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IN THE INCOME TAX APPELLATE TRIBUNAL, 'K' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.1339/Mum/2021 & 583/Mum/2022
(**Assessment Year :2016-17 & 2017-18**)

M/s. India Medtronic Private Limited (Successor to Covidien Healthcare India Private Limited 1261, Solitaire Corporate Park, Bldg. No.12, 6th Floor Andheri-Ghatkopar Link Road, Andheri(E) Mumbai-400 093	Vs.	Additional / Joint / Deputy / Assistant Commissioner of Income Tax / Income Tax Officer, National e-Assessment Centre Delhi
PAN/GIR No.AABCT6021C		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Rajan R Vora
Revenue by	Shri Nikhil Tiwari
Date of Hearing	**01/06/2023**
Date of Pronouncement	**25/08/2023**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeals have been filed by the assessee against separate final assessment order dated 26/05/2021 for the A.Y.2016-17 passed in pursuance of direction given by the DRP dated 17/03/2021 and 28/01/2022 for the A.Y.2017-18

passed in pursuance of direction given by the DRP dated 24/12/2021 u/s.144C(5).

2. In the grounds of appeal assessee has challenged transfer pricing adjustment as well as corporate additions in various grounds of appeal, which in sum and substance are; f*irstly,* grounds pertaining to transfer pricing adjustment on account of import of goods including spares from Associated Enterprises. *Secondly,* disallowance of business promotion expenses; and *lastly*, levy of interest u/s.234B and 234C. However, in both the years, assessee has taken a legal ground that wherein not only the draft assessment order, transfer pricing order and final assessment order have been passed in the case of a non-existing entity and therefore, the entire final assessment order is null and void. The relevant petition for admission of additional ground and the ground reads as under:-

> *2. In this regard this office has received the above referred letter dated 06.02.2023 requiring this office to comments on the following ground of the assessee for AY 2016-17 in their appeal against order u/s 143(3) rws 144C(13).*
>
> > *"Transfer pricing order, draft assessment order, directions of the Hon'ble DRP and final assessment order passed in the name of non-existent entity:*
> >
> > *2. erred in passing the transfer pricing order, draft assessment order, directions of the Hon'ble DRP and final assessment order in the name of Covidien Healthcare India Private Limited, which was not in existence as on the date of passing the orders and accordingly, subsequent final assessment order passed is null and void and should be quashed."*

3. It is seen from the record that the assessee filed return of income in the name of M/s Covidian Healthcare India Pvt Ltd [PAN:AABCT6021C] and the assessment was done based on the CASS selection in which return of the assessee was selected for scrutiny. Secondly, while passing orders it has been duly mentioned that M/s Covidien Healthcare India Private Limited has amalgamated with M/s India Medtronics Private Limited. First page of return of Income for AY 2016-17 is hereby attached for ready reference.

4. In view of the above, the ground raised by the assessee does not have any substance and the assessment of income was of M/s Covidian Healthcare India Pvt Ltd was correctly done by the AO, wherein the AO had clearly taken into the aspect of amalgamation of M/s Covidien Healthcare India Private Limited with M/s India Medtronics Private Limited.

5. The above comments may be considered as the due compliance from this office on the matter.

3. Before us ld. Counsel for the assessee submitted that the erstwhile company, India Medtronic Pvt. Ltd. (IMPL) was incorporated on 02/05/2002 which was primarily engaged in trading and marketing of medical devices, medical equipment products and their spares and consumables and rendering related services. M/s. Covidien Healthcare India Pvt. Ltd. (CHIPL) in whose name the orders have been passed including the draft assessment order, transfer pricing order as well as final assessment order, has been merged with IMPL w.e.f. 26/08/2016 pursuant to the order of National Company Law Tribunal (NCLT) dated 10/08/2017. M/s.Covidien Healthcare India Pvt. Ltd. had filed copy of NCLT order with Registrar of companies and accordingly, effective date of merger was

01/09/2017. Thus, M/s. Covidien Healthcare India Pvt. Ltd. had ceased to exist from the appointed date on the receipt of filing of NCLT order w.e.f. 26/08/2016. Prior to its merger, M/s.Covidien Healthcare India Pvt. Ltd. had filed its return of income for A.Y.2016-17 on 30/11/2016 declaring total income under the normal provisions of Act of Rs.13,46,94,930/-. Later on the said return was revised to Rs.12,30,15,930/- on 03/08/2017. Thereafter, the return filed by M/s. Covidien Healthcare India Pvt. Ltd. was selected for scrutiny assessment proceedings and notice u/s. 143(2) dated 29/08/2017 was issued by ACIT, Corporate Circle 1(2) Chennai in the name of M/s.Covidien Healthcare India Pvt. Ltd. In response, assessee immediately vide letter dated 21/09/2017 intimated that M/s. Covidien Healthcare India Pvt. Ltd. has now been merged with IMPL. Assessee informed the ld. AO about the merger vide letter dated 26/12/2017 filed in the name of M/s.Covidien Healthcare India Pvt. Ltd. Thereafter, again assessee filed another letter dated 11/01/2018 with the same AO at Chennai and copy of the said letter was also filed to the ACIT-10(1)(1), Mumbai for transfer of records in the name of India Medtronic Pvt. Ltd. as the case was transferred from Chennai to AO Mumbai because IMPL was assessed in Mumbai. Thereafter, a follow up letter was also filed on 14/02/2018 pursuant to the same, a transfer order u/s.127 dated 14/06/2018 was received to the assessee on the same date.

4. Now post transfer of jurisdiction to Mumbai, a notice u/s. 143(2) dated 13/08/2018 was issued by ACIT Circle 10(1)(1),

Mumbai in the name of M/s.Covidien Healthcare India Pvt. Ltd. (CHIPL) which was no longer in existence to which assessee submitted a response again on 04/09/2018 in the name of M/s. India Medtronic Pvt. Ltd (successor of CHIPL). Simultaneously transfer proceedings were initiated by the ld. TPO u/s. 92CA(2) dated 19/02/2018. When the ld. TPO issued notice u/s. 92D(3) on 04/10/2018 in the name of erstwhile CHIPL. The assessee replied and submitted vide letter dated 12/10/2018 intimating the merger with the name of the company M/s. India Medtronics Pvt. Ltd. Thereafter, the ld. TPO continued to issue notice in the name of CHIPL and assessee continued to give its reply in the name of IMPL. Finally, the ld. TPO passed transfer pricing order on 28/10/2018 still in the name of non-existing entity i.e. 'M/s. Covidien Healthcare India Pvt. Ltd.' wherein he has proposed to make adjustment of Rs.10,31,01,041/-. Post passing of ld. TPO's order, the ld. AO continued to issue notice u/s.142(1) in the name of non-existing entity and assessee kept on responding in the name of IMPL only. Finally, the draft assessment order was passed on 12/12/2019 by ACIT, Circle 10(1)(1) in the name of 'M/s. Covidien Healthcare India Pvt. Ltd.' wherein he has made disallowance of business promotion expenses of Rs.16,32,28,601/-.

5. The assessee filed objections before the ld. DRP on 10/01/2020 in the name of India Medtronic Pvt. Ltd. and also pointed out the same fact before the ld. DRP, and DRP disposed of objection vide directions dated 17/03/2021 directed the ld. AO to pass the order in the correct name of IMPL. In spite of

categorical direction by the ld. DRP, National Faceless Assessment Centre issued the final assessment order in the name of M/s. Covidien Healthcare India Pvt. Ltd. (instead of amalgamated company M/s. India Medtronic Pvt. Ltd.) vide order dated 26/05/2021 u/s.144(3)(3) r.w.s. 144C(13). Thus, throughout assessee has been intimating various authorities not only about the merger of CHIPL with IMPL, but still the orders have been passed in the name of non-existing entity. In support, he has filed a chronology summary of sequence of events alongwith relevant details in the following manner:-

Sr. No.	*Particulars*	*Date of event*
1	*Scheme of amalgamation of IMPL and Covidien India approved by the National Company Law Tribunal ('NCLT') w.e.f. 26 August 2016*	*10-Aug-2017*
2	*Form INC-28 filed with the Registrar of Companies intimating about the merger*	*01-Sept-2017*
3	*Appellant informed AO (Assistant Commissioner of Income-tax Corporate Circle 1(2), Chennai) of merger*	*26-Dec-2017*
4	*Appellant informed AO (Assistant Commissioner of Income-tax (OSD), Corporate Range 1, Chennai) of merger*	*28-Dec-2017*
5	*Letter filed with the ACIT - Corporate Circle 1(2), -Chennai and a copy of the said letter has been filed to the ACIT- 10(1}(1), Mumbai for transfer of records*	*18-Jan-2018*

6	*Follow up letter filed with the ACIT - Corporate Circle 1(2), -Chennai and a copy of the said letter has been filed to the ACIT -10(1)(1), Mumbai for transfer of records*	*14-Feb-2018*
7	*Transfer of jurisdiction from DCIT, CC -1(2), Chennai to ACIT-10(1)(1), Mumbai consequent to merger of Covidien Healthcare India Private Limited with India Medtronic Private Limited vide order u/s 127*	*14-June-2018*
8	*Notice under section 143(2) of the Act in the name of Covidien Healthcare India Private Limited issued by ACIT Circle 10(1)(1), Mumbai [pre-merger notice]*	*29-Aug-2017*
9	*Submission dated 21 September 2017 in the name of India Medtronic Private Limited {Successor to CHIPL) against notice dated 29 August 2017*	*21-Sept-2017*
10	*Notice under section 143(2) of the Act in the name of Covidien Healthcare India Private Limited issued by ACIT Circle 10(1)(1), Mumbai [post merger notice]*	*13-Aug-2018*
11	*Submission dated 30 August 201 8 in the name of India Medtronic Private Limited {Successor to CHIPL) against notice dated 13 August 2018*	*4-Sept-2018*
12	*Notice u/s 92D{3) issued by the TPO in the name of Covidien Healthcare India Private Limited*	*04-Oct-2018*
13	*Submission dated 12 October 2018 filed before TPO in name of India Medtronic Private Limited (successor to CHIPL}*	*12-Oct-2018*

14	*Notice u/s 92CA{2) issued by the TPO in the name of Covidien Healthcare India Private Limited*	*19-Dec-2018*
15	*Submission dated 1 0 January 2019 filed before TPO in name of India Medtronic Private Limited (successor to CHIPL)*	*10-Jan-2019*
16	*Submission dated 9 September 201 9 filed before TPO in name of India Medtronic Private Limited (successor to CHIPL)*	*09-Sept-2019*
17	*Submission dated 1 3 September 201 9 filed before TPO in name of India Medtronic Private Limited (successor to CHIPL}*	*13-Sept-2019*
18	*Submission dated 2 October 2019 filed before TPO in name of India Medtronic Private Limited (successor to CHIPL)*	*03-Oct-2019*
19	*Notice u/s 92CA(2) and 92D(3) issued by the TPO in the name of Covidien Healthcare India Private Limited*	*03-Oct-2019*
20	*Submission dated 7 October 2019 filed before TPO in name of India Medtronic Private Limited (successor to CHIPL)*	*07-Oct-2019*
21	*Submission dated 1 1 October 2019 filed before TPO in name of India Medtronic Private Limited (successor to CHIPL)*	*11-Oct-2019*
22	*Notice u/s 92C(3) issued by the TPO in the name of Covidien Healthcare India Private Limited*	*12-Oct-2019*
23	*Submission dated 17 October 2019 filed before TPO in name of India Medtronic Private Limited (successor to CHIPL)*	*17-Oct-2019*
24	*Transfer pricing order passed in the name M/s. Covidien Healthcare*	*28-Oct-2019*

	India Private Limited	
25	*Notice under section 142(1) of the Act received from ACIT Circle 10(1)(1), Mumbai in the name Covidien Healthcare India Private Limited*	*17-11-2019*
26	*Submission dated 25 November 201 9 against the notice dated 1 7 November 201 9 in the name of India Medtronic Private Limited (Successor to CHIPL)*	*25-Nov-2019*
27	*Issue letter received from ACIT Circle 10(1)(1), Mumbai in the name Covidien Healthcare India Private Limited*	*5-Dec-2019*
28	*Submission dated 5 December 201 9 against issue letter dated 5 December 2019 in the name of India Medtronic Private Limited (Successor to CHIPL)*	*5-Dec-2019*
29	*Draft assessment order passed in the name 'Covidien Healthcare India Private Limited' [Amalgamated with India Medtronic Private Limited]*	*12-Dec-2019*
30	*DRP objections filed in the name of India Medtronic Private Limited (successor to Covidien Healthcare India Private Limited)*	*10-Jan-2020*
31	*DRP directions passed in the name of 'Covidien Healthcare India Private Limited' [Amalgamated with India Medtronic Private Limited]*	*17-Mar-2021*
32	*Final assessment order passed in the name 'Covidien Healthcare India Private Limited' [Amalgamated with India Medtronic Private Limited]*	*26-May-2021*

6. Thereafter, the ld. Counsel further pointed out that during the pendency of proceedings for A.Y.2016-17 and 2017-18 there have been various correspondences, payment of taxes etc for the earlier years of erstwhile CHIPL, the taxes were paid continuously in the name of IMPL for which he has again filed a separate chronology of events for the sake of ready reference it is reproduced hereunder:-

1	Regular Assessment tax paid in the name of India Medtronic Private Limited against the demand raised for erstwhile CHIPL for AY 2013-14	17-July-2018
2	Submission before the AO in the name India Medtronic Private Limited (successor to CHIPL) intimating the payment of 10% of demand for AY 2013-14 raised on erstwhile CHIPL	20-July-2018
3	Regular Assessment tax paid in the name of India Medtronic Private Limited against the demand raised for erstwhile CHIPL for AY 2013-14	30-July-2018
4	Submission before the AO in the name India Medtronic Private Limited (successor to CHIPL) intimating the payment of 10% of demand for AY 2013-14 rainsed on erstwhile CHIPL	31-July-2018
5	Form 26-AS of India Medtronic Private Limited showing challan details of payment of demand for estwhile CHIPL for AY 2013-14	

6	Clarification application under Direct Tax VsV filed before the AO with cc to Principle Commissioner of Income-tax -2, Mumbai and Addl. Commissioner of Income-tax-2(1), Mumbai in the name of India Medtronic Private Limited ** (successor to CHIPL)	26-Oct-2020
7	Form 1 and Form 2 filed under Direct Tax VsV in the name and PAN of India Medtronic Private Limited for erstwhile CHIPL for AY 2013-14	01 -Dec-2020
8	Form 3 received from designated authority under Direct Tax VsV in the name and PAN of India Medtronic Private Limited for erstwhile CHIPL for AY 2013-14 in respect of appeal before the Income-tax Appellate Tribunal (ITAT) bearing ITA No. 4579/Mum/2018	17-Dec-2020
9	ITAT order (ITA No. 4579/Mum/2018) in the name of India Medtronic Private Limited (successor to CHIPL) withdrawing the appeal filed for AY 2013-14 due to opting in Direct Tax VsV for erstwhile CHIPL	05-April-2021
10	Form 4 filed under Direct Tax VsV paying taxes of INR 3,80,70,231 in the name and PAN of India Medtronic Private Limited for erstwhile CHIPL for AY 2013-14	06-April-2021
11	Revised Form 3 received from designated authority under Direct Tax VsV in the name and PAN of India Medtronic Private Limited for erstwhile CHIPL for AY 2013-14	29-Oct-2021

12	Revised Form 4 filed under Direct Tax VsV paying differential taxes of INR 52,072 in the name and PAN of India Medtronic Private Limited for erstwhile CHIPL for AY 2013-14	07-Dec-2021
13	Form 5 received from designated authority under Direct Tax VsV for erstwhile CHIPL in the name and PAN of India Medtronic Private Limited for erstwhile CHIPL for AY 2013-14	08-Dec-2021

7. Thus, he submitted that, it cannot be a case where the department was not aware of the merger of erstwhile CHIPL with IMPL. Accordingly, in view of the judgment of Hon'ble Supreme Court in the case of PCIT vs. Maruti Suzuki India Ltd. 413 ITR 613, the whole assessment is bad in law. Further, he has also relied upon the decision of the ITAT Mumbai Bench in the case of Candor Renewable Energy Pvt. Ltd. in ITA No.2561 & 2560/Mum/2021 dated 19/10/2022 wherein the Tribunal has considered the decision of Maruti Suzuki India Ltd. supra and the decision of the Hon'ble Supreme Court in the case of PCIT vs. Mahagun Realtors Pvt. Ltd. in SLP 4063/2020 and submitted that the Tribunal has categorically analysed the ratio and the principle of both the judgments and have held that once the intimation was given to the department and to the ld. AO about the merger, then the assessment order in the case of non-existing entity is bad in law.

8. On the other hand, ld. DR submitted that since assessee had filed the return of income in the name of M/s. Covidien Healthcare India Private Limited (PAN: AABCT6021C) and the assessment was done based on CASS selection in which return of assessee was selected for scrutiny and therefore, assessment could not have been made in the name of M/s. India Medtronic Pvt. Ltd., Moreover while passing the orders, the ld. AO has duly mentioned that M/s. Covidien Healthcare India Private Limited is amalgamated with M/s. India Medtronic Pvt. Ltd, then it should be treated as of assessment has been passed in the case of India Medtronic Pvt. Ltd.

9. During the course of hearing we had asked ld. DR the comments of the ld. AO that why the name of M/s. India Medtronic Pvt. Ltd. has not been changed in ITB system, because the case of the department before us has been that there was no mechanism to change the name and PAN on the system since everything is done online on an ITB system and once the PAN is not changed in ITB system, the system will not allow to change PAN or pass the assessment order in the name of another entity which here in this case is M/s. India Medtronic Pvt. Ltd. The ld. DR had submitted the following letter from the ld. AO.

(Through Proper Channel)

Sub Comments required in the case of India Medtronic Pvt. Lt PAN: MACIAZZIO (sucesor to Covidien Healthcare India Pvt. Ltd. (PAN: AABCT6021C) (ITA No13390/2021 for AY 2016-17 and ITA No.583/M/2022 for AY 2017-18-meg

Ref.: NO.CIT(DR) ITAT-10%-Sench/2027-23/778 06.03.2023

Kindly refer to the above.

2 The above referred letter was received in this charge on 10.03.2023 conveying that the Hon'ble Members have asked the department to clarify why name of the company has not been changed in ITBA system. In this regard, it is seen from the ITBA system that PAN event was net marked in the ITBA portal that is why the name of the M/s. Covidien Healthcare India Pvt. Ltd. had not changed to M/s India Medtronic Pvt. Ltd. 3. PAN event has been marked on 11.04.2023 in the case of M/s. India Medtronic PVL Ltd. (PANAAAC142270) wherein PAN of M/s. Covidien Healthcare India Pvt. Ltd. (PAN: AABCT60210) has been linked with the PAN of M/s. India Medtronic Pvt. Ltd. (PAN :AAAC142270). Screenshot of the ITBA portal showing linkage of above mentioned PANS is hereby attached for ready reference.

After we had pointed out to the department on last date of hearing, the department has changed the PAN only on 11/04/2023. Thus, the pleading has been taken before us that system does not permit for changing PAN or name of the entity.

10. We have heard both the parties at length on the legal issue and also perused the relevant finding given in the impugned order. As noted above, by the scheme of amalgamation of IMPL and CHIPL was approved by NCLT w.e.f. 26/08/2016. From the appointed date CHIPL had ceased to exist as it was merged with IMPL and therefore, any proceedings thereof should have been continue or any order which should have been passed was to be in the name of M/s. India Medtronic Pvt. Ltd. The way and manner in which various authorities of the department were

intimated about this fact of merger has been elaborated and discussed in detail hereinabove and also sequence of events which has been incorporated above. From the sequence, it could be seen that, here right from various notices issued u/s. 143(2), 142(1), TPO's order, draft assessment order, ld. DRP order and the final assessment order have been passed in the case of M/s. Covidien Healthcare India Pvt. Ltd. despite being aware of the merger with IMPL and informed from time to time on several occasions. It has also been brought on record before us that this Tribunal while deciding the issue in assessee's own case for A.Y.2014-15 has passed the order dated 27/01/2023 wherein the Tribunal dealing with similar situation had quashed the entire assessment proceedings as the draft assessment order was issued in the name of non-existing entity. ITBA portal system came in 2017 vide instruction dated 03/02/2017, however, when assessee had intimated about the merger and the PAN of IMPL, then it was incumbent upon the ld. AO as well as the departmental authorities to correct the PAN in the ITBA portal. Department cannot take the plea that assessment order in correct name and PAN could not be made because of the system failure or failure to update the ITBA portal and therefore, all the consecutive assessment orders and various other orders could not have been passed in the name of new entity with its PAN and it was constrained to pass the assessment order in the name of non-existing entity with the old PAN. If the department can make changes in 11/04/2023 after direction of the Tribunal, then, the same should have been done much before when assessee kept on

intimating before the ld. AO at various stages. Very strangely even when the ld. DRP gave a categorical direction that final assessment order should be passed in the correct name but yet DRP itself has passed the direction in the name of non-existing entity. The ld. AO despite categorical direction still did not make the change in the ITBA system and proceeded to pass the assessment order in the name of non-existing entity i.e. M/s. Covidien Healthcare India Pvt. Ltd. This cannot be the manner in which the assessment order could have been passed nor any consequential demand notice raising the demand could have been passed in the case of non-existing entity.

11. At this point it would be relevant to refer to the judgment of Marti Suzuki India Ltd supra which the issues and the observations of the Hon'ble Apex Court can be summarized in the following manner:-

- The issue whether notice issued/ assessment framed against an amalgamating/ non-existent entity post amalgamation is valid was decided by the Hon'ble Supreme Court in the landmark judgment of Maruti Suzuki (Supra). The facts of the said case were as follows:

a) Assessee - Suzuki Power-train India Limited (SPIL), was a joint venture between Suzuki Motor Corporation (SMC) and Maruti Suzuki India Ltd (MSIL).

b) SPIL filed return declaring certain taxable income, which was processed u/s 143(1).

c) Subsequently, SPIL (Amalgamating Company) was amalgamated with 'MSIL' (Amalgamated Company) with effect from 1-4-2012 under Court orders on **29.01.2013.**

d) MSIL intimated to the AO on **2.04.2013.**

e) Notice under section 143(2) dated 26.09.2013 was issued to SPIL, non-existent entity.

f) Thereafter, MSIL participated in assessment proceedings of SPIL.

g) The assessment order under section 143(3), read with section 144C (1) of the Act was passed in the name of "**SPIL (amalgamated with MSIL)".**

- The assessee argued before the tax/ appellate authorities that an assessment order passed in the name of a non-existent entity was void ab initio, since after amalgamation, the amalgamating company ceases to exist. Tax Department was of the view that since name of both the entities were mentioned in the order, the assessment order cannot be declared as invalid.

- Before the Apex Court, the main contentions of the Revenue were as follows:

(a) Names of both amalgamating and amalgamated company was mentioned in the assessment order;

(b) Even otherwise, the mistake is curable u/s 292B

(c) Assessment and subsequently appeal was represented by Amalgamated company and no prejudice is caused to the parties;

(d) In Spice, the final order only referred to the name of nonexistent entity without any reference to the amalgamated company;

(e) Even as per decision in Spice, if the order is passed on the resulting company the same shall not be void - hence in present case since both the names were mentioned it cannot be regarded as a jurisdictional defect;

(f) Draft assessment order and the final assessment order referred to both the names;

(g) In case of Spice, doctrine of merger with the judgment of SC shall not apply.

- The main contentions of the Assessee were as follows:

a) Upon a scheme of amalgamation being sanctioned, the amalgamated company is dissolved without winding up, in terms of Section 394 of the Companies Act 1956. The amalgamating company ceases to exist in the eyes of law;

b) The amalgamating company cannot thereafter be regarded as a "person" in terms of Section 2(31) of the Act against whom assessment proceedings can be initiated and an assessment order passed by relying on Saraswati Industrial Syndicate Ltd. vs. CIT [1990] 186 ITR 278 (SC);

c) The jurisdictional notice under Section 143(2) of the Act, pursuant to which the assessing officer assumed jurisdiction to make an assessment was issued in the name of SPIL, a non-existent entity and was invalid. Hence the initiation of assessment proceedings against a non-existent entity was void ab initio.

d) Reliance was placed on CIT vs. Intel Technology India (P.) Ltd. [2016] 380 ITR 272 (Kar.), Pr. CIT vs. Nokia Solutions & Network India (P.) Ltd. 402 ITR 21 (Delhi), Spice Entertainment (supra),

BDR Builders & Developers (P.) Ltd. vs. Asstt. CIT 397 ITR 529 (Delhi), Rustagi Engineering Udyog (P.) Ltd. vs. Dy. CIT 382ITR 443 (Delhi), Khurana Engineering Ltd. vs. Dy. CIT [2014] 364 ITR 600 (Guj), Takshashila Realties (P.) Ltd. vs. Dy. CIT [2017] 77 taxmann.com 160 (Guj.), Alamelu Veerappan vs. ITO 257 Taxman 72 (Mad.).

e) The order passed by the TPO in the name of SPIL, a nonexistent entity was invalid in the eyes of the law;

f) SPIL ceased to be an "eligible assessee", in terms of section 144C(15) (b) of the Act. Consequently, there was no requirement to pass a draft assessment order/reference to DRPetc.;

g) The final assessment order dated 31 October 2016 is beyond limitation in terms of Section 153(1) read with Section 153 (4) of the Act.

h) The assessment framed in the name of the amalgamating Company is invalid [refer: Spice Entertainment vs. CIT, CIT v. Dimension Apparels (P.) Ltd. [2015] 370 ITR 288 (Delhi); affirmed by Hon'ble Apex Court vide Civil Appeal No. 3125 of 2015, CIT v. Micron Steels (P.) Ltd. 372 ITR 386 (Delhi), CIT v. Micra India (P) Ltd. 231 Taxman 809 (Delhi)].

i) Assessment framed in the case of a non-existent entity is non-est in the eyes of law [refer: Pr. CIT vs. BMA Capfin Ltd. [2018] 100 taxmann.com 329 (Delhi) (Revenue's SLP dismissed against the same in Pr. CIT vs. BMA Capfin Ltd. [2018] 100 taxmann.com 330/[2019] 260 Taxman 89 (SC)]

- **The Apex Court after taking into consideration submissions of both sides held as follows:**

a) Under the approved scheme of amalgamation, the transferee assumed the liabilities of the transferor company, including tax liabilities;

b) The consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist by relying on the judgment of Saraswati Industrial Syndicate Ltd vs. CIT (Supra).

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

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

e) 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 inspite of the fact that on 2nd April 2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation.

f) Initiation of assessment proceedings against an entity which had ceased to exist was void ab initio.

g) 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.

h) Participation in the proceedings by MSIL in the circumstances cannot operate as an estoppel against law.

12. Subsequently, various Court/Tribunals followed the law laid down by the Hon'ble Apex Court in Maruti Suzuki Ltd (Supra) and quashed the assessments framed in the name of non-existent entities.

13. At the time of hearing, the ld. DR has also made reference to the judgment of the Hon'ble Supreme Court in the case of **Mahagun Realtors Pvt. Ltd**. reported in **443 ITR 194**, wherein on the facts of that case, the Hon'ble Apex Court has held that assessment proceedings initiated and concluded in the name of non-existing entity is valid and in that case Hon'ble Apex Court has distinguished its earlier judgment of Maruti Suzuki India Ltd. Therefore, it would relevant to discuss the facts in the case of M/s. Mahagun Realtors Pvt. Ltd. which is as under:-

i. The original return of MRPL was filed under Section 139(1) on 30.06.2006.

ii. The order of amalgamation was dated 11.05.2007 - but made effective from 01.04.2006. It contained a condition - Clause 220-whereby MRPL's liabilities devolved on MIPL.

iii. The original return of income was not revised even though the assessment proceedings were pending. The last date for filing the revised return was 31.03.2008, after the amalgamation order came into operation.
iv. A search and seizure proceeding was conducted in respect of the Mahagun group, including the MRPL and other companies.

v. When search and seizure of the Mahagun group took place, no indication was given about the amalgamation.
vi. A statement made on 20.03.2007 by Mr. Amit Jain, MRPL's managing director, during statutory survey proceedings under Section 133A, unearthed discrepancies in the books of account, in relation to amounts of money in MRPL's account. The specific amount admitted was 5.072 crores, in the course of the statement recorded.

vii. The warrant was in the name of MRPL. The directors of MRPL and MIPL made a combined statement under Section 132 of the Act, on 27.08.2008.

viii. A total of Rs. 30 crores cash, which was seized- was surrendered in relation to MRPL and other transferor companies, as well as MIPL, on 27.08.2008 in the course of the search operation, when a statement of Mr. Amit Jain was recorded under Section 132 (4) of the Act.

ix. Upon being issued with a notice to file returns, a return was filed in the name of MRPL on 28.05.2010. Before that, on two dates, i.e., 22/27.07.2010, letters were written on behalf of MRPL, intimating about the amalgamation, but this was for AY 2007-08 (for which separate proceedings had been initiated under Section 153A) and not for AY 2006-07.

x. The return specifically suppressed - and did not disclose the amalgamation (with MIPL) - as the response to Query 27(b) was "N.A".

xi. The return - apart from specifically being furnished in the name of MRPL, also contained its PAN number.

xii. During the assessment proceedings, there was full participation -on behalf of all transferor companies, and MIPL. A special audit was directed (which is possible only after issuing notice under Section 142). Objections to the special audit were filed in respect of portions relatable to MRPL.

xiii. After fully participating in the proceedings which were specifically in respect of the business of the erstwhile MRPL for the year ending 31.03.2006, in the cross objection before the ITAT, for the first time (in the appeal preferred by the Revenue), an additional ground was urged that the assessment order was a nullity because MRPL was not in existence.

xiv. Assessment order was issued - undoubtedly in the name of MRPL (shown as the assessee, but represented by the transferee company MIPL).

xv. Appeals were filed to the CIT (and a cross-objection, to ITAT) - by MRPL "represented by MIPL".

xvi. At no point in time - the earliest being at the time of search, and subsequently, on receipt of notice, was it plainly stated that MRPL was not in existence, and its business assets and liabilities, taken over by MIPL.

xvii. The counter affidavit filed before this court - (dated 07.11.2020) has been affirmed by Shri Amit Jain S/o Shri P.K. Jain, who- is described in the affidavit as "Director of M/S Mahagun Realtors(P) Ltd., R/o...".

FINDINGS OF THE COURT

i. Amalgamation is not like the winding up of a corporate entity. In the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues - enfolded within the new or the existing transferee entity.

ii. In other words, the business and the adventure lives on but within a new corporate residence, i.e., the transferee company. **It is, therefore, essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings.** There are analogies in civil law and procedure where upon amalgamation, the cause of action or the complaint does not per se cease - depending of course, upon the structure and objective of enactment. Broadly, the quest of legal systems and courts has been to locate if a successor or representative exists in relation to the particular cause or action, upon whom the assets might have devolved or upon whom the liability in the event it is adjudicated, would fall.

iii. The combined effect, therefore, of Section 394 (2) of the Companies Act, 1956, Section 2 (1A) and various other provisions of the Income Tax Act, is that **despite amalgamation, the business, enterprise and undertaking of the transferee or amalgamated company- which ceases to exist, after amalgamation, is treated as a continuing one, and any benefits, by way of carry forward of losses (of the transferor company), depreciation, etc., are allowed to the transferee.** Therefore, unlike a winding up, there is no end to the enterprise, with the entity. The enterprise in the case of amalgamation, continues.

iv. There is no doubt that MRPL amalgamated with MIPL had ceased to exist thereafter; this is an established fact and not in contention. The respondent has relied upon Spice and Maruti Suzuki (supra) to contend that the notice issued in the name of the amalgamating company is void and illegal. **The facts of**

present case, however, can be distinguished from the facts in Spice and Maruti Suzuki.

v. Firstly, in both the relied upon cases, the assessee had duly informed the authorities about the merger of companies and yet the assessment order was passed in the name of amalgamating/non-existent company. However, in the present case, for AY 2006-07, there was no intimation by the assessee regarding amalgamation of the company. The ROI for the AY 2006-07 first filed by the respondent on 30.06.2006 was in the name of MRPL. MRPL amalgamated with MIPL on 11.05.2007, w.e.f. 01.04.2006. In the present case, the proceedings against MRPL started on 27.08.2008-when search and seizure was first conducted on the Mahagun group of companies. Notices under Section 153A and Section 143(2) were issued in the name MRPL and the representative from MRPL corresponded with the department in the name of MRPL. On 28.05.2010, the assessee filed its ROI in the name of MRPL, and in the 'Business Reorganization' column of the form mentioned 'not applicable' in amalgamation section. Though the respondent contends that they had intimated the authorities by letter dated 22.07.2010, it was for AY 2007-2008 and not for AY 2006-07. For the AY 2007-08 to 2008-2009, separate proceedings under Section 153A were initiated against MIPL and the proceedings against MRPL for these two assessment years were quashed by the Additional CIT by order dated 30.11.2010 as the amalgamation was disclosed. In addition, in the present case the assessment order dated 11.08.2011 mentions the name of both the amalgamating (MRPL) and amalgamated (MIPL) companies.

vi. Secondly, in the cases relied upon, the amalgamated companies had participated in the proceedings before the department and the courts held that the participation by the amalgamated company will not be regarded as estoppel. However, in the present case, the participation in proceedings was by MRPL which held out itself as MRPL.

vii. 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 search 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 option 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.).

viii. 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 at 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 (2). 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.**

ix. This Court notes 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**.**

14. Thus, in that case, the return was filed in the name of MRPL even it was non-existent on 28.05.2010. The return specifically suppressed and did not disclose the amalgamation with MIPL and also contained the PAN number of erstwhile company. During the assessment proceedings, there was full participation on behalf of all transferor companies and MIPL. Even objection to the special audit was filed in respect of portions relatable to MRPL, thus after fully participating in the proceedings which were specifically in respect of erstwhile MRPL for the year ending 31.03.2006, for the first time before the ITAT in cross objection in the appeal filed by the Revenue, additional ground was urged that the assessment order was nullity because MRPL was not in existence. The assessment order was issued in the name of MRPL (representative of MIPL) and even in the first appeal before the Id. CIT (A) and cross objection before the ITAT, it was mentioned as "MRPL represented by MIPL". At no point of time, even at the time of search and subsequently on receipt of the notice, it was stated that MRPL was not in existence and its business of the erstwhile MRPL was taken over by MIPL. Even in the counter affidavit filed before the Hon'ble Apex Court, it has

been affirmed by Shri Amit Jain, who has been described in the affidavit as Director of M/s. Mahagun Realtors (P) Ltd.. It was in this background, the Hon'ble Court in para 33 observed as under -

> "33. **There is no doubt that MRPL amalgamated with MIPL and ceased to exist thereafter; this is an established fact and not in contention. The respondent has relied upon Spice and Maruti Suzuki (supra) to contend that the notice issued in the name of the amalgamating company is void and illegal. The facts of present case, however, can be distinguished from the facts in Spice and Maruti Suzuki on the following bases."**

15. Therefore, the Supreme Court merely distinguished the facts in Spice and Maruti, while continuing to agree with the fundamental principle that on amalgamation, the amalgamating entity ceases to exist. Thereafter, the Court in paras 34 onwards, held as under:

a) No intimation was given to the AO for A.Y 2006-07 [refer para 34];

b) Return filed, pursuant to notice, suppressed the fact of amalgamation. The return was filed in the name of MRPL. Further in Business Reorganization' column it was mentioned "not applicable" [refer para 34, 40].

c) Name of both the companies were mentioned in the order [refer para 34];

d) Assessee before authorities held itself out to be as MRPL [refer para 35];

e) Substantial surrender in survey and search on behalf of MRPL [refer paras 37-38];

f) Facts of present case distinctive [refer para 40];

g) The fact of amalgamation being known to the assessee, even at the stage when the search and seizure operations took place, as well as when statements were recorded of the directors and managing director of the group, was not communicated to the income tax authorities [refer paras 40-41].

h) Even when MRPL 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 Apex Court was on behalf of the director of MRPL .

i) The assessment order was 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.

j) Merely because instead of passing a common order for MIPL as the assessee, a separate order in respect of MRPL is passed, cannot nullify the assessment order.

k) Right from the time it was issued, and at 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 (2).

1) Having regard to all these reasons, the Apex Court was of the opinion that in the facts of the 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. Thus, the assessment order passed in the name of MRPL was held to be valid.

16. Further, the Court distinguished the judgments passed in the case of Maruti Suzuki (Supra) and Spice on the following grounds:

a) The legislative amendment by way of introduction of section 2(1A), defining "amalgamation", was not taken into account by the Apex Court in earlier decisions. Further, the tax treatment in case of amalgamation under various provisions (such as in section 72A, 80IA, etc.) of the Act were not brought to the notice of the Apex Court, in the earlier decisions;

b) In the relied upon cases, the assessee had duly informed the tax authorities about the fact of the merger of companies and yet the assessment order was passed in the name of the non-existent entity. However, in the present case, the assessee failed to inform the assessing officer about the amalgamation for assessment year 2006-07 (year in dispute), though disclosure was made for subsequent years (AYs 2007-08 and 2008-09). The return of income filed on 28.05.2010 (post amalgamation) pursuant to notice under section 153A was filed in the name of MRPL and the fact of business reorganization was mentioned as 'not applicable" in the return form.

c) In relied upon cases, the amalgamated companies participated in the assessment proceedings before the tax department in their own capacity, due to which the Apex Court affirmed that participation of amalgamated company shall not be regarded as estoppel against law. In the present facts, the participation in the assessment proceedings was by MRPL which held itself as MRPL.

d) The relied upon judgment of Saraswati Syndicate (Supra) was decided in relation to assessment issues when the amalgamation was not separately defined under the Act. Specific definition of 'amalgamation" has been incorporated in section 2(1 A) of the Act by way of amendment in 1967.

17. Other relevant observations made in the judgment while expressing the aforesaid opinion and holding that Maruti/ Spice

cannot (de-hors facts) be blindly applied in all cases, pointed out following points:

a) It has been observed that amalgamation is unlike winding up of a corporate entity. In the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues - enfolded within the new or the existing transferee entity. In other words, the business and the adventure lives on but within a new corporate residence, i.e., the transferee company. It is, therefore, essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings.

b) Apex court noted that there are not less than 100 instances under the Act, wherein the event of amalgamation, the method of treatment of a particular subject matter is expressly indicated in the provisions of the Act. In some instances, amalgamation results in withdrawal of a special benefit (such as an area exemption under Section 80IA) - because it is entity or unit specific. In the case of carry forward of losses and profits, a nuanced approach has been indicated. All these provisions support the idea that the enterprise or the undertaking, and the business of the amalgamating company continues.

c) The beneficial treatment, in the form of set-off, deductions (in proportion to the period the transferee was in existence, vis-a-vis the transfer to the transferee company); carry forward of loss, depreciation, all bear out that under the Act, (a) the business-including the rights, assets and liabilities of the transferor company do not cease, but continue as that of the transferor company; (b) by deeming fiction- through several provisions of the Act, the treatment of various issues, is such that the transferee is deemed to carry on the enterprise as that of the transferor.

d) Combined effect of Section 394 (2) of the Companies Act, 1956, Section 2 (1A) and various other provisions of the Income Tax Act, is that despite amalgamation, the business, enterprise and undertaking of the transferor or amalgamating company- which ceases to exist, after amalgamation, is treated as a continuing one, and any benefits, by way of carry forward of losses (of the transferor company), depreciation, etc., are allowed to the transferee. Therefore, unlike a winding up, there is no end to the enterprise, with the entity. The enterprise in the case of amalgamation continues.

e) 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.

18. The Apex Court with the aforesaid observations, quashed the order of the High Court which held that the assessment order passed in the name of non-existent entity is invalid, and restored the revenue's appeal along with assessee's cross objections to the file of the Hon'ble Tribunal to decide the issues on merits other than nullity of assessment order.

19. The aforesaid judgment of Hon'ble Supreme Court in the case of **Mahagun Realtors Pvt. Ltd.** (supra) in our humble opinion, nowhere disagrees with the principles laid down by the Hon'ble Apex Court in the case of **Maruti Suzuki India Ltd.** (supra) and **Spice Entertainment Ltd.** (supra) of Hon'ble Delhi High Court , for the reason that:-

- **Firstly**, the judgment in Mahagun nowhere disagrees with the principle in Maruti and Spice. In fact, in para 33, **the Court categorically held that there is no doubt that MRPL amalgamated with MIPL and ceased to exist thereafter which is an established fact and not in contention. Further the Court held that the respondent has relied upon Spice and Maruti Suzuki (supra) whereas the facts of present case can be distinguished from the facts in Spice and Maruti Suzuki.**
- **Secondly**, the judgment by the **Hon'ble Apex Court in Mahagun Realtors** is rendered in peculiar facts and merely holds that the law declared in the case of Maruti Suzuki cannot be applied without looking into the overall facts, in particular the conduct of the assessee and the manner of framing of assessment.
- **Thirdly**, the judgment raises a pertinent point that the business of the amalgamating entity survives even after merger, though the corporate entity may have come to an end. This point is merely to emphasize that the liability of the successor and therefore, it cannot be held that merely on account of non-existence of the predecessor, successor is not liable.
- **Fourthly, in para** 43, the Court categorically held that the aforesaid discussion is "**having regard to the facts of this case**" and the said observation is in continuation of repeated observations that the decision in Spice and Maruti are distinguishable and,
- **Lastly**, the Apex Court has decided the appeal on peculiar facts, without disagreeing with the decision in Maruti Suzuki India Ltd. and Spice Entertainment Ltd.

20. Thus, the decision of Hon'ble Apex Court in the case of **Mahagun Realtors Pvt. Ltd.** (supra) is not applicable on the facts of the assessee's case albeit its facts are clearly covered by

the judgment of Apex Court in the case **Maruti Suzuki India Ltd**. (supra).

21. This has also been highlighted in detail by the ITAT Mumbai Bench in the case of Candor Renewable Energy Pvt. Ltd., Before us ld. Counsel has also stated various other decisions, however, we are not discussing of these judgments. Thus, the entire assessment order have not been passed in the case of non-existing entity is null and void and is hereby quashed.

22. In A.Y.2017-18 also exactly similar facts are permeating and therefore, our finding given hereinabove will apply mutatis and mutandis for this year also and therefore, the assessment order passed for A.Y.2017-18 is also hereby declared null and void and it is quashed.

23. In the result appeals of the assessee are dismissed.

Order pronounced on 25th August, 2023.

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 25/08/2023
KARUNA, *sr.ps*

Copy of the Order forwarded to :
1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai

		Date	Initial	
1.	Draft dictated on			Sr.PS
2.	Draft placed before author			Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			
11.	Dictation Pad is enclosed	Yes		