HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No.1557 of 2023

Delta Electronics India Pvt. Ltd. ....Petitioner

Versus

Principal Commissioner of Income Tax
and Another ....Respondents

Present:-

Mr. Piyush Kaushik and Mr. Sahil Mullick, Advocates for the petitioner.
Mr. H.M. Bhatia, Advocate for the respondents.

JUDGMENT

Hon'ble Ravindra Maithani, J. (Oral)

The challenge in this petition is made to notice under Section148 of the Income Tax Act, 1961 ("the Income Tax Act") dated 20.03.2023 as well as order under Section 148 A(d) of the Income Tax Act dated 20.03.2023 for re-assessment of Delta Power Solutions India Pvt. Ltd. ("DPS"), for the assessment year 2019-20.

2. Heard learned counsel for the parties and perused the record.

3. It is the case of the petitioner that DPS and petitioner's Company, i.e. Delta Electronics India Pvt. Ltd. (DIN) proposed a scheme for amalgamation with appointed dated of 01.04.2018 (DPS being Transferor company or amalgamating company and DIN being Transferee company or amalgamated company). The amalgamation processes was approved by National Company Law Tribunal ("NCLT") on

31.01.2019. The proposed scheme of amalgamation was also informed to the revenue by a communication dated 08.08.2018. The revenue participated in the amalgamation proceedings before the NCLT. Post approval by the NCLT, according to the petitioner, the revenue was further informed by a communication dated 15.02.2020. But, it is the case of the petitioner that the revenue issued notice dated 03.02.2020, under Section 148A of the Income Tax Act against the Transferor company specifying, therein, that the PAN of the Transferor company was active. This notice was replied by the petitioner on 10.02.2020 bringing it to the notice of the revenue the factum of amalgamation. As also indicating that with effect from the appointed dated, i.e. 01.04.2018, all the transactions entered and appeared on the PAN of Transferor company has been duly accounted by the petitioner's company being amalgamated company in accordance with the generally accepted accounting policy and other applicable laws.

4. The revenue further gave notices on 27.02.2023 and 28.02.2023 to the Transferor company under Section 148 A of the Income Tax Act. They were replied by the petitioner on 02.03.2023 reiterating the same stand with further elaborating the facts. Thereafter, the order under Section 148 A (d) of the Income Tax Act has been passed for reopening of

the assessment of the Transferor Company for the assessment year 2019-20.

5. The revenue has filed its counter affidavit. The factum of amalgamation and appointed date has not been disputed in Para 5 of the counter affidavit. It has also been admitted by the revenue that the factum of amalgamation has duly been informed to them. In Para 7 of its counter affidavit, the revenue records that, the Transferor company has become non-existent post amalgamation, but the PAN of assessee lying a-float and was active due to the non-action/failure on the part of the assessee in the surrendering the PAN. It has been the objection of the revenue that the petition deserves to be dismissed.

6. Learned counsel for the petitioner would submit that the order impugned is bad in the eyes of law. In view of Section 170 of the Income Tax Act, the Transferor company cannot be assessed for the period post appointed date, as per approved scheme of amalgamation. He would also raise the following points in his submission:-

(i) Admittedly the appointed date is 01.04.2018.

(ii) As per the scheme of amalgamation, after appointed date whatever transaction were to be done by the Transferor company

that was done then for and on behalf of the Transferee company as a trust or in a fiduciary relationship with the transferee company.

(iii) The effective date of amalgamation would be the date of the NCLT, which, in the instant case is 31.01.2019.

(iv) During the process of amalgamation, after appointed date, the information was duly sent to the revenue about the process of amalgamation.

(v) The revenue did participate in the amalgamation proceedings before the NCLT.

(vi) In the process of amalgamation, the Transferor company did not vanish from the appointed date. In fact, it has to carry out the operations. But, they were to be done on behalf of the Transferee company. Whatever transactions were done post appointed date by the Transferor company, they have been accounted, as per accounting practice by the Transferee company and has been duly explained in the notices that were

issued by the revenue under Section 148 A of the Income Tax Act.

(vii) After the NCLT order dated 31.01.2019, the revenue was informed about the approval of the scheme of amalgamation.

7. Learned counsel for the petitioner would submit that a notice against a non-existent entity is bad and this law is well settled in a catena of decisions. He would refer to the judgments in the cases of PCIT Vs. Maruti Suzuki India Ltd., 416 ITR 613 SC, Saraswati Industrial Syndicate Ltd. Vs. CIT, 186 ITR 278 SC, and Rustagi Engineering Udyog (P.) Ltd. Vs. DCIT 67 taxmann.com 284 (Del.), Marshall Sons & Co. (India) Ltd. Vs. Income-tax Officer, [1996] 89 Taxman 619 (SC), and Principal Commissioner of Income tax Vs. Intas Pharmaceuticals Ltd. [2023] 151 taxmann.com 448 (SC).

8. In the case of Marshall (*supra*), the Hon'ble Supreme Court had occasion to interpret the scheme of amalgamation, its effective date, its appointed date, consequences, effects, course of action during the amalgamation process. In Para 12 of the judgment, the Hon'ble Supreme Court observed as follows:-

> "**12.** Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz., January 1, 1982. It is true that while sanctioning the scheme, it is open to the Court

to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it - as has happened in this case - it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During **the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case** but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with affect from the transfer date, the **Transferor Company (Subsidiary Company) shall be deemed to have carried on the business for and on behalf of the Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the Courts have not only sanctioned** the scheme in this case but have also not specified any other date as the date of transfer amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is the necessary and the logical consequence of the court sanctioning the scheme of

> amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the court before the Registrar of Companies, the allotment or shares etc. may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. The Bank of Upper India Ltd. [A.I.R.1919 P.C.9]."
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> (emphasis supplied)

9. The principles of law, as laid down in the case of Marshall (supra), has been followed recently by the Hon'ble Supreme Court in the case of Intas Pharmaceuticals (*supra*).

10. In the case of Saraswati Industrial Syndicate (*supra*), the Hon'ble Supreme Court observed that, **"on amalgamation, there is no complete destruction of the corporate personality of the transferor-company but instead there is a blending of the corporate personality of one with another corporate body and it continues as such with the other is not suitable in law. The true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there cannot be any doubt that, when two companies amalgamate and merge into one, the transferor-company loses its entity as it ceases to have its business."**

11. In the case of Rustagi (*supra*), the Hon'ble Delhi High Court has followed the principles of law, as laid down in

the case of Marshall (*supra*). In Para 3, the Hon'ble Delhi High Court posed a question as follows:-

> **3.** The principal controversy involved in the present petition is whether notices under Section 148 could lbe issued to the Assessee after the said company stood dissolved in terms of a scheme of amalgamation of the Assessee with the Petitioner approved under Section 391 and 394 of the Companies Act, 1956. The Petitioner has further challenged the re-opening of assessments on the ground that the AO had no reason to believe that any part of the income of the Assessee has escaped assessment. It is also contended that the issuance of the impugned notices have not been approved by the competent authority.

12. Referring to the earlier judgments on the point in the cases of Marshall (*supra*), and Spice Infotainment Ltd. Vs. CIT, ITA No.475 of 2011, The Hon'ble Delhi High Court observed as follows:-

> **"18.** In Marshall Sons & Co. (India) Ltd. v. Income-tax Officer [1997] 223 ITR 809 (SC), the Supreme Court held that every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The court further observed that it is also open for a court to modify the appointed date as it thinks appropriate in the facts and circumstances of the case but in a case where the court does not do so, the date as specified in the scheme would be the date on which the amalgamation would take effect. In that case, the Supreme Court was considering a challenge to the notices issued by the Income Tax Officer to the amalgamating company for the period after the appointed date of amalgamation. After examining the provisions of the Companies Act, 1956, the Supreme Court held that the notices issued by the Income Tax Officer were not warranted in law.
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> **19.** In a recent decision dated 3rd August, 2015 in ITA No. 475/2011 (SPICE Infotainment Ltd. v.

> Commissioner of Income Tax), this Court set aside the order passed by the Tribunal upholding the action of the assessing officer in framing an assessment in the name of an amalgamating company after the entity stood dissolved; this court held that the order of the Tribunal was unsustainable and framing an assessment on a dissolved company was not a procedural irregularity but a jurisdictional defect. Similarly, by an order dated 19th August, 2015, ITA 582 of 2015 (PCIT v. Images Credit and Portfolio Pvt. Ltd), this Court held that the proceedings under Section 153C of the Act could not be initiated against an entity that had ceased to exist."

13. After interpreting the law on the point, the Hon'ble Delhi High Court, in Para 20 observed that, **"in view of the aforesaid, the contention that the impugned notices issued under Section 148 of the Act were invalid as having been issued to an Assessee that had ceased to exist, must be accepted. The impugned notices are, therefore, liable to be set aside on this ground alone."**

14. In the case of Maruti Suzuki (*supra*), in a similar situation, the Hon'ble Supreme Court discussed the law on the subject while making reference to Section 170 of the income Tax Act, the Hon'ble Supreme Court observed as follows:-

> **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** (supra) 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).
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> (emphasis supplied)

15. Learned counsel for the revenue would submit that after appointed date, various transactions were made by the PAN of the Transferor company. They were not accounted for it. Therefore, notices were issued for reopening of the assessment for the assessment year 2019-20. He would submit that the reasons have been given in the impugned order as to why the order has been passed.

16. Learned counsel for the revenue would submit that the revenue may reopen the assessment with regard to the new entity, as per law.

17. In support of his contention, learned counsel for the revenue has placed reliance upon the principles of law, as laid down by the Hon'ble Karnataka High Court, in the case of Coffee Day Resorts (MSM) Pvt. Ltd. Vs. The Deputy Commissioner of Income Tax and Another, in Writ Petition No.9594 of 2023 (T-IT).

18. In a similar situation, in the case of Coffee Day (*supra*), the Hon'ble Karnataka High Court relied upon the principles of law, as laid down in the case of Maruti Suzuki (*supra*) to hold that **"assessment order passed in the name of non-existing company is a substantive illegality and is an order passed without jurisdiction."** Although, in the judgment of Coffee Day (*supra*), in the last paragraph, the Hon'ble Karnataka High Court gave liberty to the authorities to initiate appropriate proceedings, as is open in law and permissible.

19. Learned counsel for the petitioner would also submit that even if PAN of the Transferor company is active post appointed date of amalgamation, it does not give the revenue a right to proceed against him.

20. In support of his contention, learned counsel has placed reliance upon the principles of law, as laid down by the Hon'ble Bombay High Court in the case of Dhirendra Bhupendra Sanghvi Vs. Assistant Commissioner of Income Tax and others, (WP No.10163 of 2022; decided on 27.06.2023). In the case of Dhirendra Bhupendra (*supra*), the Hon'ble Bombay High Court, while referring to the judgment

in the case of Saraswati Industrial Syndicate (*supra*) and Maruti Suzuki (*supra*) , observed as follows:

> **11.** This Court in the case of CLSA India Private Limited vs The Deputy Commissioner of Income Tax, 4(1)(1) & Ors. in Writ Petition No. 2462 of 2022 whilst allowing the Petition has held that the stand of the revenue that the reassessment was justified in view of the fact that the PAN in the name of the non-existent entity had remained active does not create an exception in favour of the revenue to dilute in any manner the principles enunciated by the Apex Court in Saraswati Industrial Syndicate Ltd. v/s CIT 4 and in the case of PCIT New Delhi vs. Maruti Suzuki India Ltd. (supra).

21. The question is, can the revenue proceed against an amalgamating company post appointed date?

22. Section 170 of the Income Tax Act has been referred to during the course of argument. It is as hereunder:-

> **170. Succession to business otherwise than on death.** - (1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession,-
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> (a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;
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> (b) the successor shall be assessed in respect of the income of the previous year after the date of succession.

23. This Court is not called upon to agitate as to what are the options available to the revenue. This Court's attention is invited to the impugned notice and order. A notice

dated 20.03.2023 issued by the revenue to the petitioner under Section 148 of the Income Tax Act, and also an order passed under Section 148A (d) of the Income Tax Act, passed on 20.03.2023.

24. Admittedly, the petitioner had informed the revenue of the amalgamation process. The NCLT judgment is Annexure No.6 of the writ petition. In Para 13 of the judgment of the NCLT dated 31.01.2019, observation has been made with regard to the submissions that were made by the revenue in the amalgamation proceedings. In the same paragraph, the NCLT has noted the undertakings that were given by the Transferee company, by which the Transferee company, i.e. the petitioner, undertook that the scheme of amalgamation would ensure that the statutory dues, tax, etc, that are due and payable by the Transferor company subsequent to the merger, would stand transferred to the Transferee company.

25. The scheme of amalgamation was sanctioned by the NCLT. The petitioner did inform the revenue of it.

26. In view of the settled law, from the appointed date, under the scheme of amalgamation, the existence of the Transferor company had merged into the Transferee company. That is what the scheme of amalgamation that has been proved in the instant case by NCLT also provides. It also

provides for business and property-in-trust in Clause 8 of the scheme of amalgamation. Mere activation of PAN number may not give a right to the revenue to issue notice to a non-existent entity. Admittedly, in the instant case, the notice was given to the Transferor company, which is a non-existent entity, after the appointed date, i.e. 01.04.2018. Admittedly, the order under Section 148 A (d) of the Income Tax Act has been passed by the revenue against a non-existent entity. Therefore, the order is bad in the eyes of law. Accordingly the petitioner deserves to be allowed.

27. The petition is allowed.

28. The impugned notice dated 20.03.2023 as well as order dated 20.03.2023, passed under Section 148(A)(d) of the Income Tax Act is quashed.

(Ravindra Maithani, J.)

22.09.2023

Ravi Bisht