IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.46/PUN/2021
निर्धारण वर्ष / Assessment Year: 2014-15

DCIT, Circle-1(1), Pune.	Vs.	Barclays Global Service Centre Private Limited (Formerly : Barclays Shared Services Pvt. Ltd.), Ground to 7 Floor, Wing 3, Cluster A, EON Free Zone, MIDC Knowledge Park, Kharadi, Pune- 411014. PAN : AADCB1173D
Appellant		Respondent

C.O. No.08/PUN/2021
(Arising out of ITA No.46/PUN/2021)
निर्धारण वर्ष / Assessment Year: 2014-15

Barclays Global Service Centre Private Limited (Formerly : Barclays Shared Services Pvt. Ltd.), Ground to 7 Floor, Wing 3, Cluster A, EON Free Zone, MIDC Knowledge Park, Kharadi, Pune- 411014. PAN : AADCB1173D	Vs.	DCIT, Circle-1(1), Pune.
Appellant		Respondent

Revenue by	:	Shri J. P. Chandraker
Assessee by	:	Shri Percy Pardiwalla & Shri Hiten Chande
Date of hearing	:	09.12.2022
Date of pronouncement	:	02.01.2023

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the Revenue directed against the order of ld. Commissioner of Income Tax (Appeals)- 13, Pune ['the CIT(A)'] dated 23.06.2020 for the assessment year 2014-15. The Cross Objection filed by the assessee against the appeal of the Revenue.

2. Briefly, the facts of the case are that the assessee is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of providing Information Technology Enabled Services (ITES) to Barclays Bank PIc, United Kingdom (BBPLC) and its affiliates. The return of income for the assessment year 2014-15 was filed on 25.11.2014 declaring total income of Rs.1,13,02,89,902/- after claiming deduction u/s 10AA of the Income Tax Act, 1961 ('the Act'). The appellant company also reported international transactions entered with its AEs.

On noticing the international transactions, the Assessing Officer referred the matter to the Transfer Pricing Officer ('TPO') for the purpose of benchmarking the international transactions. The TPO vide order dated 30.10.2017 suggested the TP adjustment of Rs.95,88,72,618/-.

On receipt of the TPO's order, the Assessing Officer passed a draft assessment order dated 30.12.2017 making disallowance of the excess deduction of claimed u/s 10AA of the Act.

On receipt of the draft assessment order, the appellant had not chosen to file objection before the DRP and the final assessment order dated 20.03.2018 was passed by the Assessing Officer after making disallowance the excess deduction claimed u/s 10AA amounting to Rs.8,92,33,721/-.

3. Being aggrieved by the final assessment order, an appeal was filed before the ld. CIT(A) contending *inter alia* that the assessment order passed is null and void, as the assessment was made on non-existing entity *inter alia* challenged the addition made above, and also challenging the very validity of the assessment on the ground that the assessment order was passed in the name of non-existing company i.e. M/s. Barclays Shared Services Pvt. Ltd. in respect of Barclays Global Service Centre Pvt. Ltd.. The CIT(A) had dismissed the said ground i.e. challenging the very validity of the assessment on the ground that when the notice u/s 143(2) was issued, the amalgamating company was very much in existence. However, the ld. CIT(A) partly granted relief in respect of addition made by the Assessing Officer.

4. Being aggrieved by that part of the order of the ld. CIT(A), which is against the Revenue, the Revenue is in appeal before us in ITA No.46/PUN/2021. The assessee company filed a Cross Objection being aggrieved by the decision of the ld. CIT(A) confirming the validity of the assessment made in the name of amalgamating company i.e. M/s. Barclays Shared Services Pvt. Ltd., which was a non-existing entity.

5. First, we shall take up the Cross Objection bearing C.O. No.08/PUN/2021, which goes to the very root of the jurisdiction of the Assessing Officer. The factual background of the case is as under :-

The assessee company M/s. Barclays Shared Services Pvt. Ltd. (amalgamating company) was amalgamated with Barclays Technology Centre India Pvt. Ltd. vide order of the Hon'ble National Company Law Tribunal ('NCLT') dated 02.11.2017 formerly known as M/s. Barclays Shared Services Pvt. Ltd. now presently known as Barclays Global Service Centre Pvt. Ltd.. The appointed date for amalgamation was 01st April, 2017. However, the Scheme was approved by the Hon'ble NCLT on 02.11.2017 but, became effective only on filing the prescribed Form INC-28 along with prescribed fee before the Registrar of the Company before

April, 2017. The return of income was filed in the name of amalgamating company, as the process of amalgamation was not completed. During the course of assessment proceedings under consideration, the assessee company had brought to notice of the Assessing Officer that the factum of amalgamation vide letter dated 15.12.2017 along with copies of the amalgamation scheme dated 26.12.2017 placed at page no.1199 of Paper Book. In-spite of this, the Assessing Officer passed the assessment order in the name of amalgamating company.

6. The assessee company challenged the very validity of the assessment order on the ground that the assessment order was passed in the name of non-existing entity placing reliance on the following judicial precedents :-

(i) CIT vs. Micron Steels (P.) Ltd., 372 ITR 386 (Delhi).

(ii) Spice Entertainment Ltd. v. CST, 12 ITR 134 (SC).

(iii) PCIT vs. Maruti Suzuki India Ltd., 416 ITR 613 (Delhi).

(iv) CIT vs. Dimension Apparels (P.) Ltd., 370 ITR 288.

(v) PCIT vs. Maruti Suzuki India Ltd., 107 taxmann.com 375 (SC).

(vi) Marshall Sons & Co. (India) Ltd. vs. ITO, 223 ITR 809 (SC).

7. However, the ld. CIT(A) dismissed this ground by holding that the notice u/s 143(2) was issued in the name of the amalgamating company much before its amalgamation came into effect.

8. Being aggrieved by the decision of the ld. CIT(A), the assessee company is before us in the Cross Objection.

9. The ld. Sr. Counsel submits that the factum of amalgamation was brought to notice of the Assessing Officer vide letter dated 15.12.2017 filed before the Assessing Officer on 26.12.2017 despite this fact, the Assessing Officer passed the assessment order in the name of amalgamating company which is null and void. He further submitted that once the scheme of amalgamation comes into effect, the amalgamating company ceases to exist and an assessment order passed in the name of amalgamating company is null and void and *ab initio*, as decided by the Hon'ble Supreme Court in the case of Maruti Suzuki India Ltd. (supra). He further submits that the ratio of the decision of the Hon'ble Supreme Court in the case of PCIT vs. Mahagun Realtors (P.) Ltd., 443 ITR 194 (SC) has no application, inasmuch as, the decision of the Hon'ble Supreme Court (supra) is on premise that the factum of amalgamation was never brought to the notice of the Assessing Officer and the return of income was not revised even though, time was available for

revision of the return of income and the return of income was filed pursuant to notice which was issued after amalgamation suppressing the factum of amalgamation.

10. On the other hand, ld. CIT-DR submits that the ratio of the decision of the Hon'ble Supreme Court in the case of Mahagun Realtors (P.) Ltd. (supra) is squarely applicable to the facts of the present case. Placing reliance on the decision of the Hon'ble Supreme Court in the case of M/s. Deepak Agr Foods vs. State of Rajasthan & Ors. in Civil Appeal Nos.4327-28 of 2008, he submits that mere wrong mentioning of assessee's name in the assessment order is mere irregularity and does not render the assessment proceedings null and void. He further submits that the PAN of the assessee is still active in the assessment records and the refund was also issued in the name of the old company i.e. amalgamating company.

11. We heard the rival submissions and perused the material on record. The issue that arises for our consideration is whether or not an assessment order passed in the name of amalgamating company i.e. non-existing company, is valid in the eyes of law. There is no dispute about the fact that the factum of amalgamation was put to the notice of the Assessing Officer during the course of assessment

proceedings. Despite knowing very well that the amalgamating company was not inexistence at the time of passing the assessment order, still the Assessing Officer had chosen to pass an assessment order in the name of the amalgamating company i.e. M/s. Barclays Shared Services Pvt. Ltd.. The Hon'ble Supreme Court in the case of PCIT vs. Maruti Suzuki India Ltd. 416 ITR 613 (SC) after making a reference of its earlier decision in the case of CIT vs. Spice Infotainment Ltd. 12 ITR-OL 134 (SC) and Saraswati Industrial Syndicate Ltd. vs. CIT, 186 ITR 278 (SC) held as follows :-

> *"33. In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Enfotainment (supra) on 2 November 2017. The decision in Spice Enfotainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Enfotainment (supra)."*

12. The ratio that can be discerned from the above decision is that consequent upon the amalgamation, the amalgamating company ceases to exist, therefore, it cannot be regarded as a "person". The assessment proceedings against an entity which had ceased to exist

were *void ab initio*. The fact that the assessee had participated in the assessment proceedings cannot operate as an estoppel against law.

13. Even the Jurisdictional High Court in the case of Teleperformance Global Services Pvt. Ltd. vs. ACIT, 435 ITR 725 (Bom.) following the dictum laid down by the Hon'ble Supreme Court in the case of Maruti Suzuki India Ltd. (supra) and Spice Infotainment Ltd. (supra) held that an assessment order passed against non-existing company would be void. Such defect cannot be treated as a procedural defect and mere participation of an assessee in the assessment proceedings has no effect as there is no estoppel against law. Such defect cannot be cured. The relevant para of the judgement of the Jurisdictional High Court in the case of Teleperformance Global Services Pvt. Ltd. (supra) is as under :-

> *"22. The Supreme Court in the case of Maruti Suzuki India Ltd. (supra) had considered that income, which was subject to be charged to tax for the assessment year 2012-13 was the income of erstwhile entity prior to amalgamation. Transferee had assumed liabilities of transferor company, including that of tax. The consequence of approved scheme of amalgamation was that amalgamating company had ceased to exist and on its ceasing to exist, it cannot be regarded as a person against whom assessment proceeding can be initiated. In said case before notice under section 143(2) of the Act was issued on 26-9-2013, the scheme of amalgamation had been approved by the high court with effect from 1-4-2012. It has been observed that assessment order passed for the assessment year 2012-13 in the name of non-existing entity is a substantive illegality and would not be procedural violation of Section 292(b) of the Act.*

The Supreme Court in its aforesaid decision, has quoted an extract from its decision in Saraswati Industrial Syndicate Ltd. v. CIT [1990] 53 Taxman 92/186 ITR 278. The Supreme Court has also referred to decision of Delhi high court in the case of CIT v. Spice Enfotainment Ltd. [2018] 12 ITR-OL 134 (SC) and observed that in its decision Delhi high court had held that assessment order passed against non-existing company would be void. Such defect cannot be treated as procedural defect and mere participation of appellant would be of no effect as there is no estoppel against law. Such a defect cannot be cured by invoking provisions under section 292B. The Supreme Court had also taken note of decision in Spice Entertainment Ltd. (supra) was followed by Delhi high court in matters, viz.CIT v. Dimension Apparels (P.) Ltd. [2014] 52 taxmann.com 356/[2015] 370 ITR 288, CIT v. Micron Steels (P.) Ltd. [2015] 59 taxmann.com 470/233 Taxman 120/372 ITR 386 (Mag.); CIT v. Micra India (P.) Ltd. [2015] 57 taxmann.com 163/231 Taxman 809 and in CIT v. Intel Technology India Ltd. [2016] 380 UTE 272 Karnataka high court has held, if a statutory notice is issued in the name of non-existing entity, entire assessment would be nullity in the eye of law. It has also been so held by Delhi high court in the case of Pr. CIT v. Nokia Solutions & Network India (P.) Ltd. [2018] 90 taxmann.com 369/253 Taxman 409/402 ITR 21

23. The Supreme Court in Spice Infotainment Ltd. v. CIT [IT Appeal No. 475 of 2011, dated 3-8-2011] found that there is no reason to interfere with the impugned judgment of Delhi high court and it found no merits in the appeal and special leave petition and were dismissed accordingly.

The Supreme Court had taken note of revenue resistance contending that contrary position emerges from decision of Delhi high court decision in Sky Light Hospitality LLP v. Asstt. CIT [2018] 92 taxmann.com 93/254 Taxman 390 (SC) and that it had been affirmed by the Supreme Court. However, the Supreme Court had also taken note of Sky Light Hospitality LLP (supra) was in peculiar facts of the case, where the high court had catgegorically concluded that there was clerical mistake within the meaning of section 292B and the case had been distinguished by decisions of Delhi, Gujarat and Madras high courts in Rajender Kumar Sehgal v. ITO [2019] 101 taxmann.com 233/260 Taxman 412/414 ITR 286; Chandreshbhai Jayantibhai Patel v. ITO [2019] 101 taxmann.com 362/261 Taxman 137/413 ITR 276; and Alamelu Veerappan v. ITO [2018] 95 taxmann.com 155/257 Taxman 72.

24. In the circumstances, though the respondents refer to decision of Delhi High Court in case of Sky Light Hospitality LLP v. Asstt. CIT [2018] 90 taxmann.com 413/254 Taxman 109/405 ITR 296 it would be of little avail for the respondents. The decision in the case of Maruti Suzuki India Ltd. (supra) would hold sway over present facts and circumstances."

14. Subsequently, the Hon'ble Bombay High Court in the case of Alok Knit Exports Ltd. vs. DCIT, 446 ITR 748 (Bombay) after making a reference to the decision of the Hon'ble Supreme Court in the cases of Maruti Suzuki India Ltd., Spice Enfotainment Ltd. and Sky Light Hospitality LLP vs. CIT 405 ITR (St.) 12 (SC) reiterated that the assessment made in the name of non-existing company i.e. amalgamating company is not valid in law even if the assessee participated in the assessment proceedings. And such error cannot be corrected by recourse to the provisions of section 92B of the Act. It was further held that even though PAN card of the amalgamating company is alive and active, cannot be the reason to uphold the validity of the assessment. The Hon'ble High Court had further held that the decision of the Hon'ble Supreme Court in the case of Sky Light Hospitality LLP referred supra cannot be pressed into service as the decision was rendered in the peculiar facts of the case. The relevant observations of the Hon'ble Bombay High Court in the case of Alok Knit Exports Ltd. (supra) are as under :-

> *"6. The Apex Court in its recent judgment on this subject in Pr. CIT v. Maruti Suzuki India Ltd. [2019] 107 taxmann.com 375/265 Taxman 515/416 ITR 613, considered the judgment of Sky Light Hospitality LLP (supra) of the Apex Court and said that the Apex Court has expressly mentioned that in the peculiar facts of that case wrong name given in the notice was merely a clerical error. The Apex Court in Maruti Suzuki India Ltd. (supra), has also observed that what weighed in the dismissal of the Special Leave Petition were the peculiar facts of that*

case. The Apex Court has reiterated the settled position that the basis on which jurisdiction is invoked is under section 148 of the Act and when such jurisdiction was invoked on the basis of something which was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation, the notice is bad in law. The Apex Court has held as under :

> *In the present case, despite the fact that the Assessing Officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a coordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Enfotainment on 2 November 2017. The decision in Spice Enfotainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Enfotainment.*

7. This quotation squarely applies to this case at hand. In the case at hand as well, the indisputable fact is respondent no. 1 has invoked jurisdiction by issuing notice under section 148 of the Act to an entity that had ceased to exist. This is notwithstanding the fact that respondent no. 1 was aware that Niraj Realtors had ceased to exist..... .”

Again Hon’ble Bombay High Court in the case of Vahanvati Consultants (P.) Ltd. vs. ACIT, 448 ITR 258 (Bom.) reiterated the same position of law.

15. On the similar lines, there are decisions of Karnataka High Court in the case of eMudhra Ltd. vs. ACIT, 15 ITR-OL 249 (Kar.) and Gayatri Microns Ltd. vs. ACIT, 424 ITR 288 (Guj.). However,

a contrary view was taken by the Hon'ble Madras High Court in the case of Oasys Green Tech Pvt. Ltd. vs. ITO 426 ITR 124 (Mad.).

16. Subsequently, even the Hon'ble Supreme Court in the case of PCIT vs. Mahagun Realtors (P.) Ltd., 443 ITR 194 (SC) considering the conduct of the assessee that no intimation by the assessee regarding the amalgamation of the company and the original return of income was not even revised, though the time was available after the amalgamation and the assessee company had fully held it itself as an assessee before all forums, held that the assessment made in the name of amalgamating company is valid in law. On perusal of the decision of the Hon'ble Supreme Court in the case of Mahagun Realtors (P) Ltd. (supra), it can be discerned that the decision was rendered based on the conduct of the assessee before all the forums. The Hon'ble Supreme Court itself had observed vide para 33 of the said decision that the facts in the cases of Maruti Suzuki India Ltd., Spice Enfotainment Ltd. referred supra were distinguishable. What weighed with Hon'ble Supreme Court in arriving at the conclusion reached is that the assessee had deliberately mislead the Department by not informing the Assessing Officer as well as the CIT(A) the factum of amalgamation. Thus, it is clear that the decision in the Mahagun Realtors (P.) Ltd. (supra) was rendered in the peculiar

facts of that case. The Hon'ble Supreme Court had not expressly overruled its earlier decision, rendered in the case of Maruti Suzuki India Ltd. (supra) (A decision rendered by Bench of three Judges). The Hon'ble Supreme Court had not laid down a proposition that even if the factum of amalgamation was brought to the notice of the AO, still an assessment can be made in the name of the amalgamating company. In our considered opinion, this decision is not an authority of proposition, that an assessment can be made in the name of non-existing entity, even though the Assessing Officer was put on notice of factum of amalgamation.

17. In the present case, it is undisputed position that the factum of the amalgamation was put to notice of the AO. This fact made a lot of difference not to apply the ratio of the decision in the case of Mahagun Realtors (P.) Ltd. (supra). The Hon'ble Supreme Court in the case of Padmusundara Rao (Dead) & Ors. Vs. State of T.N. & Ors. (Civil Appeal Nos.2226 of 1997 and 2058 of 2002) held that the Courts should not place reliance on the decision without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. One additional or different fact may make a world of difference between conclusions in two cases. The relevant observation of the Hon'ble

Supreme Court in the case of Padmusundara Rao (Dead) & Ors. (supra) is as under :-

> *"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington Vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."*

18. The Hon'ble Supreme Court in the case of CIT vs. Sun Engineering Works Pvt. Ltd. 198 ITR 297 (SC) vide para 37 observed as under :-

> *"37. ..... . It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a latter case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India [1971] 3 SCR 9 this Court cautioned:*
>
> > *"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."*

19. In the light of above discussion, we are of the considered opinion that the decision of the Hon'ble Supreme Court in the case of Mahagun Realtors (P.) Ltd. (supra) cannot be interpreted to mean that even in the case where the factum of amalgamation was put to the notice of AO, still the assessment made in the name of amalgamating company i.e. non-existing company is valid in law.

20. The fact situation of the present case squarely falls within fact situation of the cases of Maruti Suzuki India Ltd., Spice Enfotainment Ltd. referred supra and the decision of the Hon'ble Bombay High Court in the case of Alok Knit Exports Ltd. vs. DCIT, 446 ITR 748 (Bom.) and Teleperformance Global Services Pvt. Ltd. vs. ACIT, 435 ITR 725 (Bom.).

21. Therefore, we have no hesitation to hold that the assessment order passed by the Assessing Officer in the name of non-existing entity is *null and void ab initio*. Accordingly, we hereby quash the assessment order.

22. In the result, the Cross Objection filed by the assessee stands allowed.

23. Now, we shall take up the appeal of the Revenue in ITA No.46/PUN/2021. Since the assessment order is quashed, the

appeal of the Revenue becomes infructuous and hence the same is dismissed. Thus, the appeal filed by the Revenue stands dismissed.

24. To sum up, the Cross Objection filed by the assessee stands allowed and the appeal filed by the Revenue stands dismissed.

Order pronounced on this 02nd day of January, 2022.

Sd/-	**Sd/-**
(S. S. VISWANETHRA RAVI)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 02nd January, 2022.
Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-13, Pune.
4. The Pr. CIT-1, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**C**" बेंच, पुणे / DR, ITAT, "**C**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.