IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : A : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.3011/Del/2015
Assessment Year: 2004-05

DCIT, Circle-18(1), New Delhi.	Vs.	NDC Telecommunications India Pvt. Ltd., 4, Central Lane, Bengali Market, New Delhi. PAN: AAACN2219C
(Appellant)		(Respondent)

Assessee by : Shri Salil Kapoor &
Ms Ananya Kapoor, Advocates
Revenue by : Shri B.P. Singh, Sr.DR

Date of Hearing : 15.10.2018
Date of Pronouncement: 16.10.2018

ORDER

PER R.K. PANDA, AM:

This appeal by the Revenue is directed against the order dated 25th February, 2015 of the CIT(A)-6,Delhi relating to Assessment Year 2004-05.

2. The only effective ground raised by the Revenue reads as under:-

> "1. Whether on the facts and circumstances of the case & in law, the ld.CIT(A) was justified in holding that reassessment cannot be made in the case of a dissolved company even for the year in which the company was existing."

3. The facts of the case in brief are that the assessee is a company and filed its return of income on 31st October, 2004 declaring loss of Rs.11,08,72,956/-. The Assessing Officer completed assessment u/s 143(3) on 29th September, 2006 determining the loss at Rs.8,78,79,819/-. Thereafter, notice u/s 148 dated 28th March, 2011 was issued to the assessee. The assessee, in response to the statutory notices, appeared before the Assessing Officer and filed various details as called for. The Assessing Officer completed the assessment determining the loss at Rs.7,27,32,900/-.

4. Before the CIT(A), apart from challenging the additions on merit, the assessee challenged the validity of the notice issued u/s 148 of the IT Act. It was argued that the assessee company got dissolved pursuant to the order of the Hon'ble Delhi High Court passed on 6th August, 2009 whereas the notice u/s 148 of the IT Act was issued to the assessee on 28th March, 2011. The copy of the order of the Hon'ble Delhi High Court was filed before the CIT(A). It was further submitted that although this fact was brought to the notice of the Assessing Officer, vide submissions dated 26th April, 2011, 27th May, 2011 and 30th September, 2011, the Assessing Officer, ignoring the fact that the company did not exist on the date of issuance of the notice u/s 148, passed the reassessment order. Therefore, the same is *void ab initio* and invalid in law. Various decisions were also brought to the notice of the CIT(A) to support the case of the assessee.

5. Based on the arguments advanced by the assessee, the ld.CIT(A) held that the reassessment proceedings initiated by the Assessing Officer and the consequent assessment order passed in the name of the assessee is clearly *void ab initio* and, therefore, he quashed the same. The relevant observations of the CIT(A) from para 4.1 onwards reads as under:-

> "4.1 I have carefully considered the submissions of the A/R of the appellant company, the facts of the case as well as the findings of the A.O. In *Ground no. 1 of appeal* the appellant has taken the plea that the AO has erred by issuing a notice u/s 148 of the Act, 1961 and initiating the reassessment proceedings u/s 147 of the Act, 1961 to a non-existant company as NDC India had been liquidated vide High Court's order dated 6.8.2009. The assessee company was engaged in the business of execution of projects and related services in Telecommunication and Information Technology sector. The Appellant filed its return of income for the Assessment Year 2004-05 on October 31, 2004 declaring a loss of Rs 110,872,956/- which was processed u/s143(1) dated 24.03.2005. Thereafter, the assessment order was passed by the AO under section 143(3) of the Act on September 29, 2006. In the assessment order, the AO reduced the business loss to Rs 87,879,819/- as against the returned business loss of Rs 110,872,956/-. In the meanwhile, the appellant company was dissolved pursuant to the Order of Hon'ble Delhi High Court passed on August 6, 2009 after obtaining "No Objection Certificate" dated December 8, 2006. Thereafter, a notice under section 148 of the Act was issued by the AO to the assessee on March 28, 2011. In reply to the AO the assessee filed letter dated 26.04.2011 stating that assessee company did not exist as it has been dissolved pursuant to order of Hon'ble High Court of Delhi and that the notice under section 148 of the Act cannot be issued to the non-existent company. The above fact was also brought to the notice of the AO by submission dated 27.05.2011 and 30.09.2011. The assessee also submitted before the AO copy of the order of High Court dissolving the assessee company. It was also submitted by the assessee that the return filed under section 139(1) of the Act may be considered as the return filed in response to the notice under section 148. In response to the request of the assessee, reasons recorded for initiating re-assessment proceedings was also provided to the assessee by the AO. The objections raised by the appellant against the proceedings u/s 147 were duly disposed off by the AO vide its order dated August 19, 2011.

4.2 The assessee company NDC Telecommunication India(P)Ltd. got dissolved pursuant to the Order of Hon'ble Delhi High Court passed on August 6, 2009 whereas the notice under section 148 of the Act was issued to assessee on March 28, 2011. This fact was brought to the notice of AO vide submissions dated April 26, 2011, May 27, 2011 and September 30, 2011. As NDC India did not exist on the date of issuance of the captioned notice i.e. March 28, 2011, the re-assessment proceedings initiated by the AO and the reassessment order passed by him are invalid in law, void ab initio and thus cannot be acted upon.

4.3 In CIT Vs. Express Newspapers Limited (40 1TR 38, 57) the Hon'ble Madras High Court has held that "the existence of an assessee is essential for an assessment. There cannot be an assessment of a non-existent person. The definition of the word 'assessee' in the Act would obviously apply to a living person. The assessment made long after a company was struck off from the register of the companies is not valid." The aforesaid decision of the Hon'ble Madras high Court has been affirmed by the Hon'ble Supreme Court in CIT Vs. Express Newspapers Limited [53 ITR 250 (SC)].

4.4 In Hewlett Packard India (P) Ltd Vs. ACIT (ITA No. 4016/Del/05) (ITAT Delhi) the Hon'ble Delhi Tribunal has held that no order can be passed on a non existing company. While passing the said order, the Hon'ble Tribunal referred to its earlier decision in the case of Impsat (P) Ltd Vs. ITO (91 ITD 354) (Del) wherein it was held that "existence of the person sought to be taxed at the point of making the assessment is a condition for the validity of the assessment".

4.5 In Modi Corp Ltd Vs. JCIT (ITA No. 211/Del/2001) (ITAT Delhi) The Hon'ble Tribunal has observed as under:

> "In view of the legal position as laid down in the aforesaid decisions, it is clear that the assessment made in the present case in the name of M/s Calcutta Instalments Company (P.) Ltd after the date of its dissolution was not valid. The fact that this company filed a return of income is not of any consequence. The assessment is, therefore, held to be invalid and is cancelled.
>
> In view of our finding that the assessment is null and void, all the other issues raised in the assessee's appeal as well as its cross-objection and the grounds raised by Revenue in both its appeals do not call for any adjudication. They are, therefore, dismissed as infructuous"

4.6 Hon'ble Jurisdictional High Court has also considered the identical issue in the case of Spice Entertainment Ltd. (supra) and held as under:-

> "11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exist 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 ITA 475/2011 & ITA- 476/2011 Page 9 of 13 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."

4.7 In Impsat (P) Ltd. vs. Income Tax Officer (2005) 92 TTJ (Del) 552 : (2004) 91 ITD 354 (Del) (ITAT Delhi) Hon'ble Delhi Tribunal held as under:

> " It is thus clear that in the present case the assessee-company ceased to exist after being dissolved under s. 560. Once it ceased to exist, there was no question of assessing it for income-tax, as it appears that there is no provision in the present Act to assess a company which is dissolved. Our attention was not drawn to any provision in the Act enabling the AO to do so. Sec. 159 of the present Act does not cure the lacuna……
>
> If the company is not in existence at the time of making the assessment, no order of assessment can be validly passed upon it under the IT Act and if one is passed, it must be a nullity."

4.8 In Commissioner of Income Tax vs Vived Marketing Servicing Pvt. Ltd. - ITA No.273/2009 - Hon'ble Delhi High 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 assessmsent order passed against the company which was not in existence as on that

> date in the eyes of la\y it had already been dissolved. The Tribunal relied upon its earlier decision in Impsat Pvt. Ltd. vs. ITO 276 ITR 136 (AT).
>
> We are of the opinion that the view taken by the Tribunal is perfectly valid and in accordance with law. No substantial question of law arise."

4.9 The facts in the case of the assessee are identical and, therefore, the ratio of the above decision of Hon'ble Courts would be squarely applicable. A company, incorporated under the Indian Companies Act is a Juridical person. It take its birth and gets life with incorporation. It dies with the dissolutions as per the provision of the Companies Act. Having regard to this consequence provided in law, assessment upon a dissolved company is impermissible as there is no provision in income tax to make an assessment thereupon. Therefore, assessment on a company which has been dissolved under the Companies Act, 1956, is invalid. There is no provision in the I. T. Act, to make assessment on dissolved company. When notice u/s 148 was issued and served and when the assessment was made, the assessee was a non-existing entity. Therefore, the proceedings initiated u/s 147 and the consequent assessment order passed in the name of the assessee is clearly void ab initio and as such the same is quashed. Once the assessment order itself is quashed, various additions made by the Assessing Officer do not survive. Therefore, I do not find the need to adjudicate the other grounds of appeal."

6. Aggrieved with the said order of the CIT(A), the Revenue is in appeal before the Tribunal.

7. The ld. Counsel for the assessee, at the outset, filed a series of decisions and submitted that the re-assessment proceedings initiated against a dissolved company/non-existent company is *void ab initio*. Therefore, this being a covered matter in view of the various decisions including the decision of the Hon'ble Delhi High Court in the case of *Spice Entertainment Ltd. vs. CIT 247 CTR 500 (Del)* and *CIT vs. Dimension Apparels Pvt. Ltd., 370 ITR 288 (Del),* the ground raised by the

Revenue should be dismissed. The ld. DR, on the other hand, heavily relied on the order of the Assessing Officer.

8. We have considered the rival submissions made by both the sides and perused the orders of the authorities below. We find the ld.CIT(A) quashed the reassessment proceedings on the ground that the same has been initiated on a non-existing entity and, therefore, the reassessment proceedings are *void ab initio*. We do not find any infirmity in the order of the CIT(A) on this issue. We find the Delhi Bench of the Tribunal in the case of *Vertex Customer Management India Pvt. Ltd. vs. DCIT vide ITA No.966/Del/2016, order dated 6th July, 2018*, has decided an identical issue and quashed the assessment on the ground that assessment has been framed on a non-existent company. The relevant observations of the Tribunal from para 10 onwards read as under:-

> "10. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. It is an admitted fact that the Hon'ble High Court's order in relation to amalgamation was passed effective on 01.04.2011 wherein Vertex Customer Services India Pvt. Ltd. i.e. original entity was merged with Vertex Customer Management India Private Limited i.e. the new entity. From the details filed by the assessee in the Paper Book, we find the assessee vide letter dated 18.07.2014 filed the fact of amalgamation before the TPO. Further from page 134 of the Paper Book, we find the assessee vide letter dated 08.12.2014 submitted before the TPO regarding the fact of amalgamation. However, we find from the order of the TPO that the TPO vide order dated 21.01.2015 has passed the order in the name of the assessee M/s Vertex Customer Services Private Limited. Further from page 2 to 26 of the Paper Book, we find the assessee vide letter dated 23.02.2015 has submitted before the Assessing Officer informing the fact of amalgamation. We find from page 148 of the Paper Book that the draft assessment order was passed on 10.03.2015 in the name of the original entity namely M/s Vertex Customer Services Private Limited. We find

from page 38 of the appeal set that the assessee in his objection before the DRP has filed the same in the name of the merged/new entity i.e. Vertex Customer Management India Private Limited. We find the DRP vide order dated 21.09.2015 had passed the order in the name of M/s Vertex Customer Management India Private Limited i.e. new entity. However, we find from the final assessment order dated 23.10.2015 that the order has been passed in the name of M/s Vertex Customer Services India Private Limited. The above sequence of events shows that despite the Assessing Officer being intimated/informed above fact of amalgamation still the Assessing Officer chooses to pass the assessment order in the name of the non-existent company. Therefore, we find merit in the argument of the ld. counsel for the assessee that since the order has been passed in the name of a non-existent company, therefore, the same has to be quashed and the provisions of section 292B will not come to the rescue of the Department.

11. We find the Hon'ble Delhi High Court in the case of Spice Entertainment Ltd. (supra) has observed as under :-

> "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 292Bof 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."
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> 13. The Punjab & Haryana High Court stated the effect of this provision in CIT Vs. Norton Motors, 275 ITR 595 in the following manner:-
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> "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."

12. We find the SLP filed by the Revenue in the case of Spice Entertainment Ltd. (supra) has been dismissed by the Hon'ble Supreme Court vide Civil Appeal No.285 of 2014 order dated 02.11.2017.

13. We find the Hon'ble Delhi High Court in the case of CIT vs. Dimension Apparels (P.) Ltd. reported in 370 ITR 288 following its earlier decision in the case of Spice Entertainment Ltd. (supra) has observed as under :-

> "19. The question of whether an assessment upon an amalgamated company is a mistake within the meaning of Section 292B was raised and answered by the Delhi High Court in Spice Entertainment Ltd. (supra). In that case, the Tribunal had held that
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> "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." (Emphasis Supplied)
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> 20. This Court rejected this argument, holding that
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> "it [becomes] incumbent upon the Income Tax Authorities to substitute the successor in place of the said 'dead person'. Such a defect cannot be treated as procedural defect... 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." (Emphasis Supplied)
>
> 21. In Spice Entertainment Ltd. (supra) the reason for the inapplicability of Section 292-B was additionally premised on the decision of the Punjab & Haryana High Court in CIT v. Norton Motor, [2005] 275 ITR 595/146 Taxman 701, that while Section 292B can cure technical defects, it cannot cure a "jurisdictional defect in the assessment notice."In Spice Entertainment Ltd. (supra), therefore, this Court expressly classified "the framing of assessment against a non-existing entity/person" as a jurisdictional defect. This has been a consistent position. As early as 1960, in

CIT v. Express Newspapers Ltd. [1960] 40 ITR 38 (Mad), the Madras High Court held that

"there cannot be an assessment of non-existent person. The assessment in the instant case was made long after the Free Press Company was stuck off from the register of the companies, and it could not be valid." (Emphasis Supplied)

22. On the last contention, i.e with respect to participation by the previous assessee, i.e the amalgamating company (which ceases to exist), again Spice Entertainment Ltd. (supra) is categorical; it was ruled on that occasion that such participation by the amalgamated company in proceedings did not cure the defect, because "there can be no estoppel in law." Vived Marketing Servicing (P.) Ltd. (supra) had also reached the same conclusion.

23. It is thus clear that all contentions sought to be urged by the revenue are in respect of familiar grounds, which have been ruled upon, against it, consistently in two decisions of this court. Therefore, no substantial question of law arises in this appeal.

24. Accordingly, there is no merit in the appeals; they are accordingly dismissed along with the pending applications without any order as to costs."

14. Since in the instant case also the assessment has been framed on a nonexistent company, therefore, following the decisions of the Jurisdictional High Court cited (supra), we hold that such assessment is a nullity in the eyes of law. Therefore, the same is quashed. The ground raised by the assessee is accordingly allowed.

15. Since the assessee succeeds on this legal ground, the other grounds being academic in nature are not being adjudicated.

16. In the result, the appeal filed by the assessee is allowed."

9. Similar view was taken by the Tribunal in the case of *M/s Sony Mobile Communications India (P) Ltd. vs. DCIT vide ITA No.554/Del/2015, order dated 6th July, 2018.* Since, in the instant case, the Assessing Officer has issued notice u/s 148 on a non-existent company as the assessee company has been liquidated vide the order

of the Hon'ble High Court dated 06.08.2009, therefore, we do not find any infirmity in the order of the CIT(A) quashing the re-assessment proceedings. We, therefore, uphold the same. The ground raised by the Revenue is, accordingly, dismissed.

10. In the result, the appeal filed by the Revenue is dismissed.

The decision was pronounced in the open court on 16.10.2018.

Sd/-	Sd/-
(KULDIP SINGH) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 16th October, 2018

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Dy. Registrar, ITAT, New Delhi