

**आयकर अपीलीय अधिकरण, कोलकाता पीठ 'एसएमसी', कोलकाता**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “(SMC)” BENCH: KOLKATA**

श्री राजेश कुमार, लेखा सदस्य के समक्ष  
[Before Shri Rajesh Kumar, Accountant Member]

**I.T.A. No. 90/Kol/2023**  
**Assessment Year : 2010-11**

Deccan Vanijya Pvt. Ltd. . (PAN: AACCD 8571 E)	Vs.	ITO, Ward-12(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	01.11.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	30.11.2023
For the Appellant/ निर्धारिती की ओर से	Shri Miraj D Shah, A.R
For the Respondent/ राजस्व की ओर से	Shri Manoj Kr. Pati, JCIT

**ORDER / आदेश**

This is the appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)- 22, Kolkata [hereinafter referred to as 'Ld. CIT(A)'] dated 10.03.2022 for the assessment year 2011-12.

2. The only issue raised before us at the time of hearing by the Id. Counsel of the assessee is that the order of Ld. CIT(A) is bad in law on the ground that Ld. CIT(A) has not decided the issue of addition of Rs. 25,00,000/- as made by the AO on account of unexplained cash credit however dismissed the appeal on the ground that the assessee has been struck off from the ROC records and even has surrendered the PAN and therefore the assessee was no longer in existence and thus wrongly dismissed the appeal of the assessee.

3. After hearing the rival contentions and perusing the material on record, we find that the AO has made the addition of Rs. 25,00,000/- on account of unexplained cash

credit after reopening the assessment u/s 147 of the Act by issuing notice u/s 148 of the Act on 15.05.2017 which culminated in framing the assessment u/s 143(3) read with Section 147 of the Act dated 27.12.2017. The said order was challenged before the Ld. CIT(A) however the Ld. CIT(A) dismissed the appeal by holding that since the assessee has been struck off from the rolls of the ROC and even the PAN has been surrendered and there being no material on record to deviate from the findings of the AO and thus finally dismissed the appeal ex-parte without disposing the same on merit. We have perused the facts of the case and undisputedly the appeal of the assessee was dismissed on the ground that the assessee has been struck off from the register maintained by the Registrar of the Companies and even PAN has been surrendered by the assessee. Thus the appeal was dismissed ex-parte without deciding the same on merit which is not correct as the first appellate authority should have decided the issue on merits. We have perused the decision of Co-ordinate Bench of Delhi in the case of M/s Dwarka Portfolio Pvt. Ltd. vs. ACIT, CC-29, New Delhi in ITA No. 2573/Del/2017 in which the similar issue has been decided in favour of the assessee by the Co-ordinate Bench by holding that the appeal cannot be dismissed on the ground that the assessee's name was struck off by the Registrar of the company and the assessee cannot be treated as cancelled and non-existent for the purpose of realizing the amount due to the company and for payment or discharge of liability or obligation of the assessee by observing and holding as under:

*"5. We have heard the parties, verified the materials on record and gave our thoughtful consideration. It is not in dispute that, the assessee Company has been struck off on 08/03/2019 from the Registrar of the Companies u/s 248(1) of the Companies Act. 6. There are two types of striking off Companies under the said Act. Strike off by the Registrar of Companies u/s 248(1) of the Companies Act and strike off by a Company its own u/s 248(2) of the Companies Act.*

***Section 248(1) of Companies Act:-***

*"248. (1) Where the Registrar has reasonable cause to believe that— (a) a company has failed to commence its business within one year of its incorporation 1[or];*

*(b) 2[\*\*\*]*

*(c) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455; or*

*[(d) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under sub-section (1) of section 10A; or*

*(e) the company is not carrying on any business or operations, as revealed after the physical verification carried out under sub-section (9) of section 12.]*

*he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.*

*(2) Without prejudice to the provisions of sub-section (1), a company may, after extinguishing all its liabilities, by a special resolution or consent of seventy-five per cent. members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner:*

*Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.*

*The Section 248(2) will be invoked by the Company itself after extinguishing all its liabilities (including tax liabilities, if any).*

*7. The Companies can itself struck off under Section 248(2) of the Companies Act by its own only after 'extinguishing all the liabilities' (including the tax liabilities if any). But in the case of Company being struck off by the Registrar under Section 248(1) of the Companies Act, irrespective of existence of assets or the liabilities of the Company, the company will be stricken off if the Company commits any defaults mentioned in the Section 248(1) of the Act.*

*8. As per Section 248 (5) of the companies Act, the registrar of the Company shall publish notice of strike off the names of the companies in the official Gazette and on such publication, the company shall be dissolved. As per Section 248(6) of the companies Act, before passing an order under Section 248 (5) of the companies Act, the Registrar shall satisfy that sufficient provision has been made for realization of the dues and also for discharge of its liabilities of the companies. Further, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies. As per sub-section (7) of the Section 248 of the Companies Act, the liability if any, of every director, manager or other officer who was exercising any power of the management and of every member of the company dissolved under sub Section (5) of Section 248 of the Companies Act.*

*248. (1) Where the Registrar has reasonable cause to believe that—*

*(2) .....*

*(3) .....*

*(4) .....*

(5) *At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.*

(6) *The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company:*

*Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.*

(7) *The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.*

(8) *Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies*

9. *When the Company is being struck off, there will be certain consequences. The Section 250 of the Companies Act deals with effect of Company notified as dissolved.*

**Section 250 of the Companies Act.**

*“250. Where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice under sub-section (5) of that section cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.”*

*Thus, if the Company being struck off, the same shall be ceased to operate as a company and the Certificate of Incorporation issued to it shall deem to have been cancelled from the such date except for the purpose of realizing the amount due to the Company and for the purpose of payment or discharge of liabilities or obligation of the Company.*

10. *Thus, Combined reading of Section 250 and the sub-Sections (6) and (7) of Section 248 of the Companies Act, once the Company is struck off, it shall be deemed to have been cancelled from such date except for the purpose of realizing the amount due to the Company and for the payment or discharge of the liabilities or obligation of the Company. Further, even after striking off of a Company, the liability if any of the Director, Manager or other Officers, exercising any power of management and of every member of the Company shall continue and may be enforced as if the Company had not been dissolved.*

11. *As per sub-section (6) of the Section 248 of the Companies Act, it is the duty of the Registrar to make provision for discharging the liability of the company before passing an order for struck off under sub-section (5) to Section 248 Companies Act. If there is any tax due from the struck off company, the Department can invoke Section 226(3) of the Income Tax Act for satisfying such tax demands.*

**Section 226(3) of the Income Tax Act:**

“(3) (i) The Assessing Officer or Tax Recovery Officer] may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee, to pay to the Assessing Officer or Tax Recovery Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and for the purposes of this sub-section, the shares of the joint holders in such account shall be presumed, until the contrary is proved, to be equal.

(iii) .....

.....

.....

(x).....

12. Further, as per Section 179 of Income Tax Act, if the tax due from Private company in respect of any income of any previous year cannot be recovered, then every person who was a Director of the private Company at any time during the relevant previous year shall be jointly and severally liable for the payment of such taxes unless he proves that non-recovery cannot be attributed to any gross neglect misfeasance or breach of duty on his part in relation of the Company.

**Section 179 of Income tax Act reads as follows:-**

179. (1) Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

(2) Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a private company cannot be recovered, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962. Explanation.—For the purposes of this section, the expression “tax due” includes penalty, interest or any other sum payable under the Act.”

13. When it comes to recovery of tax due from the struck off Company, the Department of Revenue has power either to invoke Section 226(3) of the Income Tax Act or can invoke Section 179 of the Income Tax Act and recover from the Directors after testing whether non recovery is attributed to any gross neglect misfeasance or breach of duty on the part of Directors. The Department can also invoke both 226(3) and 179 simultaneously for which there is no bar.

14. Now, the moot question arises as to 'whether the Tribunal can proceed with the appeal filed by the struck down Company or filed by the Revenue against the struck off Company?'. In other words, whether the struck off Company can be treated as alive/operative/existing for the purpose of adjudication of the tax arrears and the consequence order by which the recovery proceedings are triggered by the Revenue.

15. If the proceedings pending before the Court or the Tribunal (regarding determination of quantum the tax/liability of paying the tax) is dismissed for having become in-fructuous without adjudicating the actual tax dues or the liability of the assessee to pay such tax in the manner known to the Law and based on the such dismissal of the proceedings, if the Revenue proceeds for the recovery of the 'such tax due', the rights of the Directors of the Company will be seriously jeopardy and the same will amount to denial of the rights guaranteed under the Law.

16. In the instant Appeal, if we allow the request of the Revenue dismiss the Appeal as in-fructuous, one hand the appeal will be dismissed having become in-fructuous on the other hand, the Revenue Department will initiate proceedings under Section 179 of the Income Tax Act and that too without even adjudicating in the manner prescribed under Law on the 'quantum of actual tax due' or 'liability to pay tax', in such even great in justice will be caused, which cannot be permitted.

17. When the Revenue Department has not forgone the right to recover tax due or Written-off the demand on the ground of Company being struck off by the ROC, the right of the assessee to determine the tax liability in due process of law cannot be denied by dismissing the Appeal pending before us.

18. Further, in a case where the CIT(A) deletes the addition made by the A.O and if Revenue files Appeal before the Tribunal, even in a case where the Revenue is having a water tight case on merit, by dismissing the Appeal for having become in-fructuous will also result in non adjudication of the actual tax due by the assessee and the Revenue cannot recover the actual tax dues from the assessee. In such events, the Department of Revenue will be left with no remedy, which is contrary to the root principal of law 'Ubi Jus Ibi Remedium'.

19. The Hon'ble Apex Court while dealing with amalgamated Companies in the case of Pr. Commissioner of Income Tax Vs. Mahagun Realtors Pvt. Ltd., held that, 'whether corporate death of an entity upon amalgamation per se invalidates a tax 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. Further it restored the matter to the file of the ITAT and directed to decide the matter on merit. The relevant portion is as under:-

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

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

20. *The Hon’ble High Court of Judicature for Rajasthan in the case of Commissioner of Income Tax Vs. Gopal Shri Scrips Pvt. Ltd. in ITA No. 53/2000 vide order dated 09/08/2016 dismissed the appeal filed by the Revenue for having become in-fructuous since the Company had been struck off from the register of ROC and the said Company dissolved. The operative portion of the Hon’ble High Court is as under:-*

*“On the last date of hearing when the matter came up before the Court on 05.07.2016, counsel for the appellant was directed to seek instructions about the present status of the Respondent assessee (Company) whether it is in existence or has become non operational or defunct by passage of time. Sh. Anuroop Singhi, Adv., appearing for the appellant has placed for our perusal a communication issued from the office of Registrar of Companies dated 07.04.2011 indicating that pursuant to subsection( 5) of Section 560 of the Companies Act, 1956 the name of Gopal Shri Scrips Pvt. Ltd., has been struck off from the register and the said company is dissolved.*

*In the light of the communication placed for our perusal dated 07.04.2011, no purpose is going to be served in examining the substantial question of law which has been raised for consideration in the instant appeal and on account of these change in circumstances, the present appeal has become infructuous and accordingly stands dismissed. However, the appellant is still at liberty to file application if any occasion arises in future.”*

21. *The said order of Hon’ble High Court of Judicature for Rajasthan dated 09/08/2016 in ITA No. 53/2000 has been challenged by the Revenue Department before the Hon’ble Supreme court of India in Civil Appeal No. 2922/2019 (CIT Jaipur Vs. M/s. Gopal Scrips Pvt. Ltd.). The Hon’ble Apex Court vide order dated 12/03/2019 held that, the High Court was wrong in dismissing the appeal as having rendered infructuous and further directed to decide the appeal afresh on merit in accordance with law in view of the relevant provisions of Companies Act and Income Tax Act. The relevant portions are hereunder:*

*“9. Having heard the learned counsel for the appellant (Income Tax Department) and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned order and remand the case to the High Court for deciding the appeal afresh on merits in accordance with law.*

*10. Mere perusal of the impugned order quoted supra would go to show that the High Court dismissed the appeal on the ground that it has rendered infructuous because it was brought to its notice that the name of the company the respondent assessee has been struck off from the Register of the Company under Section 560(5) of the Companies Act, 1956.*

*11. In other words, the High Court was of the view that since the respondent Company stands dissolved as a result of the order passed by the Registrar of the Companies*

*under Section 560 (5) of the Companies Act, the appeal filed against such Company which stands dissolved does not survive for its consideration on merits.*

*12. In our view, the High Court was wrong in dismissing the appeal as having rendered infructuous.*

*13. The High Court failed to notice Section 560(5) proviso (a) of the Companies Act and further failed to notice Chapter XV of the Income Tax Act which deals with "liability in special cases" and its clause (L) which deals with "discontinuance of business or dissolution".*

*14. The aforementioned two provisions, namely, one under the Companies Act and the other under the Income Tax Act specifically deal with the cases of the Companies, whose name has been struck off under Section 560 (5) of the Companies Act.*

*15. These provisions provide as to how and in what manner the liability against such Company arising under the Companies Act and under the Income Tax Act is required to be dealt with.*

*16. Since the High Court did not decide the appeal keeping in view the aforementioned two relevant provisions, the impugned order is not legally sustainable and has to be set aside.*

*17. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside. The case is remanded to the High Court for deciding the appeal afresh on merits in accordance with law keeping in view the relevant provisions of Companies Act and the Income tax Act uninfluenced by any observations made by us on merits.*

*22. The Hon'ble Supreme Court in the case of M/s. Gopal Scrips Pvt. Ltd (supra) while allowing the Civil Appeal of the Revenue, dealt and relied on Section 560(5) of the Companies Act, 1956 and held that the Appeal filed by the Revenue is maintainable. The identical provisions have been introduced in the Companies Act, 2013 in Sub-Section sub-Sections (6) and (7) of Section 248 of the Companies Act. Therefore, the ratio laid down in the case of Gopal Scrips Pvt. Ltd (supra) is squarely applicable to the issue in hand.*

*23. In the case of M/s. Gopal Scrips Pvt. Ltd (supra), the Department of Revenue was having grievance on the Order of the Hon'ble High Court of Judicature for Rajasthan in dismissing the Appeal (ITA) for having become infructuous on the ground that the Assessee company was struck off. The Hon'ble Supreme Court has set aside the Order of the Hon'ble High Court of Judicature for Rajasthan and directed to decide the Appeal on merit. Ironically now the very same Department of revenue is seeking before us to dismiss the present Appeal as infructuous since the assessee company has been struck off. The Department cannot have such double standard.*

#### **24. CONCLUSION:-**

*(i). Though the Assessee company has been struck off under Section 248 of the Companies Act 2013, in view of sub-sections (6) and (7) of Section 248 and Section 250 of companies Act 2013, the Certificate of Incorporation issued to the Assessee company cannot be treated as cancelled for the purpose of realizing the amount due to the company and for payment or discharge of the liability or obligations of the company, we are of the opinion that the Appeal filed by the struck off Assessee Company or Appeal filed by the Revenue against the struck off*

*Company are maintainable. Therefore by rejecting the contention of the Ld. DR, we hold that the present Appeal filed by the Assessee (struck-off company) is maintainable and the same has to be decided on merit.”*

Since the facts of the case are materially same with that as discussed above , we, accordingly ,by following the above decision, hold that the appeal has been wrongly dismissed by the Ld. CIT(A) on the ground of assessee company name being struck off from the rolls of ROC. Accordingly we restore the issue/appeal to the file of ld CIT(A) with the direction to decide the same on merit.

5. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order is pronounced in the open court on 30<sup>th</sup> November, 2023

Sd/-

(Rajesh Kumar/राजेश कुमार)

Accountant Member/लेखा सदस्य

Dated: 30<sup>th</sup> November, 2023

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- Deccan Vanijya Pvt. Ltd. , 2E, Ground Floor, Cornfield Road, Goal Park, Kolkata-700019
2. Respondent – ITO, Ward-12(1), Kolkata
3. Ld. CIT(A)- 22, Kolkata
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata