REPORTABLE

IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **ITA 475 OF 2011**
&
ITA 476 OF 2011

% JUDGMENT RESERVED ON:31.05.2011
JUDGMENT DELIVERED ON:03.8.2011

(1) ITA 475 OF 2011

SPICE ENTERTAINMENT LTD. ….APPELLANT
Through: Mr.Ajay Vohra, Advocate with Ms.Kavita Jha and Mr.Somnath Shukla, Advocates.

VERSUS

COMMISSIONER OF SERVICE TAX ….RESPONDENT
Through: Mr. Sanjeev Rajpal, Advocate.

(2) ITA 476 OF 2011

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CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI,J.

1. The relevant facts giving rise to the filing of these appeals, which touch upon the questions of law raised, are as follows:-

For the previous year relevant to the assessment year 2002-03, Spice Corp Ltd. (hereinafter referred to as the amalgamating company) filed its return of income on 30th October, 2002 declaring 'NIL' income. Subsequently, vide order dated 11th February, 2004, passed by this Court, the said company stood amalgamated with M/s MCorp Private Limited (hereinafter referred to as the amalgamated company) with effect from 1st July, 2003. The aforesaid return was selected for scrutiny and notice dated 18th October, 2003 was issued by the Assessing Officer under Section 143 (2) of the Act in the name of "Spice Corp. Ltd.", the amalgamating company. The factum of Spice Corp Ltd, having been dissolved, as a result if its amalgamation with MCorp Private Limited was duly brought to the notice of the Assessing Officer vide letter dated 2nd April, 2004. Despite the aforesaid, the Assessing Officer, vide order dated 28th March, 2005 passed under Section 143 (3) of the Act, framed the assessment on Spice Corp Ltd, the amalgamating Company. The aforesaid assessment order dated 28th March, 2005 was appealed against by MCorp Global Pvt. Ltd. (erstwhile MCorp Pvt. Ltd) before the Commissioner of Income-Tax (Appeals), inter alia, on the ground that the same was bad in law and void ab initio, the assessment having been framed upon and in the name of a non-existent entity. The CIT (A), however, rejected the

aforesaid ground, though on merits, the appeal was allowed and all additions/disallowances were deleted.

2. Aggrieved by the deletion of the additions/disallowances, the Revenue carried the matter in further appeal to the Tribunal. The appellant also filed cross objections, assailing the order of the CIT (A) on the ground that the assessment order, having been passed in the name of Spice Corp Ltd., a non-existent entity, was bad in law and void ab-initio.

Dismissing the submissions made by the appellant in respect of the above ground, the Tribunal held that the mere failure of the Assessing Officer to mention the name of the amalgamated company in the assessment order did not vitiate the assessment as a whole since the assessment was, in substance and effect, made on the amalgamated company viz. MCorp Global (P) Ltd. and on the non-existent entity, viz Spice Corp Ltd. The Tribunal further held that the omission to mention the name of the amalgamated company in the assessment order was a mere procedural defect and, in terms of the provisions of Section 292B of the Act, such assessment was not invalid. In arriving at the aforesaid conclusion, the Tribunal laid emphasis on the fact that there was sufficient representation and participation of the amalgamated company before the Assessing Officer during the course of the assessment proceedings, and that the amalgamated company had preferred an appeal to CIT (A) against the assessment order. The Tribunal has accordingly remanded the file back to the Assessing Officer for framing afresh assessment in the

name of the present appellant on the ground that framing of the assessment in the name of "Spice Corp Ltd" was a mere technical error.

3. In this backdrop, the question that arises for consideration is as to whether the assessment in the name of a company which had been amalgamated and had been dissolved with the said amalgamating company will be null and void or whether framing of assessment in the name of such a company is a mere procedural defect which can be cured. The appeals were, thus, finally admitted and heard on the following questions of law:-

> "(i) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the action of the Assessing Officer in framing assessment in the name of "Spice Corp Ltd", after the said entity stood dissolved consequent upon its amalgamation with Mcorp Private Limited w.e.f 01.07.2003, was a mere "procedural defect"?
>
> (ii) whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that in view of the provisions of section 292B of the Act, the assessment, having in substance and effect, been framed on the amalgamated company which could not be regarded as null and void?"

4. The rationale given by the Tribunal, giving it to be a mere procedural defect is summed up as under:-

(i) Spice Corporation Ltd. (the amalgamating company) was an income tax assessee in the status of a company incorporated under the provisions of Companies Act, 1956.

(ii) The amalgamating company was in existence during the relevant assessment year, 2002-03 and 2003-04.

(iii) The return of income for these assessment years were filed on 30th November, 2002 and on 30th October, 2003 respectively by M/s Spice.

(iv) The scheme of amalgamating was sanctioned much subsequently on 11th February, 2004 by the High Court.

(v) The return filed by M/s Spice was selected for scrutiny and notices were issued. Pursuant thereto, the amalgamated company i.e. the appellant appeared and participated in the proceedings. Even the assessment orders were challenged by the appellant/amalgamated company. Thus, the appellant accepted that the assessment proceedings in respect of the assessment of Spice for the period prior to its amalgamation are being taken up against the appellant and it is the appellant which felt aggrieved of the assessment order and preferred appeal. The order was thus in substance and in fact, against the appellant/amalgamated company. The mere omission on the part of the AO to mention the name of the appellant/amalgamated company in place of M/s Spice was, therefore a procedural defect covered by the provisions of section 292B of the Act.

5. According to the Tribunal, if the Spice was non-existent, there was no reason for the amalgamation company to represent the same or to feel aggrieved against the

said order and preferred appeal and get the same decided on merits. In other words, any appeal preferred by a non-existence person must also be treated as *non-est.* All these acts of the appellants/ amalgamated company clearly show that it had been constantly treated the assessment made against the appellant in respect of the assessment of amalgamated company. Further, no prejudice is caused to the assessee merely because in the body of the assessment order name of the amalgamated company is not shown.

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 liaiblity, 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 amount 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 the

> notice, 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.

18. We may, however, point out that the returns were filed by M/s Spice on the day when it was in existence it would be permissible to carry out the assessment on the basis of those returns after taking the proceedings afresh from the stage of issuance of notice under Section 143 (2) of the Act. In these circumstances, it would be incumbent upon the AO to first substitute the name of the appellant in place of M/s Spice and then issue notice to the appellant. However, such a course of action can be taken by the AO only if it is still permissible as per law and has not become time barred.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

AUGUST 3,2011
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