

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.1.2020

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.Nos.21858 and 1759 of 2018
and WMP Nos.25634, 2180, 16198 and 18734 of 2018

M/s.Oasys Green Tech Private Limited
Represented by its authorised signatory
Mr.E.Venkatakrishnaiah ... Petitioner in both W.Ps

Vs.

Income Tax Officer,
Corporate Ward - 5(1)
RoomNo.412, 4th Floor,
Aayakar Bhawan, 121, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034. ... Respondent in both W.Ps

Prayer in W.P.No.21858 of 2018: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, calling for the records of the respondent comprised in its order dated 28.06.2018, passed under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961, in PAN AACBV8021G/CW 5(1), and to quash the same as arbitrary, unjust and illegal.

Prayer in W.P.No.1759 of 2018: Writ Petitions filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, calling for the records of the respondent comprised in its assessment order dated 30.12.2017, passed under Section 144 read with Section 147 of the Income Tax Act, 1961, in PAN AACBV8021G, and to quash the same as arbitrary, unjust and illegal.

For Petitioner in both W.Ps: Mr.Suhrith Parthasarathy

For Respondents in both W.Ps: Mrs.Hema Muralikrishnan
Senior Standing Counsel

C O M M O N O R D E R

Heard Mr.Suhrith Parthasarathy, learned counsel for the petitioner and Mrs.Hema Muralikrishnan, learned Senior Standing Counsel for the respondent.

2. An order of re-assessment dated 28.06.2018 for Assessment Year (AY) 2010-11 passed in terms of the provisions of the Income Tax Act, 1961 (in short 'Act') has been challenged. The main ground on which the impugned order is

assailed is that the entity known as M/s.OAS Digital Infrastructures Private Limited to whom notice under Section 148 of the Act was issued and based upon which the impugned order has been passed, did not exist at the time of issuance of notice and passing of the impugned order.

3. The sequence of relevant dates and events are as follows:

i) OAS Digital Infrastructures Private Limited (in short 'OAS'/transferor) did not file a return of income for AY 2010-11.

ii) OAS stood amalgamated with the petitioner, Oasys Green Tech Private Limited (in short 'OGT'/transferee), with effect from 01.02.2015 per order of the Madras High Court dated 20.08.2015 in Company Petition Nos.203 and 204 of 2015.

iii) Notice under Section 148 of the Act dated 31.03.2017 addressed to OAS was issued, since, admittedly, the Department was unaware of the factum of amalgamation.

iv) On 14.09.2017 OGT wrote to the Department bringing to its notice the merger and also requesting that the notice be handed over to the bearer of the letter.

v) On 09.10.2017, OGT took the view that the proceedings for re-assessment were non est, since notice under Section 148 had been issued upon a non-existing entity.

vi) The Assessing Authority however, on the basis of the notices already issued proceeded to complete the re-assessment exparte passing the present impugned order under Section 144 of the Act, to the best of his judgment.

vii) On merits, cash deposits in the bank account of the assessee have been treated as unexplained cash credits under Section 68 of the Act along with equal penalty.

viii) It is as against the aforesaid order that the petitioner has filed Writ Petition in W.P.No.1759 of 2018.

ix) An order of stay of impugned proceedings granted by this Court on 29.01.2018 was duly brought to the notice of the respondent Officer, despite which, the Officer, being of the view that proceedings for re-assessment were different and distinguishable from proceedings for the levy of penalty, has proceeded to finalise and levy penalty in terms of Section 271 (1) (c) of the Act by order dated 28.06.2018.

xi) As against the above order, the petitioner has filed W.P.No.21858 of 2018. Both the impugned orders of assessment and penalty have been framed on 'OGT (formally known as OAS)'.

4. The crux of the submissions of the petitioner are to the effect that the impugned order is based on a notice dated 31.03.2017 issued to OAS, that was non-existent on that date and hence the aforesaid notice and all subsequent proceedings including the impugned order of assessment and penalty are liable to be set aside.

5. The petitioner places reliance on the following decisions:

i) Principal Commissioner of Income Tax, New Delhi V. Maruti Suzuki India Limited (Civil Appeal No.5409 of 2019 dated 25.07.2019)

ii) Spice Entertainment Ltd. V. Commissioner of Service Tax ((2012) 280 ELT 43)

iii) M/s.Rustagi Engineering Udyog Pvt. Ltd. V. Assistant Commissioner of Income Tax, (W.P.(C) No.1289 of 1999 dated 24.02.2016)

iv) BDR Builders & Developers Pvt. Ltd. V. Assistant Commissioner of Income Tax (W.P.(C) No.2712 of 2016 dated 26.07.2017)

v) Alamelu Veerappan V. The Income Tax Officer, Non Corporate Ward 2(2) (304 CTR 512)

6. Learned Senior Standing Counsel for the revenue submits that the Department was wholly unaware of the proceedings for amalgamation of OAS with OGT. Moreover, the return of income for AY 2014-15 had been filed by 07.03.2016 in the name of OAS by OGT, further confirming the position that OAS was a functioning entity. Income tax refunds issued by the Department in favour of OAS had been duly received and encashed by OGT. Thus it did not lie in the mouth of OGT to canvass the view now that OAS was non-existent and that proceedings initiated in its name would be bad in law.

7. She distinguishes all the decisions cited by the petitioner pointing out that the transferee entities in those cases had duly brought to the notice of the revenue the factum of amalgamation, in spite of which the revenue had initiated proceedings only as against the transferor/amalgamating entity. This was the reason why the Courts (in those cases) had interfered in the proceedings, holding that once the Department had been put to notice about the amalgamation, proceedings ought to have been initiated only in the hands of the transferee entities.

8. The case of Alamelu Veerappan (supra) is distinguished stating that it relates to individuals and not a corporate merger. The provisions of Section 159 that are applicable to the case of individuals are not applicable in the case of companies. The decision has not been accepted by the Department and is pending in Writ Appeal.

9. Heard learned counsel. A relevant factor to determine the assessable entity in cases such as the present, is the conduct of the transferee entity. OGT has not only omitted to bring to the notice of the revenue the factum of amalgamation, but, has by its conduct of filing a return of income post amalgamation in the name of OAS furthered the illusion that OAS continues to exist even after amalgamation. The fact that it has benefitted from the refunds issued in favour of OAS is

also not denied. Thus, by its very conduct, OGT has led the Department to believe that OAS, as an entity, existed.

10. In the case of Maruti Suzuki (supra), the relevant facts are:

- i) The transferor entity was Suzuki Powertrain India Limited (SPIL) and the transferee entity was Maruti Suzuki India Limited (MSIL).
- ii) Return of income had been filed by SPIL, no amalgamation having taken place on that date, i.e., 28.11.2012. On 29.01.2013, the Scheme of amalgamation of SPIL and MSIL was approved with effect from 01.04.2012. On 02.04.2013, MSIL intimated the Assessing Officer of the factum of amalgamation.
- iii) Notice under Section 143(2) and a questionnaire under Section 142(1) were issued to SPIL, despite the Department having been aware that SPIL had ceased to exist upon an amalgamation.
- iv) The transfer pricing order and draft assessment order were also passed in the name of SPIL.
- v) MSIL participated in the assessment proceedings of SPIL and various communications issued by the Department revealed the fact that the Assessing Officer was aware of the amalgamation of SPIL and MSIL.
- vi) The assessment order was challenged by MSIL before the Dispute Resolution Panel (DRP) as a successor-in-interest of SPIL. No objection had been taken by MSIL to the fact that the draft assessment order and transfer pricing order had been passed in the name of SPIL to contend that such a defect would vitiate the proceedings for assessment.
- vii) The order of the DRP was issued in the name of MSIL as successor of SPIL.
- viii) The final assessment order was passed however in the name of SPIL (amalgamated with MSIL) and while challenging the same before the Income Tax Appellate Tribunal (Tribunal) an objection was raised to the effect that the assessment proceedings had been continued in the name of a non-existing entity which vitiated the order.
- ix) The Tribunal as well as the High Court accepted the stand of the assessee giving rise to the appeal before the Supreme Court.
- x) After noticing the sequence of facts as above and several decisions on the point, the Bench distinguished reliance placed by the revenue on the decision of the Delhi High Court in the case of Skylight Hospitality LLP V. Assistant Commissioner of Income Tax, Circle -28 (1), New Delhi ((2018) 405 ITR 296), wherein the Delhi High Court had taken the view that reference to the

wrong assessee in the notice was only a clerical error which could be corrected under Section 292B of the Act.

- xi) The case of Skylight (supra) was by the Supreme Court that held that it was only in the peculiar facts of that case that the Court had condoned the error in naming the assessee and the escapement of income in that case had been established conclusively otherwise.
- xii) The Supreme Court also took note of the position that that the decision in Skylight (supra) had been distinguished by the Delhi, Gujarat and Madras High Courts in the cases of Rajender Kumar Sehgal V. ITO ((2019) 260 Taxman 412), Chandreshbhai Jayantibhai Patel V. ITO ((2019) 261 Taxman 137) and Alamelu Veerappan (supra).
- xiii) Noting specifically that the Assessing Officer (in the case of Maruti Suzuki) had been informed of the fact that the amalgamating company had ceased to exist as a result of the Scheme of Amalgamation, despite which the jurisdictional notice had been issued only in its name, the appeal of the revenue was dismissed.
- xiv) At paragraph Nos.33 and 34, the Bench states as follows:

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

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

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

11. In the case of Spice Entertainment Ltd. (supra), the relevant facts are:

- i) Spice Entertainment Ltd. (SCL/transferor) had filed a return of income for A.Y.2002-03.
- ii) On 11.02.2004 SCL stood amalgamated with M/s.MCorp Private Limited (MPL). Upon receipt of notice of scrutiny, MPL duly brought to the notice of the Assessing Officer the fact that SCL had been dissolved as a result of amalgamation.
- iii) Despite being informed of the fact of amalgamation, the Assessing Officer passed an order of assessment on SCL on 28.03.2005. In second appeal, the Tribunal held that mere failure of the Assessing Officer to mention the correct name of the assessee did not vitiate the assessment, since, in substance and fact, the assessment related only to MCL.
- iv) The reasoning of the Tribunal to the effect that the error in the order of assessment was only procedural was held to be 'blemished with legal loopholes and contrary to law' by the Supreme Court.
- v) The Court noted that from 01.07.2003, SCL ceased to exist, plain and simple.
- vi) Taking note of the position that an Indian Company was a juristic person taking birth with incorporation and dying with dissolution, the Court reiterated that on amalgamation, the amalgamating company that stands subsumed with amalgamated entity and ceased to exist in the eyes of law as a separate company.
- vii) Thus, the framing of an order of assessment in the name of the erstwhile entity, where (a) returns had been filed earlier by the dead entity, (b) the Department was put to notice of such amalgamation, and (c) the amalgamated entity had participated in the assessment, was held to be bad in law as it did not constitute a mere procedural irregularity that could be cured by recourse to Section 292 of the Act.

12. As far as the case of Alamelu Veerappan (supra) is concerned, the decision is wholly distinguishable, since it relates to the provisions of Section 159(2) dealing with a deceased assessee and his legal representatives, whereas the present assessment is made in terms of Section 170 dealing

with succession to business or profession otherwise than on death.

13. In the light of the decisions discussed, let us see the facts in the present case.

- i) No return of income has been filed by OAS for the relevant assessment year. However, there are credits in the bank account that are liable to be explained by the entity for the purposes of determination of taxability.
- ii) The factum of amalgamation was not known to the Income Tax Department. The jurisdictional notice, i.e., notice under Section 148 thus came to be issued to OAS.
- iii) Receipt of notices by OGT is not denied, since it has appeared before the Assessing Officer bringing to its notice the factum of amalgamation only then.
- iv) On 14.09.2017, OGT brings to the notice of the Department the merger of OAS with OGT and specifically requests the Department to handover the notice to its office staff, one Mr.Suresh.
- v) Subsequent notices have been issued to 'OGT (formally known as OAS)' and the order of assessment has also been passed in the name of Oasys Greentech Pvt. Limited, i.e., the petitioner.
- vi) OGT has admittedly filed a return of income in the name of OAS for A.Y.2013-14 even subsequent to amalgamation and also received refunds issued to OAS.

14. The stand of the petitioner to the effect that proceedings for re-assessment ought to have been issued only in the name of OGT is clearly misconceived insofar as the Department has not been put to notice of the factum of amalgamation by OGT till 14.09.2017 and the petitioner has also, by filing a return in the name of OAS and receiving refunds addressed to OAS, furthered the impression that OAS is an existing entity. This argument is rejected. I thus find no infirmity in law insofar as the impugned proceedings for re-assessment are concerned and the same are held to be valid.

15. By letter dated 20.12.2017, the petitioner has sought confirmation as to whether a return of income can be filed manually by it, since it was unable to upload a return electronically, the successor company not having been incorporated for that assessment year. No reply has been given to this letter and instead the impugned order of assessment has come to be passed on 30.12.2017, exparte.

16. For this reason, order dated 30.12.2017 is set aside. The petitioner is permitted to file a return within a period of two (2) weeks from today. It is made clear that the assumption of jurisdiction by the respondent/Assessing Officer is perfectly in order. After hearing the petitioner, the Officer shall complete the proceedings for re-assessment on

merits within a period of four (4) weeks from date of filing of return.

17. These Writ Petitions are dismissed, however, granting liberty as set out above. No costs. Connected Miscellaneous Petitions are also dismissed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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To

Income Tax Officer,
Corporate Ward - 5(1)
RoomNo.412,4th Floor,
Aayakar Bhawan, 121, Mahatma Gandhi Road,
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Chennai - 600 034.

+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No. 3870

+2cc to Mr.Arun Karthik Mohan, Advocate, S.R.No. 4183 & 4184

W.P.Nos.21858 and 1759 of 2018
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BS (CO)

GN(10/03/2020)

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