

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No. 457/Bang/2019
Assessment Year : 2011-12

M/s. Marlabs Innovations Pvt. Ltd., (Successor of Marlabs Software Pvt. Ltd.), 14 th Floor, Citrine Block-4, Bagmane World Technology Centre, Marathalli Outer Ring Road, Mahadevapura, Bengaluru – 560 048. PAN: AACCM6627Q	Vs.	The Deputy Commissioner of Income Tax, Circle – 4(1)(2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri L. Bharath, CA
Revenue by	:	Shri Arun Kumar, CIT DR

Date of Hearing	:	23-06-2022
Date of Pronouncement	:	13-07-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against order dated 28/12/2018 passed by Ld.DCIT, Circle – 4(1)(2), Bangalore for A.Y. 2011-12.

2. The assessee has raised various issues on the transfer pricing adjustment made in respect of the international transactions between assessee and its AE.

3. However, in ground no. 2, assessee challenges the validity of impugned order as it is passed on a non-existing entity i.e. erstwhile Marlabs Software Pvt. Ltd. The relevant grounds reads as under:

“2. That on facts and circumstances of the case, the LAO has erred in passing the order on a non-existing entity i.e. erstwhile Marlabs Software Private Limited.”

4. The Ld.AR relied on decision of *Hon’ble Supreme Court in case of PCIT vs. Maruti Suzuki India Ltd. reported in (2019) 107 taxmann.com 375* wherein the *Hon’ble Supreme Court* has held that an income that was sought to be subjected to the charge of tax for the year was the income of the erstwhile entity prior to amalgamation. Under an approved scheme of amalgamation *Hon’ble Supreme Court* held that the transferee has assumed the liabilities of the transferor company, including tax liabilities. The consequence of the scheme of amalgamation approved u/s. 394 of the Companies Act, 1956 was that the amalgamating company ceased to exist. *Hon’ble Supreme Court* has held that upon the amalgamating company ceasing to exist, it cannot be regarded as a person u/s. 2(31) against whom assessment proceedings can be initiated or an assessment order would be passed. *Hon’ble Supreme Court* has noted that a notice issued u/s. 143(2) was issued to the amalgamating company followed by the notice u/s. 142(1) prior to the scheme of amalgamation being approved, the assessing officer subsequently cannot initiate assessment proceedings against an entity that ceased to exist. *Hon’ble Supreme Court* in that relevant facts held that a notice issued to a non-existent company would be *void-ab-initio* and no valid jurisdiction can be assumed by the assessing officer by issuing

such invalid notice. In the present facts of the case, the Ld.AR submitted that the effective date of amalgamation was 01/04/2016 and intimation to the Ld.AO was given by letter dated 15/12/2017 and a copy of which is placed in the records filed before this *Tribunal*. For the sake of convenience the said letter is scanned and reproduced herewith.



15 December 2017

✓ ITO

Ward 4(1)(3),
BMTC Building, Koramangala
Bangalore - 560095

Dear Sir / Madam,

Sub: Reason for non-filing of the return of income of Marlabs Software Solutions Pvt. Ltd for Assessment Year 2017-18

Ref: Scheme of Amalgamation

Order of merger passed by the National Company Law Tribunal Bengaluru Bench delivered on 05 September 2017

Assessment Year 2017-18

PAN of Marlabs Software Private Limited: AACCM6627Q

PAN of Marlabs Innovation Private Limited: AAECM6806F

We, Marlabs Innovation Private Limited ("the Company") refer to the captioned scheme of amalgamation (*Enclosed herewith as Annexure A*) where Marlabs Software Private Ltd has amalgamated with the Company with the appointed dated being 01 April 2016. Also, attached is the order passed by the National Company Law Tribunal of Bengaluru dated 05 September 2017 approving the same. (*Enclosed herewith as Annexure B*).

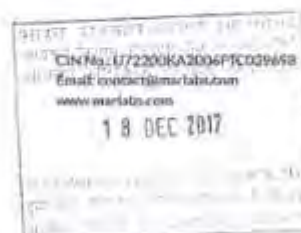
Accordingly, Marlabs Software amalgamated with the Company and ceased to exist from the appointed dated i.e. from 01 April 2016. In light of the above scheme, Marlabs Software being non-existent as on 01 April 2016, will not be required to file a return of income for Assessment Year 2017-18.

Also, the TDS credit lying in the PAN of Marlabs Software for the Financial Year ("FY") 2016-17 and for FY 2017-18 till date (*Form 26 AS enclosed herewith as Annexure C*) needs to be given to the Company. Further, the Company has claimed such TDS in its return of income for FY 2016-17 filed vide acknowledgement number 321214921301117.



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No.2, 3rd Floor, SR Complex,
Sivasubrahmanya Road, S.R. Park,
Bangalore - 560029
Tel: +91 80 4654 2600

Corporate Office
Marlabs Innovations Private Limited
Bamanga World Technology Center,
14th Floor, Citrine Block-4,
Marathahalli Outer Ring Road,
Marathahalli, Bengaluru - 560048
Tel: +91 80 6722 9400/700



5. It is submitted that the order of amalgamation by the National Company Law Tribunal, Bangalore Bench, was delivered on 05.09.2017.

6. The Ld.AR referring to the DRP order submitted that the directions are issued in the name of the transferee company being the Marlabs Innovations Pvt. Ltd., however, the Ld.AO while passing the impugned assessment order passed the order in the name of Marlabs Software Pvt. Ltd., which is a non-existent company. The Ld.AR thus submitted that, the impugned order passed is without jurisdiction, and prayed for quashing of the same.

The Ld.DR on the contrary, relied on the orders passed by authorities below.

7. We have perused the submissions advanced by both sides in the light of records placed before us.

8. We note that the scheme of amalgamation was approved by the NCLT, Bangalore Bench on 05/09/2017. The DRP took cognizance of the company that came into existence post amalgamation to be “Marlabs Innovations Pvt. Ltd.” which is clear from the cause title of the DRP directions. On receipt of the DRP direction, the Ld.AO passed the final assessment order in the name of erstwhile company being Marlabs Software Pvt. Ltd.

9. The following chart will explain the facts of the assessee's case and the facts decided by *Hon'ble Supreme Court* in case of *PCIT vs. Maruti Suzuki India Ltd.(supra)*.

10. The following chart will explain the facts of the Assessee's case and the facts of the case decided by the Hon'ble Supreme Court in the case of *M/s.Maruti Suzuki India Limited (supra)*:

Facts in the case of Maruti Suzuki India Ltd.	Facts in the case of Assessee
<ul style="list-style-type: none"> • Suzuki Powertrain India Limited (SPIL or amalgamating company) had amalgamated with Maruti Suzuki India Limited (MSIL or amalgamated company) by a scheme of amalgamation approved by the High Court (HC) on January 29, 2013, with effect from fiscal year commencing on April 1, 2012. • The scheme provided that all the assets, liabilities and duties of the amalgamating company be transferred to the MSIL and that the SPIL would stand dissolved without winding up. • On April 2, 2013 - the Assessee informed the AO that SPIL has amalgamated with MSIL. • On September 26, 2013 , the AO issued notice u/s.143(2) for AY 2011-12. • On September 4, 2015, the AO issued letters to the Assessee with the following description:- <i>"The Principal Officer M/s Suzuki Powertrain India Limited (Now known as M/s Maruti Suzuki India Limited)"</i> • On March 11, 2016, the AO passed draft assessment order in the name of SPIL. • On April 12, 2016, the Assessee filed objections against the proposed additions in the draft assessment order before the Dispute Resolution Panel (DRP). The objections were filed by MSIL as successor in interest of erstwhile SPIL. • On October 14, 2016, DRP gave its directions to the AO on the objections to the draft assessment order of the AO. • On October 31, 2016, the AO passed the final order in the name of SPIL (amalgamated with MSIL). 	<ul style="list-style-type: none"> • The Assessee filed return of income on 29/11/2011 in the name of M/s. Marlabs Software Pvt. Ltd. • By order of National Company Law Tribunal, Bangalore assed an order in the scheme of amalgamation of Marlabs Software Pvt. Ltd. with Marlabs Innovations Pvt. Ltd. on 05/09/2017. • On 15/12/2017, the AO of Marlabs Software Pvt. Ltd. was informed by the said company regarding the amalgamation and transfer of the assessment records to the AO. • The DRP directions dated 20/12/2018 was passed in the name of the transferee company being Marlabs Innovations Pvt. Ltd. • The Ld.AO passed final assessment order u/s. 143(3) r.w.s. 254 in the name of non-existent company being Marlabs Software Pvt. Ltd.

<ul style="list-style-type: none"> The Tribunal by its order dated April 6, 2017, held that the assessment order was invalid on the ground that it was void ab initio having been passed in the name of a non-existent entity by the TO. The Hon'ble Delhi High Court affirmed the order of the Tribunal. The Assessee filed appeal before the Hon'ble Supreme Court. 	
<p><u>Decision of the Hon'ble Supreme Court:</u></p> <p>While upholding HC's decision, SC held that the assessment done in the name of amalgamating company was void ab initio. The Hon'ble Supreme Court held that when once the scheme of amalgamation is approved the amalgamating company ceases to exist and therefore cannot be regarded as "person" u/s.2(31) of the Act against whom assessment proceedings can be initiated or an order can be passed. Prior to the AO assuming jurisdiction by issuing notice u/s.143(2) of the Act, the Scheme of Amalgamation had already been approved and the AO was duly informed about the factum of the Assessee no longer being in existence. Therefore notice issued under section 143(2) of the Act in the name of amalgamating company, a non-existent entity, was invalid and thereby the initiation of assessment proceedings was void ab initio. The fact that the amalgamated company participated in the assessment proceedings would not operate as estoppel.</p>	

11. The facts of the Assessee's case is identical to the facts of the case decided by the *Hon'ble Supreme Court* in the case of *M/s.Maruti Suzuki India Ltd.(supra)*. Since the assessee company ceased to be in existence as on the date when the AO passed the order of assessment, assessment so framed is not sustainable in the eyes of law, being a nullity. The *Hon'ble Supreme Court* in the

case of *M/s.Maruti Suzuki India Ltd. (supra)*, also dealt with the decision of the Hon'ble Delhi High Court in case of *Sky Light Hospitality LLP vs. ACIT* reported in (2018) 405 ITR 296 observed as under:

"27. The submission however which has been urged on behalf of the Revenue is that a contrary position emerges from the decision of the Delhi High Court in Skylight Hospitality LLP which was affirmed on 6 April 2018 by a two judge Bench of this Court consisting of Hon'ble Mr Justice A K Sikri and Hon'ble Mr Justice Ashok Bhushan³³. In assessing the merits of the above submission, it is necessary to extract the order dated 6 April 2018 of this Court:

"In the peculiar facts of this case, we are convinced that wrong name given in the notice was merely a clerical error which could be corrected under Section 292B of the Income Tax Act.

The special leave petition is dismissed.

Pending applications stand disposed of."

Now, it is evident from the above extract that it was in the peculiar facts of the case that this Court indicated its agreement that the wrong name given in the notice was merely a clerical error, capable of being corrected under Section 292B. The "peculiar facts" of Skylight Hospitality emerge from the decision of the Delhi High Court Skylight Hospitality, an LLP, had taken over on 13 May 2016 and acquired the rights and liabilities of Skylight Hospitality Pvt. Ltd upon conversion under the Limited Liability Partnership Act 2008³⁵. It instituted writ proceedings for challenging a notice under Sections 147/148 of the Act 1961 dated 30 March 2017 for AY 2010-2011. The "reasons to believe" made a reference to a tax evasion report received from the investigation unit of the income tax department. The facts were ascertained by the investigation unit. The reasons to believe referred to the assessment order for AY 2013-2014 and the findings recorded in it.

Though the notice under Sections 147/148 was issued in the name of Skylight Hospitality Pvt. Ltd. (which had ceased to exist upon conversion into an LLP), there was, as the Delhi High Court held "substantial and affirmative material and evidence on record" to show that the issuance of the notice in the name of the dissolved company was a mistake. The tax evasion report adverted to the conversion of the private limited company into an

LLP. Moreover, the reasons to believe recorded by the assessing officer adverted to the approval of the Principal Commissioner.

The PAN number of the LLP was also mentioned in some of the documents. The notice under Sections 147/148 was not in conformity with the reasons to believe and the approval of the Principal Commissioner. It was in this background that the Delhi High Court held that the case fell within the purview of Section 292B for the following reasons:

"18...There was no doubt and debate that the notice was meant for the petitioner and no one else. Legal error and mistake was made in addressing the notice. Noticeably, the appellant having received the said notice, had filed without prejudice reply/letter dated 11.04.2017. They had objected to the notice being issued in the name of the Company, which had ceased to exist. However, the reading of the said letter indicates that they had understood and were aware, that the notice was for them. It was replied and dealt with by them. The fact that notice was addressed to M/s. Skylight Hospitality Pvt. Ltd., a company which had been dissolved, was an error and technical lapse on the part of the respondent. No prejudice was caused."

28. The decision in *Spice Entertainment* was distinguished with the following observations:

"19. Petitioner relies on *Spice Infotainment Ltd. v. Commissioner of Service Tax*, (2012) 247 CTR 500. *Spice Corp. Ltd.*, the company that had filed the return, had amalgamated with another company. After notice under Section 147/148 of the Act was issued and received in the name of *Spice Corp. Ltd.*, the Assessing Officer was informed about amalgamation but the Assessment Order was passed in the name of the amalgamated company and not in the name of amalgamating company. In the said situation, the amalgamating company had filed an appeal and issue of validity of Assessment Order was raised and examined. It was held that the assessment order was invalid. This was not a case wherein notice under Section 147/148 of the Act was declared to be void and invalid but a case in which assessment order was passed in the name of and against a juristic person which had ceased to exist and stood dissolved as per provisions of the Companies Act. Order was in the name of non-existing person and hence void and illegal."

29. From a reading of the order of this Court dated 6 April 2018 in the Special Leave Petition filed by *Skylight Hospitality LLP* against the judgment of the Delhi High

Court rejecting its challenge, it is evident that the peculiar facts of the case weighed with this Court in coming to this conclusion that there was only a clerical mistake within the meaning of Section 292B. The decision in Skylight Hospitality LLP has been distinguished by the Delhi, Gujarat and Madras High Courts in:

(i) Rajender Kumar Sehgal;

(ii) Chandreshbhai Jayantibhai Patel; and

(iii) Alamelu Veerappan.

30. *There is no conflict between the decisions of this Court in Spice Enfotainment (dated 2 November 2017)³⁶ and in Skylight Hospitality LLP (dated 6 April 2018)³⁷.*

31. *Mr Zoheb Hossain, learned Counsel appearing on behalf of the Revenue urged during the course of his submissions that the notice that was in issue in Skylight Hospitality Pvt. Ltd. was under Sections 147 and 148. Hence, he urged that despite the fact that the notice is of a jurisdictional nature for reopening an assessment, this Court did not find any infirmity in the decision of the Delhi High Court holding that the issuance of a notice to an erstwhile private limited company which had since been dissolved was only a mistake curable under Section 292B.*

32. *A close reading of the order of this Court dated 6 April 2018, however indicates that what weighed in the dismissal of the Special Leave Petition were the peculiar facts of the case. Those facts have been noted above. What had weighed with the Delhi High Court was that though the notice to reopen had been issued in the name of the erstwhile entity, all the material on record including the tax evasion report suggested that there was no manner of doubt that the notice was always intended to be issued to the successor entity.*

33. *Hence, while dismissing the Special Leave Petition this Court observed that it was the peculiar facts of the case which led the court to accept the finding that the wrong name given in the notice was merely a technical error which could be corrected under Section 292B. Thus, there is no conflict between the decisions in Spice Enfotainment on the one hand and Skylight Hospitality LLP on the other hand."*

12. Respectfully following the decision of *Hon'ble Supreme Court* in case of *PCIT vs. Maruti Suzuki India Ltd.(supra)*, we hold that, since the assessee ceased to be in existence as on the date when the Ld.AO passed the impugned order of assessment, the assessment so framed is not sustainable in the eye of law. The final order of

assessment is therefore liable to be annulled, and is hereby annulled.

Accordingly, the assessee's appeal stands allowed on the legal issue raised in ground no. 2.

13. As we have decided the legal issue in favour of assessee, the issues alleged by assessee on merits is left open for academic purposes.

In the result, the appeal filed by the assessee stands allowed.

Order pronounced in open court on 13th July, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 13th July, 2022.
/MS /

Copy to:

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore