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

BEFORE SHRI AMIT SHUKLA (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACOUNTANT MEMBER)

I.T.A. No.ITA No.688 /Mum/2016
(Assessment Year: 2011-12)

M/s Westlife Development Ltd (Successor to Wespoint Leisureparks Ltd) 1001, 10h Floor, Tower-3, Indiabulls Finance Centre, Senpati Bapat Marg, Elphinstone Road, Mumbai-13	Vs	Principal Commissioner of Income-tax-5 Mumbai
PAN :AACD0528K		
(Appellant)		**(Respondent)**

Appellant by	S/S Vijay Mehta and Govind Jhaveri
Respondent by	Shri Goli Srinivasa Rao, CIT-DR

Date of hearing : 10-06-2016
Date of pronouncement : -06-2016

O R D E R

Per ASHWANI TANEJA, AM:

This appeal has been filed by the assessee against the order of Ld. Principal Commissioner of Income Tax-5, Mumbai (hereinafter called as CIT) passed u/s 263 dated 22-12-2015 for A.Y. 2011-12on the following grounds:

"1.(a) On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax [CIT] erred in initiating

proceedings u/s.263 of the Income Tax Act, 1961(the Act) vide show-cause notice dated 20-04-2015 and passing an order u/s. 263 of the Act as the reasons assigned by him for doing so are wrong and contrary to the facts of the case, the provisions of the Act, and the Rules made thereunder.

(b) On the facts and in the circumstances of the case and in law, the appellant prays that the order of the learned CIT passed u/s.263 of the Income Tax Act, 1961 may be cancelled being void ab-initio and bad in law.

2. On the facts and in the circumstances of the case and in law, learned Commissioner of Income Tax erred in holding that assessment order dated 24-10-2013 passed by the Assessing Officer u/s 143(3) of the Act with regard to issue of shares at premium was erroneous and prejudicial to the interest of the revenue despite the issues raised having been duly considered by the learned Assessing Officer while framing the assessment u/s 143(3) of the Act.

3. On the facts and in the circumstances of the case and in law, the learned CIT erred in not himself conducting necessary/ proper enquiry and verification of issues mentioned in the notice issued u/s. 263 of the Act and setting aside the assessment order for a de-novo adjudication on issues mentioned therein which is wrong and contrary to the provisions of the Act, and the Rules made thereunder.

4. On the facts and in the circumstances of the case and in law, the learned CIT erred in issuing notice dated 20-04-2015 u/s. 263 of the Act in the name Westpoint Leisureparks Pvt. Ltd, a company which had already become non-existent on the date of issuance of the said notice on account of its merger with the appellant company (Westlife Development Ltd) despite the fact regarding amalgamation been specifically brought to notice of the Income Department vide appellant's letter dated 03-09-2013. As such, the entire proceedings u/s. 263 are void ab initio, illegal, bad in law and deserve quashed.

2. During the course of hearing, arguments were made by CA Vijay Mehta, on behalf of the assessee and Shri Goli Srinivasa Rao, CIT-DR on behalf of the Revenue.

3. During the course of hearing, he Ld. counsel of the assessee inter-alia stated that in this case the impugned order passed u/s 263 is bad in law on the jurisdictional ground, that is to say that the original assessment order passed u/s 143(3) dated 24-10-2013 which has been sought to be revised by the ld.CIT was a nullity in the eyes of law, and therefore an order, which was a nullity in the eyes of law had no existence in the eyes of law and, therefore, the same could not have been revised by the Ld.CIT, thereby giving fresh life to the proceedings which had no legal existence in the eyes of law. In this regard, it has been further explained by the ld. counsel that the original assessment was framed u/s 143(3) upon an erstwhile company, viz. M/s 'Westpoint Leisureparks Pvt Ltd' (hereinafter called WLPL), which had already got amalgamated into another company namely M/s 'Westlife Development Ltd' (hereinafter called WDL) and therefore, on the date of framing of the assessment order, WLPL was not in existence. It was further submitted that this fact was brought to the knowledge of the Assessing Officer; despite that, the Assessing Officer framed the assessment upon a non-existing entity. It was submitted by him that framing of an assessment upon a company which has already been amalgamated by way of an order of the High Court is nullity in the eyes of law and in support of his arguments he placed reliance upon the following judgments:

1. Judgment of Delhi High Court in the case of Spice Infotainment Ltd. Vs. Commissioner of Service Tax in ITA 475 & 476 of 2011, dated 03.08.2011
2. CIT v. Dimension Apparels P. Ltd. [370 ITR 288 (Del)]
3. I. K. Agencies P. Ltd. v CIT [347 ITR 664 (Cal)]

4. CIT v Express Newspapers Ltd. [40 ITR 38 (Mad)]

5. Judgment of Delhi High Court in the case of CIT v Micra India P. Ltd. (2015) 57 Taxmann.com 163 (Del)

6. Order of the Tribunal Mumbai Bench, in the case of Instant Holdings Ltd. ACIT in ITA no. 4593, 4748/Mum/2011 order dated 09.03.2016.

7. Order of the Tribunal Kolkata Bench, in the case of Emerald Company Ltd in ITA no. 428/Ko1/2015 order dated 13.01.2016

8. Judgment of Karnataka High Court in the case of CIT v Intel Techno India P. Ltd. (2015) 57 Taxmann.com 159 (Kar)

9. Order of the Tribunal Kolkata Bench, in the case of Gestener (India) ACIT in ITA no. 275/Ko1/2007 "

4. It was further argued by him that the impugned assessment order was *non est* in the eyes of law and, therefore, the same could not have been revised by the ld.CIT. In this regard, he relied upon the judgment of Hon'ble Delhi High in CIT vs Escorts Farms Pvt Ltd 180 ITR 80 (Del) and upon the decision of the co-ordinate bench in the case of Krishna Kumar Saraf vs CIT ITA No.4562/Del/2011 dated 24-09-32015 and Steel Strips Ltd v ACIT 53 ITD 553 (Chd). He thus requested that the impugned revision order passed by the ld.CIT is illegal on this primary jurisdictional ground itself.

5. Per contra, Ld. Departmental Representative for the Revenue vehemently opposed the arguments of the ld. Counsel. It was submitted by the ld. CIT-DR that even if the original assessment order was framed in the name of an erstwhile company, the same was only a mere irregularity and that does not make the assessment as nullity in the eyes of law. It was submitted that such lapses were protected u/s 292B of the Act.

6. In addition to the above, it was further submitted by him that the issue with regard to illegality in the original assessment order cannot be raised here during the proceedings challenging the order u/s 263. It was further submitted

by him that in any case, the ld.CIT had proper jurisdiction to make revision of the impugned assessment order.

7. We have heard both the parties on this issue and also gone through the orders passed by the lower authorities as well as the judgments relied upon before us. In our view, we need to decide following issues, before we go into any other issues or merits of the impugned order:

1. Whether the assessee can challenge the validity of an assessment order during the appellate proceedings pertaining to examination of validity of order passed u/s 263?
2. Whether the impugned assessment order passed u/s 143(3) dated 24-10-2013 was valid in the eyes of law or a nullity as has been claimed by the assessee?
3. If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the *non est* assessment order?

In our considered view, since these issues are jurisdictional issues and go to the root of the matter, therefore before dealing with any other issue, we shall first deal with all above three issues one by one, as under:

8. **Challenging the jurisdictional defects of assessment order for assailing the jurisdictional validity of the revision order passed u/s 263:**

The first issue that arises for our consideration is – whether the assessee can challenge the jurisdictional validity of order passed u/s 143(3) in the appellate proceedings taken up for challenging the order passed u/s 263? If we analyse the nature of both of these proceedings, which are under consideration before us, we find that the original assessment proceedings can be classified in a way as **'primary proceedings'**. These are, in effect, basic / foundational proceedings and akin to a platform upon which any subsequent proceedings connected therewith can rest

upon. The proceedings initiated u/s 263 seeking to revise the original assessment order is off shoot of the primary proceedings and therefore, these may be termed as **'collateral proceedings'** in the legal framework. The issue that arises here is whether any illegality/invalidity in the order passed in the 'primary proceedings' can be set up in the 'collateral proceedings' and if yes, then of what nature?

8.1. We have analysed this issue carefully. There is no doubt that after passing of the original assessment order, the primary (i.e. original proceedings) had come to an end and attained finality and, therefore, outcome of the same cannot be disturbed, and therefore, the original assessment order framed to conclude the primary proceedings had also attained finality and it also cannot be disturbed at the instance of the assessee, except as permitted under the law and by following the due process of law. Under these circumstances, it can be said that effect of the original assessment order cannot be erased or modified subsequently. In other words, whatever tax liability had been determined in the original assessment order that had already become final and that cannot be sought to be disturbed by the assessee. But, the issue that arises here is that if the original assessment order is illegal in terms of its jurisdiction or if the same is null & void in the eyes of law on any jurisdictional grounds, then, whether it can give rise to initiation of further proceedings and whether such subsequent proceedings would be valid under the law as contained in Income Tax Act? It has been vehemently argued before us that the subsequent proceedings (i.e. collateral proceedings) derive strength only from the order passed in the original proceedings (i.e. primary proceedings). Thus, if order passed in the original proceedings is itself illegal, then that cannot give rise to valid

revision proceedings. Therefore, as per law, the validity of the order passed in the primary (original) proceedings should be allowed to be examined even at the subsequent stages, only for the limited purpose of examining whether the collateral (subsequent) proceedings have been initiated on a valid legal platform or not and for examining the validity of assumption of jurisdiction to initiate the collateral proceedings. If it is not so allowed, then, it may so happen that though order passed in the original proceedings was illegal and thus order passed in the subsequent proceedings in turn would also be illegal, but in absence of a remedy to contest the same, it may give rise to an 'enforceable' tax liability without authority of law. **Therefore, the Courts have taken this view that jurisdictional aspects of the order passed in the primary proceedings can be examined in the collateral proceedings also.** This issue is not *res integra*. This issue has been decided in many judgments by various courts, and some of them have been discussed by us in followings paragraphs.

8.2. In a matter that came up before Hon'ble Supreme Court in the case of **Kiran Singh & Ors. v. Chaman Paswan & Ors., [1955] 1 SCR 117** the facts were that the appellant in that case had undervalued the suit at Rs.2,950 and laid it in the court of the Subordinate Judge, Monghyr for recovery of possession of the suit lands and mesne profits. The suit was dismissed and on appeal it was confirmed. In the second appeal in the High Court the Registry raised the objection as to valuation under Section 11. The value of the appeal was fixed at Rs.9,980. A contention then was raised by the plaintiff in the High Court that on account of the valuation fixed by the High Court the appeal against the decree of the court of the Subordinate Judge did not lie to the District

Court, but to the High Court and on that account the decree of the District Court was a nullity. Alternatively, it was contended that it caused prejudice to the appellant. In considering that contention at page 121, a four Judge Bench of Hon'ble Supreme Court speaking through Vankatarama Ayyar, J. held that:

> **"It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, <u>even at the stage of execution and even in collateral proceedings.</u> A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."**

8.3. This judgment was subsequently followed by Hon'ble Supreme Court in the landmark case of **Sushil Kumar Mehta vs Gobind Ram Bohra, (1990) 1 SCC 193**, wherein an issue arose whether a decree can be challenged at the stage of execution and whether a decree which remained uncontested operates as res-judicata qua the parties affected by it. Hon'ble apex court, taking support from aforesaid judgment, observed as under:

> **"In the light of this position in law the question for determination is whether the impugned decree of the Civil Court can be assailed by the appellant in execution. It is already held that it is the Controller under the Act that has exclusive jurisdiction to order ejectment of a tenant from a building in the urban area leased out by the landlord. Thereby**

the Civil Court inherently lacks jurisdiction to entertain the suit and pass a decree of ejectment. Therefore, though the decree was passed and the jurisdiction of the Court was gone into in issue Nos. 4 and 5 at the ex-parte trial, the decree there-under is a nullity, and does not bind the appellant. Therefore, it does not operate as a res judicata. The Courts below have committed grave error of law in holding that the decree in the suit operated as res judicata and the appellant cannot raise the same point once again at the execution."

8.4. Similar view has been taken by Hon'ble Supreme Court by following aforesaid judgments recently in the case of **Indian Bank vs Manilal Govindji Khona reported in 2015 (3) SCC 712.** Further, similar view was emphasized by **Hon'ble Bombay High Court (GOA Bench)** in the case of **Mavany Brothers vs CIT** (Tax Appeal No 8 of 2007) in its order dt 17th April, 2015 wherein it was held that an issue of jurisdiction can be raised at any time even in appeal or execution.

8.5. The aforesaid principles, enunciated by the Apex Court in the case of **Kiran Singh & Ors. v. Chaman Paswan & Ors, supra** were reiterated by the Apex Court in the cases of **Superintendent of Taxes vs Onkarmal Nathmal Trust (AIR 1975 SC 2065)** and **Dasa Muni Reddy v. Appa Rao (AIR 1974 SC 2089)**. In the first of these decisions it was pointed out that revenue statutes protect the public on the one hand and confer power upon the State on the other, and the fetter on the jurisdiction is one meant to protect the public on the broader ground of public policy and, therefore, jurisdiction to assess or reassess a person can never be waived or created by consent. This decision shows that the basic principle recognized in **Kiran Singh (supra)** is applicable even to revenue

statutes such as the Income Tax Act. **Dasa Muni Reddy (supra)** is a judgment where the principle of **'coram non judice'** was applied to rent control law. **It was held that neither the rule of estoppel nor the principle of res judicata can confer the Court jurisdiction where none exists.** Here also the principle that was put into operation was that jurisdiction cannot be conferred by consent or agreement where it did not exist, nor can the lack of jurisdiction be waived.

8.6. These judgments were subsequently noticed by **Hon'ble Gujarat High Court in the case of P. V. Doshi 113 ITR 22(Gujrat)**. This case arose under the Income Tax Act with reference to the provisions of Section 147 dealing with re-assessment. The facts were that the assessment was sought to be reopened under Section 147 and notice under section 148 was issued. Validity of reopening was not challenged upto Tribunal and additions were challenged on merits only. The Tribunal restored the matter to the Assessing Officer with some directions to reexamine the issue on merits. When the matter came back to the assessing officer the assessee specifically raised the point of jurisdiction to reopen the assessment, contending that the notice of reopening was prompted by a mere change of opinion. The AO rejected plea of the assessee but the AAC accepted this ground and also held the reassessment to be bad in law on jurisdictional ground. Against the order of the AAC the Revenue went in appeal before the Tribunal and specifically raised the plea that the question of jurisdiction to reopen the assessment having been expressly given up by the assessee in the appeal against the reassessment order in the first round, the assessee was debarred from raising that point again before the AAC and the AAC was equally wrong in permitting the assessee to raise that point which had become final in

the first round and in adjudicating upon the same. The plea of the Revenue impressed the Tribunal which took the view that after its earlier order in the first round of proceedings the matter attained finality with regard to the point of jurisdiction which was given up before the AAC and not agitated further and that in the remand proceedings what was open before the Assessing Officer was only the question whether the addition was justified on merits and the point regarding the jurisdictional aspect was not open before the Assessing Officer. According to the Tribunal, the assessee having raised the point in the first round and having given it up could not revive it in the second round of proceedings where the issue was limited to the merits of the additions. In this view, the Tribunal accepted the Revenues plea. The assessee thereafter carried order of the Tribunal in reference before the Gujarat High Court. The High Court after considering various judgments of the Supreme Court on the point of jurisdiction to reopen the assessment and also after specifically discussing the judgment of the **Supreme Court in Onkarmal Nathmal Trust (supra) and Dasa Muni Reddy (supra)** held that the Tribunal was in error in holding that the question of jurisdiction became final when it passed the earlier remand order. It was held that neither the question of res judicata nor the rule of estoppel could be invoked where the jurisdiction of an authority was under challenge. **According to Hon'ble Gujarat High Court, the rule of *res judicata* cannot be invoked where the question involved is the competence of the Court to assume jurisdiction, either pecuniary or territorial or over the subject matter of the dispute.** Hon'ble High Court further held that since neither consent nor waiver can confer jurisdiction upon the Assessing Officer where it did not exist, no importance could

be attached to the fact that the assessee, in the first round of proceedings, expressly gave up the plea against the erroneous assumption of jurisdiction by the assessing authority. According to the Hon'ble Court, the "**finality or conclusiveness could only arise in respect of orders which are competent orders with jurisdiction and if the proceedings of reassessment are not validly initiated at all, the order would be a void order as per the settled legal position which could never have any finality or conclusiveness. If the original order is without jurisdiction, it would be only a nullity confirmed in further appeals**". In this view of the matter, Hon'ble High Court finally answered the reference in favour of the assessee.

8.7. It is further noted that many of these judgments were discussed and followed by the co-ordinate bench of the Tribunal in the case of **Indian Farmers Fertilizers Co-operative Ltd vs JCIT 105 ITD 33 (Del),** wherein a similar issue had arisen. In this case, the issue raised before the bench was whether it is open to the assessee, not having appealed against the reassessment order, **to set up or canvass its correctness in collateral proceedings taken for rectification thereof u/s 154.** The bench minutely analysed law in this regard and applying the principle of **'coram non judice'** and following aforesaid judgments of the supreme court, it was held that **if an assessee seeks to challenge the reassessment proceedings as being without jurisdiction, when action for rectification is sought to be taken on the assumption of the validity of the reassessment order, then the assessee has to step in and protect its interests and the liberty to question even the validity of the reassessment proceedings ought to be given to it…….**" *(emphasis supplied).*

8.8. Similar view was taken in another decision of the Tribunal in the case of **Dhiraj Suri vs ACIT 98 ITD 87 (Del).** In the said case, appeal was filed by the assessee before the Tribunal against the levy of penalty. In the appeal challenging the penalty order, the assessee challenged the validity of block assessment order which had determined the tax liability of the assessee on the basis of which penalty was levied subsequently. The revenue objected with respect to the ground of the assessee raising jurisdictional issues of assessment proceedings in the appeal against the penalty order. After analysing the legal position, as clarified by Hon'ble Gujrat High Court in the case of P.V. Doshi, supra and **Hon'ble <u>Bombay High Court in the case of Jainarayan Babulal vs CIT, 170 ITR 399,</u>** the bench held as that i**f the block assessment itself is without jurisdiction then there is no question of levy of any penalty u/s. 158BFA(2) and therefore it is open to the assessee to set up the question of validity of the assessment in the appeal against the levy of penalty.**

8.9. We also derive support from another judgement of **Hon'ble Bombay High Court** in the case of **Inventors Industrial Corporation Ltd vs CIT 194 ITR 548 (Bombay)** wherein it was held that assessee was entitled to challenge the jurisdiction of the AO to initiate re-assessment proceedings before the CIT(A) in the second round of proceedings, even though he had not raised it in earlier proceedings before the Assessing Officer or in the earlier appeal.

8.10. Thus, on the basis of aforesaid discussion we can safely hold that as per law, the assessee should be permitted to challenge the validity of order passed u/s 263 on the ground that the impugned assessment order was *non est* and we hold accordingly.

9. <u>Whether the impugned assessment order passed u/s 143(3) dated 24-10-2013 was valid in the eyes of law or a nullity as has been claimed by the assessee on the ground that it was framed in the hands of a non-existing company</u>.

9.1 Now we proceed to decide the issue raised by the assessee that the impugned assessment order dated 24-10-2013 on the ground that the same was *non est* for the reason that it has been framed in the hands of a *non est* entity, since WLPL had got amalgamated into WDL at the time of framing of the assessment order by the Assessing Officer. The requisite facts and chronology of events brought out by the assessee before us are as under:

S.No.	Date	Particulars
(1)	22.01.2008	Westpoint Realtors Pvt. Ltd., incorporated.
(2)	30.06.2011	Name of the company changed from Westpoint Realtors Pvt. Ltd. to Westpoint Leisureparks Pvt. Ltd. (referred to as WLPL).
(3)	23.07.2013	Westpoint Leisureparks Pvt. Ltd., amalgamated with Westlife Development Ltd.(referred to as WDL).
(4)	03.09.2013	Assessee intimated to the Assessing Officer the fact of amalgamation. Copy of Scheme as well as High Court order submitted to the Assessing Officer (enclosed at page number 57 of P.B).
(5)	24.10.2013	Assessment order passed by the Assessing Officer in the name of erstwhile company Westpoint Leisureparks Pvt. Ltd.
(6)	22.12.2015	Ld. CIT has revised the above referred assessment order vide impugned order passed u/s 263 of the Act.

9.2. During the course of hearing before us, our attention has been drawn by Ld. Counsel upon letter dated 03-09-2013 filed before the Assessing Officer during the course of original assessment proceedings intimating him about the amalgamation of erstwhile company WLPL with WDL, copy of which is placed at paper book page 57. It is noted that in the said letter the assessee has

brought out complete facts and figures mentioning about the fact of amalgamation. Ld. CIT-DR expressed doubts above filing of this letter before the AO and therefore to clarify all the doubts in this regard, further time was given to him to verify and produce the assessment records. Accordingly, on the next date of hearing assessment records were produced and it was confirmed by Ld. CIT-DR that this letter was available in the assessment records. We also examined the records to cross verify this fact. We find it appropriate to reproduce the contents of the said letter as under:-

> *" 3rd September, 2013*
>
> *To,*
> *The Income Tax Officer*
> *5(3)-4, Room No. 565,*
> *Aayakar Bhavan, M.K. Road,*
> *Mumbai - 400 020*
> *Dear Sir,*
> *Re: Transfer of Income Tax Payable/ refund receivable by erstwhile Westpoint Leisureparks Pyt. Ltd. (WLPL)*
> *Ref: PAN No. AAACW7598L allotted to WLPL*
> *This is to inform you that pursuant to a Composite Scheme of Arrangement among, inter alia, 'Ourselves and WLPL sanctioned by the Bombay High Court on 19th July, 2013, WLPL has amalgamated with our Company w.e.f. 23rd July, 2013 (the Effective Date). Consequent upon such amalgamation, all assets and liabilities of WLPL stands transferred to and vested in our company from the effective date. A copy of the Scheme alongwith the High Court Order is enclosed for your reference and record.*
> *As a result, tax refunds receivable-by WLPL and obligations of every kind (including any proceedings) against or in favour of WLPL on the effective date are deemed to have been transferred to us.*
> *Our details are as under:*
> *Name : Westlife Development Ltd*
> *<u>Details Bank</u>*
> *Name of the Bank : IDBI Bank Ltd*

Address	:	*Venkatesh Chambers* *Prescot Road, Fort* *Mumbai-400 001*
CurrentA/c No	:	*45212010004794*
PAN No.	:	*AAACD0528K*
Address	:	*1001, Tower-S, 10th Floor,* *Indiabulls Finance Centre,* *Senapati Bapat Marg,* *Elphinstone Road,* *Mumbal- 400 013*

Kindly make a note of the transfer in your records and confirm your having done."

9.3. It is also shown to us that this letter has been duly acknowledged by the office of the Income-tax Officer, Range 5(3)(4) (i.e. the AO) on 06-09-2013. Our attention was also drawn on the copy of order of Hon'ble Bombay High Court dated 19h July, 2013 for effecting the amalgamation of two companies. Our attention was further drawn on the fact that the Permanent Account Number belonging to WDL was also brought to the notice of the Assessing Officer. Our attention was also drawn on subsequent letters filed before Assessing Officer. For example, letter dt 21-10-2013 (paper book page 107-108) showing that all subsequent replies were written by WDL and submitted to the AO on its letterhead. All these documentary evidences were shown to bring home the point that the factum of amalgamation was very much in the knowledge of Assessing Officer and thus Assessing Officer was aware that WLPL was no more in existence. Therefore, by framing the order upon WLPL, a grave error was committed and it was a case of jurisdictional lapse on the part of the Assessing Officer and thus, the resultant order was nullity in the eyes of law.

9.4. On the other hand, it has been argued by the Ld. CIT-DR that it was merely a procedural defect which was curable and does not make the order a nullity. It was further argued by the Ld. CIT-DR that the same was curable u/s 292BB and since the assessee had participated in the proceedings, therefore, the assessee could not challenge the resultant assessment order as nullity in the eyes of law.

9.5. We have carefully gone through the facts of the case and submissions made by both the sides before us. We have also gone through the legal position in this regard. It is noted by us that this issue is no more *res integra.* All the arguments made by the Ld. CIT-DR have already been addressed by many Courts. The judgements relied upon by Ld. Counsel are directly on this issue and squarely covers these issues.

9.6. In addition to that, it is noted that interestingly, **Hon'ble Bombay High Court** recently decided identical issue in its judgment in the case of **Jitendra Chandralal Navlani & Anr vs UOI** in writ petition No. 1069 of 2016 vide order 8th June, 2016 as under:

> *"On receipt of the reopening notice, the Chartered Accountant of the erstwhile M/s. Addler Security Systems Pvt. Ltd., had originally accepted the same but immediately thereafter by letter dated 5th May, 2015 pointed out that the company M/s. Addler Security Systems Pvt. Ltd. is no longer in existence as it has been dissolved. Consequent thereto, the Assessing Officer has also issued a notice under Section 142(1) of the Act to one of the petitioner who was the Director of erstwhile M/s. Addler Security Systems Pvt. Ltd. (since dissolved). In*
>
> *response, the Director of the erstwhile M/s. Addler Security Systems Pvt. Ltd., pointed out that the company has already been dissolved and it is no longer in existence. Notwithstanding the above, the Assessing Officer*

by an order dated 28th March, 2016 has passed the impugned order framing the assessment in case of M/s. Addler Security Systems Pvt. Ltd. (since dissolved) for Assessment Year 2008-09.

4. Normally we would not have entertained a petition as an alternative remedy to file an appeal is available to the petitioners. However, prima facie, the impugned notice has been issued in respect of a non existing entity as M/s. Addler Security Systems Pvt. Ltd., which stands dissolved, having been struck off the Rolls of the Registrar of Companies much before its issue. ***Consequently, the assessment has been framed also in respect of the non-existing entity. This defect in issuing a reopening notice to a non-existing company and framing an assessment consequent thereto is an issue which goes to the root of the jurisdiction of the Assessing Officer to assess the non-existing company. Thus, prima facie, both the impugned notice dated 24th March, 2015 and the Assessment Order dated 28th March, 2016, are without jurisdiction.****"* (emphasis supplied).

9.7. Further, recently, the co-ordinate bench of ITAT Mumbai decided identical issue in the case of **M/s Genesys Worldeye Ltd in ITA No.473/Mum/2012 order dated 03-06-2016** in which one of us (AM) was a party. The relevant part of this order is reproduced hereunder:

> ***"4.8.*** *In our view, this argument of the Ld. DR is also not in accordance with law. The assessment is to be made by the AO in accordance with law. The jurisdiction to frame the assessment order upon a particular person can be made by the AO in accordance with the law only. The jurisdiction to frame an assessment can neither be conferred nor can it be taken away by an assessee or any other person from the AO on the basis of their consent or otherwise. If the assessment orders are framed on the basis of consent or objection of the assessee's alone then it*

would give rise to a chaotic situation. Thus, it is for the AO to carefully determine his jurisdiction to make an assessment in a lawful manner upon the appropriate person and the obligation to do so rest solely upon the shoulders of the AO which he is obliged to fulfil by following due process of law. There is no estoppel against law. If an assessment order is framed without the authority of law, then, the same would be nullity in the eyes of law, as no tax can be collected without the authority of law, as has been clearly laid down in Article 265 of our constitution.

4.9. *It is noted by us that all these issues and arguments have already been dealt with and this entire controversy has already been put to rest by various courts in their judgments. Hon'ble Delhi High Court in the case of* ***Spice Infotainment Ltd (Supra)*** *has analysed this entire controversy in detail and held that assessment order passed under such circumstances would be nullity in the eyes of law. The relevant observations of the Hon'ble High Court in the said case are very useful to deal with this controversy and the same are reproduced hereunder for the sake of ready reference:*

> *"6. On the aforesaid reasoning and analysis, the Tribunal summed up the position in para 14 of its order which reads as under:-*
>
> *"In the light of the discussions made above, we, therefore, hold that the assessment made by the AO, in substance and effect, is not against the non-existent amalgamating company. However, we do agree with the proposition or ration decided in the various cases relied upon by the learned counsel for the assessee that the assessment made against non-existent person would be invalid and liable to be struck down. But, in the present case, we find that the assessment, in substance and effect, has been made against amalgamated company in respect of assessment of income of amalgamating company for the period prior to amalgamation and mere omission to mention the name of amalgamated company alongwith the name of amalgamating company in the body of assessment against the item "name of the assessee" is not fatal to the validity of assessment but is a*

procedural defect covered by Section 292B of the Act. We hold accordingly."

7. The aforesaid line of reasoning adopted by the Tribunal is clearly blemished with legal loopholes and is contrary to law. No doubt, M/s Spice was an assessee and as an incorporated company and was in existence when it filed the returns in respect of two assessment years in questions. However, before the case could be selected for scrutiny and assessment proceedings could be initiated, M/s Spice got amalgamated with MCorp Pvt. Ltd. It was the result of the scheme of the amalgamation filed before the Company Judge of this Court which was dully sanctioned vide orders dated 11th February, 2004. With this amalgamation made effective from 1st July, 2003, M/s Spice ceased to exist. That is the plain and simple effect in law. The scheme of amalgamation itself provided for this consequence, inasmuch as simultaneous with the sanctioning of the scheme, M/s Spice was also stood dissolved by specific order of this Court. With the dissolution of this company, its name was struck off from the rolls of Companies maintained by the Registrar of Companies.

8. A company incorporated under the Indian Companies Act is a juristic person. It takes its birth and gets life with the incorporation. It dies with the dissolution as per the provisions of the Companies Act. It is trite law that on amalgamation, the amalgamating company ceases to exist in the eyes of law. This position is even accepted by the Tribunal in para-14 of its order extracted above. Having regard this consequence provided in law, in number of cases, the Supreme Court held that assessment upon a dissolved company is impermissible as there is no provision in Income-Tax to make an assessment thereupon. In the case of Saraswati Industrial Syndicate Ltd. Vs. CIT, 186 ITR 278 the legal position is explained in the following terms:

"The question is whether on the amalgamation of the Indian Sugar Company with the appellant Company, the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41(1) of the Act. The amalgamation of the two companies was effected under the order of the High Court in proceedings under Section

391 read with Section 394 of the Companies Act. The Saraswati Industrial Syndicate, the trans free Company was a subsidiary of the Indian Sugar Company, namely, the transferor Company. Under the scheme of amalgamation the Indian Sugar Company stood dissolved on 29th October, 1962 and it ceased to be in existence thereafter. Though the scheme provided that the transferee Company the Saraswati Industrial Syndicate Ltd. undertook to meet any liability of the Indian Sugar Company which that Company incurred or it could incur, any liability, before the dissolution or not thereafter.

Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the share holders of each blending Company become substantially the share holders in the Company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new Company, or by the transfer of one or more undertakings to an existing Company. Strictly amalgamation does not cover the mere acquisition by a Company of the share capital of other Company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See Halsburys Laws of England 4th Edition Vol. 7 Para 1539. Two companies may join to form a new Company, but there may be absorption or blending of one by the other, both amounts to amalgamation. When two companies are merged and are so joined, as to form a third Company or one is absorbed into one or blended with another, the amalgamating Company loses its entity."

9. The Court referred to its earlier judgment in General Radio and Appliances Co. Ltd. vs M.A. Khader (1986) 60 Comp Case 1013. In view of the aforesaid clinching position in law, it is difficult to digest the circuitous route adopted by the

Tribunal holding that the assessment was in fact in the name of amalgamated company and there was only a procedural defect.

10. Section 481 of the Companies Act provides for dissolution of the company. The Company Judge in the High Court can order dissolution of a company on the grounds stated therein. The effect of the dissolution is that the company no more survives. The dissolution puts an end to the existence of the company. It is held in M.H. Smith (Plant Hire) Ltd. Vs. D.L. Mainwaring (T/A Inshore), 1986 BCLC 342 (CA) that "once a company is dissolved it becomes a non-existent party and therefore no action can be brought in its name. Thus an insurance company which was subrogated to the rights of another insured company was held not to be entitled to maintain an action in the name of the company after the latter had been dissolved".

11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit 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 AO. 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 day. 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 estoppel against law.

12. Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B of the Act. Section 292B of the Act reads as under:-

"292B. No return of income assessment, notice, summons or other proceedings furnished or made or issue or taken or purported to have been furnished or made or issued or taken

in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reasons of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceedings is in substance and effect in conformity with or according to the intent and purpose of this Act."

13. The Punjab & Haryana High Court stated the effect of this provision in CIT Vs. Norton Motors, 275 ITR 595 in the following manner:-

"A reading of the above reproduced provision makes it clear that a mistake, defect or omission in the return of income, assessment, notice, summons or other proceeding is not sufficient to invalidate an action taken by the competent authority, provided that such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the provisions of the Act. To put it differently, Section 292B can be relied upon for resisting a challenge to thenotice, etc., only if there is a technical defect or omission in it. However, there is nothing in the plain language of that section from which it can be inferred that the same can be relied upon for curing a jurisdictional defect in the assessment notice, summons or other proceeding. In other words, if the notice, summons or other proceeding taken by an authority suffers from an inherent lacuna affecting his/its jurisdiction, the same cannot be cured by having resort to Section 292B.

14. The issue again cropped up before the Court in CIT Vs. Harjinder Kaur (2009) 222 CTR 254 (P&H). That was a case where return in question filed by the assessee was neither signed by the assessee nor verified in terms of the mandate of Section 140 of the Act. The Court was of the opinion that such a return cannot be treated as return even a return filed by the assessee and this inherent defect could not be cured inspite of the deeming effect of Section 292B of the Act. Therefore, the return was absolutely invalid and assessment could not be made on a invalid return. In the process, the Court observed as under:-

"Having given our thoughtful consideration to the submission advanced by the learned Counsel for the appellant, we are of the view that the provisions of Section 292B of the 1961 Act do not authorize the AO to ignore a defect of a substantive nature and it is, therefore, that the aforesaid provision categorically records that a return would not be treated as invalid, if the same "in substance and effect is in conformity with or according to the intent and purpose of this Act". Insofar as the return under reference is concerned, in terms of Section 140 of the 1961 Act, the same cannot be treated to be even a return filed by the respondent assessee, as the same does not even bear her signatures and had not even been verified by her. In the aforesaid view of the matter, it is not possible for us to accept that the return allegedly filed by the assessee was in substance and effect in conformity with or according to the intent and purpose of this Act. Thus viewed, it is not possible for us to accept the contention advanced by the learned Counsel for the appellant on the basis of Section 292B of the 1961 Act. The return under reference, which had been taken into consideration by the Revenue, was an absolutely invalid return as it had a glaring inherent defect which could not be cured in spite of the deeming effect of Section 292B of the 1961 Act."

15. Likewise, in the case of Sri Nath Suresh Chand Ram Naresh Vs. CIT (2006) 280 ITR 396, the Allahabad High Court held that the issue of notice under Section 148 of the Income Tax Act is a condition precedent to the validity of any assessment order to be passed under section 147 of the Act and when such a notice is not issued and assessment made, such a defect cannot be treated as cured under Section 292B of the Act. The Court observed that this provisions condones the invalidity which arises merely by mistake, defect or omission in a notice, if in substance and effect it is in conformity with or according to the intent and purpose of this Act. Since no valid notice was served on the assessee to reassess the income, all the consequent proceedings were null and void and it was not a case of irregularity. Therefore, Section 292B of the Act had no application.

16. When we apply the ratio of aforesaid cases to the facts of this case, the irresistible conclusion would be provisions

of Section 292B of the Act are not applicable in such a case. The framing of assessment against a non-existing entity/person goes to the root of the matter which is not a procedural irregularity but a jurisdictional defect as there cannot be any assessment against a dead person".

17. The order of the Tribunal is, therefore, clearly unsustainable. We, thus, decide the questions of law in favour of the assessee and against the Revenue and allow these appeals."

4.10. *This judgment was subsequently followed by another detailed judgment by* ***Hon'ble Delhi High Court in the case of CIT v. Dimension Apparels Pvt. Ltd. (supra)*** *wherein all the arguments which have been made before us by the Ld. DR have been dealt with by the Hon'ble High Court and it was held that framing of the assessment order upon a non-existing person was a jurisdictional defect and not merely a curable procedural defect, and thus nullity in the eyes of law.*

4.11. *In view of all these facts as have brought before us and the judgments brought before us and in the absence of any contrary judgment having been brought before us, we find that impugned assessment order is nullity in the eyes of law and the same is herby quashed, and thus additional grounds raised by the assessee are allowed. Since we have allowed the appeal of the assessee on the additional grounds, we do not find it necessary to go into grounds raised on merits and therefore, these are treated as infructuous."*

9.8. It is also noted that **Hon'ble Calcutta High Court** in the case of **I.K. Agencies Pvt Ltd, supra** as well as **Honble Karnataka High Court in the case of CIT vs Intel Technology Pvt Ltd 380 ITR 272 (Karnatka)** also followed the view taken by Hon'ble **Delhi High Court in the case of Spice Infotainment Ltd 247 CTR 500 (Delhi)** and held that framing of assessment against non-existing entity/person would go to root of matter and was not mere procedural irregularity, but a jurisdictional defect and there could not be any assessment against a dead person. Thus, apparently, assessment proceedings having been

initiated against non-existing company even after amalgamation of assessee company with another company were illegal, and thus order passed under such proceedings without jurisdiction and null & void.

9.9. During the course of hearing, no contrary judgement was brought to our notice by the Ld. CIT-DR. It was fairly stated that as on date this issue was covered in favour of the assessee in view of the judgments as discussed above. In these facts and circumstances and the clear position of law coming out from above discussed judgments of Hon'ble Bombay High Court, Delhi High Court, Calcutta High Court and Karnatka High Court, **we find that the impugned assessment order having been passed in the hands of WLPL i.e. a *non est* entity at the time of passing the said assessment order was null & void in the eyes of law.**

10. **<u>If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the *non est* assessment order:</u>**

Having decided the aforesaid two issues, the next issue that is to be decided by us is about the validity of order passed u/s 263 by the Ld. CIT seeking to revise the assessment order which was nullity in the eyes of law.

10.1. We have discussed in detail in earlier part of our order that an invalid order cannot give birth to legally valid proceedings. It is further noticed by us that some of the judgments relied upon by the Ld. Counsel have already addressed this issue. This issue has also been decided by the co-ordinate bench (Delhi Bench of Tribunal) in the case of **Krishna Kumar Saraf vs CIT (supra)**. The relevant part of the order is reproduced below:

"17. There is no quarrel with the proposition advanced by Id. DR that the proceedings u/s 263 are for the benefit of revenue and not for assessee.

18. However, u/s 263 the Id. Commissioner cannot revise a non est order in the eye of law. Since the assessment order was passed in pursuance to the notice U/S 143(2), which was beyond time, therefore, the assessment order passed in pursuance to the barred notice had no legs to stand as the same was non est in the eyes of law. All proceedings subsequent to the said notice are of no consequence. Further, the decision of Hon'ble Madras High Court in the case of CIT Vs. Gitsons Engineering Co. 370 ITR 87 (Mad) clearly holds that the objection in relation to non service of notice could be raised for the first time before the Tribunal as the same was legal, which went to the root of the matter.

*19. **While exercising powers u/s 263 Id. Commissioner cannot revise an assessment order which is non est in the eye of law because it would prejudice the right of assessee which has accrued in favour of assessee on account of its income being determined.** If Id. Commissioner revises such an assessment order, then it would imply extending/ granting fresh limitation for passing fresh assessment order. It is settled law that by the action of the authorities the limitation cannot be extended, because the provisions of limitation are provided in the same.*

20. In view of above discussion, ground no.3 is allowed and revision order passed u/s 263 is quashed."

10.2. It is further noticed by us that similar view has been taken by Chandigarh Bench of the Tribunal in the case of **Steel Strips Ltd (supra).**

11. Thus, after taking into account all the facts and circumstances of the case, we find that in this case, the original assessment order passed u/s 143(3) dt 24-10-2013 was null & void in the eyes of law as the same was passed upon a non-existing entity and, therefore, the Ld. CIT could not have assumed jurisdiction under the law to make revision of a *non est* order and, therefore, the impugned order passed u/s 263 by the Ld.CIT is also nullity in the eyes of law and therefore the same is hereby quashed.

12. Since we have quashed the impugned order passed u/s 263 by Ld. CIT on jurisdictional ground, we do not find it necessary to deal with, at this stage, other legal aspects and issues raised on merits of the impugned order.

13. We further clarify, at the cost of repetition, that our order shall have no bearing on the tax liability determined by the original assessment order dt. 24-10-2013, if any.

14. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the court on this _____ day of June, 2016.

(AMIT SHUKLA)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt: June, 2016
Pk/-
Copy to:

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, G-Bench

(True copy) By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES

	Details	Date	Initials	Designation
1	Draft dictated on	10-6-16		Sr PS / PS
2	Draft placed before author	15-6-16		Sr PS/PS