

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'I-2', NEW DELHI**

**BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No.1929/Del/2017  
Assessment Year: 2012-13

M/s. Pesak Ventures Ltd. (Liquidated in May, 2013) C/o- Deloitte Haskins & Sells LLP, 7 <sup>th</sup> Floor, Building 10, Tower B, DLF Cyber City Complex, DLF City Phase-II, Gurgaon	<b>Vs.</b>	DCIT (International Taxation), Circle -2(2)(2), Room No. 615, 6 <sup>th</sup> Floor, E-2 Block, Civic Centre, J.L. Nehru Marg, New Delhi
<b>PAN :AAFCP0353D</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	S/sh. S.P. Singh, Jasvinder Singh & Sambhav Jain, ARs
Respondent by	Sh. H.K. Choudhary, CIT(DR)

Date of hearing	12.06.2018
Date of pronouncement	19.06.2018

**ORDER**

**PER O.P. KANT, A.M.:**

This appeal by the assessee is directed against order dated 30/01/2017 passed by the Deputy Commissioner of Income-tax Circle 2(2)(2) (International Tax), New Delhi (in short 'the Assessing Officer') in pursuant to order of the Ld. Dispute Resolution Panel (DRP) for assessment year 2012-13. The grounds of appeal raised by the assessee are reproduced as under:

*“The Appellant objects to the order under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 ["Act"] dated 30 January 2017 (received on 3 February 2017) passed by the Deputy Commissioner of Income-tax, (International Taxation) - 2(2)(2), New Delhi ["DOT"/"AO"] for the aforesaid assessment year on the following among other grounds:*

**1. Assessment is null and void**

*1.1 The learned Transfer Pricing Officer ["TPO"]/DCIT/ Dispute Resolution Panel ["DRP"] erred in passing orders / issuing directions in the name of 'Pesak Ventures Limited' which was non-existing as on the date of issuance of orders/directions on account of its voluntary winding up in terms of dissolution certificate dated 24 May 2013 issued by the Department of Registrar of Companies and Official Receiver, Cyprus.*

*Considering the facts and circumstances of the appellant's case and the law prevailing on the subject, both the draft assessment order dated 29 March 2016 passed under section 143(3) read with section 144C(1) as well as the final assessment order dated 30 January 2017 passed under section 143(3) read with section 144C (13) are illegal and void.*

**2. Transfer pricing adjustment**

*2.1 The AO/DRP/TPO erred in making an upward adjustment of Rs. 24,78,73,420/- to the value of transaction related to sale of Compulsorily Convertible Debentures ["CCDs"] to Shriram Properties Limited ["Shriram"], without providing reasonable and adequate opportunity of being heard to the Appellant as required by provisions of section 92CA(3) read with proviso to 92C(3) of the Act.*

**3. Non-applicability of Transfer Pricing provisions**

*3.1 The learned AO / DRP / TPO erred in not appreciating the fact that Shriram was not an Associated Enterprise ["AE"] of the Appellant at the time of entering into the impugned*

*transaction related to sale of CCDs and Form No. 3CEB was filed out of abundant caution.*

*3.2 The learned AO / DRP / TPO erred in rejecting the contentions of the Appellant relating to the non-applicability of transfer pricing provisions without providing cogent reasons.*

#### **4. Erroneous rejection of valuation report and the alternate valuation Methodology**

*4.1 The learned AO /DRP/TPO erred in not accepting fair value at which the CCDs were sold by the Appellant to its joint venture partner, Shriram in accordance with the valuation report obtained from an independent valuer.*

*4.2 The learned AO / DRP / TPO erred in disregarding the prevailing business and commercial reasons surrounding the impugned transaction related to sale of CCDs.*

*4.3 The learned AO / DRP / TPO erred in not considering the valuation of CCDs under Rule 11UA of the Income-tax Rules, 1962 ["the Rules"] as submitted by the Appellant on without prejudice basis.*

*4.4 The learned AO/DRP/ TPO erred in not appreciating the fact that the value at which the CCD's were sold by the Appellant were accepted under the prevailing laws and regulations in force at the relevant time (Exchange Control Regulations i.e. "Foreign Exchange Management (Transfer or Issue of Security by Person Resident Outside India) Regulations, 2000) as per agreement.*

#### **5. Erroneous application of Discounted Cash Flow ("DCF") method**

*5.1 The learned AO / DRP / TPO erred in manner of applying the DCF method for valuation of CCDs without appreciating the facts and circumstances of the case.*

*5.2 The learned AO / DRP / TPO erred in considering the Weighted Average Cost of Capital ["WACC"] at 15% instead of 16.89% as considered in the valuation report obtained from third party valuer.*

5.3 *The learned AO / DRP / TPO erred in not applying correct valuation principles under DCF method to consider balanced weightage for cost of equity and cost of debt, while calculating WACC of Global Entropolis (Vizag) Private Limited ["GEVPL"] at the time of sale of CCDs as discounting factor.*

5.4 *The learned AO / DRP / TPO has erred in computing present value of future cash flows while applying the DCF method.*

**6. *No Transfer Pricing implication as income is not taxable under the Double Taxation Avoidance Agreement ["DTAA"]***

6.1 *The learned AO / DRP / TPO erred in not considering the fact that the impugned transaction of sale of CCDs to Shriram is not liable to tax in India under India-Cyprus DTAA and transfer pricing adjustment is not warranted.*

6.2 *The learned AO / DRP / TPO erred in not appreciating the fact that there was no intention of the Appellant to shift profits outside India and the impugned transaction related to sale of CCDs to Shriram does not warrant any transfer pricing adjustment.*

6.3 *The learned AO / DRP / TPO erred in disregarding the facts and submissions made by the Appellant without providing cogent reasons.*

**7. *Computation of gain***

7.1 *The learned DCIT/DRP erred in substituting fair market value as computed by the TPO for the actual sale consideration received by the Appellant on sale of CCDs and computing the gain accordingly.*

**8. *Re-characterization of income***

8.1 *The learned DCIT/DRP erred in re-characterising the gain on sale of CCDs as worked out by the learned DCIT/DRP due to substitution of fair market value (upward transfer pricing*

*adjustment) as interest income under section 2(28A) of the Act read with Article 11 of India-Cyprus tax treaty, which is inappropriate and bad in law.*

*8.2 The learned DCIT/DRP erred in not following the decision of the jurisdictional Delhi High Court in the case of Zaheer Mauritius v. Director of Income-tax (International tax) (47 taxmann.com 247) wherein the Hon'ble High Court held that gains arising on the sale of CCDs are capital gains.*

*8.3 The Hon'ble DRP erred in not passing a speaking order on the objections raised by Appellant with respect of re-characterization of income (ground no. 18 in the objections filed before the DRP) in its directions and has also not considered the detailed submissions and arguments provided by the Appellant in its correct perspective without providing cogent reasons. Further, the Hon'ble DRP also dismissed the rectification application filed by the Appellant in this regard.*

*8.4 The Hon'ble DRP erred in observing that the AO successfully established that the investment of the Appellant in Global Entropolis (Vizag) Private Limited in the shape of CCDs was an external borrowing which was clear from the terms of the agreements dated 21 April 2008.*

## **9. Notional income**

*9.1 Without prejudice to the above, the learned DCIT/DRP erred in not appreciating that the increase in sale value even if considered as 'interest', the same shall be notional interest and hence, such notional interest cannot be taxed in the hands of Appellant, as the same has not been received neither expected to be received in future.*

*9.2 The learned DCIT/DRP erred in not appreciating that interest income in terms of Article 14 of India-Cyprus DTAA can be taxed only on receipt basis.*

## **10. Initiation of penalty proceedings**

*10.1 The learned DCIT has erred in initiating penalty proceedings under section 271(l)(c) of the Act.*

11. *Each one of the above grounds of appeal is without prejudice to the other.*

12. *The Appellant reserves the right to amend, alter or add to the grounds of appeal.*

**2.** In this case, an additional ground was raised by the Authorized Representative as under vide his letter dated 05/06/2018, which was filed before the bench on 08/06/2018:

*“1. The Ld. Deputy Commissioner of Income-Tax erred in facts and in law in levying interest under section 234B of the Income-tax Act, 1961 without appreciating that the Appellant was not liable to pay advance tax on the impugned income as the primary liability of deduction tax on the said income was that of the payer.”*

**2.1** This additional ground was, however, withdrawn by the Ld. counsel appeared for the assessee before hearing of the case on 12/06/2018. Hence, it is dismissed as infructuous.

**3.** Briefly stated facts of the case are that assessee, i.e., M/s Pesak Ventures Ltd., a limited liability company, was incorporated in Cyprus on 23/01/2008 under the Cyprus Companies Law, as a wholly-owned subsidiary of the “Dinesh SA Investments LLC”. The principal activity of the company was of holding the investment in Indian incorporated companies engaged in real estate sector as venture capital organization. The assessee i.e. M/s Pesak Ventures Ltd., was a tax resident of Cyprus, holding valid tax residency certificate The assessee filed return of income on 28/11/2012, declaring nil income. The case was selected for scrutiny on the basis of Form No. 3CEB submitted by the assessee, wherein transaction with Associated Enterprises

(AEs) is found to be more than Rs. 15 crores. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued to the assessee. In response Authorized Representative of the assessee appeared before the Assessing Officer from time to time. In view of the International transactions entered into by the assessee with Associated Enterprises, the matter of determining arm's length price of the International transaction was referred to the Ld. Transfer Pricing Officer (TPO). The Ld. TPO in his order dated 27/01/2016 determined valuation of Compulsory Convertible Debentures (CCD) sold by the assessee to its AE at Rs.83,02,98,000/-as against valuation of the CCD shown by the assessee at Rs.74,60,00,000/-, resulting in a gain of Rs.8,42,98,000/-as against loss declared by the assessee at Rs.16,35,75,420/-. In the draft assessment order dated 29.03.2016 issued by the Ld. Assessing Officer included the upward adjustment of Rs.24,78,73,420/- proposed by the Ld. TPO. Against the draft assessment order, objections were filed before the Ld. DRP. The Ld. DRP in its direction dated 20/12/2016 has mentioned that in October, 2012, the company decided to close down its operation. The company was finally liquidated and wound up on 20/05/2013. The holding company "M/s. Dinesh SA Investments LLC" was also wound up in December, 2015. The Ld. DRP has further mentioned that M/s. SUN Apollo India Real Estate Fund LLC (SAIRL), a company incorporated under the laws of Mauritius was the ultimate shareholder of the company, as it was the holding company of M/s Dinesh SA Investments LLC. Various objections raised before

the Ld. DRP were rejected by way of directions issued dated 23/12/2016. The Assessing Officer, pursuant to the direction issued by the Ld. DRP, passed the final assessment order under section 143(3) read with section 144C(13) on 30/01/2017. Aggrieved with the said order, an appeal has been filed before the Tribunal.

**4.** Before us, the Ld. counsel first addressed the Ground No. 1 of the appeal and submitted that assessment order/directions of the Ld. DRP are null and void as the same have been made on non-existent entity as on the date of issuance of orders/directions. The Ld. counsel submitted that the assessee stands wound up in view of its voluntarily winding up in terms of dissolution certificate dated 24/05/2013 issued by the Department of Registrar of companies and official receiver, Cyprus.

**4.1** The Ld. counsel submitted that this objection was raised before the Ld. DRP, however, it was not adjudicated by the Ld. DRP. He submitted that if this ground is decided in favour of the assessee, other grounds might be rendered only academic and may not be required to adjudicate.

**4.2** On the other hand, the Ld. DR submitted that the issue of liquidation and compliance of relevant provisions of the law in this regard have not been brought before the Ld. Assessing Officer. He submitted that first of all, this issue need to be restored to the file of the Assessing Officer for verifying compliance of the provisions of the Income Tax Act by a company under liquidation and then the Assessing Officer should decide on

the issue of jurisdiction in case of the liquidated company i.e. the assessee.

**4.3** We have heard the rival submissions and perused the relevant material on record on the issue in dispute raised in Ground No. 1 of the appeal. Before the Tribunal, the appeal has been filed in prescribed form no. 36B and verified by Sh. Dilshaad Rajabalee, authorized signatory of “Sun Apollo India Real Estate LLC, Mauritius. The contention of the assessee is that company was wound up on 24/05/2013, whereas the assessment under section 143(3) read with section 144C(13) of the Act has been completed on the said company on 30/01/2017, thus, the assessment has been completed on a non-existence entity, which is illegal and void. This issue was raised by the assessee before the Ld. DRP, however, the Ld. DRP dismissed the ground of the assessee observing as under:

*“We considered the objection as above which pertains to the validity of the assessment order passed by the AO. In this connection, the panel’s considered view is that under Chapter XIV of the Act the DRP has not been equipped with the power to go into the validity or otherwise of a draft assessment order. Hence, for want of competence and authority we refrain from addressing ourselves to this ground. Accordingly, the said ground is dismissed.”*

**4.4** As far as facts of the case are concerned, on perusal of the assessment order, we find that the assessee filed return of income on 28/11/2012, declaring nil income and, thereafter, the case was selected for scrutiny and first notice under section 143(2) of the Act was issued on 27/08/2013. On the said date, the

company already stood wound up. Thus, in this case not only notice has been issued on non-existent entity but the assessment has also been completed on non-existent entity.

**4.5** Before we proceed to adjudicate the issue in dispute, we may like to visit various provisions of the Act with regard to continuance of the proceedings under the Act in case of dissolution of the entity or death of a natural person.

**4.6** We find that in case of death of a natural person, the section 159 of the Income-tax Act has provided continuity of the assessment proceedings in the hands of the legal representative and the legal representative of the deceased is deemed to be in assessee. Further, according to the section 160(1) of the Act in respect of the income of non-resident specified in section 9(1) of the Act, an agent of the non-resident including the person treated as agent under section 163 of the Act, can act as “representative assessee”. The section 163 has provided that following persons can become the agent of the non-resident:

***“Who may be regarded as agent.***

**163.** (1) *For the purposes of this Act, "agent", in relation to a non-resident, includes any person in India—*

- (a) who is employed by or on behalf of the non-resident; or*
- (b) who has any business connection with the non-resident; or*
- (c) from or through whom the non-resident is in receipt of any income, whether directly or indirectly; or*
- (d) who is the trustee of the non-resident;*

*and includes also any other person who, whether a resident or non-resident, has acquired by means of a transfer, a capital asset in India :”*

**4.7** Further, section 176 of the Act has in case of discontinued business or dissolution has provided of making assessment in the

year of such event at the discretion of the Assessing Officer. According to sub-section 3 of section 176, any person discontinuing any business of profession is required to give notice of such discontinuance within 15 days thereof. Further, sub-section 5 of the section 176 has provided for issuing notice for making assessment of the discontinued entity under section 176(1). The relevant subsection is reproduced as under:

*“Discontinued business.*

176. (1) .....

(2) .....

(3) .....

(3A) .....

(4) .....

(5) *Where an assessment is to be made under the provisions of this section, the Assessing Officer may serve on the person whose income is to be assessed or, in the case of a firm, on any person who was a partner of such firm at the time of its discontinuance or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under clause (i) of sub-section (1) of section 142 and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under clause (i) of sub-section (1) of section 142.*”

**4.8** Further, section 178 of the act has provided the liability of a liquidator of a company, which is in the process of liquidation. For ready reference, the relevant section is reproduced as under:

***“Company in liquidation.***

178. (1) *Every person—*

(a) *who is the liquidator of any company which is being wound up, whether under the orders of a court or otherwise; or*

(b) *who has been appointed the receiver of any assets of a company,*

*(hereinafter referred to as the liquidator) shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the Assessing Officer who is entitled to assess the income of the company.*

(2) *The Assessing Officer shall, after making such inquiries or calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the*

*Assessing Officer, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by the company.*

*(3) The liquidator—*

- (a) shall not, without the leave of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, part with any of the assets of the company or the properties in his hands until he has been notified by the Assessing Officer under sub-section (2) ; and*
- (b) on being so notified, shall set aside an amount, equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands :”*

**4.9** Thus, in view of the above provisions of the Act, it is clear that in case of discontinuance of the business, the assessee is required to inform to the Assessing Officer and also in case of the liquidation, the liquidator of the company is required to give notice to the Assessing Officer, who is entitled to assess the income of the company.

**4.10** In the instant case before us, there is no such information available on record, whether the Assessing Officer was informed about the discontinuance of the business or the liquidation process of the company. Though the Ld. counsel submitted that the Assessing Officer was informed about the dissolution of the company but no such information has been provided by the Ld. counsel of the assessee before us that the information was provided as per the requirements of the Act.

**4.11** The issue of validity of making assessment on non-existence entity has been decided by the Hon’ble Delhi High Court in the case of Spice Infotainment Limited Vs. CIT, (2012) 247 CTR 500, wherein it is held that the assessment in the name of the company which has been amalgamated with another company and stands dissolved, is null and void. The Hon’ble high court further held that assessment framed in the name of non-existent

entity is a jurisdictional defect and not merely a procedural irregularity of the nature which can be cured by invoking the provisions of section 292B of the Act. The above decision has been confirmed by the Hon'ble Supreme Court by dismissing the appeal of the Revenue vide order dated 2<sup>nd</sup> Nov., 2017 in Civil Appeal No. 285 of 2014 .

**4.12** Further, the Hon'ble Delhi High Court in the case of Skylight Hospitality LLP Vs. ACIT, (2018) TIOL 275 –HC-DEL on Writ Petition filed by the assessee against the order of the Assessing Officer rejecting the objections against the initiation of the proceedings under section 147 of the Act, held that *“the assessee received the notice and objected to as issued in the name of the company, which ceased to exist, but the assessee understood notice was for it. Notice was addressed to Skylight Hospitality Private Limited, a company, which had been dissolved, was an error and technical lapse on the part of the Revenue. Such mistake should not nullify the proceedings which are otherwise valid and no prejudice has been caused.”*

**4.13** The Special Leave Petition No. 7409/2018 filed by the assessee has also been dismissed by the Hon'ble Supreme Court on 06/04/2018 by observing that *‘wrong name given in the notice was merely a clerical error, which could be corrected under section 292B of the Income-tax Act’*.

**4.14** We note that in the above cases, the nonexistence entity has been succeeded by either the amalgamated company or by a limited liability partnership respectively. Thus, these are the cases of succession of entity and not of winding up of the entity.

**4.15** In case of winding up of a company, after satisfying the creditors, the remaining proceeds are returned to the shareholders in proportion of their shareholding and, thus, the entity come to an end. This is more or less analogous to the death of a natural person. We have also observed that ordinarily, on the death of a natural person, his or her legal personality ceases to exist and thereafter, no order, including an assessment order, can be passed against such dead person and if any order is passed against a dead person that would amount to nullity. However, there are certain exceptions to this general rule. The Hon'ble Gujarat High Court in the case of CIT Vs. Sumantbhai C Munshaw (1981) 128 ITR 142, such exception was considered. In said case, the legal representative of the deceased assessee, either voluntarily or in response to a notice issued against the deceased but served upon his agent, allowed the assessment proceeding to continue against the deceased without any objection and let the Assessing Officer make an assessment order after allowing to him a full opportunity of being heard. The Hon'ble Gujarat High Court held that, in such a case, it would not be open for him to take a plea at the appellate stage, as a last resort or as an afterthought, that the proceedings taken and the assessment order made against the deceased are nullity. The Hon'ble High Court held that in such cases, the assessment is liable to be set-aside for a fresh assessment in accordance with law instead of its annulment.

**4.16** In the instant case before us, we have observed that compliance of the assessment proceeding before the Assessing Officer has been made from time to time by the persons

authorized in this behalf and proceedings have not been challenged due to lack of jurisdiction. According to the available records, the validity of the jurisdiction has been challenged for first time before the Ld. DRP. In view of the above circumstances, following the finding of the Hon'ble Gujarat High Court in the case of Sumantbhai C Munshaw (supra) the assessment order should not be nullified.

**4.17** Similarly in the case of Vijay Sarin Vs ITO (1993) 201 ITR 249 (Delhi), the assessee after filing return of income died during assessment proceeding against him. The assessment was made after serving a notice under section 143(2) of the Act on the advocate of the assessee, without giving any notice to the legal representative of the deceased assessee. Some of the legal representative of the assessee challenged the assessment before the first appellate authority, who set aside the assessment directing the Assessing Officer for making a fresh assessment after issuing notice to the legal representative and making them a party to the proceedings. This finding of the first appellate authority was upheld by the Tribunal. On further reference, the Hon'ble High Court held the direction of the first appellate authority as valid and legal. The Hon'ble High Court observed that *'lack of notice to the legal representatives does not amount to Revenue authority having no jurisdiction, but the assessment was defective by reason of want of notice. It was also observed that an assessment proceeding does not cease to be a proceeding under the Act merely by reason of want of notice.*

**4.18** Similarly, in the case of Smt. Sudha Prasad Vs Chief CIT (2005) 275 ITR 135, the assessment proceeding against the deceased person, was not initiated by way of notice while that person was alive. As the death of the person was not known to the Department, the assessment was made in the name of the deceased person. The Hon'ble High Court of Jharkhand set aside the proceedings with a liberty to the Assessing Officer to complete the assessment proceeding in respect of the income of the deceased after giving notice to the legal representative of the deceased and after hearing them.

**4.19** In para 4.18 of the order, we have already observed that there is no information, whether the assessee complied with various provisions of the Act related to responsibility of company-in-liquidation or discontinuity of business. In the circumstances, we feel it appropriate to set aside the assessment passed and restore the matter to the file of the AO/TPO and direct him to verify:

- (i) whether the assessee informed the Registrar of companies, Cyprus or any other authorized entity of Cyprus with regard to applicability of Indian Income-tax Act, 1961 over the assessee;
- (ii) whether the assessee has complied with the various relevant provisions of Income Tax Act, including the provisions related to liquidation process (Section -178) or discontinuity of the business (Section 176 of the Act) and;
- (iii) whether the persons appearing on behalf of the assessee challenged the assessment proceeding before the Assessing Officer on the ground of non-existent entity.

**4.20** The assessee is also directed to produce the original certificate of dissolution or wound up of the company before the Ld. Assessing Officer, and the genuineness of which may be verified by the Ld. Assessing Officer following due procedure of law. The Ld. Assessing Officer may also verify *locus standi* of the parties, who are pursuing the proceedings on behalf of the assessee company, which stands wound up.

**4.21** After verification, if the Assessing Officer finds that the party appearing on behalf of the wound up entity is competent to represent in accordance with provision of law, then he may decide the objections raised challenging the validity of making assessment on non-existent entity, in view of our above observation and in accordance with law.

**5.** As this ground of validity of the assessment goes to the root of the matter and if it is decided against the assessee, the Ld. AO/TPO may pass the assessment on merit in accordance with law.

**6.** In result, the appeal of the assessee is allowed for statistical purposes.

The decision is pronounced in the open court on 19<sup>th</sup> June, 2018.

Sd/-

**(BHAVNESH SAINI)**  
**JUDICIAL MEMBER**

Dated: 19<sup>th</sup> June, 2018.  
RK/-(D.T.D.)  
Copy forwarded to:

Sd/-

**(O.P. KANT)**  
**ACCOUNTANT MEMBER**

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi