plainly stated that MRPL was not in existence, and its business assets and liabilities, taken over by MIPL.

xvii. The counter affidavit filed before this court - (dated 07.11.2020) has been affirmed by Shri Amit Jain S/o Shri P.K. Jain, who- is described in the affidavit as "Director of M/S Mahagun Realtors(P) Ltd., R/o...".

FINDINGS OF THE COURT

i. Amalgamation is not like the winding up of a corporate entity. In the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues - enfolded within the new or the existing transferee entity.

ii. In other words, the business and the adventure lives on but within a new corporate residence, i.e., the transferee company. ***It is, therefore, essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings.*** *There are analogies in civil law and procedure where upon amalgamation, the cause of action or the complaint does not per se cease - depending of course, upon the structure and objective of enactment. Broadly, the quest of legal systems and courts has been to locate if a successor or representative exists in relation to the particular cause or action, upon whom the assets might have devolved or upon whom the liability in the event it is adjudicated, would fall.*

iii. The combined effect, therefore, of Section 394 (2) of the Companies Act, 1956, Section 2 (1A) and various other provisions of the Income Tax Act, is that ***despite amalgamation, the business, enterprise and undertaking of the transferee or amalgamated company- which ceases to exist, after amalgamation, is treated as a continuing one, and any benefits, by way of carry forward of losses (of the transferor company), depreciation, etc., are allowed to the transferee.*** *Therefore, unlike a winding up, there is no end to the enterprise, with the entity. The enterprise in the case of amalgamation, continues.*

iv. There is no doubt that MRPL amalgamated with MIPL had ceased to exist thereafter; 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 present case, however, can be distinguished from the facts in Spice and Maruti Suzuki.***

v. Firstly, in both the relied upon cases, the assessee had duly informed the authorities about the merger of companies and yet the assessment order was passed in the name of amalgamating/non-existent company. However, in the present case, for AY 2006-07, there was no intimation by the assessee regarding amalgamation of the company. The ROI for the AY 2006-07 first filed by the respondent on 30.06.2006 was in the name of MRPL. MRPL amalgamated with MIPL on 11.05.2007, w.e.f. 01.04.2006. In the present case, the proceedings against MRPL started on 27.08.2008-when search and seizure was first conducted on the Mahagun group of companies. Notices under Section 153A and Section 143(2) were issued in the name MRPL and the representative from MRPL corresponded with the department in the name of MRPL. On 28.05.2010, the assessee filed its ROI in the name of MRPL, and in the 'Business Reorganization' column of the form mentioned

'not applicable' in amalgamation section. Though the respondent contends that they had intimated the authorities by letter dated 22.07.2010, it was for AY 2007-2008 and not for AY 2006-07. For the AY 200708 to 2008-2009, separate proceedings under Section 153A were initiated against MIPL and the proceedings against MRPL for these two assessment years were quashed by the Additional CIT by order dated 30.11.2010 as the amalgamation was disclosed. In addition, in the present case the assessment order dated 11.08.2011 mentions the name of both the amalgamating (MRPL) and amalgamated (MIPL) companies.

vi. Secondly, in the cases relied upon, the amalgamated companies had participated in the proceedings before the department and the courts held that the participation by the amalgamated company will not be regarded as estoppel. However, in the present case, the participation in proceedings was by MRPL which held out itself as MRPL.

vii. 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 Decor Pvt. Ltd.).

viii. 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.***

ix. 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.

14. Thus, in that case, the return was filed in the name of MRPL even it was non-existent on 28.05.2010. The return specifically suppressed and did not disclose the amalgamation with MIPL and also contained the PAN number of erstwhile company. During the assessment proceedings, there was full participation on behalf of all transferor companies and MIPL. Even objection to the special audit was filed in respect of portions relatable to MRPL, thus after fully participating in the proceedings which were specifically in respect of erstwhile MRPL for the year ending 31.03.2006, for the first time before the ITAT in cross objection in the appeal filed by the Revenue, additional ground was urged that the assessment order was nullity because MRPL was not in existence. The assessment order was issued in the name of MRPL (representative of MIPL) and even in the first appeal before the Id. CIT (A) and cross objection before the ITAT, it was mentioned as "MRPL represented by MIPL". At no point of time, even at the time of search and subsequently on receipt of the notice, it was stated that MRPL was not in existence and its business of the erstwhile MRPL was taken over by MIPL. Even in the counter affidavit filed before the Hon'ble Apex Court, it has been affirmed by Shri Amit Jain, who has been described in the affidavit as Director of M/s. Mahagun Realtors (P) Ltd. It was in this background, the Hon'ble Court in para 33 observed as under -

*"33. **There is no doubt that MRPL amalgamated with MIPL and ceased to exist thereafter; 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 present case, however, can be distinguished from the facts in Spice and Maruti Suzuki on the following bases."***

15. Therefore, the Supreme Court merely distinguished the facts in Spice and Maruti, while continuing to agree with the fundamental principle that on amalgamation, the amalgamating entity ceases to exist. Thereafter, the Court in paras 34 onwards, held as under:

a) No intimation was given to the AO for A.Y 2006-07 [refer para 34];

b) Return filed, pursuant to notice, suppressed the fact of amalgamation. The return was filed in the name of MRPL. Further in Business Reorganization' column it was mentioned "not applicable" [refer para 34, 40].

c) Name of both the companies were mentioned in the order [refer para 34];

d) Assessee before authorities held itself out to be as MRPL [refer para 35];

e) Substantial surrender in survey and search on behalf of MRPL [refer paras 37-38];

f) Facts of present case distinctive [refer para 40];

g) The fact of amalgamation being known to the assessee, even at the stage when the search and seizure operations took place, as well as when statements were recorded of the directors and managing director of the group, was not communicated to the income tax authorities [refer paras 4041].

h) Even when MRPL 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 Apex Court was on behalf of the director of MRPL .

i) The assessment order was 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.

j) Merely because instead of passing a common order for MIPL as the assessee, a separate order in respect of MRPL is passed, cannot nullify the assessment order.

k) 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).

1) Having regard to all these reasons, the Apex Court was of the opinion that in the facts of the 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. Thus, the assessment order passed in the name of MRPL was held to be valid.

16. Further, the Court distinguished the judgments passed in the case of Maruti Suzuki (Supra) and Spice on the following grounds:

a) The legislative amendment by way of introduction of section 2(1A), defining "amalgamation", was not taken into account by the Apex Court in earlier decisions. Further, the tax treatment in case of amalgamation under various provisions (such as in section 72A, 80IA, etc.) of the Act were not brought to the notice of the Apex Court, in the earlier decisions;

b) In the relied upon cases, the assessee had duly informed the tax authorities about the fact of the merger of companies and yet the assessment order was passed in the name of the nonexistent entity. However, in the present case, the assessee failed to inform the assessing officer about the amalgamation for assessment year 2006-07 (year in dispute), though disclosure was made for subsequent years (AYs 2007-08 and 2008-09). The return of income filed on 28.05.2010 (post amalgamation) pursuant to notice under section 153A was filed in the name of MRPL and the fact of business reorganization was mentioned as 'not applicable" in the return form.

c) In relied upon cases, the amalgamated companies participated in the assessment proceedings before the tax department in their own capacity, due to which the Apex Court affirmed that participation of amalgamated company shall not be regarded as estoppel against law. In the present facts, the participation in the assessment proceedings was by MRPL which held itself as MRPL.

d) The relied upon judgment of Saraswati Syndicate (Supra) was decided in relation to assessment issues when the amalgamation was not separately defined under the Act. Specific definition of 'amalgamation" has been incorporated in section 2(1 A) of the Act by way of amendment in 1967.

17. Other relevant observations made in the judgment while expressing the aforesaid opinion and holding that Maruti/ Spice cannot (de-hors facts) be blindly applied in all cases, pointed out following points:

a) It has been observed that amalgamation is unlike winding up of a corporate entity. In the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues - enfolded within the new or the existing transferee entity. In other words, the business and the adventure lives on but within a new corporate residence, i.e., the transferee company. It is, therefore, essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings.

b) Apex court noted that there are not less than 100 instances under the Act, wherein the event of amalgamation, the method of treatment of a particular subject matter is expressly indicated in the provisions of the Act. In some instances, amalgamation results in withdrawal of a special benefit (such as an area exemption under Section 80IA) - because it is entity or unit specific. In the case of carry forward of losses and profits, a nuanced approach has been indicated. All these provisions support the idea that the enterprise or the undertaking, and the business of the amalgamating company continues.

c) The beneficial treatment, in the form of set-off, deductions (in proportion to the period the transferee was in existence, vis-a-vis the transfer to the transferee company); carry forward of loss, depreciation, all bear out that under the Act, (a) the business-including the rights, assets and liabilities of the transferor company do not cease, but continue as that of the transferor company; (b) by deeming fiction-through several provisions of the Act, the treatment of various issues, is such that the transferee is deemed to carry on the enterprise as that of the transferor.

d) Combined effect of Section 394 (2) of the Companies Act, 1956, Section 2 (1A) and various other provisions of the Income Tax Act, is that despite amalgamation, the business, enterprise and undertaking of the transferor or amalgamating company- which ceases to exist, after amalgamation, is treated as a continuing one, and any benefits, by way of carry forward of losses (of the transferor company), depreciation, etc., are allowed to the transferee. Therefore, unlike a winding up, there is no end to the enterprise, with the entity. The enterprise in the case of amalgamation continues.

e) 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.

18. The Apex Court with the aforesaid observations, quashed the order of the High Court which held that the assessment order passed in the name of non-existent entity is invalid, and restored the revenue's appeal along with assessee's cross objections to the file of the Hon'ble Tribunal to decide the issues on merits other than nullity of assessment order.

*19. The aforesaid judgment of Hon'ble Supreme Court in the case of **Mahagun Realtors Pvt. Ltd.** (supra) in our humble opinion, nowhere disagrees with the principles laid down by the Hon'ble Apex Court in the case of **Maruti Suzuki India Ltd.** (supra) and **Spice Entertainment Ltd.** (supra) of Hon'ble Delhi High Court , for the reason that:-*

- ***Firstly**, the judgment in Mahagun nowhere disagrees with the principle in Maruti and Spice. In fact, in para 33, **the Court categorically held that there is no doubt that MRPL amalgamated with MIPL and ceased to exist thereafter which is an established fact and not in contention. Further the Court held that the respondent has relied upon Spice and Maruti Suzuki (supra) whereas the facts of present case can be distinguished from the facts in Spice and Maruti Suzuki.***

- ***Secondly**, the judgment by the **Hon'ble Apex Court in Mahagun Realtors** is rendered in peculiar facts and merely holds that the law declared in the case of Maruti Suzuki cannot be applied without looking into the overall facts, in particular the conduct of the assessee and the manner of framing of assessment.*

- ***Thirdly**, the judgment raises a pertinent point that the business of the amalgamating entity survives even after merger, though the corporate entity may have come to an end. This point is merely to emphasize that the liability of the successor and therefore, it cannot be held that merely on account of nonexistence of the predecessor, successor is not liable.*

- ***Fourthly, in para** 43, the Court categorically held that the aforesaid discussion is "**having regard to the facts of this case**" and the said observation is in continuation of repeated observations that the decision in Spice and Maruti are distinguishable and,*

- ***Lastly**, the Apex Court has decided the appeal on peculiar facts, without disagreeing with the decision in Maruti Suzuki India Ltd. and Spice Entertainment Ltd.*

*20. Thus, the decision of Hon'ble Apex Court in the case of **Mahagun Realtors Pvt. Ltd.** (supra) is not applicable on the facts of the assessee's case albeit its facts are clearly covered by the judgment of Apex Court in the case **Maruti Suzuki India Ltd**. (supra).*

21. This has also been highlighted in detail by the ITAT Mumbai Bench in the case of Candor Renewable Energy Pvt. Ltd., Before us ld. Counsel has also stated various other decisions, however, we are not discussing of these judgments. Thus, the entire assessment order have not been passed in the case of non-existing entity is null and void and is hereby quashed.

22. In A.Y.2017-18 also exactly similar facts are permeating and therefore, our finding given hereinabove will apply mutatis and mutandis for this year also and therefore, the assessment order passed for A.Y.2017-18 is also hereby declared null and void and it is quashed."

7.29 Being so, in the instant case, assessment orders in all these three assessment years have been passed u/s 143(3) r.w.s. 153A of the Act is suffering from legal infirmity as the assessment orders are framed by the ld. AO against the non-existing entity despite being having knowledge of the fact that the partnership firm is fully taken over by M/s. Trishul Buildtech Infrastructure Pvt. Ltd. and complete failure by the ld. AO to bring on record the successor in interest, so as to pass assessment orders in the name of new entity i.e. Trishul Buildtech Infrastructure Pvt. Ltd. Thus, in our considered view, assessment orders framed in all these assessment years vide order dated 30.12.2011 are not sustainable in the eyes of law and liable to be quashed as even provisions of section 292B of the Act cannot save it from being quashed as this is a jurisdictional legal infirmity, which goes to the root of the matter. Thus, we quash assessment orders in all these three impugned assessment years i.e. AY 2004-05, 2005-06 & 2007-08 and allow the appeals of the assessee on legal issue, which was remitted by Hon'ble jurisdictional High Court to this Tribunal for reconsideration.

7.30 Since we have allowed the appeals of the assessee on legal issue raised by the assessee, we refrain from going into other grounds of appeals raised before us, which are kept open with liberty to assessee to revive the same if occasion arises.

8. In the result, all the three appeals of the assessee are allowed.

Order pronounced in the open court on 26th Oct, 2023

Sd/-	**Sd/-**
(Madhumita Roy)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 26th Oct, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.