IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.491/Kol/2021
Assessment Year: 2011-12

GPT Sons Pvt. Ltd. (for GPT Venture Pvt. Ltd. since amalgamated) JC-25, GPT Centre, Sector-III, Salt Lake City, Kolkata-700098. (PAN: AABCP2721K)	Vs.	Deputy Commissioner of Income-tax, Central Circle-3(1), Kolkata.
(Appellant)		**(Respondent)**

Present for:

Appellant by : Shri A. K. Tibrewal, FCA & Shri Amit Agrawal, Advocate
Respondent by : Shri Sanjay Mukherjee, CIT, DR

Date of Hearing : 19.04.2023
Date of Pronouncement : 09.05.2023

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This captioned appeal filed by the assessee is against the order of Ld. CIT(A)-21, Kolkata vide order No. ITBA/APL/S/250/2021-22/1035671041(1) dated 17.09.2021 against the order of Ld. DCIT, Central Circle-3(1), Kolkata passed u/s. 147/143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 29.12.2018.

2. Assessee has raised as many as ten grounds of appeal which are reproduced as under:

1. That the Order dated 17th September, 2021 passed by the Learned Commissioner of Income Tax (Appeals)-21, Kolkata under section 250 of the Income Tax Act, 1961 is without jurisdiction, illegal, invalid, bad-in-law, void ab-initio, perverse and otherwise

unreasonable being passed against the facts and laws applicable in the case.

2. That the Learned Commissioner of Income Tax (Appeals)-21, Kolkata misdirected himself in law in confirming the validity of the impugned reassessment proceedings which was initiated vide issue of notice dated 30th March, 2018 issued under section 148 of the Act in the name of non-existent company viz. "GPT Ventures Private Limited", which had already amalgamated with Appellant Assessee Company i.e. GPT Sons Private Ltd, and thereby confirming the validity of the said impugned Assessment order dated 29.12.2018 passed under section 147/143(3) of the Act.

3. That the Learned Commissioner of Income Tax (Appeals)-21, Kolkata erred in confirming the validity of the impugned reassessment proceedings which was initiated vide issue of notice dated 30th March, 2018 issued under section 148 of the Act despite of the patent defect that the said notice was issued and the purported reassessment proceedings was initiated thereon in the name of non-existent amalgamated company viz. "GPT Ventures Private Limited" arbitrarily on the ground that such defect is a curable defect under section 292B of the Income Tax Act, 1961.

4. That the Learned Commissioner of Income Tax (Appeals)-21, Kolkata erred in not considering/dealing with the grounds and submissions raised by the Appellant Assessee Company contending that the impugned reassessment proceedings and the resultant reassessment order dated 29th December, 2018 passed under section 147/143(3) of the Act is without jurisdiction, illegal, invalid and bad-in-law in as much as the same does not satisfy the requirements of section 147 to section 151 of the Income Tax Act, 1961, more particularly as reasons to belief of the Assessing Officer were totally vague, incorrect and baseless and ambiguous and as it fails to show the live link with the alleged income escaping assessment.

5. That the Learned Commissioner of Income Tax (Appeals)-21, Kolkata erred in confirming the arbitrary addition of Rs.9,55,00,000, made by the Assessing Officer as unexplained cash credit under section 68 of the Income Tax Act, 1961, on the alleged ground that the Appellant Assessee Company had failed to discharge its onus to establish identity, genuineness and creditworthiness of the transactions and on the basis of mere suspicions, surmises, conjectures and assumption of incorrect facts, irrelevant considerations, wrong/baseless allegations and by ignoring the unimpeachable evidences available on record.

6. That the Learned Commissioner of Income Tax (Appeals)-21, Kolkata erred in confirming the arbitrary addition of Rs.9,55,00,000, made by the Assessing Officer as unexplained cash credit under section 68 of the Income Tax Act, 1961, by placing reliance on the statement of one Shri Mayank Daga, to draw adverse inference against the Appellant Assessee but without appreciating that the Appellant Assessee Company had

not been allowed an opportunity to cross-examine the said person and to rebut the contents of the said statement.

7. That the Learned Commissioner of income Tax (Appeals)-21, Kolkata erred in confirming the arbitrary addition of Rs.9,55,00,000, on the basis of allegations of alleged cash rotation through accommodation entries without bringing on record any credible legal evidence of cash transfer and without being able to establish that undisclosed income of the assessee company was introduced in the books by way of cash rotation between the amalgamated company/assessee company and the entry operator or any other person whatsoever.

8. That the Learned Commissioner of Income Tax (Appeals)-21, Kolkata failed to appreciate that the veracity and genuineness of the aforesaid sum of Rs.9,55,00,000 cannot be doubted as the said sum received by M/s. GPT Venture Private Limited from M/s Instyle Trading Pvt. Ltd on various dates of the Financial Year 2010-11, became own money of M/s. GPT Venture Private Limited w.e.f 01.04.2010 pursuant to the Scheme of Amalgamation approved by Hon'ble Calcutta High Court vide its order dated 18th March, 2011 rendered in Company Petition No.546 of 2010.

9. That the Learned Commissioner of Income Tax (Appeals)-21, Kolkata erred in confirming the arbitrary addition of Rs.9,55,00,000, made by the Assessing Officer as unexplained cash credit under section 68 of the Income Tax Act, by relying on various judgements which are inapplicable to the facts of this case and are totally distinguishable and by arbitrarily not considering the detailed submissions and judgments relied upon by the Appellant Assessee Company.

10. That the Appellant Assessee Company craves leave to add, alter or amend any ground of appeal during the course of hearing of the appeal."

2.1. Ground nos. 1 to 4 deal with the jurisdictional issue on the issue of notice under section 148 of the Act on a non-existing company owing to its amalgamation by the scheme of amalgamation approved by the Hon'ble High Court of Calcutta. Ground no 5 to 9 deals with the merits of the case in respect of addition of Rs.9.55 Cr. by treating the share capital and share premium as unexplained cash credit u/s. 68 of the Act. We will first take up ground nos. 1 to 4 for adjudication.

3. Brief facts of the case as culled out from the records are that assessee i.e. GPT Venture Pvt. Ltd. (in short "GVPL") was amalgamated into GPT Son Pvt. Ltd. (in short "GSPL") vide order dated 13.07.2012 passed by Hon'ble High Court of Calcutta in Co. Petition No. 76 of 2012 and Co. Application No. 1101 of 2012. GVPL lost its separate existence after it was merged with its group company GSPL. A notice u/s. 148 of the Act dated 30.03.2018 was issued from the office of ACIT, Central Circle 3(1), Kolkata on GVPL which was not in existence on the date of issue of the said notice. Before the ld. CIT(A), assessee had contested on the assumption of jurisdiction by the Ld. AO and issuance of notice u/s. 148 of the Act by submitting that notice is invalid as it is issued on a non-existent entity and, therefore, liable to be quashed as void ab initio.

3.1. Reasons recorded for issuing notice u/s. 148 of the Act refers to information according to which assessee had routed back its own unaccounted money amounting to Rs.9.55Cr. through accommodation entry provided by Instyle Trading Pvt. Ltd. (in short "ITPL") which is alleged to be a shell entity, controlled and managed by certain entry operators. In the reasons to believe recorded for issuing notice u/s. 148 of the Act on GVPL, it is noted that a search and seizure operation was conducted at the business premises of one Shri Mayank Daga on 07.03.2011 by the Investigation Directorate, Kolkata.

3.2. In the course of this proceeding, it had come to notice that unaccounted income of Rs.9.55 Cr. belonged to GVPL which had been taken from ITPL in the form of share capital

including share premium. Statements of Shri Ramesh Chand Daga, director of ITPL were also recorded u/s. 131 of the Act on 12.09.2017, in the course of search and seizure operation. In one of the questions at question no. 8, it is stated that ITPL was amalgamated and Shri Ramesh Chand Daga was required to state the nature of business of ITPL. Question no. 10 also dealt with asking details of scheme of amalgamation of ITPL. Further, from perusal of question no. 15, it is noted that in the question itself, it has been stated that ITPL was amalgamated into the GPT group concern.

3.3. Based on this statement, Ld. AO recorded the reasons to believe that investments made by the GPT group are nothing but own unaccounted money of the assessee which has been routed back in their regular books of accounts in the guise of share capital and share premium and hence, there is an escapement of income which needs further scrutiny to safeguard the interest of revenue. The reasons so recorded are placed in the paper book at page nos. 71 to 78. Based on these reasons to believe, notice u/s. 148 of the Act dated 30.03.2018 was issued in the name of GVPL.

3.4. There have been two schemes of amalgamation approved by the orders of Hon'ble High Court of Calcutta, the first order is dated 18.03.2011 which is effective from 01.04.2010, approving the merger of two companies i.e. RNT Consultants & Investors Pvt. Ltd. and ITPL with GVPL. The second order by the Hon'ble High Court at Calcutta is dated 13.07.2012 which is effective from 01.04.2011, approving the merger of five companies including GVPL with GSPL.

3.5 From the above chronology of events, the relevant facts for the present case are that ITPL got merged into GVPL and then GVPL got merged into GSPL. GVPL had received Rs. 9.55 Cr. in its regular books of account from ITPL in the form of share capital and share premium. The source of investment by ITPL was explained to be from sale proceeds derived by it from sale of its investments in shares. This investment of Rs.9.55 Cr. subsequently, on amalgamation became the investment of GVPL. Thus, pursuant to the scheme of amalgamation, investment made by ITPL became the own money of GVPL and vested in it by the operation of law in terms of approved scheme of amalgamation.

3.6. Assessee had taken as many as five grounds before the Ld. CIT(A), challenging the jurisdictional and legal issue in respect of issue of a notice on a non-existing entity, by placing reliance on several judicial precedence including that of Hon'ble Supreme Court and various Hon'ble High Courts as well as dealing with provisions of the Act and the relevant provision of the Companies Act. However, Ld. CIT(A) gave his finding by only considering the provisions of section 292B of the Act and held that issuance of notice in the name of GVPL is a curable defect which in any way has been rectified in order passed u/s. 147 read with section 143(3) of the Act. He thus, held the reassessment proceeding as legally valid. On the merits of the case also, Ld. CIT(A) sustained the addition by holding that assessee had failed to rebut the findings and observations made by the Ld. AO in the assessment proceedings.

4. Before us, Ld. Counsel for the assessee has emphasized on the contention that notice issued in the name of a non-

existing company is not tenable in the eyes of law. According to him, the jurisdiction lapse on the part of the Ld. AO is not a curable lapse u/s. 292B of the Act.

5. Ld. CIT, DR admitting the fact that though the notice was issued in the name of GVPL which was amalgamated into GSPL and was not in existence on the date of issue of the said notice, the assessment was completed and order was passed u/s. 147 read with 143(3) of the Act on 29.12.2018 in the name of "*M/s. GVPL (amalgamated company) since amalgamated to M/s. GSPL (amalgamating company".* Ld. CIT, DR thus submitted that the assessment was completed by referring to the amalgamated company GSPL, into which GVPL had got merged.

6. We have heard the rival contentions and perused the material available on record. Admittedly, it is a fact on record and is undisputed that GVPL was not in existence on the date of issue of notice u/s. 148, dated 30.03.2018 as it had already got merged into GSPL under the approved scheme of amalgamation by the Hon'ble High Court of Calcutta vide order dated 13.07.2012, which was effective from 01.04.2011. It is also a fact on record that ITPL had got merged into GVPL under the similar approved scheme of amalgamation effective from 01.04.2010. From the perusal of the order of Hon'ble High court at Calcutta which approved the scheme of amalgamation relating to GVPL and GSPL, from its page no. 5, we note that prior to giving approval to the scheme of amalgamation, Hon'ble high Court had issued notice to the Central Government to put up its case. However, despite notice having been served, nobody appeared to represent the Central Government. Relevant

extracts from the order of Hon'ble High court are reproduced hereunder for ease of reference:

> *"... And upon reading the order made herein and dated the twenty seventh day of March in the year, two thousand twelve And upon reading a letter dated the fourteenth day of May, in the year, two thousand twelve issued by the Advocate-on-Record of the said petitioner companies And another letter dated the twelfth day of June, in the year two thousand twelve of the Company Secretary of the said Target company no. 3 to the Regional Director And upon reading on the part of the Central Government a letter dated the eighth day of June, in the year two thousand twelve And upon hearing Ms. Manju Bhuteria (Mr. Ravi Asopa, Advocate appearing with her) Advocate for the said petitioner companies <u>And none appears on behalf of the Central Government</u> And it appearing from the said reports of the Chairperson that the proposed Scheme of Arrangement for take over of the said target company Nos. 1, 2, 3 and 4 and the Scheme of Amalgamation of the said transferor company all with the said holding company in accordance with law <u>And since despite notice having been served nobody appears to represents the Central Government.</u>*
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> *This court doth hereby sanction the proposed Scheme of Arrangement and Amalgamation set forth in annexure "A" of the petition herein and specified in the Schedule "A" hereto and doth hereby declares the same to be binding with effect from first day of April in the year two thousand eleven (hereinafter referred to as the said Appointed date) on the said target company Nos. 1, 2 3 and 4, the said transferor company and the said Holding company and their respective shareholders and all concerned."*
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> (emphasis supplied by us by underline)

6.1. In reference to the above extracts of the order approving the Scheme of amalgamation, we note that Hon'ble Supreme Court in the case of Dalmia Power Ltd. Vs. ACIT (2019) 112 taxman.com 252 (SC) had observed that once no objection is raised by authority affected by the scheme of amalgamation, then the said scheme attained statutory force not only inter se the transferor and transferee companies but also in rem. While giving these observations, Hon'ble Supreme Court took note of section 230(5) of the Companies Act, 2013 and Rule 8(3) of the Companies (Compromises Arrangements and Amalgamations) Rules, 2016 which deals with sending all the relevant documents in respect of scheme of amalgamation to

the Central Government, income tax authorities, Reserve Bank of India, Securities & Exchange Board and such other regulators or authorities who are likely to be affected by the scheme of amalgamation, to make their representation. The observations of Hon'ble Supreme Court in this respect are extracted as under:

> *"4.3. In compliance with section 230(5) of the Companies Act, 2013, notices under Form No.CAA. 3 under sub-Rule (1) of Rule 8 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 were sent to the Department.*
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> *Sub-section (5) of section 230 of the Companies Act, 2013 provides as under:*
>
> > *"(5) A notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals. "*
>
> *Sub-section (5) of section 230 requires that a notice of the meeting under sub-section (3) of Section 230 along with all the documents pertaining to the scheme, shall be sent to the Central Government, and statutory authorities such as the Income Tax Department, RBI, SEBI, ROC etc. and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement. The statutory authorities could raise objections within 30 days from the date of receipt of the notice, failing which, it would be presumed that they had no representation to make on the proposed schemes of compromise, arrangements and amalgamations.*
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> *Similarly, Rule 8(3) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides that any representation made to the statutory authorities notified under*

Section 230(5), shall be sent to the NCLT within a period of thirty days from the date of receipt of such notice, and a copy of such representation shall simultaneously be sent to the concerned companies. In case no representation is received within thirty days, it shall be presumed that the statutory authorities have no representation to make on the proposed scheme of compromise or arrangement.

Rule 8 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 is set out hereinunder for ready reference:

> *"(3) If the authorities referred to under sub-rule (1) desire to make any representation under sub-section (5) of section 230, the same shall be sent to the Tribunal within a period of thirty days from the date of receipt of such notice and copy of such representation shall simultaneously be sent to the concerned companies and in case no representation is received within the stated period of thirty days by the Tribunal, it shall be presumed that the authorities have no representation to make on the proposed scheme of compromise or arrangement. "*

The Department did not raise any objection within the stipulated period of 30 days despite service of notice.

Pursuant thereto, the Schemes were sanctioned by the NCLT, Chennai vide Orders 16.10.2017, 20.10.2017, 26.10.2017, 28.12.2017, 10.01.2018, 20.04.2018 and 01.05.2018; and, vide Orders dated 18.05.2017 and 30.08.2017 by the NCLT, Guwahati. Accordingly, the Schemes attained statutory force J.K. (Bom.) (P.) Ltd. v. New Kaiser-I-Hind Spg. &Wvg. Co. Ltd. [1970] 40 Compo Cas. 689 not only inter se the Transferor and Transferee Companies, but also in rem, since there was no objection raised either by the statutory authorities, the Department, or other regulators or authorities, likely to be affected by the Schemes."

6.2. The companies Act, 1956 contained similar provisions u/s. 394 and 394A as referred above by the Hon'ble Supreme Court from the Companies Act, 2013 while observing as to sending all the relevant documents in respect of Scheme of Amalgamation to the Central Government to make its representation.

7. We observe from the material on records that in the reasons to believe recorded by the Ld. AO, reference has been made to the amalgamation of ITPL into GVPL which evidently demonstrates that the fact of amalgamation was in the knowledge of the Ld. AO at the time of recording of reasons to believe, after which only approval is sought from the appropriate authority and notice is issued u/s. 148 of the Act. Despite having knowledge of the amalgamation, the notice was issued in the name of GVPL. Further, in the order of approval of scheme of amalgamation by the Hon'ble High Court of Calcutta, as extracted above, notices were issued on the Central Government against which none appeared before the Hon'ble Court. We take note of observation of the Hon'ble Supreme Court given in the case of Dalmia Power Ltd. (supra). Accordingly, the scheme of amalgamation had attained statutory force not only inter se the transferor and transferee company but also in rem.

8. Ld. Counsel had placed reliance on several judicial precedents to fortify his contentions. We refer to certain judicial precedents with their relevant extracts in the context of issue in hand before us.

8.1. In the judgment of Hon'ble Jurisdictional High Court at Calcutta in the case of I. K. Agencies (P) Ltd. Vs. Commissioner of Wealth Tax (2012) 20 taxmann.com 731 (Cal.), it was held that that if the law of the land is that the initiation of the proceeding or reopening of assessment depends upon the service of a valid notice in terms of s. 17 of the Act upon the assessee, a notice issued to a person who

is not in existence at the time of issuing such notice cannot make it valid. Thus, the fact that the real assessee subsequently filed its return with objection that such notice is invalid cannot cure the defects which go to the root of the jurisdiction to reopen the proceedings. The Court further held that the said provision cannot cure a defect of the nature involved in the case before us, where no notice at all has been issued upon the real assessee responsible for payment of the dues. By taking aid of the said provision, a case of issue of notice upon a wrong person altogether cannot be held to be binding upon the real assessee.

8.2. Hon'ble High Court of Madras had rendered its decision in the case of Alamelu Veerappan Vs. ITO (2018) 95 taxmann.com 155 (Mad.) wherein it held that "*notice issued in the name of a dead person was invalid. It further held that notice u/s. 148 was defective which goes to the root of the exercise of jurisdiction u/s. 147 of the Act and that notice u/s. 148 is, therefore a nullity.*" While giving its verdict, Hon'ble High Court placed reliance on the decision of the Hon'ble Apex Court in the case of CIT Vs. Amarchand N. Shroff (1963) 48 ITR 59 (SC).

8.3. In a recent decision by the Hon'ble Jurisdictional High Court of Calcutta in the case of Brubeck Resources Pvt. Ltd. Vs. Union of India in WPA No. 1791 of 2020 order dated 02.08.2021 wherein notice u/s. 148 was issued in the name of amalgamated company, had observed in para 10 by placing reliance on another decision of Hon'ble Gujarat High

Court in the case of Takshashila Reatiles Pvt. Ltd. Vs. DCIT reported in 2016 SCC online Gujarat 6462, as under:

> *"10. Heard the learned Counsels appearing on behalf of the respective parties at length. At the outset, it is required to be noted and it is not in dispute that the impugned notices under Section 148 of the Income Tax Act have been issued against the original assessee on 21.01.2011 to reopen the assessment for the Assessment year 2009-10. It is also not in dispute that the respective petitioners-original assessee are ordered to be amalgamated with one TakshashilaGruhNirman (Subsequently named as Takshahila Realties Pvt. Ltd). The scheme of amalgamation has been sanctioned by this Court, by which the respective petitioners are ordered to be amalgamated into TakshashilaGruhNirman (Subsequently named as Takshahila Realties Pvt. Ltd.) with effect from 01.04.2010. Under the circumstances, when the impugned notices are issued against the original assessee-amalgamating Company on 21.01.2011, it can be said that the same has been issued against the non-existent Company. It cannot be disputed that once the scheme for amalgamation has been sanctioned by the Court with effect from 01.04.2010, from that date amalgamating Company would not be in existence. Under the circumstances, the impugned notices, which are issued against the non existent Company, cannot be stained and the same deserves to be quashed and set aside. Identical question came to be considered by the Division Bench of this Court in the case of Khurana Engineering Ltd. (Supra). It was the case where the original assessee Company was ordered to be amalgamated with effect from 01.04.2009. Notice under Section 148 of the Income Tax Act was issued against and the transferor Company-amalgamating Company on 20.06.2012. The Division Bench of this Court in a writ petition filed by the transferor Company has observed and held that on and from the appointed date, as per the scheme of amalgamation sanctioned by the Court, the transferor Company shall not be in existence, and therefore, the impugned notices against the transferor Company (non-existent Company) shall not be permissible. The Division Bench has observed that in such a situation the 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 Company and also the more advisable course from the point of view of the revenue would be to make one assessment on the transferee Company and to make separate protective assessments on both the transferor 'and transferee Companies separately ultimately, the Division Bench has held that the transferor Company would no longer be amenable to the assessment proceedings for the Assessment Year 2010-11, and therefore, notice for producing documents for such assessment would therefore be invalid."*

8.4. Hon'ble Supreme Court has dealt with similar issue elaborately in the case of PCIT Vs. Maruti Suzuki India Ltd. (2019) 416 ITR 613 (SC) and has categorically observed that the basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon approving of the scheme of amalgamation. Participation in the proceeding by the appellant in the circumstances cannot operate as an estoppels against law. The relevant extracts in this respect are reproduced 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 2011-12. In doing so, this Court has relied on the decision in Spice Entertainment. "*
> *While arriving at such a decision, the Hon'ble Apex Court has taken note of Section 292-B of the Act also, which is apposite to refer to and the same reads as under;*
>
> *"292B. No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provision of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect, or omission in such return of income, assessment, notice,summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act. "*
>
> *The jurisdiction assumed by the Assessing Officer to issue notice under Section 148 of the Act to non-existing company is substantive illegality and not the procedural violation of the nature adverted to in Section 292-B of the Act. The substantive defective notice issued against a non-existing company is not curable. On this ground alone, without adjudicating upon the*

other issues raised by the petitioner inasmuch as the limitation aspect, change of opinion, non-existence of tangible material and non-failure on the part of the assessee disclosing full and true material facts need not be examined. Without going into these aspects, the writ petition requires to be allowed on the ground of issuance of notice under section 148 of the Act to the non-existing company.

14. Hence, Notice dated 28-3-2018 issued under section 148 of the Act, at Annexure-A, the order overruling the objections of the petitioner dated 29-11-2018 at Annexure-B and Notice dated 11-12-2018 issued under section 142(1) of the Act at Annexure-S are quashed.

15. The writ petition is allowed, in terms of the above."

8.5. Reference was also made to the latest decision of the Hon'ble Supreme Court in the case of PCIT Vs. Mahagun Realtors Pvt. Ltd. (2022) 443 ITR 194 (SC) wherein similar issue was dealt with. In this decision, the Hon'ble Court also considered its earlier decision in the case of Maruti Suzuki (supra). Hon'ble Court drew its conclusion in para 41 to 43 by referring to the specific facts of the case, most important being conduct of the assessee, right from the commencement of the date of search and before all the forums that it had consistently held itself out as the assessee by suppressing the fact of amalgamation. It was contested by the assessee that notice has been issued on a non-existent entity i.e MRPL which had got amalgamated into MIPL , though the fact of which was never brought on record including in the course of search and other subsequent proceedings. Having regard to the facts of the case, the appeal of the Revenue was allowed. Relevant paragraph from this decision are reproduced as under;

"41. In the light of the facts, what is overwhelmingly evident is that the amalgamation was known to the assessee even at the stage when the search and seizure operations took place, as well as statements were recorded by the revenue of the directors and managing director of the group. A return was filed, pursuant to notice, which suppressed the fact of amalgamation; on the

contrary, the return was of MRPL. Though that entity ceased to be in existence, in law, yet, appeals were filed on its behalf before the CIT, and a cross appeal was filed before ITAT. Even the affidavit before this court is on behalf of the director of MRPL. Furthermore, the assessment order painstakingly attributes specific amounts surrendered by MRPL, and after considering the special auditor's report, brings specific amounts to tax, in the sarch assessment order. That order is no doubt expressed to be of MRPL (as the assessee) - but represented by the transferee, MIPL. All these clearly indicate that the order adopted a particular method of expressing the tax liability. The AO, on the other hand, had the opt ion of making a common order, with MIPL as the assessee, but containing separate parts, relating to the different transferor companies (Mahagun Developers Ltd., Mahagun Realtors Pvt. Ltd., Universal Advertising Pvt. Ltd., ADR Home Decor Pvt. Ltd.). The mere choice of the AO in issuing a separate order in respect of MRPL, in these circumstances, cannot nullify it. Right from the time it was issued, and (It all stages of various proceedings, the parties concerned (i.e., MIPL) treated it to be in respect of the transferee company (MIPL) by virtue of the amalgamation order - and Section 394 (a). Furthermore, it would be anybody's guess, if any refund were due, as to whether MIPL would then say that it is not entitled to it, because the refund order would be issued in favour of a non-existing company (MRPL). Having regard to all these reasons, this court is of the opinion that in the facts of this case, the conduct of the assessee, commencing from the date the search took place, and before all forums, reflects that it consistently held itself out as the assessee. The approach and order of the AO is, in this court's opinion in consonance with the decision in Marshall & Sons (supra). which had held that: .

> *"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 Company."*

42. Before concluding this Court note and holds that whether corporate death of an entity upon amalgamation per se invalidates an assessment order ordinarily cannot be determined on a bare application of Section 481 of the Companies Act, 1956 (and its equivalent in the 2013 Act) but
would depend on the terms of the amalgamation and the facts of each case

43. In view of the foregoing discussion and having regard to the facts of this case, this court is of the considered view, that the impugned order of the High Court cannot e sustained; it is set aside. Since the appeal of the revenue against the order of the CIT was not heard on merits, the matter restored to the file of ITAT, which shall proceed to hear the parties on the merits of the appeal as well as the cross objections, on issues, other than the nullity of the assessment order, on merits. The appeal is allowed, in the above terms, without order on costs."

8.6. From the above it is noted that the said judgment is given on its peculiar set of facts wherein conduct of assessee consistently held itself out as the assessee though it had amalgamated into another company. In the present case before us, the facts are materially different from these, hence distinguished.

9. Considering the above judicial precedents in the present case before us, it is a fact on record as noted from the reasons to believe recorded by the Ld. AO that he already had the knowledge about the amalgamation which had taken place within the GPT group companies since questions were raised while recording statement of certain persons which formed the basis for initiating the proceeding u/s. 148 read with section 147 of the Act. Further, from the relevant extracts of the order of Hon'ble Jurisdictional High Court of Calcutta which approved the Scheme of Amalgamation, it is noted that notices were issued on the Central Government before approving the Scheme of Amalgamation. However, none appeared to represent the Central Government before the Hon'ble High Court. Thus, despite having knowledge of the scheme of amalgamation approved by the Hon'ble High Court, ld. AO assumed jurisdiction and issued notice u/s.148 of the Act on a non-existing entity i.e. GVPL who had amalgamated into GSPL with appointed date of 01.04.2011. Such an assumption of jurisdiction by the Ld. AO is held to be an incurable defect in terms of section 292B of the Act in the judicial precedents referred above.

10. We thus, find force in the submissions of the Ld. Counsel and we are of considered view on the basis of discussion made above, both on facts as well as law, to hold that reassessment proceeding initiated in the name of non-existent amalgamated company is without jurisdiction, void ab initio and is liable to be annulled. We thus, hold so accordingly. Since we have dealt with the jurisdiction issue holding the reassessment proceeding as void ab initio stated above, the grounds taken by the assessee on the merits of the case are not adjudicated upon.

11. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 9th May, 2023.

Sd/-	Sd/-
(Sanjay Garg)	(Girish Agrawal)
Judicial Member	Accountant Member

Dated: 9th May, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:
3. CIT(A)-21, Kolkata
4. CIT, Kolkata
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata