2019 INSC 815

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 5409 of 2019
(Arising out of SLP(C) No 4298 of 2019)

Pr. Commissioner of Income Tax, New Delhi **…Appellant**

Versus

Maruti Suzuki India Limited **…Respondent**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1 This appeal arises from a judgment of a Division Bench of the Delhi High Court dated 9 January 2018 which upheld the decision of the Income Tax Appellate Tribunal[1]. The Tribunal held that the assessment made in the name of Suzuki

[1] "the Tribunal"

Powertrain India Limited[2] for Assessment Year[3] 2012-13 is a nullity since the entity had been amalgamated with Maruti Suzuki India Limited[4] under an approved scheme of amalgamation and was not in existence. The High Court, while affirming this view of the Tribunal followed its own decision for AY 2011-12 in **Principal Commissioner of Income Tax – 6, New Delhi** v **Maruti Suzuki India Limited** (**successor of SPIL**)[5] ("**Maruti Suzuki**") . Holding that no question of law arose, the High Court dismissed the appeal under Section 260A of the Income Tax Act 1961[6].

2 The Revenue is in appeal.

3 Against the decision of the High Court for AY 2011-12, a Special Leave Petition[7] was dismissed by a two judge Bench of this Court on 16 July 2018 with the following observations:

> "Heard learned counsel for the parties.
>
> Delay condoned.
>
> In view of the order dated 02.11.2017 passed by this Court in C.I.T., New Delhi Vs. M/s. Spice Enfotainment Ltd. (Civil Appeal No. 285 of 2014 etc. etc.), this special leave petition also stands dismissed. Pending applications, if any, shall stand disposed of."

[2] "SPIL"
[3] "AY"
[4] "MSIL"
[5] (2017) 397 ITR 681 (DEL.)
[6] "The Act 1961"
[7] SLP (C) Diary No. 14106 of 2018

On behalf of the respondent, it has been urged that in view of the dismissal of the Special Leave Petition in relation to AY 2011-12, the same course of action must follow in the present case which deals with the assessment for AY 2012-13.

4 We have heard submissions on behalf of the appellant by Mr Zoheb Hossain, learned Counsel and for the respondents by Mr Ajay Vohra, learned Senior Counsel. In order to appreciate the nature of the controversy, a narration of the facts would be instructive.

5 The assessee is a joint venture between Suzuki Motor Corporation and MSIL. The shareholding of the two companies in the assessee was 70 per cent and 30 per cent. The assessee was known upon incorporation as Suzuki Metal India Limited. Subsequently, with effect from 8 June 2005, its name was changed to SPIL.

6 On 28 November 2012, the assessee filed its return of income declaring an income of Rs. 212,51,51,156/-. The return of income was filed in the name of SPIL (no amalgamation having taken place on the relevant date).

7 On 29 January 2013, a scheme for amalgamation of SPIL and MSIL was approved by the High Court with effect from 1 April 2012. The terms of the approved scheme provided that all liabilities and duties of the transferor company shall stand transferred to the transferee company without any further act or deed. On the scheme

coming into effect, the transferor was to stand dissolved without winding up. The scheme stipulated that the order of amalgamation will not be construed as an order granting exemptions from the payment of stamp duty or taxes or any other charges, if payable, in accordance with law.

8 On 2 April 2013, MSIL intimated the assessing officer of the amalgamation. The case was selected for scrutiny by the issuance of a notice under Section 143(2) on 26 September 2013, followed by a notice under Section 142(1) to the amalgamating company.

9 On 22 January 2016, the Transfer Pricing Officer[8] passed an order under Section 92CA (3) determining the Arm's Length Price of royalty at 3 per cent and making an adjustment of Rs. 78.97 crores in respect of royalty paid by the assessee for the relevant previous year.

10 On 11 March 2016, a draft assessment order was passed in the name of Suzuki Powertrain India Limited" (amalgamated with Maruti Suzuki India Limited). The draft assessment order sought to increase the total income of the assessee by Rs. 78.97 crores in accordance with the order of the TPO in order to ensure that the

[8] "TPO"

international transactions with regard to the payment of royalty to the Associated Enterprises is at Arm's Length.

11 MSIL participated in the assessment proceedings of the erstwhile amalgamating entity, SPIL, through its authorized representatives and officers. This is evident from the copies of the order sheets of the assessment proceedings before the assessing officer for AY 2012-13. Post amalgamation, on 30 September 2013, the Chartered Accountants addressed a communication to the Commissioner of Income Tax, Circle 9(1), pursuant to the notice under Section 143(2) for an adjournment of the assessment proceedings for AY 2012-13 until the assessment proceedings for AY 2010-11 and AY 2011-12 were completed. On 27 October 2014, the Deputy Commissioner of Income Tax Circle 9 (1) addressed a communication to the Principal Officer, SPIL seeking a response to a detailed questionnaire. Thereafter, on 4 September 2015, the Deputy Commissioner of Income Tax Circle 16(1) called for disclosure of information in the course of the assessment for AY 2012-13. The communication was addressed to:

> "The Principal Officer
> M/s Suzuki Power Train India Limited
> (Now known as M/s Maruti Suzuki India Limited)."

12 On 8 October 2015, a communication was addressed by the DGM (Finance) for MSIL in response to the notice under Section 142 (1) adverting to the case of SPIL for AY 2012-13.

13 On 12 April 2016, MSIL filed its appeal before the Dispute Resolution Panel[9] as successor in interest of the erstwhile SPIL, since amalgamated. Form 35A was verified by Mr Kenichi Ayukawa, Managing Director & CEO of MSIL. The grounds of appeal before the DRP did not allude to the objection that the draft assessment order was passed in the name of SPIL (amalgamated with MSIL) or that this defect would render the assessment proceedings invalid.

14 On 14 October 2016, the DRP issued its order in the name of MSIL (as successor in interest of erstwhile SPIL since amalgamated).

15 The final assessment order was passed on 31 October 2016 in the name of SPIL (amalgamated with MSIL) making an addition of Rs. 78.97 crores to the total income of the assessee. While preferring an appeal before the Tribunal, the assessee raised the objection that the assessment proceedings were continued in the name of the non-existent or merged entity SPIL and that the final assessment order which was also issued in the name of a non-existent entity, would be invalid.

16 By its decision dated 6 April 2017, the Tribunal set aside the final assessment order on the ground that it was *void ab initio*, having been passed in the name of a non-existent entity by the assessing officer. The decision of the Tribunal was affirmed in an appeal under Section 260A by the Delhi High Court on 9 January 2018 following

[9] "DRP"

its earlier decision in the case of the assessee for AY 2011-12. That has given rise to the present appeal.

17 Mr Zoheb Hossain, learned Counsel appearing on behalf of the appellant submitted that:

(i) The High Court was not justified in quashing the final assessment order under Section 143 (3) only on the ground that the assessment was framed in the name of the amalgamating company, which was not in existence, ignoring the fact that the names of both the amalgamated company and the amalgamating company were mentioned in the assessment order;

(ii) Even on the hypothesis that the assessment order was framed incorrectly in the name of the amalgamating company, it would amount to a “mistake, defect or omission” which is 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;

(iii) During the assessment proceedings and the subsequent proceedings in appeal, the amalgamating company was duly represented by the amalgamated company. No prejudice was caused to any of the parties by the assessment order and hence rendering the assessment order invalid on a ‘mere technicality’ would be incorrect in law. There was effective participation of the assessee in the assessment proceedings and there was no doubt in the minds of those who

participated about the entity in relation to which the assessment proceedings took place;

(iv) In **Spice Entertainment Ltd.** v **Commissioner of Service Tax**[10] ("**Spice Entertainment**")[11], the final assessment order only referred to the name of the erstwhile entity which was non-existent and there was no reference to the resulting company. In distinction, in the present case, in both the draft and the final assessment orders, the names of both the amalgamating and amalgamated companies were mentioned;

(v) In paragraph 11 of the decision of the Delhi High Court in **Spice Entertainment**, it was held that:

> "11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exist 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."

[10] 2012 (280) ELT 43 (Del.)

[11] This judgement has also been referred to as Spice Infotainment v. Commissioner of Income tax in Current Tax Reporter [(2012) 247 CTR (Del) 500]

From the above extract, it would emerge that if an assessment order had been passed on the resulting company, it would not be *void*. Hence, in the present case, the issuance of a notice under Section 143 (2) to SPIL cannot be considered to be a jurisdictional effect when the assessment order categorically mentions the names of the amalgamated and amalgamating companies;

(vi) The decision of the Delhi High Court in **Skylight Hospitality LLP** v **Assistant Commissioner of Income Tax, Circle-28(1), New Delhi**[12] ("**Skylight Hospitality LLP**"), which was confirmed by this Court on 6 April 2018[13] dealt with a situation where a notice under Section 148 was issued in the name of a non-existent private limited company. The Court held that the defect in recording the name of a non-existent company in a notice under Section 148 was a procedural defect or mistake curable under Section 292B, since no prejudice was caused to the assessee. The Delhi High Court distinguished the decision in **Spice Entertainment** on the ground that in that case even the final assessment order was in the name of a non-existent company;

(vii) In the present case, both the draft assessment order and the final assessment order contained the names of the amalgamated and amalgamating companies and hence it cannot be held that the final order is in the name of a non-existent company. The order of the TPO is not the subject of a challenge by the assessee before any forum. The directions of the TPO were implemented by

[12] (2018) 405 ITR 296 (Delhi)
[13] (2018) 13 SCC 147

the assessing officer in the draft assessment order in accordance with Section 144C(1) which was then challenged by the assessee before the DRP under Section 144C(2). Since the names of both the amalgamated and amalgamating companies were mentioned in the draft assessment order and final assessment order, there is no jurisdictional defect;

(viii) In view the decision of this Court in **Kunhayammed** v **State of Kerala**[14] ("**Kunhayammed**"), though the doctrine of merger does not apply when a Special Leave Petition is dismissed before the grant of leave to appeal, where an order rejecting a Special Leave Petition is a speaking order and reasons have been assigned for rejecting the petition, the law stated or declared in such an order will attract Article 141; and

(ix) Consequently, in the alternative, in view of the order passed by this Court on 6 April 2018 in **Skylight Hospitality LLP** on the one hand and the order dated 16 July 2018 in the case of the present assessee for AY 2011-12 and the earlier order dated 2 November 2017 in **CIT, New Delhi** v **Spice Enfotainment Ltd.**[15] ("**Spice Enfotainment Ltd**"), there appears to be a direct conflict of views on the principle whether a notice issued to a non-existent company would suffer from a jurisdictional error or whether it is a mere defect or mistake which would be governed by Section 292B.

[14] (2000) 6 SCC 359
[15] Civil Appeal No. 285 of 2014

18 On the other hand, Mr Ajay Vohra, learned Senior Counsel appearing on behalf of the respondents submitted that:

(i) Upon a scheme of amalgamation being sanctioned, the amalgamated company is dissolved without winding up, in terms of Section 394 of the Companies Act 1956. The amalgamating company ceases to exist in the eyes of law [**Saraswati Industrial Syndicate Ltd.** v **CIT**[16] ("**Saraswati Industrial Syndicate Ltd.**")];

(ii) The amalgamating company cannot thereafter be regarded as a "person" in terms of Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated and an assessment order passed;

(iii) The jurisdictional notice under Section 143(2) of the Act, pursuant to which the assessing officer assumed jurisdiction to make an assessment was issued in the name of SPIL, a non-existent entity, and was invalid. Hence the initiation of assessment proceedings against a non-existent entity was *void ab initio*.

- It has been held in the following decisions that, if a statutory notice is issued in the name of a non-existent entity, the entire assessment would be a nullity in the eyes of law:

  - **CIT** v **Intel Technology India (P) Ltd**[17]
  - **PCIT** v **Nokia Solutions & Network India (P) Ltd.** ("**Nokia Solutions**")[18]
  - **Spice Entertainment**

[16] (1990) 186 ITR 278 (SC)
[17] [2016] 380 ITR 272 (Kar.)
[18] [2018] 402 ITR 21 (Del)

- Similarly, a notice to the amalgamating company, subsequent to the amalgamation becoming effective and despite the fact of the amalgamation having been brought to the notice of the assessing officer, is *void ab initio* as held in the following decisions:

- **BDR Builders and Developers Pvt. Ltd.** v **ACIT**[19]

- **Rustagi Engineering Udyog (P.) Ltd.** v **DCIT**[20]

- **Khurana Engineering Ltd.** v **DCIT**[21]

- **Takshashila Realties (P) Ltd.** v **DCIT**[22]

- **Alamelu Veerappan** v **ITO**[23] ("**Alamelu Veerappan**")

(iv) The order passed by the TPO in the name of SPIL, a non-existent entity was invalid in the eyes of the law:

- SPIL ceased to be an "eligible assessee", in terms of section 144C (15) (b) of the Act. Consequently, there was no requirement to pass a draft assessment order/reference to DRP etc.; and
- Furthermore, the final assessment order dated 31 October 2016 is beyond limitation in terms of Section 153(1) read with Section 153 (4) of the Act.

(v) The assessment framed in the name of the amalgamating Company is invalid:

[19] [2017] 397 ITR 529 (Del)
[20] [2016] 382 ITR 443 (Del)
[21] [2014] 364 ITR 600 (Guj)
[22] [2017] 77 taxmann.com 160 (Guj.)
[23] [2018] 257 Taxman 72 (Madras)

- In terms of Section 170(2) of the Act, once the amalgamation is effective, assessment in respect of the income of the amalgamating company upto the appointed date has to be in the name of the amalgamated company as successor in interest of the amalgamating company.
- The Delhi High Court has held in **Spice Entertainment** that an assessment framed in the name of the amalgamating company, which ceased to exist in the eyes of law, was invalid and untenable in law. Such a defect would not be cured in terms of Section 292B of the Act. Further, the fact that the amalgamated company participated in the assessment proceedings would not operate as estoppel.
- Following the aforesaid decision of the High Court in the case of **Spice Entertainment**, the Delhi High Court quashed assessment orders which were framed in the name of an amalgamating company, recording also the name of the amalgamated company, in the following cases:

  -**CIT** v **Dimension Apparels Pvt. Ltd**[24] ("**Dimension Apparels**");

  affirmed by this Hon'ble Court vide Civil Appeal No. 3125 of 2015;

  - **CIT** v **Micron Steels P. Ltd. ("Micron Steels")**[25]; and

  -**CIT** v **Micra India (P) Ltd. ("Micra India")**[26].

[24] [2015] 370 ITR 288 (Del)
[25] [2015] 372 ITR 386 (Del.) (MAG.)
[26] [2015] 231 Taxman 809 (Del.)

The aforesaid judgments of the Delhi High Court have been approved by this Court in Civil Appeal No.285 of 2014 (& other connected matters). Thus applying the doctrine of merger, the law laid down by the Delhi High Court has become a precedent under Article 141.

(vi) The Respondent's case is squarely covered by the decision of this Court in its own case for the immediately preceding year:

- The Delhi High Court by its judgment reported in **Maruti Suzuki** held in favour of the Respondent by following the judgment in the case of **Spice Entertainment**.
- Further, the Revenue's SLP was dismissed by this Court on 16 July 2018 in SLP(C) D.No.14106/2018, following the judgment in **Spice Entertainment**.
- Relying on the decision of this Hon'ble Court, in the following decisions, assessments framed in the case of a non-existent entity (the amalgamating company) have been held to be *non-est* in the eyes of law:

  - **CIT** v **BMA Capfin Ltd**.[27] (Revenue's SLP dismissed against the same vide order dated 19 November 2018[28] passed in SLP(C) Diary No.40486 of 2018).

  - **Nokia Solutions**

[27] [2018] 100 taxmann.com 329 (Del.)
[28] [2018] 100 taxmann.com 330 (SC)

(vii) The judgment of the Delhi High Court in **Skylight Hospitality LLP** is distinguishable and is not applicable to the facts of the present case:

- The judgment was rendered on its own peculiar facts.
- In that case, the tax evasion petition mentioned the factum of conversion of the company into a Limited Liability Partnership[29], which was also noticed in the reasons to believe and approval of the Principal Commissioner (before issuance of a notice under Section 148 of the Act). However, only because of a clerical mistake, the notice was wrongly issued in the name of Skylight Hospitality Pvt. Ltd. instead of Skylight Hospitality LLP.
- In the aforesaid facts, the High Court held that this was an irregularity and procedural/ technical lapse which was curable under section 292B of the Act.
- The decision in the case of **Spice Enfotainment** was not followed on the ground that it pertained to the passing of an assessment order in the name of a non-existent entity whereas the case at hand dealt with a notice under Section 148 of the Act.
- The SLP filed by the assessee against the decision of the Delhi High Court was dismissed recording: "**In the peculiar facts of this case,** we are convinced that wrong name given in the notice was merely a clerical error which could be corrected under Section 292B of Act 1961";
- Subsequently, various High Courts, including the Delhi High Court have in the following decisions distinguished the judgment in the case of **Skylight**

[29] "LLP"

Hospitality LLP and have quashed the notice/assessment framed in the name of a non-existent entity:

- **Rajender Kumar Sehgal** v **ITO** ("**Rajender Kumar Sehgal**")[30]
- **Chandreshbhai Jayantibhai Patel** v **ITO** ("**Chandreshbhai Jayantibhai Patel**")[31]; and
- **Alamelu Veerappan**

19 While assessing the merits of the rival submissions, it is necessary at the outset to advert to certain significant facets of the present case:

(i) *Firstly,* the income which is sought to be subjected to the charge of tax for AY 2012-13 is the income of the erstwhile entity (SPIL) prior to amalgamation. This is on account of a transfer pricing addition of Rs. 78.97 crores;

(ii) *Secondly,* under the approved scheme of amalgamation, the transferee has assumed the liabilities of the transferor company, including tax liabilities;

(iii) *Thirdly,* the consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist. In **Saraswati Industrial Syndicate Ltd.**, the principle has been formulated by this Court in the following observations:

> "5. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more

[30] [2019] 260 Taxman 412 (Del.)
[31] (2019) 261 Taxman 137 (Guj)

> existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: *Halsbury's Laws of England* (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."

(iv) *Fourthly,* upon the amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated or an order of assessment passed;

(v) *Fifthly,* a notice under Section 143 (2) was issued on 26 September 2013 to the amalgamating company, SPIL, which was followed by a notice to it under Section 142(1);

(vi) *Sixthly*, prior to the date on which the jurisdictional notice under Section 143 (2) was issued, the scheme of amalgamation had been approved on 29 January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012;

(vii) *Seventhly*, the assessing officer assumed jurisdiction to make an assessment in pursuance of the notice under Section 143 (2). The notice was issued in the name of the amalgamating company in spite of the fact that on 2 April 2013, the

amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation. In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was *void ab initio*.

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

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

> as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law.
>
> 12. Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B of the Act."

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

(i) **Dimension Apparels**;

(ii) **Micron Steels**; and

(iii) **Micra India**.

21 In **Dimension Apparels**, a Division Bench of the Delhi High Court affirmed the quashing of an assessment order dated 31 December 2010. The Respondent had amalgamated with another company and thus, ceased to exist from 7 December 2009. The Court rejected the argument of the Revenue that the assessment was in substance and effect in conformity with the Act by reason of the fact that the assessing officer had used correct nomenclature in addressing the Assessee; stated the fact that the company had amalgamated and mentioned the correct address of the amalgamated company. It was the Revenue's contention that the omission on the part of the assessing officer to mention the name of the amalgamated company is a procedural defect. The Delhi High Court rejected this contention. In doing so, it relied on the holding in **Spice Entertainment**, where the High Court expressly clarified that "the framing of assessment against a non-existing entity/person" is a jurisdictional

defect. The Division Bench also relied on the holding in **Spice Entertainment** that participation by the amalgamated company in proceedings does not cure the defect as "there can be no estoppel in law", to affirm the quashing of the assessment order.

22 In **Micron Steels**, a notice was issued to Micron Steels Pvt Ltd (original assessee) after it had amalgamated with Lakhanpal Infrastructure Pvt Ltd. A Division Bench of the Delhi High Court upheld the setting aside of assessment orders, noting that **Spice Entertainment** is an authority for the proposition that completion of assessment in respect of a non-existent company due to the amalgamation order, would render the assessment a nullity.

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

case where the assessment was contrary to law, having been completed against a non-existent company.

24 A batch of Civil Appeals was filed before this Court against the decisions of the Delhi High Court, the lead appeal being **Spice Enfotainment**. On 2 November 2017, a Bench of this Court consisting of Hon'ble Mr Justice Rohinton Fali Nariman and Hon'ble Mr Justice Sanjay Kishan Kaul dismissed the Civil Appeals and tagged Special Leave Petitions in terms of the following order :

> "Delay condoned.
>
> Heard the learned Senior Counsel appearing for the parties.
>
> We do not find any reason to interfere with the impugned judgment(s) 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 The doctrine of merger results in the settled legal position that the judgment of the Delhi High Court stands affirmed by the above decision in the Civil Appeals.

26 The order of assessment in the case of the respondent for AY 2011-12 was set aside on the same ground. This resulted in a Special Leave Petition by the Principal

Commissioner of Income Tax – 6 Delhi[32]. The Special Leave Petition was dismissed by a two judge Bench of this Court consisting of Hon'ble Mr Justice Rohinton Fali Nariman and Hon'ble Ms Justice Indu Malhotra on 16 July 2018 in view of the order dated 2 November 2017 governing Civil Appeal No. 285 of 2014 in **Spice Enfotainment** and the connected batch of cases. Though, leave was not granted by this Court, reasons have been assigned by this Court for rejecting the Special Leave Petition. The law declared would attract the applicability of Article 141 of the Constitution. For, as this Court has held in **Kunhayammed**:

> "40…Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger."

27 The submission however which has been urged on behalf of the Revenue is that a contrary position emerges from the decision of the Delhi High Court in **Skylight Hospitality LLP** which was affirmed on 6 April 2018 by a two judge Bench of this

[32] Special Leave Petition (C) (D) No. 14106 of 2018

Court consisting of Hon'ble Mr Justice A K Sikri and Hon'ble Mr Justice Ashok Bhushan[33]. In assessing the merits of the above submission, it is necessary to extract the order dated 6 April 2018 of this Court:

> "In the peculiar facts of this case, we are convinced that wrong name given in the notice was merely a clerical error which could be corrected under Section 292B of the Income Tax Act.
>
> The special leave petition is dismissed.
>
> Pending applications stand disposed of."

Now, it is evident from the above extract that it was in the **peculiar facts** of the case that this Court indicated its agreement that the wrong name given in the notice was merely a clerical error, capable of being corrected under Section 292B. The "peculiar facts" of Skylight Hospitality emerge from the decision of the Delhi High Court[34]. Skylight Hospitality, an LLP, had taken over on 13 May 2016 and acquired the rights and liabilities of Skylight Hospitality Pvt. Ltd upon conversion under the Limited Liability Partnership Act 2008[35]. It instituted writ proceedings for challenging a notice under Sections 147/148 of the Act 1961 dated 30 March 2017 for AY 2010-2011. The "reasons to believe" made a reference to a tax evasion report received from the investigation unit of the income tax department. The facts were ascertained by the investigation unit. The reasons to believe referred to the assessment order for AY 2013-2014 and the findings recorded in it. Though the notice under Sections 147/148 was issued in the name of Skylight Hospitality Pvt. Ltd. (which had ceased to exist

[33] Special Leave Petition (C) No. 7409 of 2018
[34] "Sky Light Hospitality LLP v Assistant Commissioner of Income Tax : (2018) 405 ITR 296 (Delhi)
[35] "LLP Act 2008"

upon conversion into an LLP), there was, as the Delhi High Court held "substantial and affirmative material and evidence on record" to show that the issuance of the notice in the name of the dissolved company was a mistake. The tax evasion report adverted to the conversion of the private limited company into an LLP. Moreover, the reasons to believe recorded by the assessing officer adverted to the approval of the Principal Commissioner. The PAN number of the LLP was also mentioned in some of the documents. The notice under Sections 147/148 was not in conformity with the reasons to believe and the approval of the Principal Commissioner. It was in this background that the Delhi High Court held that the case fell within the purview of Section 292B for the following reasons:

> "18…There was no doubt and debate that the notice was meant for the petitioner and no one else. Legal error and mistake was made in addressing the notice. Noticeably, the appellant having received the said notice, had filed without prejudice reply/letter dated 11.04.2017. They had objected to the notice being issued in the name of the Company, which had ceased to exist. However, the reading of the said letter indicates that they had understood and were aware, that the notice was for them. It was replied and dealt with by them. The fact that notice was addressed to M/s. Skylight Hospitality Pvt. Ltd., a company which had been dissolved, was an error and technical lapse on the part of the respondent. No prejudice was caused."

28 The decision in **Spice Entertainment** was distinguished with the following observations:

> "19. Petitioner relies on Spice Infotainment Ltd. v. Commissioner of Service Tax, (2012) 247 CTR 500.

> Spice Corp. Ltd., the company that had filed the return, had amalgamated with another company. After notice under Section 147/148 of the Act was issued and received in the name of Spice Corp. Ltd., the Assessing Officer was informed about amalgamation but the Assessment Order was passed in the name of the amalgamated company and not in the name of amalgamating company. In the said situation, the amalgamating company had filed an appeal and issue of validity of Assessment Order was raised and examined. It was held that the assessment order was invalid. This was not a case wherein notice under Section 147/148 of the Act was declared to be void and invalid but a case in which assessment order was passed in the name of and against a juristic person which had ceased to exist and stood dissolved as per provisions of the Companies Act. Order was in the name of non-existing person and hence void and illegal."

29 From a reading of the order of this Court dated 6 April 2018 in the Special Leave Petition filed by **Skylight Hospitality LLP** against the judgment of the Delhi High Court rejecting its challenge, it is evident that the peculiar facts of the case weighed with this Court in coming to this conclusion that there was only a clerical mistake within the meaning of Section 292B. The decision in **Skylight Hospitality LLP** has been distinguished by the Delhi, Gujarat and Madras High Courts in:

(i) **Rajender Kumar Sehgal**;

(ii) **Chandreshbhai Jayantibhai Patel**; and

(iii) **Alamelu Veerappan**.

30 There is no conflict between the decisions of this Court in **Spice Enfotainment** (dated 2 November 2017)[36] and in **Skylight Hospitality LLP** (dated 6 April 2018[37]).

31 Mr Zoheb Hossain, learned Counsel appearing on behalf of the Revenue urged during the course of his submissions that the notice that was in issue in Skylight Hospitality Pvt. Ltd. was under Sections 147 and 148. Hence, he urged that despite the fact that the notice is of a jurisdictional nature for reopening an assessment, this Court did not find any infirmity in the decision of the Delhi High Court holding that the issuance of a notice to an erstwhile private limited company which had since been dissolved was only a mistake curable under Section 292B. A close reading of the order of this Court dated 6 April 2018, however indicates that what weighed in the dismissal of the Special Leave Petition were the peculiar facts of the case. Those facts have been noted above. What had weighed with the Delhi High Court was that though the notice to reopen had been issued in the name of the erstwhile entity, all the material on record including the tax evasion report suggested that there was no manner of doubt that the notice was always intended to be issued to the successor entity. Hence, while dismissing the Special Leave Petition this Court observed that it was the peculiar facts of the case which led the court to accept the finding that the wrong name given in the notice was merely a technical error which could be corrected

[36] Civil Appeal No. 285 of 2014 and connected cases
[37] Special Leave Petition No. 7409 of 2018

under Section 292B. Thus, there is no conflict between the decisions in **Spice Enfotainment** on the one hand and **Skylight Hospitality LLP** on the other hand.

It is of relevance to refer to Section 292B of the Income Tax Act which reads as follows:

> "292B. No return of income, assessment, notice, summons or other proceeding, furnished or made or issued 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 reason 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 proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act."

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.

In this context, it is necessary to advert to the provisions of Section 170 which deal with succession to business otherwise than on death. Section 170 provides as follows:

> "170. (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 assesseed 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 assesseed 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, assesseed on the predecessor, cannot be recovered from him, the 99[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.

(4) Where any business or profession carried on by a Hindu undivided family is succeeded to, and simultaneously with the succession or after the succession there has been a partition of the joint family property between the members or groups of members, the tax due in respect of the income of the business or profession succeeded to, up to the date of succession, shall be assesseed and recovered in the manner provided in section 171, but without prejudice to the provisions of this section. Explanation.—For the purposes of this section, “income” includes any gain accruing from the transfer, in any manner whatsoever, of the business or profession as a result of the succession”

Now, in the present case, learned Counsel appearing on behalf of the respondent submitted that SPIL ceased to be an eligible assessee in terms of the provisions of Section 144C read with clause (b) of sub section 15. Moreover, it has been urged that

in consequence, the final assessment order dated 31 October 2016 was beyond limitation in terms of Section 153(1) read with Section 153 (4). For the purposes of the present proceeding, we do not consider it necessary to delve into that aspect of the matter having regard to the reasons which have weighed us in the earlier part of this judgment.

32 On behalf of the Revenue, reliance has been placed on the decision of this Court in **Commissioner of Income Tax, Shillong** v **Jai Prakash Singh**[38] ("**Jai Prakash Singh**"). That was a case where the assessee did not file a return for three assessment years and died in the meantime. His son who was one of the legal representatives filed returns upon which the assessing officer issued notices under Section 142 (1) and Section 143 (2). These were complied with and no objections were raised to the assessment proceedings. The assessment order mentioned the names of all the legal representatives and the assessment was made in the status of an individual. In appeal, it was contended that the assessment proceedings were *void* as all the legal representatives were not given notice. In this backdrop, a two judge Bench of this Court held that the assessment proceedings were not null and *void,* and at the worst, that they were defective. In this context, reliance was placed on the decision of the Federal Court in **Chatturam** v **CIT**[39] holding that the jurisdiction to assess and the liability to pay tax are not conditional on the validity of the notice : the liability to pay tax is founded in the charging sections and not in the machinery

[38] (1996) 3 SCC 525
[39] (1947) 15 ITR 302 (FC)

provisions to determine the amount of tax. Reliance was also placed on the decision in **Maharaja of Patiala** v **CIT**[40] ("**Maharaja of Patiala**"). That was a case where two notices were issued after the death of the assessee in his name, requiring him to make a return of income. The notices were served upon the successor Maharaja and the assessment order was passed describing the assessee as "His Highness…late Maharaja of Patiala". The successor appealed against the assessment contending that since the notices were sent in the name of the Maharaja of Patiala and not to him as the legal representative of the Maharaja of Patiala, the assessments were illegal. The Bombay High Court held that the successor Maharaja was a legal representative of the deceased and while it would have been better to so describe him in the notice, the notice was not bad merely because it omitted to state that it was served in that capacity. Following these two decisions, this Court in **Jai Prakash Singh** held that an omission to serve or any defect in the service of notices provided by procedural provisions does not efface or erase the liability to pay tax where the liability is created by a distinct substantive provision. The omission or defect may render the order irregular but not *void* or illegal. **Jai Prakash Singh** and the two decisions that it placed reliance upon were evidently based upon the specific facts. **Jai Prakash Singh** involved a situation where the return of income had been filed by one of the legal representatives to whom notices were issued under Section 142(1) and 143(2). No objection was raised by the legal representative who had filed the return that a notice should also to be served to other legal representatives of the deceased assessee. No

[40] (1943) 11 ITR 202 (Bombay)

objection was raised before the assessing officer. Similarly, the decision in **Maharaja of Patiala** was a case where the notice had been served on the legal representative, the successor Maharaja and the Bombay High Court held that it was not *void* merely because it omitted to state that it was served in that capacity.

33 In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in **Spice Enfotainment** on 2 November 2017. The decision in **Spice Enfotainment** has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in **Spice Enfotainment**.

34 We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There

is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable.

35 For the above reasons, we find no merit in the appeal. The appeal is accordingly dismissed. There shall be no order as to costs.

…….J.
[DR DHANANJAYA Y CHANDRACHUD]

…….J.
[INDIRA BANERJEE]

New Delhi;
July 25, 2019.