

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

ITA NO. 4593/MUM/2011 : (A.Y : 2006-07)

M/s. Instant Holdings Ltd., (Successor to Instant Trading & Investment Company Ltd.) Ceat Mahal, 463, Dr. Annie Besant Road, Worli, Mumbai 400 030 (Appellant) PAN : AABCI7916B	Vs.	ACIT, Circle-6(1), Mumbai (Respondent)
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ITA NO. 4748/MUM/2011 : (A.Y : 2006-07)

ACIT, Circle-6(1), Mumbai (Appellant)	Vs.	M/s. Instant Holdings Ltd., (Successor to Instant Trading & Investment Company Ltd.) Ceat Mahal, 463, Dr. Annie Besant Road, Worli, Mumbai 400 030 (Respondent) PAN : AABCI7916B
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**Assessee by : Shri Dilip S. Damle
Revenue by : Shri Neil Philip (DR)**

**Date of Hearing : 18/02/2016
Date of Pronouncement : 09/03/2016**

ORDER

PER G.S. PANNU, AM :

These are cross-appeals filed by the assessee and the Revenue against the order of CIT(A)-14, Mumbai dated 31.03.2011, pertaining to the Assessment Year 2006-07, which in turn has arisen from the order

passed by the Assessing Officer dated 12.12.2009 under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. In brief, the background of the dispute is that a return of income was filed by the assessee, M/s. Instant Trading & Investment Company Ltd. (in short 'ITICL') for Assessment Year 2006-07 declaring a loss of Rs.5,24,13,838/- which was subject to scrutiny assessment u/s 143(3) of the Act whereby the total income has been assessed at Rs.2,89,19,530/- after making certain disallowance/additions. The appeal of the assessee was partly allowed by the CIT(A). Against some of the reliefs granted by the CIT(A), Revenue is in appeal before us whereas the assessee is in appeal on the points held by the CIT(A) against the assessee. Accordingly, cross-appeals have been preferred by the assessee and the Revenue before us.

3. At the time of hearing, the first and the foremost plea raised by the assessee was to the effect that the impugned assessment order finalized by the Assessing Officer in the name of ITICL was a nullity in the eyes of law because on the date of passing of the assessment order, the said concern, i.e. ITICL, was not in existence inasmuch as it stood amalgamated with one M/s. Instant Holdings Ltd. (in short 'IHL'). Since this plea of the assessee goes to the root of the matter and it has been contested by the assessee even before the lower authorities, we heard the said plea at the threshold itself.

4. In this context, the relevant facts are that ITICL was a company incorporated under the Companies Act, 1956 on 16.2.1987 and was engaged in the business of investment in shares and securities. A

composite scheme of arrangement u/s. 391/394 of the Companies Act, 1956 was presented before the Hon'ble Bombay High Court by ITICL alongwith three other corporate entities, viz., RPG Life Sciences Ltd., RPG Pharmaceuticals Ltd. and Instant Holdings Ltd. In terms of a scheme of arrangement approved by the Hon'ble Bombay High Court vide order dated 14.12.2007, *inter alia*, the entire assets and liabilities of ITICL vested in IHL with effect from the appointed date, i.e., 1.4.2007. The learned representative for the assessee explained with reference to the Paper Book that the copy of order of the Hon'ble Bombay High Court was filed with the Registrar of Companies alongwith Form No. 21 on 5.2.2008 and accordingly, for all intents and purposes ITICL stood dissolved w.e.f. 5.2.2008 on the records of the Registrar of Companies also. The aforesaid factual position is not in dispute and is in fact borne out of the relevant material placed in the Paper Book filed before us, viz., order of the Hon'ble Bombay High Court, copy of Form No. 21 filed with the Registrar of Companies, copy of the scheme of arrangement approved by the Hon'ble Bombay High Court, etc.

5. For the assessment year under consideration, i.e., Assessment Year 2006-07, ITICL filed a return of income on 27.11.2006, which was taken up for scrutiny assessment u/s. 143(3) of the Act. The learned representative for the assessee explained that in the course of the assessment proceedings, the authorized signatory of the erstwhile ITICL vide letter dated 2.12.2008 informed the Assessing Officer the fact of amalgamation of ITICL with IHL, enclosing copies of the relevant order of the Hon'ble Bombay High Court, scheme of arrangement, etc. The grievance of the assessee is that the subsequent assessment order finalized by the Assessing Officer on 19.12.2008 is in the name of

ITICL, which is a non-existent assessee as on the date of passing of the assessment order. Therefore, according to the learned representative such an assessment is a nullity in the eyes of law and deserves to be set-aside. In this connection, heavy reliance has been placed on the judgement of the Hon'ble Delhi High Court in the case of *Spice Infotainment Ltd. (ITA No. 475 & 476 of 2011 dated 3.8.2011)*, copy of which has been placed on record. The said judgement has been relied upon for the proposition that once it is found that the assessment is framed in the name of a non-existing entity, it does not remain a mere procedural irregularity and rather it amounts to a jurisdictional defect as there cannot be any assessment against a dead person. Further, the learned representative submitted that similar view has been expressed by the Hon'ble Karnataka High Court in the case of *CIT v. Intel Technology India Pvt. Ltd. (57 Taxmann.com 159)* following the decision of the Hon'ble Delhi High Court in the case of *Spice Infotainment Ltd. (supra)*. The learned representative also referred to a subsequent judgement of the Hon'ble Delhi High Court in the case of *CIT Central v. Micra India Pvt. Ltd. (57 Taxmann.com 163)* wherein also a similar proposition has been upheld by following its earlier judgement in the case of *CIT v. Dimensions Apparel Pvt. Ltd. (370 ITR 288) (Del)*.

6. On the other hand, the learned Departmental Representative (in short 'the DR') appearing for the Revenue has reiterated the reasoning taken by the CIT(A). According to the ld. DR, the return of income for assessment year under consideration, i.e., Assessment Year 2006-07, was filed in the name of the predecessor company, i.e. ITICL, and that the amalgamation took place w.e.f. 1.4.2007, which is relevant for Assessment Year 2008-09 and not for Assessment Year 2006-07 under

consideration; thus, according to him, the Assessing Officer has rightly made the assessment in the name of the predecessor company as during the previous year relevant to the assessment year under consideration, such company, i.e. ITICL, was in existence. Therefore, as per the Id. DR, CIT(A) was justified in rejecting the plea of the assessee in this regard.

7. We have carefully considered the rival submissions. The crux of the controversy in the present appeal revolves around the validity of the action of the Assessing Officer in finalizing the assessment order on 19.12.2008 in the name of ITICL, a company which was non-existent as on that date, since it stood amalgamated with IHL w.e.f. 1.4.2007 and stood dissolved and struck-off from the records of the Registrar of Companies on 5.2.2008 consequent to the scheme of amalgamation approved by the Hon'ble Bombay High Court on 14.12.2007.

8. In the case of Spice Infotainment Ltd. (supra), the facts were that a return was filed for Assessment Year 2002-03 on 30.10.2002 by M/s. Spice Corp Ltd., i.e., the amalgamating company. Subsequently, vide order dated 11.2.2004 passed by the Hon'ble High Court, the said company stood amalgamated with M/s. MCorp Private Ltd., i.e., the amalgamated company w.e.f. 1.7.2003. The return so filed was picked up for scrutiny assessment vide notice u/s. 143(2) of the Act dated 18.10.2003 in the name of M/s. Spice Corp Ltd., i.e., the amalgamating company. In the course of assessment proceedings, the factum of M/s. Spice Corp Ltd. having been dissolved as a result of amalgamation with M/s. MCorp Private Ltd. was brought to the notice of the Assessing Officer. However, the Assessing Officer vide order dated 28.3.2005

passed u/s. 143(3) of the Act framed the assessment on M/s. Spice Corp Ltd., i.e., the amalgamating company. In this factual background, the plea raised by the assessee before the Hon'ble High Court was that the assessment was framed against a non-existing entity as M/s. Spice Corp Ltd. had already amalgamated with M/s. MCorp Private Ltd., and therefore, the assessment order dated 28.3.2005 suffered from a jurisdictional defect. In that case, the Tribunal had taken a view that the action of the Assessing Officer in framing assessment in the name of M/s. Spice Corp Ltd. even after the said entity stood dissolved consequent upon its amalgamation with M/s. MCorp Private Ltd. w.e.f. 1.7.2003 was a mere procedural defect. In this background, the Hon'ble Delhi High Court formulated 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?”

9. The Hon'ble Delhi High Court after referring to the judgement of the Hon'ble Supreme Court in the case of (i) *Saraswati Industrial Syndicate v. CIT*, 186 ITR 278 and (ii) *General Radio and Appliances Co. Ltd. v. M.A. Khader* (1986) 60 Comp Case 1013 held that framing of assessment against a non-existing entity goes to the root of the matter, which did not constitute a procedural irregularity but a jurisdictional

defect. Accordingly, it answered the aforesaid questions of law in favour of the assessee and against the Revenue and allowed the stand of the assessee.

10. Similarly, even in the case of Intel Technology India Pvt. Ltd. (supra) the Hon'ble Karnataka High Court has reached to a similar conclusion. In the case before the Hon'ble Karnataka High Court, one M/s. SSS Ltd. stood amalgamated with Intel Technology India Pvt. Ltd. w.e.f. 1.4.2004; prior to that, it filed a return of income on 28.11.2003 for Assessment Year 2003-04 and an assessment order was passed on 27.3.2006 in the name of the predecessor amalgamating company, i.e., M/s. SSS Ltd. This assessment order was sought to be challenged on the ground that as on 27.3.2006, i.e., the date of passing of assessment order, the said concern had ceased to exist upon its amalgamation with the successor company. In this factual background, the Hon'ble Karnataka High Court, following the judgement of the Hon'ble Delhi High Court in the case of Spice Infotainment Ltd. (supra), answered the following questions of law in favour of the assessee and against the Revenue.

“(1) Whether the Tribunal was correct in holding that the order passed by the Assessing Officer on M/s Software & Silicon Systems India Pvt. Ltd., after being intimated about the merger with M/s Intel Technology India Pvt. Ltd., was without jurisdiction against the said company and null and void ?

(2) Whether the Tribunal was correct in holding that the provisions of section 292B of the Act will not make the assessment valid as a defect/omission to incorporate the name of M/s Intel Technology India Pvt. Ltd., in the assessment order as the same is not in substance and effect in confirmative with or according to the intend and purpose of this Act ?

(3) Whether the Tribunal has to examine the matter on merits and record finding on the controversy raised before it both by the revenue as well as the assessee in their separate appeals ?”

11. To the similar effect are the judgements of the Hon'ble Delhi High Court in the case of Dimensions Apparel Pvt. Ltd. and Micra India Pvt. Ltd. (supra). Apart therefrom, the judgement of the Hon'ble Calcutta High Court in the case of *I.K. Agencies (P) Ltd. v. Commissioner of Wealth Tax, 347 ITR 664* also supports the proposition sought to be canvassed by the assessee before us. In sum and substance, it is safe to deduce that an order of assessment made on an entity which is otherwise non-existent on the date of such assessment is invalid.

12. Factually speaking, in the present case the aforesaid proposition applies on all fours, as before the finalization of the impugned assessment on 19.12.2008, it was brought to the notice of the Assessing Officer that ITICL stood amalgamated with IHL w.e.f. 1.4.2007 in terms of a scheme of amalgamation approved by the Hon'ble High Court vide order dated 14.12.2007. In our considered opinion, the aforesaid error on the part of the Assessing Officer is liable to be construed as a jurisdictional defect which goes to the root of the matter and such an assessment order is liable to be set-aside. We hold so. At this point, we may take note of the argument set up by the Revenue, which is to say that the amalgamating company, i.e., ITICL was in existence throughout the previous year relevant to assessment year under consideration, and therefore, the order passed in the name of the amalgamating company, i.e., ITICL was a valid assessment. The aforesaid reason has prevailed with the CIT(A) also to reject the plea of the assessee. In our considered opinion, the aforesaid argument of the Revenue deserves to be repelled

considering the ratio of the judgement of the Hon'ble Delhi High Court in the case of Spice Infotainment Ltd. (supra). A reading of the judgement of the Hon'ble Delhi High Court in Spice Infotainment Ltd. (supra) reveals that a similar position was canvassed by the Revenue, but the Hon'ble High Court held that the assessment order passed in the name of the erstwhile company was void and such a defect cannot be treated as a procedural defect. In our considered opinion, the stand of the Revenue as well as the CIT(A) on this aspect is clearly untenable having regard to the aforesaid discussion.

13. In the result, we set-aside the action of the Assessing Officer in framing the assessment against ITICL on 19.12.2008 as the said company was non-existent as it stood amalgamated with IHL w.e.f. 1.4.2007, following the scheme of amalgamation approved by the Hon'ble Bombay High Court on 14.12.2007. Since we have approved the preliminary plea of the assessee, which goes to the root of the matter and the assessment has been set-aside as invalid, the necessity of examining the other Grounds raised by the assessee and the Revenue in the cross-appeals is obviated.

14. Thus, in conclusion we allow the appeal of the assessee, as above and dismiss the appeal of the Revenue.

Order pronounced in the open court on 9th March, 2016.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Date : 9th March, 2016

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "I" Bench, Mumbai
- 6) Guard file

By Order

SSL

Dy./Asstt. Registrar
I.T.A.T, Mumbai