Is the tax game over after amalgamation?

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Introduction

In a recent decision in the case of G.E. Medical[1], Hon ble Income Tax Appellate Tribunal (ITAT or Tribunal) upheld an assessment framed in the name of an amalgamating company despite that it had ceased to exist because of its amalgamation with another company. The issue of validity of assessment post amalgamation often arises in tax proceedings so the Author through this article seeks to decipher the law surrounding that.

Legal framework

Prior to insertion of Section 24B in the Income tax Act, 1922 (Section 159 of the Income tax Act, 1961), it was held by Bombay High Court[2] that where a person died after the commencement of the financial year but before his income of the previous year was assessed, his executor was not liable to pay tax and that if the death occurred while assessment proceedings were pending then the assessment proceedings could not be continued after his death. Section 159 of the Income tax Act, 1961 corresponds to section 24B (supra) and provides for assessment and tax recovery mechanism after death of the taxpayer.

A company is a juristic personality which not only comes into existence by operation of law but its cessation also takes place by operation of law. Section 159 deals with assessment and tax recovery after the death of a person but there is no similar provision in the Act dealing specifically with companies if they cease to exist on account of winding up or merger. Section 170 deals with cases of succession in general and can be applied to succession of companies by way of amalgamation. It provides that in a case where predecessor cannot be found (e.g. transferor company in case of amalgamation cannot be found) the assessment shall be made on the successor (transferee company) for (a) the year of succession till the date of succession and (b) for the year preceding the year of succession.

Sub-section (2) of Section 170 provides that if the predecessor cannot be found then the *income shall be assessed on* the successor. The purpose of this sub-section is to have the machinery in place for realization of taxes in case predecessor cannot be found. Sub-section (3) complements it by providing for cases where predecessor can be found and has been assessed but tax cannot be realized from him.

Jurisprudence

Various judicial decisions[3] have held that once a company (say transferor) has amalgamated with another (say transferee) and this fact has been brought to the notice of the tax officer (Assessing Officer or AO) then the tax assessment cannot be framed on the transferor company. These decisions have held that an assessment on transferor despite succession / amalgamation is a *nullity*.

However, where the taxpayer did not inform the AO about amalgamation and assessment got framed on the transferor, the High Court[4] and Tribunal[5] refused to accept the contention of the taxpayer that the assessment on non-existent transferor is invalid. The Tribunal held that the assessment framed on the transferor is only an *irregularity* as the taxpayer had failed to inform the fact of amalgamation to the

AO.

Section 394 of the Companies Act, 1956 states that the Tribunal sanctioning a compromise or arrangement may make provision *inter-alia* for *continuation* by or against the transferee company of any *legal proceedings pending* by or against the transferor company.

Issues

In the light of above discussion, following issue has been deliberated upon by the author:

Whether a failure to intimate the Assessing Officer about the fact of amalgamation can validate an assessment framed on the non-existent person?

Where the assessment for a year (say AY 2012-13) prior to the years governed by Section 170 has been completed before the *appointed* date of amalgamation (say 1 April 2016) then whether proceedings of revision under Section 263 or reassessment under section 147 or rectification under section 154 be *initiated* after the *effective* date?

Analysis

Failure to intimate

The argument that failure to intimate the fact of amalgamation validates assessment is founded on the assumption that a proper imitation would have enabled revenue authorities to make a valid assessment in the name of transferee and taxpayer should not be permitted to enjoy benefits of his mischief. However, the point to be noted here is that an assessment can be made on the transferee only to the extent permissible under Section 170. Section 170 of the Income tax Act applies only with respect to year of succession and one year prior thereto. Any assessment for a period prior thereto will in any case be unlawful. Further an assessment *in the name of* transferor can still be held an assessment *on the transferee* and thus valid under section 170[6]. Thus, the assessment of G.E. Medical Systems for FY 2010-11 should not have been held to be valid as it was outside the time frame permitted by section 170, merely for failure of taxpayer to intimate about that fact.

Initiation of proceedings after amalgamation

Section 394 of the Companies Act enables the Tribunal to make arrangement only for *continuation* of pending legal proceedings.

The phrase legal proceedings has been interpreted by the undernoted[7] case as under:

Legal proceeding' in its normal connotation can only mean a proceeding in accordance with law, and there can be no doubt that assessment proceedings under the Sales Tax Act are such proceedings.
It must be remembered in this context that the expression 'legal proceeding' is not synonymous with 'judicial proceedings'. Proceedings may be legal even if they are not judicial proceedings, if they are authorized by law.

An appeal is continuation of the process of assessment so that it can be filed even after the effective date of amalgamation[8]. In State of Tamil Nadu v. Arulmurugan & Co.[9], it was held that, An appellate authority under the taxing enactments sits in appeal, only in a manner of speaking. What it does, functionally, is only to adjust the assessment of the appellant in accordance with the facts on the record and in accordance with the law laid down by the legislature. *An appeal is a continuation of the process of assessment, and an assessment is but another name for adjustment of the tax liability to accord with the taxable event in the particular taxpayer's case.* There can be no analogy or parallel between a tax appeal and an appeal, say, in civil cases.

Under the 1922 Act, no proceeding could be said to be pending merely because a return of income was been filed until a notice for assessment[10] was issued. Under 1961 Act, filing of return may give rise to pendency of proceedings under section 143(1) and issuance of notice under section 143(2) may similarly give rise to pendency of scrutiny assessment. Similarly, once an assessment has been framed the

proceedings attain finality[11] and come to an end until the time a notice proposing to modify the same, either by way reassessment[12], revision or rectification is issued.

Conclusion

Amalgamation of a company with another seems to have the effect of preventing any potential litigation with respect to the tax liability of the transferor company in so far as the relevant proceedings are *not* pending as on the *effective* date of amalgamation. Tribunal approving the scheme of amalgamation has power to permit only the *continuation* of legal proceedings as are *pending* on the effective date and not initiation of a new proceeding. Taxpayers thus need to bear this right in mind and exercise caution while responding to the notices seeking initiation of proceedings outside the ambit of Section 170 and 394 of the respective laws discussed above.

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[1] G.E. Medical Systems v. ACIT IT(TP)A 563 /Bang/2016 [TS-334-ITAT-2017(Bang)-TP]

[2] Ellis Reid v. CIT 5 ITC 100 (Bom)

[3] CIT v. Dimension Apparels P. Ltd. 370 ITR 288 (Del); Spice Entertainment ITA 475 of 2011 (Delhi); Emirald Co. Ltd. V. ITO 176 TTJ 276 (Kol); I.K. Agencies (P) Ltd. V. CIT 347 ITR 664 (Cal)

[4] CIT v. Shaw Wallace Distilleries Ltd. 386 ITR 14 (Cal)

[5] Subhlakshmi Vanijya (P) Ltd. V. CIT 172 TTJ 721 (Kol); G.E. Medical Systems v. ACIT IT(TP)A 563 /Bang/2016

[6] For a detailed analysis of this proposition please see https://www.lexology.com/library/detail.aspx?g=04c7021a-cdbe-4172-ac0e-6a6514ea1b41

[7] Abdul Aziz Ansari v. State of Bombay [1958] 9 S.T.C. 135

[8] Garikapati v. Subbiah Choudhry AIR 1957 SC 540

[9] Tamil Nadu v. Arulmurugan & Co. [1982] 51 STC 381

[10] Balchand v. ITO 61 ITR 656 (MP)

[11] CIT v. Umiya Co-op Housing [2009] 314 ITR 272 (Guj); CIT v. Arihant Builders 6 DTR 185 (Raj HC); CIT v. Krishan Lal Dua [2005] 277 ITR 477 (P&H);

[12] CIT v. B.R. Vasa [1979] 116 ITR 940 (Cal) ; C.W. Spencer v. ITO [1957] 31 ITR 107 (Mad)