REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2022
(ARISING OUT OF SPECIAL LEAVE PETITION (C) NO. 4063 OF 2020)

PRINCIPAL COMMISSIONER
OF INCOME TAX (CENTRAL) - 2 ...PETITIONER(S)

VERSUS

M/S. MAHAGUN REALTORS (P) LTD. ...RESPONDENT(S)

J U D G M E N T

S. RAVINDRA BHAT, J.

1. Special leave to appeal granted. With consent of counsels, this appeal was heard finally. This appeal arises from an order[1] of the Delhi High Court rejecting the appeal, by the present appellant (hereafter "the revenue") and affirming the order of the Income Tax Appellate Tribunal (ITAT) which quashed the assessment order against the assessee (i.e., the respondent in this case).

2. The respondent-assessee company, Mahagun Realtors Private Limited (hereafter variously referred to as "MRPL", "the amalgamating company" or the "transferor company"), was engaged in development of real estate and had

[1] Dated 21.08.2019 in Income Tax Appeal No. 73/2019.

executed one residential project under the name "*Mahagun Maestro*" located in Noida, Uttar Pradesh. MRPL amalgamated with Mahagun India Private Limited (herein after 'MIPL') by virtue of an order[2] of the High Court (dated 10.09.2007). In terms of the order and provisions of the Companies Act, 1956, the amalgamation was with effect from 01.04.2006.

3. On 20.03.2007 survey proceedings were conducted in respect of MRPL during the course of which, some discrepancies in its books of account were noticed. On 27.08.2008, a search and seizure operation was carried out in the Mahagun group of companies, including MRPL and MIPL. During those operations, the statements of common directors of these companies were recorded, in the course of which admissions about not reflecting the true income of the said entities was made; these statements were duly recorded under provisions of the Income Tax Act, 1961 (hereafter "the Act"). On 02.03.2009, the revenue issued notice to MAPL to file Return of Income (ROI) for the assessment year (hereafter "AY") 2006-2007 under Section 153A of the Act, within 16 days. On failure by the assessee to file the ROI, the Assessing Officer (hereafter "AO") issued show cause notice on 18.05.2009 under Section 276CC of the Act. On 23.05.2009, a reply was issued to the show cause notice stating that no proceedings be initiated and that a return would be filed by 30.06.2009. A ROI on 28.05.2010, describing the assessee as MRPL was filed. On 13.08.2010, the revenue issued notice under Section 143(2) of the Act. To this, adjournment was

[2] In Company Petition No. 133/2007 c/w Company Application (M) No. 41/2007.

sought by letter dated 27.08.2010. In the ROI, the PAN[3] disclosed was "AAECM1286B" (concededly of MRPL); the information given about the assessee was that its date of incorporation was 29.09.2004 (the date of incorporation of MRPL). Under Col. 27 of the form (of ROI) to the specific query of *"Business Reorganization (a)….(b) In case of amalgamated company, write the name of amalgamating company"* the reply was "NOT APPLICABLE".

4. The Assessing Officer (AO), issued the assessment order on 11.08.2011, assessing the income of ₹ 8,62,85,332/- after making several additions of ₹ 6,47,00,972/- under various heads. The assessment order showed the assessee as *"Mahagun Relators Private Ltd, represented by Mahagun India Private Ltd".*

5. Being aggrieved, an appeal was preferred to the Commissioner of Income Tax (hereafter "CIT"). The appellant's name and particulars were as follows:

> M/s Mahagun Realtors
> (Represented by Mahagun India Pvt Ltd,
> after amalgamation)
> B-66, Vivek Vihar, Delhi-110095.

The appeal was partly allowed by the CIT on 30.04.2012. The CIT set aside some amounts brought to tax by the AO. The revenue appealed against this order before the ITAT; simultaneously, the assessee too filed a cross objection[4] to the ITAT. The revenue's appeal was dismissed; the assessee's cross objection was allowed only on a single point, i.e., that MRPL was not in existence when the

[3] Permanent Account Number
[4] CO No. 300/Del/2012

assessment order was made, as it had amalgamated with MIPL. The ITAT held *inter alia*, that:

> *"The above assessee company did not exist on the date of the assessment order, we find that the assessment order passed by the ld AO is not sustainable in law in view of the· decision of the Hon'ble Delhi High Court in case of Spice Infotainment Ltd v CIT 247 ITR 500 as well as the decision of the Hon'ble Delhi High· Court in the case of CIT v Dimension Apparel Pvt. Ltd 370 ITR 288. On the last decision Hon'ble Delhi High Court has considered the whole issue from all the angles and therefore, respectfully following the decision of Hon'ble ·Delhi High Court, we are of the view that the order of the Id AO is unsustainable."*

6. The revenue appealed to the High Court. The High Court, relying upon a judgment of this court, in *Principal Commissioner of Income Tax v. Maruti Suzuki India Limited*[5] (hereafter '*Maruti Suzuki')*, dismissed the appeal. The revenue has, therefore, appealed against that judgment.

Submissions

7. The revenue, represented by the Additional Solicitor General, Mr. N. Venkataraman, urged that the name of both the amalgamating and amalgamated companies were mentioned in the assessment order. According to him such mistakes, defects or omissions are curable under Section 292B when the assessment is in substance and effect, in conformity with or according to the intent and purpose of the Act.

8. It was contended that the amalgamating or transferor company was duly represented by the amalgamated company and no prejudice was caused to any of the parties by the assessment order. It is further urged by the revenue that in

[5] 2019 SCCOnline SC 928

Maruti Suzuki, this court rejected the revenue's appeal 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, whereas in this case, in both the draft and the final assessment orders, the names of both the amalgamating and amalgamated company were mentioned.

9. It was also urged that the facts of the *Maruti Suzuki* are distinguishable from the present case, as in that case the revenue was duly informed about the merger and change in name of the company, and yet the assessing officer passed the order in name of the transferor or amalgamating company. However, in the present case, the AO or even the revenue was not informed about the amalgamation. Even when the search and seizure operations were carried out, the directors of MIPL (and MRPL, which had ceased to exist) clearly held out that both entities existed; what is more, surrender of specific amounts relatable to MRPL's activities, for a past period, were made. A notice was issued under Section 153A on 02.03.2009 asking the assessee to file ROI. As ROI was not filed, the revenue issued show cause notice as per Section 276CC. In response of the same, the representative of the assessee filed a letter dated 23.05.2009 clearly mentioning the name of the transferor/ amalgamating company, i.e., MRPL and stated that no proceedings be initiated, and that the return would be filed by 30.06.2009. On 28.05.2010, the assessee filed ROI for AY 2006-07 in the name of MRPL. The AO assumed scrutiny jurisdiction under section 143(2) of the Act and issued notice on 13.08.2010. This notice was duly accepted by the authorized

representative on 16.09.2010. Further, on 27.08.2010 adjournment was sought on behalf of the assessee, and the letter mentioned the name of MRPL. In addition to this, the submissions dated 28.06.2011 filed by the assessee in response to the notice of the AO clearly mentioned the share holding pattern in the assessee company (MRPL) which indicated that even as of 28.06.2011, the assessee continued the proceedings in the name of MRPL.

10. It was urged that in the survey proceedings carried out on 20.03.2007, the director of the companies, made statements under oath. At this time, the application for merger was already filed in the High Court. The assessee MRPL surrendered amounts for which it was unable to account. Other entities which merged with MIPL too likewise surrendered amounts. Throughout the proceedings, the assessee never revised its offer of surrender of additional income nor brought it to the notice of the AO. Further, on 20.03.2007, the assessee issued postdated cheques in the name of MRPL. After merger, they were neither taken back nor fresh cheques were submitted from the amalgamated company MIPL.

11. It was submitted that in these circumstances, when assessment proceedings were effectively resisted, during which the AO was appraised of the amalgamation, which was duly given effect to in the assessee's description, the question of the assessment and further proceedings being a nullity cannot arise. It was pointed out that in the appeal to CIT, as well as the cross objections to ITAT, the assessee's description was as Mahagun Relators Private Ltd, *represented by Mahagun India Private Ltd.,* In these circumstances, the

assessment order, in reality and substance, was in relation to the new or transferee company, i.e., MIPL.

12. On behalf of the respondent, it was contended by Ms. Kavita Jha, learned counsel, that upon sanction of amalgamation scheme, the amalgamated company stood dissolved without winding up, in terms of section 394 of the Companies Act, 1956. Reliance was placed on the decision of this court in *Saraswati Industrial Syndicate v. Commissioner of Income Tax Haryana, Himachal Pradesh.*[6] It was argued that the amalgamating company (MRPL) cannot be regarded as a 'person' in terms of Section 2(31) of the Act.

13. Learned counsel urged that the notice under Section 153A by the AO (despite the intimation by Respondent about the amalgamation on 30.05.2008 and the statement of the director at the time of search) issued in the name of MRPL, a non-existing entity, was invalid and initiation of proceedings against non-existent entity was *void-ab-initio*.

14. Counsel urged that 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 Delhi High Court in *Spice Infotainment Limited v. Commissioner of Income Tax,*[7] (hereafter '*Spice'*) held that assessment framed in the name of the amalgamating company which was ceased to exist in law, was invalid and

[6] (1990) Supp (1) SCR 332
[7] [2012] 247 CTR 500 (Del). This judgement has also been referred to as *Spice Entertainment v. Commissioner of Income Tax* in 2012 (280) ELT 43 (Del.).

untenable and such defect would not be cured in terms of section 292B of the Act. Further, the fact that amalgamated company participated in the assessment proceedings would not operate as estoppel.

15. It was contended that the respondent's case is covered by *Maruti Suzuki* The facts of both cases are similar. In *Maruti Suzuki*, the fact of amalgamation was known to the AO and in the assessment order he tried to cure the defect by amending the cause title by including the name of both the existing and non-existing entity; the assessment order being in the name of a non-existing company, was highlighted to urge that as a result, this court should follow the *ratio* in that decision, and reject the revenue's appeal.

Analysis and Conclusions

16. The relevant provision of the Act is Section 170[8]. It *inter alia*, provides that where a person carries on any business or profession and is succeeded (to such business) by some other person (i.e., the successor), the predecessor shall be

[8] The relevant part of Section 170 reads as follows:
"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,-
(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;
(b) the successor shall be assessed in respect of the income of the previous year after the date of succession.
(2) Notwithstanding anything contained in sub- section (1), when 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 succession and of the previous 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, and all the provisions of this Act shall, so far as may be, apply accordingly.
(3) When any sum payable under this section in respect of the income of such business or profession for the previous year in which the succession took place up to the date of succession or for the previous year preceding that year, assessed on the predecessor, cannot be recovered from him, the [1] Assessing] Officer shall record a finding to that effect and the sum payable by the predecessor shall thereafter be payable by and recoverable from the successor, and the successor shall be entitled to recover from the predecessor any sum so paid."

assessed to the extent of income accruing in the previous year in which the succession took place, and the successor shall be assessed in respect of income of the previous year in respect of the income of the previous year after the date of succession.

17. The amalgamation of two or more entities with an existing company or with a company created anew was provided for, statutorily, under the old Companies Act, 1956[9], under Section 394 (1) (a). Section 394 empowered the court to approve schemes proposing amalgamation, and oversee the various steps and procedures that had to be undertaken for that purpose, including the apportionment of and devolution of assets and liabilities, etc. Section 394 (2) provided as follows:

> *"(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect."*

Section 394 (4) (a) defined "property" for the purpose of devolution of assets and liabilities:

> *"394….(4) In this section-*
>
> *(a) " property" includes property, rights and powers of every description and" liabilities" includes duties of every description; and.."*

[9] Under the present Companies Act, 2013, the corresponding provisions are Sections 230-234.

18. Amalgamation, thus, is unlike the winding up of a corporate entity. In the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues – enfolded within the new or the existing transferee entity. In other words, the business and the adventure lives on but within a new corporate residence, i.e., the transferee company. It is, therefore, essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings. There are analogies in civil law and procedure where upon amalgamation, the cause of action or the complaint does not *per se* cease – depending of course, upon the structure and objective of enactment. Broadly, the quest of legal systems and courts has been to locate if a successor or representative exists in relation to the particular cause or action, upon whom the assets might have devolved or upon whom the liability in the event it is adjudicated, would fall.

19. This court, in *Commissioner of Income Tax, v. Hukamchand Mohanlal*[10] noticed that Section 159 of the Act related to a legal representative's tax liability. It casts liability upon a legal representative in the event of death of her or his predecessor, to pay tax, in effect saying that where a person dies his legal representative shall be liable to pay any sum which the deceased would have been liable to pay if he had not died. The corresponding provision in the old Income Tax Act (of 1922) was Section 24B. The court in *Commissioner of Income Tax v.*

[10] 1972 (1) SCR 786

Amarchand Shroff[11] held that the provision did not authorise levy of tax on receipts by the legal representative of a deceased person in the year of assessment succeeding the year of account, being the previous year in which such person died. The assessee ordinarily had to be a living person and could not be a dead person. By Section 24B the legal personality of the deceased assessee was extended for the duration of the entire previous year in the course of which he died. The income received by him before his death and that received by his legal representative after his death (but in that previous year) became assessable to income tax in the relevant assessment year. Any income received in the year subsequent to the previous year or the accounting year could not be called income received by the deceased person. This reasoning was adopted later, in the judgment reported as *Commissioner of Income Tax v. James Anderson*[12] where, in the context of dividend income accruing to the estate of a deceased, this court held that as Parliament did not make

> *"any provision generally for assessment of income receivable by the estate of the deceased person, the expression "any tax which would have been payable by him under this Act if he had not died" cannot be deemed to have supplied the machinery for taxation of income received by a legal representative to the estate after the expiry of the year in the course of which such person died."*

20. In *Saraswati Syndicate* (*supra*), the facts were that after amalgamation, the transferee company claimed exemption from tax, of a sum which had been allowed as a trading liability- on accrual basis, in the hands of the transferee

[11] 1963 Supp (1) SCR 699
[12] 1964 (6) SCR 590

company which had ceased to exist. The revenue disallowed that claim; that view was upheld. This court stated that:

> *"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 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: Halsbury's Laws of England, 4th Edition Vol. 7 Para 1539. Two companies may join to form a new company, but there may be absorption or blend- ing 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.*
>
> *In M/s General Radio and Appliances Co Ltd v M.A.. Khader (dead) by Lrs., [1986] 2 S.C.C. 656, the effect of amalgamation of two companies was considered. M/s. General Radio and Appliances Co. Ltd. was tenant of a premises under an agreement providing that the tenant shall not sub-let the premises or any portion thereof to anyone without the consent of the landlord. M/s. General Radio and Appliances Co. Ltd. was amalgamated with M/s. National Ekco Radio and Engineering Co. Ltd. under a scheme of amalgamation and order of the High Court under Sections 391 and 394 of Companies Act, 1956. Under the amalgamation scheme, the transferee company, namely, M/s. National Ekco Radio and Engineering Company had acquired all the interest, rights including leasehold and tenancy rights of the transferor company and the same vested in the transferee company. Pursuant to the amalgamation scheme the transferee company continued to occupy the premises which had been let out to the transferor company. The landlord initiated proceedings for the eviction on the ground of unauthorised sub-letting of the premises by the transferor company. The transferee company set up a defence that by amalgamation of the two companies under the order of the Bombay High Court all interest, rights including lease- hold and tenancy rights held by the transferor company blended with the transferee company, therefore the transferee company was legal tenant and*

> *there was no question of any sub-letting. The Rent Controller and the High Court both decreed the landlord's suit. This Court in appeal held that under the order of amalgamation made on the basis of the High Court's order, the transferor company ceased to be in existence in the eye of law and it effaced itself for all practical purposes. This decision lays down that after the amalgamation of the two companies the transferor company ceased to have any entity and the amalgamated company ac- quired a new status and it was not possible to treat the two companies as partners or jointly liable in respect of their liabilities and assets. In the instant case the Tribunal rightly held that the appellant company was a separate entity and a different assessee, therefore, the allowance made to Indian Sugar Company, which was a different assessee, could not be held to be the income of the amalgamated company for purposes of Section 41 (1) of the Act. The High Court was in error in holding that even after amalgamation of two companies, the transferor company did not become non-existent instead it continued its entity in a blended form with the appellant company. The High Court's view that on amalgamation 'there is no complete destruction of corpo- rate personality of the transferor company 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 sustainable 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. However, their respective rights of liabilities are determined under scheme of amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective."*

21. *Saraswati Syndicate (supra)* noticeably was decided in relation to assessment issues when amalgamation was not separately defined under the Income Tax Act. By an amendment of 1967, this term was for the first time defined in the form of Section 2(1A). That provision reads as follows:

> *"(1A) "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—*

> *(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;*
> *(ii) all the liabilities of the amalgamating company of companies immediately before the amalgamation, become the liabilities of the amalgamated company by virtue of the amalgamation;*
> *(iii) shareholders holding not less than nine-tenths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first mentioned company;"*

22. The effect of amalgamation in the context of income tax, was again considered in another earlier decision, i.e., *Marshall Sons and Co. (India) Ltd. v. Income Tax Officer*[13]. There, the court held that:

> *"14. 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 date of amalgamation/date of transfer. But where the Court does not prescribed any specific date but merely sanctions the scheme presented to it - as has happened in this case - it should follow that the rate 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 and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamation units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this*

[13] 1996 Supp (9) SCR 216

case but normally provision is made for this aspect also in the scheme of amalgamation. In the present scheme, Clause 6(b) does expressly provide that with effect 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 of 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, relied on.

15. Counsel for the Revenue contended that if the aforesaid view is adopted then several complications will ensue in case the Court refuses to sanction the scheme of amalgamation. We do not see any basis for this apprehension. Firstly, 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. Secondly, and probably the more advisable course from the point of view of the Revenue would be to make one assessment on the Transferee Company taking into account the income of both, of Transferor or Transferee Companies and also to make separate protective assessments on both the Transferor and Transferee Companies separately. There may be a certain practical difficulty in adopting this course inasmuch as separate balance-sheets may not be available for the Transferor and Transferee Companies. But that may not be an insuperable problem inasmuch as assessment can always be made, on the available material, even without a balance-sheet. In certain cases, best-judgment assessment may also be resorted to. Be that as it may, we need not pursue this line of enquiry because it does not arise for consideration in these cases directly."

(emphasis supplied)

23. Many High Courts in recent years, had mostly relied upon *Saraswati Syndicate* which was a case where the transferor entity had claimed a certain relief on the basis of the agreed method of accounting. The corresponding obligation to recognise the demands was sought to be disallowed in the subsequent year, in the case of the then transferee company. The decision of the Delhi High Court, in *Spice* (*supra*), after discussing the decision in *Saraswati Syndicate,* went on to explain why assessing an amalgamating company, without framing the order in the name of the transferee company is fatal:

> *"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. v. D.L. Mainwaring (T/A Inshore), 1986 BCLC 342 (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 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."*

24. A series of decisions had followed the Delhi High Court's decision in *Spice.* All these were the subject of special leave petitions, which were disposed of by the following order in *Commissioner of Income Tax v. Spice Enfotainment Ltd*[14].

> *"Delay condoned. Heard the learned Senior Counsel appearing for the parties. We do not find any reason to interfere with the impugned judgment(s) [Spice Entertainment Ltd. v. Commr. of Service Tax, (2011 SCC OnLine Del); CIT v. Dimension Apparels (P) Ltd., (2015) 370 ITR 288; CIT v. Chanakaya Exports (P) Ltd., 2014 SCC OnLine Del 7678; CIT v. Chanakaya Exports (P) Ltd., [ITA No. 721 of 2014, order dated 24-11-2014 (Del)]; CIT v. Radha Appearals (P) Ltd., 2015 SCC OnLine Del 14568; CIT v. Intel Technology (India) (P) Ltd., 2015 SCC OnLine Kar 9493; CIT v. Chanakaya Exports (P) Ltd., 2015 SCC OnLine Del 14567; CIT v. Mayank Traders (P) Ltd., 2015 SCC OnLine Del 14633; CIT v. P.D. Associates (P) Ltd., 2015 SCC OnLine Del 14632; CIT v. Foryu Overseas (P) Ltd., 2015 SCC OnLine Del 14566; CIT v. Sapient Consulting Ltd., 2016 SCC OnLine Del 6615; passed by the High Court. In view of this, we find no merit in the appeals and special leave petitions. Accordingly, the appeals and special leave petitions are dismissed."*

25. This 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.

26. In *Dalmia Power Limited & Ors v. The Assistant Commissioner of Income Tax, Circle 1, Trichy*[15] the amalgamated (transferee) company filed a revised return, beyond the time prescribed. The original return had been filed by the transferor company. This was not allowed by the revenue. The assessee moved

[14] (2020) 18 SCC 353
[15] (2020) 14 SCC 736

the High Court. This court endorsed the view of the single judge, holding that the revenue had not objected to the amalgamation schemes duly and that Sections 139(5) and 119(2)(b) of the Act and Circular No. 9/2015 issued by the CBDT were inapplicable to a case where a revised ROI was filed pursuant to a Scheme of Arrangement and Amalgamation, approved and sanctioned by the National Company Law Tribunal.

27. In another recent decision, *McDowell and Company Ltd. v. Commissioner of Income Tax, Karnataka Central*[16] this court had occasion to consider the effect of amalgamation of two companies, and the rights and liabilities in relation to claim for depreciation, under the Act. The assessee had taken over a sick company-HPL – by amalgamation; HPL ceased to have any identity after amalgamation. The relative rights, however, were determined in terms of the scheme of amalgamation. The benefit of interest accrued after the company ceased to exist was availed of by the assessee (the successor) company. The assessee was allowed to set off the amalgamated losses of the company amalgamated with it, i.e., HPL. This benefit accrued to the assessee under Section 72A of the Act. The court held that when the assessee was allowed the benefit of the accumulated loss, while computing those losses, the income which accrued to it had to be adjusted and only thereafter net loss could have been allowed to be set off by the assessee company. The AO had made those calculations. The

[16] (2017) 13 SCC 799

assessee was given the benefit of the accumulated loss of the amalgamated company. Its effect was that though those losses were suffered by the amalgamated company they were deemed to be treated as losses of the assessee by virtue of Section 72A. This court negatived the plea that even while taking advantage of the accumulated loss, in calculating them at the hands of amalgamated company, i.e., HPL, the income accrued under Section 41(1) of the Act at the hands of HPL could not be accounted for. It was held that it had to be adjusted to see what was the actual accumulated losses, the benefit of which had to be extended to the assessee. This court considered Section 41(1) along with Section 72A of the Act.

28. This court notices that there are not less than 100 instances[17] under the Income Tax Act, wherein the event of amalgamation, the method of treatment of a particular subject matter is expressly indicated in the provisions of the Act. In some instances, amalgamation results in withdrawal of a special benefit (such as an area exemption under Section 80IA) - because it is entity or unit specific. In the case of carry forward of losses and profits, a nuanced approach has been indicated. All these provisions support the idea that the enterprise or the undertaking, and the business of the amalgamated company continues. The beneficial treatment, in the form of set-off, deductions (in proportion to the period

[17] For instance, Section 35A, 35AB (3); 35ABB; 35D (5); 35DDA; 35E; 41 (1) (Any benefit accrued by the amalgamated co.) from cessation of liability of amalgamating company shall be taxed in the hands of the amalgamated company); 43 (1); 43 (6); 32 and 43 (6) (c); 43C; 47 (vi); (via) (viaa) (viab); 47 (vii); 72A; 72AB, etc.

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

29. In *Bhagwan Dass Chopra v. United Bank of India*[18] it was held that in every case of transfer, devolution, merger or scheme of amalgamation, in which rights and liabilities of one company are transferred or devolved upon another company, the successor-in-interest becomes entitled to the liabilities and assets of the transferor company subject to the terms and conditions of contract of transfer or merger, as it were. Later, in *Singer India Ltd v. Chander Mohan Chadha*[19] this court held as follows:

> *"8. ..there can be no doubt that when two companies amalgamate and merge into one, the transferor company loses its identity as it ceases to have its business. However, their respective rights and liabilities are determined under the scheme of amalgamation, but the corporate identity of transferor company ceases to exist with effect from the date the amalgamation is made effective."*

30. The combined effect, therefore, of Section 394 (2) of the Companies Act, 1956, Section 2 (1A) and various other provisions of the Income Tax Act, is that despite amalgamation, the business, enterprise and undertaking of the transferee or amalgamated company- which ceases to exist, after amalgamation, is treated

[18] 1988 (1) SCR 1088
[19] [2004] Supp (3) SCR 535

as a continuing one, and any benefits, by way of carry forward of losses (of the transferor company), depreciation, etc., are allowed to the transferee. Therefore, unlike a winding up, there is no end to the enterprise, with the entity. The enterprise in the case of amalgamation, continues.

31. In *Maruti Suzuki* (*supra*), the scheme of amalgamation was approved on 29.01.2013 w.e.f. 01.04.2012, the same was intimated to the AO on 02.04.2013, and the notice under Section 143(2) for AY 2012-13 was issued to amalgamating company on 26.09.2013. This court in facts and circumstances observed the following:

> *"35. In this case, 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.*
>
> ---------- ----------
>
> ***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 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 Entertainment on 2 November 2017. The decision in Spice Entertainment 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 Entertainment.*
>
> ***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 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."*

32. The court, undoubtedly noticed *Saraswati Syndicate*. Further, the judgment in *Spice* (*supra*) and other line of decisions, culminating in this court's order, approving those judgments, was also noticed. Yet, the legislative change, by way of introduction of Section 2 (1A), defining "amalgamation" was not taken into account. Further, the tax treatment in the various provisions of the Act were not brought to the notice of this court, in the previous decisions.

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

34. *Firstly*, in both the relied upon cases, the assessee had duly informed the authorities about the merger of companies and yet the assessment order was passed in the name of amalgamating/non-existent company. However, in the present case, for AY 2006-07, there was no intimation by the assessee regarding amalgamation of the company. The ROI for the AY 2006-07 first filed by the respondent on 30.06.2006 was in the name of MRPL. MRPL amalgamated with MIPL on 11.05.2007, w.e.f. 01.04.2006. In the present case, the proceedings

against MRPL started in 27.08.2008- when search and seizure was first conducted on the Mahagun group of companies. Notices under Section 153A and Section 143(2) were issued in the name MRPL and the representative from MRPL corresponded with the department in the name of MRPL. On 28.05.2010, the assessee filed its ROI in the name of MRPL, and in the 'Business Reorganization' column of the form mentioned *'not applicable'* in amalgamation section. Though the respondent contends that they had intimated the authorities by letter dated 22.07.2010, it was for AY 2007-2008 and not for AY 2006-07. For the AY 2007-08 to 2008-2009, separate proceedings under Section 153A were initiated against MIPL and the proceedings against MRPL for these two assessment years were quashed by the Additional CIT by order dated 30.11.2010 as the amalgamation was disclosed. In addition, in the present case the assessment order dated 11.08.2011 mentions the name of both the amalgamating (MRPL) and amalgamated (MIPL) companies.

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

36. The judgments of this court- in *Saraswati Syndicate* and *Marshall* (*supra*) have indicated that the rights and liabilities of the transferor and transferee companies are determined by the terms of the merger. In *Saraswati Syndicate,*

the point further made is that the corporate existence of the transferor ceases, upon amalgamation.

37. In the present case, the terms of the amalgamation have been set out in the order sanctioning it, by the Delhi High Court, by its order dated 10.09.2007. The court, by its order directed the amalgamation of Mahagun Developers Ltd., Mahagun Realtors Pvt. Ltd., Universal Advertising Pvt. Ltd., ADR Home Décor Pvt. Ltd. under Section 394 of the Companies Act, 1956 with Mahagun (India) Pvt. Ltd. (MIPL) the transferee Company. The operative order of the Delhi High Court under Section 394 of the Companies Act, 1956 *inter alia* stated as follows:

> *"THIS COURT DOTH HEREBY SANCTION THE SCHEME OF AMALGAMATION setforth in Schedule -I annexed hereto and DOTH HEREBY DECLARE the same to be binding on all the shareholders and creditors of the Transferor and Transferee Companies and all concerned and Doth approve the said scheme of amalgamation with effect from the appointed date i.e., 1.04.2006.*
> *AND THIS COURT DOTH FURTHER ORDER:*
> *1. That all the property, rights and powers of the Transferor Companies specified in the First, Second and Third parts of the Schedule-II hereto and all other property, right and powers of the Transferor Companies be transferred without further act or deed to all the Transferee Company and accordingly the same shall pursuant to Section 394(2) of the Companies Act, 1956 be transferred to and vest in the Transferee Company for all the estate and interest of the Transferor Companies therein but subject nevertheless to all charges now affecting the same; and*
> *2. That all the liabilities and duties of the Transferor Companies be transferred without further act or deed to the Transferee Company and accordingly the same shall pursuant to Section 394 (2) of the Companies Act, 1956 be transferred to and become the liabilities and duties of the Transferee Company; and*
> *3. That all the proceedings now pending by or against the Transferor Companies be continued or against the Transferee Company; and*
> *4. That the Transferee Company do without further application allot to such members of the Transferor Companies as have not given such notice of dissent as it required by Clause 7 given in the scheme*

of amalgamation herein the shares in the Transferee Company to which they are entitled under the said amalgamation; and

5. That the Transferor Companies do within five weeks after the date of this order cause a certified copy of this order to be delivered to the Registrar of Companies for registration and on such certified copy being so delivered, the Transferor Companies shall be dissolved without the process of winding up and the Registrar of Companies shall place all documents relating to the Transferor Companies and registered with him on the file kept by him in relation to the Transferee Company and the files relating to the said Transferor and Transferee Companies shall be consolidated accordingly."

38. The Assessment Order passed by the A.O. recorded *inter alia* as follows:

"6.1 In the case of the assessee group a survey operation was carried out on 20-03-2007 wherein incriminating documents were found which reflected the receipt of 'on money'/suppressed sale proceeds on sale of flats/shops. During the survey one 'Jaguar' spiral diary was found which contained unrecorded sale proceeds of various projects undertaken by the group. On being confronted the Assessee group as per the statement of Amit Jain, Managing Director of Mahagun Realtors Pvt. Ltd., Mahagun Developers Ltd., Mahagun (India) Pvt. Ltd. recorded on 20-03-2007 itself vide answer to question no. 19 & 21 surrendered an amount of Rs. 16.9589 crores as per the following details for A.Y. 2007-08:

(i) Mahagun Realtors Pvt. Ltd. Rs. 5.072 crores
(ii) Mahagun Developers Ltd. Rs. 4.952 crores
(iii) Mahagun India Pvt. Ltd. Rs. 6.934 crores

For easy reference relevant portion of the statement is quoted as under:

Q. 18 Please further elaborate on the sale proceed as mentioned on pages 2 to 18 of the said diary, in the light of the fact that in reply to Q No. 15 it has been stated that the said sale proceeds are not reflected in the book of A/c.

The said sale figures denote the month-wise sale proceeds pertaining to F.Y. 2006-07 in respect of the projects under the construction at various sites as mentioned above, which are not reflected in our books of A/c are not reflected in our sales of MRPT, MDL, MIPL as on 20.03.2007.

Q.19 What is the total quantum of sale proceeds in the three companies, namely, 'MRPL, MDL, and MIPL' which has not been declared in the F.Y. 06-07 in your books of A/c as admitted by you in your replay to the above relevant question.

A. As per the said diary, the following sale proceeds not declared in our books of a/c of F.Y. 06-07 in respect of MRPL, MDL and MIPL are as under:

a) Mahagun Realtors Pvt. Ltd. (MRPL) Rs. 507.2 lacs

b) Mahagun Developers Ltd. (MDL) Rs. 495.2 lacs
c) Mahagun India Pvt. Ltd. (MIPL) Rs. 693.48 lacs

Rs. 1695.88 lacs

Q21. With reference to Q. No. 19, please re-confirm as to whether the total amount of Rs. 16,95,88,000/- is part of net profit corresponding to advance taxes paid by MDL, MIPL and MRPL for the period from 01.04.2006 to 20.03.2007.

A. I hereby re-confirm that the amount of Rs. 16,95,88,000/- has not been declared in the P& L A/c of MDL, MIPL and MRPL for the period from 01.04.2006 to 20.03.2007. I, therefore, make and unequivocal surrender of an amount of Rs. 16.95,88,000/- as the additional income of the following companies for the F.Y. 06-07 relevant to A.Y. 07-08:

a) Mahagun Realtors Pvt. Ltd. (MRPL) Rs. 507.2 lacs
b) Mahagun Developers Ltd. (MDL) Rs. 495.2 lacs
c) Mahagun India Pvt. Ltd. (MIPL) Rs. 693.48 lacs

Rs. 1695.88 lacs

I further reconfirm that the total surrendered amount of Rs. 16.95.88.000 is over and above the net profit corresponding to advance taxes paid by MDL, MIPL & MRPL for the period from 01.04.2006 to 20.03.2007. I would further like to state that the total surrender of Rs. 16.95.88.000/- in respect of MIPL, MDL & MRPL for A.Y. 2007-08 for which Income Tax Return is yet to be filed & I hereby undertake that the returns of MIPL, MDL & MRPL for A.Y. 2007-08 shall be filed at minimum returned income of Rs.16.95.88.000/- (corresponding to total surrender amount) plus the net profit corresponding to advance tax paid by MDL, MIPL & MRPL for the period from 01.04.2006 to 20.02.2007.

Thus, the surrender was over and above the net profit for AY 2007-08 in the case of respective company. The assessee was required to correlate and justify the same that it has been shown over and above the regular business income. The assessee has submitted that while filing return of income for AY 2007-08 it has disclosed income of Rs. 16.95 crores as additional cash sales under the head of business income.

6.2 Subsequent to survey operation a search and seizure operation u/s. 132 of the Income-Tax Act, 1961 was carried out in the hands of the assessee group. During the search incriminating documents/ diaries which contained entries of unaccounted income generated on account of receipt of 'on money' etc. were found and on being confronted, Shri Amit Jain, Managing Director of group and the main

person of the group in answer to question 15 of the statement recorded u/s. 132 (4) on 27-08-2008 admitted as under:
"As stated number of times above, I am not able to explain the case entries/receipts appearing in the ledgers marked as annexure A-20, A-21, A-22, A-23 & A-24. Therefore, I offer Rs. 30 crores as additional income on account of case receipts/entries in the above annexures in the hands of M/s. Mahagun India (P) Ltd. The additional income declared is over and above the regular income to be declared."
6.3 Admissions of additional income or receipts were examined in the light of the returns of income filed by the respective companies. In so far as accounting of the income of 16.95 crores admitted during the course of survey proceedings is concerned it is found to have been accounted for in the respective years for which it was offered. Here, it is important to note that Shri Amit Jain whose statement was recorded qua the surrender of additional income of 30 crores has nowhere stated as to which particular year the income surrendered is attributable to. Careful scrutiny of the returns revealed that in so far as admitted additional income of 30 crores as voluntarily surrendered during the course of search in the statement recorded u/s. 132(4) is concerned the assessee company Mahagun India (P) Ltd. instead of offering the full amount of 30 crores for taxation, has offered only 17.97 crores for AY 2009-10. This amount of additional income has been offered on the bases of peak of the annexures (A-20, A-21, A-22, A-23 & A-24) which too is found to have been capitalized by the assessee company in its work-in-progress at 16.97 crores and Rs. 1 crore as cash in hand. This word-in-progress is found debited in the books maintained for AY 2010-11 i.e., to this extend surrender made in AY 09-10 has been set off against the income meant for AY 2010-11."

39. The A.O. had directed a Special Audit under Section 142 (2A) of the Act. Having received the report of the Special Auditor and having considered the objections of the assessee the A.O. recorded further as follows:

"7.3 The documents seized reveals that the assessee group had received on 'on money' as a matter of routine/practice on sale of almost each and every flat/shop. Accordingly, it was considered expedient/necessary to work out the unaccounted receipts of 'on money' in respect of the entire area sold of all the relevant projects so as to work out the exact quantum of receipts suppressed. The Special Auditors were specifically directed to work out the quantum of addition to be made on this extrapolation bases which they worked it out at Rs. 42, 98, 06,439 as per the following;

Page	Name of the project	2005-06	2006-07	2007-08	2008-09	2009-10	Project wise total
218	Mahagun Mansion-I	1,79,63,669	7,46,38,625	(-) 4,03,62,237	30,34,948	(-)65,14,449	4,87,60,456
217	Mahagun Mestro Project	-	5,22,91,432	2,23,83,104	4,91,80,754	(-)6,21,37,750	6,17,17,540
216	Mahagun Mansion-II	2,02,54,253	5,54,20,982	(-)1,84,47,637	1,33,26,297	17,76,500	7,23,30,395
215	Mahagun Mascot					2,50,32,522	2,50,32,522
214	Mahagun Mall				5,18,87,855	5,70,76,640	10,89,64,495
213	Mahagun Morepheous E4, Noida		5,87,69,659	5,73,68,702	(-)6,16,78,845	(-)84,90,900	4,58,78,816
212	Mahagun Mosaic				(-)5,21,92,597	11,93,15,012	6,71,22,415
	Total difference	**3,82,17,922**	**2,41,030,598**	**2,09,41,932**	**35,58,412**	**12,60,57,575**	**42,98,06,439**

7.6 The reply filed by the assessee has been considered. The assessee as such does not dispute the extrapolation done but has just asked for discounting the extrapolated rate suitably and spread it over to the entire projects period. Before considering whether the reply as filed by the assessee company is acceptable or not it is considered necessary to re-iterate certain facts of the case at a glance. During the currency of the block or 7 years as relevant to the search & seizure operations as carried out in the hands of the assessee group following projects are found to have been either started or completed as per the following details;

Name of the Project	Entity to which project belongs	Date of commencement	Date of completion
Plot No. 14 Shalimar Garden	Mahagun India P. Ltd.	F.Y. 2002-2003	F.Y. 2002-2003
Flot No. 26 Shalimar Garden	Mahagun India P. Ltd.	F. Y. 2002-2003	F.Y. 2002-2003
A-10 Shalimar Garden	Mahagun India P. Ltd.	F. Y. 2002-2003	F.Y. 2003-2004
Mahagun Villa	Mahagun India P. Ltd.	F.Y. 2003-2004	F.Y. 2004-2005
Mahagun Manner	Mahagun India P. Ltd.	F.Y. 2003-2004	F.Y. 2005-2006
Mahagun Mansion -I	Mahagun Developers P. Ltd.	F. Y. 2002-2003	F. Y. 2007-2008
Mahagun Mansion -II	Mahagun India P. Ltd.	F.Y. 2004-2005	F. Y. 2007-2008
Mahagun Morpheous	Mahagun India P. Ltd.	F.Y. 2005-2006	F. Y. 2007-2008
Mahagun Maestro	Mahagun Realtors P. Ltd.	F.Y. 2005-2006	F. Y. 2007-2008

8. ***Year & Entity of taxability of suppressed receipts***

8.1 It is to mention here that during the F.Y. 2002-2003 and 2003-04, the assessee was following Project Completion Method and in subsequent years that assessee has changed to percentage completion method. Since, the assessee is following the 'Percentage Completion Method' it was incumbent upon the assessee to spread the unaccounted receipts of Rs. 16.95 as admitted during survey and of Rs. 32,82,27,143 as found in the diaries found in search in relation to the projects undertaken in proportion to the percentage of completion of the projects as achieved in the relevant years. In my view unless this is done the correct taxable income of the assessee cannot be worked out. Here, it is relevant to mention that even in its reply dated 27-07-2011, assessee has agreed that unaccounted receipts are required to be spread over to various years on the basis of percentage completion method.

8.2 On attributing the aforesaid surrender qua the stag of construction of various projects (on the same bases as adopted by the Special Auditor for working out the figure of 42 crores) likely additional income attributable to unaccounted receipts as referred to in this para amounting to Rs. 49,78,59,943 which the assessee ought to have offered for taxation is worked out as per ***Annexure A-1*** *to this order. The additions are accordingly made in the respective years of assessment over and above the receipts duly accounted for by the assessee group in its returns filed for these years. In brief, as per this working, additions to be made will be as below:*

Name of the Company	*Asstt Year*	*Amount of extrapolation worked out by Spl. Auditor*	*Addition worked out on the basis of surrender of Rs. 49,78,59,943 in the same proportion as worked out by the Special Auditor*
Mahagun Realtors P. Ltd.	*2006-07*	*5,22,91.433*	*6,05,71,018*
Mahagun Developers P. Ltd.	*2004-05*	-	-
-do-	*2005-06*	*2,02,54,253*	*2,34,61,235*
-do-	*2006-07*	*5,54,20,982*	*6,41,96,022*
Mahagun India P. Ltd.	*2004-05*		
-do-	*2005-06*	*1,79,63,669*	*2,08,07,939*
-do-	*2006-07*	*13,33,88,185*	*15,44,27,160*
-do-	*2007-08*	*2,09,41,931*	*2,42,57,786*
-do-	*2008-09*	*35,58,411*	*41,21,842*
-do-	*2009-10*	*12,60,57,575*	*14,60,16,941*
Total		***42,98,06,439***	***49,78,59,943***

8.3 Before parting with this issue it is considered necessary to pin point that assessee group ought to have offered the income in the hands of the entities which had earned the aforesaid incomes detected during survey and search action. Under the Income-Tax act, 1961 as explained by the Supreme Court in CIT vs. Ch. Atchaiah (218 ITR 241 SC) the income is required to be taxed in the correct year, under the correct heads and in the correct hands/entities. In the context of the assessee group, the suppressed receipts, irrespective of what treatment the assessee group are required to be taxed in the hands of the entities/companies which executed the aforesaid projects. Accordingly, disregarding the treatment given by the assessee group, the aforesaid unaccounted receipts totaling to 49.78 crores are brought to tax in the hands of entitles to which these are allocated as per para 8.2 above.

In view of the above, unaccounted receipts attributable to the assessee for the assessment year 2005-06 amounting to Rs. 6,05,71,018/- as supra is treated as undisclosed income of the assessee and added to the total income of the assessee. I am satisfied that the assessee has not disclosed the above receipts/income and as such penalty proceedings u/s 271(1)(c) are attracted on this score.

(Addition of Rs. 6,05,71,018/-)*"*

40. The facts of the present case are distinctive, as evident from the following sequence:

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

2. The order of amalgamation is dated 11.05.2007 – but made effective from 01.04.2006. It contains a condition – Clause 2[20] - whereby MRPL's liabilities devolved on MIPL.

3. The original return of income was not revised even though the assessment proceedings were pending. The last date for filing the revised returns was 31.03.2008, *after the amalgamation order*.

4. A search and seizure proceeding was conducted in respect of the Mahagun group, including the MRPL and other companies:

[20] *"2. That all the liabilities and duties of the Transferor Companies be transferred without further act or deed to the Transferee Company and accordingly the same shall pursuant to Section 394 (2) of the Companies Act, 1956 be transferred to and become the liabilities and duties of the Transferee Company"*

(i) When search and seizure of the Mahagun group took place, no indication was given about the amalgamation.

(ii) A statement made on 20.03.2007 by Mr. Amit Jain, MRPL's managing director, during statutory survey proceedings under Section 133A, unearthed discrepancies in the books of account, in relation to amounts of money in MRPL's account. The specific amount admitted was ₹5.072 crores, in the course of the statement recorded.

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

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

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

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

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

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

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

10. Assessment order was issued – undoubtedly in relation to MRPL (shown as the assessee, but represented by the transferee company MIPL).

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

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

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

41. In the light of the facts, what is overwhelmingly evident- is that the amalgamation was known to the assessee, even at the stage when the search and seizure operations took place, as well as statements were recorded by the revenue of the directors and managing director of the group. A return was filed, pursuant to notice, which suppressed the fact of amalgamation; on the contrary, the return was of MRPL. Though that entity ceased to be in existence, in law, yet, appeals were filed on its behalf before the CIT, and a cross appeal was filed before ITAT. Even the affidavit before this court is on behalf of the director of MRPL. Furthermore, the assessment order painstakingly attributes specific amounts surrendered by MRPL, and after considering the special auditor's report, brings

specific amounts to tax, in the search assessment order. That order is no doubt expressed to be of MRPL (as the assessee) - but represented by the transferee, MIPL. All these clearly indicate that the order adopted a particular method of expressing the tax liability. The AO, on the other hand, had the option of making a common order, with MIPL as the assessee, but containing separate parts, relating to the different transferor companies (Mahagun Developers Ltd., Mahagun Realtors Pvt. Ltd., Universal Advertising Pvt. Ltd., ADR Home Décor Pvt. Ltd.). The mere choice of the AO in issuing a separate order in respect of MRPL, in these circumstances, cannot nullify it. Right from the time it was issued, and at all stages of various proceedings, the parties concerned (i.e., MIPL) treated it to be in respect of the transferee company (MIPL) by virtue of the amalgamation order – and Section 394 (2). Furthermore, it would be anybody's guess, if any refund were due, as to whether MIPL would then say that it is not entitled to it, because the refund order would be issued in favour of a non-existing company (MRPL). Having regard to all these reasons, this court is of the opinion that in the facts of this case, the conduct of the assessee, commencing from the date the search took place, and before all forums, reflects that it consistently held itself out as the assessee. The approach and order of the AO is, in this court's opinion in consonance with the decision in *Marshall & Sons* (*supra*), which had held that:

> *"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."*

42. Before concluding, this Court notes and holds that whether corporate death of an entity upon amalgamation *per se* invalidates an assessment order ordinarily cannot be determined on a bare application of Section 481 of the Companies Act, 1956 (and its equivalent in the 2013 Act), but would depend on the terms of the amalgamation and the facts of each case.

43. In view of the foregoing discussion and having regard to the facts of this case, this court is of the considered view, that the impugned order of the High Court cannot be sustained; it is set aside. Since the appeal of the revenue against the order of the CIT was not heard on merits, the matter is restored to the file of ITAT, which shall proceed to hear the parties on the merits of the appeal- as well as the cross objections, on issues, other than the nullity of the assessment order, on merits. The appeal is allowed, in the above terms, without order on costs.

.....J.
[UDAY UMESH LALIT]

.....J.
[S. RAVINDRA BHAT]

New Delhi,
April 05, 2022.