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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **W.P. (C) 1289/1999**

M/S RUSTAGI ENGINEERING UDYOG PVT. LTD. ..... Petitioner
Through Mr S. Krishnan, Advocate.

versus

DY. COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr Ashok K. Manchanda, Senior Standing Counsel with Ms Vibhooti Malhotra, Junior Standing Counsel.

WITH

6.

\+ **W.P.(C) 1290/1999**

M/S RUSTAGI ENGINEERING UDYOG P. LTD. ..... Petitioner
Through Mr S.Krishnan, Advocate.

Versus

DY. COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr Ashok K. Manchanda, Senior Standing Counsel with Ms Vibhooti Malhotra, Junior Standing Counsel.

WITH

7.

\+ **W.P.(C) 1293/1999**

M/S RUSTAGI ENGINEERING UDYOG P. LTD. ..... Petitioner
Through Mr S.Krishnan, Advocate.

Versus

DY. COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr Ashok K. Manchanda, Senior Standing Counsel with Ms Vibhooti Malhotra, Junior Standing Counsel.

WITH

8.
\+ **W.P.(C) 1291/1999**

M/S RUSTAGI ENGINERRING UDYOG P. LTD. ..... Petitioner
Through Mr S.Krishnan, Advocate.

versus

DY. COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr Ashok K. Manchanda, Senior Standing Counsel with Ms Vibhooti Malhotra, Junior Standing Counsel.

AND

9.
\+ **W.P.(C) 1292/1999**

M/S RUSTAGI ENGINEERING UDYOG
P. LTD. ..... Petitioner
Through Mr S.Krishnan, Advocate.

versus

DY. COMMISSIONER OF INCOME TAX. .... Respondent

Through Mr Ashok K. Manchanda, Senior Standing Counsel with Ms Vibhooti Malhotra, Junior Standing Counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R

% **24.02.2016**

Vibhu Bakhru, J:

1. These petitions have been filed by M/s Ess Aar Universal (P) Ltd (hereafter the 'Petitioner'), *inter alia*, impugning the notices issued by the Assessing Officer (hereafter 'AO') under Section 148 of the Income Tax Act, 1961 (hereafter 'the Act') for re-opening the assessments to re-assess M/s Rustagi Engineering Udyog Private Limited (hereafter the 'Assessee') in respect of income for the Assessment Years ('AYs') 1989-90 to 1993-94.

2. W.P. (C) 1289/1999, W.P.(C) 1290/1999, W.P. (C) 1293/1999 and W.P. (C) 1291/1999 have been filed impugning separate notices dated 26th December, 1997 in respect of AY 1990-91, 1991-92, 1989-90 and 1992-93 respectively. W.P. (C) 1292/1999 has been filed impugning a notice dated 9th July, 1997 for AY 1993-94. The issues involved in the present Petitions are similar and, therefore, have been heard together.

3. The principal controversy involved in the present petition is whether notices under Section 148 could be issued to the Assessee after the said company stood dissolved in terms of a scheme of amalgamation of the

Assessee with the Petitioner approved under Section 391 and 394 of the Companies Act, 1956. The Petitioner has further challenged the re-opening of assessments on the ground that the AO had no reason to believe that any part of the income of the Assessee has escaped assessment. It is also contended that the issuance of the impugned notices have not been approved by the competent authority.

4. Briefly, the relevant facts are that the Assessee was engaged in the business of manufacturing of sheet metal components. Further, the Assessee was also engaged in the business of transportation under the name and style of M/s Sarvodaya Carriers. In addition, the Assessee also carried on the business of leasing assets during the relevant years. The Assessee purchased several assets which were reflected under the head "Plant & Machinery" in respect of which the Assessee claimed depreciation at the rate of 100%. These assets were leased to various independent entities and formed a part of plant and machinery used by the said entities. The lease rental received from such entities in terms of the agreement entered into with them, were duly declared as business income by the Assessee during the relevant period.

5. The returns filed by the Assessee for AY 1990-91 and 1991-92 were subjected to scrutiny and thereafter assessment orders under Section 143 (3) were passed. The separate assessment orders for AY 1990-91 and AY 1991-92 passed on 30th November, 1992 duly indicate that the AO had examined the transactions relating to the Assessee's business of leasing assets and the Assessee's claim for depreciation at the rate of 100% was examined by the AO before passing the said assessment orders.

6. An order under Section 394 of the Companies Act, 1956 sanctioning the scheme of amalgamation of the Assessee with the Petitioner was passed by this Court on 21st May, 1997. In terms of the said scheme, the Assessee was amalgamated with the Petitioner Company with effect from the appointed date, i.e., 1st April 1995.

7. Thereafter, the Assessee received a notice under Section 142(1) of the Act calling upon the Assessee to file its return of income for the AY 1996-97. The Assessee responded to the said notice by a letter dated 3rd October, 1997 and informed the AO that it was not required to file a return as the Assessee stood dissolved with effect from 1st April, 1995 in terms of the scheme sanctioned by this Court. Thereafter, the Assessee received four separate notices dated 26th December, 1997 issued under Section 148 of the Act for re-assessing the income of the Assessee for AY 1989-90, 1990-91, 1991-92 and 1992-93. The Assessee had also received a similar notice dated 9th July, 1997 for AY 1993-94.

8. The Assessee sought reasons for re-opening of assessments and issuance of notices under Section 148 of the Act. However, the same were not provided to the Assessee at the relevant time. According to the Petitioner, the impugned notices were invalid as the same were issued to the Assessee, which at the material time, stood dissolved. The Petitioner, being the amalgamated company, has preferred the present batch of Writ Petitions challenging the impugned notices issued for re-assessing the income of the Assessee.

9. During the course of the present proceedings, the Petitioner was supplied

with a copy of a letter dated 8th October, 1997 sent by the Office of the Assistant Commissioner of Income Tax to the Deputy Commissioner of Income Tax Range-II for seeking an approval for re-opening the assessments for AY 1990-91 to 1992-93. The said letter contained the reasons for re-opening of the assessment and the same reads as under:-

"The Deputy Commissioner of Income-tax,
Range 2, New Delhi.

Sub:- M/s Rustagi Engg. Udyog (P) Ltd.
Approval u/s 151 of the I.T. Act.

Sir,

The assessment for A/Y 1994-95 in the above mentioned case has been completed u/s 143 (3) of the I.T. Act, 1961. The assessee company had claimed 100% depreciation on MS Moulds costing Rs.60,62,500/-. To verify the genuineness of the transactions, on request, survey was conducted by the Inv. wing (Pune and Meerut) at the premises of the lessee (Thane) and supplier (Ghaziabad). The survey revealed that the transaction was actually sham transaction. In fact no MS Moulds were purchased. The assessee company had created various papers to give air of genuineness to a factually sham transaction. Accordingly the wrong depreciation claimed to the extent of Rs.60,62,500/- was withdrawn and penalty was initiated u/s 271 (1) (c).

In the light of the above, the earlier year records of the assessee company were also examined. It was observed that the assessee company has been claiming 100% depreciation on a variety of assets over a various assessment years. The brief summary of which is as under:-

A.Y.	Asset	Rate of Depr.	Value	Total
1993-94	Plant & Machinery (below	100%	20,24,280	

	Rs.5000) Temporary structure	100%	41,40,000	61,64,280
1992-93	1. Plant & Machinery (Below Rs.5000)	100%	68,04,665.8	
1991-92	1. Plant & Machinery (Below Rs.5000)	100%	24,35,144.62	
1990-91	1. Plant & Machinery	100%	19,93,819.00	
1989-90	1. Plant & Machinery (Below Rs.5000)	100%	6,99,999.36	
1988-89	Plant & Machinery (Below Rs.5000)	100%	1,38,854	

From the above it is very clear that the assessee company has adopted systematically a method to evade tax by creating paper transactions to claim substantial depreciation (100%). Due to this the assessment for the A.Y. 1993-94 has been re-opened u/s 147 of the I.T. Act, 1961 and accordingly notice u/s 148 has been issued on 9.7.1997.

The assessment for the assessment year 1990-91 to 1992-93 is required to be re-opened u/s 148 since the income claimed as depreciation amounting to Rs.19,93,819/-, Rs.24,35,144/- and Rs.68,04,665/- respectively has escaped assessment. Since the period of more than 4 years have elapsed from the end of relevant assessment year and the income escaped in each year exceeds Rs.50,000/- your sanction u/s 151 of the I.T. Act 1961 is required for re-opening the cases."

10. The reasons for re-opening the assessments for AY 1989-90 and 1993-94 are concededly similar to the reasons as reflected in the above quoted letter.

11. These petitions were admitted on 9th February, 2000 and by an order dated 10th March, 2000, further proceedings pursuant to the impugned notices issued under Section 148 of the Act were stayed.

12. Mr S. Krishnan, learned advocate appearing for the Petitioner contended that the impugned notices were invalid as the same had been issued in the name of a non-existing entity (the Assessee). He pointed out that the AO had also been duly informed that the Assessee stood dissolved with effect from 1st April, 1995 as it had merged with the Petitioner Company.

13. Mr Krishnan next contended that the AO had no tangible material to form a belief that the income of the Assessee for the relevant assessment years had escaped assessment. He submitted that the AO had sought to re-open the assessment on the basis of the assessment order dated 27th March, 1997 passed under Section 143(3) of the Act in respect of AY 1994-95. In that year, the AO had disallowed the Assessee's claim for depreciation to the extent of Rs. 60,62,500/- which was claimed in respect of MS Moulds that were leased by the Assessee. The AO held that the said transaction was a sham transaction and concluded that in fact, MS Moulds were purchased by the Assessee. Mr Krishnan contended that the said return could not give rise to any reason to believe that the depreciation claimed by the Assessee in respect of other assets was also impermissible. He further informed this court that an appeal had been preferred by the Petitioner against the said assessment order dated 27th March 1997 and the Commissioner Income Tax (Appeals) had set it aside by an order dated 16th December 1997. Mr. Krishnan also handed over a copy of the said order dated 16th December 1997.

14. Lastly, Mr Krishnan contended that the impugned notices were issued without any approval from the competent authority. He stated that the

Respondents had been called upon on several occasions to produce the approval but had failed to do so.

15. Mr Ashok Manchanda, learned Senior Standing Counsel countered the arguments advanced by Mr Krishnan and contended that a survey team had found that the transaction relating to purchase of 'MS moulds' costing Rs.60,62,500/- in the financial year 1993-94 (relevant to AY1994-95) was a sham transaction and this would also give reason for the AO to believe that other transactions relating to purchase of other assets were also sham transactions. He submitted that the survey conducted in respect of the transaction for the purchase of MS moulds had disclosed the *modus operandi* of the Assessee and thus, all other transactions, where the Assessee had claimed 100% depreciation, were suspect. He argued that at the stage of issuance of notice, the AO was not required to finally determine whether the income of an Assessee had escaped assessment but was only required to form a *prima facie* opinion.

16. We have heard the learned counsel for the parties.

17. It is well settled that the in a case of amalgamation, the amalgamating company would stand dissolved from the date on which the amalgamation/transfer takes effect.

18. In ***Marshall Sons & Co. (India) Ltd. v. Income-tax Officer [1997] 223 ITR 809 (SC),*** the Supreme Court held that every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The court further observed that it is

also open for a court to modify the appointed date as it thinks appropriate in the facts and circumstances of the case but in a case where the court does not do so, the date as specified in the scheme would be the date on which the amalgamation would take effect. In that case, the Supreme Court was considering a challenge to the notices issued by the Income Tax Officer to the amalgamating company for the period after the appointed date of amalgamation. After examining the provisions of the Companies Act, 1956, the Supreme Court held that the notices issued by the Income Tax Officer were not warranted in law.

19. In a recent decision ***dated 3rd August, 2015 in ITA No. 475/2011*** **(*SPICE Infotainment Ltd. v. Commissioner of Income Tax*),** this Court set aside the order passed by the Tribunal upholding the action of the assessing officer in framing an assessment in the name of an amalgamating company after the entity stood dissolved; this court held that the order of the Tribunal was unsustainable and framing an assessment on a dissolved company was not a procedural irregularity but a jurisdictional defect. Similarly, by an order ***dated 19th August, 2015, ITA 582 of 2015*** (***PCIT v. Images Credit and Portfolio Pvt. Ltd***), this Court held that the proceedings under Section 153C of the Act could not be initiated against an entity that had ceased to exist.

20. In view of the aforesaid, the contention that the impugned notices issued under Section 148 of the Act were invalid as having been issued to an Assessee that had ceased to exist, must be accepted. The impugned notices are, therefore, liable to be set aside on this ground alone.

21. Having stated the above, we must also add that in our view, the impugned notices must also be set aside as the AO had no reason to believe that the income of the Assessee for the relevant assessment years had escaped assessment. Concededly, the AO had no tangible material in regard to any of the transactions pertaining to the relevant assessment years. Although the AO may have entertained a suspicion that the Assessee's income has escaped assessment, such suspicion could not form the basis of initiating proceedings under Section 147 of the Act. A reason to believe – not reason to suspect - is the precondition for exercise of jurisdiction under Section 147 of the Act. In ***Income Tax Officer, Calcutta & Ors. vs. Lakhmani Mewal Das*****: [1976] 103 ITR 437 (SC)** the Supreme Court held that there must be a "live link" or a "close nexus" between the material available with the AO and his reason to believe that income of an assessee had escaped assessment. The court further observed as under:

> "The powers of the Income-tax Officer to reopen assessment though wide are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi- judicial proceedings. It is, therefore, essential that before such

> action is taken the requirements of the law should be satisfied."

22. It is also relevant to mention that the assessment order dated 27th March, 1997 for the Assessment Year 1994-95, which formed the basis for initiation of re-assessment proceedings and issuance of impugned notices, was set aside by Commissioner of Income Tax (Appeal). The Petitioner had contested the AO's finding that the transaction of purchase and lease of moulds in the year 1993-94 relevant to assessment year 1994-95 was a sham transaction. The Assessee had also relied on the proceedings filed by the lessee ***(M/s Prestige HM Polycontainers Ltd. and Others) in Suit No. 1318/1997*** wherein the lessee had affirmed that the equipment in question was installed at the lessee's plant in NOIDA which had been taken over by Pradeshiya Industrial Corporation of Uttar Pradesh under Section 29 of the State Financial Corporation Act.

23. In any view of the matter, the AO's conclusion that a particular transaction is a sham transaction cannot be a reason to believe that other transactions – including which were accepted by the AO after due scrutiny in AY 1990-91 and 1991-92 – in respect of which the AO has no material are also sham transactions. Thus, the impugned notices under Section 148 are also liable to be set aside for the foresaid reason.

24. In view of our aforesaid conclusion, it is not necessary to examine whether the impugned notices were approved by the competent authority as required under the Act.

25. Accordingly, the Petitions are allowed and the impugned notices are set aside. The interim order passed on 10th March, 2000 is made absolute. In the circumstances, the parties are left to bear their own costs.

VIBHU BAKHRU, J

S.MURALIDHAR, J

FEBRUARY 24, 2016
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HIGH COURT OF DELHI
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