Pr Commissioner Of Vs. M/s Quantech Global Services Ltd

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Court : Karnataka

Decided On : Feb-04-2021

Judge : Satish Chandra Sharma and V Srishananda

Appeal No. : ITA 439/2018

Appellant : Pr Commissioner Of

Respondent : M/s Quantech Global Services Ltd

Judgement :

1 IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE04H DAY OF FEBRUARY, 2021 PRESENT THE HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA AND THE HON'BLE MR. JUSTICE V.SRISHANANDA ITA NO.439/2018 BETWEEN:

1. PR. COMMISSIONER OF INCOME-1 TAX-7, BMTC COMPLEX, KORAMANGALA BANGALORE2 THE ASSISTANT COMMISSIONER OF INCOME-TAX, CIRCLE-16(3) BANGALORE APPELLANTS (BY SRI.SANMATHI E.I., ADV.) AND: M/S.QUANTECH GLOBAL SERVICES LTD., (SINCE MERGED WITH WIPRO LTD.,) DODDAKANNELLI, SARJAPUR ROAD BENGALURU AAACQ0681N RESPONDENT (BY SRI.S.GANESH, SR. ADV., FOR SRI.SANDEEP HUILGOL, ADV.) THIS ITA IS FILED UNDER SECTION260A OF INCOME TAX ACT1961 ARISING OUT OF

ORDER

DATED1901.2018 PASSED IN ITA NO.1947/H/2011, FOR THE ASSESSMENT YEAR:

2007. 2008 AND ETC. 2 THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR

JUDGMENT
, THIS DAY SATISH CHANDRA SHARMA J., PRONOUNCED THE FOLLOWING:

JUDGMENT
The present appeal has been filed under Section 268 of the Income Tax Act, 1961 (for short the IT Act) by the appellants- Income Tax Department being aggrieved by the order dated 19.01.2018 passed by the Income Tax Appellate Tribunal B Bench, Bangalore, in ITA No.1947/H/2011 for the Assessment Year 2007-08.

2. The facts of the case reveal that the respondent- assessee was involved in the business of Development of Computer Software aided design and engineering services for automobile Industry. The respondent-company on account of Scheme of amalgamation stood merged with the Wipro Limited, the Scheme of amalgamation was approved by the High Court of Andhra Pradesh vide order dated 21.02.2008 and by the High Court of Karnataka vide order dated 10.01.2008 with effect from 01.04.2007. The facts of the case further reveal in spite of merger of the assessee i.e., M/s. Quantech Global Services Ltd. (QGSL) with M/s. Wipro Ltd. Notice under Section 143(2) was issued on 19.09.2008 upon the assessee. Since there were 3 international transactions carried out by the QGSL, a reference was made to Transfer Pricing Officer (TPO) vide letter dated 30.11.2009 and during the course of proceeding before the TPO, assessee vide its letter dated 09.06.2010 categorically stated that its registered office was at Hyderabad and it stood merged with Wipro Ltd., pursuant to the scheme of amalgamation approved by the High Court of Andhra Pradesh vide order dated 21.02.2008 and scheme of amalgamation approved by the High Court of Karnataka vide order dated 10.01.2008. A request was also made to the Commissioner to transfer the files to Bangalore as the company Wipro Ltd., is assessed in Circle 2(1), Bangalore. The aforesaid facts were not taken into account by the TPO while passing an order on 29.10.2010 in the name of erstwhile company (amalgamating company) i.e.,

QGSL which already stood merged with the Wipro Ltd. against its PAN No.AAACQ0681N. Thereafter, a draft assessment order was passed against the amalgamating company against its own PAN No.on 29.10.2012. Against the draft assessment order, assessee has filed the objections before the DRP and brought to its notice the orders passed by the High Court of Andhra Pradesh as well as High Court of Karnataka in respect of merger and raised a ground that no assessment order can be passed in the name of non- 4 existing entity. The objections were rejected by the DRP and the DRP has passed an order in the name of the amalgamating company i.e., QGSL and thereafter, the Assessing Officer has passed an order in the name of the amalgamating company which was non-existent.

3. The respondent-assessee (QGSL) has preferred an appeal against the order passed by the Assessing Officer before the Income Tax Appellate Tribunal (ITAT) and the ITAT has allowed the appeal. The assessee has placed reliance upon a judgment delivered by the Delhi High Court in the case of Spice Infotainment Ltd. Vs. CIT, in ITA.No.475/2011, decided on 3.8.2011.

4. The appeal was admitted on the following substantial questions of law: (a) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in holding that assessment order passed is invalid on the ground that assessee-company did not exist on the day of passing assessment order by following the decision of Delhi High Court in the case of M/s.Spice Informainment Ltd. 5 (b) Whether in the facts and circumstances of the case, the Tribunal is justified in law in holding that assessment order is invalid when name of the Company was Wipro Ltd. During Financial Year 2006-07 and the order of this Honble Ciourt approving merger scheme of the assessee was passed on 10/1/2008 and as such assessee-company existed during the financial year 2006-07, as such assessment order passed in the name of the assessee is proper and justified?. (c) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in holding that assessment order passed is invalid on the ground that assessee-company did not exist on the day of passing assessment order by following the decision of Delhi High Court in the case of M/s. Spice Informainment Ltd. When merged company name has been shown in assessment

order, TPO order, DRP order and ITAT order and along with assesseee-company and representative of the merged company contested the case on merits before all the authorities?. 6 5. Learned counsel for the parties were heard at length and the undisputed facts reveal that for the assessment year 2006-2007 the case of the respondent company was selected for scrutiny assessment under Section 143(3) read with 92CA and 144C of the IT Act. The undisputed facts also reveal that the respondent company pursuant to the scheme of amalgamation stood merged with the Wipro Limited, the Scheme of amalgamation was approved by the High Court of Andhra Pradesh vide order dated 21.02.2008 and by the High Court of Karnataka vide order dated 10.01.2008 with effect from 01.04.2007 and in spite of merger of the assessee i.e., M/s. Quantech Global Services Ltd. (QGSL) with M/s. Wipro Ltd., notice under Section 143(2) was issued on 19.09.2008 upon the assessee. Undisputedly, the international transactions carried out by the QGSL, a reference was made to Transfer Pricing Officer (TPO) vide letter dated 30.11.2009 and during the course of proceeding before the TPO, assessee vide its letter dated 09.06.2010 categorically stated that its registered office was at Hyderabad and it stood merged with Wipro Ltd., pursuant to the scheme of amalgamation approved by the High Court of Andhra Pradesh vide order dated 21.02.2008 and scheme of amalgamation approved by the High Court of Karnataka vide order dated 10.01.2008. A7request was also made to the Commissioner to transfer the files to Bangalore as the company Wipro Ltd., is assessed in Circle 2(1), Bangalore. The aforesaid facts were not taken into account by the TPO while passing an order on 29.10.2010 in the name of erstwhile company (amalgamating company) i.e., QGSL. Thus, it was well within the knowledge of the authorities that the respondent company stood merged with Wipro Ltd., on 01.04.2007 and it is not a case where the information was not available with the TPO or with the Assessing Officer.

6. The Delhi High Court in the case of Spice Entertainment Ltd., vs. Commissioner of Service Tax, in ITA.No.475/2011, decided on 3.8.2011, in paragraphs 8 to 18 has held as under: 8. A company incorporated under the Indian Companies Act is a juristic person. It takes its birth and gets life with the incorporation. It dies with the dissolution as per the provisions of the Companies Act. It is trite law that on amalgamation, the amalgamating company ceases to exist in the eyes of law. This

position is even accepted by the Tribunal in para-14 of its order extracted above. Having regard this consequence provided in law, in number of cases, the Supreme Court held that assessment upon a dissolved company is impermissible as there is no provision in Income-Tax to make an assessment thereupon. In the case of 8 Saraswati Industrial Syndicate Ltd. Vs. CIT, 186 ITR278the legal position is explained in the following terms: The question is whether on the amalgamation of the Indian Sugar Company with the appellant Company, the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41(1)of the Act. The amalgamation of the two companies was effected under the order of the High Court in proceedings under Section 391 read with Section 394 of the Companies Act. The Saraswati Industrial Syndicate, the trans free Company was a subsidiary of the Indian Sugar Company, namely, the transferor Company. Under the scheme of amalgamation the Indian Sugar Company stood dissolved on 29th October, 1962 and it ceased to be in existence thereafter. Though the scheme provided that the transferee Company the Saraswati Industrial Syndicate Ltd. undertook to meet any liability of the Indian Sugar Company which that Company incurred or it could incur, any liability, before the dissolution or not thereafter. Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one 9 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 share holders of each blending Company become substantially the share holders 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 Halsburys Laws of England 4th Edition Vol. 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.

9. The Court referred to its earlier judgment in General Radio and Appliances Co. Ltd. Vs. M.A. Khader(1986) 60 Comp Case 1013. In view of the aforesaid clinching 10 position in law, it is difficult to digest the circuitous route adopted by the Tribunal holding that the assessment was in fact in the name of amalgamated company and there was only a procedural defect.

10. Section 481 of the Companies Act provides for dissolution of the company. The Company Judge in the High Court can order dissolution of a company on the grounds stated therein. The effect of the dissolution is that the company no more survives. The dissolution puts an end to the existence of the company. It is held in M.H. Smith (Plant Hire) Ltd. Vs. D.L. Mainwaring (T/A Inshore), 1986 BCLC342(CA) that once a company is dissolved it becomes a non-existent party and therefore no action can be brought in its name. Thus an insurance company which was subrogated to the rights of another insured company was held not to be entitled to maintain an action in the name of the company after the latter had been dissolved.

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 and assessment order passed in the name of 11 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. Section 292B of the Act reads as under:- 292B. No return of income assessment, notice, summons or other proceedings furnished or made or issue or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reasons of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceedings is in substance and effect in conformity with or according to the intent and purpose of this Act.

13. The Punjab & Haryana High Court stated the effect of this provision in CIT Vs. Norton Motors, 275 ITR595in the following manner:- A reading of the above reproduced provision makes it clear that a mistake, defect or 12 omission in the return of income, assessment, notice, summons or other proceeding is not sufficient to invalidate an action taken by the competent authority, provided that such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the provisions of the Act. To put it differently, Section 292B can be relied upon for resisting a challenge to the notice, etc., only if there is a technical defect or omission in it. However, there is nothing in the plain language of that section from which it can be inferred that the same can be relied upon for curing a jurisdictional defect in the assessment notice, summons or other proceeding. In other words, if the notice, summons or other proceeding taken by an authority suffers from an inherent lacuna affecting his/its jurisdiction, the same cannot be cured by having resort to Section 292B.

14. The issue again cropped up before the Court in CIT Vs. Harjinder Kaur (2009) 222 CTR254(P&H). That was a case where return in question filed by the assessee was neither signed by the assessee nor verified in terms of the mandate of Section 140 of the Act. The Court was of the opinion that such a return cannot be treated as return even a return filed by the assessee and this inherent defect could not be cured inspite of the deeming effect of Section 292B of the Act. Therefore, the return 13 was absolutely invalid and assessment could not be made on a invalid return. In the process, the Court observed as under:- Having given our thoughtful consideration to the submission advanced by the learned Counsel for

the appellant, we are of the view that the provisions of Section 292B of the 1961 Act do not authorize the AO to ignore a defect of a substantive nature and it is, therefore, that the aforesaid provision categorically records that a return would not be treated as invalid, if the same "in substance and effect is in conformity with or according to the intent and purpose of this Act". Insofar as the return under reference is concerned, in terms of Section 140 of the 1961 Act, the same cannot be treated to be even a return filed by the respondent assessee, as the same does not even bear her signatures and had not even been verified by her. In the aforesaid view of the matter, it is not possible for us to accept that the return allegedly filed by the assessee was in substance and effect in conformity with or according to the intent and purpose of this Act. Thus viewed, it is not possible for us to accept the contention advanced by the learned Counsel for the appellant on the basis of Section 292B of the 1961 Act. The return under reference, which had been taken into consideration by the Revenue, was an absolutely invalid return as it had a glaring inherent defect which could not be cured in spite of the deeming effect of Section 292Bof the 1961 Act 15. Likewise, in the case of Sri Nath Suresh Chand Ram Naresh Vs. CIT (2006) 280 ITR396 the Allahabad 14 High Court held that the issue of notice under Section 148 of the Income Tax Act is a condition precedent to the validity of any assessment order to be passed under section 147 of the Act and when such a notice is not issued and assessment made, such a defect cannot be treated as cured under Section 292B of the Act. The Court observed that this provisions condones the invalidity which arises merely by mistake, defect or omission in a notice, if in substance and effect it is in conformity with or according to the intent and purpose of this Act. Since no valid notice was served on the assessee to reassess the income, all the consequent proceedings were null and void and it was not a case of irregularity. Therefore, Section 292B of the Act had no application.

16. When we apply the ratio of aforesaid cases to the facts of this case, the irresistible conclusion would be provisions of Section 292B of the Act are not applicable in such a case. The framing of assessment against a non- existing entity/person goes to the root of the matter which is not a procedural irregularity but a jurisdictional defect as there cannot be any assessment against a dead person.

17. The order of the Tribunal is, therefore, clearly unsustainable. We, thus, decide the questions of law in favour of the assessee and against the Revenue and allow these appeals.

18. We may, however, point out that the returns were filed by M/s Spice on the day when it was in existence it would be permissible to carry out the assessment on the 15 basis of those returns after taking the proceedings afresh from the stage of issuance of notice under Section 143 (2) of the Act. In these circumstances, it would be incumbent upon the AO to first substitute the name of the appellant in place of M/s Spice and then issue notice to the appellant. However, such a course of action can be taken by the AO only if it is still permissible as per law and has not become time barred.

7. The Delhi High Court in the aforesaid case has held that an assessment order could not have been passed against a non-existent company. It is not a procedural irregularity but a jurisdictional defect as there cannot be any assessment against a dead person. The judgment delivered by the Delhi High Court was subjected to judicial scrutiny before the Honble Supreme Court and the Honble Supreme Court in Civil appeal No.285/2014 (C.I.T New Delhi vs. M/s Spice Enfotainment Ltd.,) has dismissed the appeal by an order dated 2.11.2017.

8. That the Honble Supreme Court in the case of Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki India Limited, reported in 2019 SCC OnLine SC928has dealt with a similar issue and taking into account the judgment delivered in the case of Spice Enfotainment Ltd., in 16 paragraphs 39, 40 and 41 the Honble Supreme Court has held as under: 39. 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 circumstance 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 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 AY20112012. In doing so, this Court has relied on the decision in Spice Enfotainment.

40. 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 AY201112 must, in our view be adopted in respect of the present appeal which relates to AY201213. 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 17 business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable.

41. For the above reasons, we find no merit in the appeal. The appeal is accordingly dismissed. There shall be no order as to costs. The Honble Supreme Court has thus upheld the contention that there cannot be any assessment order in respect of a non- existent entity.

9. The Honble Supreme Court in the case of Principal Commisioner of Income-tax vs. BMA Capfin Ltd., reported in (2018) 100 taxmann.com 330 (SC) in paragraph 3 has held as under: 3. In the opinion of the Court, the settled position indicated arising from the string of judgment, i.e., Spice Entertainment (supra) onward still CIT v. Vivid Marketing Services (P) Ltd., (IT Appeal No.273 of 2009), is in no way distinguishable. The rationale for holding that even Section 292B is in applicable in all these cases consistently was that once the corporate entity is merged with another, i.e., transferee corporation or entity, the assessment had to be completed in the latters hands. In the present case, the revenue despite being intimated did not complete the assessment in a composite manner in the hands of the Adhunik Technology Pvt. Ltd., Clearly they were notified about the development as the assessee 18 was duty bound to. Despite that, the Revenue persisted in completing a separate assessment order in respect of an entity which was not in existence. The Honble Supreme Court has once again dismissed the SLP

preferred by the department, meaning thereby upholding the law laid down in the earlier case that there cannot be an assessment order against a non-existent company.

10. The Delhi High Court in the case of Principal Commissioner of Income-tax 6, New Delhi vs. Maruti Suzuki India Ltd., reported in (2017) 85 taxmann.com 330 (Delhi), in paragraphs 12 to 17 has held as under:- 12. Even thereafter the Revenue has repeatedly brought the said issue before this Court in a large number of cases where, in more or less identical circumstances, the AO had passed the assessment order in the name of the entity that had ceased to exist as on the date of the assessment order. In many of these cases, as in the present case, the AO, after mentioning the name of the Amalgamating Company as the Assessee, mentioned below it the name of the Amalgamated Company. Illustratively the cases are: (i) CIT v Micra India (P) Ltd., (2015) 231 Taxman 809/57 taxmann.com 163(Del); (ii) CIT v. Micron Steels (P) Ltd., (2015) 372 ITR386233 Taxman 120/59 taxmann.com 470(Del) 19 (iii) CIT v. Dimension Apparels (P) Ltd. (2015) 370 ITR288(2014) 52 taxmann.com 356 (Del) (iv) BDR Builders & Developers (P) Ltd. V. Asstt. CIT (Decision dated 26th July 2017 passed by this Court in W.P (C) No.2712/2016) 13. The question whether, for the purposes of Section 170(2) of the Act, the defect of passing the assessment order in the name of an non-existent entity is a mere irregularity was answered by this court in Dimension Apparels (P) Ltd. (supra) where in paras 6 and 7 it was held as under: 6. Sections 170(1) and 170(2) of the Act do not assist the revenue in their case. The revenue does not contest that in a case of amalgamation, the predecessor (being a dissolved company) cannot be found. Consequently, section 170(2) applies. This provision clarifies that where the predecessor cannot be found, the assessment of the income of the previous year in which the succession took place up to the date of the succession and of the precious year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor. (Emphasis supplied) 7. The revenue seems to argue that the assessment is justified because the liabilities of the amalgamating company accrue to the amalgamated (transferee) company. While that is 20 true, the question here is which entity must the assessment be made on. The text of Section 170(2) makes it clear that the assessment must be made on

the successor (i.e., the amalgamated company).

14. The submission that under Section 292B of the Act, the successor-in-interest is precluded from raising an objection if it has participated in the assessment proceedings was negative in Spice Infotainment Ltd.s case (supra) where it was held: ..... once it is found that the assessment is framed in the name of a non-existent entity it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292-B of the Act.

15. On the issue of participation, the Court Dimension Apparels (P) Ltd.s (supra) observed: 22. On the last contention, i.e with respect to participation by the previous assessee, i.e the amalgamating company (which ceases to exist), again Spice (supra) is categorical; it was ruled on that occasion that such participation by the amalgamated company in proceedings did not cure the defect, because there can be no estoppel in law. Vived Marketing Servicing Pvt. Ltd., (supra) had also reached the same conclusion. 16. The legal position having been made abundantly clear in the above decisions, the Court has no hesitating in answering the question framed in the 21 negative, i.e. in favour of the Assessee and against the Revenue.

17. The appeal is accordingly dismissed but, in the circumstances, with no orders as to costs. The Delhi High Court in the aforesaid case after taking into account the earlier judgments on the issue involved has once again held that in case the assessment orders are framed in the name of a non-existent company it does not mean a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292-B of the Income-tax Act.

11. In the considered opinion of this Court, the legal proposition of law has already been crystallized and there could not have been any assessment order in respect of the respondent - company as it was not in existence (amalgamating company). A similar view has been taken by a Co-ordinate Bench of this Court in the case of Commissioner of Income-tax, Central Circle, Bangalore vs. Intel Technology India (P) Ltd., reported in (2015) 57 taxmann.com 159 (Karnataka).

12. Therefore, as the legal position is abundantly clear in the light of the decisions referred to above, this Court has no 22 hesitation in answering the questions framed in the negative i.e., in favour of the Assessee and against the Revenue. The appeal is accordingly dismissed with no orders as to costs. Sd/- JUDGE Sd/- JUDGE TL/nd