IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "B", NEW DELHI

BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER

AND

SHRI A.T. VARKEY, JUDICIAL MEMBER

	I.T.A. Nos. 5874, 5875, 5876, 5877 & 5878/Del/2013	
	A.Yrs. : 2003-04, 2004-05, 2005-06, 2006-07 & 2007-08	
M/s Computer Engineering Services India (P) Ltd., (Amalgamated with Istronics Ltd) F-345, Lado Sarai, New Delhi (PAN: AAAC10163R)	**VS.**	**ACIT, CENTRAL CIRCLE-21, NEW DELHI**
(APPELLANT)		**(RESPONDENT)**

AND

	I.T.A. Nos. 5975, 5976, 5977, 5978 & 5979/Del/2013	
	A.Yrs. : 2003-04, 2004-05, 2005-06, 2006-07 & 2007-08	
ACIT, CENTRAL CIRCLE-21, NEW DELHI	**VS.**	**M/s Computer Engineering Services India (P) Ltd., (Amalgamated with Istronics Ltd) F-345, Lado Sarai, New Delhi (PAN: AAAC10163R)**
(APPELLANT)		**(RESPONDENT)**

AND

	I.T.A. Nos. 559, 560, 561, 562, 563 & 564/Del/2014	
	A.Yrs. : 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09	
DCIT, CENTRAL CIRCLE-03, NEW DELHI	**VS.**	**M/S FORYU OVERSEAS (P) Ltd., F-5/9, Ground Floor, Vasant Vihar, New Delhi**

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		(PAN: AAACF9353Q)
(APPELLANT)		**(RESPONDENT)**

AND

	Cross Objection Nos. 247, 248, 249, 250, 251 & 252/Del/2014 (In ITA Nos. 559, 560, 561, 562, 563 & 564/Del/2014	
	A.Yrs. : 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09	
M/S FORYU OVERSEAS (P) Ltd., F-5/9, Ground Floor, Vasant Vihar, New Delhi (PAN: AAACF9353Q)	**VS.**	**DCIT, CENTRAL CIRCLE-03, NEW DELHI**
(APPELLANT)		**(RESPONDENT)**

Assessee by : Sh. Kapil Goel, Adv.
Department by : Sh. Ramesh Chander, CIT(DR)

Date of Hearing	**15.05.2015**
Date of pronouncement	**29.05.2015**

ORDER

PER Bench

1. These are 22 cross appeals directed against orders passed by the CIT(Appeals)-II, New Delhi pertaining to the Assessment years 2003-04 to 2007-08 in the case of M/s Computer Engineering Services India Pvt. Ltd. and Assessment Years 2003-04 to 2008-09 in the case of M/s Foryu Overseas (P) Ltd.

2. Since the facts and grounds of the appeals in all the Assessment years are more or less common, we shall consider the facts and grounds of appeal/additional grounds of appeal for Assessment year 2003-04 in the case of Computer Engineering Services India (P) Ltd. and the decision arrived for the Assessment year 2003-04 would be equally applicable to other Assessment years from 2004-05 to 2008-09 of M/s Computer Engineering Services India (P) Ltd. and, Assessment years 2003-04 to 2008-09 of M/s Foryu Overseas (P) Ltd. in which an additional ground against admission of Cross-Objection preferred by the assessee is challenged by the Revenue, which we dealt with as a preliminary objection and has adjudicated on 30-01-2015.

3. Taking up Assessment year 2003-04 of M/s Computer Engineering Services India (P) Ltd. (ITA No. 5874/D/2013 (Assessee) and 5975/D/2013 (Deptt.) and an additional ground raised by the Revenue in M/s Foryu Overseas (P) Ltd.

4. At the outset, the Ld. CIT, DR, Sri Ramesh Chander, opposed vehemently admission of the cross objection filed by the assessee in M/s Foryu Overseas Pvt. Ltd. According to

him, the CO filed by the assessee suffers from latches and hence need to be dismissed at the very outset itself. According to him, the Revenue filed appeal on 31.01.2014 and the notice of hearing was generated, signed and dispatched on 04.02.2014. So according to him, the CO filed by the assessee on 15.09.2014 is hopelessly hit by limitation, so it should not be admitted. On the other hand, Ld. AR, Sri Kapil Goel submitted that the assessee have received the notice of Revenue's appeal on 12.09.2014 and promptly has filed the CO on 19.09.2014. So it is well within the time as prescribed by law, so CO is not hit by limitation as contented by the Ld. DR. In the light of the aforesaid submissions of both parties we thought it prudent to find out the question of fact raised before us, so vide order-sheet entry dated 16.01.2015, we have passed the following order:-

"The department has filed a written synopsis in support of its plea of C.O. filed by the assessee being barred by limitation, inter-alia, on the ground that Acknowledgement-Cum-Notice of appeal being generated on 31/Jan/2014 and

signed on 04/Feb/2014 must have been dispatched earlier to 11/Sept/2014, the date as reported by registry vide its report dated: 17/12/2014 on record. This aspect needs to be verified with respect to dispatch register from 31/Jan/2014. The Registry is directed to give its report before 23/Jan/2015 on this written synopsis and also to explain the delay in dispatching the notice/memorandum of appeal (Form 36) to the respondent-assesses. This matter will be heard on 30/Jan/2015."

5. On 21.01.2015, the report of the registry was placed on record as under:

"The appeal of the revenue was received in this office on 31/01/2014 and acknowledgement was generated by the computer section 04.02.2014. No notice was issued from 31.01.2014 to 11.09.2014. The grounds of appeal was signed on 01.09.2014 in the appeal section and sent to the dispatch section on 11.09.2014. The grounds of appeal were issued by post on 11.09.2014 and as directed, it has been verified in the dispatch register 31.01.2014 to 11.09.2014, the acknowledgement/Form 36 along with grounds of appeal were not dispatched before 11.09.2014. The assessee received the grounds on 12.09.2014 and filed the CO on 19.09.2014.
Early hearing application was filed by the assessee on 28.10.2014, which was granted by the Hon'ble Vice President (DZ) on 30.10.2014. Thereafter the cases were fixed for hearing on 11.12.2014 and notice for hearing was generated on 31.10.2014 and issued on 03.11.2014."

6. On 30.01.2015, vide order-sheet entry dated 30.01.2015 after perusing the records and after satisfying ourselves about the

veracity of the claim made by the assessee to the objection raised by the Revenue in this regard, we have recorded the finding in this respect as under:-

"We have perused the Report of AR and are satisfied that the CO's filed by the A (assessee) are within time. The matter can now be proceeded with."

7. In the aforesaid factual matrix, the objection raised by the Revenue in this respect has no merits and therefore dismissed.

8. The revenue has however also raised another Additional Ground of Appeal as under:

"The ld. CIT(A) has erred in law in adjudicating the appeal filed by the assessee in as much as statutory requirement of filing statement of facts with Form No. 35 was not complied with."

9. The ld CIT DR submitted passionately that the assessee as per the statutory Form No. 35 was under a statutory obligation to file statement of fact and this was not complied with. In the absence of this compliance of statutory requirement the appeal was defective in as much as not

maintainable and hence ought not to have been adjudicated upon. For non compliance of this statutory requirement the adjudication gets vitiated and argued at length and submitted written arguments in support of his contention. According to him, this statutory requirement cannot be ignored and goes to the root of the matter. On the other hand, it was submitted by the assessee that alongwith Form No. 35 the assessee had filed the detailed written submissions containing all fact and as per the scheme of the Act. According to him, the appeal before the CIT(A) is continuation of the assessment proceeding. The ld. CIT(A) has got co-existensive and co-terminus powers to decide the appeal. It was contended that grounds has been raised in the appeal memo which is self-explanatory. It was submitted that separate filing of facts cannot come in the way in any manner or disabled the CIT(A) while deciding the issue before him. The ld. AR of the assessee pointed that the ld. CIT(A) has called for the remand report and non filing of the statement of facts in no

way will affect the lis at hand before the ld. CIT(A). At best it can be called an irregularity which cannot be fatal and he referred to the leading Commentary on Income Tax Law Chaturvedi and Pithisaria Page 12734 Sixth Edition 2014. Thereafter, the ld. AR quoted the Hon'ble Supreme Court observations in Jai Jai Ram Manohar Lal vs. Natiional Building Material Supply AIR 1969 SC 1267 and ITAT Coordinate 'G' Bench decision in the case of Shri Ram Hari Ram ITA 3531/D/2012 wherein similar objection was rejected by Speaking order para 8 and 9.

10. We have carefully considered the arguments of both sides, perused the material placed before us. We are not reproducing the lengthy argument note of the ldDR, because we take note that a Coordinate Bench of this Tribunal in the case of SVP Builders (India) Ltd. vs. DCIT ITA No. 4674/D/2014 dated 19.2.2015 has adjudicated this issue and held as under:

"15 Rival contention heard. On a careful consideration of the facts and circumstances of the case, a perusal of the

papers on record and the order of the authorities below, as well as case laws cited, we hold as follows:
"The first objection of the ld. DR is that the statement of facts have not been filed by the assessee, in Form No. 35, filed before the CIT(A). The CIT(A) has not treated the forms filed before him as defective. He admitted the appeal and adjudicated the matter on merits. The order of the ld. CIT(A) is the impugned order appealed against before us. The ld. DR wants us to hold that the order of the ld. CIT(A) is illegal and against the law as there is a defect in Form No. 35
In our view the arguments raised by the ld. DR are devoid on merit. Defects in the return of income filed, defects on Form No. 35 which is the form of appeal etc. are to be considered by the respective authorities before whom these are filed and the maintainability of the appeal before us cannot be challenged. The right of appeal is a substantive right. Procedural issues can not take away substantial rights of a person. This cannot be a ground for the revenue to challenge the order of the ld. CIT(A) which is in this case in favour of the Revenue. The arguments to say the least are farfetched. Hence we dismiss the same.

11 In view of the Coordinate Bench decision, we concur with the view expressed by the Coordinate Bench of the Tribunal and we dismiss the additional ground raised by the revenue in this regard.

12 Ground No.5 of the assessee's appeal which is against the validity of the issue of notice under Section 153C of the Act and consequently the completion of assessment in pursuance thereto, reads as under.

"5. That on the facts and circumstances of the case and the provision of law, the Ld.CIT(Appeals) has failed to appreciate that initiation of proceedings under Section 153C including issue of notice and also completion of assessment on the company which has already become nonexistent on account of its merger with other company is illegal and bad in law as such the assessment being bad in law deserves to be quashed."

13. An interrelated Additional Ground raised by the department is as under:

"1 The ld. CIT(A) has erred in law as well as on facts in deciding the issue related to framing of assessment on an entity which did not exist at the time of issuance of notice u/s 153(C) of the IT Act, 1961, since this claim or ground was not the before the AO. Adjudication on this issue by the ld. CIT(A) is beyond the jurisdiction conferred upon CIT(A)."

14. The facts of the case are that there was a search and seizure action under Section 132 of the Income Tax Act (the Act) in the cases of Shri BK Dhingra, Smt.Poonam Dhingra and M/s Madhusudan Buildcon Pvt.Ltd., New Delhi on 20th October,2008. On the basis of documents found from the residential premises of Shri BK Dhingra, which were belonging to the assessee company, proceedings under Section 153C read with S.153A were initiated in the case of the assessee vide notice dated 6th October, 2010. The

Assessing Officer completed the assessment vide order dated 31st December,2010 at the total income of Rs.31,75,433/- in which the following additions were made:

Unexplained purchases u/s 69C	Rs. 29,03,880/-
Expenses disallowed	Rs. 2,80,208/-

Both the above additions were deleted by the ld. CIT(A). Therefore, the revenue is in appeal against the deletion of the additions by the Ld.CIT(A). The assessee is in appeal wherein the validity of the initiation of proceedings under Section 153C on various grounds have been challenged. However, at the time of hearing before us, the Ld.Counsel for the assessee first referred and argued ground no.5 of the assessee's appeal. Therefore, we have taken up ground no.5 of the assessee's appeal first for hearing and adjudication. It was stated by the ld. Counsel for the for the assessee that there was amalgamation of the assessee company with M/s Instronics Ltd., the Hon'ble Jurisdictional High Court sanctioned the amalgamation vide order dt. 30.10.2007. That after the order of the amalgamation by the Hon'ble Jurisdictional High Court the assessee company namely M/s Computer Engineering Services India (P) Ltd. (supra) ceased to exist. That the Assessing Officer issued notice under Section 153C on 4.10.2010 which was after the order

of Hon’ble Jurisdictional High Court sanctioning the scheme of amalgamation. Thus the notice issued under Section 153C in the name of non existing company is a nullity and consequently the assessment framed on the basis of notice issued under Section 153C is also a nullity. The reliance was placed on the following decision of the various Benches of the ITAT:

a) Impsat (P) Ltd. Vs Income Tax Officer, (2004) 91 ITD 354 (Del)

b) ACIT Vs SPN Milk Products Industries Pvt. Ltd., ITA No. 565 to 578/Del/2012 order dated 22.01.2012 of ITAT Delhi Benche 'G' New Delhi.

c) ACIT Vs Dimension Apparels Pvt. Ltd., ITA No. 571 to 576/Del/2012, order dated 21.06.2013 of ITAT Delhi Bench 'B' New Delhi.

d) ACIT Vs Micra India Pvt. Ltd., ITA No. 1060 to 1065/Del/2012 order dated 21.09.2012 of ITAT Delhi Bench 'E' New Delhi.

e) ACIT Vs Chanakaya Export Pvt. Ltd., ITA No. 539 to 544/Del/2012 order dated 19.07.2013 of ITAT Delhi Bench 'B' New Delhi.

f) Triveni Engineering & Industries Ltd. Vs DCIT, (2005) 93 ITD 561(Del.)

g) Century Enka Ltd. Vs DCIT (2006) 101 ITD 489 (Mum) (2008) 303 ITR 1 (Mum)

h) Pampasar Distillery Ltd. Vs ACIT, (2007) 15 SOT 331 (Kol)

i) Satwant Exports Pvt. Ltd. vs. ACIT ITA No. 5340 to 5345/D/2013 A.Y(s) 2003-04 to 2008-09 dated 11.4.2014

j) Mayank Traders (P) Ltd. vs. ACIT ITA No. 5307/D/2013 A.Y.s 2005-06 dated 28.11.2014

k) M/s Images Credit and Portfolio (P) Ltd. vs. ACIT ITA No. 53010 to 5306/D/2013 A.Y. 2004-05 to 2008-09

15. The reliance was placed on the following judgments of the various Hon’ble High Courts/Hon’ble Supreme Courts:

a) Spice Entertainment Ltd. Vs CIT, ITA No. 475 of 2011 judgment dated 08.08.2011 of Hon'ble Delhi High Court

b) CIT Vs Express Newspapers Ltd. (1960) 40 ITR 38 (MAD)

c) I. K. Agencies Pvt. Ltd. Vs CWT, Kol-II, of Hon'ble Calcutta High Court (2012) 20 Taxman.com 731 (Cal.)

d) CIT Vs Amarchand N. Shroff (1963) 48 ITR 59 (SC)

e) CIT Vs Kurban Hussain Ibrahimji Mithiborwala, 1973 CTR (SC) 454; (1971) 82 ITR 821 (SC) Mevron Projects Pvt. Ltd.

f) CIT Vs Vived Marketing Servicing Pvt. Ltd., ITA No. 273/2009 order dated 17.09.2009 of Hon'ble Delhi High Court

g) Khurana Engineering Ltd. Vs DCIT, SCA NO. 605 of 2013, (2013) 217 Taxman 75 (Guj.)

h) Torrent Pvt. Ltd. Vs CIT, SCA No. 5857 of 2004, judgment dated 29.04.2013 of Hon'ble Gujarat High Court.

i) CIT vs. Dimension Apparels (P) Ltd. ITA No. 327/2014 (Del) dated 8.7.2014

j) CIT vs. M/s Chanakaya Exports (P) Ltd. ITA No. 684/2014 (Del) dated 12.11.2014

k) CIT vs. Satwant Exports ITA No. 725/2014 (Del) dated 26.11.2014 dated 26.11.2014

l) CIT vs. Micra India (P) Ltd. ITA No. 441, 444 to 446, 452 & 461/2013 dated 22.1.2013

16. Further, as regarding the plea that AO was unaware about amalgamation, it was submitted that;

a) firstly Hon’ble Supreme Court (four Judges) Raza Textiles Ltd. vs. ITO Rampur on 22.9.1972 equivalent

citations: A-R 1973 SC 1362, 87 ITR 539 (SC), (1973) 1 SCC 633: has clearly held that:

"No authority, much less a quasi judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly it is incomprehensible to think that a quasi judicial authority like the Income Tax officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen"

b) secondly, Hon'ble Supreme Court in Saraswati Industrial Syndicate 1990 Supp. 1 SCR 3/ (186 ITR 278) has held that "after the amalgamation of the two companies the transferor company ceased to have any entity and the 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."

c) thirdly, assessee has duly filed the Hon'ble High Court amalgamation orders which are available in public domain to ld. AO during assessment proceedings, and has taken the said plea before ld. CIT(A) in written submissions on which remand report is called for and duly obtained. In remand report ld. AO has admitted the fact of amalgamation which as per settled principle of Indian jurisprudence that admitted fact requires no proof and so answers to revenue's self defeating contention. Further nowhere in remand report or otherwise it is stated by the ld. AO or ld. CIT(A) that fact of

amalgamation was not intimated to ld. AO and on the contrary a express and loud finding is recorded by ld. CIT(A) in impugned orders, that intimation to ld. AO about amalgamation was made late at fag end of assessment proceedings which is sufficient to known of the revenue's instant plea. Further nobody can make exception to order passed by Hon'ble High Court in amalgamation proceedings which is public proceedings at large. No where it is disputed in revenue's ground even today, that companies which are assessed here were existing and operative on the date of issuance of seminal notice u/s 153C of the Act.

d) fourthly, ITAT Coordinate Bench in Image Credit case (Coordinate bench order dated 19.12.2014) has categorically held that "whether the assessee intimated about the amalgamation before the issue of notice u/s 153C or not would not be relevant for deciding the issue of validity of the notice u/s 153C of the Act. Whether the assessee intimated or not the fact remains that M/s Images Credit and Portfolio (P) Ltd. ceased to exist after the approval of amalgamation by the Hon'ble Knowledge of the revenue or not any notice issued in the name of a non existent person is a nullity."

e) Sixthly, in recent decision on similar facts, it is held by Hon'ble jurisdictional High Court held as under:

The Hon'ble High Court of Delhi decided on 22.1.2015 in the case of Micra India Pvt. Ltd. as follows:-

"It is urged on behalf of the revenue that the ITAT fell into error in not noticing that the assessee, at the initial stages of the proceedings before the assessing officer, did not object to the proceedings and did not rely upon the amalgamation, it was contended that in these circumstances, the ITAIT should not have interfered with and quashed the assessment. Counsel (or the revenue argued that after receiving the notice u/s 153C, the assessee participated in the proceedings. The AO, in fact took note of the change resultant from the amalgamation and reflected that in the assessment order. The revenue further argues that having participated in the assessment proceedings, it is not open to the assessee to contest their validity; it relies upon section 292B of the Act in support of this contention."

f) The learned counsel for the assessee argued that the proceedings against assessee company abated with its dissolution, consequent upon its amalgamation with the transferee company. This even was notified well in advance by the transferee company, which had even reflected the income and other related matters of the transferor company for the relevant period. Even after receipt of notice u/s 153C the transferee company intimated about amalgamation, yet the final assessment order of the AO in respect of a company which did not exist o the date of the assessment, it was

therefore urged that the impugned order of the ITAT should be left undisturbed.

g) The learned counsel for the assessee relied upon two rulings of Hon'ble High Court: Spice Entertainment Ltd. vs. CIT(ITA No. 475/2011; reported in 2012 (280) ELT 43) and CIT vs. Vivid Marketing Services Pvt. Ltd. (ITA 273/2009).

h) It was submitted that in the case of Vivid Marketing (supra), it has been held as under:

"When the Assessing Officer passed the order of assessment against the respondent company, it had already been dissolved and struck off the register of the Registrar of companies' u/s 560 of the Companies Act. In these circumstances, the Tribunal rightly held there could not have been any assessment order passed against the company which was not have been any assessment order passed against the company which was not in existence as on that date in the eyes of law it had already been dissolved. It was further held section 176 of the Act, which enacts provisions relating to discontinuation of business, does not apply to a case of amalgamation/dissolution. It was further
held that section 159 of the Act, which provides for tax liability to be attached to the legal representatives of a deceased person, is also inapplicable. The language of sectioni 159 ex-facie applies to natural persons, and cannot be extended, through a legal fiction to the dissolution of companies.
There is another aspect in these appeals, which is the applicability of section 292B of the Act. Section 292B, interalia prescribes that proceedings etc. initiated cannot be deemed invalid "merely by reason of mistake, defect or omission" in any return of income, assessment or notice.

The revenue had argued that this provision neutralizes procedural defects in jurisdiction. In these circumstances, it was submitted, having regard to the assessee's omission to urge the so-called illegality at the threshold, the Court ought to interfere with the order of the ITAT. This question, too, has been dealt within CIT vs. Dimension Apparels Pvt. Ltd. reported in 370 ITR 288. In that case after noticing section 292B, the Court discussed the ruling in Spice Entertainment (supra) wherein it had been held that since the assessment made in such cases is against an amalgamated company in respect of income of the amalgamating company for the period prior to the amalgamation, the income tax authorities are nevertheless under an obligation to substitute the successor in place of the amalgamated company. Thus, "such a defect cannot be treated as procedural defect". In any event, it is to be noted that the fact of amalgamation of the assessee with the transferee company had been intimated and disclosed in response to the notice u/s 153C on 22.11.2010. Accordingly, this ground, too has no merit and is rejected. In the present case, no doubt there was participation during the course of assessment; however the AO, despite being told that the original company was no longer in existence, did not take remedial measures and did not transpose the transferee as the company which had to be assessed. Instead, he restored to a peculiar procedure of describing the original assessee as the one in existence; the order also mentioned the transferee's name below that of M/s Micra India Pvt. Ltd. Now, that did not lead to the assessment being completed in the name of the transferee company. According to the AO, M/s Micra India Pvt. Ltd. was still in existence. Clearly, this was a case where the assessment was contrary to law as having being completed against a non existent company. The ITAT's decision is, in the circumstances, justified and warranted."

17. It was also submitted by the assessee that when assessee filed detailed written submissions to ld. CIT(A) on the subject issue of assessment on non existing company, same were duly sent to ld. AO for his comments where remand report dated 12.1.2012 (pages 81, 82 of paper book) & dated 8.8.2011 (pages 891, 92 of paper book). In Computer and Foryu cases were duly sent to Ld CIT-A through supervision Add CIT. In that report, Ld AO has firstly confirmed the factum of amalgamation and secondly has not raised any sort of objection what so ever. This is besides the fact that in Computer case assessee has duly filed a letter to Ld AO specifically communicating fact of amalgamation. On basis of the overwhelming material on records, Ld CIT-A adjudicated the issue which is sought to be complained by revenue on flimsy grounds. In view of above, Ld. Counsel of the assessee vehemently objected to admission of aforesaid grounds being afterthought and contrary to valid remand report placed on records.

18. He further submitted that if it is allowed, then remand report which is an extremely important piece of evidence and document in eyes of law will be set to naught and will derail the entire proceedings. Further, there is no explanation as to under what, circumstances Ld AO and Ld Add CIT gave that

report which is confirming the factum of amalgamation. Further there is no explanation forthcoming as to under what circumstance Ld AO was prevented from raising this ground in original appeal memo which clearly indicates that all is not well with revenue here. Merely because remand report in extant filed by Ld AO supported assessee's case, cannot be a grounds to ignore it or treat is as unreliable. He prayed that validity and sanctity of remand report which is validly filed by Ld AO through official channel to Ld Add CIT, may please be addressed in juxtaposition to contrary averments made in grounds raised at this stage. He regard to quote from Hon'ble Apex Court order in case of Parsuram Potteries 106 ITR page, 1;

"…It has been said that the taxes (i.e. the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realizing that price should familiarize themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue…"

19 He submitted that so volte face and vacillating grounds by revenue, in view of available and speaking remand report, cannot be accepted and deserves to be rejected in limine being sans merit.

20. The ld. CIT, DR on other hand relied upon the order of the authorities below and stated that return of income in response to the notice u/s 153C dated 4.10.2010 was filed on 22.11.2010 in the name of Computer Engineering Services (P) Ltd. No reference to the amalgamation of Computer Engineering Services (P) ltd. with Instronics Ltd. was made. It was only in response to the notice u/s 142(1) and the questionnaire dated 23.11.2010 that the appellant informed the AO in November 2010 about its merger with Instronics Ltd. Moreover, the response was made using the letter head of Computer Engineering Services (P) Ltd. and the letter was signed by the "Authorised Signatory Director" for 'Computer Engineering Services (P) Ltd.". It is also stated that the previous letter dated 26.10.2010 mentioning the amalgamation (referred by the appellant in its written submission) was not addressed to the AO of the appellant and also did not bear the receipt stamp of the Department. It was stated that when the appellant itself filed the return of income in the name of Computer Engineering Services (P) Ltd. and used the letter head of Computer Engineering Services (P) Ltd. to respond to the questionnaire issued by the AO, it can hardly make a case of 'illegality' of the impugned orders and,

in any case the assessment proceedings were attended by Instronics Ltd.

21. We have carefully considered the arguments of both sides, perused the material placed before us. Admittedly the assessment for the year under consideration has been completed on the basis of notice under Section 153C dt. 14.10.2010 which reads as under:

"To

M/s Computer Engineering Services Pvt. Ltd.
C-33, Hastsak Vihar
Uttam Nagar,
New Delhi

Sir/madam,

In pursuance of the provisions of section 153C of the Income Tax Act, 1961, inserted by the Finance Act, 2003 with effect from 1st June 2003, you are required to furnish return of income in respect of assessment year 2003-04 in respect of which you are assessable as company.

2 The return shall be in 'Form' as prescribed in sub-rule (1) 12 of Income Tax Rules, 1962 and shall be delivered in this office within 15 days of service of this notice. The prescribed from should be duly verified and signed in accordance with the provisions of section 140 of the Income Tax Act 1961.

(Gautam Deb)
Asstt. Commissioner of Income Tax
Central Circle-17, New Delhi"

22 From the above it is evident that the notice has been issued in the name of Computer Engineering Services Pvt. Ltd. That

the Hon'ble Delhi High Court, which is the Jurisdictional High Court, has passed the order dt. 30.10.2007 under Section 394 of the Companies Act, 1956 approving the amalgamation of the assessee company with M/s Instronics Ltd. The relevant finding of their Lordships held as under.

"*THIS COURT DOTH HEREBY SANCTION THE SCHME OF AMALGAMATION set forth in Schedule I annexed hereto and Doth hereby declare the same to be binding on all the shareholders & creditors of the Transferor and Transferee Companies and all concerned and doth approve the said Scheme of Amalgamation with effect from the appointed date i.e. 01.04.2007."*

23. Thus their Lordships have approved the amalgamation w.e.f. appointed date i.e. 1st April,2007. The order approving amalgamation was passed on 30.10.2007 by which M/s Computer Engineering Services (P) Ltd. which is a transferor company merged and amalgamated with M/s Instronics Ltd. which is a transferee company. Thus M/s Computer Engineering Services (P) Ltd. i.e. the assessee ceased to exist w.e.f. 1.4.2007. The notice under Section 153C in the name of M/s Computer Engineering Services (P) Ltd. was issued on 4.10.2010 after the date when M/s Computer Engineering Services (P) Ltd. ceased to exist. The Hon'ble Jursidictional High Court has considered the validity of notice issued under Section 143(2) of the Act after amalgamation in the case of

M/s Spice Entertainment Ltd. vide ITA; nos. 475 and 576/2000. Their Lordships held as under.

"11. After the sanction of the scheme on 11th April,2004, the Spice ceases to exist w.e.f. 1st July,2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said 'dead person'. When notice under Section 143(2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the Assessing Officer. 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 date. 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 estoppels against law."

24. The ratio of the above decision would be squarely applicable to the case of the assessee because the facts are identical. In the above mentioned case notice under section 143(2) of the Act was sent to the company which was not in existence on the date of the issue of notice. Similarly in the case of the assessee notice under Section 153C was issued in the name of M/s Computer Engineering Services (P) Ltd.. on 4.10.2010 when this company was not in existence. Therefore, the ratio of the decision of Hon'ble jurisdictional High Court in the case of M/s Spice Entertainment Ltd. (supra) would be squarely applicable to the issue of notice

under Section 153C in the case of the assessee. The above view has been followed by Hon'ble High Court of Delhi in the case of CIT vs. Radha Apparels Pvt. Ltd. ITA No. 4956/2015 dated 18.3.2015 whereby it has been held as under:

"1. The Revenue is aggrieved by the order of the Income Tax Appellate Tribunal (ITAT) dated 15th July, 2014 in appeals pertaining to Assessment Years 2003-2004 to 2008-2009 (in ITA Nos.5488-5493/Del/ 2011). The ITAT upheld the order of the CIT, inter alia, holding that the assessment in respect of the company which was amalgamated under Sections 391/394 of the Companies Act was invalid.

2. Briefly the necessary facts are that the original assessee was amalgamated with M/s SS Bhatia Estate Developers Pvt. Ltd., to form M/s Festive Homes Pvt. Ltd. (hereinafter referred to as the 'transferee company') by virtue of a scheme of amalgamation approved by this Court on 17th November, 2009. The appointed date of amalgamation was 1st April, 2008. Notice was issued to the original assessee under Section 153 C of the Income Tax Act on 8th September, 2010. On 8th October, 2010, the Revenue was informed that the original assessee (i.e. the transferor under the scheme of amalgamation) had been dissolved pursuant to the amalgamation scheme and approved by the Court and that consequently the return for Assessment Year 2009-2010 had not been filed by the original assessee. A reply to the Revenue's questionnaire was given by the assessee on 12th November, 2010, again bringing to the notice of the authorities that the scheme of amalgamation had dissolved the original assessee in whose shoes the transferee company had completely stepped in. Despite this, the Assessing Officer finalized the assessment under Section 153C, in respect of the

original assessee. In appeal it was successfully contended on behalf of the assessee – which was represented by the transferee that the assessment under Section 153C was invalid since it was completed in respect of a non-existent entity. This order was appealed against by the Revenue unsuccessfully; the ITAT rejected its appeal.
3. At the outset, we notice that the ITAT followed the ruling of this Court in M/s. Spice Entertainment Ltd. vs. CIT, ITA No.475/2011 decided on 3rd August, 2011, subsequently followed in other rulings (refer to Additional Commissioner of Income Tax vs. Micra India Pvt. Ltd., ITA No.446/2013).
4. In view of this consistent view expressed by this Court we are of the opinion that no substantial question of law arises. 5. The appeals are accordingly dismissed."

25. Also Karnataka High Court in the case of CIT vs. M/s Intel Technology India Pvt. Ltd. ITA No. 499/2009 has held as under:

"7 In the present case also, the proceedings had been initiated against a non existing company/SSS 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 no 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 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.

26 On a similar issue, the Hon'ble Calcutta High Court in the case of I.K. Agencies Pvt. Ltd. vs. CWT 20 taxmann.com 731 has held as under:

"That the initiation of the proceedings for reopening of assessment depends upon the service of valid notice in terms of section 17 upon the assessee. A notice issued to a person who is not in existence at the time of issuing such notice cannot make in existence at the time of issuing such notice cannot make it valid and the law permits the Assessing Officer to issue a fresh notice in conformity with the law.
The authorities below totally overlooked the fact that initiation of the proceedings for reassessment was vitiated for not giving notice under section 17 to the assessee and the notice issued upon 'A;' which was not in existence at that time was insufficient to initiate proceedings against the assessee who had taken over the liability of 'A' earlier to the issue of such notice and such fact was also made known to the revenue. Thus, the reassessment proceedings were to be set aside on that ground alone."

27. Similarly, the Hon'ble Jurisdictional High Court vide order dated 17.9.2009 in ITA No. 273/2009 in the case of CIT vs. Vived Marketing Services Pvt. Ltd. (supra) held as under:

"When the AO passed the order of assessment against the respondent company, it has already been dissolved and struck off the register of the Registrar of companies under section 560 of the Companies Act. In these circumstances, the Tribunal rightly held that there could not have been any assessment order passed against the company which was not in existence as on that date in the eyes of law it had already been dissolved. The Tribunal relied upon its earlier decision in Impsat Pvt. Ltd. vs. ITO 276 ITR 136 (AT). We are of the

opinion that the view taken by the Tribunal is perfectly valid and in accordance with law. No substantial question of law arises dismissed."

28. Same view has been expressed by the Hon'ble Gujarat High Court on a similar issue in the case of Khurana Engineering Ltd. Vs DCIT (OSD) (2013) 217 Taxman 75 wherein it has been held that the assessment proceedings could not be resorted to in case of amalgamated company.

29. In view of the aforesaid discussion and keeping in view the ratio laid down in the above said judicial pronouncements, we are of the view that for making the assessment, it is absolutely essential that the person so to be assessed should be in existence at the time of making the assessment. In the present case the assessment has been framed by the AO on a date when the present assessee was not in existence therefore, the assessment framed by the AO vide assessment order dated 31.12.2010 was not valid.

30. Moreover it is seen that on 26.10.2010 the assessee intimated to the Assessing Officer with regard to amalgamation of the assessee company with M/s Instronics Ltd. and also furnished a copy of the order of the Hon'ble Jurisdictional High Court. At that time the Assessing Officer could have issued the

notice under Section 153C in the name of the transferor company i.e. M/s Instronics Ltd. Also in AO in the remand report dated 12.1.2012 (pages 81-82 of Paper book) has held as under:

"The appellant has contended that proceedings u/s 153C have wrongly been initiated as on date of issue of notice the said company amalgamated with M/s Instronics Ltd., and as such proceedings initiated were against non existent person and bad in law. Further the assessee has contended that no satisfaction to the effect that document belonging to the assessee company was seized from a person covered under search which is a prime requirement for initiating proceedings has been done in the case of assessee company.
The documents belonging to the assessee company were seized from a person covered under search i.e. Shri B. K. Dhingra is evident from the fact available on record as well as examined and discussed in detail during the assessment proceedings. The proceedings were initiated u/s 153C of the Act in the case of the assessee company after recording satisfaction. The proceedings were initiated on the assessee company as the assessee company amalgamated during FY 2008-09 relevant to Assessment year 2009-10 and prior to the existed in independent capacity.
Further the appellant is precluded from challenging the proceedings so initiated as per provisions of section 292BB of the Act. Under the circumstances of the assessee challenging the assessment is not sustainable.
Further it is submitted that the assessee has not given any fresh/additional evidence to substantiate its claim. Detailed observation and findings have already been given in the assessment order. It is emphasized that the said assessment order has been passed with the approval of Addl. CIT Central Range-2, New Delhi. Under the circumstances I

stand by the additions made in the assessment order and pray that the addition made should be upheld and the prayer of the appellant be rejected."

31. It may be stated here that Coordinate Bench of the Tribunal in the case of M/s Images Credit and Portfolio (P) Ltd. vs. ACIT ITA No. 53010 to 5306/D/2013 A.Y. 2004-05 to 2008-09 has held as under:

"Whether the assessee intimated about the amalgamation before the issue of notice under Section 153C or not would not be relevant for deciding the issue of validity of the notice under Section 153C of the Act. Whether the assessee intimated or not the fact remains that M/s Images Credit and Portfolio (P) Ltd. ceased to exist after the approval of amalgamation by the Hon'ble Jurisdictional High Court i.e. 25th day of May,2010. Whether it is in the knowledge of the Revenue or not any notice issued in the name of a non existent person is a nullity."

32. Also as regards section 292B of the Act, the Hon'ble Delhi High Court in the case of CIT vs. Micra India (P) Ltd. ITA No. 441, 444 to 446, 452 & 461/2013 dated 22.1.2013 has considering the applicability of section 292B of the Act and the plea regarding participation during the course of assessment held as under:

"9. There is another aspect in these appeals, which is the applicability of Section 292B of the Act. Section 292B, inter alia, prescribes that proceedings etc. initiated cannot be deemed invalid "merely by reason of mistake, defect or omission" in any return of income, assessment or notice. The

revenue had argued that this provision neutralizes procedural defects in jurisdiction. In these circumstances, it was submitted, having regard to the assessee's omission to urge the so-called illegality at the threshold, the Court ITA 441/2013 & connected matters Page 6 ought to interfere with the order of the ITAT. This question, too, has been dealt with - in CIT v. Dimension Apparels Pvt. Ltd. reported in (2015) 370 ITR 288. In that case, after noticing Section 292B, the Court discussed the ruling in Spice Entertainment (supra), wherein it had been held that since the assessment made in such cases is against an amalgamated company in respect of income of the amalgamating company for the period prior to the amalgamation, the income tax authorities are nevertheless under an obligation to substitute the successor in place of the amalgamated company. Thus, "such a defect cannot be treated as procedural defect". In any event, it is to be noted that the fact of amalgamation of the assessee with the transferee company had been intimated and disclosed in response to the notice under Section 153C on 22.11.2010. Accordingly, this ground, too, has no merit and is rejected.

10 In the present case, no doubt there was participation during the course of assessment; however, the AO, despite being told that the original company was no longer in existence, did not take remedial measures and did not transpose the transferee as the company which had to be assessed. Instead, he resorted to a peculiar procedure of describing the original assessee as the one in existence; the order also mentioned the transferee's name below that of M/s Micra India Pvt. Ltd. Now, that did not lead to the assessment being completed in the name of the transferee company. According to the AO, M/s Micra India Pvt. Ltd. was still in existence. Clearly, this was a case where the assessment was contrary to law, as having being completed against a non-existent company. The ITAT's decision is, in the circumstances, justified and warranted."

33. Considering the totality of the above facts and respectfully following the decision of Hon'ble Jurisdictional High Court in the case of M/s Spice Entertainment Ltd. we hold that the issue of notice under Section 153C in the name of M/s Computer Engineering Services (P) Ltd. on 4.10.2010 is void. Accordingly the same is quashed. Once the notice issued under Section 153C has been quashed the assessment completed in pursuance to such notice also cannot survive and the same is also quashed.

34. Before parting with the matter, we would like to deal with the contention of Ld CIT-DR that extant plea of amalgamation as raised by assessee is hit by provisions of section 124(3) of the Act. In this regard, he vociferously argued and tried to persuade us that said provision clearly comes in the way of assessee to raise the plea of assessment on non existing company without raising the same before AO at a later stage and heavily relied on Full Bench decision of Guwathi High Court in Smt. Sohani Devi Jain reported in 109 ITR 130. After much deliberation, we are unable to subscribe to the views of Ld CIT-DR for the simple reason that Hon'ble Jurisdictional Delhi High Court in the case of S.S.Ahluwalia in ITA 255/2002 (order dated 14/3/2014) reported in 2014

(88) CCH (158) Delhi H.C. in turn relying on another Delhi High court decision in case of K.K. Loomba reported in 241 ITR 152 has clearly held that section 124 has applicability to only territorial jurisdiction issue and not to other jurisdictional issues *when there is inherent lack of jurisdiction.* Further, we wish to commemorate the trite principle that an order which is nullity in the eyes of law, plea relating to the same can be raised at any stage even during collateral proceedings as explained in leading case law of Gujarat High court in case of P.V.Doshi 113 ITR Page 22.

35. The Hon'ble Delhi High Court in the case of S.S. Ahluwalia (Supra) has held as under:

36. In Budhia Swain and Ors. Vs. Gopinath Dev and Ors. (1999) 4 SCC 396, it was highlighted that distinction exists and was well recognized between lack of jurisdiction and mere error in exercise of jurisdiction. Lack of jurisdiction strikes at the very root of the action/act and want of jurisdiction might vitiate proceedings rendering the orders passed and exercise thereof, a nullity. But a mere error in exercise of jurisdiction would not vitiate the legality and validity of the proceedings and the said order was valid unless set aside in the manner known to law by laying a

challenge, subject to law of limitation. The following portion of Hira Lal Patni Vs. Kali Nath, ***AIR 1962 SC 199*** *was quoted:*

> ….**The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it.**

36. In the light of the above binding jurisdictional high court precedents, we do not approve the objection taken by Ld CIT-DR that the assessee's plea is barred by section 124(3) as same is not applicable to present factual situation.

37. The facts in the AY 2004-05 to 2007-08 in the cases of M/s Computer Engineering Services (P) Ltd. and, AY 2003-04 to 2008-09 in the cases of M/s Foryu Overseas (P) Ltd. are identical. Therefore, the issue of notice under Section 153C for the AY 2003-04 to 2008-09 and the consequential assessment orders which were passed in pursuance to such notice are also cancelled.

38 Since we have already quashed the assessment order, the grounds of appeal raised by the Revenue in its appeals against the deletion of addition by the Ld.CIT(A) do not survive.

39. In the result, assessee's appeals are allowed and Revenue's appeals are dismissed.

Order pronounced in the open court on 29.05.2015.

Sd/-	**Sd/-**
(S.V.MEHROTRA) **ACCOUNTANT MEMBER**	**(A.T. VARKEY)** **JUDICIAL MEMBER**

Dated 29 /05/2015

A K Keot/

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi