

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri A. T. Varkey, JM & Dr. (Shri) Arjun Lal Saini, AM]

I.TA No.1408/Kol/2019 A.Y 2012-13		
M/s. Durja Vinimay Pvt. Ltd PAN: AADCD2076R	Vs.	Pr.CIT, Kolkata-4, Kolkata
Appellant		Respondent
I.TA No.1409/Kol/2019 A.Y 2012-13		
M/s. Gyan Mandir Tradecom Pvt. Ltd PAN: AAECG5505H	Vs.	Pr.CIT, Kolkata-4, Kolkata
Appellant		Respondent
I.TA No.1410/Kol/2019 A.Y 2012-13		
M/s. Paramtma Vinimay Pvt. Ltd PAN: AAFCP1334G	Vs.	Pr.CIT, Kolkata-4, Kolkata
Appellant		Respondent
I.TA No.1411/Kol/2019 A.Y 2012-13		
M/s. Aditi Vintrade Pvt. Ltd PAN: AAJCA1785C	Vs.	Pr.CIT, Kolkata-4, Kolkata
Appellant		Respondent
I.TA No.1412/Kol/2019 A.Y 2012-13		
M/s. Light House Merchants Pvt. Ltd PAN: AACCL1461F	Vs.	Pr.CIT, Kolkata-4, Kolkata
Appellant		Respondent

Date of Hearing	15.10.2019
Date of Pronouncement	22.11.2018

For the Appellant/Assessee	S/Shri S.K. Tulsian, Sr. Advocate & Puja Somani, Advocate, Id.ARs
For the Respondent	Shri Radhey Shyam, CIT, Id. Sr.DR

ORDER

PER SHRI A.T. VARKEY, JM

All the aforesaid appeals are preferred by different assessee's (as captioned in the cause list above) are against the separate orders of Ld. PrCIT, Kolkata-4, dated 12-03-2019, 14-03-2019 for the assessment year 2012-13.

2. Main grievances of the assessee's/ corporate legal entities are that the impugned revisional order passed under section 263 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") by the Id. Pr.CIT, Kolkata against them are *non est* in the eye of law, since they were not existing in the eyes of law by virtue of being merged with other legal entities as per the Hon'ble National company Law Tribunal (in short hereinafter "NCLT") order. The learned AR in order to assist the Bench to understand the facts necessary to decide the legal issue has filed before us the following charts in respect of all the five different assessee's/legal entities, from which we can get a bird's eye view about the facts necessary to adjudicate the legal issue:-

ITA No. 1408/Kol/2019 A.Y 2012-13

M/s. Durja Vinimay Pvt. Ltd [Merged with Nihon Impex Pvt. Ltd on 21-12-2018

Sr. No.	Date	Facts
1.	17-09-2012	ROI filed on 17-09-2012 declaring income of Rs.560/-
2.	25.03.2015	Assessment of the company for A.Y. 2012-13 was completed vide order u/s. 143(3) of the Act dated 25.03.2015 determining the total income of Rs.22,36,50,560/-.
3.	27-07-2016	Notice u/s 263 of the Act was issued on the assessee
4.	27.09.2016	The assessment order dated 25-03-2015 was set aside vide order u/s. 263 of the Act dated 27.09.2016 for de novo assessment after detailed enquiry on the issue of share allotment by the appellant- company.
5.	28.10.2016	In pursuance of the said order passed u/s. 263 of the Act, the Ld. A.O. passed assessment order u/s. 263/143(3) on 28.10.2016 determining total income of Rs.14,960/-.
6.	21.12.2018	By virtue of order of Hon'ble NCLT, Kolkata Bench dated 21.12.2018, the company M/s. Durja Vinimay Pvt. Ltd. stood amalgamated with M/s. Nihon Impex Pvt. Ltd. w.e.f. 01.04.2017 and formed part of RoC records
7.	31.12.2018	The Ld. Pr. C.I.T., Kolkata-4 thereafter again initiated proceeding u/s. 263 for the second time on the non-existing entity (Durja Vinimay Pvt. Ltd.) vide show cause notice dated 31.12.2018. He passed order u/s. 263 of the Act dated 12.03.2019 and directed the A.O. to pass a fresh assessment order.
8.	31.01.2019	Assessee intimated the learned AO, ITO Ward - 11(2) that the assessee company has been amalgamated with M/s.

		Nihon Impex Pvt. Ltd. w.e.f. 01.04.2017. Amalgamation order copy was enclosed.
9.	12.03.2019	The learned Pr.CIT passed order u/s. 263 of the Act dated 12.03.2019 in the name of non-existing entity, Durja Vinimay Pvt. Ltd. wherein the A.O. was directed to pass a fresh assessment order.
10.	07-06-2019	Appeal filed before the Hon'ble ITAT, Kolkata on 07-06-2019

ITA No. 1409/Kol/2019 A.Y 2012-13

M/s. Gyan Mandir Pvt. Ltd [Merged with Nihon Impex Pvt. Ltd on 21-10-2018

Sr. No.	Date	Facts
1.	13-06-2012	ROI filed declaring income of Rs. 310/-
2.	26.03.2015	Assessment of the company for A.Y. 2012-13 was completed vide order u/s. 143(3) of the Act dated 20.03.2015 determining the total income of Rs. 19,10,50,516/-.
3.	03-06-2016	The assessment order dated 26-03-2015 was set aside vide order u/s. 263 of the Act dated 17-10-2016 for de novo assessment after detailed enquiry on the issue of share allotment by the appellant- company.
4.	03-11-2016	In pursuance of the said order passed u/s. 263 of the Act, the Ld. A.O. passed assessment order u/s. 263/143(3) on 03.11.2016 determining total income of Rs.310/-.
5.	21.10.2018	By virtue of order of Hon'ble NCLT, Kolkata Bench dated 21.10.2018, the company M/s. Gyan Mandir Tradecom Pvt. Ltd. stood amalgamated with M/s. Nihon Impex Pvt. Ltd. w.e.f. 01.04.2017 and formed part of RoC records
6.	30-01-2019	The Ld. Pr. C.I.T., Kolkata-4 thereafter again initiated proceeding u/s. 263 for the second time on the non-existing entity (Gyan Mandir Tradecom Pvt. Ltd.). He passed order u/s. 263 of the Act dated 12.03.2019 and directed the A.O. to pass a fresh assessment order.
7.	09.02.2019	Assessee intimated the learned AO, ITO Ward - 11(2) that the assessee company has been amalgamated with M/s. Nihon Impex Pvt. Ltd. w.e.f. 01.04.2017.
8.	12.03.2019	The learned Pr.CIT passed order u/s. 263 of the Act dated 12.03.2019 in the name of non-existing entity, Gyan Mandir Tradecom Pvt. Ltd wherein the A.O. was directed to pass a fresh assessment order.
9.	07-06-2019	Appeal filed before the Hon'ble ITAT, Kolkata on 07-06-2019

ITA No. 1410/Kol/2019 A.Y 2012-13

M/s. Paramtma Vinimay Pvt. Ltd [Merged with Warner Dealcom Pvt. Ltd on 25-10-2018]

Sr. No.	Date	Facts
1.	17-09-2012	ROI filed on 17-09-2012 declaring income of Rs.550/-
2.	25.03.2015	Assessment of the company for A.Y. 2012-13 was completed vide order u/s. 143(3) of the Act dated 25.03.2015 determining the total income of Rs.25.67 cr.
3.	27-07-2016	Notice u/s 263 of the Act was issued on the assessee
4.	17-10-2016	The assessment order dated 25-03-2015 was set aside vide order u/s. 263 of the Act dated 27.10.2016 for de novo assessment after detailed enquiry on the issue of share allotment by the appellant- company.
5.	28.10.2016	In pursuance of the said order passed u/s. 263 of the Act, the Ld. A.O. passed assessment order u/s. 263/143(3) on 28.10.2016 determining total income of Rs.14,960/-.
6.	25.10.2018	By virtue of order of Hon'ble NCLT, Kolkata Bench dated 25.10.2018, the company M/s. Paramtma Vinimay Pvt. Ltd stood amalgamated with M/s. Warner Dealcom Pvt. Ltd w.e.f. 01.04.2017 and formed part of RoC records
7.	31.12.2018	The Ld. Pr. C.I.T., Kolkata-4 thereafter again initiated proceeding u/s. 263 for the second time on the non-existing entity (M/s. Paramtma Vinimay Pvt. Ltd) vide show cause notice dated 31.12.2018.
8.	30.01.2019	Assessee intimated the learned AO, ITO Ward - 11(2) that the assessee company has been amalgamated with M/s. Warner Dealcom Pvt. Ltd w.e.f. 01.04.2017. Amalgamation order copy was enclosed.
9.	12.03.2019	The learned Pr.CIT passed order u/s. 263 of the Act dated 12.03.2019 in the name of non-existing entity, M/s. Paramtma Vinimay Pvt. wherein the A.O. was directed to pass a fresh assessment order.
10.	07-06-2019	Appeal filed before the Hon'ble ITAT, Kolkata on 07-06-2019

ITA No. 1411/Kol/2019 A.Y 2012-13

M/s. Aditi Vintrade Pvt. Ltd [Merged with Utkarsh Dealer Pvt. Ltd on 23-10-2018]

Sr. No.	Date	Facts
1.	30-11-2012	ROI filed on 30-11-2012 declaring income of Rs.340/-

2.	20.03.2015	Assessment of the company for A.Y. 2012-13 was completed vide order u/s. 143(3) of the Act dated 20.03.2015 determining the total income of Rs.21,89,00,340/-.
3.	03-06-2016	The assessment order dated 20-03-2015 was set aside vide order u/s. 263 of the Act dated 03-06-2016 for de novo assessment after detailed enquiry on the issue of share allotment by the appellant- company.
4.	14-07-2016	In pursuance of the said order passed u/s. 263 of the Act, the Ld. A.O. passed assessment order u/s. 263/143(3) on 14-07-2016 determining total income of Rs.340/-.
5.	23.10.2018	By virtue of order of Hon'ble NCLT, Kolkata Bench dated 23-10-2018, the company M/s. Aditi Vintrade Pvt. Ltd. stood amalgamated with M/s. Utkarsh Dealer Pvt. Ltd. w.e.f. 01.04.2017 and formed part of RoC records
6.	30-01-2019	The Ld. Pr. C.I.T., Kolkata-4 thereafter again initiated proceeding u/s. 263 for the second time on the non-existing entity (Aditi Vintrade Pvt. Ltd.) . He passed order u/s. 263 of the Act dated 14.03.2019 and directed the A.O. to pass a fresh assessment order.
7.	15-01-2019	Assessee intimated the learned AO, ITO Ward - 11(2) that the assessee company has been amalgamated with M/s. Utkarsh Dealer Pvt. Ltd. w.e.f. 01.04.2017.
8.	14-03-2019	The learned Pr.CIT passed order u/s. 263 of the Act dated 14.03.2019 in the name of non-existing entity, Aditi Vintrade Pvt. Ltd. wherein the A.O. was directed to pass a fresh assessment order.
9.	07-06-2019	Appeal filed before the Hon'ble ITAT, Kolkata on 07-06-2019

ITA No. 1412/Kol/2019 A.Y 2012-13

M/s. Light House Merchants Pvt. Ltd | Merged with Hipoline Commerce Pvt. Ltd on 17-12-2018

Sr. No.	Date	Facts
1.	13-09-2012	ROI filed declaring income of Rs.330/-
2.	26.03.2015	Assessment of the company for A.Y. 2012-13 was completed vide order u/s. 143(3) of the Act dated 26.03.2015 determining the total income of Rs.20.72 cr.
3.	06-06-2016	The assessment order dated 26-03-2015 was set aside vide order u/s. 263 of the Act dated 06-06-2016 for de novo assessment after detailed enquiry on the issue of share allotment by the appellant- company.
4.	14-07-2016	In pursuance of the said order passed u/s. 263 of the Act, the Ld. A.O. passed assessment order u/s. 263/143(3) on

		14-07-2016 determining total income of Rs.330/-.
5.	17-12-2018	By virtue of order of Hon'ble NCLT, Kolkata Bench dated 17.12.2018, the company M/s. Lighthouse Merchants Pvt. Ltd. stood amalgamated with M/s. Hipoline Commerce Pvt. Ltd. w.e.f. 01.04.2017 and formed part of RoC records
6.	30-01-2019	The Ld. Pr. C.I.T., Kolkata-4 thereafter again initiated proceeding u/s. 263 for the second time on the non-existing entity (Lighthouse Merchants Pvt. Ltd.)
7.	08-03-2019	Intimation to the learned AO, ITO Ward-11(2) that the assessee company has been amalgamated with M/s. Hipoline Commerce Pvt. Ltd. W.e.f 01.04.2017.
8.	12-03-2019	The learned Pr.CIT passed order u/s. 263 of the Act dated 12.03.2019 in the name of non-existing entity, Lighthouse Merchants Pvt. Ltd. wherein the A.O. was directed to pass a fresh assessment order.
9.	07-06-2019	Appeal filed before the Hon'ble ITAT, Kolkata on 07-06-2019

3. From a perusal of the afore-stated chart, it is clear that the impugned revisional order(s) u/s. 263 of the Act has been passed by the Id. Pr. CIT against the aforesaid captioned assessee's who are not existing in the eyes of law. Moreover, we also note that notice informing proposed action of revision u/s. 263 of the Act was issued to them after they/assessee's had already amalgamated with different entities. Therefore, we find the following facts emerging from the aforesaid chart(s).

Sl. No.	Name of assessee	Date of merger/amalgamation vide order of NCLT/w.e.f.	Merged/Amalgamated legal entity	Show cause notice proposing 263 action by PCIT& date of 263 order
1	M/s.Durja VinimayP.Ltd	21-12-2018/01.04.2017	M/s. Nihon Impex P.Ltd	31-12-2018/12.03.2019
2	M/s. Gyan Mandir Tradecom P.Ltd	21-10-2018/01.04.2017	M/s. Nihon Impex P.Ltd	30-01-2019/12.03.2019
3	M/s. Paramatma Vinimay P.Ltd	25-10-2018/01.04.2017	M/s. Warner Dealcom P.Ltd	31-12-2018/12.03.2019
4	M/s. Aditi Vintrade P.Ltd	23-10-2018/01.04.2017	M/s. Utkarsh Dealer P.Ltd	30-01-2019/14.03.2019
5	M/s. Light	17-12-	M/s. Hipoline	30-01-2019/

	House Merchants P.Ltd	2018/01.04.2017	Commerce P.Ltd	12.03.2019
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4. We also note that the impugned orders have been passed by the Id. Pr. CIT after the assessee's informed their respective AO's about the passing of NCLT order, by virtue of which the assessee's/company(ies) had merged with the other corporate entities as shown in the above mentioned chart (supra). Thus, we find that all the assessee's before us had already merged with other corporate entities by virtue of Hon'ble NCLT orders prior to the notice issued by the Pr. CIT proposing revisional jurisdiction u/s. 263 of the Act for the AY 2012-13 and the impugned orders have been passed by the Ld. Pr. CIT on non-existing assessee's which had ceased to exist in the eyes of law. Since facts are similar for adjudicating the legal issue, we take up the lead case as that of M/s. Durga Vinimay Pvt. Ltd. [ITA No. 1408/Kol/2019] for A.Y 2012-13 for the purpose of adjudicating the legal issue raised before us. Since facts are similar, the result in respect of other cases will follow the result of the lead case.

5. Brief facts of the case of M/s. Durja Vinimay P.Ltd which merged with M/s. Nihon Impacts P. Ltd on 21-12-2018, w.e.f 01.04.2017 are given below:

6. In the present case, we note that the assessee company filed its return of income for the assessment year 2012-13 on 17-09-2012 declaring total income at Rs.560/-. During the year, the assessee raised share capital of Rs.22,36,50,000/- (share capital Rs.11,18,2501- and share premium ofRs.22,25,31,750/-). The case was later selected for scrutiny and assessment order was framed under section 143(3) of the Act was passed on 25-03-2015 wherein addition of Rs. 22,36,50,000/- was made under section 68 of the Act and the total income of the assessee was determined at Rs.22,36,50,560/- Subsequently, notice u/s. 263 of the Act was issued by the Ld Principal Commissioner of Income-tax on 27-07-2016 on the ground that the AO did not examine the details submitted by the assessee and completed the assessment (dt. 25.03.2015) without carrying out proper enquiries. Thus, the first order u/s. 263 of the Act was passed on 27-09-2016 setting aside the assessment order passed u/s. 143(3) of the Act on 25-03-2015 to be framed de novo with a direction to the AO to carry out proper examination of books of accounts and Bank Accounts of assessee as well as that of investors.

Thereafter, the AO while giving effect to the order of the Ld. Principal Commissioner u/s. 263 of the Act initiated reassessment proceedings in the light of the directions issued by the Ld. PrCIT in the 263 order dated 27.09.2016. Consequently, the AO issued notice u/s.142(1) of the Act and after serving the same on the assessee the AO notes that the AR of the assessee appeared pursuant to the notice u/s. 142(1) of the Act and produced the books of accounts for the current year, filed the details of 2nd source of funds and also produced the Bank Statements. And the AO notes that these documents were verified on a test check basis and no adverse inference was found. It was also noted by the AO that summons u/s. 131 of the Act was also served on Shri Rajeev Kumar, Director of the company and in response, Shri Rajeev Kumar had personally appeared before him and his statement was recorded. The AO has also recorded the fact that he had examined and verified the books of accounts and the bank statements of the subscriber companies filed by those companies before the predecessor AO in response to the notice issued u/s. 133(6) of the Act by him. Thus, after examination and re-examination of records, no adverse inference was drawn by the AO. In view of the enquiry carried out during re-assessment, the AO was pleased not to make addition of Rs.22,36,50,000/- u/s.68 of the Act which was earlier made in the original assessment order dated 25-03-2015. Thus, the AO, while carrying out the de novo re-assessment pursuant to the order of Ld. CIT u/s. 263 of the Act was pleased to accept the explanation furnished by the assessee in respect of capital infused in the form of shares and share premium to the tune of Rs.22,36,50,000/- and order u/s.263/143(3) of the Act was passed by AO on 28-10-2016 wherein the total income of the assessee was assessed at Rs.14,960/-. In the said order, a fresh addition of Rs.14,400/- was made u/s. 14A of the Act. Subsequently, by virtue of order of Hon'ble National Company Law Tribunal, Kolkata Bench dated 21.12.2018, the assessee company M/s. Durja Vinimay Pvt Ltd. stood amalgamated with M/s. Nihon Impex Pvt. Ltd. w.e.f. 01.04.2017 and which fact was incorporated in the RoC records. Assessee intimated this fact to the AO, ITO Ward - 11(2) on 31-01-2019 that the assessee company has been amalgamated with M/s. Nihon Impex Pvt. Ltd. w.e.f. 01.04.2017. Meanwhile, with regard to the order passed by AO u/s. 263/143(3) of the Act on 28-10-2016, the learned PCIT-4, Kolkata has issued a Show Cause Notice u/s. 263 of the Act dated 31-12-2018 in the name of erstwhile company, M/s Durja

Vinimay Pvt Ltd. And thereafter the order u/s. 263 of the Act dated 12-03-2019 was also passed in the name of the non-existent company, M/s Durja Vinimay Pvt. Ltd. though the fact of amalgamation with the M/s. Nihon Impex Pvt. Ltd. w.e.f. 01.04.2017 was brought to the notice of AO 31.01.2019 and the Ld. Pr. CIT has passed the impugned order only on 12.03.2019 in the name of ceased company i.e. M/s. Durja vinimay Pvt. Ltd. Aggrieved by the order of the Ld. Pr. CIT u/s. 263 of the Act, the assessee has filed this appeal before us raising the legal issue which are as follows:

“1. That, the Ld. Pr. C.I.T., Kolkata-4 has erred on facts and in law in having issued notice u/s.263 on the erstwhile dissolved company M/s.Durja Vinimay Pvt. Ltd. and passed order dated 12.03.2019 on the said non-existing company in spite of the fact that by virtue of order of Hon'ble NCLT, Kolkata Bench dated 21.12.2018 the said company stood amalgamated with Nihon Impex Pvt. Ltd. w.e.f. 01.04.2017 and also forms part of RoC records.

2. That, therefore, as tshe impugned second order of Ld. Pr. C.IT. u/s. 263 of the Act dated 12.03.2019 passed on a non-existent and erstwhile dissolved entity being void and an incurable defect in the eyes of law, the same should be quashed, more so when the information about the merger and surrender of PAN of the amalgamating company was given to ITO, Ward-12(1), Kolkata vide letter dated 31.01.2019.”

7. The Ld. AR assailing the decision of the Ld. Pr. CIT contended in respect of the legal issue that the impugned order passed u/s. 263 of the Act dated 12-03-2019 is a nullity since it is passed against a non-existing legal entity. According to him, the re-assessment order passed by AO in the second round u/s. 263/143(3) of the Act on 28-10-2016, the learned PCIT-4, Kolkata had erred in issuing the Show Cause Notice u/s 263 of the Act dated 31-12-2018 in the name of erstwhile company, M/s Durja Vinimlay Pvt. Ltd. and since the notice was issued in the name of M/s Durja Vinimay Pvt Ltd, which is admittedly a non-existent company as on the date when the notice u/s. 263 was issued, the assessee did not participate in the revision proceedings. Thereafter, the assessee also duly intimated the AO, ITO Ward - 11(2) on 31-01-2019 that the assessee company had been amalgamated with M/s. Nihon Impex Pvt. Ltd. w.e.f. 01.04.2017 by virtue of the order of, Hon'ble National Company Law Tribunal, Kolkata Bench dated 21.12.2018. However, it was pointed out by the Ld. AR that despite the said communication, the impugned order u/s. 263 of the Act was passed on 12-03-2019 in the name of the non-existent company, M/s Durja Vinimay Pvt. Ltd., which makes the order bad in the eyes of law.

8. According to the Ld. AR, since the impugned order u/s. 263 of the Act was passed in the name of M/s. Durja Vinimay Pvt Ltd. which had been amalgamated with M/s. Nihon Impex Private Limited under an approved scheme of amalgamation w.e.f 01-04-2017 and was not in existence at the time the section 263 order was passed dated 12-03-2019, the said order is a nullity. According to Ld. AR, it is trite law that on amalgamation, the amalgamating company ceases to exist in the eyes of law. According to him, the said proposition of the assessee gets fortified by the recent decision of the Hon'ble Supreme Court in the case of PCIT vs Maruti Suzuki India Limited (Civil Appeal No. 5409 of 2019) pronounced on 25th July 2019. In this judgment of the Hon'ble Apex Court, according to Ld. AR, the Hon'ble Supreme Court has elaborately discussed the facts and the judgment delivered by the Hon'ble Delhi High Court in the cases of M/s. Spice Infotainment Ltd. Vs. CIT (Delhi) (2012) 247 CTR 500 (affirmed by the Apex Court vide order dated 02-11-2017) which is in favour of assessee, and distinguished the case of M/s. Skylight Hospitality LLP v ACIT (2018) 405 ITR 0296 (Delhi) relied upon by the Ld. CIT, DR for the department. According to Ld. AR, in this case i.e M/s Maruti Suzuki (supra), the facts of M/s. Skylight Hospitality LLP (supra) were distinguished by the Hon'ble Apex Court and by placing reliance on the decision in the case of M/s. Spice Infotainment (supra) it was held that,

"In the present case, 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 coordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Infotainment on 2 November 2017. The decision in Spice Infotainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Infotainment. "

9. The Ld. AR drew our attention to the decision rendered by the Hon'ble Delhi High Court in the case of M/s. Spice Infotainment Ltd. Vs. CIT (Delhi) (2012) 247 CTR 500 wherein it was held that,

"No doubt, S was an assessee and an incorporated company and was in existence when it filed the returns in respect of two assessment years in question. However, before the case could be selected for scrutiny and assessment proceedings could be initiated, S got amalgamated with

MC Ltd. It was the result of the scheme of the amalgamation filed before the Company Judge of this Court which was duly sanctioned vide orders dt. 11th Feb., 2004. With this amalgamation made effective from 1st July, 2003, S ceased to exist. That is the plain and simple effect in law. The scheme of amalgamation itself provided for this consequence, inasmuch as simultaneous with the sanctioning of the scheme, S was also stood dissolved by specific order of this Court. With the dissolution of this company, its name was struck off from the rolls of companies maintained by the RoC. 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. In view of the aforesaid clinching position in law, it is difficult to digest the circuitious 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. After the sanction of the scheme on 11th Feb., 2004, S ceased to exist w. e.f 1st July, 2003. Even if S had filed the returns, it became incumbent upon the IT authorities to substitute the successor in place of the said dead person'. When notice u/s. 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 AO made the assessment in the name of S which was non- existing entity on that day. In such proceedings an assessment order passed in the name of S 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. "

10. According to Id AR, the Hon'ble Apex Court distinguished the facts of M/s. Skylight Hospitality LLP (supra), in the judgement of Maruti Suzuki (supra) and was pleased to concur with the decision of the Hon'ble Delhi High Court in M/s Spice Infotainment. According to Id AR, in M/s. Skylight Hospitality LLP(supra) the Hon'ble Court dealt with a situation where a notice under Section 148 was issued in the name of erstwhile private limited company which got converted to an LLP [Limited Liability Partnership] and not a case of amalgamation. The Hon'ble Delhi Court taking note that since as such no prejudice was caused to the assessee, the defect in not recording the name of the converted LLP in the impugned notice under Section 148 was a procedural defect or mistake curable under Section 292B, It was pointed out by the Id AR that in Skylight Hospitality LLP, the Hon'ble Delhi High Court distinguished the decision in Spice Infotainment on the ground that in that case (*Spice Infotainment*)even the final assessment order was in the name of the amalgamating company which was a non-existent company on the date the assessment order was passed.

11. Thus, according to Ld. AR, the facts of cases decided in M/s Maruti Suzuki and M/s Spice Infotainment are squarely applicable to the facts of the present case. It was brought to our knowledge that in the case of both Maruti Suzuki and Spice Infotainment, the assessment order was passed in the name of the non-existent

amalgamating company and the said order passed was held to be a nullity by the Hon'ble Apex Court. And in the present case of the assessee also, the impugned order u/s 263 of the Act dated 12-03-2019 was passed in the name of the amalgamating company, M/s Durja Vinimay Pvt Ltd which was indisputably not in existence at the time when the section 263 order was passed and as such, the impugned order passed u/s 263 of the Act is a nullity in law and prayed that the impugned orders be quashed.

12. Per contra ld. CIT DR supporting the impugned order of Ld. Pr. CIT, drew our attention to chart drawn in the case of M/s. Light House Merchants pvt. Ltd i.e. ITA No. 1412/Kol/2019 for the A.Y 2012-13 and pointed out that the assessee only intimated the AO about the fact of amalgamation on 08-03-2019 whereas on 17-12-2018 the assessee company was merged with M/s. Hipoline Pvt. Ltd. And it was pointed out by the ld. CIT DR that the impugned order was passed on 12-03-2019 u/s. 263 of the Act. Therefore, it was contended that effectively the Ld. Pr. CIT got prior notice of only four days about the fact that the assessee merged with another legal entity. According to him, the ld Pr CIT has passed the impugned order by only setting aside the re-assessment order and remanded it back to AO for framing of de- novo assessment, which in no case is going to prejudice the assessee. According to the ld. CIT DR, since no reassessments have been framed u/s. 143(3) of the Act against the non-existent companies, no prejudice is caused to the assessee and the Ld. Pr. CIT has only set aside the assessment order and, therefore, it was a mere procedural defect and can be cured. The learned CIT DR has relied on the order of the Hon'ble Delhi High Court in the case of M/s. Skylight Houspitality LLP,[which decision has been upheld by the Hon'ble Apex Court] and submitted that the 263 show cause notice proposing revision of reassessment order, as well as the impugned order u/s. 263 will in no way prejudice the assessee. According to him, since no reassessment levying tax has been framed/made against the assessee, he relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. M/s. Electro House [1971]82ITR824(SC) and also the case of Gita Devi Agarwal Vs. CIT [1970]76ITR496(SC) and does not want us to interfere in the order of the Ld. Pr. CIT which is impugned before us.

13. We have heard both the parties and perused the records. We note that M/s. Durja Vinimay Pvt. Ltd. filed the return of income for the year under consideration (AY 2012-13) on 17.09.2012 declaring an income of Rs.560/-. Later, the case of assessee was scrutinized by the AO who was pleased to frame an assessment order dated 25.03.2015 under section 143(3) of the Act determining total income of Rs. 22,36,50,560/-. Thereafter, on 27.07.2016, the Ld. Pr. CIT issued show cause notice dated 27.07.2016 intimating his desire to exercise his revisional jurisdiction u/s. 263 of the Act and thereafter by order dated 27.09.2016 Ld. Pr. CIT was pleased to set aside the order of the AO dated 25.03.2015 and directed de novo assessment as well as directing him to carry out proper examination of books of account and bank accounts of assessee as well as investors.

14. Thereafter, the AO records in the reassessment order dated 28.10.2016 [in the second round of re-assessment ordered by Ld. Pr. CIT] that the Ld. Pr. CIT -4 has also directed that the proceedings should be initiated at the earliest and the same should be completed without waiting for the time barring date. The AO also observes that the Ld. Pr. CIT, Kol-4, Kolkata has also directed him to follow the direction of Ld. Pr. CCIT, Kolkata dated 17.03.2015 in connection with Boards Circular, and office memorandum dated 07.11.2014 of CBDT in respect of steps towards a non adversarial tax regime. Then the AO records the fact that notice u/s. 142(1) dated 07.10.2016 was issued and served upon the assessee through speed post and fixing date of hearing on 17.10.2016 and in response to the notice u/s. 142(1) dated 17.10.2016, Shri Mukesh Kr. Jhyawar, FCA, the authorised representative (hereinafter referred to as AR) of the assessee appeared and filed power of attorney, the details of directors name and address along with PAN, Date of appointment and produced the books of accounts for the AY 2012-13 relevant to FY 2011-12; and the AO acknowledges that the details of 2nd source of fund and also produced the details of bank statement of the assessee company which is maintained from 01.04.2011 to 31.03.2012 and the AO finds that all the transactions were duly reflected in the bank statement and that all the relevant documents were verified by him on test check basis and that there was no adverse inference need to be drawn against the assessee.

15. Thereafter, the AO records that summons u/s. 131 of the Act was issued on 24.10.2016 to the director of the assessee company fixing the date of hearing on 27.07.2016. And pursuant to the summons, the Director Shri Rajeev Kumar appeared with photo identity proof, and his statement was recorded by the AO and placed in the records. According to AO (which he records in the reassessment order dated 28.10.2016), that during the course of assessment proceedings u/s 143(3)/263 the following features he noted which are as stated below:- [Reproduced from reassessment order dated 28.10.2016]

A. Discharge of onus of liability by M/s. Durja Vinimay Pvt. Ltd., as under:

- i) Assessee Company furnished all documents as requisitioned earlier.*
- [ii] Information provided by assessee Company later on, turned to be correct one.*
- (ill) Attendance of one of the Present Director of company against Summon issued u/s.131 and recording his statement is sufficient.*

B. Responses of Investors Companies:-

- (i) Subscribing companies has sufficient capital for investments.*
- (ii) Subscribing companies also invested in equity shares related to other companies.*
- (iii) Reference of cash deposits is not found in the statement of Bank Accounts filed by Investor Companies.*
- (iv) Financial transactions made during financial year 2011-12 between M/s. Durja Vinimay Pvt. Ltd., and Investors Companies found reported to Revenue.*
- (v) Notice u/s. 133(6) issued by the predecessor to all the share holder before the assessment proceeding /s. 143(3) and all the share holders reply was received and available in the records.*

C. On examination and re-examination of records conclusion as stated above has been made: [by AO]

- (i) Subscribing companies had sufficient capital as on 31.03.2012 and investments made was not confined to Assessee Company.*
- [ii] Books of accounts maintained by those companies were duly audited.*
- (iii) Investing companies are PAN holders and filed their returns.*
- (iv) Information as furnished against notices were cross verified and matched.*
- (vi) Financial transitions were done through bank accounts.*

Thereafter the AO concludes and records his finding *“in view of facts as stated above financial transactions related to relevant previous year as claimed by Assessee Company appears legally in order. Reports of transactions and parties involved in it*

are already in the notice of Revenue. All share holder files their returns regularly. In view of the facts as stated above it appears that Assessee Company discharged the burden of proof. All transactions are already in the notice of Revenue. During the course of re-examination of case and inquiry, in consideration of aforesaid facts, no adverse inference could be drawn. Total income, on verification of accounts, inquiries and after providing sufficient opportunity to assessee Company, is considered as under.” And thereafter, the AO computed the total income on 28.10.2016 at Rs.14,960/-.

17. After the AO has given effect on 28.10.2016 (supra) and framed the re-assessment order in the light of the Ld Pr. CIT order dated 27.07.2016, the assessee company got amalgamated with M/s. Nihon Impex Private Ltd. We note that it was the result of the scheme of amalgamation filed before the Hon’ble NCLT which was duly sanctioned vide order dated 21.12.2018. With this amalgamation made effective from 01.04.2017, the assessee company [M/s. Durja Vinimay Pvt. Ltd.] ceased to exist. That is the plain and simple effect in law as held by the Hon’ble Delhi High Court in M/s. Spice Infotainment Lt.ds Vs. CIT (supra). It is noted that the scheme of amalgamation itself provided for this consequences, in as much as simultaneous with the sanctioning of the scheme, the assessee M/s. Durja Vinimay Pvt. Ltd. stood dissolved by specific order of Hon’ble NCLT. With the dissolution of M/s. Durja Vinimay its name was struck off from the rolls of the companies maintained by the ROC. The Hon’ble Delhi High court in M/s. Spice Infotainment has explained the effect of dissolution of a company “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.” Therefore, the impugned order passed by the Ld. Pr. CIT in the name of M/s. Durja vinimay Pvt. Ltd. i.e, in the name of assessee’s which ceased to exist after the sanction of scheme on 21.12.2018 with effect from 01.04.2017, by the impugned order dated 12.03.209 is void. Since the assessee’s before us was not an existing entity when the impugned order was passed by the Ld. Pr. CIT and the fact was that the

assessee's had informed their AO's about the order of dissolution and sanctioning of scheme by Hon'ble NCLT w.e.f. 01.04.2017 on the following dates:

Sl. No.	Name of companies	Date of Amalgamation	Date of intimation to AO	Date of 263 order
1.	M/s. Durja Vinimay Pvt. Ltd. (merged with M/s. Nihon Impex P. Ltd.)	21.12.2018	31.01.2019	12.03.2019
2.	M/s. Gyan Mandir Tradecom P. Ltd. (merged with M/s. Nihon Impex P. Ltd.)	21.12.2018	09.02.2019	12.03.2019
3.	M/s. Paramatma Vinimay P. Ltd. (merged with M/s. Warner Dealcom P. Ltd.)	25.10.2018	15.01.2019	12.03.2019
4.	M/s. Aditi Vintrade P. Ltd. (merged with M/s. Utkarsh Deler P. Ltd.)	23.10.2018	15.01.2019	14.03.2019
5.	M/s. Light House Merchants P. Ltd. (merged with M/ HIpoline Commerce P. Ltd.)	17.12.2018	08.03.2019	12.03.2019

So, when the department was aware of the dissolution of assessee's companies, it was incumbent upon the Ld. Pr. CIT to take notice of this fact and substitute the successor company while passing the impugned order, after giving opportunity of hearing to amalgamated company as envisaged under section 263 of the Act. And since the aforesaid action has not been admittedly done by the Ld. Pr. CIT, the impugned order passed against the non-existing entities, which ceased to exist on the date of the impugned order is void.

18. Coming to the Ld. CIT, DR reliance on the order of M/s Sky Light LLP (supra), we note that it was a case of conversion of a private Limited Company to Limited Liability Partnership [LLP] and not a case of dissolution & amalgamation with another corporate entity as in this case. Therefore, the case M/s. Sky Light LLP is clearly distinguishable and therefore, the ratio is not applicable to this case. We note that in this present cases/appeals, the ratio of Hon'ble Delhi High Court in M/s. Spice Infotainment is applicable, which order of Hon'ble Delhi High Court has been upheld by the Hon'ble Supreme Court by order dated 02.11.2017 reported in 247 CTR 500 (SC) wherein we note that the Hon'ble Supreme Court has distinguished the case of M/s. Sky Light Hospitality LLP (supra) in PCIT V. Maruti Suzuki India Ltd. [Civil Appeal No. 5409 of 2019] order dated 25.07.2019.

19. On behalf of the revenue, reliance has been placed on the decision of Hon'ble Supreme Court in the case of Gita Devi Aggarwal Vs. CIT (1970) 76 ITR 496 (SC). That was a case wherein the assessee had challenged that she did not receive the notice issued by the Commissioner while exercising his revisionary power u/s. 33B of 1922 Act (as per 1961 Act it is Sec. 263) and had filed a Writ Petition before the Hon'ble Calcutta High court which has been dismissed by the Hon'ble High court. And the same was challenged before the Hon'ble Supreme Court wherein their Lordship confirmed the order of the Hon'ble Calcutta High Court by observing that section 33B of 1922 Act does not in express terms require a notice to be served. And it was also observed that section 33B only requires the commissioner to give an opportunity to the assessee of being heard and that no notice is contemplated by section 33B of the 1922 Act. The same view has been reiterated in the order of the Hon'ble Supreme court in the case of CIT Vs. M/s. Electro House (Supra). We also have no quarrel that notice to assessee is not a condition precedent for invoking jurisdiction u/s. 263 of the Act, so the SCN forwarded in the present case by Ld. Pr. CIT in the name of erstwhile ceased amalgamating assessee companies does not dent the jurisdiction of Ld. Pr. CIT. However, it has to be kept in mind that u/s. 263 giving an opportunity to assessee before passing order u/s. 263 of the Act is a necessity and failure to give opportunity to assessee before passing the order u/s. 263 of the Act will make the order passed under section 263 fragile for violation of natural justice and thus illegal. Moreover, according to us the action of the Pr CIT to have passed the impugned order under section 263 in the name of non-existent/amalgamating companies is bad in law and therefore, these two decisions cited by the Ld. CIT, DR do not come to the aid of the department and since we have already taken note that the ratio decidendi of the Hon'ble Delhi High court in M/s. Skylight Hospitality LLP Vs. ACIT is distinguishable on the facts of these cases and the Hon'ble supreme Court has distinguished the order of the Hon'ble Delhi High court in M/s. Skylight Hospitality LLP vis-a-vis that of the Hon'ble Delhi High court'' decision in Spice Infotainment Ltd. We note that the facts of cases decided in M/s Maruti Suzuki and M/s Spice Infotainment are squarely applicable to the facts of the present cases before us. We note that in both Maruti Suzuki and Spice Infotainment, the assessment order was passed in the name of the non-existent amalgamating companies and the said orders passed were held to be a nullity by the

Hon'ble Apex Court. And in the present case of the assessee also, the impugned order u/s 263 of the Act dated 12-03-2019 was passed in the name of the amalgamating company, M/s Durja Vinimay Pvt Ltd which was undisputedly not in existence at the time when the section 263 order was passed and as such, the impugned order passed u/s 263 of the Act is a nullity in law We note that the Hon'ble Supreme Court in the case of Maruti Suzuki India Ltd. was adjudicating a judgment of the Division Bench of the Hon'ble Delhi High Court which upheld the decision of the Income Tax Appellate Tribunal. The Tribunal held that the assessment made in the name of M/s. Suzuki Powertrain India Ltd. for the AY 2012-13 is a nullity since the entity has been amalgamated with M/s. Maruti Suzuki India Ltd. under an approved scheme of amalgamation and was not in existence. The Hon'ble Supreme Court noted the facts of the case as under:

“5.The assessee was a joint venture between M/s. Suzuki Motor Corporation and Maruti Suzuki India Ltd. The shareholding of the two companies in the assessee was 70% and 30%. The assessee was known upon incorporation as Suzuki Metal India Limited. Subsequently, with effect from 8 June 2005, its name was changed to SPIL.

6. On 28 November 2012, the assessee filed its return of income declaring an income of Rs. 212,51,51,156/-. The return of income was filed in the name of SPIL (no amalgamation having taken place on the relevant date).

7. On 29 January 2013, a scheme for amalgamation of SPIL and MSIL was approved by the High Court with effect from 1 April 2012. The terms of the approved scheme provided that all liabilities and duties of the transferor company shall stand transferred to the transferee company without any further act or deed. On the scheme coming into effect, the transferor was to stand dissolved without winding up. The scheme stipulated that the order of amalgamation will not be construed as an order granting exemptions from the payment of stamp duty or taxes or any other charges, if payable, in accordance with law.

8 On 2 April 2013, MSIL intimated the assessing officer of the amalgamation. The case was selected for scrutiny by the issuance of a notice under Section 143(2) on 26 September 2013, followed by a notice under Section 142(1) to the amalgamating company.

9 On 22 January 2016, the Transfer Pricing Officer⁸ passed an order under Section 92CA (3) determining the Arm's Length Price of royalty at 3 per cent and making an adjustment of Rs. 78.97 crores in respect of royalty paid by the assessee for the relevant previous year.

10 On 11 March 2016, a draft assessment order was passed in the name of Suzuki Powertrain India Limited” (amalgamated with Maruti Suzuki India Limited). The draft assessment order sought to increase the total income of the assessee by Rs. 78.97 crores in accordance with the order of the TPO in order to ensure that the international transactions with regard to the payment of royalty to the Associated Enterprises is at Arm's Length.

11 MSIL participated in the assessment proceedings of the erstwhile amalgamating entity, SPIL, through its authorized representatives and officers. This is evident from the copies of the order sheets of the assessment proceedings before the assessing officer for AY 2012-13. Post amalgamation, on 30 September 2013, the Chartered Accountants addressed a communication to the Commissioner of Income Tax, Circle 9(1), pursuant to the notice under Section 143(2) for an adjournment of the assessment proceedings for AY 2012-13 until the assessment proceedings for AY 2010-11 and AY 2011-12 were completed. On 27 October 2014, the Deputy Commissioner of Income Tax Circle 9 (1) addressed a communication to the Principal Officer, SPIL seeking a response to a detailed questionnaire. Thereafter, on 4 September 2015, the Deputy Commissioner of Income Tax Circle 16(1) called for disclosure of information in the course of the assessment for AY 2012-13. The communication was addressed to:

*“The Principal Officer
M/s Suzuki Power Train India Limited
(Now known as M/s Maruti Suzuki India Limited).”*

12 On 8 October 2015, a communication was addressed by the DGM (Finance) for MSIL in response to the notice under Section 142 (1) adverting to the case of SPIL for AY 2012-13.

13. On 12 April 2016, MSIL filed its appeal before the Dispute Resolution Panel⁹ as successor in interest of the erstwhile SPIL, since amalgamated. Form 35A was verified by Mr Kenichi Ayukawa, Managing Director & CEO of MSIL. The grounds of appeal before the DRP did not allude to the objection that the draft assessment order was passed in the name of SPIL (amalgamated with MSIL) or that this defect would render the assessment proceedings invalid.

14 On 14 October 2016, the DRP issued its order in the name of MSIL (as successor in interest of erstwhile SPIL since amalgamated).

15 The final assessment order was passed on 31 October 2016 in the name of SPIL (amalgamated with MSIL) making an addition of Rs. 78.97 crores to the total income of the assessee. While preferring an appeal before the Tribunal, the assessee raised the objection that the assessment proceedings were continued in the name of the non-existent or merged entity SPIL and that the final assessment order which was also issued in the name of a non-existent entity, would be invalid.

16 By its decision dated 6 April 2017, the Tribunal set aside the final assessment order on the ground that it was void ab initio, having been passed in the name of a non-existent entity by the assessing officer. The decision of the Tribunal was affirmed in an appeal under Section 260A by the Delhi High Court on 9 January 2018 following its earlier decision in the case of the assessee for AY 2011-12. That has given rise to the present appeal.”

20. The revenue’s contention has been noted by the Hon’ble Supreme court in para 17 of the order which is as under:

(i) *The High Court was not justified in quashing the final assessment order under Section 143 (3) only on the ground that the assessment was framed in the name of the amalgamating company, which was not in existence, ignoring the fact that the names of both the amalgamated company and the amalgamating company were mentioned in the assessment order;*

(ii) *Even on the hypothesis that the assessment order was framed incorrectly in the name of the amalgamating company, it would amount to a “mistake, defect or omission” which is curable under Section 292B when the assessment is, “in substance and effect, in conformity with or according to the intent and purpose” of the Act;*

(iii) *During the assessment proceedings and the subsequent proceedings in appeal, the amalgamating company was duly represented by the amalgamated company. No prejudice was caused to any of the parties by the assessment order and hence rendering the assessment order invalid on a ‘mere technicality’ would be incorrect in law. There was effective participation of the assessee in the assessment proceedings and there was no doubt in the minds of those who*

participated about the entity in relation to which the assessment proceedings took place;

(iv) *In **Spice Entertainment Ltd. v Commissioner of Service Tax**¹⁰ (“**Spice Entertainment**”)¹¹, the final assessment order only referred to the name of the erstwhile entity which was non-existent and there was no reference to the*

resulting company. In distinction, in the present case, in both the draft and the final assessment orders, the names of both the amalgamating and amalgamated companies were mentioned;

(v) *In paragraph 11 of the decision of the Delhi High Court in **Spice Entertainment**, it was held that:*

“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 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.”

From the above extract, it would emerge that if an assessment order had been passed on the resulting company, it would not be void. Hence, in the present case, the issuance of a notice under Section 143 (2) to SPIL cannot be considered to be a jurisdictional effect when the assessment order categorically mentions the names of the amalgamated and amalgamating companies;

~~(vi) *The decision of the Delhi High Court in **Skylight Hospitality LLP v Assistant Commissioner of Income Tax, Circle-28(1), New Delhi**¹² (“**Skylight Hospitality LLP**”)¹³, which was confirmed by this Court on 6 April 2018¹³ dealt with a situation where a notice under Section 148 was issued in the name of a*~~

non-existent private limited company. The Court held that the defect in recording the name of a non-existent company in a notice under Section 148 was a procedural defect or mistake curable under Section 292B, since no prejudice was caused to the assessee. The Delhi High Court distinguished the decision in **Spice Entertainment** on the ground that in that case even the final assessment order was in the name of a non-existent company;

(vii) In the present case, both the draft assessment order and the final assessment order contained the names of the amalgamated and amalgamating companies and hence it cannot be held that the final order is in the name of a non-existent company. The order of the TPO is not the subject of a challenge by the assessee before any forum. The directions of the TPO were implemented by the assessing officer in the draft assessment order in accordance with Section 144C(1) which was then challenged by the assessee before the DRP under Section 144C(2). Since the names of both the amalgamated and amalgamating companies were mentioned in the draft assessment order and final assessment order, there is no jurisdictional defect;

(viii) In view the decision of this Court in **Kunhayammed v State of Kerala**¹⁴ (“**Kunhayammed**”), though the doctrine of merger does not apply when a Special Leave Petition is dismissed before the grant of leave to appeal, where an order rejecting a Special Leave Petition is a speaking order and reasons have been assigned for rejecting the petition, the law stated or declared in such an order will attract Article 141; and

(ix) Consequently, in the alternative, in view of the order passed by this Court on 6 April 2018 in **Skylight Hospitality LLP** on the one hand and the order dated 16 July 2018 in the case of the present assessee for AY 2011-12 and the earlier order dated 2 November 2017 in **CIT, New Delhi v Spice Entertainment Ltd.**¹⁵ (“**Spice Entertainment Ltd**”), there appears to be a direct conflict of views on the principle whether a notice issued to a non-existent company would suffer from a jurisdictional error or whether it is a mere defect or mistake which would be governed by Section 292B.”

21. After hearing the Ld. Counsel for the assessee, the Hon’ble Supreme Court has adverted to certain significant facets of the present case (Maruti Suzuki’s case)

(i) Firstly, the income which is sought to be subjected to the charge of tax for AY 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) Secondly, under the approved scheme of amalgamation, the transferee has assumed the liabilities of the transferor company, including tax liabilities;

(iii) Thirdly, the consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist. In **Saraswati Industrial Syndicate Ltd.**, the principle has been formulated by this Court in the following observations:

“5. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of 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 shareholders of each blending company become substantially the shareholders 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: Halsbury's Laws of England (4th edition volume 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."

(iv) *Fourthly, upon the amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated or an order of assessment passed;*

(v) *Fifthly, a notice under Section 143 (2) was issued on 26 September 2013 to the amalgamating company, SPIL, which was followed by a notice to it under Section 142(1);*

(vi) *Sixthly, prior to the date on which the jurisdictional notice under Section 143 (2) was issued, the scheme of amalgamation had been approved on 29 January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012;*

(vii) *Seventhly, 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 April 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."*

22. Thereafter, the Hon'ble Supreme court has distinguished the Hon'ble Delhi High Court decision in skylight Hospitality LLP which was affirmed by the Hon'ble supreme court on 6th April, 2018 by observing as under:

*"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 Court³⁴. 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.”

*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.”*

23. The Hon’ble Supreme court in this case after taking note of the provisions of section 292B of the Act in para 31 held that “In this case, 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.” Thereafter, the Hon’ble Supreme Court concluded the order by holding as under:

*“In the present case, 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 learned judges which dismissed the appeal of the Revenue in **Spice Entertainment** on 2 November 2017. The decision in **Spice Entertainment** has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in **Spice Entertainment**.*

We find 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 AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 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.”

24. In the light of the aforesaid discussions and relying on the decision of the Hon’ble Apex court in Maruti Suzuki (Supra) and Spice Infotainment Ltd.(supra), we note that the impugned order passed under section 263 Of the Act by the Ld. Pr. CIT against the amalgamating companies which were not in existence on the date of the impugned order is a

nullity and, therefore, we are inclined to quash all the impugned orders as shown in the captioned appeals.

25. In the result, all the appeals of the assessee's are allowed.

Order Pronounced in the Open Court on 22nd November, 2019

Sd/-
Dr. Arjun Lal Saini
Accountant Member

Sd/-
A.T. Varkey
Judicial Member

Dated 22 -11-201

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee: M/s. Durja Vinimay P.Ltd (merged with Nihon Implex Ltd) 9 Crooked Lane, 1st Fl, Room No. 7A, Kolkata-69/ M/s. Gyan Mandir Tradecom P.Ltd (merged with Nihon Impex P.Ltd) 9 Crooked Lane, 1st Fl., Room No. 7A, Kolkata-69/ M/s. Paramtma Vinimay P.Ltd (merged with Warner Dealcom P.Ltd 9 Crooked Lane, 1st Fl., Room No. 7A, Kolkata-69/M/s. Aditi Vintrade P.Ltd (merged with Utkarsh Dealer P.Ltd) 9 Crooked Lane, 1st FL., Room No. 7A, Kolkata-69/M/s. Light House Merchants P.Ltd (merged with Hipoline Commerce P.Ltd) 27A, Waterloo St., 1st Fl., Kolkata-69.
- 2 Respondent/Revenue: The Pr. CIT, Kol-4, Kolkata
3. CIT,
4. CIT(A), Kolkata.
5. DR, Kolkata Benches, Kolkata

**PP/SPS True Copy By By Order Assistant Registrar

ITAT Kolkata