<u>आयकर अपीलीय अधिकरण, कोलकाता पीठ "ए'', कोलकाता</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्य के समक्ष

[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 994/Kol/2018
Assessment Year: 2011-12

Solvent Real Estate Pvt. Ltd. (PAN: AAMCS 8286 R)	Vs.	ITO, Ward-10(2), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

I.T.A. No. 879/Kol/2018
Assessment Year: 2011-12

ITO, Ward-10(2), Kolkata	Vs.	Solvent Real Estate Pvt. Ltd. (PAN: AAMCS 8286 R)
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	27.12.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	05.01.2024
For the Appellant/ निर्धारिती की ओर से	Shri C Roy, A.R
For the Respondent/ राजस्व की ओर से	Shri Abhijit Kundu, CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

These are the cross appeals preferred by the assessee as well as by the revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-4, Kolkata (hereinafter referred to as the Ld. CIT(A)"] dated 15.03.2018 for the AY 2011-12.First we shall adjudicate assessee's appeal in ITA No. 994/Kol/2018 for AY 2011-12.

ITA No. 994/Kol/2018 for AY 2011-12.

2. The assessee has challenged the order of Ld. CIT(A) on various grounds of appeal on merit raising common issue that the Ld. CIT(A) has erred in directing the AO to assess the income @ 5% of total turnover.

3. The assessee has also filed an additional ground vide letter filed on 17.04.2023 challenging the validity of the assessment order framed u/s 143(3) read with 263 of the Act dated 30.12.2016 by raising the following grounds:

> *"That assessment order be quashed since the company was already merged w.e.f. 01.04.2015 and therefore the order passed in the name of the non-existent entity is invalid, void ab-initio."*

4. The Ld. Counsel for the assessee submitted that the issue raised by the assessee is purely a legal issue emanating from the records available in the record file and goes to the root of the matter. The Ld. A.R argued that no further verification of the facts is required to be done in connection with the additional ground raised by the assessee and accordingly prayed that grounds raised by the assessee which goes to the root of the matter may kindly be admitted for adjudication. In defense of his arguments the ld. Counsel relied on the two following decisions:

> *i) Hon'ble Supreme Court in the case of Jute Corporation of India Ltd. Vs CIT in 187 ITR 688 (SC)*

ii) National Thermal Power Co. Ltd v. CIT [1998] 229 ITR 383 (SC).

5. The Ld. D.R on the other hand strongly opposed the filing of additional ground by the assessee by submitting that the issue has not been raised before the authorities below and is being raised for the first time before this tribunal. The Ld. D.R therefore prayed that grounds raised by the assessee may kindly be dismissed.

6. After hearing the rival contentions and perusing the material on record including the intimation to the AO qua the said amalgamation, we observe that the assessee company has been merged with Elite Realcon Pvt. Ltd. vide amalgamation order passed by the Hon'ble Calcutta High Court dated 21.11.2016 and the fact was intimated to the AO vide letter dated 28.11.2016 which was duly acknowledged by the office of ITO, Ward-10(2), Kolkata. We also note that thereafter the copy of the order was also filed but that was filed subsequent to the date of the assessment order. However in the first letter dated 28.11.2016 the assessee has requested the AO to find out the fact from Central Govt. Standing Counsel qua amalgamation having been approved by the Hon'ble Calcutta High Court w.e.f. the effective date 01.04.2015. In our view the issue raised by the assessee is purely a legal issue and we are, therefore, inclined to admit the additional ground for adjudication.

7. The ld. A.R, at the outset, submitted that the assessee company having been merged with the Elite Realcon Pvt. Ltd. w.e.f 1.4.2015 vide order dated 21.11.2016 and therefore the said company has ceased to exist from the said date in terms of order passed by the Hon'ble Calcutta High Court a copy of which is filed before the Bench. The Ld. A.R stated that the AO has duly been informed qua the said order of the Hon'ble Calcutta High Court vide letter dated 28.11.2016 immediately after the assessee came to the know about the order of Hon'ble Calcutta High Court having been passed on 21.11.2016 and also requested the AO to find the veracity of the said fact from the Standing Counsel, Govt. of India that the assessee company stands merged with Elite Realcon Pvt. Ltd., the amalgamated company. The Ld. A.R submitted that despite the fact that AO having been intimated by the said letter and

was in the knowledge of the amalgamation ,he framed assessment u/s 143(3) read with Section 263 of the Act vide order dated 30.12.2016 in the name of non existent company.The Ld. A.R stated that the said order passed by the AO may kindly be quashed as being nullity, and invalid in the eyes of law as the assessment cannot be framed in the name of non-existing entity/company. In defense of arguments the Ld. A.R relied on the series of decisions:

i) Principal Commissioner of Income Tax, New Delhi v.Maruti Suzuki India Ltd [2019] 107 taxmann.com 375 (SC)

ii) Marshall Sons & Co. (India) Ltd.v. Income-tax Officer [1997] 223 ITR 809 (SC)

iii) Spice Enfotainment vs. Commissioner of Service Tax in ITA 475/2011 dated 2.8.2011(Del)

The Ld. A.R therefore prayed that the assessment framed may kindly be quashed.

8. The Ld. D.R on the other hand strongly opposed the arguments presented by the ld AR by submitting that the assessee has informed vide letter dated 28.11.2016 and it appears that the assessee has not mentioned the assessment procedure in its letter and also that the assessee has not submitted the copy of the order of Hon'ble Calcutta High Court. The Ld. D.R stated that the certified copy of the order was signed on 6.1.2017 and the same was received by the assessee on the same date and thus the copy of the said order was not available before the AO at the time of hearing of the assessment and thus assessment was rightly framed by the AO in the name of Solvent Real Estate Pvt. Ltd. The Ld. D.R also submitted that as per the amalgamation order effective date means the date on which the certified copy of the Hon'ble High Court order sanctioning this scheme was filed before the Registrar of the company. The Ld. D.R stated that the effective date of the amalgamation should be 6.1.2017 and not from the date of the order i.e. 21.11.2016. The Ld. D.R therefore prayed that the additional ground may kindly be dismissed.

9. After hearing the rival contentions and perusing the material on record including the impugned order of amalgamation passed by the Hon'ble Calcutta High Court, we observe that the assessee company M/s Solvent Real Estate Pvt. Ltd. has merged and amalgamated with Elite Realcon Pvt. Ltd. vide order dated 21.11.2016 by passed by the Hon'ble Calcutta High Court. We note that the assessee has intimated the AO vide letter dated 28.11.2016 even before the receipt of certified copy of the order passed by the Hon'ble Calcutta High Court and requested the AO to confirm the fact from the Central Govt. Standing Counsel that the assessee stood amalgamated w.e.f 1.4.2015 the effective date of amalgamation as per scheme of Amalgamation with another entity named Elite Realcon Pvt. Ltd.Therefore this is undisputed that the assessee company i.e. Solvent Real estate pvt. Ltd. has ceased to exist w.e.f 1.4.2015 vide order dated 21.11.2016 passed by the Hon'ble Calcutta High Court. The assessment in this case was framed in the name of non-existing entity despite the fact being intimated and informed to the AO vide letter dated 28.11.2016 and despite that the AO proceeded to frame the assessment vide order dated 30.12.2016 approximately a month after u/s 143(3) read with Section 263 of the Act. The AO has framed the assessment nonetheless he was informed by the assessee vide letter dated 28.11.202016. In our considered view the framing of assessment in the name of non-existing entity is invalid and void ab-initio and cannot be sustained. The case of the assessee finds support from the decision of Hon'ble Supreme Court in the case of CIT vs. Maruti Suzuki (supra) wherein the Hon'ble Apex Court has held as under:

- *it is necessary at the outset to advert to certain significant facts of the present case:*

  (i) The income which is sought to be subjected to the charge of tax for assessment year 2012-13 is the income of the erstwhile entity (SPIL) prior to amalgamation. This is on account of a transfer pricing addition of Rs. 78.97 crores.

  (ii) Under the approved scheme of amalgamation, the transferee has assumed the liabilities of the transferor company, including tax liabilities.

  (iii) The consequence of the scheme of amalgamation approved under section 394 of the Companies Act, 1956 is that the amalgamating company ceased to exist.

  (iv) Upon the amalgamating company ceasing to exist, it cannot be regarded as a person under section 2(31) against whom assessment proceedings can be initiated or an order of assessment passed;

(v) A notice under section 143 (2) was issued on 26-9-2013 to the amalgamating company, SPIL, which was followed by a notice to it under section 142(1);

(vi) Prior to the date on which the jurisdictional notice under section 143 (2) was issued, the scheme of amalgamation had been approved on 29-1-2013 by the High Court of Delhi under the Companies Act, 1956 with effect from 1-4-2012;

(vii) The Assessing Officer assumed jurisdiction to make an assessment in pursuance of the notice under section 143 (2). The notice was issued in the name of the amalgamating company in spite of the fact that on 2-4- 2013, the amalgamated company MSIL had addressed a communication to the Assessing Officer intimating the fact of amalgamation. In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was void ab initio. [Para 19]

- *The notice under section 143(2) under which jurisdiction was assumed by the Assessing Officer was issued to a non-existent company. The assessment order was issued against the amalgamating company. This is a substantive illegality and not a procedural violation of the nature adverted to in section 292B. In this context, it is necessary to advert to the provisions of section 170 which deal with succession to business otherwise than on death.[Para 31]*
- *Despite the fact that the Assessing Officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two judges which dismissed the appeal of the revenue in CIT v. Spice Enfotainment [Civil Appeal No. 285 of 2014, dated 2-11-2017]. The decision in Spice Enfotainment Ltd. (supra) has been followed in the case of the assessee while dismissing the Special Leave Petition for assessment year 2011-2012. In doing so, this Court has relied on the decision in Spice Enfotainment (supra).[Para 33]*
- *There is no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for assessent year 2011-12 must be adopted in respect of the present appeal which relates to assessment year 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable.[Para 34]*
- *For the above reasons, there is no merit in the appeal. The appeal is accordingly dismissed.[Para 35]*

9.1. Similarly the Hon'ble Apex Court has also decided a similar issue in favour of the assessee in the case of Marshall Sons & Co. (supra) by holding that the framing of assessment in the name of non-existing entity is invalid. The operative part is reproduced as under:

> *The effect of scheme of sections 391, 394 & 394A of the Companies Act (so far as relevant for purposes of the present case) can be summarised as under :*

(a) Where an amalgamation of two or more companies is proposed, an application has to be made to the Court for the purpose. Thereupon, the Court may call the meeting of members of the companies concerned. The order of the Court shall be in Form No. 35 prescribed by the Companies (Court) Rules.

(b) Such notice of the meeting has to be sent individually to all the members. (The notice and the explanatory statement under section 393 are settled by the officer of the Court.)

(c) Apart from individual notices, the notice of the meeting has also to be published in such newspapers as may be directed by the Court.

(d) Only when a majority of the members representing three-fourths of the value of the members present and voting, either in person or by proxy, approves the scheme, would the Court proceed to sanction the amalgamation arrangement. Such an order shall bind all concerned Of course, the Court shall not sanction any such arrangement unless it is satisfied that the applicants have disclosed all material facts fully and truly.

(e) The application for confirmation made under sections 391(2) and 394 is also required to be advertised in the same newspapers in which the notice of the meeting was advertised and the notice is also required to be served on the Central Government as provided by section 394A.

(f) If the Court is satisfied that the statutory formalities have been duly complied with and the scheme is fair and a reasonable one and beneficial to the interests of the companies and its members, the Court may sanction the scheme. While sanctioning the scheme, the Court may also provide for all or any of the matters specified in clauses (i) to (vi) of sub-section (1) of section 394. The two provisos appended to said sub-section provide for certain pre-conditions which too have to be observed by the Court. Sub-section (2) provides that where the order sanctioning the amalgamation provides for any of the matters in clauses (i) to (vi) aforesaid, they shall take effect as provided in the order.

(g) Within 30 days of the order sanctioning the amalgamation arrangement, the company concerned shall file a certified copy of the order before the Registrar for registration. This is made mandatory by the second limb of sub-section (3) of section 394.

(h) The order sanctioning the scheme is required to be drawn up in accordance with Form Nos. 41 and 42 of the Companies [Court] Rules.

In the scheme of amalgamation, the expression 'the transfer date' was defined to mean '1st January, 1982' and the expression 'the operative date' meant the date on which the certified copies of the orders of the High Courts of Tamil Nadu and Calcutta under section 391(2)/394(2) shall have been filed with the Registrars of Companies in Tamil Nadu and Calcutta, respectively. The expression 'terminal date' was defined to mean the date immediately preceding the operative date.

A reading of clauses 7 and 8 of the scheme showed that according to the scheme, the entire undertaking of the subsidiary company shall be transferred to the holding company with effect from the transferred date and that the subsidiary company shall be amalgamated with the holding company with effect from the said date.

Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation shall take place. The scheme concerned herein did so provide, viz., 1-1-1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and

prescribe such date of amalgamation as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it, as had happened in the instant case, it should follow that the date of amalgamation is the date specified in the scheme as 'the transfer date'. It cannot be otherwise. It must be remembered that before applying to the Court under section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation. The proceedings before the Court may take some time; indeed, they are bound to take some time because several steps provided by sections 391 to 394A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the transferor-company and the transferee-company may carry on business, as had happened in the instant case, but normally provision is made for this aspect also in the scheme of amalgamation.

In the instant case, the scheme expressly provided that with effect from the transfer date, the transferor-company (subsidiary company) shall be deemed to have carried on the business for and on behalf of the transferee-company (holding company) with all attendant consequences. It was equally relevant to notice that the Courts had not only sanctioned the scheme in the instant case but had also not specified any other date as the date of transfer/ amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation took effect on and from the date of the order sanctioning the scheme. Therefore, the impugned notices issued by the ITO, were not warranted in law. The business carried on by the transferor-company (subsidiary company) should be deemed to have been carried on for and on behalf of the transferee-company. This was the necessary and the logical consequence of the Court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the Court before the Registrar of Companies, the allotment of shares, etc., may have all taken place subsequent to the date of amalgamation, yet the date of amalgamation in the circumstances of the instant case would be 1-1-1982.

The aforesaid view could not ensue any complications in case the Court refused to sanction the scheme of amalgamation. As firstly, an assessment can always be made and is supposed to be made on the transferee-company taking into account the income of both the transferor and transferee companies. Secondly, and probably the more advisable course from the point of view of the revenue would be to make one assessment on the transferee-company taking into account the income of both the transferor and transferee-companies and also to make separate protective assessments on both the transferor and transferee companies separately. There may be a certain practical difficulty in adopting this course inasmuch as separate balance sheets may not be available of the transferor and transferee companies. But that may not be an insuperable problem inasmuch as assessment could always be made, on the available material, even without a balance sheet. In certain cases, best-judgement assessment may also be resorted to.

9.2. Considering the facts and circumstances of the assessee's case, we find that the present case is squarely covered by the above decisions of the Hon'ble apex Court and therefore we have no hesitation to hold that the assessment order passed by the AO in the name of non-existing entity is nullity and void ab initio. Accordingly we quash the assessment order. Thus the additional ground raised by the assessee is allowed.

10. Since we have quashed the assessment order, the appeal of the revenue becomes infractuous and is dismissed.

11. In the result, the appeal of the assessee is allowed and the appeal of the revenue is dismissed.

Order is pronounced in the open court on 5th January, 2024

Sd/- Sd/-

(Sonjoy Sarma /संजय शर्मा) (Rajesh Kumar/राजेश कुमार)
Judicial Member/न्यायिक सदस्य Accountant Member/लेखा सदस्य

Dated: 5th January, 2024

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Solvent Real Estate Pvt. Ltd., 6 & 6/3, Sashi Shekhar Bose Road, Kolkata-700025.
2. Respondent – ITO, Ward-10(2), Kolkata
3. Ld. CIT(A)-4, Kolkata
4. Ld. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata