IN THE INCOME TAX APPELLATE TRIBUNAL
CHENNAI BENCH '**B**' : CHENNAI

[BEFORE SHRI HARI OM MARATHA, JUDICIAL MEMBER
AND SHRI N.S. SAINI, ACCOUNTANT MEMBER]

I.T.A.No.440/Mds/2011
Assessment year : 2002-03

M/s Spencer and Company Ltd Spencer Plaza, 4th Floor No.769, Anna Salai Chennai 600 002 **[PAN – AAACS4451J]**	**vs**	The ACIT Circle VI(4) Chennai
(Appellant)		(Respondent)

Appellant by : Shri Dilip S. Damle
Respondent by : Shri R. Clement Ramesh Kumar

O R D E R

PER HARI OM MARATHA, JUDICIAL MEMBER:

This appeal of the assessee, for assessment year 2002-03, is directed against the order of the ld. CIT, passed u/s 263 of the Act on 10.2.2011.

2. In nut shell, the facts leading to this appeal are that for assessment year 2002-03, the assessee-company filed its return of income on 31.1.2002 admitting total income of ₹ 2,33,52,400/- and claimed a refund of ₹ 38,99,599/-. This return was processed u/s 143(1) on 29.3.2004 and the refund was determined by crediting the

TDS to the tune of ₹ 96,01,025/-. This intimation was revised on 19.7.2004 to consider the TDS allowable correctly at ₹ 90,59,669/- instead of originally allowed at ₹ 96,01,025/-. Subsequently, a revised return was filed by the assessee-company on 30.11.2003 declaring income of ₹ 2,29,61,640/- and claiming a refund of ₹ 36,60,052/-. Action u/s 154 was taken vide order dated 19.7.2004. Subsequently, a notice u/s 148 was issued to the assessee-company after obtaining the requisite approval of Addl. CIT, Range VI, on 26.9.2007 to disallow interest u/s 14A. At the request of the assessee-company, a copy of reasons recorded by the Assessing Officer was supplied to the assessee vide letter dated 19.11.2007. The reasons for reopening are as under:

> "That you had incurred interest expenses to the tune of ₹ 3,38,38,6651- on an accumulated loan amount of ₹ 31,92,55, 749/- whereas the funds amounting to ₹ 9,60, 70,1481- and ` 43,51, 29, 845/have been given as loans and made as investments respectively to/in subsidiary/associate companies. As there is direct nexus between loans obtained and investments made, expenditure incurred in relation to income not includable in total income (assessable) shall not be deductible under Section 14A. In the above said circumstances, initiation of proceedings under Section 147 is set in motion to re-compute income for AY 2002 - 03 thereby to assess the interest expenditure of ` 3,38,38,6651- which has escaped assessment" .

3. The main objection of the assessee-company was as under:

> "a. First of all we would like to submit that during the previous year relevant to Assessment Year 20*02-03, M/s.* Spencer Industrial Fund Ltd was merged in our Company vide Order dated 25.10.02 passed by the Hon'ble Madras High Court. In this connection, we draw your attention to Note No: 13 in the Notes to Accounts of the audited accounts filed with the revised return of income. Upon perusal of the same you would note that necessary accounting entries were passed in our books for recognizing the investments made by the erstwhile M/s Spencer's Industrial Fund Ltd and held by them for an aggregate amount of ₹ 43,88,77,240/- (comprising of listed securities ₹ 2,53,77,240/- and un-listed securities ₹ 41,35,00,000/-). Consequent upon the Merger, the said investments aggregating to ₹ 43,88,77,240/- of the erstwhile M/s Spencer's Industrial Fund Ltd were included in the investments in our books and were shown under the head "Investments".
>
> We therefore submit that we did not purchase these investments during the previous year but merely accounted for the same upon Merger of M/s. Spencer Industrial Fund Ltd with our Company. Further we would like to mention that M/s Spencer industrial fund Ltd did not have any borrowings from any Bank/Financial Institution at the time of its Merger in our Company. We therefore submit that the allegation made in the recorded reasons that we had purchased investments during the previous year from out of borrowed funds is wrong and without appreciating the facts available on records. "

4. The Assessing Officer decided the objections raised against proposed re-opening vide order dated 15.02.2008, overruling the same. Finally, order u/s 143(3) r.w.s 147 was passed on 24.12.2008 disallowing the interest u/s 14A to the tune of ₹ 2,56,53,000/- and assessed the total income at ₹ 4,86,14,640/-. The ld. CIT, Chennai-

III, noticed that the amalgamation of M/s Spencer Industrial Fund Ltd (transferor company) with M/s Spencer and Company Ltd (transferee company) was with effect from 1.4.2001, pursuant to the order of the Hon'ble Madras High Court dated 25.10.2002, issued a show cause notice u/s 263 of the Act dated 28.12.2010, the relevant portion of which is extracted herein below:

> "2. Meanwhile, the Assessing Officer issued notice u/s 148 of the Act to disallow interest u/s 14A after obtaining approval of the Addl. Commissioner of Income tax, Company Range-VI,- Chennai. As the assessee objected to the-reopening of assessment, an adjudication order was passed on 15.02.2008 overruling the objections. Finally, order u/s 143(3) r.w.s. 147 of the Act was passed on 24.12.2008 disallowing interest u/s 14A of the Act to the tune of ₹ 2,56,53,000/- and assessed the total income at ₹ 4,86,14,640/-.
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> 3. From a perusal of the records, it is seen that the amalgamation of M/s Spencer Industrial Fund Ltd. (transferor company) with M/s. Spencer and Co. Ltd. (transferee company) w.e.f 01.04.2001 pursuant to the order of the Hon'ble Madras High Court dated 25.10.2002 provides among other things as under:
>
> > "The net fair value of assets of the transferor company as reduced by the paid up value of shares to be issued and allotted by the transferee company pursuant to this scheme shall be adjusted with the General Reserves in the books of account of the transferee company."
>
> In accordance with the above provision, the rights and obligations of M/s. Spencer Industrial Fund Ltd. have been recorded at their respective face values under the "purchase method of accounting for amalgamation". Thus, the excess of fair value of net assets taken over by the company over the paid

up value of equity shares amounting to ` 2899.68 lakhs has been transferred to General Reserve as per Note 13(iii). Further, from the Note 13 of Schedule Q it is seen that the said amount has been added with the previous year's amount (Schedule B - Reserves and Surplus).

4. As per section 28(iv) of the Income-tax Act, 1961 the value of any benefit whether convertible into money or not, arising from the business or profession shall be chargeable to tax under the head "profits and gains of business or profession". From the above, it is clear that M/s. Spencer and Co. Ltd has benefited to the tune of ₹ 2899.68 lakhs on account of the scheme of amalgamation which requires to be treated as business income and taxed accordingly. This issue has not been considered by the AO at the time of completing the assessment u/s 143(3) of the Act. Hence the order passed by the, AO is erroneous and prejudicial to the interests of the revenue.

. 5. In view of the above, you are requested to show cause why the assessment u/s 143(3) r.w.s 147 of the Act should not be revised, as it is erroneous and prejudicial to the interests of revenue."

5. Against the above show cause notice, a reply running in 26 pages was filed, a copy of which is enclosed in the paper book. The company challenged the proposed actions legally as well as on merits. The assessee-company's stand is that by not assessing the sum of ` 2899.68 lakhs as business income u/s 28(iv) of the Act no error has been committed by the Assessing Officer and concomitantly no prejudice to the interest of Revenue has been caused. A preliminary legal objection was raised that proceedings u/s 263, can be initiated within a period of two years from the end of the year in which order is passed. According to the assessee, the company had filed its return

on 31.10.2002 and 23.11.2002 respectively, which were processed u/s 143(1) on 29.3.2004 and 19.7.2004, respectively. These returns were accompanied with the audited accounts. It was stated that in Note No.13 of Schedule Q of the audited accounts, the company had made complete disclosure regarding accounting entries passed in the amalgamated company's books to give effect to the amalgamation of SIFL. The case of the assessee-company is that the error, if any, on non-inclusion of the alleged profit of ` 2899.68 lakhs in the total income occurred while processing and issuing the intimation u/s 143(1) and therefore, proceedings u/s 263 on this issue, as detailed in the show cause notice, should have been initiated within two years from 31.3.2005, because the return was processed u/s 143(1) on 19.7.2004. However, no revisional proceeding u/s 263 was initiated on or before 31.3.2007. Hence, this action of the ld. CIT is barred by limitation.

6. On merits, it was stated that the company namely, M/s Spencer Industrial Fund Ltd (SIFL) got amalgamated with the assessee-company with effect from 1.4.2001 by virtue of an order of the Hon'ble Madras High Court in Petition Nos.207 and 208/2002 [Connected Comp. Appln. Nos.983 & 1008/2002]. Pursuant to the

amalgamation, the assets and liabilities and rights and obligation of SIFL vested in the assessee-company which were recorded in the company's books at their fair values under the "Purchase method of accounting for amalgamation". The excess of fair value of net asets taken over by the assessee-company over the paid up value of equity shares was computed at ` 2899.68 lakhs which was transferred to the General Reserve of the assessee-company, which is evident from page 19 of the Annual Report under Schedule B – Reserves and Surplus. According to the assessee, this amount cannot be subjected to tax as business income u/s 28(iv) of the Act. After considering the lengthy written submission of the assessee which contained various facets of arguments from different angles, ultimately, the ld. CIT has found the assessment order erroneous because the Assessing Officer has not at all examined this issue and therefore, prejudice has also been caused to interests of the Revenue. Hence, he has held the assessment order as erroneous in so far as it was prejudicial to the interests of the Revenue and consequently, has set it aside with a direction to assess the amount of ` 2899.68 lakhs in the hands of the assessee as per law. Against this order dated 10.2.2011, the assessee-company is aggrieved and has raised the following grounds:

"1. For that on the facts and in the circumstances of the case, the CIT was unjustified in law and on facts in passing an order of revision u/ s 263 of the Act for A.Y. 2002-03 even though the period of limitation for passing of the revision order had long expired.

2 For that on the facts and in the circumstances of the case, the CIT erred in justifying the assumption of jurisdiction u/ s 263 beyond the period of limitation on the ground that the original return was processed u/s 143(1) and therefore, the period of limitation was to be determined with reference to date on which the order u/s 143(3)/ 147 was passed.

3 For that on the facts and in the circumstances of the case, the AO having initiated the reassessment proceeding for the purpose of making disallowance u/s 14A of the Act, the CIT was unjustified In holding the order of the reassessment as erroneous and prejudicial within the meaning of Sec 263 with reference to an issue for which reassessment proceeding had not been started.

4 For that on the facts and in the circumstances of the case, the order of the CIT u/s 263 be held to be time barred and for that reason be held to be abinitio void in view of the decision of the Supreme Court in 293 ITR 1.

5 For that on the facts and in the circumstances of the case, the CIT was unjustified in holding that General Reserves of Rs.2988.68(sic 2899.68) lacs created in the assessee's account consequent to give accounting effect for amalgamation of Spencer Industrial Fund Ltd was assessable as business income of the appellant u/s 28(iv) of the Act.

6 For that on the facts and in the circumstances of the case, the accounting entries regarding creation of reserve and takeover of the assets and liabilities having been made in the accounts to give effect to the approved scheme of amalgamation of Spencer Industrial Fund Ltd sanctioned by the Madras High Court, the CIT was unjustified in holding that the Reserve created in the books of the amalgamated company represented benefit or perquisite arising from carrying on of a business, assessable u/s 28(iv).

7 For that on the facts and in the circumstances of the case, the appellant not being in the business of acquiring companies or undertakings through amalgamation, the CIT was grossly unjustified in holding that the General Reserve created in the books to give effect to amalgamation was benefit or perquisite accruing to the appellant in the course of carrying on of business.

8 For that on the facts and in the circumstances of the case, the creation of reserve having been created in the course of a transaction carried out by the appellant for taking over "undertaking" of the amalgamating company, the CIT should have appreciated that the transaction was in the capital field and therefore did not give rise to income chargeable u/s 28(iv) of the Act.

9 For that on the facts and in the circumstances of the case, the CIT overlooked and ignored the fact that in the course of amalgamation the appellant had taken over the "net assets" of amalgamating company and in consideration thereof, had issued its own equity shares having equivalent / corresponding value thereof to the shareholders of the amalgamating company no benefit or perquisite either actually or notionally accrued to the appellant and therefore no income chargeable to tax could be assessed in

the appellant's hand in A.Y.2002-03 u/s.28(iv) of the 1. T. Act, 1961.

10 For that on the facts and in the circumstances of the case, since the transaction in question was amalgamation within the meaning of Sec 2(IB) of the I T Act and further there being specific provisions in the Act dealing with "amalgamation" according to which such transaction was one of "acquisition" of a "capital asset", the CIT grossly unjustified in directing the AO to assess the sum of ` 2988.68(sic2899.68)lacs as benefit or perquisite arising in the course of business.

11 For that on the facts and in the circumstances of the case, the order of the CIT directing the AO to assess ` 2688.68(sic 2899.68) lacs as income u/s 28(iv) be vacated because the assessment order passed by the AO was neither erroneous nor prejudicial to the interest of the revenue within the meaning of Sec 263 of the Act.

12 For that on the facts and in the circumstances of the case, the AO having followed one of the permissible course available to him in law the CIT was unjustified in holding the assessment order u/s. 147/143(3) to be erroneous and prejudicial to the interest of the revenue and therefore the order of the CIT passed u/ s 263 be cancelled.

13 For that the appellant craves leave to file additional grounds and or amend or alter the grounds already taken either before or at the time of hearing of the appeal."

7. We have heard the rival submissions and have circumspected the entire record before us. The first issue, raised vide Ground Nos. 1 to 4, is regarding legal aspect that the revisional order dated 10.2.2011 passed u/s 263, is time barred and thus it cannot survive being based on invalid assumption of jurisdiction by the ld. CIT. Let us examine this contention of the ld.AR, Shri Dilip S.Damle vis-à-vis the facts culled out on record. Undisputedly, the assessee-company had filed return of income u/s 139(1) for assessment year 2002-03, on 30.10.2002. A revised return was filed consequent upon amalgamation approved by the Hon'ble Madras High Court on 25.10.2002 whereby SIFL was ordered to be amalgamated with the assessee-company, with a view to incorporate the operational results of the amalgamating company for financial year 2001-02 [corresponding assessment year 2002-03] because the decision of the Hon'ble High Court was effective from 1.4.2001. The assessee company revised its return u/s 139(5) by filing a return on 23.11.2003 disclosing information regarding amalgamation of SIFL with it. The returns filed u/s 139(1) and 139(5) were processed u/s 143(1). Precisely, the revised return was processed u/s 143(1) on 19.7.2004. Thereafter, the Assessing Officer believed that income chargeable to tax has escaped assessment so, he recorded the requisite reason u/s

148(2), that disallowance u/s 14A was required to be made out of interest paid. Thus, in Assessing Officer's opinion, total disallowance of interest expenses in terms of section 14A had escaped assessment for assessment year 2002-03. Accordingly, notice u/s 148 was issued to the assessee. The Assessing Officer provided a copy of reasons when it was so requested by the assessee-company. The assessee-company raised objections to reopening of assessment as narrated in the former part of this order, but the Assessing Officer rejected the same vide order dated 15.2.2008. Thereafter, the Assessing Officer completed the assessment u/s 143(3) r.w.s 147 on **24.12.2008**. The reopening was on account of disallowance of interest expenses in terms of section 14A. This issue even traveled upto the Tribunal. Subsequently, the ld. CIT called for the records of this assessment order dated **24.12.2008** on the premise that the Assessing Officer should have assessed the sum of ` 2899.68 lakhs as assessee's business income u/s 28(iv) of the Act, being the value of benefit arising from its business on account of the scheme of amalgamation which requires to be treated as business income and tax accordingly. This issue had not been considered at all by the Assessing Officer in the assessment order made for the first time on 24.12.2008. On this reason, the ld. CIT, gave a notice u/s 263 to show cause as to why the

order should not be revised. After considering the contentions of the assessee, the ld. CIT has set aside the order dated 24.12.2008 with a direction to redo the same vide order dated 10.2.2011, which is assailed by the assessee to be beyond permitted limit as provided u/s 263. The essence of this issue is that in the re-assessment, there is no whisper about alleged benefit arising from the amalgamation. According to the ld.AR, the period of limitation for the purpose of invoking revisional power u/s 263 cannot be computed with reference to re-assessment order dated **24.12.2008** because the subject matter of re-assessment was limited to the reasons recorded u/s 148(2). In other words, according to the ld.AR, no error was committed by the Assessing Officer while passing the order dated 24.12.2008 because the intent and scope of that order was limited or confined only to the reasons recorded u/s 148(2) of the Act. In this regard, heavy reliance has been placed on the decision of Hon'ble Supreme Court rendered in the case of CIT vs Alagendran Finance Ltd (293 ITR 1), by upholding the decision of the Hon'ble Madras High Court reported in 264 ITR 269. Apart from the above, the ld.AR has also relied on other decisions which we will discuss later.

8. On the other hand, the case of the ld.DR, Shri R.Clement Ramesh Kumar, is that as stated in the written submission filed by the assessee in regard to show cause notice, the ld. CIT has proceeded to revise the order dated 24.12.2008 passed u/s 143(3) r.w.s 147 of the Act. He categorically submitted that the Assessing Officer has not at all touched the impugned issue in his order dated 24.12.2008. According to him, the processing of return of income u/s 143(1) is simply an intimation and cannot be treated as an assessment order. The assessment order was framed for the first time on 24.12.2008 and therefore, the limitation would start from that date and not from 31.3.2005 (143(1) passed on 19.7.2004). He has referred to the amalgamation and has submitted that the differential amount of ` 2899.68 lakhs by which the assessee was benefited on account of this scheme of amalgamation was not at all touched, discussed, or decided by the Assessing Officer. He has also relied on some decisions to substantiate his contention.

9. After cogitating the rival stands in the light of provisions and relevant precedents, we have found that the core issue before us is whether the date from which the limitation of two years provided u/s 263 for initiating revisional proceedings is to be reckoned from the

date of processing of return of income done u/s 143(1) on 19.7.2004 or else it is to be reckoned from the date of the re-assessment order i.e 24.12.2008, which is the date of order passed u/s 147/143(1). The crux of the argument of the ld.AR is that when the return was processed and the fact regarding amalgamation of the companies approved by the Hon'ble Madras High Court was brought to the notice of the Assessing Officer, and he did not rake up this issue while processing the return or at best while making the re-assessment order because he was convinced that there was no such alleged benefit which have arisen and can be taxed as business income u/s 28(iv) of the Act. This issue becomes settled as on 19.7.2004, more particularly when this was not a ground for reopening as well. On the other hand, the crux of the submission of the ld. Jt. CIT/DR is that the assessment order made on 24.12.2008 is the first assessment order and the proceeding done on 19.7.2004 is not an assessment order. Hence, the limitation shall be counted with reference to 24.12.2008 and not 19.7.2004.

10. We have treaded through the relevant law and also the precedents on which both parties have relied upon and have also circumspectiously considered the minute nuances involved in this legal

tangle. Section 263 of the Act provides in sub-section (2) a period of two years from the end of the financial year in which the order sought to be revised was passed for making order u/s 263. This limitation is further subject to sub-clause (3) of section 263 which reads as under:

> "(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal,] the High Court or the Supreme Court.
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> *Explanation*.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

11. Before we discuss and decide the issue, we may mention that in case the relevant date is found to be 19.7.2004, the limitation to raise this issue has expired long back but in other case, if the limitation starts from the re-assessment order dated **24.12.2008** the order in question is well within the limitation. It would be beneficial to understand the scheme of the Act regarding making assessment , re-assessment and revision so that this issue can be set at rest by passing a reasoned order. Sections 143 to 145 of the Act lay down the provisions dealing with the processes which should be the culmination of the first but a crucial stage dealing with the very object and purpose

of the Act, viz. the determination by the Assessing Officer of the total income and tax payable by an assessee in any assessment year. The Act clearly provides, for the purpose of making assessment or re-assessment, a complete code which is contained in Chapter XIV except for the undisclosed income found as a result of search or requisition, which is the subject matter of Chapter XIVB of the Act. The word 'assessment ' used in the Act has different connotations according to the context in which it is used in the Act. This word, in a wider sense, means not only the computation of income but also the entire process of computation which includes determination of income, determination of tax payable and determination of tax refundable. In other words, comprehensively, this word includes the whole procedure for imposing liability upon the tax payer wherein the following three stages are involved –

(i) The taxable income of the assessee has to be arrived at;

(ii) Determination of the sum payable by the assessee on the income computed or the amount refundable to him thereon; and

(iii) The service on the assessee of the notice of demands specifying the sum payable by him.

12. After 1.4.1989, the actual assessment proceedings are preceded by a stage which is in financial parlance known as pre-assessment in the sense that the assessee is required to comply with the other requirement of advance tax, TDS procedures et al. The pre-assessment stage assumes colossal overtures. Upto 31.3.1989, after return of income was filed, the Assessing Officer could make an assessment u/s 143(1) without requiring the presence of the assessee or production by him of any evidence in support of the return. But when the assessee would object to such an assessment or where the officer was of the opinion that the assessment so made was incorrect or incomplete or in a case where an Officer did not complete the assessment u/s 143(1), but wanted to make a further enquiry, a notice u/s 143(2) was to be issued to the assessee requiring him to produce the evidence in support of his return. After considering the material and evidence produced by the assessee and after making such necessary enquiries, as he deemed fit, the Assessing Officer could make assessment u/s 143(3). With effect from 1.4.1989, section 143 was completely recast providing a new scheme of assessment whereby the requirement of passing an assessment order, in all cases where return of income was filed, was dispensed with. However, the Assessing Officer was given powers to make prima-facie adjustments

to the income and loss declared in the return on the basis of information available in such return, accounts or documents, when the deduction, allowance or relief claimed was obviously and patently inadmissible. But there was some confusion to understand the scope of this provision of making prima-facie adjustments in a judicious manner which resulted in multiplicity of proceedings by way of appeals and/or rectifications, etc. Resultantly, this provision was given goby with effect from 1.6.1999. By Finance Act, 1999, with effect from 1.6.1999, a new section 143(1) was substituted whereunder if the return has been filed u/s 139 or in response to notice u/s 142(1) '**intimation**' shall be sent to the assessee specifying the sum payable by or refundable to him or in other cases acknowledgement of the return shall be deemed to be the '**intimation'**. The period of limitation for sending such intimation u/s 151 is two years from the end of the assessment year in which the income was first assessable. The remedy against such intimation shall be by way of rectification as per the provisions of section 154(1)(b) of the Act.

13. Now coming to assessment proceedings u/s 143(3) which are commonly known as regular assessment proceedings. Assessment could be made even in respect of assessment made under pre-1989

section 143(1) provided the Assessing Officer would consider it necessary or expedient to do so to verify the correctness and completeness of the return by requiring the presence of the assessee or by the production of evidence in that behalf. The Assessing Officer had to seek approval of Dy. CIT to serve notice u/s 143(2) prior to 1989, however, post 1989, the regular assessment to assess the total income or loss of the previous year when the return is filed u/s 139 or in response to notice u/s 142(1) and the Assessing Officer considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax in any manner. In case the Assessing Officer does not get any aid or books of account and other information which may be in possession of the assessee and which could form the basis for a well reasoned assessment order, in cases where there is a failure to file return, failure to comply with all the terms of notice issued u/s 142(1), failure to comply with the direction u/s 142(2A) or special audit and failure to comply with all the terms of 143(2), the Assessing Officer is empowered to make best judgment assessment u/s 144 of the Act.

14. The Act provides for the machinery in Chapter XIV u/s 147 to 153 for the assessment of escaped income in certain circumstances.

The fundamental principle underlined these provisions is that in case income assessable in one assessment year has escaped assessment then in order to bring such escaped income to tax, the completed assessment is required to be reopened and it has to be redone in order to include the escaped income so that the income of that particular year is assessed accordingly.

15. After 1.4.1989, there has been a major change in the scheme of re-assessment and it is that changed provision which is applicable to the facts of this given case. For ready reference, it would be beneficial to reproduce section 147 herein below:

> "[**Income escaping assessment.**
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> [22]**147.** If the [23][Assessing] Officer [24][has reason to believe[25]] that any income chargeable to tax has escaped assessment[25] for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess[25] such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
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> **Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure[26] on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts[26] necessary for his assessment, for that assessment year:

[27][**Provided further** that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily[26] amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(*a*) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(*b*) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(*c*) where an assessment has been made, but—

(*i*) income chargeable to tax has been underassessed ; or

(*ii*) such income has been assessed at too low a rate ; or

(*iii*) such income has been made the subject of excessive relief under this Act ; or

(*iv*) excessive loss or depreciation allowance or any other allowance under this Act has been computed.]

[27a]**[**Explanation 3.—*For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148*.**]**"

16. The existing legal interpretation that once an assessment has been reopened, any other income that has escaped assessment and

comes to the notice of the Assessing Officer subsequently during the course of proceedings can also be included in the assessment so made. Again, limitations to initiate re-assessment proceedings have been provided and the method of further proceeding towards re-assessment is laid down in section 148 which reads as under:

> **Issue of notice where income has escaped assessment.**
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> [29]**148.** [30][(1)] Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve[31] on the assessee a notice requiring him to furnish within such period, [32][* * *] as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be[33], apply accordingly as if such return were a return required to be furnished under section 139 :]
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> [34][**Provided** that in a case—
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> (*a*) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and
>
> (*b*) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, re-assessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:
>
> **Provided further** that in a case—
>
> (*a*) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and
>
> (*b*) subsequently a notice has been served under clause (*ii*) of sub-section (2) of section 143 after the expiry of twelve

months specified in the proviso to clause (*ii*) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.]

[35][*Explanation.*—For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.]

[36][(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.]"

17. Since all the requirements laid down under these two sections have been clearly followed and the re-assessment proceedings are not under challenge in this appeal, we are not required to discuss in detail other aspects of the assessment proceedings. But the fact remains that the re-assessment was done in this case for the reason that disallowance u/s 14A resulted into escapement of income while processing the revised income.

18. Under section 263, the ld. CIT may call for and examine the records of any proceeding under this Act and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order

thereon as the circumstances of the case justify. The detailed legal position on the subject of revision will be discussed later on as we are required to deal with limitation aspect of initiation of revisional jurisdiction alone before we enter into the merits of the case.

19. The proviso appended to section 147 is of wider importance because it signifies that to initiate re-assessment proceedings a time limit has been prescribed that "after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment , for that assessment year." Apparently, from the above proviso, it appears that it is applicable only for the assessments which have been made u/s 143(3) or u/s 147 but in cases of assessment u/s 143(1) no limitation would apply. In principle, in cases where an intimation u/s 143(1) is not valid by an order u/s 143(3), there would be no difference underlined i.e the assessment is completed for that assessment year. This is further verified by the amendment made to section 143 wherein an Explanation has been added by the Finance (No.2) Act, 1991 with effect from 1.10.1991 whereby such an order

u/s 143(1) has been specifically made liable to revision u/s 264 of the Act. Further, the scope of this Explanation was expanded by the Finance Act, 1994 with effect from 1.6.1994 whereby such an order u/s 143(1) has been specifically made appealable u/s 236 of the Act. This situation would apply for intimation assessment framed upto 31.5.1999. With effect from 1.6.1999 vide Finance Act, 1999 section 143(1) has been substituted and 143(1)(a) has been omitted. As a result of such amendment brought on statute, there is no definition with regard to the order passed u/s 143(1) and 143(3) and hence, the proviso will also be applicable to the orders passed u/s 143(1). Meaning thereby, the time limit for requisition of re-assessment will also be applied for assessment u/s 143(1) and the Assessing Officer cannot issue any notice after the expiry of four years from the end of the relevant assessment year unless the assessee has failed to disclose fully and truly all material facts necessary for his assessment for that assessment year.

20. In effect, as per the provisions of section 263(1), where an original order is rectified by an order of rectification, it ceases to exist and a rectified order comes into existence. After the date of rectification, there remains no original order in existence. The ld. CIT cannot exercise his power of revision with reference to the original

order. Once an order of rectification is passed, the assessment itself is modified and what remains thereafter is, not the order of rectification but the assessment as rectified. In this regard, decisions of Hon'ble Madras High Court in the case of Vedantham Raghaviah vs Third Addl. Income-tax Officer, 49 ITR 314(Mad) and that of S.Arthanari vs First Income-tax Officer, 83 ITR 828, are relevant. Likewise, once the re-assessment order is passed, the original assessment order ceases to exist. In this regard, the decision of Hon'ble Madras High Court's decision rendered in the case of CIT vs Standard Motor Products of India Ltd, 142 ITR 877 is relevant. In this case, it has been held thus:

> **Held**, (i) that the Tribunal was not justified in holding that in the reassessment proceedings under s. 147(a) the excess depreciation allowed originally on certain machineries for the assessment years 1961-62 to 1963-64 'could not be withdrawn;
>
> (ii) that from the very nature of things and from the very object which they are intended to subserve, a canteen, fire-service station, pump house, overhead tanks and wells, overhead line and street-lights, co-operative stores, buildings, etc., are essential adjuncts to the factory premises. Accordingly these items are part of factory buildings. The administrative block was admittedly said to consist of the office of the Chief Engineer, Industrial Engineering Department, drawing office, etc. Consequently the necessary drawings connected with the work of 'the factory was being done in this block. In such circumstances the administrative building could be considered only as part and parcel of the factory buildings. Similarly latrines, compound walls, workers' gate, etc., were also factory buildings.

> The Tribunal was, therefore, justified in its view that the administrative buildings, latrines, compound walls, etc, were entitled to a higher rate of depreciation. In order to find out whether a particular structure or construction falls within the category of factory buildings or not, the court has to approach the question from the functional point of view. "

21. Likewise, the case of Hon'ble Supreme Court in the case of Kundanlal vs CST, Tax LD.AR 2094 S.C also states the similar view. We may make it clear that circumstances in which an order u/s 147 and order u/s 154 can be passed are not mutually exclusive and may overlap. There is nothing in the provisions of these two sections to suggest any conflict between them of such a nature that the provision of one section will not apply if those of the other will apply. Since they can overlap, it is possible for a case to be governed by both. The Assessing Officer has jurisdiction to take action under either of the two sections as the circumstances may require. We may refer to the Hon'ble Madras High Court's decision rendered in the case of CIT vs E.I.D. Parry Ltd, 216 ITR 489. So, what is the legal position in this regard is that once the order is rectified or re-assessment order is made, the original assessment order gets merged with the subsequent order and the date for computing limitation will have reference to the date of the subsequent order and not the previous order. Once the

order is reopened, it is reopened for all practical purposes, so it cannot be said that when the intimation passed u/s 143(1) was reopened after recording reasons for escapement of a particular income, the limitation will start from the date of intimation, particularly in relation to a different kind of income which is the subject matter of revision. This is an illogical interpretation of the provisions of the Act.

22. The case of CIT vs Alagendran Finance Ltd, 293 ITR 1, is not applicable to the facts of this case. The Assessing Officer is not empowered to apply his mind while passing the intimation or processing the returns of income for a particular year. Therefore, the decision of Hon'ble Supreme Court (supra) will not apply to the facts of this case because in that case regular assessment u/s 143(3) had already been made and thereafter re-assessment was made in relation to certain items of income. Under the provisions of section 147, the power vested with the Assessing Officer is to assess or re-assess. When after intimation, the assessment is made u/s 143(3) r.w.s 147 it has got different connotations as it is the first regular assessment and not exactly a re-assessment. But under the provisions of section 147 and 148, the requirement of recording of reasons, etc are made applicable in both the cases, sometimes, these provision is misconstrued in the way that the intimation has to be

treated as a regular assessment . This conclusion is contrary to the express provision of the law.

23. The decisions relied on by the ld.AR are the cases in which the facts are totally distinguishable. The decision in the case of K.S.Subbiah Pillai & Co. (India) Pvt. Ltd. vs CIT, 260 ITR 304, was rendered before the amendment/substitution of section 143(1). At that time, the summary assessment order was made u/s 143(1)(a) of the Act. This decision was rendered when the Tribunal put a view that the ld. CIT had no jurisdiction to revise the order passed in summary assessment . The Hon'ble Madras High Court by following its own earlier judgment in the case of CIT vs Smt. R.G.Umaranee, 262 ITR 507, held that even summary assessment could be revised u/s 263 of the Act. Since there is no longer such summary assessment as per the provision in the Act, this decision will not apply to the given facts of this case.

24. Reliance was placed on the decision of Hon'ble Supreme Court rendered in the case of CIT vs Alagendran Finance Ltd, 293 ITR 1. The facts of that case are that assessee for various assessment years were completed u/s 143(3). The question framed for the answer by the High Court was as under:

> "As to whether in the facts and circumstances of the case, the revision u/s 263 should be done by taking into account the date of the original assessment order under section 143(3) and not the order of re-assessment under section 147 read with section 143(3) of the Income-tax Act, 1961 ?

The Hon'ble Supreme Court answered this issue by stating that the limitation for revision shall start from the original assessment order in so far as the issues which were not the subject matter of re-assessment order. As we have stated above, the facts in that case are entirely different and distinguishable because in that case, already assessment has been made u/s 143(3). In the case before us there is no such assessment order which was made prior to making the assessment u/s 143(3)/147 (which was the first assessment order in this case). If for the sake of discussion we say that this case applies to the facts of this case, its ratio decidendi will go against the interest of the assessee. As per the ld.AR, the scope and nature of transaction under the scheme of amalgamation approved by the Hon'ble Madras High Court u/s 391 to 394 of the Companies Act, 1956, SIFL was an independent company incorporated on 31.3.2001 having independent corporate identity. It owned numerous assets and liabilities of its own. It was an independent taxable entity and assessed to tax separately. By virtue of approval granted on 25.10.2002, the entire 'undertaking'

consisting of assets, rights, privileges and liabilities of SIFL stood vested in the assessee-company with retrospective effect from 1.4.2001. Consequently, SIFL stood wound up automatically. Consequently, all the assets and all liabilities vested in the assessee-company by operation of law**.** All shareholders of SIFL automatically became entitled to be the assessee's shareholders. The assessee-company allotted one share of ` 10/- each against every 20 shares held in SIFL. The predominant asset of SIFL was 'shares' in numerous bodies, corporate and which SIFL owned and held by way of 'investment'. This entire investment stood vested in assessee-company with effect from 1.4.2001. The assessee-company continued to hold these shares by way of 'investments'. Thus, this arrangement resulted into acquisition of capital asset being 'undertaking' of SIFL as per the A.R which cannot be construed as a transaction undertaken in the ordinary course of business. The case of the ld.AR is that the assessee-company was not involved in making profits or gain by acquiring and selling 'business undertaking' in a business like manner. Since the transaction involved transfer of the undertaking on going concern basis, if any, income would arise can be charged to tax under the head 'capital gains' and not under the head 'profits and gains of business. Anyway, the argument of the ld.AR is that if any

income accrued or arose from this transaction, it would be assessable in the hands of transferor and not the transferee(assessee) as per the provisions of section 55 of the Act and not under Sections 28 to 44 of the Act. But it was clarified that this amalgamation did not result any capital gains to the transferee either because in this case transfer of the following assets was involved:

(i) amalgamation of 'undertaking' which constituted a 'capital asset'

(ii) The shareholders of the amalgamating company were allotted shares of the amalgamated company because of the scheme of amalgamation and that too result into 'capital of asset' being the shares of the amalgamating company.

25. It was argued that no such capital gain arises although capital asset is transferred in view of section 47(iv) of the Act. The case as put forth by the ld.AR is that consequent on transfer of the 'undertaking' of the amalgamating company 'capital asset' owned by SIFL became the assessee-company's capital asset. The accounting of the acquired asset was carried out in assessee's books on fair value basis. The legal argument of the ld.AR is that if sections 47 and 49 are read together cumulatively, it would become evident that for the purpose of taxation, amalgamation of SIFL was a revenue neutral event. It was argued by relying on the decision of Mumbai Bench of

the ITAT in the case of HDFC Securities Ltd vs ACIT [9 Taxman 23] in which case, the assessee had purchased stock exchange card issued by BSE and the cost of acquisition was shown at ` 2.8 crores on which it claimed depreciation. The assessee received shares in exchange of membership card . Such exchange was specifically kept outside the purview of section 45 because of the exemption provided by section 47(xiiia). But the Assessing Officer sought to assess the difference between the fair value of shares received and WDV of the stock exchange card by invoking section 28(iv) of the Act. On further appeal, the Tribunal held that the transfer of stock exchange card in lieu of the shares issued by stock exchange in the scheme of corporatization was not a transfer in view of section 47(xiiia) of the Act and therefore, no income as capital gains was chargeable to tax. The Tribunal has held that corporatization of the stock exchange was an independent event which did not occur in the course of the assessee's business. It was held that this transaction did not result in accrual of any benefit from the assessee's conduct of business. Finally, it was held that it was not a benefit or perquisite assessable as business income and therefore, no income could be brought to tax u/s 28(iv). In this regard reliance was also placed on the decision of Chennai Bench in the case of ACIT vs TVS Motors Ltd (128 ITD 47). In this

case M/s LAC was a subsidiary of the assessee in which the assessee held approximately 66% shares. The said subsidiary was amalgamated with the assessee in terms of a Composite Scheme of Arrangement. Before the amalgamation of LAC with the assessee, two undertakings of the amalgamating company were transferred on slump sale basis to another company on going concern basis. On amalgamation of LAC with the assessee, all remaining assets and liabilities of LAC became properties and liabilities of the assessee. For giving effect to the amalgamation, shares held by the assessee in the subsidiary were cancelled. The outside shareholders of the amalgamating company were allotted shares of the amalgamated company i.e the assessee. In the books of amalgamated company entries were passed to give effect to the amalgamation consequent to which a 'capital reserve' was recognized and accounted for in the books of account of the assessee. The assessee claimed that the transaction in question was an amalgamation within the meaning of section 2(IB) of the Act therefore, no profit or gain was assessable in the hands of the transferee. The Assessing Officer was not agreeable and held that what was approved by the High Court was a composite Scheme of Arrangement not amounting to amalgamation within the meaning of section 2(IB). So, he assessed the sum of ` 6.43 crores

recorded as capital reserve in the books of the amalgamated company as 'income from other sources'. On appeal, the ld. CIT(A) and Tribunal held that the Scheme of Arrangement was approved by the Hon'ble Madras High Court which also deals with the amalgamation. It was further held that all conditions of section 2(IB) were fulfilled and it was a case of amalgamation. So, no income was assessable in the hands of the assessee being the amalgamated company in respect of accounting entry passed, recording creation of capital reserve which arose consequent to accounting of the amalgamation.

26. Further it was argued that section 28(iv) of the Act brings to tax the value of any benefit or perquisite arising from the business. The expression "arising from the business" used in section 28(iv) is very significant. Because for invoking the same, the condition precedent is that the benefit or perquisite should necessarily arise form the business which the assessee carries on during the relevant previous year . It was argued that such a benefit or perquisite should not have remote nexus with business but should have direct and live and proximate nexus and it should not be nominal or notional. For invoking section 28(iv) it is imperative to prove the existence of a business which should have live nexus with the benefit or or perquisite according to the assessee. In this regard, reliance was placed on the

decision of Hon'ble Bombay High Court rendered in the cases of Mahindra & Mahindra P. Ltd vs CIT , 261 ITR 501, of Gujarat High Court in the case of CIT vs Alchemic P. Ltd (130 ITR 168) and of Hon'ble Delhi High Court in the case of Ravinder Singh vs CIT (205 ITR 353). Finally it was argued that in such circumstances the Assessing Officer has not committed any error by not making addition with reference to the entries passed in the books to give effect to the amalgamation of SIFL.

27. On the other hand, the ld. Jt. CIT/DR has repeated similar arguments as were recorded as reasons by the ld. CIT.

28. In those cases, there was an order passed u/s 143(3) and the error was committed in that order itself which continued in the re-assessment order also. But in the given case, the assessment was made for the first time u/s 143(3) r.w.s 147 as we have stated above and there was no occasion before that to scrutinize the return. In case section 263(2) is read in conjunction with other provisions of the Act, it would be clear that order passed u/s 143(3) r.w.s 147 can be revised. So, it becomes amply clear that the limitation will start from the date of assessment made u/s 143(3) r.w.s 147 i.e 24.12.2008 in this case and not from the date of intimation as has been claimed by the

assessee-company. Hence, the order passed u/s 263 is within limitation and the jurisdiction assumed by the ld. CIT is valid. The legal issue cannot be allowed and stands dismissed.

ON MERITS:

29. On merits, the facts of the case are that the amalgamation of the assessee-company with SIFL took place as approved by the Hon'ble Madras High Court vide its judgment/order dated 25.10.2002 and the scheme of arrangement was provided as follows:

> "With effect from the Appointed Date", the "Undertaking" of the Transferor Company shall, without further act or deed, be transferred to and vest in an shall in and shall be deemed to have been transferred to and vested in the Transferee Company pursuant to section 394 of the act as a going concern, subject however, to all charges, liens, mortgages, if any, then affecting the same or any part thereof."

The expression 'Undertaking of the Transferor Company' was defined in Clause E of Part I of the Scheme as follows:

> "Undertaking of the Transferor Company" means and includes:
>
> i) All the properties, investments, assets and liabilities of the Transferor Company immediately before the amalgamation, including the Business as a going concern.
>
> ii) Without prejudice to the generality of the foregoing clause, the said Undertaking shall also include all rights, powers, interest, authorities, privileges, liberties and all properties and assets, moveable or immoveable, real or personal, corporeal or incorporeal, in possession or reversion, present or contingent of whatsoever nature

and wherever situate including land, buildings, office equipments, inventories, investments in shares, debentures, bonds and other securities, sundry debtors, cash and bank balance, loan and advances, leases or agency and all other interests and rights in or arising out of such property together with all licenses, trade marks, import entitlement arid other quotas, if any, held, applied for or as may be obtained hereafter by the Transferor Company or which the Transferor Company is entitled to and all debts, liabilities, duties and obligations of the Transferor Company of whatsoever kind."

Clause 5 of Para II of the said Scheme further provided as follows:

"Upon the Scheme being sanctioned by the Hon'ble High Court at Madras and transfer taking place as stipulated under Clause 1 hereof-

a) The Transferee Company shall, without further application, issue to SIHL, for itself as well as in behalf of its nominees, one (1) Equity Share of all the face value of Rs.1 0/- each in the Transferee Company, credited as fully paid up for every Twenty (20) equity shares of the face value of Rs.10/- each held by them in the Transferor Company. The above ratio was arrived at based on the report of an external expert namely, M/s. Price Waterhouse Coopers. Such issue of shares shall be subject to the provisions of Claude 6(a) hereunder contained.

b) All debentures and loans held by the Transferor Company and the Transferee Company inter se shall stand cancelled .

c) All the employees of the Transferor Company shall become the employees of the Transferee Company on the same terms and conditions on which they are engaged by the Transferor Company without any interruption in service as a result of the transfer of the Undertaking of the Transferor Company to the Transferee Company.

d) Subject to an order being made by the Hon'ble High Court at Madras, the Transferor Company shall be dissolved without winding up. "

Section 2(IB) of the Act defines the expression "Amalgamation" as follows:

> "amalgamation ", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that -
>
> (i) all the property of the amalgamating company or companies immediately before the amalgamation become the property of the amalgamated company by virtue of the amalgamation,
>
> (ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation,
>
> (iii) Shareholder holding not less than (three fourths) in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation,
>
> otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first mentioned company.

30. Consequent upon the amalgamation of SIFL, entries were passed in assessee's books of account for financial year 2001-02 for

giving effect to this scheme approved by the Hon'ble Madras High Court. After the amalgamation, the business of the transferor company was carried out by the assessee-company and the excess of ` 2899.68 lakhs arising out of the amalgamation, as per the ld. CIT had to be assessed as business income only as per the provisions of section 28(iv) of the Act.

31. Before we deal with the merits of this case, we would like to detail the scheme of the Act regarding revision u/s 263 of the Act. It is trite that an order can be revised only and only if twin conditions of 'error in the order' and 'prejudice caused to the Revenue' co-exist. The subject of 'revision under section 263' has been vastly examined and analysed by various Courts including that of Hon'ble Apex Court. The revisional power conferred on the CIT vide section 263 is of vide amplitude. It enables the CIT to call for and examine the records of any proceeding under the Act. It empowers the CIT to make or cause to be made such an enquiry as he deems necessary in order to find out if any order passed by Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue. The only limitation on his powers is that he must have some material(s) which would enable him to form a prima facie opinion that the order passed by the Officer is erroneous in so far as it is prejudicial to the interest of the Revenue.

Once he comes to the above conclusions on the basis of the 'material' that the order of the Assessing Officer is erroneous and also prejudicial to the interests of the Revenue, the CIT is empowered to pass an order as the circumstances of the case may warrant. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct to frame a fresh assessment. He is empowered to take recourse to any of the three courses indicated in section 263. So, it is clear that the CIT does not have unfettered and unchequred discretion to revise an order. The CIT is required to exercise revisional power within the bounds of the law and has to satisfy the need of fairness in administrative action and fair play with due respect to the principle of audi alteram partem as envisaged in the Constitution of India as well in section 263. As order can be treated as 'erroneous' if it was passed in utter ignorance or in violation of any law; or passed without taking into consideration all the relevant facts or by taking into consideration irrelevant facts. The 'prejudice' that it contemplated under section 263 is the prejudice to the Income Tax administration as a whole. The revision has to be done for the purpose of setting right distortions and prejudices caused to the Revenue in the above context. The fundamental principles

which emerge from the several cases regarding the powers of the CIT under section 263 may be summarized below:

(i) The CIT must record satisfaction that the order of the Assessing Officer is erroneous and prejudicial to the interests of the revenue. Both the conditions must be fulfilled.

(ii) Section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer and it is only when an order is erroneous, that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice for the requirement or order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interest of the revenue and if the Assessing Officer has adopted one of the courses permissible under law or where two views are possible and the Assessing Officer has taken one view under with which the CIT does not agree, it cannot be treated as an erroneous order, unless the view taken by the Assessing Officer is unsustainable under the law.

(vi) If while making the assessment, the Assessing Officer examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the CIT, while exercising his power under section 263, is not permitted to substitute his estimate of income in place of the income estimated by the Assessing Officer.

(vii) The Assessing Officer exercise quasi-judicial power vested in him and if he exercise such power in accordance with law and arrives as a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.

(viii) The CIT, before exercising his jurisdiction under section 263, must have material on record to arrive at a satisfaction.

(ix) If the Assessing Officer has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation be a letter in writing and the Assessing Officer allowed the claim on being satisfied with the explanation of the assessee, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard

32. Adverting to the facts of this case, we have noticed that the intention of amalgamation was to establish a larger company with larger resources enabling growth and development of assessee's business. The other benefit in mind was to improve assessee's equity ratio [In reference to Part Nos. II & III, Point Nos 6©and 6(e) of the Scheme of Amalgamation approved by the Hon'ble Madras High Court). Further, as per AS-14 of the Accounting Standards issued by the Institute of Chartered Accountants of India (ICAI), which is mandatory for companies of amalgamation in this case has to be satisfied the requirement that business of the transferor company should be carried on by the transferee company (the assessee). As a result of amalgamation, there was increase in Net Asset value (NAV) on account of the scheme and the same was completed as per the business expediency which resulted into increase in General Reserve to the tune of ` 2899.68 lakhs. Section 28(iv) of the Act reads as under:

> **"Profits and gains of business or profession.**
>
> **28.** The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—
>
> ……..
>
> (iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession ;]"

33. Now, we have to see whether the assessee has got any profit or benefit out of this transaction or not. If we analyze the facts of this case, we can clearly understand that this amalgamation scheme was to augment the business of the assessee-company and definitely to be benefited by this scheme. This transaction can be read as a 'business expediency', transaction done by the assessee and thus the excess NAV credit or General reserve are to be assessed u/s 28(iv) of the Act. The Hon'ble Jurisdictional High Court, while deciding the case of CIT vs Aries Advertising Pvt. Ltd (255 ITR 510) has held that transfer of any amount to the General Reserve is to be treated as profits of the business. The Hon'ble High Court has also discussed and followed the decision of Hon'ble Supreme Court rendered in the case of Vazir Sultan Tobacco Co. Ltd vs CIT, 132 ITR 559. It is an admitted fact that the Assessing Officer has not applied his mind to this aspect of the case at all, hence, in view of above discussed legal proposition, this is a pure case of non-application of mind by the Assessing Officer which, in turn, tantamounts to an error and this error has definitely resulted into jeopardizing the interests of the Revenue. Thus, both the conditions laid down in section 263 do co-exist in this case which makes the assessment order in question revisionable.

34. We will now discuss the other contentions of the assessee raised orally as well as in written submission before us. After considering the rival claims, we find that the call for a business restructuring can be met by amalgamations, mergers/demergers, slump sales etc. Each of the methods has its own pros and cones. In a merger, all assets and liabilities of the selling company become that of the purchasing company. 90% of the equity shareholders became shareholders of the purchasing company. The consideration is paid fully in the form of shares alone and fractional portion may be settled in cash. There must be an intention to carry on the same business. There should be a uniformity in the accounting policies. The assessee company by way of amalgamation had envisaged that the amalgamation would enable the establishment of a larger company with larger resources as stated above. There is no dispute that after the amalgamation, the excess of ` 2899.68 lakhs arose out of the alleged amalgamation. Now the question is how this amount has been assessed or not assessed at all. In our considered opinion, this receipt has to be assessed under the head 'business income' only and by no enlargement of reason this amount can be assessed as 'capital gains'. The addition to general reserve was due to increase in NAV on account of this scheme of amalgamation and the same was completed as per

business expediency and the increase in General Reserve to the tune of ` 2899.68 lakhs is thus taxable u/s 28(iv) of the Act . The Hon'ble Madras High Court in the case of CIT vs Aries Advertising Pvt. Ltd. 255 ITR 510, has held that transfer of any amount to the General Reserve is to be treated as profits of business. This decision has a binding effect on all the authorities operating in Tamil Nadu. We may further mention that the above decision was rendered after following the decision of Hon'ble Supreme Court rendered in the case of Vazir Sultan Tobacco Co. Ltd vs CIT, 132 ITR 559. In our considered opinion, the ld. CIT has correctly come to the conclusion that since the Assessing Officer has not applied the provisions of section 28(iv) on this amount at all, order of the Assessing Officer is erroneous and also prejudicial to the interests of the Revenue. There is a distinction between 'lack of inquiry' and 'inadequate inquiry'. If there is any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263, merely because he has a different opinion in the matter. In this regard, the recent decision of Hon'ble Delhi High Court rendered in the case of CIT vs Sunbeam Auto Ltd, 332 ITR 167, is relevant. Accordingly, we confirm setting aside of the assessment order and confirm the direction given by the ld. CIT to the Assessing Officer.

35. In the result, the appeal fails on both legal as well as meritorious grounds. Accordingly, the appeal of the assessee-company stands dismissed.

The order pronounced in the open court on

Sd/-

(N.S. SAINI)
ACCOUNTANT MEMBER

(HARI OM MARATHA)
JUDICIAL MEMBER

Dated: July, 2011
RD

Copy to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Per separate order
Sd/-
(N.S.SAINI)
Accountant Member
23.8.2011

PER N. S. SAINI (ACCOUNTANT MEMBER)

36 I have carefully gone through the draft order proposed by my learned brother. After discussions with the learned brother, neither I have been able to persuade myself to concur with the opinion proposed in the draft order nor could convince my learned brother to agree with my point of view. I, therefore, proceed to write this separate and dissenting order.

37. The facts relevant to the issue, grounds of appeal taken in the appeal and submissions of the parties before us are recorded in the proposed order of my learned brother, and therefore, for the sake of brevity, I refrain from repeating the same except to the extent considered necessary hereinafter for the sake of convenience.

38. The undisputed facts of the case relevant to the first issue raised before us are that the revised return of income filed by the assessee on 23.11.2004 was processed under section 143(1) on 29.03.2004 and such return of income became final because of non-issuance of notice under section 143(2) of the Act by 30.11.2004. Subsequently, the return which became so final was re-opened by issuance of a notice under section 148 of the Act and in pursuance thereof assessment u/s 147/143(3) was completed on 24.12.2008. Thereafter, the impugned order under section 263 was passed by the 10.02.2011 on considering the assessment made in this case as erroneous and prejudicial to the interest of the revenue inasmuch as Rs. 2,899.68 lakhs which was credited by the assessee in general reserve to give effect to amalgamation of SIFL with it in pursuance to a scheme of amalgamation approved by the Hon'ble Madras High Court was not brought to tax as income. It is also not in dispute that the notice under section 147 was issued for the purpose of disallowing certain expenditure relating to exempt income in terms of provisions of section 14A of the Act after recording reasons to that effect and in that proceedings there was no whisper at all about the amount of Rs. 2,899.68 lakhs which was credited by the assessee in its general reserve. The impugned order under section 263 was passed for assessing said amount of Rs. 2,899.68 lakhs credited by the assessee in general reserve by treating the said amount as income by invoking provisions of section 28(iv) of the Act. In other words, subject matter of impugned order passed u/s 263 is quite distinct and different from the subject matter of re-assessment order passed u/s 147 of the Act on 24.12.2008. On the above facts and circumstances of the case, the first issue

which fell for our consideration is whether the impugned order passed on 10.02.2011 under section 263 of the Act is barred by limitation or not.

39. In the instant case, it is also not in dispute that period of limitation provided in sub-section (2) of section 263 if reckoned from the date of order passed under section 147 then the impugned order will be within time otherwise the same will be barred by limitation and bad in law. I would also like to clarify that we are, in the instant case, not concerned with the issue that where the return of income has acquired finality because of non-issuance of notice under section 143(2) within the prescribed time, whether such assessment or deemed assessment can be revised by the CIT by invoking provisions of section 263 of the Act or not. The issue before us is that when the amount of Rs.2899.68 lakhs which was credited to the general reserve by the assessee in pursuance to a scheme of amalgamation approved by the High Court was not the subject matter of proceedings under section 147 of the Act and when the CIT treated the assessment as erroneous and prejudicial to the interest of the revenue in relation to that issue only, the time limit for section 263 is to be reckoned from the date of such order passed under section 147 or not?

40. In my considered opinion, the above issue is no more res-intigra and the same is squarely covered by the decision of the Hon'ble Supreme Court in the case of CIT Vs. Alagendran Finance Limited (2007) 293 ITR 1 (SC) as well as the decision of the Hon'ble Jurisdictional High Court in the case of CWT v. A.K. Thanga Pillai (2001) 252 ITR 260 (Mad) in favour of the assessee. In the case of Alagendran Finance Limited (supra), the Hon'ble Supreme Court observed that the CIT has exercised its revisional jurisdiction only in respect of lease equalization fund and the said lease equalization fund was not the subject matter of reassessment proceedings. Proceedings under section 147 had nothing to do with the income relating to lease equalization fund. In the above circumstances, it was held that the period of limitation provided under sub-section (2) of section 263 would begin to run from the date of original assessment and not from the date of reassessment.

The Hon'ble Supreme Court in the above decision has quoted the following with approval from the decision of the Hon'ble Jurisdictional High Court in the case of A.K. Thanga Pillai (Supra):-

> *"Under section 17 of the Wealth-tax Act, 1957, even as it is under section 147 of the Income-tax Act, proceedings for reassessment can be initiated when what is assessable to tax has escaped assessment for any assessment year. The power to deal with under-assessment and the scope of reassessment proceedings as explained by the Supreme Court in the case of Sun Engg. Works (P.) Ltd. (supra), is in relation to that which has escaped assessment, and does not extend to reopening the entire assessment for the purpose or redoing the same de novo. An assessee cannot agitate in any such reassessment proceedings matters forming part of the original assessment which are not required to be dealt with for the purpose of levying tax on that which had escaped tax earlier. Cases of under assessment are also treated as instances of escaped assessment.*
> *The Revenue is similarly bound……"*

41. The contention that since no regular assessment under section 143(3) was framed in the instant case before passing of the order under section 147/143(3) of the Act on 24.12.2008 and as the said order passed under section 147 was the first regular assessment in the instant case, therefore, irrespective of the issue involved in the proceedings under section 147, the CIT can pass order under section 263 in respect of any issue whether the same was subject matter of proceedings under section 147 or not and the time limit for passing order under section 263 even in respect of issues which were not the subject matter of proceedings under section 147 will also begin to run from the date of passing of order under section 147, in my considered opinion has no force. It is a well settled position that even in cases where return has acquired finality only after processing under section 143(1) of the Act because of non-issuance of notice under section 143(2) within the prescribed

time, the scope of proceedings u/s 147 is limited to the assessment of income escaping assessment only or income under assessed and does not extend to revising or reconsidering the whole assessment. In proceedings initiated under section 147 in such a case, it cannot be held that the entire assessment is reopened and the AO can undertake a roving and fishing enquiry in respect of any issue he likes to probe if any other income has escaped assessment or not. The above view finds support from the decision of the Hon'ble Punjab & Haryana High Court in the case of Vipan Khanna v. CIT (2002) 255 ITR 220 (P&H). If shall be suffice to extract the followings from the aforesaid decision which is at page 234:-

> *"Thus, we are of the considered view that as per the law laid down by the Apex Court in the case of Sun Engineering Works Pvt. Ltd. (1992) 198 ITR 297, when proceedings under section 147 of the Act are initiated, the proceedings are open only qua items of underassessment. The finality of the assessment proceedings on other issues remains undisturbed. According to us it makes no difference whether the assessment proceedings have become final on account of framing of an assessment under section 143(3) of the Act or on account of non-issue of a notice under section 143(2) of the Act within the stipulated period. The amendment made in section 143 and 147 of the Act with effect from April 1, 1989, do not in any manner negate this proposition of law as enunciate by the Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (1992) 198 ITR 297."*

To the above effect is also the decision of the Hon'ble Kerala High Court in the case of Travancore Cements Ltd vs. ACIT (2008) 305 ITR 170 (Ker).

42. As the scope of proceedings under section 147 remains the same in either case where assessment has earlier been made u/s 143(3) or where return has become final because of non-issuance of notice under section 143(2) within the prescribed time, in my considered opinion, the decision of the Hon'ble Supreme Court in the case of Alagendran Finance Limited (supra) and of the Hon'ble Madras High Court in the case of A.K. Thanga Pillai (Supra) is squarely applicable in the

instant case also. I, therefore, respectfully following the same hold that the impugned order under section 263 being passed on a issue which was not the subject matter of proceedings under section 147 of the Act in the instant case and therefore, the time limit for such 263 order cannot be reckoned from the date of 147 order and consequently, the same was passed beyond the time limit provided in the statute and therefore, bad in law and is accordingly, quashed.

43. The next issue relates to treating of Rs. 2,899.68 lakhs as business income under section 28(iv) of the Act in a proceeding initiated under section 263 of the Act. In the impugned order u/s 263 of the Act, the CIT has held that a sum of Rs.2899.68 lakhs credited to the general reserve by the assessee was chargeable to tax in the hands of the appellant as perquisite or benefit accruing to it in the course of business assessable u/s 28(iv) of the Act.

44. The facts relevant to this issue are that the SIFL was a wholly owned subsidiary of Spencer International Hotels Limited, which in turn was a wholly owned subsidiary of the assessee company. In other words SIFL was a step down subsidiary of the assessee and within the provisions of section 4 of the Companies Act, SIFL was also a subsidiary of the assessee. The said SIFL amalgamated with the assessee company. From the scheme of the amalgamation, which is placed at page nos. 76 to 101 of the paper book, which was approved by the Hon'ble Madras High Court it appeared that with effect from the appointed date i.e. 1st April, 2001 undertaking of the transferor i.e. SIFL was transferred and vested in the assessee company. Further, in consideration of transfer of all assets and all liabilities of the amalgamating company to the amalgamated company, the consideration was paid in the form of allotment of shares by the amalgamated company to the shareholders of the amalgamating company. This is clear from para 5 (a) of Part-II of the Scheme of Arrangement approved by the Court. The said shares were to be allotted by the assessee in the ratio of 1 share for every 20 shares held by the shareholders in the amalgamating company. In the financial accounts for the year

ended 31.3.2002, the assessee gave accounting effect to the assets and liabilities taken over and the shares allotted to the shareholders of the amalgamating company. In Note No. 13 of the Schedule Q of the audited accounts, the following disclosures were made by the assessee concerning accounting of amalgamation of SIFL:-

In terms of a Scheme of amalgamation sanctioned by the Hon'ble High Court of Madras vide Order dated October 25, 2002, Spencer Industrial Fund Ltd (SIFL) has been amalgamated with the Company with effect from Apr 1, 2001. In accordance with the said Scheme :

(i) the assets, liabilities, rights and obligations of SIFL have been vested in the Company with effect from April 1, 2001 and have been recorded at their respective fair values under the purchase method of accounting for amalgamation.

(ii) 6,133,505 equity shares of Rs 10/- each are to be allotted as fully paid up to a trust (to be created by the company on behalf of SIHL) on the basis of 1 equity share of the Company for every 20 equity shares held in SIFL, without payment being received in cash. The same has been shown under the head 'Share capital suspense'.

(iii) Excess of fair value of net assets taken over by the company over the paid up value of equity shares to be allotted has been dealt with as under :

	Rs in lakhs	Rs in lakhs
Fair value investments	4,388.78	
Current assets	9.03	
Total assets	----------	4,397.81
Less : Liabilities taken over		(331.33)
Net assets taken over		4,066.48
Less:		
Consideration payable by way of allotment of equity shares in Spencer and Company Ltd	(613.35)	
Cancellation of Debentures issued to Spencer And Company Ltd	(530.00)	
Current account with Spencer and Company Limited	(18.19)	
Special Reserve Fund	(5.26)	

		(1,166.80)

Balance transferred to General Reserve	*2,899.68*

(iv) Had the said Scheme not prescribed the above treatment, an amount of Rs 2,899.68 lakhs would have been credited to Capital Reserve instead of General Reserve as required by the Accounting Standard 14 (AS-14) 'Accounting for amalgamations'.

(v)Till the date of amalgamation, the core business of SIFL was investment activity.

(vi)Consequent to the order of Hon'ble High Court of Madras, the Authorised Share Capital of the Company will be increased to Rs 12 Crores comprising of 12,000,000 equity shares of Rs 10 each.

After setting off of the value of liabilities from the fair value of the assets taken over by the assessee, the net sum of Rs.3513.03 lakhs was payable by way of consideration for taking over the undertaking of SIFL. The said consideration was fully satisfied by the assessee by issuing 61,33,505 nos. of equity shares of Rs.10/- each having paid up value of Rs.10/-. In other words, the fair value of the shares of the assessee company was adopted at about Rs. 57/- per share under the scheme approved by the Hon'ble Madras High Court. As the face value of shares was Rs. 10/-, the difference or premium of about Rs. 47/- per share works out to Rs. 2,899.68 Lacks. This difference between the value of net assets taken over and the face value of shares allotted amounted to Rs. 2,899.68 lakhs was credited to the general reserve by the assessee in terms of the scheme approved by the Hon'ble Madras High Court. According to the CIT, the said amount of Rs. 2,899.68 lakhs is assessable under section 28(iv) of the Act as business income and the contention of the assessee is that it is not income at all and therefore not taxable.

45. From the above facts, I find that the entry of crediting of said amount of Rs. 2,899.68 lakhs in general reserve by the assessee in its books of account relates to the transaction of amalgamation of SIFL with the assessee company. Firstly, the amalgamation was in conformity with provisions of section 2(1B) of the Act. In terms of the order of the Court, the entire undertaking of the amalgamating

company consisting of all assets and liabilities as on the date of amalgamation on going concern basis, vested in the amalgamated company and thereafter the amalgamating company stood wound up automatically and in consideration the shareholders of the amalgamating company were allotted equity shares of the amalgamated company and the exchange of shares was based on fair values of equity shares of the respective companies.

46. Further, I find at page nos. 140 to 149 of the paper book contains the valuation report of the fair value of shares of the assessee company. In the said valuation report, the fair value of 1 Equity Share of Rs.10/- each of the assessee company was determined at Rs.57/- per share. It is observed that based on this fair value, the Hon'ble Madras High Court approved the exchange ratio of 1 share of Rs.10/- each of the amalgamated company to be issued in exchange of 20 shares held by the shareholders in the amalgamating company while sanctioning the scheme of arrangement. Accordingly the assessee issued 61,33,505 Equity Shares of Rs.10/- each in exchange of 12,26,70,100 nos. equity shares issued by SIFL and in consideration of receipt of net asset of Rs. 3,513.03 lakhs. The assessee has credited face value of the shares amounting to Rs. 613.35 Lakh in share capital account and credited the balance of Rs. 2,899.68 in general reserve account in accordance with the scheme approved by the Hon'ble Madras High Court.

47. In view of the above facts in my considered opinion Rs. 2,899.68 lakhs represents premium value of shares having face value of Rs. 613.35 lakhs issued by the assessee company. The same represents difference between the fair value and face value of shares issued by the assessee company. The same is of the nature of share premium received by a company on issue of its own share capital which is capital in nature. It is an established position of the law that the character of a receipt does not depend upon the accounting treatment given by the assessee in its books of account and tax is to levied as per the actual character of the receipt and not merely on the basis of accounting treatment given by the assessee to that receipt in its books of account.

48. According to the CIT, the said amount of Rs. 2,899.68 lakhs is to be treated as income chargeable to tax within the meaning of section 28(iv) of the Act. The said section 28(iv) of the Act reads as follows:-

"(iv) the value of any benefit or perquisite, whether convertible into money or not arising from business or the exercise of a profession"

Thus, it is observed that the pre-requisites for applicability of the aforesaid provisions are firstly, there should be any benefit or perquisite arising in favour of the assessee. Further, the said benefit or perquisite should arise from business of the assessee.

49. In the instant case, it is observed that the fair value of a share of the assessee company as on the date of amalgamation was estimated by the valuer at Rs.57/- per share for the purpose of scheme of amalgamation by the valuer which was approved by the Hon'ble Madras High court. Accordingly, the aggregate fair value of 61,33,505 equity shares issued by the assessee company in respect of amalgamation transaction works out to Rs.3,496 lakhs approx. The assessee company, in consideration of receipt of net asset of Rs. 3,513 lakhs issued own shares having fair value of Rs. 3,496 lakhs approx. Therefore, by no stretch of imagination it can be held that the assessee company received any benefit or perquisite of Rs. 2,899.68 lakhs in the above amalgamation transaction. The assessee company issued its own shares having fair value of about Rs. 3,496 lakhs. As the face value of shares so issued was Rs. 613.30 lakhs, the excess of fair value over face value of Rs. 2,899.68 lakhs was credited by it in its general reserve. No increment in the fair value of a share of the assessee company took place because of the amalgamation simpliciter or on crediting of Rs. 2,899.68 lakhs to the general reserve. Thus, in my considered opinion, the very first condition set out above for applicability of section 28(iv) itself is not satisfied in the instant case.

50. Still further, the one more condition for applicability of section 28(iv) of the Act is that the benefit or perquisite must arise from business or exercise of profession. The phrase 'arise from business' in the context of section 28(iv) contemplates not only some connection with the business undertaking of the assessee but it envisages that the benefit or perquisite must arise out from actual conduct of the business of the assessee. In other words, before sub-section (iv) of S.28 is invoked it is necessary to show and prove the proximate cause or nexus between the alleged benefit or perquisite and the business actually carried on by the assessee. The nexus or the proximate cause must be real, immediate and not illusionary or imaginary. The benefit or perquisite contemplated by S.28(iv) must necessarily have a live connection with the business carried on by the assessee and the benefit must accrue or arise in the course of carrying on of such business. The benefit or perquisite should be in the nature of trade receipt. The nature of assessee's business during the year under consideration as stated in the order of assessment is "Bread franchisee operations, property rentals and licence fees". It is admitted position that the amount of Rs. 2,899.68 lakhs in question has not arisen from the aforesaid business activity of the assessee. In the impugned order, the CIT has alleged that by virtue of amalgamation of the undertaking, the assessee company was likely to derive in future certain commercial gains and benefits and for this reason he has held that income was chargeable u/s 28(iv) because the acquisition of business undertaking was to provide the assessee with economic advantages at future unspecified date resulting in increase in profitability. In my considered opinion, the future gain or benefit when actually derived by the assessee, the same certainly will be assessed as business income and only because a transaction now undertaken will bring more commercial gain or benefit to the assessee in future does not entitle the CIT to treat the present transaction itself as benefit or perquisite arising from business and bring the value of the said transaction to tax by deeming the same as income under section 28(iv) of the Act. The grounds on which the CIT has invoked provisions of section 28(iv) is clearly untenable. In the present case the amalgamation between SIFL and the assessee

was intended to result in larger company with larger resources enabling growth and development of business. It also envisaged that the amalgamation would result in increase in equity base which would improve the debt-equity ratio. The proposed amalgamation was also to enable the complementary business of both the companies to realize benefits for greater synergy by eliminating duplication of costs. However, with reference to these objectives which shows some benefit were likely to be achieved in future from amalgamation it cannot be said that the acquisition of the assets of SIFL resulted in realization of any present perquisite or benefit in the course of carrying on of a business which could be assessed under section 28(iv) of the Act. The future benefits when actually realized, received or accrued to the assessee, depending upon the system of accounting adopted, will certainly be includible in the assessable income of the assessee at that point of time. Under the provisions of section 28(iv), the value of benefit or perquisite which actually accrued in the relevant previous year can only be brought to tax and bringing to tax certain amount under that section it is not sufficient to show that some capital asset has been acquired by the assessee which will result in accrual of benefit or perquisite to the assessee in future. I find that the general reserve was credited by Rs. 2,899.68 lakhs and the same was not in relation to any trade receipt or for any receipt in the course of conduct of actual business of the assessee but because of implementation of a scheme of amalgamation or in connection with recording of transactions of amalgamation of SIFL. Thus, in my considered view, even the second limb of section 28(iv) is also not satisfied in the instant case.

51. My above view finds support from the decision of the Hon'ble Madras High Court in the case of Iskrameco Regent Ltd vs. CIT, a copy of which has been placed at pages 172 to 186 in the paper book, wherein the Hon'ble Jurisdictional High Court has analyzed the provisions of S.28(iv) of the Act and found that in case of waiver of principal amount of loan received by an assessee who is not engaged in trading in money transactions, the benefit accrued to the assessee cannot be held as arising from business. The Hon'ble High Court has categorically held that grant of

loan by the bank could not be termed as a trading transaction and therefore could not be construed to be in the course of business. Indisputably, the loan was obtained for investing in capital assets and a part of the principal loan along with interest was waived under the agreement. According to the Court, waiver of the principal loan amount did not result in the change of character with regard to original receipt which was capital in nature and the same did not change towards a trading transaction. The High Court therefore held that provisions of S.28 (iv) of the Act is not applicable in the assessee's case. The ratio laid down in the above judgment clearly shows that before Section 28(iv) of the Act is invoked, it is necessary for the authority to ascertain the actual nature of the business of the assessee and to show that the value of benefit or perquisite accrued to the assessee from the actual conduct of that business.

52. Support for the above view can also be drawn from the decision of the Hon'ble Mumbai Bench of ITAT in the case of HDFC Securities Ltd Vs. ACIT (9 taxmann.com 23). In this case the assessee had purchased stock exchange card issued by BSE. The cost of acquisition was Rs. 2.8 crores on which it claimed depreciation. In the scheme of corporatization of BSE, the assessee received shares in exchange of membership card. The AO sought to assess the difference between the fair value of shares received and WDV of the stock exchange card by invoking Sec 28(iv) of the I T Act. The Tribunal inter-alia held that corporatization of the stock exchange was an independent event which did not occur in the course of the assessee's business. Issue of shares in lieu of stock exchange card did not result in accrual of any "benefit" from the assessee's conduct of business. The Tribunal also held that the transaction was in the capital field being exchange of stock exchange card with that of shares of the Exchange. The Tribunal therefore held that it was not a benefit or perquisite assessable as business income and therefore no income could be brought to tax u/s 28(iv).

53. The learned A/R also made an alternative submission which is that if it is taken that the assessee (transferee company) earned some real income from its

transaction of amalgamation with SFIL which is held to be assessable to tax then, it shall be fair and reasonable also to determine the loss suffered by the SFIL (transferor company) in the very same transaction and allow set off for the same. He pointed out that the amalgamation became legally effective on and from 1.4.2001 and accordingly the income or loss of SIFL for the period 1.4.2001 to 31.3.2002 was also assessable in the hands of the assessee company only. He contended that in case it is held that Rs. 2,899.68 lakh is held as income of the assessee on account of receiving of net asset of Rs. 3,513.03 lakh in consideration for issuance of shares of Rs. 613.35 Lakh only and thereby crediting Rs. 2,899.68 lakh to general reserve then, on the same analogy loss of similar amount should also be held as accrued to SIFL. He explained that on the same analogy it has to be held that SIFL on transfer of net assets having fair value of Rs. 3,513.03 lakh received shares of Rs. 613.35 lakhs only and thus suffered loss of Rs. 2,899.68 lakh. As the income or loss of SIFL is also assessable in the hands of the assessee company for the relevant period, the CIT should have allowed deduction for this loss of Rs. 2,899.68 lakh also. He also submitted that not only this loss of Rs. 2,899.68 lakhs but in that case, the assessee's income should be further reduced by Rs. 8,752.95 lakhs. He explained that the cost of investments in the books of SIFL were Rs. 13,141.73 lakhs which were transferred on amalgamation to the assessee company at a fair value of Rs. 4,388.78 lakhs only. Consequently, on transfer of investments from SIFL to the assessee company, the SIFL suffered a further loss of Rs. 8,752.95 lakhs. If one has to infer accrual of benefit or perquisite of Rs. 2,899.68 lakh in the hands of the amalgamated company in relation to transaction of amalgamation, then by same logic and on the same principle the loss of Rs. 11,652.63 lakh (Rs. 2,899.68 lakh and Rs. 8,752.95 lakh) in the hands of amalgamating company due to transfer of assets to amalgamated company should also be taken into consideration in arriving at taxable income. It is not in dispute that in the assessment of the amalgamated company the income or loss of the amalgamating company for the A.Y. 2002-03 was also assessable. He submitted that different considerations cannot apply for assessment of income and

assessment of loss. I find the above argument quite interesting at the first blush. But, on closer look, I find that it is not acceptable for two reasons. Firstly, as already stated above, in my considered opinion, no taxable income results from a mere transaction of amalgamation of two companies and Rs. 2,899.68 lakh is held by me as not taxable income in the hands of the assessee company. Secondly, it is an established position of law that no one can earn from himself or itself. On amalgamation which became effective on and from 01.04.2001, the assessee company and SIFL became one entity. Therefore, transaction between the same will not give rise to any taxable income or assessable loss.

54. Before concluding, I would also like to observe that in the instant case, the scheme of Arrangement involved transfer of an "undertaking" on going concern basis for which consideration was paid by the assessee and thereby acquired the assets and liabilities of the amalgamating company. The assessee received assets and liabilities, and on netting off, net asset having fair value of Rs. 3,513.03 lakh was received. The consideration was paid by issuing shares of face value of Rs. 613.35 lakhs. The balance amount of Rs. 2,899.68 lakh was credited in general reserve account by the assessee company. As per the scheme of the I.T. Act, 1961 save and except, the special circumstances prescribed in Section 56(vii)/(viii) of the Act, the I.T. Act does not envisage accrual of taxable income where transferee of an asset simply acquires an asset for a cost even when such cost is less than the fair market value of assets acquired. It is not the case of anybody that the transaction in question is hit by the provisions of section 56(vii)/(viii) of the Act. Thus, even when things are looked from this angle also, no taxable income can be held to be accrued to the assessee.

55. In view of the discussions made hereinabove, I am of the considered opinion that Rs. 2,899.68 lakh is not assessable as income in the hands of the assessee under section 28 (iv) of the Act, since neither any benefit or perquisite arose to the assessee of the said value during the year under consideration nor the same arose from the business carried on by the assessee. I, therefore, find the directions issued

by the CIT u/s 263 for assessment of the said amount as income u/s 28(iv) is unsustainable and without merit and therefore, cancel the same.

56. In view of my above decision, the other grounds of appeal taken by the assessee in this appeal have become academic in nature requiring no separate adjudication and therefore, not adjudicated upon.

57. In the result, the appeal filed by the assessee is allowed.

Sd/-

(N.S. SAINI)
ACCOUNTANT MEMBER

Dated 23.08.2011

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

B E F O R E
Dr. O.K.NARAYANAN, VICE-PRESIDENT
THIRD MEMBER

ITA No.440(Mds)/2011
Assessment Year : 2002-03

M/s. Spencer & Company Ltd., Spencer Plaza, 4th Floor, 769-Anna Salai, Chennai-600 002. PAN AAACS4451J. (Appellant)	Vs.	The Assistant Commissioner of Income-tax, Circle VI(4), Chennai. (Respondent)

Appellant by : Shri Dilip S Damle, Chartered Accountant
Respondent by : Shri R.B.Naik, IRS, Commissioner of IT.

Date of Hearing : 14th December, 2011
Date of Order : 2nd April, 2012

O R D E R

PER Dr.O.K.NARAYANAN, VICE-PRESIDENT:

This appeal is filed by the assessee. The relevant assessment year is 2002-03. The appeal is directed against

the revision order passed by the Commissioner of Income-tax, Chennai-III at Chennai. The revision order has been passed under section 263 of the Income-tax Act, 1961 on 10-2-2011.

2. The assessee company filed its return of income for the impugned assessment year on 31-12-2002. An income of ₹ 2,33,92,400/- was admitted. Subsequently, a revised return was filed on 23-11-2003 on a revised income of ₹ 2,29,61,640/-. The assessment was completed under section 143(3), read with section 147, on 24-12-2008 on a total income of ₹ 4,86,14,640/-.

3. On a perusal of the assessment records, it was noticed that a company by name M/s.Spencer Industrial Fund Ltd. (SIFL) got amalgamated with the assessee company with effect from 1st April, 2001. The amalgamation was effected through a Court Order dated 25-10-2002.

4. Pursuant to the amalgamation, the assets and liabilities and the rights and obligations of SIFL vested with the assessee company and those items have been recorded at their fair values. The excess of fair value of net assets taken over by the assessee company over the paid up value

of allotted equity shares worked out to ₹ 2,899.68 lakhs. This surplus amount has been transferred by the assessee to its General Reserve Account.

5. The Commissioner of Income-tax further observed that this surplus amount of ₹ 2,899.68 lakhs was not subjected to tax as business income under section 28(iv) of the Income-tax Act, 1961. The Commissioner found that this issue was not at all examined by the assessing authority. Therefore, he proposed to revise the assessment, as it was erroneous and prejudicial to the interests of the Revenue.

6. When this proposal was communicated to the assessee, the following objections were raised by the assessee for the consideration of the Commissioner of Income-tax:-

> 1. The period of limitation to issue notice under section 263 cannot be reckoned with the order dated 24-12-2008, when the income-escaping assessment was completed under section 143(3), read with section 147. This is because the issue of surplus arising on amalgamation was not the subject matter of income-escaping

assessment and the subject matter of the reassessment was only the question of disallowance of expenditure under section 14A. The limitation is to be computed from the date of processing of the revised return under section 143(1), made on 19-7-2004. Therefore, the notice issued under section 263 is barred by limitation.

2. The proper head of income under which the income arising from the amalgamation of two companies could be assessed was 'capital gains' and not 'profits and gains of business'.

3. A benefit or perquisite that does not arise from carrying on of a business activity by the assessee, but arises in the course of acquiring a capital asset, is not taxable under section 28(iv).

4. Creation of reserve in the books of an amalgamated company to give accounting effect to the amalgamation does not represent income chargeable to tax.

7. The Commissioner of Income-tax considered the objections raised by the assessee and also the judicial pronouncements relied on by the assessee. The assessee had placed reliance on the decision of the Hon'ble Supreme Court rendered in the case of CIT vs. Alagendran Finance Ltd., 293 ITR 1. This is with reference to the issue of notice under section 263. The Commissioner of Income-tax distinguished that case. He found that in the said decision the Hon'ble Supreme Court was dealing with a situation wherein the assessment was initially completed under section 143(3) and thereafter the assessment was reopened under section 143(3), read with section 147, and in both the orders, the error that was sought to be rectified, had crept in. That case dealt with a situation where there was an order under section 143(3) and the error was committed in that order itself which continued in the reassessment order also. The Commissioner of Income-tax observed that in the present case the assessment was made for the first time under section 143(3), read with section 147 and there was no occasion to look into any order passed under section 143(3). The Commissioner also pointed out that the Assessing

Officer has not looked into the assessability of ₹ 2,899.68 lakhs under section 28(iv) and this itself makes the assessment order erroneous in the light of the decision of the Hon'ble Gujarat High Court rendered in the case of Additional Commissioner of Income-tax vs. Mukur Corporation, 111 ITR 312.

8. Regarding the objection of the assessee against the head of income, the Commissioner of Income-tax held that a head of income for assessment cannot be reduced to a level of a ritualistic formula. It also cannot be put in a watertight compartment. Assessing an income under the proper head depends upon the facts and circumstances of each case. He held that once the business of the transferor company is carried on by the assessee, the excess of ₹ 2,899.68 lakhs, arising out of the amalgamation, has to be assessed as business income.

9. The Commissioner of Income-tax also observed that the addition to General Reserve was due to increase in Net Asset Value (NAV) and the same was completed as per business expediency and, therefore, the increase reflected in the General Reserve Account is taxable in terms of section

28(iv) of the Act. He further observed that the Hon'ble Madras High Court in the case of CIT vs. Aries Advertising Co. Pvt. Ltd., 255 ITR 510, has held that transfer of any amount to the General Reserve is to be treated as profits of the business. He also drew strength from the decision of the Hon'ble Supreme Court in the case of Vazir Sultan Tobacco Co. Ltd. vs. CIT, 132 ITR 559.

10. Thus, finally, the Commissioner of Income-tax turned down all the objections raised by the assessee and directed the Assessing Officer to assess the amount of ₹ 2,899.68 lakhs in the hands of the assessee company.

11. It is against the above revision order of the Commissioner of Income-tax that the assessee company has come in appeal before the Tribunal.

12. A Division Bench of this Tribunal, consisting of Hon'ble Judicial Member and Hon'ble Accountant Member, heard the appeal. The assessee had taken two sets of grounds before the Tribunal, one relating to limitation and the other relating to merits. The learned Judicial Member agreed with the view taken by the Commissioner of Income-tax and dismissed the appeal filed by the assessee company. He

held that the limitation period has to be computed from 24-12-2008, being the date of passing the first assessment order under section 143(3), read with section 147. Accordingly, he held that the order passed under section 263 of the Act is not barred by limitation. Regarding the merits of the case, the learned Judicial Member held that the failure on the part of the assessing authority even to look into the matter of surplus credit in the General Reserve Account, has made the assessment order erroneous and prejudicial to the interests of the Revenue.

13. On merits of the case, the learned Judicial Member held as follows: That the assessee company by way of amalgamation had envisaged that the amalgamation would enable to establish a larger company with more resources; that there is no dispute that as a result of amalgamation, an excess of ₹ 2,899.68 lakhs had arisen to the assessee company and that the excess has to be assessed under the head 'Business Income' and the same cannot be assessed as 'Capital Gains'. Relying on the decision of the Hon'ble Madras High Court in the case of CIT vs. Aries Advertising Co. Pvt. Ltd., 255 ITR 510, the learned

Judicial Member held that transfer of any amount to the General Reserve is to be treated as business profit. He further observed that the above decision of the Hon'ble Madras High Court was rendered, following the judgment of the Hon'ble Supreme Court in the case of Vazir Sultan Tobacco Co. Ltd. vs. CIT, 132 ITR 559. He held that the surplus amount of ₹ 2,899.68 lakhs is taxable as business income.

14. The learned Accountant Member, on the other hand, found that the revision order passed by the Commissioner of Income-tax is not in accordance with law. He found force in the argument advanced by the assessee company. The learned Accountant Member found that the decision of the Hon'ble Supreme Court in the case of CIT vs. Alagendran Finance Ltd., 293 ITR 1 and the decision of the Hon'ble Madras High Court in the case of CWT vs. A.K.Thanga Pillai, 252 ITR 260 are applicable to the present case and as such the limitation period cannot be reckoned with the date of passing of the assessment order under section 147. This is because the issue raised by the Commissioner of Income-tax in his revision order was not the

subject matter of proceedings under section 147 of the Act. He accordingly held that the order under section 263, passed by the Commissioner of Income-tax, was beyond the time limit provided in the statute and, therefore, the order is bad in law. He quashed the revision order.

15. On merits of the case, the learned Accountant Member observed that in consideration of receipt of net assets of ₹ 3,513 lakhs the assessee has issued own shares having fair value of ₹ 3,496 lakhs approximately and, therefore, it cannot be held that the assessee company received any benefit or perquisite of ₹ 2,899.68 lakhs in the amalgamation process. He has pointed out that the assessee company issued its own shares having fair value of ₹ 3,496 lakhs. But the face value of the shares so issued being ₹ 613.30 lakhs, the excess of fair value over face value of ₹ 2,899.68 lakhs had to be credited in the General Reserve. But for this no gain was made by the assessee company.

16. The learned Accountant Member further held that the surplus cannot be treated as income under section

28(iv) of the Act. For the purpose of section 28(iv) the benefit or perquisite must arise from business or exercise of profession. The phrase 'arising from business' in the context of section 28(iv) contemplates not only some connection with the business undertaking of the assessee, but it envisages that the benefit or perquisite must arise from actual conduct of the business itself. The benefit or perquisite should be in the nature of trade receipt. In order to invoke section 28(iv), it is not sufficient to show that some capital asset has been acquired by the assessee, which has resulted in accrual of benefit or perquisite, that too in future. Ultimately, he held that the alleged amount of ₹ 2,899.68 lakhs cannot be treated as taxable in the hands of the assessee.

17. Thus, he accepted the contentions raised by the assessee and allowed the appeal.

18. As difference of opinion arose between the Hon'ble Members, who heard the case, reference under section 255(4) of the Act was made. Questions were framed and placed before the Hon'ble President to nominate a Third Member. The Members have framed different sets of questions.

19. The questions framed by the Hon'ble Judicial Member read as below:-

> *"1. Whether the order passed by the ld. CIT u/s 263 in the given case is barred by limitation or not?*
>
> *2. Whether any issue of income on which the Assessing Officer did not apply his mind while passing the assessment order u/s 143 r.w.s. 147 would give a valid jurisdiction to the ld. CIT to revise that order or not ?"*

20. The points of difference framed by the learned Accountant Member are as follows:-

> *"1. Whether the order passed by the ld. CIT u/s. 263 in the given case is barred by limitation or not?*
>
> *2. Whether, on the facts and circumstances of the case any prejudice was caused to the interest of the Revenue by the order passed under section 147 of the Act by the Assessing Officer?*

3. Whether, on the facts and circumstances of the case, there was any error in the order passed u/s. 147 of the Act on 24.12.2008 by the Assessing Officer, which can be considered as erroneous, in so far as prejudicial to the interest of the Revenue?

4. Whether, on the facts and circumstances of the case, the ld. CIT was justified in holding that ₹ 2899.68 lakhs was income assessable in view of the provisions of section 28(iv) of the Act?"

21. The Hon'ble President has nominated me as the Third Member and that is how the matter has been placed before me for adjudication.

22. Even though the Hon'ble Members of the original Division Bench has framed different sets of questions to be referred to the Third Member, in effect, the two issues to be considered in the present appeal are the following:-

1. Whether the Commissioner of Income-tax is justified in initiating action under section 263 of the Income-tax Act, 1961? And

2. Whether the sum of ₹ 2,899.68 lakhs transferred by the assessee to its General Reserve on amalgamation is to be treated as income taxable under section 28(iv) of the Income-tax Act, 1961?

23. I heard Shri Dilip S.Damle, the learned chartered accountant appearing for the assessee, and Shri R.B.Naik, the learned Commissioner of Income-tax appearing for the Revenue.

24. The learned chartered accountant has raised all those grounds raised before the Division Bench. Therefore, those arguments and other premises are not repeated for fear of platitude. In short, the argument of the learned chartered accountant is that the reserve created by the assessee company to give effect to the amalgamation in the annual account, did not represent its income assessable under section 28(iv) of the Act. The sum of ₹ 2,899.68 lakhs, in fact, represented the difference between the face value of shares allotted to the shareholders of the amalgamating company and the value of 'net assets' taken over on amalgamation. The reserve accounted in company's books

was nothing but an accounting adjustment carried out in assessee's books to balance the assets and liabilities side of the Balance Sheet, and, therefore, no real income could be assessed under section 28(iv) with reference to the sum of ₹ 2,899.68 lakhs.

25. On conclusion of the hearing, the assessee has also caused to file a copy of the order passed by the C-Bench of this Tribunal dated 21-9-2011 in the case of M/s.Quintegra Solutions Pvt. Ltd. in ITA Nos.1526 to 1530 & 2056(Mds)/2010, etc., stating that the very same issue has been considered by the above co-ordinate Bench and the said decision is squarely applicable to the case of the assessee company.

26. The learned Commissioner of Income-tax, on the other hand, submitted that the accounting treatment provided by the assessee company has increased the quantum of General Reserve in the accounts of the assessee company and it is a gain taxable under section 28(iv) of the Income-tax Act, 1961.

27. Both the sides argued at length on the question of section 263 as well.

28. After hearing both sides in detail, I may first examine the question whether the revision order passed by the Commissioner of Income-tax under section 263 of the Act is sustainable in law or not.

29. The return filed by the assessee was initially processed under section 143(1) of the Act. The assessee had thereafter filed a revised return. An order under section 154 was carried out thereafter. It is when the matter was resting so, that the notice under section 148 was issued, as a result of which the assessment was completed under section 143(3), read with section 147. It is the latest assessment order passed under section 143(3), read with section 147, which has been revised by the Commissioner of Income-tax under section 263 of the Income-tax Act, 1961.

30. The contention of the assessee that the income-escaping assessment cannot be considered for computing the period of limitation on the ground that the issue considered by the Assessing Officer in the income-escaping assessment is not the subject matter if revision, is not an acceptable proposition in law. Section 263 empowers the Commissioner of Income-tax to call for and examine the

record of any proceeding under this Act and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may pass such order as the circumstances of the case may justify, etc. The assessment order passed by the assessing authority under section 143(3), read with section 147 is coming under the expression 'any proceeding under this Act'. In simple terms, any statutory proceeding concluded by the assessing authority, is open for the revisional jurisdiction of the Commissioner of Income-tax under section 263 of the Act. This authority of the Commissioner of Income-tax cannot be denied on the ground that the issue considered in the income-escaping assessment and the issue proposed to be considered in the revision are different. The authority of the Commissioner of Income-tax is not issue-based. His authority is proceeding-based.

31. Another important point is that all the proceedings prior to the passing of the assessment order under section 143(3), read with section 147, have been merged with the assessment order passed under section

143(3), read with section 147. Therefore, it is to be seen that no proceeding exists before the Commissioner of Income-tax, other than the latest proceeding of assessment concluded under section 143(3), read with section 147. Therefore, genetically itself, the Commissioner of Income-tax is competent to exercise his jurisdiction under section 263 on the income-escaping assessment order passed by the Assessing Officer under section 143(3), read with section 147.

32. Moreover, the income-escaping assessment order passed by the Assessing Officer under section 143(3), read with section 147, is an assessment order passed by the Assessing Officer. Therefore, any issue, which the Commissioner of income-tax thinks that the Assessing Officer has not considered in the assessment, could be brought to life by the Commissioner of Income-tax in exercise of his powers under section 263.

33. Therefore, in the facts and circumstances of the case, the Commissioner of Income-tax is justified in passing the order under section 263 in the present case. He has rightly reckoned the period of limitation from the date of

passing of the income-escaping assessment order under section 143(3), read with section 147. The revision order passed by the Commissioner of Income-tax is within the period of limitation.

34. Therefore, on the question of legality of the revision order passed under section 263, I agree with the view taken by the Hon'ble Judicial Member.

35. Now, it is the question whether the sum of ₹ 2,899.68 lakhs, accounted in the company's books as a 'reserve', could be treated as income in the hands of the assessee company under section 28(iv) of the Income-tax Act, 1961 or not?

36. In this context I have to state that the assessee has taken an alternative plea that if at all the said sum is exigible to tax, the same should have been taxed under the head 'capital gains'. I may not be able to subscribe to the above argument of the learned chartered accountant. Capital gain arises out of a deal of 'transfer'. In the present case, the assessee has not entered into any transaction of transfer. In fact, it has acquired the business of another company through the medium of amalgamation. As there is

no transfer as such of any capital asset made by the assessee, the question of taxing capital gains does not arise. Moreover, section 47(vi) provides that any transfer, in a scheme of amalgamation of a capital asset by the amalgamating company to the amalgamated company, if the amalgamated company is an Indian company, is not treated as a transfer for the purpose of levy of capital gains tax. Therefore, the argument of the assessee that if at all the income is liable for taxation, the same should be taxed as capital gains, is not a proposition sustainable in law. That is rejected.

37. A similar issue was considered by the C-Bench of this Tribunal in the case of M/s.Quintegra Solutions Ltd., through its common order dated 21-9-2011. The reference of the order is ITA Nos.1526 to 1530 and 2056(Mds)/2010. In the above case of M/s.Quintegra Solutions Ltd., an exactly similar case of amalgamation was considered by the Tribunal. The issue was whether section 28(iv) was applicable or not. In that case, pursuant to amalgamation of two companies, the amalgamated company had issued its equity shares to the shareholders against the value of 'net

asset' taken over. The differential amount between the two figures was adjusted in the books of the amalgamated company by way of 'goodwill'. The amount of goodwill credited in the books of the amalgamated company for giving accounting effect to the amalgamation, was assessed by the assessing authority as benefit or perquisite arising in the course of business under section 28(iv) of the Income-tax Act, 1961. In first appeal, the Commissioner of Income-tax(Appeals) agreed with the contention raised by the assessee that the differential amount between the face value of the shares allotted and the value of net assets taken over did not represent any income assessable under section 28(iv) because such amount was merely a balancing figure adjusted in the books of the amalgamated company. The view taken by the Commissioner of Income-tax(Appeals) has been upheld by the Tribunal in the above-mentioned order.

38. The discussion made by the Tribunal in the above common order is reproduced below for a better appreciation of the situation:-

> *"4.1. The only ground raised in this appeal is that the Commissioner of Income-tax(Appeals) has erred*

in deleting the addition of ₹ 35,98,25,190/-, treated as income by the Assessing Officer as goodwill taxable under section 28(iv) of the Income-tax Act, 1961.

4.2. The assessee company is a product of amalgamation of M/s.Transys Technologies Pvt. Ltd. and M/s. Sophia Software Ltd. The excess of cost of acquisition over the carrying value of the net asset on the date of merger has been brought in the financial statement of the assessee company as goodwill. The assessee has adopted this method on the principle that the carrying value of the goodwill is susceptible to the events and changes taking place in the surrounding circumstances. This accounting entry to adjust for the balancing figure has been treated by the assessing authority as receipt of ₹ 35,98,25,190/- in the event of the merger of M/s.Transys Technologies Pvt. Ltd. with the assessee company. The assessing authority treated the same as income under the provisions of section 28(iv) of the Income-

tax Act, 1961. When this matter was considered in first appeal, the assessee argued at length that the finding of the Assessing Officer is erroneous in the facts of the case and there is nothing to be taken into consideration under section 28(iv). After hearing the detailed submissions of the assessee company, the Commissioner of Income-tax(Appeals) remanded the matter to the Assessing Officer, to which a remand report was furnished by the Assessing Officer. In the remand report dated 28-1-2010, the assessing authority himself has stated that where amalgamation is authorised by the High Court, the balancing figure on the asset side of the balance sheet takes the character of goodwill, which cannot be taxed. All the details relating to the computation of the figure, like the High Court order, the way the goodwill was arrived at and the details of other items of balance-sheets of both amalgamating and amalgamated companies were placed both before the assessing authority and the Commissioner of Income-tax(Appeals). In the light

of the above stated remand report, the Commissioner of Income-tax(Appeals) deleted the addition.

4.3. We do not find any merit in the ground raised by the Revenue in the present appeal. There is no doubt that the amalgamation was authorised by the High Court. The relevant particulars were filed before the lower authorities. The balancing figure has been correctly worked out. The assessing authority himself has fairly admitted in his remand report that the said balancing figure cannot be treated as income taxable under section 28(iv). We find that there is no merit in the ground raised by the Revenue.

4.4. The appeal for the assessment year 2003-04 in ITA No.1527(Mds)/2010 is liable to be dismissed."

39. I find that the issue agitated in this Third Member Case is squarely covered by the order of the co-

ordinate Bench, in which myself was a party, who, in fact, has authored that order.

40. The learned Judicial Member has relied on the judgment of the Hon'ble Madras High Court in the case of Commissioner of Income-tax vs. Aries Advertising Pvt. Ltd., 255 ITR 510, as the anchor of his reasoning to decide the issue against the assessee by holding that the amount is taxable under section 28(iv). In that case considered by the Hon'ble Madras High Court, the assessee had written back unclaimed trade balances to its profit and loss account. Those unclaimed balances in fact were generated out of trading operations carried out by that assessee. The money had arisen out of ordinary trading transactions. The court held that although the amounts received originally were not of income nature, the amount remained with the assessee for a long period unclaimed by the trade parties. By lapse of time, the claim of the deposit became time barred and the amount attains a totally different quality. The court held that it becomes a definite trade surplus. The court also observed that the assessee itself treats the money as its own money and takes the amount to its profit and loss account. It is in

those circumstances that the Hon'ble High Court has held that those amounts are assessable in the hands of the assessee. In the present case, the facts are diametrically opposite. The amount of ₹ 2,899.68 lakhs transferred by the assessee to its General Reserve was not generated out of trading operations. The surplus in fact arose out of acquisition of capital assets. It was a transaction in the capital segment. In fact, there is no surplus. It was only an accounting notion. It was necessarily to be reflected in the accounts so as to tally the balance sheet. On amalgamation, shares can be allotted only on its face value. At the same time, the market value of the shares is very high. The assets are taken over by the assessee and the number of shares to be allotted to the amalgamated company was computed on the basis of the market value of the shares evaluated on the basis of valuation report. Therefore, the acquisition transaction has been taken on the basis of the market value of the shares of the assessee company vis-à-vis net worth of those assets taken over. Therefore, the amalgamation transaction has taken place on the basis of comparable variables. It was a fair deal and approved by the Hon'ble

High Court of Madras. There is no complaint against the method of valuation or the market value assigned, shares of the assessee company or the value assigned to the assets taken over. When the transaction of amalgamation is passed through a judicial process, the assessee has to record the values in its books of accounts. Obviously, the value of the assets will have to be accounted at its net worth value as taken over by the assessee company. As already stated, the assets are compared to the market value of the shares of the assessee company. The face value is obviously less. Therefore, in such a transaction of amalgamation, there is inherent possibility of the assessee gaining a "book surplus" being the difference between the market value and the face value of the shares. This is not in the revenue segment and not in the nature of any benefit or perquisite. Therefore, section 28(iv) does not apply to the case even remotely. Therefore, the decision of the Hon'ble Madras High Court in the case of CIT vs. Aries advertising Co. Pvt. Ltd., 255 ITR 510, relied on by the learned Judicial Member, is not applicable to the present case.

41. Even if the surplus is attributed to a capital transaction, there again section 47(vi) provides that any surplus arising in such cases of amalgamation cannot be brought to capital gains tax, as the act of amalgamation is not treated as 'transfer' for the purposes of section 45.

42. As held by the Tribunal in the case of M/s.Quintegra Solutions Pvt. Ltd., the sum of ₹ 2,899.68 lakhs is only a balancing figure arising out of the entries passed in the books of account as a result of amalgamation and the same cannot be treated as income taxable under section 28(iv) of the Act.

43. I must also refer to the judgment of the Hon'ble Supreme Court rendered in the case of Vazir Sultan Tobacco Co. Ltd. vs. CIT, 132 ITR 559, which has been referred to by the learned Judicial Member. In that judgment, in fact, the Hon'ble Supreme Court has examined the distinction between 'reserve' and 'provision' in the context of taxation legislation. While distinguishing 'reserve' from 'provision' the Hon'ble court has observed that reserve is an appropriation of profits, the asset or assets by which it is represented being retained to form part of the capital employed in the business.

Even though the court has mentioned that a reserve may be a surplus, the court has equally characterized it as part of capital employed in the business. Further, the Hon'ble Supreme Court has observed that the question whether an amount would constitute reserve or not will have to be decided having regard to the true nature and character of the sum so appropriated depending on the surrounding circumstances, particularly the intention and purpose for which such appropriation has been made. The true nature and character of the appropriation must be determined with reference to the substance of the matter. This means that one must have regard to the intention with which and the purpose for which the appropriation has been made, such intention and purpose being gathered from the surrounding circumstances. In the present case, in fact there is no appropriation at all. The surplus of ₹ 2,899.68 lakhs has been generated in the present case as a result of amalgamation and arising out of the consequence of recording the financial transactions with reference to the face value of the shares allotted. Therefore, it is somewhat an automatic consequence of the process of amalgamation.

The assessee has no role to appropriate any such amount towards reserve. The balancing figure has been conveniently transferred to General Reserve as it is a technical by-product of amalgamation. The said decision of the Hon'ble Supreme Court enlightens on the principles governing the concept of provision and reserve, but does not apply to the facts of the present case.

44. In short, I agree with the learned Judicial Member to hold that the order passed by the Commissioner of Income-tax under section 263 of the Act in this case is not barred by limitation and I agree with the learned Accountant Member to hold that the sum of ₹ 2,988.68 lakhs is not in the nature of any benefit or perquisite and thus not taxable under section 28(iv) of the Income-tax Act, 1961. The two questions referred to me are answered in the above manner.

45. Now, this case will be placed before the Regular Bench to pass concluding orders on the basis of majority view.

Sd/-

(Dr. O.K.Narayanan)
Vice-President
THIRD MEMBER

Chennai,
Dated the 2nd April, 2012.
V.A.P.

IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : CHENNAI

[BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER]

I.T.A.No. 440/Mds/2011
Assessment year : 2002-03

M/s Spencer & Company Ltd Spencer Plaza 4th Floor, 769, Anna Salai Chennai 600 002 PAN AAACS 4451 J] (Appellant)	**vs**	The Asstt. Commissioner of Income-tax Circle VI(4) Chennai (Respondent)

Appellant by	**:**	Shri Dilip S. Damle, CA
Respondent by	**:**	Shri R.Viswanathan, Jt. CIT
Date of Hearing	**:**	20-4-2012
Date of Pronouncement	**:**	20-04-2012

O R D E R

PER N.S. SAINI, ACCOUNTANT MEMBER

There being difference of opinion between Members constituting the Bench, the matter was referred to Third Member under section 255(4) of the Act for deciding the difference in opinion:

2. The Hon'ble Vice-President, sitting as the Third Member, has framed the following two issues for deciding the points of difference between the Members constituting the Bench:

> "1. Whether the Commissioner of Income-tax is justified in initiating action under section 263 of the Income-tax Act, 1961? And
>
> 2. Whether the sum of ₹ 2,899.68 lakhs transferred by the assessee to its General Reserve on amalgamation is to be treated as income taxable under section 28(iv) of the Income-tax Act, 1961?"

3. The Hon'ble Vice-President, on first issue, agreeing with the Judicial Member has held that the proceeding u/s 263 of the Act by the ld. CIT was not barred by limitation. The Hon'ble Vice-President, on second issue, has agreed with the Accountant Member and held that the sum of ₹ 2,899.68 lakhs is not in the nature of any benefit or perquisite and thus, not taxable u/s 28(iv) of the Income-tax Act, 1961. Thus, in view of the majority decision, the appeal of the assessee is partly allowed as above.

4. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 20-04-2012.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(N.S.SAINI)**
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 20th April, 2012
RD

Copy to: Appellant/Respondent/CIT(A)/CIT/DR