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

BEFORE SHRI ANIKESH BANERJEE, JM &
MS PADMAVATHY S, AM

I.T.A. No.4196/Mum/2023
(Assessment Year: 2013-14)

I.T.A. No.4197/Mum/2023
(Assessment Year: 2015-16)

Griffin Marine Travel Pvt. Ltd. (Amalgamated with Instone India Pvt. Ltd.) 4/42, Der Deutsche Parkz, Subhas Nagar Road, Bhandup Wet, S.O. Mumbai-400078. **PAN : AAACG2764N**	Vs.	**Asstt. Commissioner of Income Tax, Circle-1(1),** Room No. 607, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant)	:	**Respondent**)

Appellant /Assessee by	:	Shri Kumar Kale, Adv.
Revenue / Respondent by	:	Shri Swapnil Savant, JCIT
Date of Hearing	:	09.09.2024
Date of Pronouncement	:	10.09.2024

O R D E R

Per Padmavathy S, AM:

These appeals by the assessee are against the separate orders of Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre (NFAC), Delhi [in short 'the CIT(A)'] both dated 25.09.2024 for Assessment Year (AY) 2013-14 & 2015-16. In both the appeals besides raising grounds contending the addition made on merits, the assessee raised grounds contending the following

legal issues with regard to the re-opening done under section 147 of the Income Tax Act, 1961 (the Act):

(i) The notice under section 148 of the Act was issued after expiry of 4 years from the end of the relevant AY without satisfying mandate of the 1st proviso to section 147 of the Act.
(ii) There was no fresh tangible material for re-opening of the assessment which is based on a mere change of opinion on reappraisal of the same material already on record.
(iii) The notice under section 147 and the order under section 147 have been passed in the name of a non-existing entity (amalgamating company).

2. We will first consider the appeal for **AY 2013-14 in ITA No.4196 / Mum / 2023.** The assessee is a private limited company which is engaged in the business of making air travel arrangements for various marine companies. The assessee filed the return of income for AY 2013-14 on 29.11.2013 declaring a total income of Rs. 14,40,43,210/-. The assessment was completed under section 143(3) of the Act vide order dated 11.03.2016. The assessee as per the Form-3CB had stated that it is following mercantile system of accounting except in case of Airline Incentive. The Assessing Officer (AO) stated that the assessee being a company has to compulsorily follow accrual system of accounting and cannot follow cash systems of certain receipts and hybrid system of accounting. Further since the assessee has accounted the Airline Incentive on cash basis, the AO held that the income from Airline Incentive is under assessed to the extent of Rs. 23,61,000/-. The AO accordingly held that to this extent there is omission on the part of assessee to account income on accrual basis and reopened the assessment by issuing notice under section 148 of the Act dated 31.03.2021, stating that the income of the assessee has escaped. The AO completed the assessment under section 147 r.w.s. 144 by adding the amount of Rs. 23,61,000/- to the income of the assessee.

Aggrieved assessee filed further appeal before the CIT(A). The assessee raised the same legal contentions before the CIT(A) and also contended the issue of merit. The CIT(A) upheld the addition made by the AO on both counts. The assessee is in appeal against the order of the CIT(A).

3. The ld. Authorized Representative (AR) submitted that the re-assessment is initiated after the expiry of 4 years and therefore the 1st proviso to section 147 is applicable in assessee's case. The ld. AR argued that in the reasons recorded the AO has stated that based on the method of accounting as mentioned in Form-3CB the notice of reopening is issued since the assessee has followed cash system for accounting airline incentives. Therefore, the ld. AR argued that there is no failure on the part of the assessee to disclose fully and truly all the material facts. The ld. AR drew our attention to the letter filed before the AO during the course of assessment under section 143(3) of the Act in which the assessee has specifically filed details pertaining to Airline Incentives and the reason for accounting to the same cash basis (page 24 of Paper Book). Accordingly, the ld. AR submitted that the reason for reopening is merely based on change of opinion with regard to the information which is already part of records. Without prejudice to the above submissions, the ld. AR submitted that the notice under section 148 is issued in the name of the entity which is non-existent and in this regard drew our attention to the order of Hon'ble Bombay High Court vide order dated 26.02.2016 has approved the amalgamation of Griffin Marine Travel Pvt. Ltd. (Amalgamating Company) with Instone India Pvt. Ltd. (Amalgamated Company). The ld. AR further drew our attention to the letter filed before the AO on 13.02.2017 in response to notice under section 210 for payment of advance tax in which the assessee has brought to the notice of the AO about the amalgamation. Therefore, the ld. AR argued that the AO is very much aware of the amalgamation and that the notice issued under

section 148 of the Act on 31.03.2021 in the name of Griffin Marine Travel Pvt. Ltd. is invalid. The ld. AR in this regard relied on the decision of the Hon'ble Bombay High Court in the case of CLSA India Pvt. Ltd. Vs. DCIT (2023) 149 taxmann.com 380 (Bom.) and Vertiv Energy Pvt. Ltd. Vs. ACIT (2024) 160 taxmann.com 696 (Bom.).

4. The ld. Departmental Representative (DR) on the other hand relied on the order of the CIT(A).

5. We heard the parties and perused the material on record. For the purpose of adjudication, we will first consider the legal contention that the notice under section 148 which issued after the expiry of 4 years without satisfying the mandate of 1st proviso to section 147 of the Act. In this regard, we will look at the relevant provisions of section 147 of the Act which reads as under:

> ***Income escaping assessment.***
> ***147.*** *If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*
> ***Provided*** *that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section* ***after the expiry of four years from the end of the relevant assessment year****, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the* ***failure on the part of the assessee*** *to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or* ***to disclose fully and truly all material facts necessary for his assessment, for that assessment year****:*
> *****

6. From the above provisions, it is clear that where the assessment under section 143(3) has been made for the relevant AY, the AO cannot take action after expiry of 4 years from the end of relevant AY unless any income chargeable to tax has escaped assessment by reason on the part of the assessee to disclose fully and truly all material facts necessary for this assessment. In assessee's case the notice under section 148 was issued on 31.03.2021 which is beyond 4 years and the assessment under section 143(3) of the Act is completed vide order dated 11.03.2016. Therefore, the 1st proviso to section 147 is clearly applicable in assessee's case. From the perusal of the reasons recorded (page 34 & 35 of the PB) we notice that the AO on the basis of information in Form 3CB stating that the assessee has followed mercantile system of accounting except in the case of Airline Incentive, has re-opened the assessment stating that the income from Airline Incentive should have been accounted on accrual basis and that the income to the extent of Rs. 23,61,000/- has escaped assessment for the said reason. It is clear from the said reasons that the AO has re-opened the assessment based on the information i.e. disclosed by the assessee in Form 3CD with respect to method of accounting. Further we notice that the assessee during the course of assessment under section 143(3) of the Act has filed a letter has submitted before the AO the reason for accounting the Airline Incentive on tax basis and that the AO while completing the assessment under section 143(3) did not make any addition towards the same. Therefore, in our considered view there is no failure on the part of assessee to disclose fully and truly all material facts for the purpose of assessment and accordingly re-opening for the said reason beyond 4 years is not tenable. We also see merit in the contention of the ld. AR that the re-opening is merely based on change of opinion on the material which is already available on record and

which has been considered during the course of original assessment. Accordingly, we hold that on this count also the re-opening by the AO is not sustainable.

7. With regard to notice being issued on non-existing entity, we notice that the Hon'ble Bombay High Court has considered the similar issue in the case of CLSA India Pvt. Ltd. (supra) where it has been held that

> *"5. This is clearly untenable in view of the Apex Court judgment in Saraswati Industrial Syndicate Ltd. v. CIT [1990] 53 Taxman 92/186 ITR 278 wherein the following principles were formulated:*
>
> > *"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-organization 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: 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."*
>
> *In the case of Spice Entertainment Ltd. vs. CST 2012 (280) EL T 43 (Delhi) a Division bench of the Delhi High Court held that once the factum of amalgamation of a company had been brought to the notice of the A.O, despite which the proceedings are continued and an order of assessment passed in the name of non-existence company, the order of assessment would not be merely be a procedural defect but would render it void.*

6. Recently, the Apex Court in the case of Pr CIT v. Maruti Suzuki India Ltd. [2019] 107 taxmann.com 375/265 Tasman 515/416 ITR 613 reiterated the aforementioned principles and held 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 Einfotainment 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.*

7. The stand of the revenue that the reassessment was justified in view of the fact that the PAN in the name of the non-existent entity had remained active does not create an exception in favour of the revenue to dilute in any manner the principles enunciated hereinabove.

8. Be that as it may, the writ petition is allowed. The impugned notice dated 31st March, 2021, the order of assessment dated 31st March, 2022 as also the consequential demand notice and penalty notice dated 31st March, 2022 are set aside."

8. The Hon'ble High Court has clearly held that when the fact of amalgamation is brought to the notice of the AO, the AO is not correct in issuing the notice in the name of non-existing entity. The Hon'ble High Court has further held that even if the assessee has participated in the proceedings it cannot stop the assessee from raising this contention since there is no estoppel against law. In assessee's case when notice under section 210 for payment of advance tax was issued, the assessee has written to the AO stating that it is amalgamated with the Instone India Pvt. Ltd. However, vide notice under dated 31.03.2021 issued in the name of Griffin Marine

Travel Pvt. Ltd. the AO has re-opened the assessment which in our considered view is not justifiable and therefore, liable to be quashed.

9. In result, the appeal of the assessee for AY 2013-14 is allowed.

10. For AY 2015-16 (**ITA No. 4197/Mum/2023)** the assessee filed the return of income 31.11.2015 declaring a total income of Rs. 18,83,84,660/-. The case was selected for scrutiny and assessment order under section 143(3) dated 29.05.2017 was passed assessing the income of the assessee at Rs. 18,83,96,660/-. Subsequently, the AO re-opened the assessment by stating that

> *"1. In this case, the return of income was on 30.11.2015 ANNEXURE declaring total income of Rs.18,83,84,660/-. The case was selected for scrutiny and assessment order u/s. 143(3) of the I. T. Act, 1961 was passed on 29.05.2017 assessing the total income at Rs.18,83,96,660/-.*
>
> *2. It is seen from the profit & loss account that the assessee has debited advertisement & publicity of Rs.2,41,266/-. However, as per Annexure-III to clause 21 of the Tax Audit Report-details of amounts debited to the profit & loss account, being in the nature of capital, personal, advertisement expenditure etc., the expenditure under this head aggregates to Rs. 1,91,000/-. However, the difference of Rs.50,266/- has not been added back to the total income by the assessee. Therefore, the difference amount of Rs.50,266/- under the head advertisement expenditure ought to have been disallowed by the assesse, which resulted in underassessment of income to the extent of Rs.50,266/-.*
>
> *3. Therefore, I have reason to believe that taxable income by virtue of incorrect claim of expenses, as stated in para 2, has escaped assessment by the reason of omission on part of the assessee within the meaning of section 147 of the IT Act, 1961. Further this case is squarely covered under the provisions of Explanation 1 to section 147 of the Act. Therefore, I am satisfied that this is a fit case to issue notice u/s. 148(1) r.w.s. 147 of the IT Act, 1961."*

11. The AO accordingly completed the re-assessment by making an addition of Rs. 1,91,000/-. The CIT(A) on further appeal confirmed the addition made by the AO rejecting the contentions of the assessee both on legal as well as on merits.

12. We heard the parties and perused the material on record. From the reasons recorded as extracted above, it is clear that the AO has re-opened the assessment based on the information contained in the Tax Audit Report (TAR). The year under consideration, the re-opening vide notice dated 31.03.2021 is beyond 4 years and the assessment is completed under section 143(3). Therefore, for AY 2015-16 also the 1st proviso to section 147 of the Act is applicable. We have while considering the similar issue for AY 2013-14 already held that re-opening beyond 4 years cannot be done when there is no failure on the part of the assessee to disclose fully and truly all material facts. Considering the reasons recorded and the other facts pertaining to AY 2015-16, we are of the view that the above decision with regard to AY 2013-14 is mutatis mutandis applicable for AY 2015-16 also. Accordingly, we hold that the notice issued under section 148 of the Act is invalid and the assessment based on the same is liable to be quashed.

13. The ld. AR raised similar contention for AY 2015-16 also stating that the notice being issued in the name of non-existing entity. On perusal of records, we notice that the facts for AY 2015-16 with regard to the above contention of the ld. AR are similar to the facts for AY 2013-14. Therefore, following our earlier decision, we hold that the notice issued by the AO under section 148 of the Act is invalid on this count also.

14. In the result, the appeal of the assessee for AY 2015-16 is allowed.

15. Since we have allowed the appeals for AY 2013-14 & 2015-16 based on the legal contentions raised by the assessee, the grounds raised on merits have become academic and does not warrant separate adjudication.

16. In result, the appeal of the assessee for AY 2013-14 & 2015-16 are allowed.

Order pronounced in the open court on 10-09-2024.

Sd/-	***Sd/-***
(ANIKESH BANERJEE)	**(PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai