आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'D' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No.1578/Ahd/2015

निर्धारण वर्ष/ Asstt. Year: 2006-2007

Milestone Tradelinks P.Ltd. [In the matter of Hinduja Exports Pvt.Ltd., which stands amalgamated with the appellant company] 103, "Shaily House" 3, Harihar Park Society Nr.Income Tax Under Bridge Navrangpura, Ahmedabad 380 009. PAN : AACCM 9423 C.	Vs	ITO, Ward-4(3) Ahmedabad.

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri Hiren Trivedi, AR
Revenue by :	Shri Sanjay Agrawal, CIT-DR

सुनवाई की तारीख/**Date of Hearing : 07/01/2016**
घोषणा की तारीख /**Date of Pronouncement: 04 /03/2016**

आदेश/O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER:

The assessee is in appeal before us against the order of the ld.CIT-2, Ahmedabad dated 31.3.2015 passed under section 263 of the Income Tax Act, for the Asstt.Year 2006-07.

2. Grounds of appeal taken by the assessee read as under:

"1. On the facts and in the circumstances of the case, the learned Principal CIT erred in issuing notice u/s.263 and subsequently passing the impugned order u/s.263 in the name of "Hinduja Exports Pvt. Ltd." which is a non-existent company and

on that ground the aforesaid notice and the order u/s.263 are ab initio void and bad in law.

2. On the facts and in the circumstances of the case, the learned Principal CIT erred in assuming his jurisdiction u/s.263 of the I.T. Act, whereas the mandatory conditions for assuming such jurisdiction are totally absent, with the result that the impugned order passed u/s.263 is bad in law.

3. On the facts and in the circumstances of the case, the learned Principal CIT erred in arriving at a conclusion without any basis whatsoever to the effect that the assessment order passed by the Assessing Qfficer was erroneous as well as prejudicial to the interest of the revenue.

4. On the facts and in the circumstances of the case, the learned Principal CIT erred in cancelling the assessment order passed by the Assessing Officer on 28.3.2013 u/s.!43[3J read with section 147 of the I.T. Act and further in directing the Assessing Officer to "make fresh assessment".

5. The appellant craves leave to add, alter, amend and/or withdraw any ground or grounds of appeal either before or during the course of hearing of the appeal."

3. The ld.counsel for the assessee at the very outset submitted that order passed by the ld.Commissioner under section 263 of the Income Tax Act is *ab initio void*, because the same has been passed in the name of non-existing company, viz. Hinduja Exports Pvt. Ltd. ["HEPL" for short]. He submitted that this company had amalgamated with the assessee-company viz. Milestone Tradelinks Pvt. Ltd. w.e.f. 1.4.2011 as approved by the Hon'ble Gujarat High Court vide its order dated 3.9.2012 in Company Petition No.117 of 2012. On the strength of Hon'ble Gujarat High Court order passed in SPA No.605 of 2013 in the case of Khurana Engineering Ltd. as successor of M.S.Khurana Vs. DCIT, he contended that impugned order of the ld.Commissioner deserves to be quashed. He further relied upon the judgment of Hon'ble Supreme Court in the case of Marshall Sons & Co.(India) Ltd. Vs. ITO, reported in 223 ITR 809. In order to buttress his contention

that the order was passed in the name of non-existing company, the ld.counsel for the assessee took us through page nos.260 to 296 of the paper book, wherein copy of the order of the Hon'ble Gujarat High Court passed in Company Petition No.117 of 2012 along with scheme of amalgamation has been placed on record. He further contended that this fact of amalgamation was brought to the notice of the AO vide letter dated 23.7.2013. Copy of this letter has been placed on record. The AO of the assessee i.e. Milestone Tradelinks Pvt. Ltd. has recognized this fact of amalgamation in the assessment order passed under section 143(3) in Asstt.Year 2012-13. The ld.counsel for the assessee placed on record copy of the assessment order.

4. On the other hand, the ld.DR also filed paper book containing 24 pages. He contended that reply submitted on 26.3.2015 was signed by authorized person of HEPL. Similarly, power of attorney filed by Shri Narayan Shah, ITP has been signed by HEPL, because, stamp of HEPL along with initial of some persons is available. The adjournment application dated 6.1.2015 is again signed on behalf of HEPL. Therefore, it indicates that proceeding is to be continued in the name of HEPL. On the strength of ITAT order of Kolkata Bench in the case of Subhlakshimi Vanijay P. Ltd. Vs. CIT, 155 ITD 171 , he contended that if an assessee keeps in dark the Revenue, then this amalgamation ought to be ignored. He drew our attention towards paragraph-30.b of the ITAT order in order to buttress his contention. He further contended that if this Bench does not want to concur with the view of Kolkata Bench of the ITAT, the matter be referred to larger Bench. The ld.DR further contended that though the assessee has intimated the AO, but did not give any intimation to the Commissioner.

5. We have duly considered rival contentions and gone through the record carefully. On page no.260 to 296 of the paper book, the

assessee has placed copy of the Hon'ble Gujarat High Court order in Company Petition No.117 of 2012 and scheme of amalgamation. In part-1 of the scheme the definition to different terms has been provided. At Sr.1(e) the appointed date has been provided. It reads as under:

"Appointed date" means 1st April, 2011"

The "effective date" has been explained at Sr.1(f). It reads as under:

> *"Effective Date" means the last of the dates on which all conditions, mattes and filings referred to in clause 19 hereof have been fulfilled and all necessary orders, approvals and consents referred to therein have been obtained. References in this Scheme to the date of "coming into effect of this Scheme" or "upon the Scheme being effective" shall mean the Effective Date."*

6. This scheme has been approved by the Hon'ble Gujarat High Court vide order dated 3.9.2012. The scheme has been approved w.e.f. appointed date i.e. 1.4.2011. Meaning thereby, the status of the company, Hinduja Exports Pvt. Ltd. was extinguished and it merged with the assessee-company. The ld.commissioner has issued notice under section 263 on 24.12.2014. This notice was issued after merger of HEPL in the assessee-company. The notice was issued in the name of HEPL. It was not issued to Milestone Tradelinks Pvt. Ltd. The assessee has communicated the effect of merger by way of amalgamation to the AO vide letter dated 23.7.2013 which was duly received in the office of ITO on 26.7.2013. The copy of the letter has been produced in the paper book. It reads as under:

"From:

Hinduja Exports Pvt Ltd. *Date : 23. 07. 2013*

PAN : AABCH4708E
A-1011,
Narnarayan Complex,
Navrangpura,
Ahmedabad - 380009.

[Seal of Deptt]
INCOME TAX OFFICER
26 JUL 2013
COMP.WARD-4(3)

To:
The Income Tax Officer,
Ward-4(3), Ahmedabad.

Dear Sir,

Sub : Regarding filing of return of income for A. Y. 201 2-13- reg.
Ref: No. ITO/Wd. 4(3)/Non Filers-12-13/13-14 dated 15.07.2013.

We are in receipt of your above mentioned letter asking us to file the return of income for the A.Y. 2012-13 by stating that from your record it is seen that we have not yet filed the return of income for the said assessment year. In this regard we submit that the company has been amalgamated as per the Hon'ble Gujarat High Court order in company petition no. 117 of 2012 and company application no. 212 of 2012 dated 03.09.2012 with Milestone Tradelink Pvt. Ltd. (PAN: AACCM9423C)with appointed date 01.04.2011 relevant to A.Y. 2012-13. The copy of amalgamation order is enclosed herewith for your perusal.

In view of the above as the company is not in existence, your honour is requested to cancel/drop the assessment proceeding initiated by you.

Thanking You,

Yours Faithfully,
For, M/sHinduja Exports Pvt. Ltd,
Sd/-
(Authorized Signatory)
Encl: As above."

7. Cognizance of this fact was taken by the AO in the assessment proceedings for the Asstt.Year 2012-13. The assessee, Milestone Tradelinks Pvt. Ltd. has filed its return for the Asstt.Year 2012-13 on 28.8.2012. It has informed the AO about the amalgamation of HEPL

with it vide order dated 3.9.2012 passed by the Hon'ble Gujarat High Court. These facts have been noted by the AO in the assessment order dated 5.2.2015. The discussion made by the AO *qua* this fact reads as under:

> "*The assessee filed its Return of Income electronically vide E-filing Acknowledgement Number 500821281280912 on 28/09/2012 declaring total income at Rs.Nil/- after set off earlier year loss. During the year under consideration the Hon'ble Gujarat High Court vide his order dated 03.09.2012 approved the scheme of amalgamation of Aditya Corpex Pvt. Ltd, Ambitious Tradelinks Pvt. Ltd, Anand Trade-Movers (Gujarat) Pvt. Ltd, Hinduja Exports Pvt. Ltd, Midex Overseas Ltd, Nabh Tradelink Pvt. Ltd and Surya Rath Tradelinks Pvt. Ltd. with Milestone Tradelinks Pvt. Ltd. For implementation of the amalgamation Scheme as per of the Hon'ble Gujarat High Court the assessee filed its revised return of income electronically vide E-filing Acknowledgement Number 793020511270913 on 27.09.2013 declaring total income at Rs. 17,46,695/-. This case was selected for scrutiny. Notice u/s 143(2) of the I.T. Act was issued on 06/08/2013 and served on 14.08.2013. Further notice u/s.143(2) was issued on 22.07.2014 due to change of incumbent and served through Speed Post. A notice u/s 142(1) of the I.T. Act with questionnaire was issued on 02.12.2014 and served to the assessee on 05.12.2014."*

8. An identical situation has come up before the Hon'ble High Court in Special Civil Application No.605 of 2013. In that case, registered company in the name and style of M/s.Khurana Infrastructure and Toll Road P.Ltd. merged with Khurana Engineering Ltd. under scheme of amalgamation. The Hon'ble High Court has approved the scheme of amalgamation and appointed date defined in the scheme was 1.4.2009. The AO of erstwhile company had issued notice under section 142(1) for the Asstt.Year 2010-11. Transferee company has challenged this notice on the ground that M/s.Khurana Infrastrcture and Toll Road Pvt. Ltd. is no more in existence, because of its amalgamation. The Hon'ble High Court has accepted this amalgamation scheme on 18.3.2011 passed in Company Petition No.161 of 2010. The Hon'ble Gujarat High Court has allowed the writ petition and held that after the amalgamation, the

erstwhile company seized to exist, and therefore, no notice under section 142 can be issued upon that. The Hon'ble Gujarat High Court has relied upon the decision of Hon'ble Supreme Court in the case of Marshall Sons and Co. (India Ltd.(supra). The relevant findings of the Hon'ble high Court read as under:

> *"5. It is the case of the petitioner that by virtue of such amalgamation, now since the transferor company no longer survives from 1.4.09, question of assessing such company for the purpose of income tax would not survive. It is on this ground that the notice issued by the respondent calling upon the transferor company to provide the details with respect to the assessment year 2010-11 is challenged in this petition.*
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> *6. Having heard the learned counsel for the parties, it emerges from the record that the transferor company had merged in transferee company with effect from 1.4.09. The High Court did not provide for any modification in the appointed date as envisaged in the merger scheme itself. In that view of the matter, as held by the Supreme Court in the case of Marshall Sons and Co. (India) Ltd v. I.T.O. , 223 ITR 809, the effective date for amalgamation would be the date as envisaged under the scheme. The Supreme Court in the said decision observed as under:*
>
> > *"14. Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz. January 1, 1982. It is true that while sanctioning the scheme it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in this facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it - as has happened in this case - it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1) a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the Court may take sometime; indeed, they are bound to take some*

time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with effect from the transfer date, the Transferor Company (Subsidiary Company) shall be deemed to have carried on the business for and on behalf of the Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the Courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer/amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income-tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is the necessary and the logical consequence of the Court sanctioning the scheme of amalgamation as presented to it. The order of the Court, sanctioning the scheme, the filing of the certified copies of the orders of the Court before the Registrar of Companies, the allotment of shares etc. may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982 . This is also the ratio of the decision of the Privy Council in Raghubar Dayal, v. Bank of Upper India Ltd., AIR 1919 PC 9.

Counsel for the Revenue contended that if the aforesaid view is adopted then several complications will ensue in case the Court refuses to sanction the scheme of amalgamation. We do not see any basis for this apprehension. Firstly, 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. Secondly, and probably the more advisable course from the point of view of the Revenue would be to make one assessment on the Transferee

Company taking into account the income of both of Transferor or Transferee Companies and also to make separate protective assessments on both the Transferor and Transferee Companies separately. There may be a certain practical difficulty in adopting this course inasmuch as separate balancesheets may not be available for the Transferor and Transferee Companies. But that may not be an insuperable problem inasmuch as assessment can always be made, on the available material, even without a balance-sheet. In certain cases, best-judgment assessment may also be resorted to. Be that as it may, we need not pursue this line of enquiry because it does not arise for consideration in these cases directly."

In view of the above concluded position of law, we have no hesitation in holding that the transferor company would no longer be amenable to assessment proceedings for the assessment year 2010-11. The notice for producing documents for such assessment would, therefore, be invalid. Reference of the Revenue to clause 6 of the scheme is wholly misplaced. Clause 6 refers to two dates, namely, appointed date and the effective date. It only clarifies that the scheme shall be operative from the appointed date, but shall become effective from the effective date. This, in our opinion, does not alter the position of law. The term 'appointed date' as defined in clause 1(ii) itself envisages 1st April 2009 as the appointed date unless, of course, any other date as may be approved by the High Court. In the present case, the High Court made no change in this respect. The appointed date for the said scheme, therefore, must be held to be 1.4.2009.

In the result, the petition is allowed. The impugned notice Annexure A is quashed. Rule is made absolute accordingly."

9. The ld.CIT-DR, on the strength of ITAT's decision in the case of Subhlakshmi Vanijya P.Ltd. (supra) has contended that if the assessee keep the department in dark and not informed about such amalgamation, then the assessee cannot be allowed to derive benefit from its own fraudulent practice. He drew our attention to pages no.30 of the judgment. This paragraph read as under:

"*30.b. We do not dispute the general proposition that once a company gets amalgamated with another, it loses its original*

identity and no proceedings can be taken in its earlier name. Such proceedings have to continue in the name of the amalgamated company and order can also be passed in the new name. However, this general position can have no application, where the Revenue is kept in dark and is not informed about such amalgamation. The position becomes more critical where, even after such amalgamation, the amalgamating company launches proceedings in its old name. In such circumstances, it cannot be allowed on turn around later and claim that though it wrongly initiated the proceedings in wrong name, but the court should have taken cognizance of the reality of amalgamation. NO assessee can be allowed to drive benefit from its own fraudulent practice.

30.c. It is observed in the instant case despite its amalgamation, the assessee chose to file its return of income after the date of amalgamation, in its earlier name and that is how the assessment got completed u/s 147 in the same name. It is obvious that in such circumstances, the assessee cannot be allowed to take advantage of its own manipulation. It is further interesting to note that the assessee also allowed the proceedings u/s 147 to complete in its earlier name, but-is now seeking to object to the order of the Id. CIT on this aspect of the matter. Law does not permit a person to both approbate and reprobate. This contention is therefore, rejected."

10. On the strength of these paragraphs and on the strength of adjournment application, power of attorney alleged to have been signed by the HEPL, he contended that the assessee did not inform the Commissioner about the factum of amalgamation, and therefore, at this stage, it cannot be permitted to raise this plea.

11. On due consideration of all these arguments, we are of the view that in the Income Tax Act, there is no provision to communicate this fact to the Commissioner. The assessee has already informed the AO. We have extracted the copy of the letter written by the assessee. We have also made reference of the assessment order vide which the AO has taken cognizance of this fact while he issued notice under section 143(2) of the Income Tax Act. In the order of the ITAT, Kolkata Bench itself has observed that legally when a company amalgamates with

another, it loses its identity and no proceedings can be taken in its earlier name. The Bench had taken a different view on account of notorious facts available in that case. No such circumstances are before us. Apart from above, we are of the view that even if the assessee gave consent for taking up the proceedings under section 263 against it, that would not infuse jurisdiction in the ld.Commissioner. In other words, this adjournment application, reply to show cause notice would not infuse jurisdiction to ld.Commissioner. Jurisdiction should be by virtue of operation of the Act and not by the consent of an assessee. A perusal of section 263 would indicate that before taking any action under section 263, the ld.Commissioner has to pursue record and record would include the communication made by the assessee to the AO on 23.7.2013 intimating about the fact of amalgamation. Therefore, we are of the view that the issue in dispute is squarely covered in favour of the assessee by the decision of Hon'ble Gujarat High Court in the case of Khurana Engineering Ltd. (supra). Since we have arrived at a conclusion that initiation of proceedings against HEPL is *void ab inito*, therefore, we do not deem it necessary to adjudicate on other issues on merit. No proceedings under section 263 can be taken up against HEPL after its amalgamation with Milestone Tradelinks Pvt. Ltd. Therefore, we allow the appeal of the assessee and quash the order passed by the ld.Commissioner under section 263 of the Income Tax Act.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 4th March, 2015 at Ahmedabad.

Sd/-	**Sd/-**
(MANISH BORAD)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 04/03/2016