IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : D : NEW DELHI

BEFORE DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1866/Del/2022
Assessment Year: 2018-19

Boopendradas (Vikash) Sungker, as ex-Director of Red Fort India Real Estate Humayun, 5th Floor, Ebene Esplanade, 24, Bank Street, Cyber City, Mauritius – 72201.	Vs	DCIT, Circle-3(1)(1), International Taxation, New Delhi – 110 002.
PAN: AADCR6882P		
(Appellant)		(Respondent)

Assessee by : Shri Gaurav Jain, Adv. &
Shri Vibhu Gupta, Advocate
Revenue by : Shri Vijay B. Vasanta, CIT-DR

Date of Hearing : 04.07.2024
Date of Pronouncement : 06.09.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the final assessment order dated 20.06.2022 passed by Circle 3(1)(1), International Taxation, Delhi (hereinafter referred to as the Ld.

AO) u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Heard and perused the record. On conclusion of hearing, Sh. Gaurav Jain, Advocate, appearing for Mr Boopendradas (Vikash) Sungker, former director of M/s Red Fort India Real Estate Humayun (hereinafter referred as erstwhile company) has provided a synopsis which has admitted basic facts giving rise to appeal and the contentions on point of law and facts. To make it convenient, for the Bench to determine the grounds, the synopsis is reproduced below:-

> *"1. Red Fort India Real Estate Humayun (hereinafter referred to as 'Red Fort Mauritius/assessee') was incorporated on 16.07.2007 as 'Company limited by shares' under the provisions of Mauritius Companies Act, 2001, for the specific purpose of making investment in the securities of Prestige Projects Pvt Ltd ('Prestige India"). The beneficial shareholding of the company was held by Red Fort India Real Estate Fund 1 LP situated in Cayman Islands ('Red Fort Cayman').*
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> *2. During the financial year 2008-09, the assessee had made investment in 11,22,000 Class A Equity Shares of Prestige India, for an aggregate amount of Rs.1,12,00,000, under the Foreign Direct Investment ('FDF) route.*
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> *3. In addition to investment made by the assessee, another entity namely Alena Investments Limited situated in Cyprus ('Alena Cyprus'), wholly owned subsidiary of the assessee, also made an aggregate investment of Rs.106,35,13,000 in various instruments of Prestige India during the FY 2008-09 to 2011-12.*
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> *4. The above investments in Prestige India were made by the*

assessee and Alena Cyprus to earn long term capital appreciation and the investment were held by the entities for almost 10 years. Subsequently, during the AY 2018-19 (i.e. the year of sale), the assessee received an offer to sell its stake/investment in Prestige India. However, the buyer i.e. Prestige Builders and Developers Pvt. Ltd. ('Indian Buyer') wanted to conclude transaction with a single seller.

5. Therefore, the securities/shares of Prestige India held by Alena Cyprus were transferred to the assessee vide Securities Purchase Agreement dated 06.10.2017 i.e. AY 2018-19, at fair value of such securities, for a total consideration of Rs.200,61,39,424/-, as against the original cost of Rs.106,35,13,000.

6.Subsequent to the above transaction, the assessee sold the entire securities held in Prestige India (including securities purchased from Alena) to the Indian Buyer vide Securities Purchase Agreement dated 09.10.2017.

7. In the return of income filed by the assessee in India for the AY 2018-19, out of the total capital gains of Rs.4,85,87,899, gains aggregating to Rs.4,85,78,113/- were claimed as not chargeable to tax under Article 13(4) of the India-Mauritius DTAA and the balance gains of Rs.9785 were offered to tax.

8. It is pertinent to mention here that Alena Cyprus had also filed its return of income in India for the AY 2018-19 wherein the long term capital gains of Rs. 80,86,75,225 arising from sale of shares to the assessee were declared exemption claimed under Article 13 of the India-Cyprus DTAA. The return filed by Alena Cyprus was duly processed and stood concluded vide intimation dated 12.04.2019 passed under section 143(1) of the Income Act, 1961 ('the Act').

9. The return of income filed by the assessee was selected for complete scrutiny vide notice dated 23.09.2019 under section 143(2) of the Act.

10. Since the specific purpose of making investment in Prestige India was achieved, the assessee filed an application before the Financial Services Commission, Mauritius on 28.12.2020 (during the pendency of assessment proceedings) for dissolution and removal of the company from Register of Companies, Mauritius. The above fact was also intimated to the assessing officer vide reply dated 01.03.2021.

11. Subsequently, in compliance with Mauritius law, another application was filed by the assessee before the Registrar of Companies, Mauritius on 04.06.2021 for removing the name of the company from register of companies.

12. In the meanwhile, the assessing officer passed the draft assessment order dated 30.09.2021 under section 144C(1) of the Act, denying benefit of exemption under Article 13(4) of the Indo- Mauritius DTAA to the assessee, holding that there was no commercial/ economic substance behind the existence of that Company in Mauritius and, therefore, benefit of Treaty cannot be applied, simply on the basis of TRC issued by the Revenue authorities of Mauritis to that company.

13. Additionally, the assessing officer also erroneously disregarded the separate legal existence of Alena Cyprus, holding the same also to be a mere arrangement to take benefit of India Cyprus Treaty and added the entire capital gains derived by Alena Cyprus, on sale of securities/ shares of Prestige India, to the income of the assessee .

14. Accordingly, the assessing officer proposed assessment at total income of Rs.97,14,67,000 under the head capital gains on sale of securities/ shares of Prestige India in the hands of the assessee.

15. Against the aforesaid draft assessment order, the assessee filed its objections before the Dispute Resolution Panel ('DRP').

16. However, immediately after filing the objections, the Registrar of Companies, Mauritius vide order dated 29.10.2021 removed the name of the company under section 308 of the (Mauritius) Companies Act 2001. In other words, the assessee ceased to exist as a legal entity with effect from 29.10.2021.

17. The aforesaid fact that the assessee had ceased to exist with effect from 29.10.2021 was duly informed to the ld. DRP vide letters dated 04.02.2022 and 11.02.2022. However despite intimation, the DRP proceeded to issue directions under section 144C(5) of the Act vide order dated 03.06.2022 passed in the name of non-existent entity, confirming the draft order of the assessing officer.

18. Accordingly, the assessing officer passed final assessment order dated 20.06.2022 under section 143(3) r.w.s 144C(13) of the Act assessing the income of the appellant at Rs.97,14,67,000. It is pertinent to note that the impugned order was passed in the name of the non-existing entity only i.e. 'Red Fort India Real Estate Humayun'.

19. The aforesaid final assessment order passed by the assessing officer has been challenged before the Hon'ble Tribunal. Brief submissions in respect of the grounds of appeal raised are as under:

GOA No. 1 to 1.3: Final assessment order passed in the name of non-existent entity

20. It is submitted that the final assessment order passed in the name of non-existing entity is illegal, bad in law and without jurisdiction for the reasons elaborated hereunder:

21. The relevant provisions of Mauritius Companies Act, 2001 dealing with removal from register of Companies are reproduced hereunder:

"308. Removal from register
A company shall be removed from the register of companies when a notice, signed by the Registrar stating that the company is removed from the register, is registered under this Act.

309. Grounds for removal from register
(1) Subject to the other provisions of this section, the Registrar shall remove a company from the register of companies where —

(a) the company is an amalgamating company, other than an amalgamated company, on the day on which the Registrar issues a certificate of amalgamation under section 249 of this Act; or

(b) the Registrar is satisfied that -
(i) the company has ceased to carry on business; and
(ii) there is no other reason for the company to continue in existence; or

(c) the company has been put into liquidation, and -
(i) no liquidator is acting; or
(ii) the documents referred to in section 265(3) of the Companies Act 1984 have not been sent or delivered to the Registrar within 6 months of the date on which the

liquidation of the company is completed; or

(d) ***the Registrar receives a request, in a form approved by him, from -***

(i) a shareholder authorised to make the request by a special resolution of shareholders entitled to vote and voting on the question; or
(ii) the Board or any other person, where the constitution of the company so requires or permits

that the company be removed from the register on any grounds specified in subsection (2); or

(e) a liquidator sends or delivers to the Registrar the documents referred to in section 265(4) of the Companies Act 1984

(2) A request that a company be removed from the register under subsection (l)(d) may be made on the grounds –

(a) that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and this Act; or

(b) that the company has no surplus assets after paying its debts in full or in part, and no creditor has applied to the Court under section 216 of the Companies Act 1984 for an order putting the company into liquidation.

(3) ***A request that a company be removed from the register under subsection (1) (d) shall be accompanied by a written notice from the Commissioner of Income Tax and the Commissioner for Value Added Tax stating that there is no objection to the company being removed from the register.***

(4) The Registrar shall not remove a company from the register under subsection (l)(b) unless —
(a) the Registrar has given notice in accordance with section 310; and
(b) the company has satisfied the Registrar that it is carrying on business or that reasons exist for the company to continue in existence; and
(c) the Registrar-
a. is satisfied that no person has objected to the

removal under section 312; or

b. where an objection to the removal has been received, has complied with section 313

(5) Registrar shall not remove a company from the register under subsection (1) (c) or (e) unless -

(a) the Registrar is satisfied that notice has been given in accordance -with section 310; and

(b) the Registrar-

(i) is satisfied that no person has objected to the removal under section 312; or

(ii) where an objection to the removal has been received, has complied with section 313."

310. Notice of intention to remove where company has ceased to carry on business

(1) Before removing a company from the register under section 309(1) (b), the Registrar shall-

(a) give notice to the company in accordance with subsection (2);

(b) give notice of the matters set out in subsection (3) to any person who is entitled to a charge registered under section 127; and

(c) give public notice of the matters set out in subsection (3).

(2) The notice to be given under subsection (l)(a) shall-

(a) state the section under, and the grounds on, which it is intended to remove the company from the register; and

(b) state that, unless-

(i) by the date specified in the notice, which shall not be less than 28 days after the date of the notice, the company satisfies the Registrar by notice in writing that it is still carrying on business or there is other reason for it to continue in existence; or

(ii) the Registrar does not proceed to remove the company from the register under section 313,

the company shall be removed from the register.

(3) The notice to be given under subsection (1) (b) and (c)

shall specify-

(a) the name of the company and its registered office;

(b) the section under, and the grounds on, which it is intended to remove the company from the register; and

(c) the date by which an objection to the removal under section 309 shall be delivered to the Registrar, which shall not be less than 28 days after the date of the notice.

311. Notice of intention to remove in other cases

(1) Where a company is to be removed from the register under section 309(1)(c), the Registrar shall give public notice of the matters set out in subsection (4).

(2) ***Where a company is to be removed from the register under section 309(1)(d) or (e), the applicant, or the liquidator, as the case may be, shall give public notice of the matters set out in subsection (4).***

(3) Where a company is to be removed from the register under section 309(1) (c), the Registrar, or, where it is to be removed from the register under section 309(1)(d), the applicant, as the case may be, shall also give notice of the matters set out in subsection (4) to -

(a) the company; and

(b) any person entitled to a charge registered under section 127.

(4) ***The notice to be given under this section shall specify —***

(a) the name of the company and its registered office;

(b) the section under, and the grounds on, which it is intended to remove the company from the register; and

(c) the date by which an objection to the removal under section 313 shall be delivered to the Registrar, which shall be not less than 28 days after the date of the notice.

312. Objection to removal from register

(1) Where a notice is given of an intention to remove a company from the register, any person may deliver to the

Registrar, not later than the date specified in the notice, an objection to the removal on grounds that ~

(a) the company is still carrying on business or there is other reason for it to continue in existence;

(b) the company is a party to legal proceedings;

(c) the company is in receivership, or liquidation, or both;

(d) the person is a creditor, or a shareholder, or a person who has an undischarged claim against the company;

(e) the person believes that there exists, and intends to pursue, a right of action on behalf of the company under Part XII; or

(f) for any other reason, it would not be just and equitable to remove the company from the register.

(2) For the purposes of subsection (l)(d) -

(a) a claim by a creditor against a company is not an undischarged claim where-

(i) the claim has been paid in full;
(ii) the claim has been paid in part under a compromise entered into under Part XVII or by being otherwise compounded to the reasonable satisfaction of the creditor;

(iii) the claim has been paid in full or in part by a receiver or a liquidator in the course of a completed receivership or liquidation; or

(iv) a receiver or a liquidator has notified the creditor that the assets of the company are not sufficient to enable any payment to be made to the creditor; and
(b)a claim by a shareholder or any other person against a company is not an undischarged claim unless -

(i) payment has been made to the shareholder or that person in accordance with a right under the company's constitution or this Act to receive or share in the company's surplus assets; or

(ii) a receiver or liquidator has notified the shareholder or that person that the company has no surplus assets. ”

22. On perusal of the aforesaid sections, it may be observed that section 309 of the Mauritius Companies Act, 2001 provides following grounds for removal of a company from the register:

a) *Company is amalgamated with another company;*

b) *Registrar is satisfied that company had ceased to carry on business and there is no reason for the company to continue in existence;*

c) *Company has been put into liquidation;*

d) ***Registrar receives a request in a form approved by him from shareholders that the company may be removed from the register on the ground that company has ceased to carry on business***

e) *Liquidator sends or delivers to the Registrar the document referred to in section 265(4) of the Companies Act 1984*

23. It is important to note that in a case where the registrar receives a request to remove a company from the Register of Companies [i.e. under section 309(l)(d)], in that case provisions of Mauritius Companies Act, 2001 provides following compliances:

(a) *Application in approved form [Section 309(1)(d)];*

(b) *A special resolution of shareholders to make application for removal of company's name from the Register of Companies [Section 309(1)(d)];*

(c) *Company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets or no surplus assets left after paying its debts in full [Section 309(2)];*

(d) *Written notice from the Commissioner of Income Tax and the Commissioner for Value Added Tax (collectively Mauritius Revenue Authority) stating that there is no objection to the company being removed from the register [Section 309(3)];*

(e) *Notice specifying the name of the company, section and the grounds on which it is intended to be removed to be given to public, company and persons entitled to charge [Section 311].*

24. In compliance with the aforesaid provisions of the Mauritius Companies Act, 2001, the assessee took the following steps:

Date	*Event*	*Relevant Provision of Mauritius Companies Act*

28.12.2020	*The assessee filed an application dated 28.12.2020 before the Financial Services Commission, Mauritius (regulatory authority responsible for the regulation, supervision and inspection of all financial services business in Mauritius) intimating the intent to remove the company from Register of Companies, Mauritius and obtaining their no-objection for the same. The said application was duly accompanied by a shareholders' resolution dated 24.12.2020, Global business license of the company and management accounts as at 24.12.2020. Copy of application filed is enclosed at Pages 44 to 49 of the PB.*	
01.03.2021	*The above fact was also duly communicated to the assessing officer vide reply dated 01.03.2021 filed during the course of assessment proceedings. The relevant extracts of the reply are reproduced hereunder:* *"In this regard, the Assessee submits that on 28 December 2020 (copy enclosed as Annexure 11), it has filed an application before the Financial Services Commission, Mauritius for the purpose of removing it from the Registrar of Companies in Mauritius. Accordingly, it is in the process of being wound up. "*	

	(Refer Pages 361 to 369 of the PB)	
04.06.2021	*The application was filed by the assessee before the Registrar of Companies, Mauritius on 04.06.2021 for removing the name of the company from register of companies as per section 309(1)(d) of the Mauritius Companies Act, 2001. Copy of application filed is enclosed at Pages 50 to 59 of the PB.*	*Section 309(1)(d)*
	All the other necessary compliances were made in accordance with Mauritius Companies Act, 2001 before the name of the assessee was removed from the register of companies in the following manner:	
04.06.2021	*Form 23 i.e. Application for removal of company from register duly filed by company (Page 51-52 of PB) with following disclosures:* *"The company has ceased to carry on business, has discharged in full all its liabilities to all known creditors and has distributed its assets in accordance with its constitution/ the Companies Act, 2001 - Yes* *The company has no surplus assets after paying its debts in*	*Section 309(l)(d) read with section 309(2)*

	full or in part, and no creditor has applied to the Court under section 216 of the Companies Act, 1984 for an order putting the company into liquidation- No "	
24.12.2020	*Special Resolution passed by the shareholders (Page 59 of PB)*	*Section 309(1)(d)*
06.01.2021	*Notices given in the Government Gazette and newspapers intimating that the company has ceased to carry on business, has discharged in full all its liabilities to all known creditors and has distributed its surplus assets in accordance with the Companies Act, 2001 (Pages 53 to 56 of the PB);*	*Section 311*
21.05.2021	*No objection certificate dated 21.05.2021 granted by Mauritius Revenue Authority for removal of company's name (Page 58 of PB)*	*Section 309(3)*
04.06.2021	*Letter of no-charge dated 04.06.2021 filed with the Registrar of Companies (@Page 57 of PB)*	*Section 311*

25. In view of the above, it would be appreciated that

30.09.2021	*Draft assessment order by AO under section 144C of the Act, against which objections were filed before the DRP.*	
29.10.2021	*Registrar of Companies, Mauritius vide order dated 29.10.2021 removed the name of the company under section 308 of the (Mauritius) Companies Act 2001. (Pages 60 of the PB)*	*Section 308*
04.02.2022/ 11.02.2022	*Letter before DRP intimating dissolution of the Company by way of removal from the Register of companies, w.e.f. 29.10.2021. (Copy of letters attached at Pages*	
03.06.2022	*DRP order in the name of non-existent entity*	
20.06.2022	*Final assessment order under section 143(3)/144C(13) in the*	

the process of removal of the name of Company from the Register of Companies; in other words, dissolution of company, took place strictly in accordance with provisions of Mauritius Companies Act, which inter alia included publication of notices in the official gazette, along with specific intimation to the assessing officer during the pending assessment proceedings. Since, the Red Fort, Mauritius had strictly followed the procedure, the company was permitted to be dissolved and its name was removed from the Register of Companies by the Mauritius authorities. There was no failure in following the said procedure, nor the same has been pointed by the assessing officer in the assessment order. Had the assessing officer any dispute in the dissolution process, necessary recourse could have been adopted in terms of section 312 of the Mauritius Companies Act, 2001.

26. Accordingly, it is submitted, that since the assessee ceased to exist/became non-existent in the eyes of law as on 29.10.2021, no order could have been passed in the name of such non-existent entity after the said date. In view of the same, the impugned orders dated 03.06.2022 passed by the DRP as also the order dated 20.06.2022 passed under section 143(3)/144C in the name of the assessee/non-existent entity are illegal, bad in law and beyond jurisdiction, which deserves to be quashed on that ground itself, at the threshold.

27. Attention in this regard is invited to the provisions of section 4 of the Act which provides that the charge of tax is on the total income of a person for the previous year. The expression 'person' has been defined in section 2(31) to include, inter alia, a 'company' including a foreign company.

28. It will be kindly appreciated that under the Act, charge of income-tax is on the total income of a person, which has been specifically defined in section 2 thereto. A foreign company has been included as a 'person' chargeable to tax under the provisions of the Act. As a natural corollary, once a company is dissolved i.e. the company ceases to exist as a legal entity, it cannot be treated as person assessable to the Act.

29. It is submitted that the existence of the name of the company in the Register of Companies is the proof of its existence. Once the name of the company is struck off from the Register of Companies, the company ceases to be an artificial juridical person, having a separate legal entity. Thus, the assessment made in the name of a dissolved company whose name has been struck off from the Register of Companies is akin to assessment in the name of a dead person. Such assessment is, it is submitted, nullity in the eyes of law.

30. The Courts/ Tribunals have consistently held,that assessment order passed in the name of a dead person or a non-existent entity would be a nullity and of no consequence.

31. Reliance is placed on the decision of Supreme Court in the case of PCIT vs. Maruti Suzuki India Ltd. [2019] 107 taxmann.com 375 (SC). In that case, the assessee filed return declaring income which was processed under section 143(1) of the Act. Subsequently, the assessee- company was amalgamated with Maruti Suzuki India Ltd. and this fact was intimated to the assessing officer. However, notice under section 143(2) dated 26.09.2013 was issued to the non-existing entity and the assessment order was also passed in the name of ceased entity.

32. When the matter reached the Supreme Court, the Court held that an order issued in the name of a non-existent company is void ab initio. While doing so, the Court held as under:

a) *Under the approved scheme of amalgamation, the transferee assumed the liabilities of the transferor company, including tax liabilities;*

b) *The consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist by relying on the judgment of Saraswati Industrial Syndicate Ltd vs. CIT (Supra).*

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

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

e) *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 02.04.2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation.*

f) *Initiation of assessment proceedings against an entity which had ceased to exist was void ab initio.*

g) *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.*

h) *Participation in the proceedings by MSIL in the circumstances cannot operate as an estoppel against law*

33.Further, reliance is placed on the following decisions wherein it has been held that that an assessment framed in the name of a non-existent entity/ dead person would tantamount to jurisdictional defect, thus, making it void-ab-initio:

- *CIT v. Amarchand N. Shroff: 48 ITR 59 (SC)*
- *Saraswati Industrial Syndicate Ltd. v. CIT [1990]: 53*

Taxman 92 (SC)

- *ITO v. Ram Prasad: 86 ITR 145 (SC)*
- *Savita Kapila vs. ACIT: 426 ITR 502 (Del)*
- *Mrs. Sripathi Subbaraya Manahora L/H Late Sripatlti Subbaraya Gupta vs. PCIT [WP(C)No.267812020; decided on 08.07.2021] (Del)]*
- *ACIT v. Micra India (P.) Ltd.: 231 Taxman 809 (Del)*
- *Vived Marketing Servicing (P) Limited in ITA No. 273/2009 (Del)*
- *CIT v. Micron Steels (P.) Ltd.: 233 Taxman 120 (Del)*
- *CIT v. Express Newspaper: 40 ITR 38 (Mad) [affirmed by Supreme Court in 53 ITR 250]*
- *CIT v. Intel Technologies India (P.) Ltd.: 232 Taxman 279 (Kar)*
- *Kunvarji Fincorp Pvt. Ltd. vs. DCIT: SCA 1110 of 2022 (Guj HC)*
- *CIT vs. Sony Mobile Communications Ind Pvt Ltd (Now merged with Sony India Pvt. Ltd.): ITA No. 115/ 2019 (Del HC)*
- *Adani Wilmar Limited vs ACIT: SCA 5374 of 2022 (Guj HC)*
- *Roquette India Pvt. Ltd. vs. ACIT: SCA 5719 of 2022 (Guj HC)*
- *Motorola Solutions India Pvt. Ltd. vs. ACIT: ITA No. 99 of 2015 (Del ITAT)*
- *DCIT vs. BJN Holdings Ltd.: ITA No. 42 of 2022 (Del ITAT)*
- *Siemens Ltd. vs. DCIT: [2023] 147 taxmann.com 118 (Mum ITAT)*
- *Hindustan Unilever Ltd vs. DCIT: ITA No. 1860 of 2022 (Mum ITAT)*

- *Abbott India Ltd. vs. ACIT: [2023] 152 taxmann.com 275 (Mum ITAT)*

34. *Further, specific reliance is placed on the following decisions wherein the company was amalgamated during the course of assessment proceedings, however, the order was passed in the name of non-existing entity. Even in such cases, the Courts held that assessment framed in the name of non-existent entity is bad in law and without jurisdiction:*

- *CIT v. Spice Entertainment Ltd.: 247 CTR 500 (Del)- affirmed by SC in Civil Appeal No. 285 of 2014*
- *PCIT vs. Nokia Solutions & Network India (P.) Ltd.: 402 ITR 21 (Del. HC)*

- *CIT v. Dimensions Apparels Pvt. Ltd.: 370 ITR 288 (Del.)*

35. *The ratio emanating from the aforesaid decisions is squarely applicable to facts of the present case, in as much as, the assessee company was dissolved during the pendency of the assessment proceedings, i.e., after the date of draft assessment order, but before the date of final assessment order.*

36. *Reliance, is placed on the following decisions wherein it has been held that assessment proceedings under section 144C, even when they are pending before DRP, are pending assessment proceedings, until final assessment order is passed.*

- *The Bombay High Court in the case of Vodafone India Services (P.) Ltd. vs. UOI: 361 ITR 531 held that process before the DRP is a continuation of the assessment proceedings as only thereafter would a final appealable assessment order be passed.*

- *The Delhi High Court in the case of Alpine Electronics Asia Pte Ltd.: 341 ITR 247 held that where the assessee raised objection to service of notice under section 143(2) for the first time before the DRP, since the assessment proceedings were pending and not concluded, the said objection was not barred under section 292BB of the Act, which bars objection after the conclusion of assessment.*

37. *Reliance is placed on the following decisions, wherein it has been successively held that, assessment on a company dissolved as per the provisions of the (Indian) Companies Act, is an assessment on a non-existent entity, which is nullity in the eyes of law:*

38. *Specific reliance is placed on the decision of Delhi Bench of the Tribunal in the case of Impsat (P.) Ltd. vs. ITO: 91 ITD 354. In that case, the Board of directors applied to have the company's name struck off under section 560 of the Companies Act, 1956. Consequently, the name of the company was struck off by ROC on 18.09.2001 and the company ceased to exist. Subsequent thereto, the assessee filed its return for the assessment year 2001-2002 on 29.10.2001. However, the assessing officer completed assessment and made addition under section 56(1) of the Act which was confirmed by CIT(A). On further appeal, a ground*

was raised before the Tribunal that the assessment order was passed in the name of a dissolved entity and therefore, was illegal. On this aspect, the Tribunal held as under:

"……

13. From, the above, the position that emerges is that both under the old Act and the new Act it is absolutely essential that the person sought to be assessed should be in existence at the time of making the assessment and that elaborate provisions were made in the Acts to ensure that if the person sought to be assessed is not in existence at the time of making the assessment, some other person or body or entity was expressly fastened with the liability to be assessed.

14. The contention is that the assessee-company was not in existence after 18-9-2001 on which date it was dissolved under section 560 of the Companies Act, 1956. In order to appreciate the contention, we need to take a look at section 560 of the Companies Act. It provides for a summary procedure for putting an end to the corporate existence without going through the cumbersome procedure of liquidation. It confers powers upon the Registrar of Companies to strike the name of the company off the register, if it is defunct. The Registrar has to follow a prescribed procedure such as giving an opportunity to the company, notification in the gazette and so on. Sub-section (5) provides that after the expiry of the prescribed time, after the publication in the gazette of his intention to strike off the name of the company from his register, during which he has not received any representation from the company, the Registrar may strike the name of the company off the register and shall publish a notification to that effect in the official gazette and "on the publication in the Official Gazette of this notice, the company shall stand dissolved". There is provision for restoration of the name of the company and if the name is restored, sub-section (7) says that the "company shall be deemed to have continued inexistence as if its name had not been struck off.

15. There is a distinction under the company law between winding up or liquidation on the one hand and dissolution of the company on the other. This has been brought out by the Supreme Court in Hari Prasad JayantilaI & Co's case (supra). At page 798, Hon'ble Justice Shah, speaking for the court observed:……

16. ***The quoted observations show' that dissolution is a stage subsequent to the winding up or liquidation, the end of the existence of the company. Till dissolution, the corporate existence continues. It follows, per contra, that once a company is dissolved, its corporate existence comes to an end. It is no longer in existence; it is dead.***

17.A reference to page 1901 of A. Ramaiya's commentary on the Companies Act, 1956 (12th Edition) by Hon'ble Justice Y.V. Chandrachud (former Chief Justice of India) show's the following extract from Halsbury's Laws of England, fourth edition, Vol. 7, para 1448, page 809 under the heading "Effect of dissolution".....

18. At page 1930 of the same treatise, under the heading "Property after dissolution", it has been stated that the property of the company after dissolution is bona vacantia and escheats to the State. There is also a reference to the judgment of the Supreme Court in Narendra Bahadur Tandonv. Shanker Lal [1982] 52 Comp. Cas. 62, in which it has been held that once a company is dissolved it ceases to exist and thereafter a liquidator cannot represent the company, since it is non-existent.

19. It is thus clear that in the present case the assessee-company ceased to exist after being dissolved under section 560. Once it ceased to exist, there was no question of assessing it for income-tax, as it appears that there is no provision in the present Act to assess a company which is dissolved. Our attention was not drawn to any provision in the Act enabling the Assessing Officer to do so. Section 159 of the present Act does not cure the lacuna. It corresponds to section 24B of the 1922 Act. Sub-section (1) says that where a person dies, his legal representatives shall be liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased. Sub-section (2)(b)enables the Assessing Officer to take any proceeding against the legal representative of a deceased person, which he could have taken against the deceased himself if he had not died and clause (c) of the sub-section says that the other provisions of the Act shall apply accordingly. Sub-section (3)says the legal representative of the deceased shall, for the purposes of this Act, be deemed to be an assessee. Sub-section (4) makes each and every legal representative personally liable for the tax payable by him in such capacity and sub-section (6) says that such liability will however be limited to the extent to which the estate is capable of meeting the liability. This section, in the very nature of things and considering the language employed in subsection (1), can apply only to individuals or natural persons. In CWT v. G.E. Narayana [1992] 193 1TR 41 1, 49 the Karnataka High Court held, while interpreting section 19 of the Wealth Tax Act which is in pari materia with the section 159 of the IT Act, that the word "dies" is normally referable to the life of a living person, animal or plant and in the absence of any statutory fiction cannot be extended to cover a case of a disruption of a joint family. Similarly, it cannot also cover a case of a dissolution of a company, and there is no statutory fiction extending section 159 to a case of dissolution of a

company under section 560 of the Companies Act. In the above judgment, it was held at page 48 that "a specific provision is necessary to make an order of assessment against a taxable entity which does not exist on the date of the assessment even though the said entity was in existence when the liability to tax arose".

.....

21. That takes us to the next question regarding the validity of an assessment on a nonexistent person. It is a nullity. Reference may be made to the judgments of the Supreme Court in Amarchand N. Shroff's case (supra) and ITO v. Ram Prasad [1972] 86ITR 145. These are cases of an individual and a joint family respectively, but the ratio is that there can be no assessment on a dead person. Just as an individual ceases to exist on death and a joint Hindu family ceases to exist on being disrupted, a company ceases to exist on being dissolved under section 560 of the Companies Act. We have already noted the judgment of the Supreme Court in Hari Prasad Jayantilal's case (supra) as to the effect of dissolution and the treatise of A. Ramaiya on Company Law in this behalf. If the company is not in existence at the time of making the assessment, no order of assessment can be validly passed upon it under the Income-tax Act and if one is passed, it must be a nullity.

.....

23. ***For the above reasons, we accept the first contention and hold that the assessment order passed on the assessee-company is a nullity. "***

39. *The aforesaid decision has been approved by the Hon'ble jurisdictional High Court in the case of CIT v. Vived Marketing Servicing (P.) Ltd. [IT Appeal No. 273 of 2009]. The relevant extracts of the decision of High Court are as under:*

"When the Assessing Officer passed the order of assessment against the respondent company, it had already been dissolved and struck off the register of the Registrar of companies under Section 560 of the Companies Act. In these circumstances, the Tribunal rightly held that there could not have been any assessment order passed against the company which was not in existence as on that date in the eyes of law it had already been ***dissolved.*** The Tribunal relied upon its earlier decision in Impsat Pvt. Ltd. Vs. ITO 276 ITR 136 (AT). We are of the opinion that the view taken by the Tribunal is perfectly valid and in accordance with law. No substantial question of law arises. ***"***

- *Reliance is also placed on the recent decision of Jammu & Kashmir and Ladakh High Court in the case of M/s Rainawari Finance & Investment Company Pvt. Ltd. vs. ITO: ITA No. 21*

of 2014. In that case, the assessee-company ceased to exist and stood dissolved under Section 560(5) of the Companies Act and a notification in this regard stood published in Government Gazette dated April 22 to April 28, 2006. However, the assessment under section 143(3) of the Act was completed vide order dated 21.12.2006 in the name of the non-existing entity. Thus, the question of law was raised before the High Court that whether the assessment order passed in the name of non-existing entity is bad in law or not. The Hon'ble High Court held that once a company is dissolved under the Companies Act, it ceases to exist and therefore, no order of assessment could be validly passed against it under the Income Tax Act and if it is passed, it would be a nullity. The relevant extracts of the order of Hon'ble High Court are as under:

"21. Be that as it may, now it has come to light that on the date the assessment order was passed, the appellant-company stood dissolved under Section 560(5) of the Companies Act and, therefore, could not have been assessed. In terms of Section 143 of the Income Tax Act, assessment can be made by the assessing authority only against the assesee, who has filed a return under Section 139 of the Income Tax Act or in response to a notice issued under Subsection (1) of Section 142 of the Income Tax Act. The term "assessee" is defined in Subsection (7) of Section 2 of the Income Tax Act to mean that a person by whom any tax or any other sum of money is payable under the Income Tax Act and the term "person" used in Subsection (7) is defined in Subsection (31) of Section 2 of the Income Tax Act to include an individual, a Hindu undivided family, a company, a firm, an association of person or a body of individuals, whether incorporated or not, a local authority, and every artificial juridical person, not falling within any of the aforesaid clauses etc etc.

22.From a reading of Subsection (7) along with Subsection 31 of Section 2 of the Income Tax Act, it becomes abundantly clear that the assessee to be assessed for income tax under Section 143 of the Income Tax Act must be a person in existence. Indisputably, a company is a juridical person but the moment it is struck off from the Register of Companies and is dissolved, it ceases to exist. Making of an assessment order against a non-existent company would be like passing a decree by a civil court against a dead person. Such order of assessment made

against a non-existent entity would be nullity and would not give rise to any right or liability under such assessment order. The view we have taken is supported by a judgment of the High Court of Delhi dated 17.09.2009 passed in ITA No.273/2009 titled Commissioner of Income Tax v. Vived Marketing Servicing Pvt. Ltd. One paragraph judgment rendered by the Delhi High Court has upheld the decision of ITAT in Impsat Pvt. Ltd. v. ITO 276 ITR 136 (AT). One paragraph judgment reads thus:-.....
23. The relevant observations of the IT AT Delhi Bench in Impsat (P) Ltd. v. Income Tax Officer are also worth taking note of and are, thus, set out below:- .....

24. We, thus, answer the question by holding that once a company is dissolved under Section 560(5) of the Companies Act, it ceases to exist and, therefore, no order of assessment could be validly passed against it under the Income Tax Act and if it is passed, it would be a nullity. Having answered the aforesaid question, we allow the appeal and set aside the order of assessment dated 21.12.2006, order of the Commissioner of Income Tax (Appeals), Jammu dated 01.04.2013 and the order of the Tribunal dated 30.01.2014. "

-Reliance is also placed on the decision of the Delhi Bench of the Tribunal in the case of Anujay Hycare Products (P) Ltd vs. ITO: ITA No. 4411 of 2017. In that case, the assessee filed its return of income on 30.09.2009. Subsequently, the case of the assessee was selected for scrutiny. During the course of pending assessment proceedings, the name of the company was struck off w.e.f. 30.05.2011 vide order passed by RoC, Delhi.

Pursuant to that, the assessing officer passed the assessment order dated 29.12.2011 in the name of non-existing entity whose name was already struck off by the RoC. Hence, the assessee raised a ground before the ITAT that the assessment order passed on a non-existent company is void ab initio. The Hon'ble Tribunal held as under:

"8. We have considered the rival submissions and perused the material on record. The assessee-company placed on record the order of ROC, Delhi and Haryana, dated 30th May, 2011 whereby, pursuant to Section 560(5) of the Companies Act, 1956, the name of the assessee-company has been struck-off in the Register of Companies and the assessee- company is dissolved. Therefore, w.e.f 30th May, 2011, the assessee-company became non-existent and stood dissolved. The A.O. however, passed the assessment order on 29th December, 2011 i.e., after dissolution of the assessee-company. Therefore, there

could not have been any valid assessment order passed against the assessee-company which was not in existence as on the day of passing of the assessment order because it had already been dissolved. The assessment in the case of non-existing entity is thus nullity. Therefore, A. O. had no jurisdiction to pass the order against the non-existing company. All the decisions relied upon by the Learned Counsel for the Assessee above, squarely apply to the facts and circumstances of the case. Even the judgment of the Hon 'ble Delhi High Court in the case of Spice Infotainment Ltd., vs. CIT (supra), has been confirmed by the Hon'ble Supreme Court vide order dated 02nd November, 2017 (supra). It may also be noted here that A.O. in the remand report has referred to certain correspondence between Revenue Department and the O/o. ROC through which certain information against the assessee-company has been obtained. Ultimately, the O/o. ROC intimated to the Income Tax Department that it is not within their powers to revive the assessee- company under section 560(6) of the Companies Act. The information have been taken by the Department and it is not intimated as to what action have been taken by the Department against the assessee-company in this regard.

However, as on today, it is an established fact that assessee-company has already been dissolved and its name is struck-off from the Registrar of Companies. Therefore, it is a non-existing Company and as such, A.O. cannot pass the assessment order under section 143(3) of the I.T. Act, 1961 against the assessee company. The issue is, therefore, covered in favour of the assessee-company by the above judgments of Hon'ble Delhi High Court, relied upon by the Learned Counsel for the Assessee. The decisions relied upon by the Ld. D.R. are clearly distinguishable on facts. In view of the above discussion, we set aside and quash the orders of the authorities below. Resultantly, all additions are deleted. Since, the orders of the authorities below have been quashed, therefore, additions on merit are not decided as the same are left with academic discussion only. However, the Revenue Department is at liberty to pursue the matter with the Registrar of Companies, if so advised, in accordance with law. In the result, appeal of the assessee-company is allowed. "

-Attention is also invited to the decision of Delhi Bench of the Tribunal in the case of Galaxy Technosys Pvt. Ltd. vs. ITO: ITA No. 1637 of 2018. In that case, name of the assessee company was struck off by the Registrar of Companies w.e.f. 05.06.2013. The assessing officer issued notice dated 11.09.2014 under section 148 of the Act in the name of non-existing entity. Further, during the course of assessment

proceedings, it was again informed to the assessing officer that the company had ceased to exist. However, the assessing officer proceeded to pass the assessment order in the name of non-existing entity. On appeal, the CIT(A) confirmed the order of the AO.

On further appeal, the Tribunal held that the assessment framed by the AO on a company which was non-existing on the date of the passing of the order is invalid. The relevant findings of the Hon'ble Tribunal are reproduced as under:

"4. I have considered the rival submissions and perused the relevant finding during the impugned order as well as material referred to before me. One of the main legal contention raised is, that the initiation of proceedings u/s 147 and consequently assessment order framed u/s 147/143(3) is void ab initio as the assessee company has ceased to exist since November, 2013 and therefore, any subsequent proceedings on such non existing company have no legal basis. On the perusal of material placed on record which is even borne out from the appellate order, specifically from pages 12 to 20, it is seen that Registrar of Company had issued a notice u/s 560(3) of the Companies Act on 27.6.2013, which was forwarded to the Chief Commissioner of Income Tax that the Company, 'M/s. Galaxy Technosys Private Limited' will be struck off from the register and such company will be dissolved. Another notice/undertaking was sent vide intimation dated 9.11.2013 by Registrar of Company to the Income Tax Department, specifically intimating that 'Galaxy Technosys Private Ltd. ' has been struck off from the register and the said company is dissolved. Again this information was given to the AO during the course of the assessment proceedings by the assessee vide letter dated 21st March, 2016 which reads as under .....

5. Despite communications by the Registrar of the Company to the department and again by the Company before the AO and Ld. C1T (A), it is very surprising to see that none ofthe authorities have addressed this issue, as to how the assessment can be passed in the case of non existing entity which was dissolved much prior of initiation of provision u/s 147/148. Hon 'ble Delhi High Court in the case of Spice Infotainment Ltd. vs CIT reported in (2012) 247 CTR 500, has held that assessment in the name of the company which has been amalgamated with another company and stood dissolved is null and void and assessment framed in the name of a non-existing entity is a jurisdictional defect and not merely a procedural irregularity of the nature which can be cured by invoking the provision of section 292B. Similarly,

this principle was reiterated in the subsequent judgment by the Delhi High Court in the case of CIT vs. Dimension Apparels (P) Ltd. (2015) 370 ITR 288, wherein the Hon'ble High Court held that order of assessment on a company which cease to exist is not a procedural irregularity which can be cured by section 292B. In another judgment in the case of PCIT vs. BMA Capfin Ltd (2018) 100 taxman.com 329 Delhi, the Hon'ble Jurisdictional High Court, following the aforesaid judgments have quashed the assessment. This later judgment has also been affirmed by the Hon'ble Supreme Court by way of SLP, whereby the SLP has been dismissed vide order dated 19th November, 2018. Even in the judgments relied upon by the Ld. Counsel before me, which was also stated and relied upon before the Ld. CIT (A), similar preposition has been laid down. Thus, going by the principle and ratio laid down by the Hon'ble Delhi High Court, it is quite ostensible that assessment order cannot be passed in the case of non-existing company especially when this has been brought to the knowledge of the department.

6. However there is one judgment of Hon'ble Delhi High Court in the case of Sky Light Hospitality LLP vs. ACIT (2018) 405 ITR 296, wherein Hon'ble High Court on the issue of notice u/s 148 which was addressed to an erstwhile Private Limited which has ceased to exist and was converted into LLP, it was observed that it will not invalidate the reassessment proceedings and the same was not a jurisdictional error bid irregularity and procedural laps which could be cured u/s 292B. In the case before the Hon'ble Court the issue pertains to notice u/s 148 addressed to the erstwhile company. However, it was not a case that where the assessment order was passed in the case of the non-existing entity. This distinction has been made clear by the Hon'ble High Court in para 18 in the following manner:-

7. Thus, here in this case assessment framed by the AO on company which was non existing on the date of the passing of the order is not valid assessment which deserves to be quashed.

8. In the result appeal of the assesee is allowed. "

- Attention is also invited to the recent decision of the Mumbai Bench of the Tribunal in the case of ITO vs. M/s Silverline Trading Company Ltd.: ITA No. 2253 of 2023. In that case, the assessee-company was struck off from the Register of Companies as per the certificate dated 18.03.2011 issued by the MCA. However, despite this fact available, the learned Assessing Officer passed assessment orders dated 29.02.2016 in the name of non-existing entity. On appeal, the CIT(A) quashed the assessment orders passed in the name of

non-existing entity. On Revenue's appeal before the Tribunal, it was held as under:

4.On careful consideration of the facts and rival contention, we find that the above appellant entity is not in existence since 18th March, 2011, as per the certificate issued by the Registrar of Companies, Maharashtra, Mumbai as its name has been struck off under Section 560 (5) of the Companies Act, 1986, in easy exist Scheme, 2010. The coordinate Benches in asses see ".s own case in IT A no. 2435/Mum/2021, for A.Y. 2011- 12 and further in ITA No. 6633/Mum/2017, for A.Y. 2007-08 has already quashed the assessment orders. ***The issue is now also squarely covered by the decision of Hon'ble Jammu and Kashmir and Ladakh High Court in ITA No. 21 of 2014 dated 3rd November, 2013, M/S. RAINA WARI FINANCE & INVESTMENT COMPANY PVT. LTD. VERSUS INCOME TAX OFFICER, JAMMU 2023 (11) TMI 812 - JAMMU AND KASHMIR AND LADAKH HIGH COURT wherein it has been categorically held that once a company is dissolved under Section 560(5) of the Companies Act, it ceases to exist and therefore, no order of assessment could be validly passed against it under the Income Tax Act and if it is so passed, it would be a nullity. The Hon'ble High Court also took support of the judgment of Hon'ble Delhi HC dated 17th September, 2009, passed in ITA No.273 of 2009 in case of CIT*** vs. ***Vivid Marketing Services Pvt. Ltd. The Honourable High court held as under:-***

5.Coming to the decision of the Hon'ble Delhi High Court in case of Skylight Hospitality Ltd, the issue was that the private limited was converted to limited liability partnership under the limited liability partnership Act, 2008 and that was not the case of dissolution of the company. Therefore, that decision does not apply to the facts of this case.

6. Therefore respectfully following decision of coordinate benches in assessee "s own case as well as the decision of Honourable J & K High court, Both the assessment orders passed in the name of non existing company are not sustainable and correctly quashed by Id CIT (A). Thus, orders of the ld CIT (A) are upheld for both the years. *"*

- *The Mumbai Bench of the Tribunal in the case of DCIT vs. Asia Pacific Systems Ltd Republic of Mauritius: ITA No. 4778 of 2015. In that case, the assessee-company was liquidated on 11.03.2009. However, the assessing officer issued notice dated 29.03.2012 under section 148 of the Act in the name of liquated company which has ceased to exist*

and also proceeded to pass the assessment order dated 20.05.2013 in the name of non-existing entity. On appeal, the CIT(A) quashed the reassessment order passed in the name of liquidated company. On further appeal, the Tribunal confirmed the order passed by CIT(A), the relevant extracts of the order of the Tribunal are as under:

"5.We have heard the rival submissions and carefully considered the same along with the orders of the tax authorities below. We noted, it is a fact that assessment in this case was made on the assessee by issue of notice dated 29.03.2012. But, much before the date on initiation of the assessment proceedings, the assessee company had liquidated on 11.03.2009. We do not find any infirmity in the order of the CIT(A) in holding that the assessment framed as null and void in the name of the company which had already liquidated. Our aforesaid view is duly supported by the following decisions: ….
No contrary decision was brought to our knowledge by the learned DR, even though he has vehemently relied on the order of the Assessing Officer. We, therefore, confirm the order of the CIT(A) and quash the assessment framed by the Assessing Officer.

5. Since the assessment made by the Assessing Officer has eventually been quashed by us, the other grounds taken by the Revenue does not require any adjudication. "

- To the same effect is the decision of Ahmedabad Bench of the Tribunal in the case of Mehta Air Travels Pvt. Ltd. vs. ITO: ITA No. 3300 of 2016.

40. *In view of the above, it is the respectful submission, that the impugned assessment order passed in the name of non-existent entity is illegal and calls to be quashed and the present ground of appeal be allowed."*

3. Giving thoughtful consideration to the submissions made by Sh. Gaurav Jain, Advocate, we are of the considered view that before examining the grounds on merits of additions, as made by assessing officer, it is first necessary to determine the following two legal aspects involved in the appeal;

(i) The first being, the maintainability of this appeal on behalf of the erstwhile company through or by Mr. Boopendradas (Vikash) Sungker.

(ii) Secondly, if the impugned assessment order passed against earstwhile company, whose name stands struck off from register of companies is one passed against a non existent entity, so is void and non-est against the erstwhile company, and on that account the appeal needs to be allowed.

4. In order to determine these issues, if go through the various provisions of the Act, we find that the provision of section 159 of the Act is with regard to *"legal representatives"* of the assessee in case of a natural person who dies and same is not applicable as erstwhile company is not natural person. Then, section 160 of the Act, is with regard to determination of *"representative assessee"* for various class of assessee including the non-residents and then section 161 provides for the liability of representative assessee as per section and Section 162 of the Act is providing for the rights of the representative of the assessee to recover the tax paid. Then section 163 of the Act defines for the purpose of this Act, who can be considered as 'agent' for Non-

Resident Indian and Section 166 of the Act provides for direct assessment in case of assessee on whose behalf representative assessee have been appointed or for whose benefit income therein referred to is receivable. None of these provisions came to help the AO in regard to erstwhile company.

4.1. We further find that the remedies of the AO against the property in cases of representative assessee under section 167 of the Act have no application in case before us and do not come for assistance of the AO, where, a foreign company opts for voluntarily closure of business and getting name struck off with ROC.

4.2 However, we note that section 170 of the Act is applicable in cases wherever there is a succession of business otherwise than on death and in cases where the person succeeding continues to carry on the business or profession which too is not the case here.

4.3 Relevant here is the section 176(1) of the Act, which provides for the assessment in case of **'discontinued business'** and the section is meant for those circumstances where any business or

profession is discontinued during the assessment year and sub-section (1) of section 176 provides that the income of the period from the expiry of the previous year for that assessment year upto the date of such discontinuance may, at the discretion of the AO, be charged to tax in the assessment year.

4.4 Section 178 of the Act, provides for company in liquidation, which is not the case here, as there was voluntary dissolution of company followed by request to ROC for striking off name of the company.

5. Based on aforesaid, we examine the substantial plea raised by Sh. Gaurav Jain Advocate that that courts and Tribunals have consistently held that the assessment order passed in the name of a dead person or a non-existing entity would be nullity and of no consequence. Reliance in this regard is placed on the judgement of the Hon'ble Supreme Court in the case of **PCIT vs. Maruti Suzuki India Ltd. (2019) 107 taxmann.com 375 (SC)** and a series of decisions as referred in paras 33 and 34 of the synopsis. Ld. Counsel, has relied decision of the coordinate Bench in the case of **Impsat (P) Ltd. vs. ITO, 91 ITD** 354 and the decision of the Hon'ble jurisdictional High Court in the case

of ***CIT vs. Vived Marketing Servicing (P) Ltd. (ITA no.273 of 2009)*** have been relied. Further reliance is placed on the decision of the Jammu & Kashmir and Ladakh High Court in the case of ***M/s Rainawari Finance & Investment Company Pvt. Ltd. vs. ITO, ITA No.21 of 2014*** and the coordinate Bench decisions in the cases of ***Anujay Hycare Products (P) Ltd. vs. ITO, ITA No.4411 of 2017, Galaxy Technosys Pvt. Ltd. vs. ITO, ITA No.1637 of 2018***; decision of the Mumbai Bench in the cases of ***ITO vs. M/s Silverline Trading Company Ltd. (ITA No.2253 of 2023)*** and ***DCIT vs. Asia Pacific Systems Ltd. Republic of Mauritius (ITA No.4778 of 2015).***

6. Taking into consideration these judgements, we are of the considered view that they are primarily in regard to those entities where there is amalgamation of two entities or there is dissolution of any incorporated entity consequent to liquidation. These are cases where either there is a successor in interest left or during the proceedings of dissolution or liquidation the claim of creditors including of revenue is duly considered and met. Further in these cases the assessing officer was well informed of the fact of entity going non-existent before the passing of the assessment order.

7. However, in this case before us, the Bench was confronted with a situation where the assessee claims of filing an application on 28.12.2020 before the Financial Services Commission, Mauritius, which is the regulatory authority responsible for the regulation, supervision and inspection of all financial services and business in Mauritius. The application was moved intimating the said authority the intent to remove the company from Register of Companies of Mauritius and obtaining No Objection. The reason was closure of business. The claim of counsel is that the said application was duly accompanied by a shareholders resolution dated 24th December, 2020, the global licence of the company and management account as at 24.12.2020, the copy of which is placed on the record at pages 44 to 49 of the paper book. The Revenue does not dispute that filing of this application was brought to the notice of the AO on 01.03.2021.

8. Then, on 04.06.2021 an application was filed by the assessee before the Registrar of Companies, Mauritius for removing the name of the company from the Register of companies as per section 309(1)(d) of the Mauritius Companies Act 2001. The copy of this application is on record at pages 50-59

of the paper book. On 04.06.2021 itself, Form No.23 which is application for removal of company was filed along with the following disclosures:-

> *"The **company has ceased to carry on business**, has discharged in full all its liabilities to all known creditors and has distributed its assets in accordance with its constitution/ the Companies Act, 2001 – **Yes.**"*
> *"The company has no surplus assets after paying its debts in full or in part and no creditor has applied to the Court under section 216 of the Companies Act, 1984 for an order putting the company into liquidation – **No**."*

9. The Special Resolution passed by the shareholders on 24.12.2020 is available at page 59 of the paper book. On pages 53 to 56, notices given in Government Gazette and newspapers intimating that the company has ceased to carry on business and has discharged in full all its liabilities to all loan creditors and has distributed its surplus assets in accordance with the Companies Act, 2002 is filed.

10. Then at page 58, the copy of no objection certificate dated 21.05.2021 granted by Mauritius Revenue Authorities for removal of company's name is filed. At page No.57, the assessee has filed a letter of 'no charge' dated 04.06.2021 filed with the Registrar of Companies. On page 60 of the paper book, the letter dated 29.10.2021 is filed which was issued by Registrar of

Companies, Mauritius, removing the name of the company u/s 308 of the Mauritius Companies Act, 2001.

11. Now, after taking into consideration the reply dated 01.03.2021 available at pages 361 to 363 of the paper book by which the Ld. Counsel claims that erstwhile company had informed the AO of filing of an application for removal of the name of the assessee from Registrar of Companies, we find that it was in response to a notice u/s 142(1) of the Act, where in 14 questionnaires were raised and the reply was filed. The question no. 13 related to the status of the company as on date i.e whether the same was wound up or active and the erstwhile company had informed the AO that on 28.12.2020 an application is moved to the Financial Services Commission, Mauritius for the purpose of removing it from Register of Companies, Mauritius. Accordingly, it was in the process of being wound up.

12. The reply, however, does not show that if there was any mention as to who would be the successor of the company or authorized representative or agent to contest the assessment order further after the name of company is struck off. In this manner the cases relied about entities going into amalgamation

or liquidation, where assets of any erstwhile company are succeeded by successor in interest and fact being conveyed to AO being on record are distinguishable and have no persuasive value.

13. At the same time we are of view that when the draft assessment order was passed on 30.09.2021, the company was very much in existence and, at the same time, the AO was not informed of the further steps taken after 28.12.2020. In this context, when we consider the letter dated 28.12.2020 available at page 44 of the paper book, we find that it is addressed to Chief Executive, Financial Services Commission and is merely an intimation of the intention of the assessee to apply to the competent authority, Registrar of Companies, Mauritius for removal of the name of the company form the Register of Companies and, for that purpose, a no objection was sought from the Financial Services Commission. Thus, when on 01.03.2021 the AO was informed, actually no application was moved to the Registrar of Companies, Mauritius for getting struck off the name of the company from Register of Companies so as to expect the AO to have taken any recourse under the Act.

14. Further, we find that this application, to the Registrar of Companies, Mauritius for getting struck off the name of the company from Register of Companies was filed on 04.06.2021, in Form 23 and the copies of which are made available from pages 50-59 of the paper book. However, this fact of making application in Form 23 was not intimated to the AO at any time.

14.1 Then, we can see that the grounds for removal mentioned in this Form 23 as available at page 52 of the paper book are incorrect and false, as the fact of pendency of the assessment before the Indian tax authorities was not disclosed.

14.2 Even otherwise, with regard to the question of the assessment order being passed against the non-existing entity for which the assessment order is vitiated, the aforesaid discussion establishes that at no point of time before the AO or DRP the erstwhile company had claimed that the name of the assessee is being struck off for closure of the business or discontinuance of the business after the distribution of assets. In this context, we are of the considered view that where a corporate entity voluntarily opts for discontinuance of business and prefers to get the name of the company struck off and dissolve the company,

after distributing its assets, the provisions of section 176 of the Act may become applicable and without any specific notice in terms of sub-section (3) of section 176 of the Act informing the AO of discontinuance of the business, the erstwhile company cannot claim that the assessment order was passed against the non-existing entity.

14.3 Thus, we are of the considered view that at the time of passing the draft assessment order on 30.09.2021 by the AO, there was no infirmity, on the basis of the plea that this draft assessment order was against the non-existing entity or the company whose name is struck off.

15. Then further it comes up that after the draft assessment order of 30.09.2021, the Registrar of Companies, Mauritius had removed the name of the company on 29.10.2021. To consider the plea that DRP was informed of same yet directions are passed against non-existing entity we find from the DRP directions, that the objections were filed on 29.10.2021 only i.e., the day on which the Registrar of Companies, Mauritius had removed the name of the company u/s 308 of the Mauritius Companies Act, 2001. This cannot be a mere co-incidence. Rather seems to an

attempt of the erstwhile company to combat the assessment proceedings with self inflicted harm, of closing the business and getting name struck off, leaving Indian Tax Authorities, frustrated.

16. At the same time, it becomes questionable as to if at all the company having got its name struck off, had *locus standi* to file the objections before DRP.

17. Then, going through the grounds and objections raised before the DRP, there was no specific ground that the draft assessment has been passed against a non-existing entity. As Ld. Counsel was specifically confronted of this aspect, at time of hearing it was claimed by him that by letters dated 04.02.2022 and 11.02.2022, the DRP was informed of the dissolution of the company by way of removal from Register of Companies w.e.f. 29.10.2021.

17.1 Examining, the copies of these letters available at pages 61-66 of the paper book, we can see that letter dated 04.02.2022, was issued by Price Waterhouse & Co. LLP to the DRP about the fact that their client has gone into liquidation in Mauritius and

subsequent to same ***Power of Attorney of the client signed by the client's director on 13.10.2021 has lapsed and as director signing the power of attorney does not have any authority, post liquidation of the client, Price Waterhouse & Co. LLP withdraws the Power of Attorney filed before the DRP*** and request was made that the proceedings be abated as they have become infructuous.

18. It appears that thereafter, a notice u/s 144C(11) of the Act was issued to the erstwhile company for which Mr. Boopendradas (Vikash) Sungker had informed DRP, by letter dated 11/2/22, as follows:-

> *"This is with reference to the captioned notice received from your good office to my email id addressed to Red Fort Humayun.*
> *In this regard, I, Boopendradas Sungker, wish to inform your Honours that the name of the company has been removed from the register under Section 308 of the (Mauritius) Companies Act 2001 with effect from October 29, 2021. The proof of the same is enclosed as Annexure 1 for your kind reference.* ***Accordingly, I, no longer serve as a Director of the liquidated company and have no authority to respond to this notice.***
> *Based on the above, by way of this letter, as I no longer serve as a director of Red Fort Humayun, I wish to return this notice to your Honours and request your goodself to abate the proceedings initiated against the liquidated company which does not even exist today.*
> *We request your office to kindly take the above documents/ information in your records."*

19. Thus, what we can make out from this letter dated 11/2/22 is that Mr. Boopendradas (Vikash) Sungker, who has filed the present appeal before the Tribunal, as ex-Director of the assessee company admitted that he no longer serves as a director of the liquidated company and has no authority to respond to the notices of the tax authority. He had returned the notice to the DRP.

20. The DRP had dealt with the letter dated 04.02.2022 of Price Waterhouse & Co. LLP and observed in para 3 of the DRP as follows:-

> *"3. The case was fixed for virtual hearing on 04.02.2022, The Panel received letter dated 04.02.2022 stating that the Power of Attorney (POA) issued by the taxpayer in favour of Price Waterhouse & Co LLP had lapsed as the company had been liquidated. Shri Kshitiz Bansal appeared for virtual hearing on the above mentioned date and the case was adjourned to 15.02.2022. Subsequently, a notice under section 144C(11) of the Income Tax Act, 1961 (the Act) was generated and was sent to the assessee through ITBA. However no one appeared on behalf of the assessee. In view of the same, the issues are decided on the basis of material available on record."*

21. However, on going through the record of the appeal set, we find still the appeal is shown to be filed by the assessee company through Mr. Boopendradas (Vikash) Sungker as ex-Director.

22. Further more, it is apparent from the appeal set and Form 36 that the same is signed by Mr. Boopendradas (Vikash) Sungker and he has not mentioned as to if he has signed and verified this appeal as a director of the assessee company. There is nothing on record to show that there was a resolution in favour of him to file the appeal and sign Form 36. In fact, if the earlier communication with DRP dated 11.02.2022 is considered correct and which also acts as estoppels against him, he himself admits that he had no *locus standi* to represent the assessee company any more.

23. To be more precise, there is not even a power of attorney in favour of counsels who are appearing, before Tribunal, for the erstwhile company, even by Mr. Boopendradas (Vikash) Sungker.

24. There is more to look into if Mr. Boopendradas (Vikash) Sungker, being former director has any locus standi to challenge the assessment order against the erstwhile company, on question of law or merits of addition. The definition of 'assessee', as given u/s 2(7) of the Act provides as follows:-

> *"Section 2(7).* "**assessee**" *means a person by whom any tax or any other sum of money is payable under this Act, and includes—*
> *(a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or*

assessment of fringe benefits or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person;
(b) every person who is deemed to be an assessee under any provision of this Act;
(c) every person who is deemed to be an assessee in default under any provision of this Act;"

24.1 Taking into consideration aforesaid definition of 'assessee', we are of the considered view that the return is filed by erstwhile company and consequent to the assessment concluded by the AO, the tax demand is payable by the erstwhile company. So by merely being a 'former director', Mr. Boopendradas (Vikash) Sungker, had no contingent liability as a 'person' by whom demand of tax is payable.

24.2 The demand is against the erstwhile company and AO has recourse available to make recovery of tax demand by invoking one of the powers of section 173 of the Act, which provides for recovery of tax in respect of non-resident from his assets and being relevant the same is reproduced below:-

"Recovery of tax in respect of non-resident from his assets.

173. Without prejudice to the provisions of sub-section (1) of section 161 or of section 167, where the person entitled to the income referred to in clause (i) of sub-section (1) of section 9 is a non-resident, the tax chargeable thereon, whether in his name or in the name of his agent who is liable as a representative assessee, may be recovered by deduction

under any of the provisions of Chapter XVII-B and any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident which are, ***or may at any time come, within India."***

24.3 Then, most important is the relevancy of provision of section 179 of the Act, which provides for liability of directors of a private company as follows:-

Liability of directors of private company .

179. *(1) Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.*

(2) Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a private company cannot be recovered, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962.

Explanation.—For the purposes of this section, the expression "tax due" includes penalty, interest , fees or any other sum payable under the Act.

24.4 Thus based on aforesaid section 179 of the Act, we are of considered view that it is only when the AO, proceeds against the former director for making a recovery of tax payable by the

erstwhile company, the former director will he aggrieved with the recovery. But that too will not place the former director in the cradle of 'assessee', as only limited right given to former director is to deny the liability by proving that the non-recovery of tax demand cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. However, the merits of assessment order cannot be assailed by an appeal u/s section 246(1) providing for appeal before CIT(A) or under section 253 of the Act, which, provides for appeal to this Tribunal, since it is 'assessee' who can challenge the merits of assessment order passed u/s 143(3) of the Act.

24.5 Thus, based on the aforesaid discussion, the only conclusions that can be drawn is that the very filing and subsistence of the appeal before this Tribunal on behalf of the erstwhile company, through or by Mr. Boopendradas (Vikash) Sungker becomes questionable and answered against him.

25. In this context, the judgement of the coordinate Bench of Delhi in the case of ***ACIT vs. M/s Zeus Impex Pvt. Ltd., ITA. No. 375 to 379/Del/2022 order dated 13.05.2024*** can be relied wherein an appeal filed by the Revenue itself was also not considered maintainable for the reason that before the CIT(A), the

appeal was filed by a former director of a company whose name was struck off. The coordinate Bench had considered the Revenue's appeal to be arising out of *"defective and incompetent appeal placed before CIT(A)"* and the Cross Objections of the assessee was dismissed being filed by former director being unauthorized to file the memo.

26. The second issue before us is also somehow covered against the erstwhile company and in this context, the issue has been considered by the coordinate Bench at Delhi in the case of ***Dwarka Portfolio (P) Ltd. vs. ACIT (2022) 139 taxmann.com 477 (Delhi-Trib.)*** wherein one of us, i.e., the ld. Accountant Member was also on the Bench and it was held that the appeal filed on behalf of the company whose name is struck off is maintainable and the conclusion of the Bench in para 24 being relevant is reproduced below:-

> *"24. CONCLUSION:-*
> *(i). Though the Assessee company has been struck off under Section 248 of the Companies Act 2013, in view of sub-sections (6) and (7) of Section 248 and Section 250 of companies Act 2013, the Certificate of Incorporation issued to the Assessee company cannot be treated as cancelled for the purpose of realizing the amount due to the company and for payment or discharge of the liability or obligations of the company, we are of the opinion that the Appeal filed by the struck off Assessee Company or Appeal filed by the Revenue against the struck off*

Company are maintainable. Therefore by rejecting the contention of the Ld. DR, we hold that the present Appeal filed by the Assessee (struck-off company) is maintainable and the same has to be decided on merit.
(ii). Since, we held that, the present Appeal is maintainable, the Counsel appearing on behalf of the Assessee Company has every locus to represent the Assessee in the present Appeal.
(iii). Office is directed to list the appeal before the regular Bench for hearing on 07/09/2022."

27. The aforesaid decision categorically holds that the certificate of incorporation issued to the assessee company cannot be treated as cancelled for the purpose of realizing the amount due to the company and for payment and discharge of the liability or obligations of the company. Though in that case assessment order was not passed against a company whose name was struck off, and name was struck off at stage of pendency of appeal before the Tribunal, however, the ratio of the order of the coordinate Bench substantiates our conclusion that as for the purpose of tax liability the provisions of the Act concerning the amalgamated corporate entities or which are liquidated, are not applicable, as different consequences follow under law, in case of the company whose name is struck off on discontinuance of business

28. Further more, a coordinate Bench wherein, both of us, were on the Bench had considered the aspect of effect of passing an

assessment order in case of a company whose name is struck off, and in the case of ***Zoetic Infrastructure and Constructions Pvt. Ltd. vs. ITO, ITA No.5896/Del/2019, order dated 10.08.2022***, we held in para 8 to 10 as follows:-

> *"8. After taking into consideration the judgments relied by Ld. Counsel for the assessee, the Bench is of firm opinion that the same are not applicable on the present facts and circumstances. The judgments relied are in regard to companies which were dissolved pursuant to the orders of Hon'ble High Courts in Company Petition or the assessee had become non- existing entity, due to amalgamation of the company. However, here is the case where admittedly the name of directors of the assessee company were disqualified by ROC u/s 164(2) of the Companies Act with effect from 01.11.2016 till 31.10.2021 leading to struck off of the name of company from Register of Companies and consequential dissolution with effect from 07.06.2017 vide order dated 30.06.2017. The same was in pursuant of powers under sub section 5 of section 248 of the Companies Act r.w.r. 3 and 9 of the Companies (removal of names of companies from Register of Companies) Rules, 2016. This dissolution after struck off the name of company by Register of Companies has to be distinguished with dissolution pursuant to orders of Hon'ble High Court or amalgamation of the Companies.*
>
> *9. The ld. AO had approached the NCLT for restoration of the name of company as the reassessment proceedings were pending before him which were getting time barred on 31.12.2018. The restoration of name of the company will have a retrospective effect as if name of company was never struck off, however the stringent law of limitation under the Act would have debarred the Ld. AO from passing re-assessment order after 31.12.2018. Even if the petition u/s 252(1) r.w.s. 252(3) of the Companies Act was allowed and the name of company was restored,*

as if, it was never struck off, that would not have revived the limitation for re-assessment which had started to run and would have ended on 31.12.2018. Therefore, the impugned assessment order cannot be said to be void ab initio having been passed on a non-existing entity. ***Like protective assessments, the preemptive assessments made against companies whose name have been stuck off by Registrar of Companies, for the statutory defaults under the Companies Act, are valid and cannot be set aside on Jurisdictional defect.*** *More so when revival application is sub judice. So there is no substance in the grounds raised.*

10. However, as the Ld. Counsel for assessee claims that the assessee has good case on merits but same require verification of facts and assessee was ex-parte in assessment proceedings. The ends of justice will be served by letting assessee appear before Ld. AO and justify its claim to the satisfaction of Ld. AO."

29. In the light of the aforesaid discussion, determining both the issues against the appellant Mr. Boopendradas (Vikash) Sungker, **the appeal is dismissed.**

Order pronounced in the open court on 06.09.2024.

Sd/-	Sd/-
(DR. B.R.R. KUMAR)	(ANUBHAV SHARMA)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 06th September, 2024

dk

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi