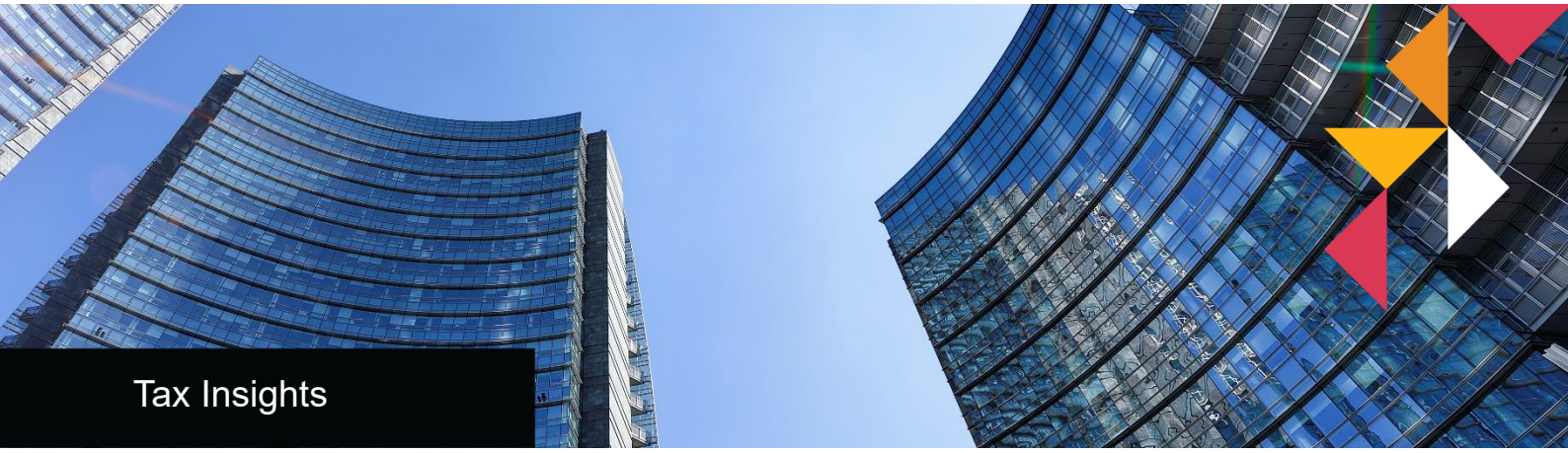

Tax Insights

14 April 2022

Supreme Court upholds validity of assessment order in name of the amalgamating entity after amalgamation based on facts of the case

In brief

The Supreme Court of India[1], on the basis of facts, allowed the Revenue's appeal and reversed the High Court's order. The High Court had dismissed the Revenue's appeal regarding the validity of the assessment order on the amalgamating company after amalgamation. The Supreme Court distinguished its earlier judgement in the case of Maruti Suzuki India Limited (Maruti Suzuki).[2]

In detail

Facts

- The taxpayer was engaged in the development of real estate. Pursuant to the order of the Delhi High Court dated 10 September 2007[3], it was amalgamated with the amalgamated company with effect from 1 April 2006.
- The taxpayer had filed the original tax return under section 139 of the Income-tax Act, 1961 (the Act) for assessment year (AY) 2006–2007 on 30 June 2006. A survey proceeding was conducted on 20 March 2007 in respect of the taxpayer. Some discrepancies in the books of accounts were noticed. Subsequently, on 27 August 2008, search and seizure operation was carried out in various group companies, including the taxpayer.
- The statement made by the managing director of the taxpayer during the survey proceedings unearthed discrepancies in the books of accounts of the taxpayer. However, the taxpayer made no indication in the statement about the ongoing scheme of amalgamation involving the taxpayer. Additionally, the statements made were in the capacity of director of the taxpayer.
- Thereafter, the Revenue issued a notice to the taxpayer on 2 March 2009 to file a return of income under section 153A of the Act for AY 2006–2007.

1 Special Leave Petition (C) No. 4063 OF 2020

2 Principal CIT *v.* Maruti Suzuki India Limed [2019] SCC Online SC 928

3 In Company Petition No. 133/ 2007 c/ w Company Application (M) No. 41/ 2007

- The taxpayer filed the return of income on 28 May 2010 for AY 2006–2007 in the name of the taxpayer, i.e. the amalgamating company along with its Permanent Account Number (PAN). In response to a specific column in the return of income with respect to business reorganisations, the taxpayer mentioned 'not applicable.'
- Later, the taxpayer served letters to the Revenue intimating about the amalgamation on 27 July 2010 for AY 2007–2008, for which separate proceedings were initiated under section 153A of the Act.
- The Tax Officer (TO) issued the assessment order on 11 August 2011 and made several additions to income under various heads. The assessment order showed the taxpayer in the cause title as 'taxpayer (represented by the amalgamated company)'.

Revenue's contention

- The taxpayer was duly represented by the amalgamated company, and no prejudice was caused to any of the parties by the assessment order.
- The facts in the case of Maruti Suzuki[2] are distinguishable from the taxpayer's case. In Maruti Suzuki's case, the Revenue was duly informed about the merger; yet, the TO had passed the order only in the name of the amalgamating company. The Supreme Court had rejected the Revenue's appeal in Maruti Suzuki's case on the ground that the final assessment order referred only to the name of the amalgamating company and there was no mention of the resulting company. However, in the taxpayer's case, the names of both the amalgamating and amalgamated company were mentioned.
- During the survey proceedings, the director of the taxpayer failed to mention about the amalgamation in the statements made, as the application for merger was already filed in the High Court at the time of survey proceedings. Furthermore, the taxpayer surrendered amounts for which it was unable to account and issued post-dated cheques in its name. After the amalgamation was sanctioned by the High Court, the post-dated cheques were neither taken back nor were fresh cheques submitted by the amalgamated company.
- The TO was appraised of the amalgamation when the assessment proceedings were resisted, to which the TO duly gave effect to the taxpayer's description in the cause title of the assessment order. Furthermore, the description by the taxpayer in the taxpayer's appeal to the CIT as well as cross objections to the Income-tax Appellate Tribunal (Tribunal) was 'taxpayer (represented by amalgamated company)'.
- Thus, the assessment order, in reality and substance, was in relation to the amalgamated company.

Taxpayer's contention

- Upon sanction of amalgamation, the amalgamating company stood dissolved without winding up, in terms of section 394 of the Companies Act, 1956. The amalgamating company cannot be regarded as a 'person' in terms of section 2(31) of the Act.
- The statement issued by the director at the time of search in the name of the taxpayer, a non-existing entity, was invalid. Initiation of proceedings against a non-existent entity was *void-ab-initio*.
- The assessment framed in the name of amalgamating company is invalid in terms of section 170(2) of the Act. Once the amalgamation is effective, the notice had to be issued in the name of amalgamated company.
- The taxpayer's case was covered by the judgement of the Delhi High Court in the case of Spice Infotainment Limited[4] (Spice). It was held that assessment framed in the name of the amalgamating company that had ceased to exist in law was invalid and untenable, and such defect would not be cured in terms of section 292B of the Act.
- Additionally, the case was covered by the Supreme Court decision in the case of Maruti Suzuki[2], as in both the cases, the fact of amalgamation was known to the TO during the assessment proceedings. However, in the taxpayer's case, the TO tried to cure the defect by amending the cause title by including the name of both the existing and non-existing entity.

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4 Spice Infotainment Limited *v.* CIT [2012] 247 CTR 500 (Delhi) This judgement has also been referred to as Spice Entertainment *v.* Commissioner of Income Tax in [2012] 280 ELT 43 (Delhi).

Supreme Court's decision

- Unlike the winding up of a corporate entity, in the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed. Thus, it ceases to exist. Yet, in every other sense of the term, the corporate venture continues within the new or the existing transferee entity. In other words, the business and the venture 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 a corporate entity, which brings to an end or terminates any assessment proceedings.
- Accordingly, based on the provisions of the law, it was held 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. Any benefits, by way of carry forward of losses (of the transferor company), depreciation, etc. are allowed to the transferee. Therefore, unlike in the case of winding up, there is no end to the enterprise with the entity. The enterprise in the case of amalgamation, continues.
- The Supreme Court, without elaborate discussion, approved the reasoning in various judgments which held that upon the cessation of the transferor company, assessment of the transferor (or amalgamated company) was impermissible.
- The facts of the present case were distinguished from the facts in the cases of Spice[4] and Maruti Suzuki[2] on the following bases:
    - In both the relied-upon cases, the concerned taxpayers had duly informed the Revenue about the merger of companies. Yet, the assessment order was passed in the name of the amalgamating or non-existent company. However, in the present taxpayer's case, for AY 2006–07, there was no intimation by the taxpayer regarding the amalgamation of the company. Although the taxpayer contends that they had intimated the authorities *via* a letter for AY 2007–2008 and not for AY 2006–2007.
    - In addition, in the present case of the taxpayer, the assessment order mentions the names of both the taxpayer and the amalgamated company.
    - In both the relied-upon cases, 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 taxpayer participated in the proceedings, holding itself out as the taxpayer.
- The return of income was filed by the taxpayer in its name with its PAN specifically suppressed and without disclosing the amalgamation.
- Neither during the search and survey proceedings nor subsequently on receipt of notice did the taxpayer state that it was not in existence and that its business assets and liabilities were taken over by the amalgamated company.
- The taxpayer, for the first time in the cross objection filed with the Tribunal, raised an additional ground urging that the assessment order was a nullity because it was not in existence.
- The assessment order is undoubtedly expressed to be of the taxpayer (as the taxpayer) but represented by the amalgamated company. This clearly indicates that the TO adopted a particular method of expressing the tax liability.
- The TO had the option of making a common order, with the amalgamated company as the taxpayer but containing separate parts, relating to the different transferor companies. The mere choice of the TO in issuing a separate order in respect of the taxpayer, in these circumstances, cannot nullify it.
- The conduct of the taxpayer, commencing from the date the search took place, and before all forums, reflects that it consistently held itself out as the taxpayer. The approach and order of the TO is in consonance with the decision in the case of Marshall Sons and Co. (India) Limited[5], which held the following:

[5] Marshall Sons and Co. (India) Limited *v.* ITO [1996] Supp (9) SCR 216

  - an assessment can always be made and is supposed to be made on the transferee company taking into account the income of both the transferor and transferee company.

- It was further argued that if the payer was entitled to any refund, then whether the amalgamated company would deny such entitlement to refund stating that the order was in favour of a non-existing company.
- 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 Companies Act, 2013) but would depend on the terms of the amalgamation and the facts of each case.
- The impugned order of the High Court cannot be sustained on the issue of nullity of the assessment order and was set aside.

The takeaways

The Supreme Court has categorically held that the validity of an assessment order under the Act with respect to the amalgamating company cannot be determined on a bare application of dissolution or winding up provisions of the Companies Act, 2013, but that it would depend on the terms of the amalgamation and the facts of each case.

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