2017 (9) TMI 387 - DELHI HIGH COURT

Pr. Commissioner of Income Tax-6, New Delhi Versus Maruti Suzuki India Limited (Successor of Suzuki Powertrain India Limited)

ITA No. 65/2017

Dated: - 04 September 2017

Validity of assessment order in the name of the amalgamating company - assessment framed in the name of the non-existent company - procedural defect - successor-in-interest - Held that:- 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. See Spice Infotainment Ltd. v. CIT [2011 (8) TMI 544 - DELHI HIGH COURT]

In Spice Infotainment (supra) where it was held: “once it is found that the assessment is framed in the name of a non-existent entity it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292-B of the Act. - Decided in favour of the Assessee

Judgment / Order

S. MURALIDHAR & PRATHIBA M. SINGH JJ.

Appellant Through: Mr. Asheesh Jain, Senior Standing Counsel with Mr. Vikrant A. Maheshwari, Advocates

Respondent Through: Mr. Ajay Vohra, Senior Advocate with Ms. Kavita Jha and Mr. Vikrant A. Maheshwari, Advocates

O R D E R

Dr. S. Muralidhar, J.:

1. This is an appeal by the Revenue against the order dated 21st July 2016 passed by the Income Tax Appellate Tribunal (‘ITAT’) in ITA No. 288/Del/2016 for the Assessment Year (‘AY’) 2011-12.

2. The question sought to be urged by the Revenue in this appeal is whether the order of the ITAT is perverse inasmuch as it invalidates the assessment order dated 29th December 2015 passed by the Assessing Officer (‘AO’) for AY 2011-12 on the ground that it has framed in the name of the amalgamating company.

3. On 24th January 2017, while admitting this appeal, this Court framed the following question of law:

> *“Did the ITAT misapply the provisions of Section 170 (2) of the Income Tax Act in the circumstances of the case, while concluding that the assessment order was not tenable for having been framed in the name of the non-existent company.”*

4. The facts are that on 28th November 2011 Suzuki Powertrain India Ltd. ('SPIL') filed its return for AY 2011-12 declaring an income of □ 76,08,30,888/-. The return was processed under Section 143 (1) of the Income Tax Act, 1961 ('Act') and then picked up for scrutiny. Notices under Section 143 (2) of the Act were issued.

5. On 29th January 2013, this Court passed an order in Company Petition No. 490 of 2012 approving the Scheme of Amalgamation ('Scheme') by which SPIL (Amalgamating Company) was amalgamated with Maruti Suzuki India Ltd. ('MSIL') (Amalgamated Company) with effect from 1st April 2012 (the 'appointed date'). The Scheme inter alia provided that, "all the liabilities and duties on the entire undertaking of the Petitioner/Amalgamating Company be transferred without further act or deed to the Petitioner/Amalgamated Company and accordingly the same shall pursuant to Section 394 (2) of the Companies Act, 1956 be transferred to and become the liabilities of the Petitioner/Amalgamated Company."

6. Thereafter, assessment proceedings continued with the participation of MSIL representing SPIL in the assessment proceedings.

7. On 29th December 2015, the AO passed the assessment order under Section 143 (3) read with Section 144C (1) of the Act in which the name and address of the Assessee was shown as:

"M/s. Suzuki Powertrain India Ltd

(Amalgamated with M/s Maruti

Suzuki India Ltd)., Plot No 1,

Nelson Mandela Road, Vasant

Kunj, New Delhi-110070"

8. MSIL filed an appeal before the ITAT where one of the grounds urged was that the assessment order was without jurisdiction inasmuch as it had been passed in the name of an entity that ceased to exist on the date of the assessment order. The ITAT accepted the above plea of the Respondent-MSIL, as a result of which the assessment order was set aside.

9. On the strength of the decision of the Supreme Court in ***Kuldeep Kumar Dubey v. Ramesh Chandra Goyal (2015) 3 SCC 525***, Mr. Asheesh Jain, learned Senior Standing Counsel for the Revenue, urges that in the present case the error, if at all, was a mere misdescription of the party in the assessment order and nothing more. This could not result in the assessment order itself being set aside. He further submits that the record of the assessment proceedings shows that MSIL participated in it fully and raised no objection as to the continuation of the proceedings on the ground of lack of jurisdiction. Mr Jain invokes Section 292B of the Act to urge that the Assessee is precluded from questioning the assessment order on the ground that it was passed in the name of a non-existent entity. He points out that below the name of the Amalgamating Company, the AO has taken care to mention that it has since been amalgamated with MSIL.

10. In reply, Mr. Ajay Vohra, learned Senior Counsel for the Assessee, has drawn the attention of the Court to a long line of decisions including ***Saraswati Industrial Syndicate Ltd. v. CIT [1990] 186 ITR 278 (SC) and Spice Infotainment Ltd. v. CIT (2011) 247 CTR (Del) 500*** wherein an identical question has been answered in favour of the Assessee and against the Revenue. Mr. Vohra points out that for the purposes of Section 170 (2) of the Act, two assessment orders will have to be passed: one in the name of MSIL itself for the AY in question and the other again in the name of MSIL indicating that the said assessment order is being passed under Section 170 (2) of the Act in respect of its tax liability as successor in interest of the Amalgamating company.

11.1 In Spice Infotainment (supra), the issue that arose was in the context of the AO having framed the assessment in the name of 'Spice Corp Limited' after the said entity stood 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. It was also urged by the Revenue that since the amalgamated entity had participated in the assessment proceedings without raising any objection, it should be precluded from raising it thereafter.

11.2 The two questions framed by this Court in Spice Infotainment (supra) were as under:

"(i) Whether on the facts and in the circumstances of the case, the

Tribunal erred in law in holding that the action of the Assessing Officer in framing assessment in the name of "Spice Corp Ltd", after the said entity stood dissolved consequent upon its amalgamation with Mcorp Private Limited w.e.f. 01.07.2003, was a mere "procedural defect"?

(ii) whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that in view of the provisions of section 292B of the Act, the assessment, having in substance and effect, been framed on the amalgamated company which could not be regarded as null and void?"

11.3 This Court, in Spice Infotainment (supra) discussed and noted the following observations in the decision of the Supreme Court in Saraswati Industrial Syndicate (supra): "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."

11.4 The Court in Spice Infotainment (supra) thereafter held as under:

"11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit 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.

11.5 Consequently, the aforesaid two questions were answered in favour of the Assessee and against the Revenue.

12. Even thereafter the Revenue has repeatedly brought the said issue before this Court in a large number of cases where, in more or less identical circumstances, the AO had passed the assessment order in the name of the entity that had ceased to exist as on the date of the assessment order. In many of these cases, as in the present case, the AO, after mentioning the name of the Amalgamating Company as the Assessee, mentioned below it the name of the Amalgamated Company. Illustratively the cases are:

(i) CIT v Micra India (P) Ltd. (2015) 231 Taxman 809 (Del);

(ii) CIT v. Micron Steels (P) Ltd. [2015] 372 ITR 386 (Del)

(iii) CIT v. Dimensions Apparels (P) Ltd. [2015] 370 ITR 288 (Del)

(iv) BDR Builders & Developers Pvt. Ltd. v. ACIT (Decision dated 26th July 2017 passed by this Court in W.P.(C) No. 2712 of 2016)

13. The question whether, for the purposes of Section 170 (2) of the Act, the defect of passing the assessment order in the name of an non-existent entity is a mere irregularity was answered by this Court in **CIT v. Dimensions Apparels (P) Ltd. (supra),** where in paras 6 and 7 it was held as under:

"6. Sections 170(1) and 170(2) of the Act do not assist the revenue in their case. The revenue does not contest that in a case of amalgamation, the predecessor (being a dissolved company) "cannot be found". Consequently, Section 170(2) applies. This provision clarifies that where the predecessor cannot be found, "the assessment of the income of the previous year in which the succession took place up to the date of the succession and of the precious year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor." (Emphasis Supplied)

7. The revenue seems to argue that the assessment is justified because the liabilities of the amalgamating company accrue to the amalgamated (transferee) company. While that is true, the question here is which entity must the assessment be made on. The text of Section 170(2) makes it clear that the assessment must be made on the successor (i.e., the amalgamated company)."

14. The submission that under Section 292B of the Act, the successor-in-interest is precluded from raising an objection if it has participated in the assessment proceedings was negative in ***Spice Infotainment (supra)*** where it was held: "...once it is found that the assessment is framed in the name of a non-existent entity it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292-B of the Act."

15. On the issue of participation, the Court ***CIT v. Dimensions Apparels (P) Ltd. (supra)*** observed:

*"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 (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 Pvt. Ltd., (supra)** had also reached the same conclusion."*

16. The legal position having been made abundantly clear in the above decisions, the Court has no hesitation in answering the question framed in the negative, i.e. in favour of the Assessee and against the Revenue.

17. The appeal is accordingly dismissed but, in the circumstances, with no orders as to costs.

Citations: in 2017 (9) TMI 387 - DELHI HIGH COURT

1. KULDEEP KUMAR DUBEY & ORS. Versus RAMESH CHANDRA GOYAL (D) TH LRS. - 2015 (1) TMI 1345 - SUPREME COURT
2. Saraswati Industrial Syndicate Limited Versus Commissioner of Income-Tax, Haryana Himachal Pradesh And Delhi III - 1990 (9) TMI 1 - SUPREME Court
3. BDR Builders & Developers Pvt. Ltd. Versus Assistant Commissioner of Income Tax - 2017 (8) TMI 42 - DELHI HIGH COURT
4. COMMISSIONER OF INCOME TAX –II Versus M/s MICRON STEELS PVT. LTD AND M/s STEELS PVT. LTD - 2015 (2) TMI 589 - DELHI HIGH COURT
5. COMMISSIONER OF INCOME TAX (C) -II Versus MICRA INDIA PVT LTD - 2015 (5) TMI 613 - DELHI HIGH COURT
6. Commissioner of Income Tax-III Versus Dimension Apparels Pvt. Ltd. - 2014 (11) TMI 181 - DELHI HIGH COURT
7. Spice Enfotainment Ltd. Versus Commissioner of Income Tax [Printed as: SPICE ENTERTAINMENT LTD. Versus COMMISSIONER OF SERVICE TAX] - 2011 (8) TMI 544 - DELHI HIGH COURT
8. COMMISSIONER OF INCOME TAX Versus VIVED MARKETING SERVIEING PVT. LTD. - 2009 (9) TMI 917 - Delhi high court
9. Maruti Suzuki India Ltd. Versus Dy. Commissioner of Income Tax, Circle-16 (1) , New Delhi - 2016 (8) TMI 820 - ITAT DELHI