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

Decided on: 22nd January, 2015

\+ **ITA 441/2013**
\+ **ITA 444/2013**
\+ **ITA 445/2013**
\+ **ITA 446/2013**
\+ **ITA 452/2013**
\+ **ITA 461/2013**

COMMISSIONER OF INCOME TAX (C)-II ..... Appellant
Through Mr. N P Sahni, Sr. Standing Counsel with Mr. Nitin Gulati and Mr. Judy James, Jr. Standing Counsel

versus

MICRA INDIA PVT LTD ..... Respondent
Through Mr. Salil Kapoor and Mr. Vikas Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The present appeals of the revenue are directed against common order of the Income Tax Appellate Tribunal (hereinafter, "ITAT") dated 21.9.2012 passed in ITA Nos. 1060-1065/Del./2012. The question of law sought to be urged by the revenue is whether in the facts and circumstances of the case, the notice issued under Section 153C/143(3) of the Income Tax Act, 1961

(hereinafter, "the Act") to M/s Micra India Pvt. Ltd. was binding and could have been proceeded with further.

2. The facts necessary to decide the case are that the original assessee, M/s Micra India Pvt. Ltd., was assessed in the regular course of its business for assessment years 2003-04 through 2008-09. Proceedings under Section 391 of the Companies Act were initiated to amalgamate the said assessee (M/s Micra India Pvt. Ltd.) with M/s Dynamic Buildmart (P) Ltd. (hereinafter referred to as "transferee"). The order sanctioning the amalgamation scheme was made by this Court on 22.12.2009; in its terms the appointed date was 01.04.2008. In other words, the amalgamation was w.e.f. 01.04.2008. In terms of the sanctioned scheme, the liabilities of the transferor company, i.e. the original assessee M/s Micra India Pvt. Ltd., were to be taken over and discharged by the transferee. For the subsequent period, i.e. 2009-10 and 2010-11, comprehensive returns were filed by transferee-company at the relevant time. Accordingly, the fact of amalgamation was communicated to the revenue on 06.05.2010. While so, on 08.09.2010, the revenue issued notice under Section 153C to M/s Micra India Pvt. Ltd. (which had ceased to exist by then) on the basis of a search conducted in the premises of some other parties (including M/s Madhusudan Buildcon Pvt. Ltd. and M/s Mayank Traders Pvt. Ltd.) on 20.10.2008. In response to the notice under Section 153C, the assessee in its return filed on 02.11.2010 contended that the proceedings were illegal, bad in law and without jurisdiction. Subsequently, the assessee in its response dated 22.11.2010 to the AO's questionnaire stated that, *inter alia*, the assessee had ceased to exist on account of the dissolution consequent upon amalgamation

sanctioned by this Court on 22.12.2009 w.e.f 1.4.2008. The AO, however, completed the assessment in respect of the transferor company. The assessee's contention that the order was invalid ultimately prevailed with the ITAT, which held that since the assessee had amalgamated with the transferee company, notice ought to have been sent to the latter, and since such notice had not been issued to the transferee company, the entire proceedings were a nullity.

3. It is urged on behalf of the revenue that the ITAT fell into error in not noticing that the assessee, at the initial stages of the proceedings before the assessing officer, did not object to the proceedings and did not rely upon the amalgamation. It was contended that in these circumstances, the ITAT should not have interfered with and quashed the assessment. Counsel for the revenue argued that after receiving the notice under Section 153C, the assessee participated in the proceedings. The AO, in fact took note of the change resultant from the amalgamation and reflected that in the assessment order. The revenue further argues that having participated in the assessment proceedings, it is not open to the assessee to contest their validity; it relies upon Section 292B of the Act in support of this contention.

4. Learned counsel for the assessee argued that the proceedings against M/s Micra India Pvt. Ltd. abated with its dissolution, consequent upon its amalgamation with the transferee company. This event was notified well in advance by the transferee company, which had even reflected the income and other related matters of the transferor company for the relevant period. Even after receipt of notice under Section 153C, the transferee company intimated about amalgamation. Yet the final assessment order of the AO was

in respect of a company which did not exist on the date of the assessment. It was, therefore, urged that the impugned order of the ITAT should be left undisturbed.

5. Counsel for the assessee relies upon the decision of the Supreme Court in *Saraswati Industrial Syndicate* v. *CIT*, 1990 Supp. 1 SCR 332 and two rulings of this Court : *Spice Entertainment Ltd* v. *CIT* (ITA 475/2011; reported in 2012 (280) ELT 43) and *CIT* v. *Vivid Marketing Servicing Pvt. Ltd.* (ITA 273/2009). In *Spice Entertainment* (supra) this Court held as follows:

> *"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"*
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> *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 provision 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."*

6. In a case of amalgamation, the predecessor of the assessee (being a dissolved company) "cannot be found". Consequently, Section 170(2) of the Act 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 previous 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, however, urges 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. In *Saraswati Industrial Syndicate* (supra) it was 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."*

In *Vivid Marketing* (supra), this court held:

> *"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 assessment order passed against the company which was not in existence as on that date in the eyes of law it had already been dissolved."*

It was further held that Section 176 of the Act, which enacts provisions relating to discontinuation of business, does not apply to a case of amalgamation/dissolution. It was further held that Section 159 of the Act, which provides for tax liability to be attached to the legal representatives of a deceased person, is also inapplicable. The language of Section 159 *ex-facie* applies to natural persons, and cannot be extended, through a legal fiction, to the dissolution of companies.

9. There is another aspect in these appeals, which is the applicability of Section 292B of the Act. Section 292B, *inter alia*, prescribes that proceedings etc. initiated cannot be deemed invalid *"merely by reason of mistake, defect or omission"* in any return of income, assessment or notice. The revenue had argued that this provision neutralizes procedural defects in jurisdiction. In these circumstances, it was submitted, having regard to the assessee's omission to urge the so-called illegality at the threshold, the Court

ought to interfere with the order of the ITAT. This question, too, has been dealt with - in *CIT v. Dimension Apparels Pvt. Ltd.* reported in (2015) 370 ITR 288. In that case, after noticing Section 292B, the Court discussed the ruling in *Spice Entertainment* (supra), wherein it had been held that since the assessment made in such cases is against an amalgamated company in respect of income of the amalgamating company for the period prior to the amalgamation, the income tax authorities are nevertheless under an obligation to substitute the successor in place of the amalgamated company. Thus, *"such a defect cannot be treated as procedural defect"*. In any event, it is to be noted that the fact of amalgamation of the assessee with the transferee company had been intimated and disclosed in response to the notice under Section 153C on 22.11.2010. Accordingly, this ground, too, has no merit and is rejected.

10. In the present case, no doubt there was participation during the course of assessment; however, the AO, despite being told that the original company was no longer in existence, did not take remedial measures and did not transpose the transferee as the company which had to be assessed. Instead, he resorted to a peculiar procedure of describing the original assessee as the one in existence; the order also mentioned the transferee's name below that of M/s Micra India Pvt. Ltd. Now, that did not lead to the assessment being completed in the name of the transferee company. According to the AO, M/s Micra India Pvt. Ltd. was still in existence. Clearly, this was a case where the assessment was contrary to law, as having being completed against a non-existent company. The ITAT's decision is, in the circumstances, justified and warranted.

11. For the above reasons it is held that these appeals do not involve any substantial question of law and of liability. The appeals are accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

JANUARY 22, 2015
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