

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'C', KOLKATA**

[Before Shri P.M. Jagtap, AM and Shri Aby. T. Varkey, JM]

**I.T.A. No. 674/Kol/2016
Assessment Year: 2008-09**

***M/s. Basundhara Goods (P) Ltd.....Appellant
(Formerly merged with Param Mitra Investments Ltd.)Kolkata
129, Transport Centre,
Rohtak Road, Punjabi Bagh,
New Delhi - 110 035
[PAN : AADCB 1931 H]***

***Income Tax Officer Kolkata.....Respondent
Ward 5(4),
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata - 700 069***

Appearances by:

Shri Ravi Tulsian, FCA appearing on behalf of the Assessee.

Shri P.K. Srihari, CIT (DR) appearing on behalf of the Revenue.

Date of concluding the hearing : March 16, 2018

Date of pronouncing the order : March 23, 2018

ORDER

Per P.M. Jagtap, AM

This appeal filed by the assessee is directed against the order of Ld. CIT(A) - 6, Kolkata dated 29.02.2016.

2. The relevant facts of the case giving rise to this appeal are that the assessee is a company which is engaged in the business of share dealing and investment. The return of income for the year under consideration was filed by it on 14.08.2008 declaring a total income of Rs. 749/-. In the assessment originally completed under section 147/143(3) vide an order dated 30.04.2010, the total income of the assessee was determined by the A.O. at Rs. 17,720/-. The said assessment was subsequently set aside by the Ld. CIT vide an order

dated 28.03.2013 passed under section 263 with the direction to the A.O. to complete the assessment afresh after making proper enquiries and examinations in order to verify the genuineness and source of share capital contribution received by the assessee during the year under consideration as well as identity and creditworthiness of the share holders. In pursuance of the Ld. CIT(A)'s order under section 263, fresh assessment was made by the A.O. vide an order dated 25.03.2014 passed under section 143(3)/263/147/143(3) wherein he made the addition of Rs. 15.38 crores to the total income of the assessee by treating the entire share capital contribution including share premium received by the assessee during the year under consideration as unexplained cash credits.

3. Against the order passed by the A.O. under section 143(3)/263/147/143(3), an appeal was preferred by the assessee before the Ld. CIT(A) and vide his appellate order dated 29.02.2016 passed ex-parte, the Ld. CIT(A) confirmed the entire addition of Rs. 15.38 crores made by the A.O. to the total income of the assessee under section 68 by treating the share capital contribution including the share premium received by the assessee during the year under consideration as unexplained cash credits. Aggrieved by the order of the Ld. CIT(A), the assessee has preferred this appeal before the Tribunal.

4. In Ground No. 12 of this appeal, the assessee has raised a preliminary issue challenging the validity of the order of the A.O.

passed under section 143(3)/263/147/143(3) on the ground that the same is passed in the name of non-existent company.

5. The learned counsel for the assessee submitted that the return of income of the assessee for the year under consideration was filed on 14.08.2008 in the name of M/s. Basundhara Goods Pvt. Ltd. and even the assessment 147/143(3) was originally completed by the A.O. on 30.04.2010 in the same name. He submitted that the said company namely M/s. Basundhara Goods Pvt. Ltd. was merged with M/s. Lokseva Textrade Pvt. Ltd. with effect from 19.03.2012 as per the order of the Hon'ble Calcutta High Court passed on 19.03.2012. He submitted that even M/s. Lokseva Text Trade Pvt. Ltd. thereafter was merged with M/s. Param Mitra Investments Pvt. Ltd. with effect from 01.04.2013 as per the order passed by Hon'ble Delhi High Court on 17.12.2013. He contended that even though the Assessing Officer while passing the assessment order under section 143(3)/263/147/143(3) on 25.03.2014 took cognizance of the first amalgamation of M/s. Basundhara Goods Pvt. Ltd. with M/s. Lokseva Textrade Pvt. Ltd., he failed to take into consideration the amalgamation of M/s. Lokseva Textrade Pvt. Ltd. with M/s. Param Mitra Investments Pvt. Ltd. with effect from 01.04.2013. He contended that the order of the A.O. under section 143(3)/263/147/143(3) dated 25.03.2014 thus came to be passed in the name of M/s. Lokseva Textrade Pvt. Ltd. which was not in existence as on 25.03.2014 having already amalgamated with M/s. Param Mitra Investments Pvt. Ltd. with effect from 01.04.2013 as per the order of the Hon'ble Delhi High Court passed on 17.12.2013. He

contended that the order passed by the A.O. under section 143(3)/263/143(3)/147 in the name of non-existent company is invalid and the same is liable to be cancelled. In support of this contention, he relied on the following judicial pronouncements:

1. *M/s. Saraswati Industrial Syndicate Ltd. vs CIT 186 ITR 278 (SC).*
2. *M/s. Spice Infotainment Ltd. vs CIT 247 CTR 500 (Delhi).*
3. *Principal CIT vs Maruti Suzuki India Ltd. 85 taxmann.com 330 Delhi.*
4. *M/s. Pampasar Distillery Ltd. vs ACIT 15 SOT 331 (Kolkata).*
5. *M/s. Pawansut Management Ltd. vs ITO (ITA No. 1524/Kol/2016 dtd. 14.02.2018).*
6. *ACIT vs M/s. Garuda Imaging & Diagnostics (P) Ltd. (ITA No. 449-451/Del/2016 dtd. 05.01.2018).*

6. The Ld. CIT DR, on the other hand, contended that since amalgamated entity had participated in the assessment proceedings without raising any objection, it should be precluded from raising this issue now at this stage before the Tribunal for the first time. He also contended that the defect in passing the assessment order by the A.O. in the name of amalgamating company instead of amalgamated company is curable being a procedural one. He also contended that it is a mere procedural irregularity which can be cured by invoking the provisions of section 292B of the Act.

7. We have considered the rival submissions on this preliminary issue in the light of the relevant facts of the case as well as the material available on record including the judicial pronouncements cited by the learned counsel for the assessee. It is observed that although the return of income for the year under consideration was originally filed in this case on 14.08.2008 in the name of M/s. Basundhara Goods Pvt. Ltd. and even the assessment under section

147/143(3) was originally completed by the A.O. on 30.04.2010 in the same name, the said company namely M/s. Basundhara Goods Pvt. Ltd. had got merged with M/s. Lokseva Textrade Pvt. Ltd. with effect from 19.02.2012. Thereafter even M/s. Lokseva Textrade Pvt. Ltd. also got merged with M/s. Param Mitra Pvt. Ltd. with effect from 01.04.2013 as per the order passed by the Hon'ble Delhi High Court on 17.12.2013. The Assessing Officer while completing the assessment order under section 143(3)/263/147/143(3) on 25.03.2014 however took cognizance only of the first amalgamation of M/s. Basundhara Goods Pvt. Ltd. with M/s. Lokseva Textrade Pvt. Ltd. and passed the assessment order on 25.03.2014 in the name of M/s. Lokseva Textrade Pvt. Ltd. which was not in existence as on 25.03.2014 having already amalgamated with M/s. Param Mitra Investments Pvt. Ltd. with effect from 01.04.2013 as per the order of the Hon'ble Delhi High Court passed on 17.12.2013.

8. In the case of M/s. Saraswati Industrial Syndicate Ltd. (supra) cited by the learned counsel for the assessee, the issue of effect of amalgamation or merger of two or more companies was considered by the Hon'ble Supreme Court and it was held that the amalgamation is a blending of two or more existing undertakings into one undertaking and when one is absorbed into or blended with another, the amalgamating company loses its entity. It was held that when two companies amalgamate and merge into one, their respective rights or liabilities are determined under the scheme of amalgamation but the corporate entity of the transferee company ceases to exist with effect from the date, the amalgamation is made effective.

9. In the case of Spice Infotainment Ltd. (supra), the issue that arose was in the context of the A.O. having framed the assessment in the name of "Spice Corp Limited" after the said entity was dissolved consequent to its amalgamation with "MCorp Private Limited" with effect from 1st July 2003. Like in the present case, even there it was urged by the revenue that this was a procedural defect and since the amalgamated entity had participated in the assessment proceedings without raising any objection, it should be precluded from raising it thereafter. This contention of the revenue however was not accepted by the Hon'ble Delhi High Court. It was held by their Lordships that the assessment order passed in the name of Spice Cork Ltd. after it had ceased to exist with effect from 1st July 2003 after the sanction of the scheme of amalgamation on 11th April, 2004 was void and such a defect could not be treated as a procedural defect. It was held that mere participation by the appellant would be of no effect as there was no estoppel against law. To the similar effect is another decision of Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. (supra) wherein it was held that once it is found that the assessment is framed in the name of non-existent entity, it does not remain only a procedural irregularity of the nature which can be cured by invoking the provisions of section 292B of the Act.

10 In the case of Pampasar Distillery Ltd. vs ACIT 15 SOT 331, the Co-ordinate Bench of this Tribunal also had an occasion to consider a similar issue in the light of Section 170 of the Income Tax Act which

deals with the succession to the business otherwise than on death and it was held by the Tribunal that the provision of Section 170 would be squarely applicable in respect of the case of amalgamation. It was held that by the process of amalgamation, the business which was being carried on by the amalgamating company is succeeded by the amalgamated company which continues to carry on the said business. It was held that the amalgamating company therefore, is assessable in respect of income upto the of amalgamation and after the amalgamation once the amalgamating company is dissolved and does not remain in existence, the income up to the date of amalgamation should be assessed in the hands of amalgamated company being the successor company in the like manner and to the same extent as it would have been assessed in the hands of amalgamating company. The assessment made on the hands of amalgamating company thus was quashed by the Tribunal by holding it as nullity as the same was made in the hands of non-existent company. Similarly the order passed under section 201(1)/201(1A) of the Act in the hands of M/s. Pawansut Management Ltd. vs ITO (ITA 1524/Kol/2016 dtd. 14.02.2008) was annulled by the Co-ordinate Bench of this Tribunal by holding the same as invalid on the ground that there would not be an assessment of a non-existent person. It was held by the Tribunal that the assessment can be made only against a person as defined under section 2(31) of the Act and a company after it is dissolved cannot be said to be a person in terms of the provisions of Section 2(31). It was held that on amalgamation, the amalgamating company ceases to exist in the eyes of the law and there cannot be an assessment of non-existent person.

11. The Delhi Bench of this Tribunal also encountered a similar situation in the case of M/s. Garuda Imaging & Diagnostics (P) Ltd., a company which was merged with M/s. Bhandari Consultancy & Finance Ltd. w.e.f. 1st April, 2009. A search, however, was conducted in the case of the said company and not only a notice under section 153A was issued on 23rd October, 2013 in the same name but even the assessment order under section 153A/143(3) was passed on 30th March, 2015. The said assessment framed under section 153A/143(3) was quashed by the Tribunal vide its order dated 05.01.2018 passed in ITA No. 449-451/Del/2016 holding that the entire proceedings initiated against the assessee company, which did not exist, was void abinitio and bad in law. It was also held by the Tribunal that the fact that the department came to know later on about the merger of the assessee company with the transferee company would not make any difference.

12. Keeping in view the legal position emanating from the various judicial pronouncements discussed above, we are of the view that the assessment made in the present case under section 143(3)/263/147/143(3) in the name of M/s. Lokseva Textrade Pvt. Ltd. on 25.03.2014 when the said company was not in existence having already merged / amalgamated with M/s. Param Mitra Investments Pvt. Ltd. with effect from 01.04.2013 as per the order of the Delhi High Court on 17.12.2013 is a nullity being bad in law and the same is liable to be cancelled. We order accordingly and allow ground no. 12 of the assessee's appeal.

13. At the time of hearing, the learned DR has contended that the A.O. may be directed to pass a fresh assessment order for the year under consideration in the name of the amalgamated company by following the due process of law. In our opinion, the Assessing Officer is at liberty to have such alternative recourse. However, as held by the Delhi High Court in the case of M/s. Spice Infotainment Ltd. (supra) such a course of action can be taken by the A.O. only if it is still permissible as per law and has not become time barred.

14. Keeping in view our decision rendered on the preliminary issue raised by the assessee in ground no 12 cancelling the order passed by the A.O. under section 143(3)/263/147/143(3) by holding the same to be illegal, other grounds raised in this appeal have become infructuous and we do not consider it necessary or expedient to adjudicate upon the same.

15. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 23rd March, 2018.

Sd/-

(Aby.T. Varkey)
JUDICIAL MEMBER

Sd/-

(P.M. Jagtap)
ACCOUNTANT MEMBER

Dated: 23/03/2018
Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. Basundhara Goods (P) Ltd., (formerly merged with Param Mitra Investments Ltd.), 129, Transport Centre, Rahtak Road, Punjabi Bagh, New Delhi – 110 035.
2. ITO Ward 5(4), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Sr. P.S. / H.O.O.
ITAT, Kolkata