आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'डी' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT AND SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. Nos. 677 & 678/Ahd/2019

(**निर्धारण वर्ष /** Assessment Years : 2013-14 & 2014-15)

Intas Lifesciences Erstwhile known as Intas Pharmaceuticals Since merged with Intas Pharmaceuticals Ltd., Intas Corporate House, Nr. Sola Bridge, S. G. Highway, Thaltej, Ahmedabad - 380054	**बनाम**/ Vs.	**ACIT** Circle-5(2) Ahmedabad – 380015 1st Floor, Narayan Chambers, Ashram Road, Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACFI0241H		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri S. N. Soparkar, A.R.
प्रत्यर्थी की ओर से / **Respondent by :**	Shri O. P. Sharma, CIT. D.R.

सुनवाई की तारीख **/ Date of Hearing**	12/03/2020
घोषणा की तारीख /**Date of Pronouncement**	04/06/2020

आदेश/O R D E R

PER WASEEM AHMED - AM:

Both captioned appeals have been filed at the instance of the assessee against the common order of the Commissioner of Income

Tax (Appeals)-5, Ahmedabad (CIT(A) in short) dated 25/03/2019 relevant to Assessment Years (AY) 2013-14 & 2014-15.

2. The assessee has raised the following grounds of appeal:

"1. <u>Grounds pertaining to Transfer Pricing Adjustments.</u>

The Ld. CIT(A) have erred on the facts, in circumstances of the case and in law in confirming an upward transfer pricing adjustment as under:

Transfer pricing adjustment on specified domestic transactions of sale of finished goods undertaken with the AE - Rs 192,84,97,000/-

a) In the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciating that in the facts of present case both appellant and Intas Pharmaceuticals Limited (herein after referred "IPL") were paying AMT/MAT and therefore in absence of tax arbitrage, the provisions of specified domestic transactions would not apply to transaction of purchase of finished goods from the IP Firm.

b) Assuming but not accepting and without prejudice to Ground No. 1 (a), in the facts and circumstances of the case and in law, the learned CIT(A) ought to have appreciated that IPL, which fulfils the conditions of selection of the tested party as laid down under Rule 10B of the Income Tax Rules and whose data regarding the comparable companies and the comparable uncontrolled transactions were more reliably available should be considered as a tested party

c) That in the facts and circumstances of the case and in law, the learned CIT(A) erred in not appreciating the fact that the AO/TPO has failed to find out appropriate comparable for IP Firm and benchmarked the IP Firm with entities whose Functions, Assets and Risk ('FAR') Analysis and business profile was more akin to the appellant company and which were used by the appellant company as comparable entity in its TP documentation.

*d) That in the facts and circumstances of the case, the learned CIT(A) wholly erred in incorrectly observing that "it is noted after few years, the appellant merged into the flagship concern, which shows the intention of the appellant. **<u>As, the appellant failed to take benefit out of the said scheme of arrangement of claiming deduction in one unit and taking benefit in both units were detected by the revenue, the appellant subsequently merged two entities into one concern.)</u>***

e) That in the facts and circumstances of the case and in law, the learned CIT(A) while giving incorrect observation as stated in Ground No. 1 (d) failed to appreciate that the appellant merged with effect from 1st April 2014 into Intas Pharmaceuticals Limited/IPL as per scheme of amalgamation sanction by order passed by Hon'ble Gujarat High Court on 1st October 2015, whereas the first order proposing transfer pricing adjustment was passed by TPO on 31st October 2016. Further, the deduction/tax holiday under section 8QIC/80IE qua undertaking and not qua assessee and therefore post amalgamation of appellant into IPL, the IPL continued to enjoy the tax holiday and the tax department also allowed benefit of the same in hands of IPL while passing assessment order for AY 2015-16.

f) That in the facts and circumstances of the case and in law, the learned CIT(A) further erred in ignoring the fact that under secondary analysis, the appellant and IPL has substantiated the ALP under internal Resale Price Method by benchmarking gross margin earned IPL in reselling the products bought from IP Firm vis a vis the gross margin earned by it in reselling the products bought from third parties.

2. <u>Grounds pertaining to Corporate tax adjustment consequent to upward Transfer Pricing adjustment as per Ground 1.</u>

a) In the facts and circumstances of the case, the learned CIT(A) has erred in confirming the view of the AO erred that due to close connection, the appellant earned more than ordinary profit of Rs.182,95,73,261/- and consequently making upward adjustment of Rs.176,44,41,970/- to the Total Income by re-computing the deductions under section 80IC and 80IE of the Act.

3. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order.

5. In the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming action of the ld. AO in initiating penalty u/s. 271(1)(c) of the Act."

3. The assessee has raised the following additional ground of appeal vide letter dated NIL.

"1. On the facts and in the circumstances of the case, the order passed by the Assessing Officer u/s.143(3) r.w.s. 92CA(4) of the I.T. Act dated 6.2.2017 is bad in law and ab initio void for the reason that the assessment order has been passed in the name of the erstwhile partnership firm M/s. Intas Pharmaceuticals where as on the date of the assessment the said partnership firm had already merged with Intas Pharmaceuticals Ltd. which is a company incorporated under the relevant provisions of the Companies Act.

2. Following from the preceding Ground No.1 the impugned assessment order dated 6.2.2017 deserves to be quashed and vacated.

3. On the facts and in the circumstances of the case, the order dated 25.3.2019 passed by the learned CIT(A) is bad in law and void ab initio for the reason that the said order has been passed in the name of M/s. Intas Lifesciences (previously known as Intas Pharmaceuticals), whereas the said firm was not in existence at the time of passing of the appellate order and it had already merged with Intas Pharmaceuticals Ltd. which is a company incorporated under the relevant provisions of the Companies Act.

4. Following from the preceding Ground No.3, the impugned appellate order also requires to be quashed and vacated."

4. First, we take up the additional ground of appeal raised by the assessee challenging the validity of the assessment on the reasoning that it was framed in the name of non-existent company.

5. The facts in brief are that the assessee is a Private Limited Company and the assessee was erstwhile Partnership Firm namely Intas Pharmaceuticals. The assessee is engaged in the business of manufacturing of Pharmaceuticals Products. The assessee was eligible to claim the deduction under section 80IC and 80IE of the Act. The assessee, however, in the year under consideration was subject to scrutiny assessment involving the issue of the determination of the arm's length price in relation to transactions covered under specified domestic transaction. The assessee in the meantime got amalgamated with Intas Pharmaceuticals Limited which was intimated to the TPO vide letter dated 30-10-2015 by the assessee. However the AO framed the assessment order dated 06-02-2017 under section 143(3) read with section 92CA (3) of the Act in the name of the firm namely M/s Intas Pharmaceuticals which was a non-existent entity at that point of time. The AO framed the assessment order under section 143(3) read with section 92CA(3) of the Act by making addition to the total income amounting to Rs. 176,44,41,970/- only.

6. The Ld. AR before us has challenged the validity of the assessment order framed by the AO under section 143(3) read with section 92CA(3) of the Act dated 06-02-2017 on the reasoning that it was framed on erstwhile partnership firm which was a non-existent entity at that point of time. The submission of the assessee stands as under:

> *"1. Appeals against the orders of the learned CIT(A) for the assessment Years 2013-14 and 2014-15 have been filed before this Hon'ble Tribunal which are pending as of now being ITA No. 677/Ahd/2019 for the Assessment Year 2013-14 and ITA No. 678/Ahd/2019 for the Assessment Year 2014-15. Subsequent to the Filing of the aforesaid appeals the appellant has been advised that an important legal issue was left out inadvertently from the Grounds of Appeal originally raised before this Hon'ble Tribunal. This issue is a purely legal issue and, therefore, additional grounds of appeal are being now filed before this Hon'ble Tribunal with a prayer that the same may kindly be admitted and decided on merits. As per the additional grounds of appeal it has been submitted that the impugned assessment orders as well as the appellate orders*

have been passed in the name of the erstwhile partnership firm which no more existed on the relevant dates of passing of the relevant orders which means that the said orders have been passed in the names of non-existing entities. It is submitted that for this reason the orders are nullity in the eyes of law and, therefore, these orders deserve to be quashed being bad in law.

2. The relevant facts briefly stated are as under:-

(i) Intas Pharmaceutical (herein after referred as "IP Firm"] was in existence in the form of a partnership firm, dated 1st December 2005, under the provisions of the Indian Partnership Act, 1932.

(ii) Name of "Intas Lifesciences" with effect from 28th February 2015.

(iii) Intas Lifesciences, the said partnership firm has been converted into a private limited company, in the name of Intas Lifesciences Private Limited [herein after referred as "ILPL"), with effect from 7th May 2015, in compliance with the provisions of Chapter XXI of the Companies Act, 2013.

(iv) The Board of Directors of ILPL and Intas Pharmaceuticals Limited (herein after referred as "IPL"J in their meeting held on 12.3.2015 granted in principle approval for amalgamation of ILPL with IPL.

(v) The scheme of amalgamation was approved by the Board of Directors in their meeting held on 9.7.2015 with appointed date being 1.4.2014.

(vi) Then after the said scheme of amalgamation was filed with Hon'ble Gujarat High Court.

(vii) The Hon'ble High Court on admitting the petition of ILPL and IPL seeking sanctioning of scheme of amalgamation, directed issuance of notice/serving notice of hearing to Central Government i.e. Regional Director to whom power of Central Government are delegated and Official Liquidator. In terms of General Circular No.l of 2014 dated 15th January 2014 issued by Ministry of Corporate Affairs, Government of India, invited views/objection/specific comments from the Income Tax Department on the proposed scheme of amalgamation vide his letter dated 14th August 2015.

(viii) The Hon'ble Gujarat High Court sanctioned the scheme of amalgamation of ILPL with IPL, vide its order dated 28th September 2015, after taking into account the clearance/no objection given by the Regional Director and the Official Liquidator.

(ix) Vide letter dated October 30, 2015, it was intimated to the department that name of M/s Intas Pharmaceuticals [the assessee / partnership firm) was changed to M/s Intas Lifesciences, which was then converted into private limited company as per the provisions of Companies Act, 2013 as M/s Intas Lifesciences Private Limited. Later on the as per the scheme of amalgamation approved by the Hon'ble Gujarat High Court, M/s Intas Lifesciences Private Limited merged / amalgamated with M/s Intas Pharmaceuticals Limited. As per the scheme approved/sanctioned by the Hon'ble Gujarat Hight Court, the appointed date was 1st April 2014. In view of above, the income of M/s Intas Lifesciences Private Limited was merged with the income of M/s Intas Pharmaceuticals Limited w.e.f. 1st April 2014.

3. It may be mentioned that the Hon'ble High Court of Gujarat disposed off the relevant Petition No. 267 of 2015 and the Application No.237 of 2015 with Company Petition No. 268 of 2015 and Application No. 238 of 2015 vide judgement dated 28th September, 2015 and the relevant observations of the Hon'ble High Court are reproduced below for ready reference from para-11 of the judgement:-

> *"11. Considering the entire facts and circumstances of the case and on perusal of the Scheme and the proceedings, it appears that the requirements of the provisions of sections 391 to 394 of the Companies Act, 1956 are satisfied. The Scheme is genuine and bona fide and in the interest of the shareholders and creditors. I, therefore, accordingly allow the company Petitions and approve the Scheme. The Scheme is hereby sanctioned. Prayers made in the respective Company Petitions are hereby granted."*

4. From the above, it may kindly be appreciated that from the date of the High Court's order viz. 28th September, 2015 the earlier entity which was a partnership firm got merged with a limited company and, therefore, it is a legal requirement that any order passed under any of the statutory provisions of the Income-tax Act must be passed in the name of the new entity and if any such order is passed in the name of the non-existent entity such order has to be treated as illegal and ab initio void. The appellant strongly relies on the recent judgement of the Hon'ble Supreme Court in the case of PCIT vs. Maruti Suzuki India Ltd. [2019] 107 taxmann.com 375 (SC) / [2019] 416 ITR 613 (SC). For ready reference, the facts and the ratio of the aforesaid Apex Court judgement are reproduced below from the Headnote:-

"FACTS

- *The assessee SPIL was a joint venture between SMC and MSIL. It filed its return declaring certain taxable income. The return was processed under section 143(1) and then picked up for scrutiny. Notices under section 143(2) were issued.*

- *Subsequently, the High Court passed an order approving the Scheme of Amalgamation by which SPIL (Amalgamating Company) was amalgamated with 'MSIL' (Amalgamated Company) with effect from 1-4-2012.*

- *Thereafter, assessment proceedings continued with the participation of MSIL representing SPIL in the assessment proceedings. The Assessing Officer passed the assessment order under section 143(3), read with section 144C(1) in the name of SPIL.*

- *The assessee filed appeal where one of the grounds urged was that the assessment order was without jurisdiction inasmuch as it had been passed in the name of an entity that had ceased to exist on the date of the assessment order.*

- *The Tribunal accepted the said plea of the assessee as a result of which the assessment order was set aside.*

- *On revenue's appeal the High Court following its earlier decision in the case of the assessee for assessment year 2011-12 affirmed the decision of the Tribunal.*

- *On appeal to the Supreme Court:*

HELD

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

  (i) The income which is sought to be subjected to the charge of tax for assessment year 2012-13 is the income of the erstwhile entity (SPIL) prior to amalgamation. This is on account of a transfer pricing addition of Rs. 78.97 crores.
  (ii) Under the approved scheme of amalgamation, the transferee has assumed the liabilities of the transferor company, including tax liabilities.
  (iii) The consequence of the scheme of amalgamation approved under section 394 of the Companies Act, 1956 is that the amalgamating company ceased to exist.
  (iv) Upon the amalgamating company ceasing to exist, it cannot be regarded as a person under section 2(31) against whom assessment proceedings can be initiated or an order of assessment passed;
  (v) A notice under section 143 (2) was issued on 26-9-2013 to the amalgamating company, SPIL, which was followed by a notice to it under section 142(1);
  (vi) Prior to the date on which the jurisdictional notice under section 143 (2) was issued, the scheme of amalgamation had been approved on 29-1-2013 by the High Court of Delhi under the Companies Act, 1956 with effect from 1-4-2012;
  (vii) The Assessing Officer assumed jurisdiction to make an assessment in pursuance of the notice under section 143 (2). The notice was issued in the name of the amalgamating company in spite of the fact that on 2-4-2013, the amalgamated company MSIL had addressed a communication to the Assessing Officer intimating the fact of amalgamation. In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was void ab initio. [Para 19]

- *The notice under section 143(2) under which jurisdiction was assumed by the Assessing Officer was issued to a non-existent company. The assessment order was issued against the amalgamating company. This is a substantive illegality and not a procedural violation of the nature adverted to in section 292B. In this context, it is necessary to advert to the provisions of section 170 which deal with succession to business otherwise than on death.[Para 31]*

- *Despite the fact that the Assessing Officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two judges which dismissed the appeal of the revenue in CIT v. Spice Enfotainment [Civil Appeal No. 285 of 2014, dated 2-11-2017]. The decision in Spice Enfotainment Ltd. (supra) has been followed in the case of the assessee while dismissing the Special*

Leave Petition for assessment year 2011-2012. In doing so, this Court has relied on the decision in Spice Enfotainment (supra).[Para33]

- *There is no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for assessent year 2011-12 must be adopted in respect of the present appeal which relates to assessment year 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable. [Para 34]*

- *For the above reasons, there is no merit in the appeal. The appeal is accordingly dismissed.[Para 35].*

CASE REVIEW

*Pr. CIT(A) v. Maruti Suzuki India Ltd- [2019] 107 taxmann.com 472 (Delhi) (para 35) [**affirmed; see annex**].*

Pr. CIT v. Maruti Suzuki India Ltd. [2017] 85 taxmann.com 330/250 Taxman 409/397 ITR 681 (Delhi) (para 34) and CIT v. Spice Enfortainment Civil Appeal No. 285 of 2014, dated 2-11-2017 (para 33) followed'."

The aforesaid Hon'ble Supreme Court decision is fully applicable to the facts of the appellant's case.

5. *It may be mentioned here that this issue was neither raised before the Assessing Officer nor before the learned CIT(A) and while filing the appeals before this Hon'ble Tribunal, this legal issue was inadvertently omitted from the grounds of appeal. It is submitted that a purely legal issue can be raised before the Hon'ble ITAT at any stage of the pendency of the appeal even if such issue was not raised before the lower authorities. It is reiterated that all the relevant facts were already available on record before the Assessing Officer and the learned CIT(A). In these circumstances this Hon'ble Tribunal can admit the additional grounds of appeal now raised which go to the very root of the matter, In support of this submission, the appellant relies on the legal position emerging from the following cases:-*

   (i) CIT vs. Abhinitha Foundation P. Ltd, 396 1TR 251 (Mad.)

   (ii) CIT vs. Britannia India Ltd, 396 ITR 677 (Cal.)

   (iii) CIT(E) vs. Yamuna Expressway Industrial Development Authority, 395 ITR 18 (All.]

   (iv) CIT vs. Sinhgad Technical Education Society, 397 ITR 344(SC)

6. *In the backdrop of the factual and the legal position explained above, it is prayed that the additional grounds of appeal may kindly be admitted and decided in the light of the binding Supreme Court decision in the case of Maruti Suzuki India (supra)."*

7. On the other hand the Ld. DR has strongly objected on the admission of additional grounds of appeal and further submitted that the notice under section 143(2) of the Act was issued on 8-9-2014 in the name of the erstwhile partnership firm and therefore the assessment is valid.

8. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly the additional ground of appeal was not raised by the assessee before the authorities below. However, all the facts related to the additional ground of appeal are arising from the order of the authorities below and no additional fact needs to be referred. Further, we also note that the issue raised by the assessee in the additional ground of appeal is legal in nature which can be admitted at any stage during the proceedings in view of the judgment of the Hon'ble Supreme Court in the case of NTPC Ltd Vs.CIT reported in 229 ITR 383. Accordingly, we admit the additional ground of appeal raised by the assessee and proceed to adjudicate the same.

9. Now coming to the legality of order framed by the AO under section 143(3) read with section 92CA(3) of the Act vide order dated 06-02-2017, in this regard we note that the AO on the first page of his order has mentioned the name of Intas Pharmaceuticals which was a partnership firm. Thus it is clear that the assessment order was framed in the name of non-existent entity (Intas Pharmaceuticals) as the Intas Pharmaceuticals was amalgamated with Intas Pharmaceutical Ltd w.e.f. 01-04-2014 by the order of the Hon'ble Gujarat High Court dated 28-09-2015 and subsequently intimated to the Department vide letter dated 30-10-2015.

However, it is undisputed fact that at the time of issue of notice under section 143(2) of the Act, the firm i.e. Intas Pharmaceuticals was not amalgamated but the assessment order was framed after amalgamation in the name of Intas Pharmaceuticals which was not existing at the relevant point of time.

We further note that the Department was aware about the amalgamation of the firm before framing the assessment order as the assessee intimated to the department as well as Hon'ble High Court also called the comments from the Department on the proposed scheme of amalgamation. Thus we can say that the provision of section 292B of the Act will not be applicable to the assessee as it is not a curable defect/mistake.

In this regard we would like to take a note of the position of law laid down by the Hon'ble Supreme in the case PCIT Vs. Maruti Suzuki India Limited reported in 416 ITR 613. The facts in this case are that Suzuki Motors Corporation, and Maruti Suzuki India limited (in short MSIL) constituted a joint venture with shareholding of 70% and 30%. Such joint venture was incorporated as Suzuki Motor India Ltd. Subsequently w.e.f. 8.6.2005 its name was changed to SPIL. On 28.11.2012 SPIL has filed its return of income. Upto this date no amalgamation had taken place. On January 29, 2013 a scheme for amalgamation of SPIL and MSIL was approved by the Hon'ble High Court w.e.f. 1.4.2012. The terms of approval scheme provided that all liability and duties of the transferor company shall stand transferred to the transferee company. On scheme being coming into effect, the transferor company was to stand dissolved without winding up. The scheme stipulated that the order of amalgamation will not be construed as an order granted exemption from the payment of stamp duty or taxes, or any other charges, if any payable in accordance with law. The AO has initiated the assessment proceedings by issuance of notice under section 143(2) on 26.9.2013 followed by a notice under section 142(1) of the Act to the amalgamating company. MSIL participated in the assessment proceedings of erstwhile amalgamating entity i.e. SPIL through its authorized representative and officers. The assessment was framed. Thereafter during the appellate proceedings before the Tribunal the assessee took an objection that final assessment order was passed on 31.10.2016 in the name of SPIL which was amalgamated with MSIL. The assessee took an objection that the assessment order has been passed in the name of company which ceased to exist and therefore, the assessment order is

void ab initio. This plea of the assessee was accepted by the Tribunal. This order of the Tribunal was upheld by the Hon'ble High Court. Ultimately issue travelled upto Hon'ble Supreme Court. While taking cognizance of the submissions, and the proposition laid down in various High Courts' decisions, the Hon'ble Supreme Court made the following observations:

> *"19. While assessing the merits of the rival submissions, it is necessary at the outset to advert to certain significant facets of the present 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., (supra) 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.*

20. In Spice Entertainment, (supra) a Division Bench of the Delhi High Court dealt with the question as to whether an assessment in the name of a company which has been amalgamated and has been dissolved is null and void or, whether the framing of an assessment in the name of such company is merely a procedural defect which can be cured. The High Court held that upon a notice under Section 143 (2) being addressed, the amalgamated company had brought the fact of the amalgamation to the notice of the assessing officer. Despite this, the assessing officer did not substitute the name of the amalgamated company and proceeded to make an assessment in the name of a non-existent company which renders it void. This, in the view of the High Court, was not merely a procedural defect. Moreover, the participation by the amalgamated company would have no effect since there could be no estoppel against law :

"11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said 'dead person'. When notice under Section 143 (2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the appellant on record. Instead, the Assessing Officer made the assessment in the name of M/s Spice which was non existing entity on that day. In such proceedings an 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.

12. Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B of the Act."

Following the decision in Spice Entertainment, (supra) the Delhi High Court quashed assessment orders which were framed in the name of the amalgamating company in:

(i) Dimension Apparels (supra);
(ii) Micron Steels; and (supra)
(iii) Micra India (supra).

21. In Dimension Apparels, (supra) a Division Bench of the Delhi High Court affirmed the quashing of an assessment order dated 31 December 2010. The Respondent had amalgamated with another company and thus, ceased to exist from 7 December 2009. The Court rejected the argument of the Revenue that the assessment was in substance and effect in conformity with the Act by reason of the fact that the assessing officer had used correct nomenclature in addressing the Assessee; stated the fact that the company had amalgamated and mentioned the correct address of the amalgamated company. It was the Revenue's contention that the omission on the part of the assessing officer to mention the name of the amalgamated company is a procedural defect. The Delhi High Court rejected this contention. In doing so, it relied on the holding in Spice Entertainment, (supra) where the High Court expressly clarified that "the framing of assessment against a non-existing entity/person" is a jurisdictional defect. The Division Bench also relied on the holding in Spice Entertainment (supra) that participation by the amalgamated company in proceedings does not cure the defect as "there can be no estoppel in law", to affirm the quashing of the assessment order.

22. In Micron Steels, (supra) a notice was issued to Micron Steels Pvt Ltd (original assessee) after it had amalgamated with Lakhanpal Infrastructure Pvt Ltd. A Division Bench of the Delhi High Court upheld the setting aside of assessment orders, noting that Spice Entertainment (supra) is an authority for the proposition that completion of

assessment in respect of a non-existent company due to the amalgamation order, would render the assessment a nullity.

23. In Micra India, (supra) the original assessee Micra India Pvt. Ltd had amalgamated with Dynamic Buildmart (P) Ltd. Notice was issued to the original assessee by the Revenue after the fact of amalgamation had been communicated to it. The Court noted that though the assessee had participated in the assessment, the original assessee was no longer in existence and the assessment officer did not the take the remedial measure of transposing the transferee as the company which had to be assessed. Instead, the original assessee was described as one in existence and the order mentioned the transferee's name below that of the original assessee. The Division Bench adverted to the judgment in Dimension Apparels (supra) wherein the High Court had discussed the ruling in Spice Entertainment (supra). It was held that this was a case where the assessment was contrary to law, having been completed against a non-existent company."

Hon'ble Supreme Court thereafter took note of the judgment in the case of Sky Light Hospitality Vs. ACIT, 259 taxman 390 (SC). This judgment was pressed in service by the Revenue to point out that if an order was framed in accordance with law in the name of amalgamating company, then it would amount to mistake, defect or omission which is curable under section 292B of the Income Tax Act. Hon'ble Supreme Court has dealt with this judgment and explained its impact. Hon'ble Supreme Court ultimately upheld the judgment of Hon'ble Delhi High Court in the case of Maruti Suzuki (supra) and held that assessment order passed subsequently in the name of non-existing company would be without jurisdiction and a nullity. Concluding paragraph of the judgment are worth to note which reads as under:

"33. 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 Enfotainment (supra) on 2 November 2017. The decision in Spice Enfotainment 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 Enfotainment (supra).

34. 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."

In the case of Emerald Company Ltd., ITAT Kolkatta Bench has also dealt with similar situation after making reference to judgment of the Hon'ble Delhi High Court in the case of CIT Vs. Dimension Apparels P.Ltd., 370 ITR 288 (Del) as well as decision of Hon'ble Delhi High Court in the case of Spice Entertainment Ltd. The ITAT has also made reference to the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Intel Technology Ltd. P. Ltd., 380 ITR 272 (Kar.). The Tribunal has held that action under section 263 is a jurisdictional action against an assessee. In the case of a company, the ld. Commissioner was required to issue a show cause notice against a juridical person contemplated in section 2(31) of the Income Tax Act and if a juridical person ceases to exist then it would not be construed as a person within the meaning of section 2(31) against whom any action can be taken. The Commissioner would not assume proper jurisdiction and such type of defect would not be cured with help of section 292B of the Act, because it is not a procedural irregularity which could be cured. We also note that this Tribunal in the case of Snowhill Agencies Pvt. Ltd. Vs. Pr. CIT bearing ITA No. 1775/AHD/2019 vide order dated 21-1-2020 involving identical facts and circumstances has decided the issue in favour of the assessee. In view of above, we note that the assessment framed under section 143(3) r.w.s. 92CA of the Act is not sustainable. Hence the additional ground of appeal of the assessee is allowed.

10. Since the legal issues are addressed and decided in favor of the assessee, we refrain to give our findings on merits of disallowances under the provisions of the Act. Accordingly the grounds raised by the assessee do not require any separate adjudication. Thus we dismiss the same as infructuous.

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

Coming to ITA 678/Ahd/2019 AY 2014-15

12. At the outset we note that this tribunal in the own case of the assessee *(supra)* involving identical facts and circumstances has decided the issue in the

favour of the assessee. For the detailed discussion, please refer the relevant paragraph bearing No. 8 to 9 of this order. The learned DR at the time of hearing has also not brought anything on record contrary to the argument advanced by the learned AR. Hence respectfully following the principle laid down in the own case of the assessee by this tribunal, we note that the assessment framed under section 143(3) r.w.s. 92CA of the Act is not sustainable. Hence the additional ground of appeal of the assessee is allowed.

13. In the combined result, both the appeals of the assessee are partly allowed.

This Order pronounced in Open Court 04/06/2020

Sd/-	Sd/-
(RAJPAL YADAV)	(WASEEM AHMED)
VICE PRESIDENT	ACCOUNTANT MEMBER

Ahmedabad: Dated 04/06/2020

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।