*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 08.07.2014

\+ **ITA 327/2014, C.M. NO.10527/2014**
\+ **ITA 328/2014, C.M. NO. 10528/2014**
\+ **ITA 329/2014**
\+ **ITA 330/2014, C.M. NO. 10641/2014**
\+ **ITA 332/2014, C.M. NO. 10690/2014**

COMMISSIONER OF INCOME TAX-III ..... Appellant

Versus

DIMENSION APPARELS PVT. LTD. ..... Respondent
Through : Ms. Suruchii Aggarwal, Sr. Standing Counsel for the revenue.
None on behalf of the respondent.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The Appellants (hereafter, "the Revenue") challenge an order dated 21.06.2013 of the Income Tax Appellate Tribunal ("ITAT") - Delhi (Branch B) in ITA Nos. 571/DEL/2012; 572/DEL/2012; 573/DEL/2012, 574/DEL/2012 and 576/DEL/2012. The ITAT quashed the assessment order against the respondent (hereafter “the Assessee”) framed under Sections 143(3), 153A and 153C of the Income Tax Act, 1961 (hereafter “the Act”).

2. The Assessment Order was made on 31.12.2010, and covered

the assessment years 2003-04 to 2008-09. The assessee had contended that it had ceased to exist from 7.12.2009, because, by virtue of an order of this Court – it had been amalgamated with another company under Sections 391(2) and 394 of the Companies Act. Aggrieved by the Assessment Order, the assessee appealed to the CIT(A). It argued that the assessment order was invalid, because on the date on which it was passed, the Assessee had already ceased to exist (having been amalgamated). The CIT(A) agreed with this contention and held that:

> *"In my considered opinion, a Company, incorporated under the Indian companies Act is a Juridical person. It take its birth and gets life with incorporation. It dies with the dissolution, as per the provision of the companies Act. It is trite law that the amalgamating company ceases to exist in the eyes of law. Having regard to this consequence provided in law, assessment upon a dissolved company is impermissible as there is no provision in income tax to make an assessment thereupon. Therefore, I agree with the appellant that assessment on a company, which has been dissolved/amalgamated under section 391 and 394 of the Companies Act, 1956, is invalid. There is no provision in the IT Act, to make assessment on an amalgamating company (transferor/dissolved company), even though the appellant company participated in assessment proceedings."*

3. The revenue, being aggrieved by the CIT(A)'s decision appealed to the ITAT. The said order was, however, upheld on appeal by the ITAT.

4. The revenue, in its appeal argues, first of all that by virtue of Sections 170(1) and 170(2) of the Income Tax Act, in cases of succession of business, where the predecessor cannot be found, the

assessment that would otherwise have been made upon the predecessor, shall instead be made upon the successor in a like manner. It is secondly contended that the error in the assessment order, if any, is a minor one, at best an irregularity; thus saved by Section 292B of the Act. It was argued lastly that the assessee had itself participated in the proceedings throughout and could not be heard to complain against the assessment order. The revenue relies on the Madras High Court ruling in *Marshall Sons and Co. vs. Income Tax Officer* (1992) 195 ITR 417.

5. The assessee contends that no question of law arises for consideration. It submits that the text and phraseology of Sections 170 (1) and (2) do not support the revenue's arguments. The assessee further relies on *Saraswati Industrial Syndicate v. CIT*, 1990 Supl. (1) SCR 332 in support of its contentions and the findings of the tax authorities below, i.e. the CIT (A) and the ITAT. *Spice Entertainment Ltd. Vs. CIT* - ITA No.475 of 2011, decided by a Division Bench of this Court, as well as an earlier decision in *Commissioner of Income Tax v. Vived Marketing Servicing Pvt. Ltd.* ITA No. 273/2009 were relied on by the assessee as well, in support of its contentions. It was also pointed out that the jurisdictional defect in this case could not be cured under Section 292-B of the Act.

6. Sections 170(1) and 170(2) of the Act do not assist the revenue in their case. The revenue does not contest that in a case of amalgamation, the predecessor (being a dissolved company) *"cannot be found"*. Consequently, Section 170(2) applies. This provision clarifies that where the predecessor cannot be found,

> "*the assessment of the income of the previous year in which the succession took place up to the date of the succession and of the precious year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor*." (Emphasis Supplied)

7. The revenue seems to argue that the assessment is justified because the liabilities of the amalgamating company accrue to the amalgamated (transferee) company. While that is true, the question here is which entity must the assessment be made on. The text of Section 170(2) makes it clear that the assessment must be made on the successor (i.e., the amalgamated company).

8. The Supreme Court, in *Saraswati Industrial Syndicate* (*supra*) 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.*" (Emphasis Supplied)

9. With respect to the specific issue of assessment, in *Vived Marketing Servicing Pvt. Ltd. No.* (supra) the Court observed that:

> "*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 that there could not have been any assessmsent order passed against the company which was not in existence as on that date in the eyes of law it had already been dissolved*." (Emphasis Supplied)

10. *Vived Marketing Servicing Pvt. Ltd. (supra)* also noted that Section 176 of the IT Act, which contains provisions pertaining to a *discontinuation* of business, does not apply to a case of amalgamation/dissolution. It was also held that Section 159 of the Act, which provides for tax liability to be attached to the legal representatives of a deceased person, is likewise inapplicable. The language of Section 159 evidently only applies to natural persons, and cannot be extended, through a legal fiction, to the dissolution of companies.

11. *Marshall Sons and Co.* (supra), is relied on by the revenue. It was held in that judgment that

> "*the transferor-company shall, with effect from the transfer date, be deemed to have carried on its business for and on behalf of the transferee-company and, accordingly, the profits and losses of the transferor- company for the period commencing from the transfer date, shall be deemed to be the profits or losses of the transferee-company and shall be available to the transferee-company for disposal in any manner*."

12. That case, however, involved a controversy about the effective date of amalgamation, and not about whether an assessment of income can be made on an amalgamated company. In fact, the logic of the Madras High Court's decision undermines the Appellants' case. The Madras High Court found for the Revenue, because, in its opinion, the effective date of amalgamation came after the date of the assessment. The assessee argued that the date of amalgamation was January 1, 1982, whereas the assessment order was dated November 25, 1984.

13. The Madras High Court held that

> *"according to the records maintained pursuant to the provisions of the Companies Act, the subsidiary company had continued to remain in existence up to January 21, 1986, even long after January 1, 1982."*

14. On this basis, it held the Assessee liable. This obviously implies that had the company *not* been in existence at the time of the assessment order, it would not have been liable.

15. In *Spice* (supra), this Court, after discussing the law declared by the Supreme Court in *Saraswati Industrial Syndicate* (supra) stated that:

> *"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.*
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> *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."*

16. The authority of the above precedent binds us; we see no reason to differ from the logic and reasoning in *Spice (supra).*

17. The other aspect is as to the applicability of Section 292-B of the Act, which reads as follows:

> *"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."*

18. The Revenue argues that the assessment was in substance and effect in conformity with the Act, because the Assessing Officer had

used correct nomenclature in writing the name of the Assessee, along with the fact that the company had amalgamated, as well as the correct address of the amalgamated company. Consequently, they contend that

> "*the mere omission, if any on the part of the AO to mention the name of the appellant/amalgamated company in place of M/s Dimension Apparel… [is]… therefore a procedural defec*t."

19. The question of whether an assessment upon an amalgamated company is a mistake within the meaning of Section 292B was raised and answered by the Delhi High Court in *Spice (supra)*. In that case, the Tribunal had held 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."* (Emphasis Supplied)

20. This Court rejected this argument, holding that

> "*it* [becomes] *incumbent upon the Income Tax Authorities to substitute the successor in place of the said 'dead person'. Such a defect cannot be treated as procedural defect… 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."* (Emphasis Supplied)

21. In *Spice* (supra) the reason for the inapplicability of Section 292-B was additionally premised on the decision of the Punjab & Haryana High Court in *CIT v. Norton Motor,* 275 ITR 595, that while Section 292B can cure technical defects, it cannot cure a *"jurisdictional defect in the assessment notice."* In *Spice (supra),* therefore, this Court expressly classified *"the framing of assessment against a non-existing entity/person"* as a jurisdictional defect. This has been a consistent position. As early as 1960, in *CIT v. Express Newspapers,* 1960 (40) ITR 38 (Mad), the Madras High Court held that

> "*there cannot be an assessment of non-existent person… The assessment in the instant case was made long after the Free Press Company was stuck off from the register of the companies, and it could not be valid.*" (Emphasis Supplied)

22. On the last contention, i.e with respect to participation by the previous assessee, i.e the amalgamating company (which ceases to exist), again *Spice (supra) is* categorical; it was ruled on that occasion that such participation by the amalgamated company in proceedings did not cure the defect, because "*there can be no estoppel in law*." *Vived Marketing Servicing Pvt. Ltd.,* (*supra*) had also reached the same conclusion.

23. It is thus clear that all contentions sought to be urged by the revenue are in respect of familiar grounds, which have been ruled upon, against it, consistently in two decisions of this court. Therefore, no substantial question of law arises in this appeal.

24. Accordingly, there is no merit in the appeals; they are

accordingly dismissed along with the pending applications without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

VIBHU BAKHRU
(JUDGE)

JULY 08, 2014