

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B' NEW DELHI****BEFORE SHRI B. R. R. KUMAR, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER****I.T.A. No. 2563/DEL/2017 (A.Y 2014-15)**

M/s Dwarka Portfolio Pvt. Ltd. 13/34, W.E.A, Karol Bagh, New Delhi PAN No. AABCD6378G (APPELLANT)	Vs	Assistant Commissioner of Income Tax , Central Circle-29, New Delhi (RESPONDENT)
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Appellant by	Sh. Anunav Kumar, Adv
Respondent by	Ms. Yagya Saini Kakkar, CIT DR

I.T.A. No. 2868/DEL/2019 (A.Y 2014-15)

Shastri Buildcon Pvt. Ltd. 512, 5 th Floor, Viswadeep Tower, Janakpuri, New Delhi-110056 PAN No. AARCS5851M (APPELLANT)	Vs	DCIT Circle-23(1), Room No. 232, C. R. Building, I. P. Estate, New Delhi (RESPONDENT)
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Appellant by	None
Respondent by	Ms. Yagya Saini Kakkar, CIT DR

**I.T.A. No. 5338/DEL/2011 (A.Y 2008-09)
(BENCH-'D')**

Vavasi Telegence Pvt. Ltd. A-32, 2 nd Floor, Genisis Building, MCIA, Mathura Road, New Delhi PAN No. AABCV5624K (APPELLANT)	Vs	DCIT Circle-17(1) New Delhi (RESPONDENT)
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Appellant by	None
Respondent by	Sh. Binod Kumar, CIT DR

Date of Hearing	18.05.2022
Date of Pronouncement	27.05.2022

INTERLOCUTORY ORDER

PER: YOGESH KUMAR U.S., JM

The above three appeals have been heard on different dates on the maintainability of the Appeal, since the question of law are identical; we deem it fit to decide the issue in a common order.

2. I.T.A. No. 2563/DEL/2017 (A.Y 2014-15)

In the above appeal the assessee has challenged the order dated 24/03/2017 passed by CIT(A), wherein an addition of Rs. 18,00,00,000/- made u/s 68 of Income Tax Act by the A.O has been confirmed by the CIT(A), New Delhi for Assessment Year 2014-15.

3. When the appeal is taken up for hearing, the Ld. DR submitted that, the assessee Company has been struck off vide Notification No ROC/DELHI/248(5)/STK-7/10587 dated 08/03/2019 of Registrar of Companies NCT of Delhi and Haryana. Further, submitted that, in view of the said Notification, the appeal filed by the assessee has become in-fructuous and prayed for dismissal of the present appeal as not maintainable. The Ld. DR has also produced Form No. STK-7 i.e. notice of striking off and dissolution issued by the ROC under Section 248(5) of Companies Act 2013 (hereinafter referred to as the Companies Act) along with list of struck off Companies, wherein the name of the assessee Company figured at Serial No. 606. The Ld. DR further submitted since the Assessee Company has been struck off, the Counsel appearing on behalf of the Assessee struck off Assessee Company has no locus standi to represent before the Tribunal.

4. Per contra, the Ld. Counsel for the assessee submitted that, the Appeal cannot be dismissed as 'not maintainable' merely on the ground of striking off the Assessee Company by the ROC and insisted to hear and decide the present

Appeal on merit. Ld. Counsel for the assessee has relied on the judgment of Hon'ble Supreme Court reported in 2019 (3) TMI 703 SUPREME COURT in the case of Commissioner of Income tax Jaipur Vs. Gopal Shri Scrips Pvt. Ltd. dated 12/03/2019 and also taken us through the relevant provisions of Companies Act and also the Income Tax Act.

5. We have heard the parties, verified the materials on record and gave our thoughtful consideration. It is not in dispute that, the assessee Company has been struck off on 08/03/2019 from the Registrar of the Companies u/s 248(1) of the Companies Act.

6. There are two types of striking off Companies under the said Act. Strike off by the Registrar of Companies u/s 248(1) of the Companies Act and strike off by a Company its own u/s 248(2) of the Companies Act.

Section 248(1) of Companies Act:-

“248. (1) Where the Registrar has reasonable cause to believe that—

(a) a company has failed to commence its business within one year of its incorporation ¹[or];

*(b) ²[***]*

*(c) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under **section 455**; or*

*[(d) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under sub-section (1) of **section 10A**; or*

(e) the company is not carrying on any business or operations, as revealed after the physical verification carried out under sub-section (9) of section 12.]

he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.

(2) *Without prejudice to the provisions of sub-section (1), a company may, after extinguishing all its liabilities, by a special resolution or consent of seventy-five per cent. members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner:*

Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

The Section 248(2) will be invoked by the Company itself after extinguishing all its liabilities (including tax liabilities, if any).

7. The Companies can itself struck off under Section 248(2) of the Companies Act by its own only after 'extinguishing all the liabilities' (including the tax liabilities if any). But in the case of Company being struck off by the Registrar under Section 248(1) of the Companies Act, irrespective of existence of assets or the liabilities of the Company, the company will be stricken off if the Company commits any defaults mentioned in the Section 248(1) of the Act.

8. As per Section 248 (5) of the companies Act, the registrar of the Company shall publish notice of strike off the names of the companies in the official Gazette and on such publication, the company shall be dissolved. As per

Section 248(6) of the companies Act, before passing an order under Section 248 (5) of the companies Act, the Registrar shall satisfy that sufficient provision has been made for realization of the dues and also for discharge of its liabilities of the companies. Further, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies. As per sub-section (7) of the Section 248 of the Companies Act, the liability if any, of every director, manager or other officer who was exercising any power of the management and of every member of the company dissolved under sub Section (5) of Section 248 of the Companies Act.

248. (1) *Where the Registrar has reasonable cause to believe that—*

(2)

(3)

(4)

(5) *At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.*

(6) *The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company:*

Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

(7) The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.

(8) Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies

9. When the Company is being struck off, there will be certain consequences. The Section 250 of the Companies Act deals with effect of Company notified as dissolved.

Section 250 of the Companies Act.

“250. Where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice under sub-section (5) of that section cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.”

Thus, if the Company being struck off, the same shall be ceased to operate as a company and the Certificate of Incorporation issued to it shall deem to have been cancelled from the such date except for the purpose of realizing the amount due to the Company and for the purpose of payment or discharge of liabilities or obligation of the Company.

10. Thus, Combined reading of Section 250 and the sub-Sections (6) and (7) of Section 248 of the Companies Act, once the Company is struck off, it shall be deemed to have been cancelled from such date except for the purpose of realizing the amount due to the Company and for the payment or discharge of

the liabilities or obligation of the Company. Further, even after striking off of a Company, the liability if any of the Director, Manager or other Officers, exercising any power of management and of every member of the Company shall continue and may be enforced as if the Company had not been dissolved.

11. As per sub-section (6) of the Section 248 of the Companies Act, it is the duty of the Registrar to make provision for discharging the liability of the company before passing an order for struck off under sub-section (5) to Section 248 Companies Act. If there is any tax due from the struck off company, the Department can invoke Section 226(3) of the Income Tax Act for satisfying such tax demands.

Section 226(3) of the Income Tax Act:

“(3) (i) The Assessing Officer or Tax Recovery Officer] may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee, to pay to the Assessing Officer or Tax Recovery Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and

for the purposes of this sub- section, the shares of the joint holders in such account shall be presumed, until the contrary is proved, to be equal.

(iii)

.....

.....

(x).....

12. Further, as per Section 179 of Income Tax Act, if the tax due from Private company in respect of any income of any previous year cannot be recovered, then every person who was a Director of the private Company at any time during the relevant previous year shall be jointly and severally liable for the payment of such taxes unless he proves that non-recovery cannot be attributed to any gross neglect misfeasance or breach of duty on his part in relation of the Company.

Section 179 of Income tax Act reads as follows:-

179. (1) Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

(2) Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a private company cannot be recovered, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax due

in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962.

Explanation.—For the purposes of this section, the expression “tax due” includes penalty, interest or any other sum payable under the Act.”

13. When it comes to recovery of tax due from the struck off Company, the Department of Revenue has power either to invoke Section 226(3) of the Income Tax Act or can invoke Section 179 of the Income Tax Act and recover from the Directors after testing whether non recovery is attributed to any gross neglect misfeasance or breach of duty on the part of Directors. The Department can also invoke both 226(3) and 179 simultaneously for which there is no bar.

14. Now, the moot question arises as to ‘whether the Tribunal can proceed with the appeal filed by the struck down Company or filed by the Revenue against the struck off Company ?’. In other words, whether the struck off Company can be treated as alive/operative/existing for the purpose of adjudication of the tax arrears and the consequence order by which the recovery proceedings are triggered by the Revenue.

15. If the proceedings pending before the Court or the Tribunal (regarding determination of quantum the tax/liability of paying the tax) is dismissed for having become in-fructuous without adjudicating the actual tax dues or the liability of the assessee to pay such tax in the manner known to the Law and based on the such dismissal of the proceedings, if the Revenue proceeds for the recovery of the ‘such tax due’, the rights of the Directors of the Company will be seriously jeopardy and the same will amount to denial of the rights guaranteed under the Law.

16. In the instant Appeal, if we allow the request of the Revenue dismiss the Appeal as in-fructuous, one hand the appeal will be dismissed having become in-fructuous on the other hand, the Revenue Department will initiate proceedings under Section 179 of the Income Tax Act and that too without even adjudicating in the manner prescribed under Law on the 'quantum of actual tax due' or 'liability to pay tax', in such even great in justice will be caused, which cannot be permitted.

17. When the Revenue Department has not forgone the right to recover tax due or Written-off the demand on the ground of Company being struck off by the ROC, the right of the assessee to determine the tax liability in due process of law cannot be denied by dismissing the Appeal pending before us.

18. Further, in a case where the CIT(A) deletes the addition made by the A.O and if Revenue files Appeal before the Tribunal, even in a case where the Revenue is having a water tight case on merit, by dismissing the Appeal for having become in-fructuous will also result in non adjudication of the actual tax due by the assessee and the Revenue cannot recover the actual tax dues from the assessee. In such events, the Department of Revenue will be left with no remedy, which is contrary to the root principal of law '*Ubi Jus Ibi Remedium*'.

19. The Hon'ble Apex Court while dealing with amalgamated Companies in the case of ***Pr. Commissioner of Income Tax Vs. Mahagun Realtors Pvt. Ltd.***, held that, 'whether corporate death of an entity upon amalgamation per se invalidates a tax assessment order ordinarily cannot be determined on a bare application of Section 481 of the Companies Act, 1956 (and its equivalent in the 2013 Act), but would depend on the terms of the amalgamation and the facts of each case. Further it restored the matter to the file of the ITAT and directed to decide the matter on merit. The relevant portion is as under:-

“42. Before concluding, this Court notes and holds that whether corporate death of an entity upon amalgamation per se invalidates an assessment order ordinarily cannot be determined on a bare application of [Section 481](#) of the Companies Act, 1956 (and its equivalent in the 2013 Act), but would depend on the terms of the amalgamation and the facts of each case.

43. In view of the foregoing discussion and having regard to the facts of this case, this court is of the considered view, that the impugned order of the High Court cannot be sustained; it is set aside. Since the appeal of the revenue against the order of the CIT was not heard on merits, the matter is restored to the file of ITAT, which shall proceed to hear the parties on the merits of the appeal as well as the cross objections, on issues, other than the nullity of the assessment order, on merits. The appeal is allowed, in the above terms, without order on costs.”(emphasis supplied)

20. The Hon’ble High Court of Judicature for Rajasthan in the case of Commissioner of Income Tax Vs. Gopal Shri Scrips Pvt. Ltd. in ITA No. 53/2000 vide order dated 09/08/2016 dismissed the appeal filed by the Revenue for having become in-fructuous since the Company had been struck off from the register of ROC and the said Company dissolved. The operative portion of the Hon’ble High Court is as under:-

“On the last date of hearing when the matter came up before the Court on 05.07.2016, counsel for the appellant was directed to seek instructions about the present status of the Respondent assessee (Company) whether it is in existence or has become non operational or defunct by passage of time.

Sh. Anuroop Singhi, Adv., appearing for the appellant has placed for our perusal a communication issued from the office of Registrar of Companies dated 07.04.2011 indicating that pursuant to subsection(5) of Section 560 of the Companies Act, 1956 the name of Gopal Shri Scrips Pvt. Ltd., has been struck off from the register and the said company is dissolved.

In the light of the communication placed for our perusal dated 07.04.2011, no purpose is going to be served in examining the substantial question of law which has been raised for consideration in the instant appeal and on account of these change in circumstances, the present appeal has become infructuous and accordingly stands dismissed. However, the appellant is still at liberty to file application if any occasion arises in future.”

21. The said order of Hon’ble High Court of Judicature for Rajasthan dated 09/08/2016 in ITA No. 53/2000 has been challenged by the Revenue Department before the Hon’ble Supreme court of India in Civil Appeal No. 2922/2019 (CIT Jaipur Vs. M/s. Gopal Scrips Pvt. Ltd.). The Hon’ble Apex Court vide order dated 12/03/2019 held that, the High Court was wrong in dismissing the appeal as having rendered infructuous and further directed to decide the appeal afresh on merit in accordance with law in view of the relevant provisions of Companies Act and Income Tax Act. The relevant portions are hereunder:

“9. Having heard the learned counsel for the appellant (Income Tax Department) and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned order and remand the case to the High Court for deciding the appeal afresh on merits in accordance with law.

10. Mere perusal of the impugned order quoted supra would go to show that the High Court dismissed the appeal on the ground that it has rendered infructuous because it was brought to its notice that the name of the company the respondent assessee has been struck off from the Register of the Company under [Section 560\(5\)](#) of the Companies Act, 1956.

11. In other words, the High Court was of the view that since the respondent Company stands dissolved as a result of the order passed by the Registrar of the Companies under [Section 560](#) (5) of the [Companies Act](#), the appeal filed against such Company which stands dissolved does not survive for its consideration on merits.

12. In our view, the High Court was wrong in dismissing the appeal as having rendered infructuous.

13. The High Court failed to notice [Section 560\(5\)](#) proviso (a) of the [Companies Act](#) and further failed to notice Chapter XV of the Income Tax Act which deals with "liability in special cases" and its clause (L) which deals with "discontinuance of business or dissolution".

14. The aforementioned two provisions, namely, one under the [Companies Act](#) and the other under the [Income Tax Act](#) specifically deal with the cases of the Companies, whose name has been struck off under [Section 560](#) (5) of the [Companies Act](#).

15. These provisions provide as to how and in what manner the liability against such Company arising under the [Companies Act](#) and under the [Income Tax Act](#) is required to be dealt with.

16. Since the High Court did not decide the appeal keeping in view the aforementioned two relevant provisions, the impugned order is not legally sustainable and has to be set aside.

17. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside. The case is remanded to the High Court for deciding the appeal afresh on merits in accordance with law keeping in view the relevant provisions of Companies Act and the Income tax Act uninfluenced by any observations made by us on merits.

22. The Hon'ble Supreme Court in the case of M/s. Gopal Scrips Pvt. Ltd (supra) while allowing the Civil Appeal of the Revenue, dealt and relied on Section 560(5) of the Companies Act, 1956 and held that the Appeal filed by the Revenue is maintainable. The identical provisions have been introduced in the Companies Act, 2013 in Sub-Section sub-Sections (6) and (7) of Section 248 of the Companies Act. Therefore, the ratio laid down in the case of Gopal Scrips Pvt. Ltd (supra) is squarely applicable to the issue in hand.

23. In the case of M/s. Gopal Scrips Pvt. Ltd (supra), the Department of Revenue was having grievance on the Order of the Hon'ble High Court of Judicature for Rajasthan in dismissing the Appeal (ITA) for having become in fructuous on the ground that the Assessee company was struck off. The Hon'ble Supreme Court has set aside the Order of the Hon'ble High Court of Judicature for Rajasthan and directed to decide the Appeal on merit. Ironically now the very same Department of revenue is seeking before us to dismiss the present Appeal as in-fructuous since the assessee company has been struck off. The Department cannot have such double standard.

24. CONCLUSION:-

(i). Though the Assessee company has been struck off under Section 248 of the Companies Act 2013, in view of sub-sections (6) and (7) of Section 248 and Section 250 of companies Act 2013, the Certificate of Incorporation issued to the Assessee company cannot be treated as cancelled for the purpose of realizing the amount due to the company and for payment or discharge of the liability or obligations of the company, we are of the opinion that the Appeal filed by the struck off Assessee Company or Appeal filed by the Revenue against the struck off Company are maintainable. Therefore by rejecting the contention of the Ld. DR, we hold that the present Appeal filed by the Assessee (struck-off company) is maintainable and the same has to be decided on merit.

(ii). Since, we held that, the present Appeal is maintainable, the Counsel appearing on behalf of the Assessee Company has every locus to represent the Assessee in the present Appeal.

(iii). Office is directed to list the appeal before the regular Bench for hearing on 07/09/2022.

25. The ITA No. 2563/Del/2017 and ITA No. No. 2788/Del/2019 are also filed by the respective assesseees, wherein the Ld. DR has also sought for dismissal of the appeal as not maintainable on the same ground of striking off of Companies by ROC. We have already decided the question of law and held that the Appeal is maintainable even after striking off of the assessee company in ITA No. 2788/Del/2019, the said ratio is also applied in the above two appeals. Accordingly, we direct the Office to list the appeal in ITA No. 2868/Del/2019 & 5338/Del/2011 before a Regular Bench on 07/09/2022.

26 We direct the Department of Revenue to widely circulate the order in the interest of justice.

Order pronounced in the Open Court on this 27th Day of May, 2022

Sd/-
(B. R. R. KUMAR)
ACCOUNTANT MEMBER
Dated: 27/05/2022
*R. Naheed **

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI