

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

[Before Shri J. Sudhakar Reddy, Accountant Member & Shri S.S. Godara, Judicial Member]

**I.T.A. No. 84/Kol/2019
Assessment Year: 2011-12**

DCIT, Circle-11(1), Kolkata.....Appellant
Vs.

M/s. JCT Limited.....Respondent
[PAN: AAACJ 6733 E]

**I.T.A. No. 2389/Kol/2018
Assessment Year: 2011-12**

M/s. JCT Limited.....Appellant
[PAN: AAACJ 6733 E]

Vs.

DCIT, Circle-11(1), Kolkata.....Respondent

Appearances by:

Sh. Vijay Shankar, CIT, appeared on behalf of the Revenue.
Sh. A.K. Gupta, FCA &

Ms. Kinjal Buaria, ACA., appeared on behalf of the Assessee.

Date of concluding the hearing : March 12th, 2020
Date of pronouncing the order : July 8th, 2020

ORDER

Per J. Sudhakar Reddy, AM:

These are cross appeals directed against the order of the Commissioner of Income Tax (Appeals)-4, Kolkata ['CIT(A)' for short] dated 19.09.2018 u/s 250 of the Income Tax Act, 1961 ('the Act' for short) for AY 2011-12.

2. Facts as brought out by the Id. CIT(A) are extracted for ready reference:

"1.0. The appellant is a Public Limited Company and is a member of Thapar Group engaged in the business of manufacturing and selling of Textiles, Yarns, Nylon and Polyester Filament yarn, Polyester Chips, Nylon Chips, Readymade Garments etc. and exports of these products. During the assessment year 2011-12 the assessee company filed its return of income declaring total income at 'NIL' under normal provision of the Act. The company had computed book profit u/s 115JB at Rs. 210,666,822/-, and computed total tax liability of Rs. 41,986,951/-. The return was picked up for scrutiny under CASS and notice issued on 01-08-2012 u/s 143(2). Subsequently, the assessee company revised its return of income declaring total income NIL. Notice u/s 142(1) were issued and served on the assessee company and finally assessment framed u/s 143(3) of the Act by making various disallowances in the said order. The AO has assessed total income of the assessee of Rs. 21,37,16,635/- as per Book Profit u/s 115JB raising demand of Rs. 429,970/- in the order u/s 143(3) dated 30.03.2014."

3. On appeal the Id. CIT(A) granted part relief. Aggrieved, both the Revenue as well as the assessee are in appeal before us.

4. We have heard Sh. A.K. Gupta, Id. Counsel for the assessee and Sh. Vijay Shankar, Id. DR on behalf of the Revenue. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and case laws cited, we hold as follows.

5. We first take up the assessee's appeal in ITA No. 2389/Kol/2018. The grounds of appeal are as follows:

"1. (i) That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) - 4, Kolkata acted beyond his jurisdiction and not accepted the decision of amalgamation of M/s Gupta & Syal Ltd. with JCT Ltd. approved by Punjab & Haryana High Court & Delhi High Court.

(ii) That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) - 4, Kolkata was not justified in enhancing the total income of the appellant rejecting the lawful Set Off of "Long Term Capital Gain" against unabsorbed depreciation u/s 32(2) of the Income Tax Act, 1961 holding the alleged amalgamation as colourable device.

(iii) That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) - 4, Kolkata erred in appreciating the facts that the entire purpose of the amalgamation was only to avoid legitimate capital gain tax on sale of leasehold land.

(iv) That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) - 4, Kolkata erred in taking into consideration of Regional Director's Comment regarding merger and tax avoidance vide Circular No - 1/2014 dtd. 15/01/2014 which was not in existence in this assessment year.

(v) That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) - 4, Kolkata erred in applying the effect of "General Anti Avoidance Rule" (GAAR) in two High Court's approved amalgamation scheme and raised the doubt of Court's decision of amalgamation although 'GAAR' was not in existence in this assessment year.

(vi) That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) - 4, Kolkata was unjustified in invoking the test of 'piercing the corporate veil'

(vii) That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) - 4, Kolkata had enhanced the income ignoring all the materials, documents and evidences on record and without judiciously considering the explanation furnished and denied the set off of Capital Gains with unabsorbed depreciation which is perverse and such enhancement is liable to be deleted.

2. (i) That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) - 4, Kolkata erred in holding the Income from House Rent at Rs. 450,000/- (decided by Assessing Officer) being 15 times of actual rent on estimate based on the Sale value of the Property of Rs. 120 Crores without considering written submission and provisions of Section 23 of the Income Tax Act, 1961.

(ii) That on the fact and in the circumstance of the case, the learned Commissioner of Income Tax (Appeals) - 4, Kolkata had disregarded the earlier assessments wherein the House Property income was assessed in pursuance to Provisions of Section 23 and as such, the decision of the Commissioner of Income Tax (Appeals) - 4, Kolkata is bad in law.

3. That the appellant craves leave to supplement, substitute, add, alter, amend, cancel or otherwise modify all or any of the grounds herein before or at the time of hearing, if necessary so arises."

6. The facts relating to ground No. 1 are brought out by the Id. CIT(A) at para 2.0 to 2.3. The findings of the Id. CIT(A) are as follows:

"2.0. Ground No. 1; Short-term Capital gains from sale of Property at 13, Aurangzeb Road, New Delhi:

2.1. During the relevant assessment year 2011-12 (i.e. previous year 2010-11) Gupta & Syal Ltd., a wholly owned subsidiary company of the appellant company was amalgamated with the appellant company w.e.f 01-04-2010 under the scheme of amalgamation approved by High Court of Punjab & Haryana vide order dated 25-03-2011 and by the order of High Court, Delhi vide order dated 10-05-2011. From the Financial statement of the appellant company, it is observed that the company has yearly turnover of Rs. 726 Cr. However, its subsidiary company Gupta & Syal Limited has no major business activity. From Financial statement it is evident that the company has no substantial business activity. The only income earned by the subsidiary is from sale of Investment and rent received. In the captioned assessment year, the appellant company sold a land details of which is given, as under:

- *Located at 13, Aurangzeb Road, New Delhi. The Property was spread over 1.497 acres and had building constructed on it.*
- *M.s Gupta 85 Syal Ltd. (i.e. subsidiary company) had acquired the perpetual the lease-hold rights of this property from Mr. S. Mokham Singh Sandhu vide Sale deed dt. 15.01.1966 of Rs. 5.45 lakhs.*
- *In pursuant to government decision the said land converted into freehold property on 26.11.2010 by payment of conversion charge of Rs. 2,39,05,168/-*
- *M/s. Gupta & Syal Limited sold the said property on 14.03.2011 to Ms. Savitri Devi Singh for a consideration of Rs. 120 crs. and computed long term capital gain of Rs. 107,98,39,652/-.*

However, post amalgamation with the appellant company the entire gain on sale of above land was set off against the brought forward unabsorbed depreciation of the appellant company. In computing book profit u/s 115JB also the gain on sale of above land substantially set off against the brought forward loss/depreciation as per books. The detail of Capital Gain computation as returned by the appellant company is presented as under:

Sl. No.	Particulars	Amount
1.	Description of the asset with measurement	Bungalow on Plot No. 8, Block - 11, Municipal N13, Aurangzeb Road, New Delhi measuring 7245 Sq. Yards. (Leasehold Property)
2.	Date of Acquisition	15.01.1966
3.	Cost of Acquisition	
(i)	Cost u/s 49(l)(e) read with Section 47(v)	Rs. 5,45,100/-
(ii)	Cost u/s 55(2)(b)(ii) as on 01.04.1981 as per valuation report of Er. S K Bhagat, FIE(India)	Rs. 1,35,38,000/-
(iii)	Conversion cost paid for making land & building freehold On 08.10.2010- Rs. 2,00,00,000/- On 08.11.2010-Rs. 39,05,168/-	Rs. 2,39,05,168/-
(iv)	Indexed cost of acquisition: Cost as per Sr. No. (ii)- Rs. 1,35,38,000/- Financial Year Cost of Inflation Index 1981-82 700 2010-11 711 (Rs. 1,35,38,000*711)/100 = Rs. 9,62,55,180/-	Rs. 6,62,55,180/-
(v)	Total of (iii) & (iv) above	Rs. 12,01,60,348/-

4.	Sold on	14.03.2011
5.	Sold to	Ms. Savitri Devi Singh
6.	Consideration Received	Rs. 120,00,00,000/-
7.	Value for the purpose of Stamp Duty u/s 50C	Rs. 10,26,26,850/-
8.	Consideration being the higher of Sr. No. 5 & 6 Rs. 120,00,000/- Less: Cost as per Sr. no. 3(v) above Rs. 12,01,60,348/- Capital Gain Rs. 107,98,39,652/-	Rs. 107,98,39,652/-

2.2. However, the Ld. AO did not accept the above computation and disputed the nature of the capital gain. As per the AO, the ownership of the above land came to the appellant company subsidiary only in 2010 i.e. when the nature of land changed from leasehold to freehold on payment of conversion charges. The AO also contended that since the land was sold within 36 months from the date it was owned by the appellant company therefore the resultant gain will be short term capital gain only. Accordingly, the AO denied the indexation benefit and computed the gain at Rs. 117,55,49,732/-. The AO has taxed this sum @30% instead of 20% as computed by the appellant company. Apart from above, the AO has not disputed any other element of the capital gain computation.

Short Term Capital Gain			
Sale Consideration		1,200,000,000	
Less: Expenditure in connection with transfer	545,100		
Cost of Transfer	23,905,168	24,450,268	
			1,175,549,732

2.3. During the course of proceedings, the Ld. AR of the appellant company submitted that for the purpose of computing capital gain u/s 45 of the Act, the nature of capital assets needs to be determined based on Sec. 2(42A) of the Act. In terms of said sec., for determining holding period of the capital asset, what is relevant is the date from which said asset is held by the assessee. The date from which the assessee becomes the owner of said asset is not relevant factor. In support of its contention the AR has placed reliance on the decision of the Allahabad HC in CIT -vs.- Smt. Rama Rani Kalia [2013] 38 Taxman.com 176/358 ITR 499. Accordingly, the AR finally submitted that the holding period shall be reckoned from the year 1966 when the land was first held by the assessee and not from year 2010 when it was merely converted from leasehold land to free hold land."

7. Thereafter the Id. CIT(A) had examined the issue from another angle as he was of the view that the AO has examined the issue in a very narrow sense. He invoked his powers u/s 251(1) of the Act and gave notice of enhancement to the assessee. The finding of the Id. CIT(A) is that, the entire purpose of amalgamating M/s. Gupta & Syal Ltd. with the assessee company M/s. JCT Ltd. w.e.f. 01.04.2010 was a colourful device to avoid payment of tax. He was of the view that he had the right to pierce through the corporate veil and look through the entire transaction, solely on the substance, other than the form. While acknowledging the fact that GAAR provisions are not applicable in this yew, he drew strength from these future proposed provisions, to hold that the merger was done in this case to avoid capital gains tax on sale of land, by setting off gains with brought forward losses of the assessee firm. As a consequence of this finding,

he held that no set off of losses shall be allowed in respect of the said capital gains tax and that the same shall be taxed both under the normal as well as MAT provisions.

8. This decision of the Id. CIT(A) is against the scheme of amalgamation approved by the Hon'ble High Court. The amalgamation scheme approved by the High Court, it is extracted for ready reference:

"Background of the amalgamating company"

- *Gupta & Syal Limited Company is a Public Limited company which is wholly owned subsidiary company of the appellant company.*
- *Gupta & Syal Limited has no substantial business activity. The only income earned by the company from sale of Investment and rent only.*
- *In the Balance Sheet of Gupta & Syal Limited the Net Worth of the company is 10.50 lakhs as on 31.03.2009. And in the last two-year profit of the company was Rs. (48,495) and Rs. 71,099 only. The profit mainly earns by the company by selling of investment and rent received. In the books of the company the major assets was a Building on leasehold land of Rs. 5.45 lakhs and HDFC Prudence Mutual Fund-Growth of Rs. 2.70 lakhs.*

The detail of land in question is also given as below:

- *The land is located at 13, Aurangzeb Road, New Delhi. The Property was spread over 1.497 acres and had building constructed on it.*
- *M/s. Gupta & Syal Ltd. had acquired the perpetual the lease-hold rights of this property from Mr. S. Mokham Singh Sandhu vide Sale deed dt. 15.01.1966 of Rs. 5.45 lakhs.*
- *Mr. Mohkam Singh Sandhu acquired this property from his father Mr. Basakha Singh by a Gift Deed dt.30.10.1952 who had taken the same as perpetual lease under a lease agreement dt. 21.10.1941 w.e.f. 08.04.1933 from the Governor General, Govt, of India.*
- *8-10-2010 cheque of Rs.40 crores received in favour of Gupta and Sayal Ltd. for sale of property from the buyer.(stated by AR vide order sheet noting dated 24-07-2018).*
- *In pursuant to government decision the said land converted into free-hold property on 26.11.2010 by payment of conversion charge of Rs. 2,39,05,168/-*
- *M/s. Gupta & Syal Limited sold the said property on 14.03.2011 to Ms. Savitri Devi Singh for a consideration of Rs. 120crs.*
- *On 19.10.2010 the Board of Directors passed a resolution and approved and adopt the scheme of amalgamation.*
- *On . . .2011 filed in the High Court of Delhi and High Court of Punjab and Haryana, proposing merger of Gupta & Syal Limited with the appellant company.*
- *Amalgamated with JCT Ltd. take effect from 01.04.2010 as per scheme of amalgamation approved by High Court of Punjab and Haryana order dated 25.03.2011 and High Court of Delhi order dated 10.05.2011.*
- *In the books of accounts of the appellant company total scheme is shown as under:*

a) Pursuant to the scheme of amalgamation of the erstwhile wholly owned subsidiary company namely Gupta & Syal Ltd. (hereinafter referred as 'transferor' company) with JCT Limited (hereinafter referred as 'transferee' company) sanctioned by the Hon'ble High Court of Delhi vide order dated 10.05.2011 and Hon'ble High Court of Punjab and Haryana vide order dated

25.03.2011, all assets and liabilities of transferor company were transferred and stood vested with transferee company with effect from April 1, 2010.

The amalgamation has been accounted for under the 'Pooling of Interests' method as prescribed by the Accounting Standard 14 'Accounting for amalgamation' issued by the Institute of Chartered Accountants of India. Accordingly, assets and liabilities of transferor company as at April 1, 2010 have been incorporated in the financial statements of transferee company in the same manner and form as they appear in the financial statements of the transferor company except for building on leasehold land (including cost of land) of Rs. 5.45 lakhs. This was shown under Investment in the books of transferor company which has been included under fixed assets in the books of transferee company in terms of the scheme of amalgamation.

b) Loss of Rs. 17.83 lakhs arising on amalgamation consists of:

	(Rs. In lakhs)
i. Accumulated deficit of transferor company	37.75
ii. Loss on cancellation of shares held inter-se among transferor and transferee companies	10.08
iii. Write back of provision for doubtful debts in the books of transferee company relating to advance to transferor company	(30.00)
	17.83

c) In terms of scheme of amalgamation no shares of the transferee company have been issued to the shareholders of the transferor company being wholly owned subsidiary of the transferee company."

9. The Hon'ble High Court in its order u/s 394 of the Companies Act, 1956 dated 10.05.2011 in part 2 ordered as follows:

"2. That with effect from 1st April, 2010, the Business Enterprises of Transferor Company with all its assets as on 1st April, 2010 including land, buildings, plant & machinery, tools, implements and fire arms, furniture, fixtures, office equipments, vehicles, capital work-in-progress together with all permits, quotas, rights, industrial and other licenses, offices, depots, trade marks, privileges and benefits of all contracts, agreements, inventories, sundry debtors, cash and bank balances, loans and advances and other current assets, investments and work in process including liabilities towards sundry creditors, acceptances, advances, security deposits, interest, accrued but not due, advance from customers and other liabilities and all reserves and surplus together with services of all permanent employees, shall pursuant to the provisions contained under Section 394 of the Companies Act, 1956 without any further act or deed, be transferred to and vested in or be deemed to have been transferred to and vested in the JCT Limited / the Transferee Company for all rights, title and interest of Transferor Company therein, absolutely but subject to all existing charges thereon.

3. That such assets which are moveable in nature or are otherwise capable of transfer by manual delivery they shall be physically handed over through actual delivery, or endorsement and the same may be transferred by the Transferor Company without requiring any deed or instrument of conveyance for the same and shall become the property of the Transferee Company to the end and intent that the ownership and property therein passes to the Transferee Company.

4. That in respect of the assets belonging to the Transferor Company other than specified under Clause 3, the same shall without any further act, instrument or deed shall be transferred to and stand vested in and/ or deemed to be transferred to the Transferee Company pursuant to the provisions of Section 394 of the Act.

5. That with effect from 1st April, 2010, all the liabilities of Transferor Company be transferred without further act or deed to JCT Limited / the Transferee Company and accordingly the same

pursuant to Section 394 of the Companies Act, 1956 be transferred to and become the liabilities and dues of JCT Limited / The Transferee Company.

6. That all proceedings now pending by or against Transferor Company be continued by or against JCT Limited / the Transferee Company but JCT Limited shall have the right to settle the dues, if any, of the Transferor Company by way of swap of any of the investments held by them.

7. That JCT Limited / the Transferee Company shall take over on and from 1st April, 2010 all employees of Transferor Company on the terms and conditions on which they are employed without any interruption of service so that the services of all such employees with Transferor Company upto 1st April, 2010 shall be taken into account for purpose of all retirement benefits, retrenchment, compensation, gratuity and other terminal benefits.

8. That all contracts, deeds, bonds, agreements and other instruments of whatever nature relating to Transferor Company to which Transferor Company are party subsisting or having effect, shall remain in full force and effect against or in favour of JCT Limited / the Transferee Company and may be enforced as fully and effectually as if instead of Transferor Company, JCT Limited / the Transferee Company had been a party thereto.

9. That the vesting of Business Enterprises of Transferor Company in JCT Limited / the Transferee Company shall not affect, any transaction or proceedings already concluded or taken by Transferor Company on and after April, 2010 to the end and intent that JCT Limited / the Transferee Company accepts on behalf of itself all acts, deeds, and things done and executed by Transferor Company. As from 1st April, 2010 Transferor Company shall be deemed to have been possessed of all its properties and shall be deemed to have carried on and to be carrying on its business for and on behalf of and in trust for JCT Limited / the Transferee Company until such time as this Scheme becomes effective. All income or profit accruing to Transferor Company and all costs, charges and expenses incurred by Transferor Company, after 1st April, 2010 shall for all purposes be treated as the income, profits, costs charges and expenses of JCT Limited / the Transferee Company.

10. That to the extent that there are Inter-company loans, advances, deposits, obligations, advances or other outstanding in the books of the Transferor Company, the obligations in respect thereof shall come to an end and there shall be no liability in that behalf and corresponding effect shall be given in the books of accounts and the records of the Transferor and The Transferee Company for the reduction of such assets or liabilities as the case may be and there would be no accrual of interest or any other charges with effect from the Appointed Date."

10. When the Hon'ble High Court had specifically ordered that all incomes and profits of the transferor company shall for all purposes, be treated as the income, profit, costs etc. of the assessee company, the Id. CIT(A) cannot take a view contrary to this order. Hence, the view of the Id. CIT(A) on this issue is against law.

11. The 'B' Bench of the Kolkata Tribunal in ITA No. 2145/Kol/2014 for the AY 2011-12 in the case of Electrocast Sales India Ltd. vs. DCIT order dated 09.03.2018 held as follows:

"4.4. We find that the scheme of amalgamation would be approved by the Hon'ble High Court only after ensuring that the same is not prejudicial to the interests of its members or to public interest. Hence the merger scheme approved by the Hon'ble High Court having in mind the larger public interest, cannot be disturbed by the revenue merely because the assessee is not entitled for benefits u/s 72A of the Act. The expression 'Public interest' was discussed by the Hon'ble Gujarat High Court in the case of Wood Polymer Ltd reported in 109 ITR 177 (Guj) wherein the Hon'ble Court refused to sanction the scheme of amalgamation formulated solely for the purpose of avoiding taxes. It was held that:

“The court is charged with a duty, before it finally permits dissolution of the transferor-company by dissolving it without winding up, to ascertain whether its affairs have been carried on, not only in a manner not prejudicial to its members but in even public interest. The expression “public interest” must take its colour and content from the context in which it is used. The context in which the expression “public interest” is used, enables the court to find out why the transferor company came into existence, for what purpose it was set up, who were its promoters, who were controlling it, what object was sought to be achieved through creation of the transferor company and why it was being dissolved by merging it with another company, That is the colour and content of the expression “public interest” as used in the second proviso to section 394(1) of the Act which have to be enquired into. If the only purpose appears to be to acquire certain capital asset through the intermediary of the transferor-company created for that very purpose to meet the requirement of law, and in the process to defeat tax liability which would otherwise arise, it could not be said that the affairs of the transferor-company sought to be amalgamated, created for the sole purpose of facilitating transfer of capital asset through its medium, have not been carried on in a manner prejudicial to public interest. Public interest looms large in this background and the machinery of judicial process is sought to be utilized for defeating public interest and the court would not lend its assistance to defeat public interest. The court would, therefore, not sanction the scheme of amalgamation.”

Hence it could be safely inferred that the Court would exercise due diligence and would conduct detailed enquiries before sanctioning the scheme. A scheme formulated for the purposes of tax evasion cannot be held to be in ‘public interest’ and hence the same cannot be sanctioned under the provisions of Companies Act, 1956. The fact that the Hon’ble Calcutta High Court had accorded its sanction to the scheme of amalgamation in the assessee’s case implies that the same had been done by considering representations from the various fields and by duly considering the tax evasion point for income tax purposes. In this regard, we would like to place reliance on the functions, powers and discretions of the court that had been noted by Shri A .Ramaiya in the Companies Act, Part 2 at pages 2499 and 2500 in Point No. 6 incorporated hereunder:

“That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.”

4.4.1. Further we find that the provisions of section 394A of the Companies Act, 1956 reads as under:-

Notice to be given to Central Government for applications under sections 391 and 394 – The court shall give notice of every application made to it under section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections.

Hence if there be any objections for the income tax department , they could raise the same at that stage i.e prior to sanction of scheme by the court. Once the scheme is approved, it implies that the same has been done after duly considering the representations from the Government / revenue. Similar view was expressed by the Co-ordinate bench of this Tribunal in the case of ITO vs Purbanchaal Power Co. Ltd in ITA No. 201/Kol/2010 dated 17.7.2014 wherein it was held that :-

From the above provisions of section 394A of the Companies Act, 1956, legal position enunciated in the decisions of Hon’ble Gujarat High Court in the case of Wood Polymer Ltd ., in re and Bengal Hotels Pvt Ltd in re, supra and Vodafone Essar Gujarat Ltd., supra, evidently makes the purpose clear that if the revenue wants to object to the proposed scheme of amalgamation, it has to do so in the course of proceedings before the High Court but before the final order is passed. Whenever such objections have been raised, these have been considered on merits by the concerned High Court and also incorporated the condition for safeguarding the interest of revenue in the very scheme. As a matter of public policy, once a scheme of amalgamation is approved by Hon’ble High Court no authority should be allowed to tinker with the scheme. In the present case of the assessee, neither the official liquidator nor the Regional Director nor Central Government raised any objection to the scheme of amalgamation. In such

circumstances, we are of the view that the revenue has nothing to say at the time of approval of the scheme by Hon'ble High Court in the present case.

4.5. We find that the Hon'ble Madras High Court in the case of *Pentamedia Graphics Ltd vs ITO* reported in 236 CTR 204 (Mad) had categorically held that once the scheme had been sanctioned with effect from a particular date by the Court, it is binding on everyone including the statutory authorities. It further held that having regard to the law declared by the Hon'ble Apex Court as to the effect of the scheme sanctioned by the Court, the only course open to the revenue would be to act as per the scheme sanctioned effective from 1st Jan 2004, which means that the tax authorities are bound to take note of the state of affairs of the applicant as on 1st Jan 2004 and a return filed regarding the same cannot be ignored on the strength of section 139(5) of the IT Act. The merits or otherwise on the returns filed, however, is a matter of assessment for the authorities to consider and pass order in accordance with law. It was further held that when the claim of the assessee in the appeal had already been granted, on a mere circumstance that the Department had not accepted the same and gone before the appellate forum does not mean that the scheme sanctioned would be of no consequence to the respondent. The respondent cannot ignore the order of this Court approving the scheme giving the effective date as 1st Jan, 2004. Similar view, that once the court sanctions the scheme, the Income tax department will be bound by the same, including the appointed date and cannot review the same, has been held by the Hon'ble Bombay High Court in the case of *Casby CFS (P) Ltd* reported in 231 Taxman 89 (Bom) dated 19.3.2015.

(underlining provided by us)

4.5.1. We also find that the Hon'ble Supreme Court in the case of *J.K.(Bombay) (P) Ltd vs New Kaiser -I-Hind Spg.& Wvg.Co.* reported in 1970 AIR 1041 (SC) dated 22.11.1968 had held :

The Principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties; it becomes binding on the company, the creditors and the shareholders and has statutory force, and therefore the joint-debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of sec. 391 of the Act, a scheme is statutorily binding even on creditors, and shareholders who dissented from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and the creditors acquiesce in such alteration.

(underlining provided by us)

4.5.2. We find that the aforesaid observations of the Hon'ble Supreme Court had been followed by the Hon'ble Bombay High Court in the case of *Sadanand Varde and Others vs State of Maharashtra* reported in 247 ITR 609 (Bom) wherein it was held that :

"Once a scheme becomes sanctioned by the court, it ceases to operate as a mere agreement between the parties and becomes binding on the company, the creditors and the shareholders and has statutory operation by virtue of the provisions of section 391 of the Companies Act."

The said judgement of Hon'ble Bombay High Court further provided that an appeal, if any, against the order of amalgamation lies u/s 391(7) of the Companies Act, 1956 and the same cannot be agitated in any collateral proceeding. The relevant extract of the same is reproduced hereunder for the sake of ready reference:-

"We are of the view that the amalgamation, which has become final and binding, cannot be permitted to be challenged by the petitioners, without locus standi, in a collateral proceeding in the present writ petition. An amalgamation order can only be challenged under the Companies Act by an appeal under section 291(7) by any one of the parties, but no such appeal was ever filed."

In the instant case before us, the Id AR informed that the Income Tax Department, which is part of Union of India, had not filed any appeal u/s 391(7) of the Companies Act, 1956 against the order of amalgamation sanctioned by the Hon'ble High Court. This fact was not controverted by the Id DR before us.

4.6. The Id AR further argued that the scheme of amalgamation, as sanctioned by the Hon'ble Calcutta High Court, was effective from 1.4.2010 and the parties had acted according to the

said scheme and cannot be subjected to reversal after a period of 7 years by virtue of the principle of 'res judicata', 'constructive res judicata' and 'acquiescence'. In this regard, the Id AR placed reliance on the decision of Hon'ble Supreme Court in the case of Forward Construction Co. and Others vs Prabhat Mandal reported in 1986 AIR 391 (SC) wherein it was held that :

"The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided."

We find that in the instant case, the income tax department had the opportunity to controvert the specific clause mentioned in para 10(iii) in the scheme of amalgamation, when the scheme was presented before the Hon'ble High Court for approval. Thus applying the principles of res judicata as explained by the Hon'ble Apex Court in the aforesaid case, the issue can be deemed to be heard and decided. Accordingly, the argument that the same cannot be agitated in appeal u/s 391(7) of the Companies Act, 1956 deserves attention and merit. The English Court of Chancery in case of Henderson vs Henderson reported in (1843-60) All ER Rep 378 while construing Explanation IV to Section 11 of Code of Civil Procedure quoted hereunder:-

The plea of res judicata applies, except in special case (sic), not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

4.7. It would be relevant to note that the scheme of amalgamation was approved on 6.10.2010 and intimation to this effect was sent by the assessee to the income tax department in January 2011 (copies of letters enclosed in pages 33 to 37 of paper book). The same was acted upon by the assessee assuming acceptance from the income tax department since no appeal against the said judgement of the Hon'ble High Court was filed before the Hon'ble Supreme Court. Thus, at this juncture, if the revenue is allowed to challenge the same u/s 391(7) of the Companies Act, 1956, then it would be clearly barred by the doctrine of acquiescence and estoppel. In law, acquiescence occurs when a person knowingly stands by without raising any objection to the infringement of his or her rights, while someone else unknowingly and without malice aforethought acts in a manner inconsistent with their rights. As a result of acquiescence, the person whose rights are infringed may lose the ability to make a legal claim against the infringer, or may be unable to obtain an injunction against continued infringement. The doctrine infers a form of 'permission' that results from silence or passiveness over an extended period of time. Applying this principle to the instant case before us, the assessee probably paid a consideration for the set off of accumulated losses taken over from the amalgamating companies and accordingly the share exchange ratio (as approved under the scheme) was acted upon assuming acceptance from the income tax department. Thus by applying the Doctrine of acquiescence, the department would be now barred from raising an objection to the scheme. Further a claim of estoppel arises when one party gives legal notice to a second party of a fact or claim, and the second party fails to challenge or refute that claim within a reasonable time. The second party may be said to have acquiesced to the claim, and thus to be estopped from later challenging it or making a counterclaim based upon the actions of the other party. In the instant case also, the fact of amalgamation was intimated to the income tax department 7 years back against which no appeal was preferred by them. Accordingly the claim of estoppel applies. These Doctrines of Estoppel and Acquiescence had been approved by the Hon'ble Calcutta High Court in the case of Suresh Kumar Rungta and Ors vs Roadco India Pvt Ltd dated 22.9.2011 wherein the Hon'ble Calcutta High Court upheld the view of Trial Court wherein it was held that "the present appellants / applicants had knowledge about the passing of order of winding up. They had knowledge or have had occasion to come before this Court earlier, and did not come because they have accepted legality and validity of amalgamation".

Applying the Doctrine of Acquiescence and Estoppel the Hon'ble Court held that "It appears to us all the appellants have accepted the scheme of amalgamation and now these companies against whom relief is sought for are no longer in existence and they cannot be reverted back to their earlier position as by this time third parties right have been created by reallocation or

reallotment of shareholding for there may be fresh subscribing. In true sense there has been sea change in the shareholding pattern of these companies. Therefore we dismiss the appeal."

4.8. In view of the aforesaid observations and findings in the facts and circumstances of the case, we hold that the accumulated losses of amalgamating companies, comprising of unabsorbed short term capital loss of Rs 10,26,44,123/- ; unabsorbed long term capital loss of Rs 6,34,784/- and unabsorbed business loss of Rs 6,63,574/- , would belong to the amalgamated company pursuant to clause in para 10(iii) of the scheme of amalgamation which was approved by the Hon'ble Calcutta High Court vide order dated 6.10.2010. Since the losses belonged to the amalgamated company i.e the assessee herein, the provisions of section 72 and section 74 of the Act would come into play with respect to set off of the same against the respective incomes of the assessee . In view of this, the provisions of non-compliance of section 72A of the Act as narrated by the Id CITA does not hold any water. Accordingly, the Grounds 1 & 2 raised by the assessee are allowed."

12. Applying the propositions of the law laid down in the case law cited above to the facts of the case we have to necessarily hold that the conclusion of the Id. CIT(A) that the merger in question, approved by the Hon'ble High Court is a colourful device, is illegal and without any factual or legal base. Invoking GAAR provisions, when they are not applicable for the impugned assessment year is also bad in law. The dichotomy in the order of the Id. CIT(A) is clear from the fact, that he chooses to tax capital gains in question, in the hands of the assessee company, though he holds that the merger is a sham transaction. At para 3.2 he holds as follows:

"3.2 It is possible that the assessee might take a plea that if the transaction is held to be taxed avoidance device then the transaction of amalgamation may be disregarded and it may be treated as if sale of property has taken place in the hands of Gupta 86 Syal Limited. Therefore, tax if any has to be levied in the hands of Gupta 86 Syal Limited. However, since Gupta 8& Syal Limited is no longer in existence, therefore, even if the amount were to be taxed in the hands of the Gupta 8& Syal Limited it would be taxed in the hands of the assessee M/s. JCT Ltd. or theoretically speaking it can be stated that the capital gains becomes taxable in the hands of Gupta & Syal Limited (now merged with M/s. JCT Ltd.). Net effect of the same could not be any different as M/s. JCT Ltd. only would have to pay taxes on the transaction of sale of property. Therefore, the above point is only academic in nature as in both the situations the income from sale of property is only taxed in the hands of M/s. JCT Ltd."

13. We are unable to approve this finding in view of the binding order of the Hon'ble High Court on the merger. Thus, we direct the AO to grant benefit of set off of carry forward losses in respect of the said capital gains both under the normal and MAT provisions.

14. The Id. DR had argued that, for the purpose of indexation, the fact that the assessee had leasehold rights from the year 1966 and that these leasehold rights were converted into free hold rights w.e.f. 26.11.2010 by payment of ₹2.39 crores as cost of conversion has to be taken into consideration and hence the entire gain cannot be held as long term capital gain for the purpose of indexation. For this the Id. Counsel for the assessee submitted that no indexation has been claimed by the assessee on this amount

of ₹2.39 crores paid towards cost of conversion of leasehold property into free hold property. In the result, ground No. 1 of the assessee is allowed.

15. Ground No. 2 is on the issue of addition on account of house rent. The facts are brought out at para 5.1 at page 16 of the order of the Id. CIT(A) which is extracted below:

"5.1. In the computation of Income, the appellant company computed Gross Annual Value of the property situated at 13, Aurangzeb Road, New Delhi at Rs. 30,000/- being the rent received by M/s. Gupta & Syal Ltd., a wholly owned subsidiary of the appellant company during the year from Mr. Samir Thapar. The very said property sold out for Rs. 120 Crs. As per the documents produced by the appellant company, the rateable value of the property has been computed at Rs. 30,800 only and accordingly municipal tax of Rs. 6,160/- has been assessed. The AO did not accept the appellant computation of Gross Annual Value and stated that Gross Annual Value of the property should be 15 times of the actual rent of Rs. 2,500 presently received from director. Therefore, the AO computed Gross Annual value at Rs. 4,50,000/- [2500 x 15 x 12] and made a net addition of Rs. 2,94,000/- to the total income of the appellant company."

16. This issue is covered in favour of the assessee and against the Revenue by order of the Hon'ble Calcutta High Court in the case of *CIT vs. Kishanlal and Sons (Udyog) Pvt. Ltd.* [2003] 260 ITR 481 (Cal) at para 13 page 6 held as follows:

"13. We proceed to answer the second question as formulated above, therefore, on the basis that the annual rental is the rental received by the assessee from 1962 onwards, and also during the assessment years in question, as the genuine return on the assessee's property, as a genuine deed of lease entered into by the parties at arms length."

17. The 'A' Bench of the ITAT, Kolkata in the case of *Oberoi Hotels Pvt. Ltd. vs. DCIT* in ITA Nos. 230/Kol/2012 and 1030/Kol/2012 for the AYs 2007-08 and 2008-09 order dated 15.10.2015 had considered similar issue and at para 23 page 14 held as follows:

"23. We have heard rival submissions and gone through facts and circumstances of the case. We find that the AO erred in determining an arbitrary annual value of property by holding that Section 23 is a deeming provision and determination of annual value does not depend on actual realization of rent. The AO while applying clause (a) of Section 1 to Section 23 in the assessee case failed to appreciate that in the present case actually let out the property being a farm house is on rent to EIH Limited and if a property is actually let out, then the expectation of its letting out becomes an actual reality and such property cannot be expected to let from year to year at any figure higher than the rent which is being produced actually by the property in question. Hence, even as per the deeming provision of Section 23(1)(a), in the case of let out property, only the actual rent received was required to be considered as annual value of property. The AO failed to appreciate such estimation of annual letable value as per provision of Section 23(1)(a) was called for only in case of vacant property and not where the property was actually let out since in the case of let out property, the assessee was not entitled to anything over and above the agreed rent. The said action of the AO has resulted in taxing notional income in the hands of the assessee, which never accrued and hence cannot be brought to tax. Accordingly, we are of the view that the CIT(A) has rightly deleted the addition and hence, we confirm the order of CIT(A) on this issue. This common issue of revenue's appeal is dismissed."

18. Applying the propositions of law laid down in these case law to the facts of the case, we allow these grounds of the assessee.

19. In the result, this appeal of the assessee is allowed.

20. Now we take up the Revenue appeal in ITA No. 84/Kol/2019.

21. Grounds of appeal are as follows:

"1. That on the fact and in the circumstances of the case the Ld. CIT(A) erred in calculating capital gain tax as long term capital gain tax rather short term capital gain tax.

2. The CIT(A), Kolkata had not justified in deleting the disallowance of Rs. 26,88,303/- u/s 14A.

3. Expenditure relating to Premium payable on redemption of FCCB for Rs. 4,41,08,784/- had not been charged to P/L account as revenue expenditure. Hence claim of the assessee is not allowable and decision of Ld. CIT(A) is not accepted.

4. As per the Tax Audit report the assessee had not furnished employees contribution to the concerned authority within due date. Therefore, Ld. CIT(A) decision is not accepted.

5. The Ld. CIT(A) had erred in giving benefit of set off of unabsorbed depreciation for the A.Y. 1996-97 and A.Y. 1997-98 to the assessee.

6. That the appellant craves for leave to add, alter or modify any of the grounds of appeal before or at the time of hearing."

22. On the issue of ground no. 1, the ld. CIT(A) at page 6 para 2.4.1 held as follows:

"2.4.1. I have perused the order of the AO and submission of the appellant and gone through the same. Capital gain from transfer of capital asset is chargeable to tax u/s 45 of the Act. Sec. 48 prescribed provision regarding the manner in which said capital gain shall be computed. Short term capital asset is defined in Sec. 2(42A) and as per said Sec. if a capital asset is "held" by an assessee for not more than 36 months immediately preceding the date of transfer, it is treated as short term capital gain. It is to be noted that the expression use by the provision is "Held by the assessee" and not "owned by the assessee". In the present case, as per the records, the land is held by the subsidiary company of the appellant since 15.01.1966 as the perpetual lease was granted in its favour. On 26.11.2010, the title of the said land changed from leasehold to freehold and nothing else has changed. For effecting said change the appellant company has paid the conversion charge of Rs. 2,39,05,168/-which under no circumstances can be compared with the cost of the land which runs into hundreds of crores. The relevant provision of Section 2(42A) is extracted as under:

"short term capital asset' means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of transfer;"

*In this provision, the Legislature has used the expression 'held' as against "owned". Therefore, the contention of the AO that ownership is relevant is not in accordance with the provision of the Act. The above view finds support from the recent judgement of Kolkata ITAT in the case of *Stewarts & Lloyds of India Ltd. vs. CIT* [ITA No. 372/Kol/2009] where it was held that in computing capital gain ownership of the property not to be considered, in computing the capital gain from the date of asset held by the assessee is to be considered."*

23. We find no infirmity in this finding as it is supported by the decision of the Kolkata 'A' Bench of the Tribunal in the case of *Stewarts & Lloyds of India Ltd. vs. CIT* in ITA No. 372/Kol/2009 order dated 02.03.2016 as well as the judgement of Hon'ble Allahabad High Court in the case of *Amar Nath Agrawal vs. CIT* [2015] 51 taxmann.com 120 (Allahabad). Hence this ground of the Revenue is dismissed.

24. Ground no. 2 is on the issue of computation of disallowance u/s 14A of the Act. The Id. CIT(A) at page 15 para 4.2.1 and 4.2.2 held as follows:

"4.2.1 I have gone through the submission of the Ld. AR of the appellant company and the order of the Ld. AO. During the course of the proceeding, The AR of the appellant company also submitted Balance Sheet and investment schedule. On perusal of the balance sheet, it is evident that the appellant company's surplus fund far exceeds the investment amount which indicates that investment was not made out of borrowed fund. Further, the interest expenses relate to the borrowings which are directly related to business of the appellant company. Therefore, I am of the view that no interest expenses can be attributed while working out disallowance u/s 14A 'r.w.r 8D of Income Tax Rules.

4.2.2 Further, I also found that disallowance under clause (iii) of Rule 8D has been rightly worked out by the AO and the amount derived of Rs. 3,65,110/-also appears to be reasonable. Therefore, considering the all facts and circumstances, the disallowance made under clause (ii) of rule 8D is hereby deleted and therefore, disallowance is restricted to Rs. 3,65,110/-. The appeal is party allowed in favor of the appellant company."

25. This decision is in line with the proposition of law laid down by the Hon'ble Bombay High Court in the case of *CIT vs. HDFC Bank Ltd. [2014] 49 taxmann.com 335 (Bombay)* and the judgement of the Hon'ble Delhi High Court in the case of *PCIT vs. Caraf Builders & Constructions (P.) Ltd. [2019] 101 taxmann.com 167 (Delhi)*. The propositions of law laid down in these case laws that, when they are interest free funds available to the assessee then the presumption is that such interest free funds have been utilised for non-interest bearing investments. Thus, we uphold this finding of the Id. CIT(A).

26. Ground no. 3 is relating to disallowance of premium payable on redemption of FCCB. The Id. CIT(A) at page 17 para 6.2.1 held as follows:

"6.2.1 I have perused the order of the AO and also considered the submission of the appellant company. Foreign Currency Convertible Bonds (FCCBs) is a kind of debt instrument. It cannot be equated with the equity just because of the fact that at the later stage it may be converted into equity. Premium payable on FCCBs is nothing but a kind of interest on debt or loan. Recently, Mumbai Tribunal in Mahindra 6b Mahindra Ltd. [ITA No. 586/Mum/2013] has allowed premium on redemption of FCCBs on prorata basis as deductible expenditure u/s 37(1) of the IT Act. Therefore, relying on the said decision I am allowing the deduction in respect of said premium over the period of FCCBs i.e. age of the bonds. Therefore, this ground is also partly allowed in favor of the appellant."

27. This issue is covered in favour of the assessee by the judgement of the Hon'ble Supreme Court in the case of *Madras Industrial Investment Corpn. Ltd. [1997] 91 Taxman 340 (SC)* and the judgement of the Tribunal in the case of *Universal Cables Ltd. vs. CIT [2000] 243 ITR 371 (Calcutta)*. This Bench of the Tribunal in the case of *M/s. Kanoria Chemicals & Industries Ltd. vs. ACIT in ITA No. 1880/Kol/2014 at para 14 page 10 and 11 held as follows:*

"14. Ground No. 4 of the departmental appeal for the Assessment Year 2009-10 and the Ground No. 2 for the Assessment Year 2010-11, are on the issue of allowability of the claim of the assessee for deduction of premium payable on redemption of FCCB bonds, which the assessee have been claiming on pro rata basis based on over the terms (i.e. Time Period) of the bond. The Assessing Officer disallowed this claim on the ground that:-

- a) The assessee has not debited its profit and loss account.*
- b) That the liability was contingent in nature.*
- c) And that the bonds are convertible and hence no deduction is allowed.*

During the course of remand proceedings, the Assessing Officer raised another point regarding tax deduction at source. On appeal the Id. First Appellate Authority held that the liability to pay premium on FCCBs is not a contingent one. He further held that, the actual payment need to be done on the redemption of these FCCBs and entries need not be made every year. He applied the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. v. Commissioner of Income-tax 225 ITR 802 SC and upheld the claim of the assessee. He pointed out that tax has been deducted at source in the year of redemption of bonds and hence was of the view that no tax need be deducted every year. He held that the assessee was entitled to deduction of the premium on yearly basis by relying on the order of the Bangalore Bench of the Tribunal in the case of Crane Softwares Internation Ltd. vs. DCIT (supra) and the decision in the case of Mahindra & Mahindra Ltd. vs. DCIT (supra). He held that the assessee was entitled to deduction of the premium, subject to disallowance made u/s 43A of the Act. The issues are the same for both the Assessment Years.

As stated earlier, in our view, the liability is not a contingent liability. Deduction is liable on yearly basis as the liability accrues on time basis. The Hon'ble Calcutta High Court in the case of National Engg. Industries Ltd. v. Commissioner of Income-tax [1999] 236ITR 577 (Calcutta) is relied in this regard. The Hon'ble Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. (supra), laid down the principle that, deduction should be allowed on pro-rata basis over the terms of the bond."

28. As order of the Id. CIT(A) is consistent with the above propositions of law, we uphold the same and dismiss this ground of the Revenue.

29. Ground no. 4 is against the deletion of disallowance of employees' contribution to PF & ESIC. The Id. CIT(A) followed the decision of the jurisdictional High Court in the case of CIT vs. Vijay Shree Ltd. (supra) and at para 7.2.1 held as follows:

"7.2.1 I have gone through the submission of the appellant and the order of the Ld. AO. I have also gone through the decisions on which the appellant company placed reliance. The above issue has been decided by the Hon'ble Kolkata ITAT in appellant own case in ITA No. 228/Kol/2015 in favour of the appellant. Therefore, following the said decision I am deleting the addition made by the AO in this regard and hence this ground is also decided in favour of the appellant company."

30. We find no infirmity in the same. Hence this ground of the revenue is dismissed.

31. Ground no. 5 is on the issue of set off of unabsorbed depreciation for the AY 1996-97 and 1997-98. This issue has been discussed by the Id. CIT(A) at para 9.2.1, 9.2.2 and 9.2.3 of his order page 18 and 19. We do not extract the same for the sake of parity. This issue has been adjudicated in the assessee's own case in ITA No. 913/Kol/2014

order dated 14.03.2017 in favour of the assessee. Consistent with the view taken therein, we uphold the finding of the Id. CIT(A) and dismiss this ground of the Revenue.

32. Before parting, it is noted that the order is being pronounced after ninety (90) days of hearing. However, taking note of the extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the Co-ordinate Bench of the Mumbai Tribunal in the case of *DCIT vs. JSW Limited in ITA No. 6264/Mum/2018 & 6103/Mum/2018*, Assessment Year 2013-14, order dated 14th May, 2020.

33. In the result, the appeal of the Revenue is dismissed and the appeal of the assessee is allowed.

Kolkata, the 8th July, 2020.

Sd/-
 [S.S. Godara]
 Judicial Member

Sd/-
 [J. Sudhakar Reddy]
 Accountant Member

Dated: 08.07.2020
Bidhan

Copy of the order forwarded to:

1. ***DCIT, Circle-11(1), Kolkata.***
2. ***JCT Limited, 18, Monilal Saha Lane, 2nd Floor, New Market, Kolkata-700 013.***
3. CIT(A)-4, Kolkata. (sent through e-mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through e-mail)

True copy

By order

Assistant Registrar
 ITAT, Kolkata Benches