IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 2165/MUM/2023
(Assessment Year: 2018-19)

DY. Commissioner of Income Tax, Central Circle-3(4) Room No. 1915, 19th Floor, Air India Building, Nariman Point, Mumbai-400021	Vs.	Samagra Wealthmax private Limited, 5th Floor, Sunteck Centre 37-40 Subhash Road, Vile Parle East, Mumbai-400 057
(Appellant)		**(Respondent)**

PAN No. AAQCS5451E

Assessee by	:	Shri Rakesh Joshi & Shri Gaurav Kabra, ARs
Revenue by	:	Shri Dr. Kishor Dhule – CIT DR

Date of hearing: 26.07.2024
Date of pronouncement 08.10.2024

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the Deputy Commissioner of Income Tax, Central Circle-3(4), Mumbai (the Assessing Officer) for Assessment Year (A.Y.) 2018-19 against the appellate order passed by the Commissioner of Income Tax (Appeals)- 51 (learned CIT(A)), Mumbai dated 13.03.2023 wherein the

appeal filed bySamagra Wealthmax private Limited [the assessee, also referred to as Samagra] against the assessment order passed by National e-assessment, Delhi (the Assessing Officer) dated 29.04.2021, was partly allowed.

02. The learned Assessing Officer is aggrieved with the appellate order raising following two grounds of appeal:

> *"1. On the facts and in the circumstances of the case, the learned CIT (A) is not justified in holding that no income is generated on account of credit of ₹149,29,00,000/- as reserve and surplus, ignoring the fact that no consideration was paid by the assessee company to the shareholders of the amalgamating company.*
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> *2. On the facts and in the circumstances of the case, the learned CIT (A) is not justified in holding that the reserve and surplus credited in the balance sheet of the assessee company (amalgamated company) of ₹149,29,00,000/- as a capital in nature without appreciating the fact that no basis what so ever was furnished by the assessee about the value of assets taken over by the amalgamated company of ₹150,12,85,900/-. The appellant craves to leave, to add, to amend and/ or to alter any of the ground of appeal, if need be. The appellant, therefore, prays that on the ground stated above, the order of the learned CIT (A)-51, Mumbai may be set aside and that of the Assessing Officer Restored. "*

03. Assessee is a Company engaged in the business of Real Estate, filed its return of income on 29.09.2018 at a total

income of Rs.19,09,730/-. This return was picked up for scrutiny under the e-assessment scheme 2019 on the issue of amalgamation or demerger. The assessee is a Company incorporated under the Companies Act and during the year, with an intent to simplify the group structure, rationalize the administrative overhead and to achieve greater administrative efficiency, M/s Celina Buildcon and Infra Private Ltd. was amalgamated with the assessee company as per the scheme of amalgamation approved by the Regional Director, Western Region, Mumbai. In accordance with the scheme Rs.1,49,29,00,000/- was credited to the capital reserve.

04. The assessee company held the entire share capital of M/s Orval Corporate Solution Private Limited (Orval) which in turn held the entire share capital of Celina Buildcon and Infra Pvt. Ltd. Thus, Celina Buildcon and Infra Pvt. was indirectly owned subsidiary company of the assessee. Therefore, because of restriction u/s.19 of the Companies Act, 2013 no shares were issued by the assessee to the shareholders of Celina Infra Buildcon and Infra Pvt. Ltd. on amalgamation of Celina with the assessee. Clause-5 of the Scheme specifically provided that the equity shares in transferor company (Celina) are wholly owned by Orval Corporate Solutions Private Ltd. (Orval), which in turn is a wholly owned subsidiary of the transferee company (the assessee/Samagra) and, therefore, the assessee would not issue any equity shares as consideration for merger. Further, Rs.149.29 crores was invested by Orval in Celina by way of subscription to rights issue of equity shares and thus was in the nature of equity contribution.

05. The learned Assessing Officer noted that at the end of the F.Y. 2017-18, Orval Corporate Solutions have shown NIL assets or investment. In fact, the Orval Corporate Solution has booked amount of Rs.149.29 crores of diminution in the value of assets. Therefore, the above transaction generated capital reserve in the books of the assessee company of Rs.149.29 crore. On examination of the scheme of amalgamation and the consequent book entries, the learned Assessing Officer issued a show cause notice to the assessee as to why the amount of Rs.149.29 crores should not be treated as income of the assessee company for A.Y. 2018-19 either as income from other sources or business income by invoking the provisions of Section 41(1) of the Act.

06. The learned Assessing Officer alternatively also held that assessee is not the holding company of Celina Buildcon, but Orval Corporate Solution Pvt. Ltd. is the holding company of Celina Buildcon. Thus, the merger of Celina Buildcon into the assessee is not covered. Thus, the merger of Celina Buildcon into the assessee is not covered under the provisions of Clause(v) of Section 47 of the Act. Consequently, the assessee cannot claim the benefit of Section 56(2)(X) (c) of the Act. According to the Assessing Officer all the three companies are different entities. The Assessing Officer further noted that the Directors of Celina and Orval are the same persons and all three companies belonged to the same group. He held that there cannot be any reasons as to how an investment made by Group Company Orval into its subsidiary Celina which ultimately merged into the holding company of Orval i.e., assessee can have hundred percent diminution in value in the very same year. Further if there is no liability to be paid back at the end of the year by Celina to Orval, the assessee got

richer with an asset of Rs.149.29 crores for which it must pay corresponding amount as merger consideration. Thus, it is evident that the assessee company has received assets worth Rs.149.29 crores without consideration. Accordingly, the provisions of Section 56(2)(x) (c) of the Act are applicable.

07. Thus, according to him, the issue of diminution in value of investment can be separately dealt with in the hands of Orval Corporate Solutions Pvt. Ltd. but assessee was issued a show cause notice as to why the amount of Rs.149.29 crores be not taxed under the provisions of Section 56(2)(x)(c) of the Act.

08. The assessee submitted its reply stating that.

i. Amalgamation of Celina with the assessee comply with the definition of amalgamation u/s.2(1B) of the Act. The assessee submitted that one of the conditions for a merger to qualify as an amalgamation is that shareholders holding not less $3/4^{th}$ in the value of the shares in the amalgamating company should become shareholders of amalgamated company by virtue of the amalgamation. However, exception in the case is that the shares of the amalgamating company are already held by the amalgamated company or its subsidiary. As the shareholding of Celina is held by subsidiary of assessee company, the merger qualifies as an amalgamation and all the exemptions provided should be available.

ii. Assessee further referred to the provisions of the Companies Act and submitted that issuance of shares by assessee to its wholly owned subsidiary

would have violated the provisions of the Companies Act. Looking at that the Regional Director have approved the scheme of merger.

iii. Assessee also submitted that as no shares were issued, no consideration was paid pursuant to the merger, Orval wrote off its entire investment in the shares of Celina. Orval did not claim the diminution in the value of the investment as an expense at the time of filing of its return of income. Thus, no benefit has been claimed by Orval on the write off of the investment.

iv. Reserve has arisen in the books of the assessee company pursuant to the accounting treatment provided in the scheme. The same was reserve of capital nature and, therefore, should not be taxable in the hands of the assessee.

v. Assessee further stated that provisions of Section 47(vi) of the Act provides that the receipt of any property by assessee i.e., amalgamated company pursuant to merger from Celina i.e., amalgamating company does not amount to transfer and, therefore, nothing is taxable in the hands of the assessee u/s. 56(2)(x) of the Act. Thus, the claim of the assessee is that the above merger is tax neutral.

vi. Assessee submitted that the above receipt is not chargeable to tax as income at all. The assessee relied on the several judicial precedents.

vii. With respect to the taxability u/s. 41(1) of the Act, the assessee submitted that the amount received by Celina was not in the form of any loss or expense or trading liability for which allowance or deduction was allowed to Celina, but it was by way of share capital and, therefore, the provisions of Section 41(1) does not apply.

viii. Thus, the claim of the assessee is that neither the above sum is taxable u/s.56(2)(x) of the Act and nor u/s.41(1) of the Act.

ix. The assessee also submitted that even otherwise the assets acquired by the assessee does not fall within the meaning of the term property and, therefore, the provisions of Section 56(2)(x)(c) of the Act does not apply.

09. The learned Assessing Officer rejected the contentions of the assessee and held that the assessee has received assets worth Rs.149.29 crores without consideration and, therefore, the same is required to be added u/s.28(iv) of the Act.

010. Accordingly, the assessment order u/s.143(3) of the Act read with section 144B of the Act was passed on 29.04.2021 determining total income of the assessee at Rs.149,48,9,730/- against the returned income of Rs.19,09,730/- thereby making an addition of Rs.149.29 crores.

011. The assessee aggrieved with assessment order preferred appeal before the learned CIT(A) contesting that the above sum is neither taxable u/s.28(iv) of the Act and nor u/s. 56(2)(x)(c) of the Act. The learned CIT(A) considered the

above submission of the assessee as per paragraph 7 of his order as under:

"7. Ground No. 1 pertains to the addition of Rs. 149,29,00,000/- as capital reserve generated on count of amalgamation as income u/s 28(iv) of the Act.

7.1 The submissions made by the assessee in respect of Ground no.1 are as under :-

Ground No. 1

"9. At the outset, we would like to submit that Samagra Wealthmax Private Limited ('Samagra' or 'appellant'). along with its nominee, held the entire share capital of Orval Corporate Solutions Private Limited ('Orval). Orval, along with its nominee, in turn held the entire share capital Celina Buildcon and Infra Private Limited (Celina). Therefore, Celina was an indirect wholly owned subsidiary of the appellant.

10. Thus, with an intent to simplify the group structure, rationalize the administrative overheads and to achieve greater administrative efficiency, Celina Buildcon and Infra Private Limited and was amalgamated with the appellant as per the section 233 of the Companies Act, 2013 during the year under consideration. Consequently, all the assets and liabilities of Celina stood transferred to the appellant. Since, the appellant was the ultimate holding company of M/s. Celina Buildcon and Infra Pvt. Ltd, no shares were issued were issued by the appellant to the shareholders of Celina as consideration for the merger in view of the

provisions of Section 19 of the Companies Act, 2013 which prohibits any holding company from allotting or transferring its shares to its subsidiary company and any such allotment/transfer would be considered as void. The provisions of Section 19 of the Companies Act 2013 has been reproduced hereunder for further clarification:

"No company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void."

11. Thus, abiding the provisions as stated above, no shares were issued by appellant to the shareholders of Celina as consideration for the merger as it would indirectly be tantamount to appellant issuing its shares to itself. No company is allowed to hold its own shares and therefore, if the appellant had issued any shares to Celina, it would have been in gross violation of this basic principle and also the abovementioned provisions of the Companies Act.

12. Further the said contention was also mentioned in the scheme of amalgamation between the parties. Your goodself's attention is draw to Clause 5 of the Scheme out by the Regional Director (Ministry of Corporate Affairs) dated 08.05.2018. The same has been reproduced below:

"For the purpose of this Scheme, it is hereby clarified that the equity shares in Transferor Company are wholly owned by Orval Corporate Solutions Private Limited, which in tum is a wholly owned subsidiary of the Transferee Company. Hence the Transferee Company would not issue any equity shares as consideration for merger."

Copy of the scheme as mentioned in enclosed in the paper book.

Thus, considering the provisions of the scheme of amalgamation approved by the Regional Director (Ministry of Corporate Affairs) and the restrictions provided under the Companies Act, the appellant had rightly not provided any shares to shareholders of its subsidiary le Celina Buildcon and Infra Private Limited.

13. Further in addition to the above, it is pertinent to reproduce the section 2(1B) of the Income Tax Act, 1961 which defines Amalgamation as follows:

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

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation.

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation.

(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company:" [Emphasis applied)

14. It may be noted that one of the conditions for a merger to qualify as an 'amalgamation' as per the provisions of Act, is that shareholders holding not less than three-fourths in value of the shares in the amalgamating company should become shareholders of the amalgamated company by virtue of the amalgamation. However, the said sub-clause (iii) provides an exception in case the shares of the

amalgamating company are already held by the amalgamated company or its subsidiary Thus, based on the above, the said merger of Celina Into the appellant qualifies as an amalgamation u/s 2(1B) and consequently all the exemptions provided in the Act should be available to the said merger.

15. Further, we would like to draw the reference to clause 4.7 of the Scheme which states as under:

"This Part of the Scheme has been drawn up to comply with the conditions relating to "Amalgamation as specified under Section 2(1B) of the Income Tax Act, 1961. If any terms or provisions of the Scheme are found or interpreted to be Inconsistent with the provisions of the said Section of the Income Tax Act, 1961, at a later date including resulting from an amendment of law or for any other reason whatsoever, the provisions of the said Section of the Income Tax Act, 1961, shall prevail and the Scheme shall stand modified to the extent determined necessary to comply with Section 2(1B) of the Income Tax Act, 1961. Such modification will however not affect the other parts of the Scheme."

Considering the scheme has been approved by the Regional Director on behalf the Central Government (powers delegated to Regional Director), issuance of shares by appellant to its wholly owned subsidiary would have violated the provisions of the Companies Act.

Further, with regards to the allegation made by the Assessing Officer by adding the amount of Rs 149.25 crore u/s 28(iv) of the Act, it is submitted that the reserve has arisen on account of amalgamation pursuant to the accounting treatment provided in the Scheme (which was in accordance with the applicable accounting standards) and that the said reserve was a reserve of capital nature and not a benefit or a perquisite or advantage of any kind accruing to the appellant and thus should not be taxable in hands of the assessee. Copy of the statutory auditor certifying that the accounting treatment provided in the scheme was in accordance with the applicable standards is mentioned in the financial statement which is enclosed in paper book.

17. To examine the applicability of provisions TMENT of section 28(iv) of the Act, the relevant provision is reproduced herein below:

"28 The following Income shall be chargeable to income-tax under the head 'Profit and gains of business or profession."

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of profession."

18. In order to tax any amount w/s. 28(iv) of the Act, the following prerequisites need to be satisfied.

(i) there must be benefit or perquisite.

(ii) It must be received in a form other than money.

(iii) it must arise out of the business or profession carried on by the recipient, and

(iv) it must be revenue in nature.

a) At first, it is submitted that there is absolutely no benefit or perquisite arising out of the scheme of amalgamation. The appellant was indirectly holding or ultimate holding company having the shares of Celina through its 100% subsidiaries and nominees which after the amalgamation led to the direct ownership of the assets in the appellant's name. In the whole process, the appellant has neither become richer nor poorer. Thus, the first condition of section 28(iv) of the Act le., receipt of a benefit or perquisite, is completely absent in the present case as a sine qua non of the same is that the recipient has gained as a consequence of the transaction.

b) Thereafter, it is submitted that, a book entry recording a reserve is a consequence of the amalgamation, which entry is required to be passed for the limited purpose of balancing the account based on the double entry system employed, cannot give rise to any benefit or perquisite in the course of the business. The only relationship between two companies were that of indirect holding between them. The reserve arose out of the amalgamation pursuant to the scheme sanctioned by the Regional Director on behalf the Central Government (powers

delegated to Regional Director). In this factual background, it cannot be said that the amalgamation reserve arose out of any business activity of the appellant. Thus, the reserve created on account of amalgamation is capital in nature and cannot be said to be created on account of business activity. In this regard. reliance is placed on the following judicial pronouncements wherein it has held concluded that reserve arising out of amalgamation is capital in nature and cannot be treated as revenue under the ambit of section 28(lv) of the Act. The same are reproduced as under-.

- CIT Vs Stad Ltd., ITA No. 118 of 2015 (Madras High Court)

A plain reading of the above-said provision makes it clear that the amount reflected in the balance sheet of the assessee under the head reserves and surplus cannot be treated as a benefit or perquisite arising from business or exercise of profession. The difference amount post amalgamation was the amalgamation reserve, and it could not be said that it is out of normal transaction of the business. The present transaction is capital in nature arose on account of amalgamation of four companies. Hence, we have no hesitation to hold that the manner in which the Revenue wants to treat this amount is not in consonance with Section 28(iv) of the Income Tax Act."

- ITAT Kolkata Bench in the case of ITO vs Kyal Developers (P.) Ltd (2014) 42 taxmann.com 70 held as under

"In the present case there is no maternal whatsoever before us to indicate that the benefit, even if accruing to the assessee, on account of amalgamation by way of merger as not in revenue field, and not of an income nature. Accordingly, there was no occasion to invoke Section 28(iv) of the Act. According to us, CIT(A) was quite justified in his observations that the amalgamation is not an adventure in the nature of trade" and that the amalgamation is not an adventure in the nature of trade" and that "this transaction is clearly a capital account transaction, and he was justified in deleting the addition."

- ITAT Delhi Bench in the case of Aamby Valley Ltd. v. ACIT (2019) 102 taxmann.com 385 (Delhi Trib.) held as under

"107.2……..

……..Thus, in our view, the amalgamation cannot be regarded to be the ordinary business transaction. The Ld. D.R. though, contended that benefit has arisen to the assessee by way of increase in general reserve in consequence of the Composite Scheme of Arrangement and Amalgamation and assessee has no other activities except that assessee is in the business, therefore, the benefit cannot be said to be arisen from any activity other than the business. We

do not agree with the submission of the Ld. D.R. In our view, the net increase in the general reserve of the assessee-company is neither a benefit nor a perquisite nor it is arisen out of carrying on of the business or profession by the assessee. The transaction of Composite Scheme of Arrangement and Amalgamation cannot be regarded to be the one carried into during the course of carrying on the business. We, therefore, hold that provisions of Section 28(iv) is not applicable to the facts and circumstances of the case. We, accordingly, set-aside the orders of the authorities below and delete the addition of Rs 46,999.38 crores made under section 28(IV) of the Income Tax Act."

- Nerka Chemicals P. Ltd. Vs. DCIT ITA No. 4423/ Mum/2014, 4585/ Mum/2015 & 4850/Mum/2016
- Spencer & Co. Ltd. V. ACIT, Chemical, Madras ITAT 440/Mad/2011
- ITO Vs Shreyas Investment P. Ltd., 1485/Ko/2014. Kolkata ITAT

Thus, examining the present case the touchstone of aforesaid judicial pronouncements, we humbly submit that the capital reserve cannot be treated as an Income u/s 28(iv) of the Act.

19. Further without prejudice to the above, the Ld. AO in his assessment order on page 3 has mentioned as follows:

"It is an undisputed fact that Samagra is not the holding company of Celina buildcon rather it is Orval corporate solution. Thus, the merger of Celina Buildcon into Samagra wealthmax is not covered under the provision of Clause 9(v) of Section 47 of the of Act. However, invoking the provision of section 47 (V) of the Act into the instant Situation intends to ignore the above fundamental principle of corporate laws.

Consequently, assessee Company is not entitled to claim the benefit of Section 56 (2)(c) of the Act."

20. In this regard, we would like to re-iterate that the appellant was holding 100% equity shares of M/s. Orval Corporate Solutions Private Limited which in turn was holding 100% of the shares of M/s. Celina Buildcon and Infra Private Limited. Thus, the appellant was indirectly holding 100% shares of M/s. Celina Buildcon and Infra Private Limited. It is submitted that the term "subsidiary" as mentioned in Section 47(v) of the Act has not been defined in the Income Tax Act, 1961. Therefore, a reference needs to be made to the provisions of the Companies Act, 2013 to understand the meaning of the term subsidiary company. A perusal of the provisions of Section 2(87) of the Companies Act, 2013 would show as follows:

"Subsidiary company or subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company-

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one half of the total share capital either at its own or together with one subsidiary companies."

Since in the present case, the appellant together with its subsidiary (i.e., M/s. Orval Corporate Solutions Private Limited) was holding more than one-half of the total share capital of M/s. Celina Buildcon and Infra Private Limited, M/s. Celina Buildcon and Infra Private Limited is a subsidiary company of the appellant. Thus, the term subsidiary as mentioned in Section 47(v) of the Act includes a "step-down subsidiary. The same has been recently held by the Hon'ble Kolkata ITAT in the case of Emami Infrastructure Ltd. vs. ITO [2018] 91 taxmann.com 62 (Kolkata-Trib.) wherein the Hon'ble Kolkata ITAT has followed the principle laid down by the Jurisdictional Bombay HC in the case of Hon'ble Jurisdictional Bombay HC in the case of Petrosil Oil Company Limited vs. CIT [1999] 236 ITR 220 (Bom.).

21. Thereafter, your attention is also drawn to the provisions of section 47 of the Income Tax Act, 1961 (The Act) which provides for certain "transactions not regarded as transfer."

Clause (vi) of Section 47 provides as follows:

"(vi) any transfer, in a scheme of amalgamation, of a capital asset by the amalgamating company to the

amalgamated company if the amalgamated company is an Indian company:"

Since the merger qualifies as an exempt transfer u/s 47(vi) of the Act, receipt of any property by the appellant (amalgamated company), pursuant to merger from Celina (amalgamating company) should be exempt in hands of appellant u/s 56(2)(x) of the Act on account of the specific exemption provided. Your goodself may also appreciate that the merger has complied with all the conditions mentioned under section 2(1B) of the Act. Thus, the Ld. AO's allegation that the said transaction cannot be regarded as a transfer as it does not falls within the ambit of Section 47(v) of the Act is erroneous and bad in law.

Therefore, we humbly submit that the reserves and surplus arising out of amalgamation should not be treated as Income of the appellant in either section 28(iv) of the Act nor in section 56(2)(x) of the Act.

7.2 The submissions of the appellant and the findings of the AO have been considered. It is noted that during the year under consideration, Celina Buildcon and Infra Private Limited was amalgamated with the assessee company as per the scheme of amalgamation approved by the Regional Director, Ministry of Corporate Affairs, Western Region, Mumbai. In accordance with the scheme approved by the Regional Director, Ministry of Corporate Affairs, an amount of Rs 1,49,29,00,000/- was credited to the capital reserve by the assessee company. The AO in his assessment order has added

Rs. 1,49,29,00,000/- to the total income of appellant u/s 28(iv) of the Income tax Act 1961. The appellant through its submission has submitted that the reserve has arisen on account of amalgamation pursuant to the accounting treatment provided in the Scheme and which was in accordance with the applicable accounting standards. The capital reserve had to be created as the appellant was the ultimate holding company of Celina and no shares were issued by the appellant to the shareholders of Celina as consideration for the merger in view of section 19 of the Companies Act 2013 which prohibits any holding company from allotting any shares to its subsidiary company. The said reserve was a reserve of capital nature and not a benefit or a perquisite or advantage of any kind accruing to the appellant and thus, according to the appellant, should not be held as taxable in hands of the assessee.

7.3 Before adjudicating the said issue, one would like to reproduce the provisions of section 28(iv) of the Act which is the basis of the addition made by the AO. The same is reproduced herein below:

"28 The following income shall be chargeable to income-tax under the head "Profit and gains of business or profession.

……..

(iv) the value of any benefit or perquisite, whether arising from business or the exercise of profession.",

7.4 Section 28(iv) of the Act specifies the following conditions which need to be satisfied before making any addition which are as under:

(i) there must be benefit or perquisite.

(ii) It must arise out of the business or profession carried on by the recipient, and

(iii) it must be revenue in nature.

7.5 In the instant case, it is noticed that no benefit or perquisite is arising out of the scheme of amalgamation. The appellant was indirectly holding or in other words was the ultimate holding company having the shares of Celina through its 100% subsidiaries and nominees which after the amalgamation led to the direct ownership of the assets in the appellant's name. In the whole process, the appellant has neither become richer nor poorer. If any benefit or perquisite does not arise from the business or profession carried on by the assessee, the provisions of Section 28(iv) in any case cannot be applied. It is evident that the intention of the Legislature is not to apply the provisions of Section 28(iv) to a case where there is increase in the general reserves arising due to recording of the shares in the balance sheet of the assessee at their market value.

7.6 Further, it is also observed that a book entry recording a reserve is a consequence of the amalgamation, which is required to be passed for the limited purpose of balancing the accounts based on the double entry system employed and cannot give rise to

any benefit or perquisite in the course of the business. The only relationship between the two companies i.e., Samagra and Celina was that of indirect holding between them. In this factual background, it cannot be said that the amalgamation reserve arose out of any business activity of the appellant Scheme of Amalgamation cannot also be regarded as an adventure in the nature of trade. Thus, the reserve created on account of amalgamation is capital in nature and cannot be said to be created on account of regular business activity. Similar view has been taken by the Hon'ble Madras High Court, in the case of CIT vs Stads Ltd., (2015) 373 ITR 313 (Mad.) in which in para 11 was held as Under:

> *"A plain reading of the above said provision makes it clear that the amount reflected in the balance sheet of the assessee under the head "reserves and surplus cannot be treated as a benefit or perquisite arising from business or exercise of profession. The difference amount post-amalgamation was the amalgamation reserve, and it could not he said that It is out of normal transaction of the business."*

7.7 Further Hon'ble ITAT, Kolkata in the case of ITO vs Shreyans Investments Private Limited 141 ITD 672 (Kolkata-Tribunal) relying on the decision of the Hon'ble Bombay High Court in the case of Mahindra ang Mahindra 261 ITR 501 (Bom.) had taken a view that reserve arising out of amalgamation cannot be treated as income under section 28(iv) of the Income-

Tax Act, 1961. The relevant extracts of the said decision are as under:

8. To find out whether or not the benefit, even if that be so, is on capital account or revenue account, it is necessary to understand the nature of transaction which has resulted in, what the Assessing Officer, perceives as benefit to the assessee. This was a case of amalgamation in the nature of merger, and an amalgamation in the nature of merger, in corporate parlance, is the process of blending of two or more companies into one of these blending companies, the shareholders of each blending company becoming substantially the shareholder of the company which holds the blended undertaking. The expression 'amalgamating company' is used for the blending company' which loses its existence into the other company and the expression 'amalgamated company is used for blended undertaking, which holds existence of those two or more companies. In essence thus, the whole exercise of amalgamation in the nature of merger is an exercise in that of pooling of resources, as also pooling of assets, into the company in which two or more companies are blended. It is a process of corporate reconstruction, and it is only with the approval of Hon'ble jurisdictional High Court that this exercise is carried out. In the present case also, as stated in paragraph 4 of Part I of Schedule A (i.e. scheme of amalgamation) to Hon'ble Calcutta High Court's order dated 9th April 2008, "for the purpose of better, efficient and economical management, control and running of the business and to withstand the

recessionary trend in the economy of the business undertaking concerned and for administrative convenience and to obtain advantage of economies of large scale, the present scheme is proposed to amalgamate the transferor company (i.e. VVPL) with the transferee company (i.e. the assessee)". As a result of amalgamation, the assessee, being the transferee company, will increase its assets and liabilities, and, even if there be any benefit in the process, such a benefit can only be in the capital field because its relatable to the non-trading assets and capital. What it affects is the capital structure of the assessee company and the manner in which business is consolidated. As the Assessing Officer himself observes, ".....this exercise of amalgamation is also aimed at bolstering the capability of the assessee to conduct business more dynamically and earn more profit. So, the enhancement of its capital reserve, as a result of this amalgamation can only be construed as a benefit accrued to the assessee...", but then it is not even the case of the Assessing Officer that the benefit is in the revenue field, and unless the Assessing Officer is to discharge the onus of demonstrating that the benefit is in the revenue field, there cannot be any occasion to invoke Section 28(iv). Applying the test laid down by Hon'ble Madras High Court, in the case of Seshasayee Brothers (supra), also, we find that the benefit is referable to the capital and is thus not of an income nature. Even if. as the Assessing Officer observes, it can be surmised that the assessee is benefited in a myriad way by way of amalgamation", it does not lead to the conclusion that the benefit is in

revenue field which alone can be treated as income and thus be considered for taxability under section 28(iv) of the Act. The onus is on the Assessing Officer to demonstrate that the receipt is of the revenue nature.

9. We have noted that the Assessing Officer's observations to the effect that 'business' under section 28 has a very broad meaning and may be used in different connotations" and that it includes adventure in the nature of trade, as also his reliance on Hon'ble Supreme Court's judgment in the case of Rajputana Textiles (Agencies) Lid. v. CIT [1961] 42 ITR 743 (SC), wherein it was held that where from the very beginning, purchase of shares is made with the intention of selling them, at a profit, it is an adventure in the nature of trade. However, we are unable to see any merits in these arguments either. Whatever be the scope of expression business, an advantage has to be of income nature first, and when it is not of income nature, it cannot be brought to tax under the head profits and gains from business or profession. As regards the transactions in the nature of 'adventure in the nature of trade' in a situation in which shares are purchased with an intention of selling the same, right now we are dealing with a case of amalgamation by way of merger and not by way of purchase of shares, and, therefore, there cannot be any question of selling of the shares, nor does this judicial precedent deal with the issue before us in any other manner. There is no material whatsoever before us to indicate that the benefit, even if accruing to the assessee, was in

revenue field, in the course of assessee's business dealings or of trading nature in view of these discussions, we are of the considered view that the benefit, if any, derived by the assessee on account of amalgamation by way of merger was not in revenue field, and not of an Income nature, Accordingly there was no occasion to invoke Section 28(iv) of the Act. Learned CIT(A) was quite justified in his observations that "the amalgamation is not an adventure in the nature of trade and that this transaction is clearly a capital account transaction." Learned CIT(A) was quite Justified in deleting the impugned addition, we uphold his conclusions, and we decline to interfere in the matter.

7.8 Further in order to analyze the applicability of section 56(2)(x) of the Act, we have to first see section 47 of the Act, which provides for certain "transactions not regarded as transfer" and is reproduced here below:

Clause (vi) of Section 47 provides as follows:

(vi) any transfer, in a scheme of amalgamation, of a capital asset by the amalgamating company to the amalgamated company if the amalgamated company is an Indian company,"

7.9 Since in the given case, the amalgamation qualifies as an exempt transfer u/s 47(vi) of the Act, therefore, receipt of any property by the appellant (amalgamated company) pursuant to amalgamation with Celina (amalgamating company) would be considered as a

transaction not regarded as transfer. Accordingly, the proviso of section 56(2)(x)(c) of the Act mentions that provisions of section 56(2)(x)(c) shall not apply to any sum of money, or any property received in certain cases. Transaction u/s 47(vi) of the Act is also included in this category. Thus, on combined reading of above two sections, it is clear that the provisions of section 56(2)(x)(c) of the Act would also not be applicable to the transfer in the given case on account of the specific exemption provided.

7.10 Furthermore, it is also pertinent to analyze the applicability of section 115JB of the Act to this transaction of amalgamation. The appellant has through its submissions submitted that both revaluation reserve and capital reserve are different terms, and it is pertinent to mention that capital reserve created in amalgamation cannot be regarded as revaluation reserve. It is evident that the capital reserve does not fall within the definition of 'Income under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. The same was held by Hon'ble Calcutta High Court in the case of PCIT vs. Ankit Metal and Power Ltd. (109 Taxmann.com 93) and by the Hon'ble Mumbai ITAT in case of Balibo Limited Vs DCIT (ITAT Mumbai) ITA No. 5428/Mum/2015. In view of the above, since the capital reserve, which arose in amalgamation, is not in nature of income and is not a revaluation reserve, the same cannot be included in book profit u/s 115JB of the Act.

7.11 Also, on perusal of the submissions made by the appellant, it is also noticed that due to amalgamation of Celina with Samagra, the loss suffered by the Orval during the FY 2017-18 was not claimed or carried forward by the Orval while filing its return of income for the FY 2017-18 relevant to AY 2018- 19.

7.12 In view of the above, I have no hesitation to hold that the manner in which the AO has treated this amount is not in consonance with section 28 (iv) and other relevant provisions of the Income-tax Act, 1961. Accordingly, the addition made by the AO is deleted and the ground of appeal raised by the appellant is allowed."

012. In view of above facts, the learned CIT(A) deleted the above addition. The Assessing Officer is aggrieved and is in appeal before us.

013. In the appeal of the assessee, the Assessing Officer raised the ground that the addition is deleted by the learned CIT(A), holding that no income is generated on account of credit of Rs.149.29 crores and further by Ground No.2 that the learned CIT(A) is not correct in holding that reserve & surplus credited in the balance sheet of the assessee company of Rs.149.29 crores is capital in nature.

014. The learned CIT(DR) vehemently supported the order of the learned Assessing Officer. He submitted that :-

i. He referred to the annual account of the assessee company for F.Y. 2017-18 and submitted that in Schedule-III of the reserve and surplus assessee has credited Rs.149.35 crores as capital reserve on

the merger of the company. He referred to Note No.21 to the financial statement and stated that Celina Buildcon Infra Pvt. Ltd. has been merged with the assessee company as per order of Ministry of Corporate Affairs dated 09.05.2018. All the assets' liabilities and reserves of Celina Buildcon and Infra Pvt. Ltd. as on 01.04.2017 have been taken over by the assessee at their book value. All the reserves of the transferor company have also been transferred as capital reserve of the assessee company. He submitted that Celina Buildcon and Infra Pvt. Ltd. has merged with the assessee company. Such merger is not covered into the definition of amalgamation as per Section 2(1B) of the Act as no shareholders of the Celina were made the shareholders of assessee company. Thus, there is a violation of Section 2(1B)(iii) of the Act. Because of this, the assessee is not entitled to the benefit of provisions of Section 47(vi) of the Act and, therefore, the impugned amalgamation is a transfer chargeable to tax. Further, the amount of Rs.149.29 crores is chargeable to tax u/s. 56(2)(x) of the Act. It was submitted that the learned CIT(A) did not consider the above provisions correctly and, therefore, the order of the learned CIT(A) is not sustainable.

x. He further submitted that the assessee has benefited by generation of the capital reserves of Rs.149.29 crores and has also earned the assets of that value and, therefore, the addition made by the learned Assessing Officer deserves to be sustained.

015. The learned Authorized Representative supported the order of the learned CIT(A) and relied on paper book filed. He explained the scheme of amalgamation between the assessee and Celina Buildcon with the financial statement of the assessee. He also referred to the provisions of Section 19 of the Companies Act which prohibits holding of shares by subsidiary company into holding company. He further referred to the provisions of Section 41(1), 28(4), 47(4) and Section 56(2)(x) of the Act. He referred to the scheme of the amalgamation wherein the appointed date is 01.04.2017 and, therefore, his submission was that provisions of Section 56(2)(x)(c) of the Act does not apply to the above scheme.

016. In the rejoinder, the learned Departmental Representative relied upon the decision of Coordinate Bench in case of Vertex Project LLP (2023) 150 taxmann.com 109 (Hyd).

017. The Ld. AR submitted that decision does not apply due to sunset dates of the respective sections.

018. We have carefully considered the rival contention and perused the orders of the learned lower authorities. We have also considered paper book filed as well as judicial precedents relied on up by parties.

019. Brief facts of the case are that the assessee i.e., Samagra Wealthmax Private Limited, along with its nominee, held the entire share capital of Orval Corporate Solutions Private Limited ('Orval'). Orval, along with its nominee, in turn held the entire share capital of Celina Buildcon and Infra Private Limited ('Celina'). In other words, Celina was an indirect wholly owned subsidiary of the Samagra. During the year under consideration, Celina had raised the capital by issuing

83,87,079 equity shares of Rs. 10/- each at Rs. 178/- per equity share thereby raising a total amount of Rs 149,29,00,000/-. Further it was mentioned that with an intent to simplify the group structure, rationalize the administrative overheads and to achieve greater administrative efficiency, Celina was amalgamated with assessee as per the section 233 of the Companies Act, 2013. The said scheme of amalgamation was approved by the Regional Director of Ministry of Corporate Affairs vide order dated 9th May 2018, copy of order and amalgamation scheme is available in paper book. Since, the appellant was the ultimate holding company of M/s. Celina Buildcon and Infra Pvt. Ltd, therefore on merger the said shares were cancelled and no shares were issued by the assessee to the shareholders of Celina as consideration for the merger in view of the provisions of Section 19 of the Companies Act, 2013.

020. In this regard, it is pertinent to refer the provision of section 2 (1B) of the Act which is as under :-

> "(1B) "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—
> (i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company virtue of the amalgamation.
> (ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company virtue of the amalgamation.

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

021. It may be noted that one of the conditions for a merger to qualify as an 'amalgamation' as per the provisions of Act, is that shareholders holding not less than three-fourths in value of the shares in the amalgamating company should become shareholders of the amalgamated company by virtue of the amalgamation. However, the said sub-clause (iii) provides an exception in case the shares of the amalgamating company are already held by the amalgamated company or its subsidiary. Thus, based on the above, the said merger of Celina into the appellant qualifies as an 'amalgamation' u/s 2(1B) and consequently all the exemptions provided in the Act should be available to the said merger. Due to the above exception, this clause is not applicable in the case of assessee company.

022. Ld. CIT DR relied on the decision of Hyderabad Tribunal in the case of Vertex Projects LLP (150 taxmann.com 109) wherein it was concluded that where pursuant to scheme of amalgamation several companies amalgamated with assessee-company in which public were not substantially interested and shares of amalgamating companies were received by assessee at a price lower than fair market value of shares, Assessing Officer had

rightly charged difference on account of price paid by assessee and FMV of shares as income of assessee under section 56(2)(viia) of The Act. We find that order of Vertex Projects LLp deals with the addition made u/s 56(2)(viia) of the Act. In this regard, it is submitted that section 56(2)(viia) is applicable from 01.06.2010 to 31.03.2017.

023. Provision of section 2 (56) (via) the Act are as under:

"(viia) where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June 2010 **but before the 1st day of April 2017,** any property, being shares of a company not being a company in which the public are substantially interested,—

(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property.

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.

Explanation.—For the purposes of this clause, "fair market value" of a property, being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the Explanation to clause (vii);"

024. In the instant case, it is admitted fact that the appointed date for the said amalgamation is with effect from 01.04.2017 being appointed date as per 1.3 of the schemes. The same was mentioned in the scheme approved by The Regional director,

relevant page of which available on page 26 of the paper book where appointed date defined as April 1, 2017, and also audited financial statements (relevant page 21 of the paper book) wherein the said facts have been mentioned. Thus, the said case law relied upon by the Ld. DR will not be applicable in the instant case as section 56(2)(viia) is applicable only till 31.03.2017.

025. The appellant has received asset worth Rs. 149.29 Crore (on result of amalgamation) without consideration and ld. AO concluded that the said amount should be taxed u/s 28(iv) of the Act.

026. Provision of section 28(iv) of the Income Tax Act, 1961 ("the Act) which are as under:

> "28 The following income shall be chargeable to income-tax under the head 'Profit and gains of business or profession,-
> (iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of profession."

027. Thus, in order to tax any amount u/s. 28(iv) of the Act, the following prerequisites need to be satisfied:

a. there must be benefit or perquisite arising to the company.
b. it must arise out of the business or profession carried on by the recipient; and
c. it must be revenue in nature.

028. In this regard, there is absolutely no benefit or perquisite arising out of the scheme of amalgamation. The appellant was ultimate holding company having the shares of Celina through its 100% subsidiary along with its nominees which after the amalgamation

led to the direct ownership of the assets in the appellant's name. In the whole process, the appellant has neither become richer nor poorer. Thus, the first condition of section 28(iv) of the Act i.e., receipt of a benefit or perquisite, is completely absent in the present case as a sine qua non of the same is that the recipient has gained as a consequence of the transaction.

029. It is also contested that recording a reserve in consequence to amalgamation order is required to be passed for the limited purpose of balancing the accounts based on the double entry system employed and thereby cannot give rise to any benefit or perquisite in the course of the business. The only relationship between two companies was that of indirect holding between them. In this factual background, it cannot be said that the amalgamation reserve arose out of any business activity of the appellant. Scheme of Amalgamation cannot be regarded to be the one carried into during the course of carrying on the business. Thus, the reserve created on account of amalgamation was contested as capital in nature and not created on account of business activity.

030. The ld. CIT (A) considered several decisions wherein it is held that reserve arising out of amalgamation is capital in nature and cannot be treated as revenue under the ambit of section 28(iv) of the Act.

031. Therefore, considering the aforesaid provisions, ld. CIT (A) is correct in holding that capital reserve cannot be treated as an Income u/s 28(iv) of the Act. Therefore, provision of section 28(iv) of the Act is not applicable to the present case.

032. Therefore, considering the above facts Ld. CIT(A) has rightly deleted the addition made by the ld. AO. Hence , we do not find any infirmity in the order of the learned CIT – A in deleting the addition made by the learned assessing officer.

033. In the result, appeal of the learned AO is dismissed.

Order pronounced in the open court on 08.10.2024.

Sd/- Sd/-

(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 08.10.2024
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai