

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

BEFORE SH. R.K PANDA, ACCOUNTANT MEMBER

ITA No.2183/Del/2018

Assessment Year: 2014-15

Value First Digital Media Pvt. Ltd. Plot No.40, Okhla Industrial Estate, Phase-III, New Delhi-110020 PAN No. AABCV8400B	Vs	Assistant Commissioner of Income Tax Circle – 5 (2) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Arun Chhabra, CA Sh. Gaurav Mital, CA
Respondent by	Sh. Amit Jain, Sr. DR.

Date of hearing:	12/03/2019
Date of Pronouncement:	02/05/2019

ORDER

PER R.K. PANDA, AM:

1. This appeal filed by the assessee is directed against the order dated 12.09.2017 of the CIT(A)-25, New Delhi relating to A. Y. 2014-15.
2. Facts of the case, in brief, are that the assessee is a company and filed its return of income on 29.09.2014 declaring loss of Rs.33,18,009/-. The Assessing Officer completed the assessment u/s 143 (3) on a total income of Rs.11,47,350/- wherein he made addition of Rs.45,35,355/- on account of mismatch in the 26AS income and the income declared in the income tax return.

3. Before CIT(A) the assessee, apart from challenging the addition on merit, submitted that during the year under consideration the assessee company was amalgamated with M/s. Value First Digital Media Private Limited which was the holding company of the assessee. The assessee was amalgamated w.e.f. 01 January 2014 vide scheme of amalgamation between assessee company and M/s. Value First Digital Media Private Limited and their respective shareholders and creditors under sections 391 and 394 of the Companies Act, 1956. The scheme has been sanctioned by the Honourable High Court of Delhi, vide its order dated 11th August 2014 and 19 August 2014. Consequent to the scheme become effective w.e.f. 01st January 2014 the Assessee company stands dissolved without being wound up and was not having legal existence from that date. Therefore, the assessment completed on a non-existent company is not legally valid.

4. However, the Ld. CIT(A) was not satisfied with the arguments advanced by the assessee and upheld the action of the Assessing Officer in making the addition on account of mismatch of the 26 AS figure and the income declared in the return of income. So far as the argument of the assessee that the assessment has been framed of a non-existent company is concerned he rejected the same on the ground that the assessee itself had filed the appeal in the case of a non-existent company and directed the Assessing Officer to bring the amount to tax in the hands of the appropriate entity. The relevant observation of Ld. CIT(A) read as under :-

Perusal of the Written Submissions dated 25.07.17 included in the Paper Book filed on this date revealed that the Appellant Company had stood Dissolved and was not having any Legal Existence. A relevant excerpt from

the Written Submission dated 25.07.17 is as under:

"During the year under consideration the Appellant company was amalgamated with M/s Value First Digital Media Private Limited [Formerly known as ValueFirst Messaging Private Limited) which was the Holding Company of the Appellant. The appellant was amalgamated w.e.f. 01 January 2014. vide Scheme of Amalgamation between Appellant company and M/s Value First Digital Media Private Limited and their respective shareholders and creditors under sections 391 and 394 of the Companies Act, 1956. The Scheme has been sanctioned by the Honorable High Court of Delhi, vide its order dated 11 August 2014 and 19 August 2014. Consequent to the scheme become effective i.e. w.e.f. 01st January 2014 the Appellant Company stands dissolved without being wound up and was not having legal existence from that date."

*8.10 It was thus seen during the appellate proceedings that the Appellant Company stood Dissolved and was not having any Legal Existence from 01.01.14. It was also noticed that the present Appeal was filed on 15.11.16 in the name of M/s Cellnext Solutions Ltd. with the PAN : AABCC3935G. During the appellate proceedings on 24.08.2017, when the case was partly discussed, it was pointed out to Sh. Umesh Chand Goyal, CA and Sh, Ram Avtar Sharma, CA, the Learned Counsels of the Appellant that on one hand it was claimed that the Appellant Company stood Dissolved and was not having any Legal Existence from 01.01.14, but the present Appeal was filed on 15.11,16 in the name of M/s Cellnext Solutions Ltd., and thus the Appeal was filed in the name of a Company which stood Dissolved and was not having any Legal Existence, and that the Learned Counsels were arguing on behalf of a Company which they themselves in the Written Submissions filed by them claimed to be nonexistent. **The Learned Counsels were required to explain as to why the Appeal should not be treated as invalid.***

8.11 However, on the subsequent hearing, i.e. on 06.09.17, Sh. Ram Avtar Sharma, CA, the Learned Counsel of the Appellant attended and filed Written Submissions dated and Application u/s 250(5) seeking permission to raise Additional Grounds, which are reproduced above in

Para 7.2 and 7.3.

8.12 The Order Sheet Entry made in the appellate proceedings on 06.09.17 is as under:

"06.09.17 1. Sh. Ram Avtar Sharma, CA, attended and filed.

i) Letter dated 06.09.17

ii) Application u/s 250 (5) seeking permission to raise Additional Grounds.

iii) Written Submissions dated 06.09.17.

2. It was pointed out to the Learned Counsel that the issue of the Appeal being filed by a Non existing Company was raised by the undersigned on when the Appeal was party discussed. Now, rather than answering that issue, Additional Grounds are being raised.

Case discussed."

8.13 It is seen that once the Learned Counsels Sh. Umesh Chand Goyal, CA and Sh. Ram Avtar Sharma, CA were confronted with the contradiction that on one hand, they claimed that the Appellant Company stood Dissolved and was not having any Legal Existence from 01.01.14, but on the other hand they were vehemently arguing regarding the Appeal filed by a non existing Company ; the Learned Counsels, rather than replying to that query, have sought permission to raise Additional Grounds and filed Submissions dated 06.09.17 regarding such claimed Additional Grounds. In view of the facts of the case, the request to raise such Additional Grounds is hereby rejected.

8.14 In view of the fact that the Appeal was filed on 15.11.16 by the Company which legally should not have any existence, based on the assertions in the Written Submissions dated 25.07.17 Counsels of the Appellant Company itself in the appellate proceedings, the Appeal cannot be entertained and is hereby rejected as an invalid Appeal.

8.15 Further, it is seen that on one hand it is claimed that M/s Cellnext Solutions Ltd. was amalgamated with M/s Value First Digital Media Pvt. Ltd. with effect from 01.01.14, but the entity' i.e. M/s Cellnext

Solutions Ltd. has continued its illegal existence even thereafter and is continuing its activities which is illustrated by the filing of Appeal on 15.11.16, arguments during assessment proceedings and appellate proceedings etc. In view of such situation, the Assessing Officer should take necessary- legal action in the cases of M/s Cellnext Solutions Ltd. and M/s Value First Digital Media Pvt. Ltd., so as to investigate and to bring out the true state of affairs.

8.16 *The Assessing Officer is directed to ensure that the Income for the year under consideration i.e. AY 14-15 is brought to tax in the hands of the appropriate entity.*

5. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds of appeal :-

- 1.0 *That on the facts and in the circumstances of the case and in law, the order passed by the Learned Commissioner of Income-tax (Appeals) ('Ld. CIT(A)') is erroneous and bad in law.*
- 2.0 ***Initiation of assessment proceedings on a non-existent entity***
- 2.1 *On the facts and circumstances of the case and law, the Learned Assessing Officer ('Ld. AO') erred in initiation of assessment proceedings on a non-existent entity which was merged with M/s ValueFirst Digital Media Pvt. Ltd. with effect from January 1, 2014.*
- 2.2 *On the facts and circumstances of the case, the notices issued under section 143(2) of the Act and subsequent assessment order passed under section 143(3) of the Act is bad in law and void ab initio.*
- 2.3 *On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in rejecting the appeal filed by the appellant.*
- 3.0 ***Addition of business income not pertaining to the Appellant***
- 3.1 *Without prejudice to the above, on the facts and circumstances of the case the Ld. AO erred in computing the taxable income of the appellant at Rs. 11,47,346 as against*

returned loss of Rs. 33,88,009 claimed by the appellant.

3.2 *Without prejudice to the above, on the facts and circumstances of the case the Ld. AO erred in making addition amounting to Rs 45,35,355 by treating Business Income of the appellant of AY 2014-15 for rendering services whereas the same does not pertain to the appellant.*

4.0 ***Setting off of unabsorbed depreciation against the assessed income***

4.1 *Without prejudice to the above, the Ld. AO erred in not setting off unabsorbed depreciation of Rs 48,32,999 with the assessed income of Rs 11,47,346 for AY 2014-15.*

6. The Ld. Counsel for the assessee at the outset submitted that the Hon'ble Delhi High Court in the case of Spice Entertainment Limited Vs. CIT vide ITA No.475 and 476 / Del/2011 order dated 03.08.2011 has decided an identical issue and has held that the framing of assessment against the nonexistent 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 dead person. However, the Hon'ble High court has restored the issue to the file of the Assessing Officer to carry the assessment on the basis of those returns after taking the proceedings afresh from the stage of issuance of notice u/s 143 (2) of the IT Act by substantiating the name of the amalgamated company. However, such a course of action can be taken by the Assessing Officer only after it is still permissible as per law and has not become time barred. He accordingly submitted that since the Assessing Officer in the instant case has framed the assessment on a nonexistent company, therefore, the same being null and void, the addition made by the Assessing Officer and upheld by the CIT (A) should be deleted.

7. The Ld. DR on the other hand strongly supported the order of the CIT(A) and submitted that when the assessee has filed the return of income in the name of the company and also filed the appeal on the name of the assessee company and participated during the assessment proceedings as well as the appeal proceedings, the assessee cannot challenge the assessment order to be null and void on the ground that the same has been framed on a nonexistent company.

8. I have considered the rival arguments made by both the sides and perused the orders of the authorities below. I have also considered the various decisions cited before me. The only issue to be decided in the impugned appeal is as to whether the assessment framed in the name of M/s. Cellnext Solution Private Limited instead of Value First Digital India Private Limited is correct as per law or not. It is submission of the Ld. Counsel for the assessee that the assessee M/s. Cellnext Solutions Limited was the holding company of the assessee. The assessee was amalgamated w.e.f. 01.01.2014 vide scheme of amalgamation between assessee company and M/s. Value First Digital Media Private Limited the scheme was sanctioned by the Hon'ble Delhi High Court vide order dated 11.08.2014 and 19.08.2014 w.e.f. 01.01.2014. I find the assessee company filed its return of income on 29.09.2014 in the name of M/s. Cellnext Solutions Private Limited under these circumstances when the assessee itself has filed return of income in the name of Cellnext Solutions Private Limited on 29.09.2014 whereas the scheme of amalgamation was sanctioned by the Hon'ble Delhi High Court vide order dated 11.08.2014 and 19.08.2014 which is effective from

01.01.2014 the assessee in my opinion cannot argue that assessment has been framed on a dead company or a nonexistent company.

9. I find the Hon'ble Delhi High Court in the case of M/s. Spice Infotainment Ltd. (supra) relied on by Ld. Counsel for the assessee has observed as under :-

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 liability, 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.” 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.

9. *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”.*

10. *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 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.

11. *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.”

12. *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 292 B.

13. *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 undersaving 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."

14. *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.

15. *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'.*

16. *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.*

17. *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.*

10. I, therefore, deem it proper to restore the issue to the file of the Assessing Officer with a direction to pass appropriate order in the light of the decision of Hon'ble Delhi High Court in the case of Spice Infotainment Limited (supra). Since the ld. Counsel for the assessee did not argue the other grounds on merit, therefore, these grounds are dismissed. The appeal filed by the assessee is accordingly allowed for statistical purpose.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 02.05.2019.

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

Neha

Date:- 02.05.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	02.04.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	02.05.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	