Marshall Sons & Co. [India] Ltd vs Income Tax Officer on 27 November, 1996

Equivalent citations: AIR 1997 SUPREME COURT 1763, 1997 (2) SCC 302, 1997 AIR SCW 990, 1997 TAX. L. R. 277, (1996) 10 JT 740 (SC), (1996) 89 TAXMAN 619, 1997 (1) COM LJ 1 SC, 1996 (10) JT 740, (1997) 1 COMLJ 1, (1997) 223 ITR 809, (1997) 24 CORLA 1, (1997) 6 SUPREME 115, (1997) 88 COMCAS 528, (1997) 138 CURTAXREP 1

Author: B.P. Jeevan Reddy

Bench: B.P.Jeevan Reddy, Suhas C.Sen

PETITIONER:
MARSHALL SONS & CO. [INDIA] LTD.

Vs.

RESPONDENT:
INCOME TAX OFFICER

DATE OF JUDGMENT: 27/11/1996

BENCH:
B.P.JEEVAN REDDY, SUHAS C.SEN

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T B.P. JEEVAN REDDY, J.

These appeals are preferred by Marshall Sons and Company [India] Limited [hereinafter referred to as the "Holding Company"] as successors to Marshall Sons and Company [Manufacturing] Limited [hereinafter referred to as the "Subsidiary Company"] against the judgment and order of the Madras High Court dismissing the writ petitions filed by them. The matter arises under the Income Tax Act.

The Holding Company had its registered office at 33-A, Chowranghee Road, Calcutta while the Subsidiary Company had its registered office at Madras. For the purposes of assessment under the Income Tax Act, while the accounting year of the Holding Company was the year ending on 30th June, the accounting year of the Subsidiary Company was the calendar year. On 1st December, 1982, two letters were addressed by the Subsidiary Company to the Income Tax Officer stating that the company is desirous of effecting a change in the accounting year. They stated that they would wish to close their accounts on June 30, 1983 for the eighteen months' period [January 1, 1982 to June 30, 1983] instead of closing the accounts on December 31, 1982. It was also stated that since the accounting year of the Holding Company ends on June 30, they too would like to follow the same practice. In response to said letters, the Income Tax Officer asked for certain particulars which were supplied. On February 3, 1983, the Income Tax Officer permitted the Subsidiary Company to change the accounting year from December 12, 1982 to June 30, 1983 subject to the conditions mentioned therein, viz.:

> "As a consequence to the change, the income of the period of 18 months from 1.1.82 to 30.6.83 will be assessed for the asstt. year 1984-85. Any relief that may be withdrawn in the future legislation with effect from asstt. year 1984- 85 will be made applicable to the entire income for the asst. year 1984-85 and depreciation will be allowed proportionately as per rules.
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> The asstt. year 1983-84 which is slipped on account of the change of the previous year will, however, be treated as one assessment year for the purposes of set off of carried forward losses, relief u/s.80J of the Income Tax Act, 1961, if any."

In December, 1982, the Subsidiary Company passed a resolution proposing to amalgamate with the Holding Company with effect from January 1, 1982. An application was made to the Company Court and pursuant to the orders of the Court, a meeting of the shareholders was held on February 11, 1982 whereat a resolution was passed approving the amalgamation of the Subsidiary Company with the Holding Company, similar resolution was passed by the shareholders of the Holding Company on May 7, 1983. The Company Court [Madras High Court] sanctioned the scheme of amalgamation by its order dated November 21, 1983 in C.P. No.23 of 1983. On a similar application filed before the Calcutta High Court, C.P. No.284 of 1983, that High Court [Company court] to sanctioned the scheme of amalgamation by its order dated January 11, 1984. In both the orders,it was directed that certified copies of the said orders shall be delivered to the Registrars of Companies at Madras and Calcutta within thirty days therefrom. Accordingly, certified copies of the orders were filed before the Registrars of Companies on January 29, 1984 at Madras and on February 24, 1984 at Calcutta. The name of the Subsidiary Company was struck off the register of Companies, maintained by the Registrar of Companies at Madras, on January 21, 1986.

On November 25, 1984, a notice under Section 139(2) of the Income Tax Act was issued to the Subsidiary Company calling upon it to file a return of its income for the Assessment Years 1984-85 [for the year ending June 30, 1983] and for 1985-86 [year ending June 30, 1984]. The Subsidiary Company replied stating that inasmuch as the Subsidiary Company has been amalgamated with the Holding Company under a scheme of amalgamation sanctioned by the Company Courts of Madras

and Calcutta and because the said amalgamation was with effect from January 1, 1982, there was no question of the Subsidiary Company filing a return for the said two assessment years. There was exchange of notices/replies thereafter, which it is not necessary to mention at this stage Ultimately, the Income Tax Officer issued a notice under Section 142(1) asking for compliance with it by February 7, 1986. At that stage, the appellant-company filed writ petitions in the Madras High Court questioning the aforesaid notices.

In the writ petitions filed by the appellant, the main ground urged was that inasmuch as the amalgamation has taken effect on and from January 1, 1982, the Income Tax Officer had no authority to call upon the Subsidiary Company to file a return for any period subsequent thereto. It was submitted that the scheme of amalgamation has been sanctioned by the Company Courts at Madras and Calcutta and that, therefore, any business which may have been carried on by the Subsidiary Company subsequent to January 1, 1982 was as an agent of the Holding Company and not on its own account. It was submitted that the Subsidiary Company had no income of its own - indeed no existence of its own in law on or after January 1, 1982. In the counter-affidavit filed by the Income Tax Officer, he submitted that the amalgamation became effective only when it was sanctioned by the Court and after certified copies of the orders of the Courts were filed with the Registrars of Companies. His case was that only when the name of the Subsidiary Company was struck off the register by the Registrar of Companies, Madras that the Subsidiary Company can be said to have ceased to exist. The respondent also stated that, as a matter of fact, the relevant clauses in the scheme of amalgamation themselves indicate that the scheme was to take effect only when sanctioned by the court and only when the shares of the Holding Company are allotted to members of the Subsidiary Company. He submitted that this allotment of shares took place only in June, 1984. The Income Tax Officer further submitted in his counter affidavit that the said amalgamation was a device adopted to evade the tax legitimately due from the Subsidiary Company. He submitted that while the Holding Company was incurring losses, the Subsidiary Company was making substantial profits and that the scheme of amalgamation was merely a device to avoid paying taxes on the income earned by the Subsidiary Company. The idea behind the amalgamation, according to him, was to set off the accumulated losses of the Holding Company against the profits of the Subsidiary Company. He also raised objection with respect to the maintainability of the writ petition on the ground inter alia that the Income Tax Act provides adequate remedies to agitate all the contentions urged in the said writ petition.

The High Court dismissed the writ petition with the following findings:

> (1) The date of amalgamation [January 1, 1982] specified in the scheme of amalgamation is "totally artificial and arbitrary". Till the beginning of December 1982, the amalgamation was not even in the contemplation of either company. Only in December 1982, was the resolution of the Directors passed proposing amalgamation. The shareholders meeting took place sometime in February 1983. The scheme itself contemplates that it is subject to and conditional upon the scheme being sanctioned by the court under Section 391 of the Act and appropriate orders being made for implementation of the said scheme under Section 394. The scheme also provides that its implementation is conditional upon the shareholders holding

not less than 9/10th in value of the shares in the Subsidiary Company becoming shareholders of the transferee company. In this view of the matter, specifying the date of amalgamation as January 1, 1982 has no relevance or meaning. The amalgamation becomes effective only when the Court approves the scheme of amalgamation and not at any earlier point of time. In other words, the operative dates would be January 20, 1984 and February 24, 1984, on which dates the Madras and Calcutta High Courts approved the scheme. There is nothing in the orders of Courts to show that the said orders were to be effective from January 1, 1982.

(2) From the counter-affidavit, it appears that the Subsidiary Company was borne on the register of companies upto January 21, 1986. This shows that the company was in existence till that date and that it did not cease to exist, as a fact, on January 1, 1982.

(3) In view of the aforesaid findings, it is not necessary to go into or express any opinion on the plea of the Income Tax Officer that the said amalgamation was merely a device to evade the payment of taxes legitimately due on the income of the Subsidiary Company. For the same reason, no opinion need be expressed on the objection of the Income Tax Officer with respect to the maintainability of the writ petition.

Sri N.K. Poddar, learned counsel for the appellant, urged a number of grounds in support of his attack upon the validity of the judgment under appeal. He submitted that the view taken by the Madras High Court in United India Life Assurance Company v. Commissioner of Income Tax [(1963) 49 I.T.R. 956], which has been followed in the judgment under appeal does not represent the correct view of law. He submitted that the contrary view taken by the Bombay High Court in Commissioner of Income Tax, Pune v. Swastik Rubber Products Limited [(1983) 140 I.T.R.304) (and followed in later decisions of that Court) represents the correct view. In other words, the contention is that inasmuch as both the Madras and Calcutta High Courts [Company Courts] had approved the scheme of amalgamation as it stood, it means that the scheme of amalgamation is effective from January 1, 1982. No doubt, the scheme states that it is conditional upon being sanctioned by the Court but that only means that whenever it is sanctioned by the Court, the scheme as approved takes effect. The scheme specifically states that the scheme of amalgamation is effective from January 1, 1982. Learned counsel submitted that according to the well- accepted practice prevailing in this country, all schemes of amalgamation specify a particular date of amalgamation and unless the court specifies otherwise, the date provided in the scheme of amalgamation is taken as the actual date of amalgamation. Counsel submitted that subsequent to January 1, 1982, the Subsidiary Company may have carried on business awaiting the orders of the Court but it could not do otherwise and that the business so carried on by it was as an agent of and for and on behalf of the Holding Company and not on its own account. Learned counsel also submitted that no balance-sheet was drawn for any period subsequent to January 1, 1982 for the Subsidiary Company. No Annual General Body Meeting of shareholders was held of the Subsidiary Company after the said date and that, to all intents and purposes, the Subsidiary Company ceased to exist as an independent entity on and from January 1, 1982. Counsel relied upon the language of Sections 391 and 394 and on certain decisions in support of his contention. Sri Poddar raised an alternate contention too, viz., if for any reason, it is held that the amalgamation is not effective with effect

from February 1, 1982, it must be held to be effective from February 11,1983/May 7, 1983 [the date on which the shareholders' meetings were held]. Both these dates are prior to June 30, 1983 - the last day of the accounting year [as sanctioned by the Income Tax Officer]; since the income of the company can be said to accrue only at the end of the year when the accounts are made up - and not from day to day - it must be held that no income accrued to Subsidiary Company at the end of the said accounting year [January 1, 1982 to June 30, 1983]; the income accrued only on June 30, 1983 and it accrued only to the Holding Company.

On the other hand, Dr. R.R. Misra, learned counsel for the Revenue, supported the reasoning and conclusion of the High Court. Learned counsel further submitted that the scheme of amalgamation was a mere device to evade the payment of taxes lawfully due according to law and that this is a good ground on which the Income Tax authorities can ignore the alleged amalgamation even if for any reason it can be held that it is effective from January 1, 1982. Counsel also submitted that the writ petition filed by the appellant ought to have been dismissed summarily on the ground that it was premature and that the appellant should have been directed to pursue the remedies provided by the Income Tax Act according to law. The High Court, he submits, ought not to have entered into the merits of several contentions raised by the appellant, all of which can be more satisfactorily gone into after the assessments are made wherein all the relevant facts could have been gathered.

Let us first examine the position obtaining in this behalf under the Companies Act. Sub-sections (1). (2) and (3) of Section 391 (relevant for our purpose) and Section 394 read:

> "S. 391. Power to compromise or make arrangements with creditors and member.- (1) Where a compromise or arrangement is proposed--
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> (a) between a company and its creditors or any class of them; or
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> (b) between a company and its members or any class of them;

the Court may, on the application of the company or of any creditor or member of the company, or in the case of a company which s being wound-up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed under the rules made under section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound-up, on the liquidator and constributories of the company:

> Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom

> an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like. (3) An order made by the Court under sub-section (3) shall have no effect until a certified copy of the order has been filed with the Registrar.

S.394. Provisions for facilitating reconstruction and amalgamation of companies.--(1) Where an application is made to the Court under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court--

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a `transferor company') is to be transferred to another company (in this section referred to as `the transferee company');

the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:-

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(iii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company:

(iv) the dissolution, without winding-up of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

> Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme or the amalgamation of a company, which is being

wound-up, with any other company or companies, shall e sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest:

Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the Court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within thirty days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

(4) In this section--

(a) `property' includes property, rights and powers of every description; and `liabilities' includes duties of every description; and `liabilities' includes duties of every description; and

(b) `transferee company' does not include any company, other than a company within the meaning of this Act; but `transferor company' includes any body corporate, whether a company within the meaning of this Act or not."

Section 394-A provides that on every application under Section 391 or Section 394, the Court shall give notice of such application to the Central Government and shall take into consideration the representations, if any, made to it by that government before passing any order under any of the said sections. Rules 67 to 87 of the Companies [Court] Rules, 1959 deal with matters provided by Sections 391 to

394. The form in which several notices contemplated by Sections 391 and 394 and Rules 67 to 87 are to be issued are prescribed in Forms 33 to 42 appended to the Companies [Court] Rules.

The effect and scheme of the above provisions, insofar as it is relevant to the facts of the case before us, may be summarised thus:

(a) Where an amalgamation of two or more companies is proposed, an application has to be made to the Court for the purpose. Thereupon, the Court may call the meeting of members of the companies concerned. The order of the Court shall be in Form 35 prescribed by the Rules;

(b) Such notice of the meeting has to be sent individually to all the members. (The notice and the explanatory statement under Section 393 are settled by the officer of the Court.)

(c) Apart from individual notices, the notice of the meeting has also to be published in such newspapers as may be directed by the Court.

(d) Only when a majority of the members representing three-

fourths of the value of the members present and voting, either in person or by proxy, approves the scheme, would the Court proceed to sanction the amalgamation arrangement. Such an order shall bind all concerned. Of course, the Court shall not sanction any such arrangement unless it is satisfied that the applicants have disclosed all material facts fully and truly;

(e) the application for confirmation made under Section 391(2) and 394 is also required to be advertised in the same newspapers in which the notice of the meeting was advertised and the notice is also required to be served on the Central Government as provided by Section 394-A.

(f) If the Court is satisfied that the statutory formalities have been duly complied with and the scheme is fair and a reasonable one and beneficial to the interests of the companies and its members, the Court may sanction the scheme. While sanctioning the scheme, the Court may also provide for all or any of the matters specified in clauses

(i) to (vi) of sub-section (1) of Section 394. The two provisos appended to said sub-section provide for certain pre-conditions which too have to be observed by the Court. Sub-section (2) provides that where the order sanctioning the amalgamation provides for any of the matters in clauses

(i) to (vi) aforesaid, they shall take effect as provided in the order.

(g) Within 30 days of the order sanctioning the amalgamation arrangement, the company concerned shall file a certified copy of the order before the Registrar for registration. This is made mandatory by the second limb of sub-section (3) of Section 394.

(h) The order sanctioning the scheme is required to be drawn up in accordance with Forms 41 and 42 of the companies [Court] Rules.

We may now refer to the scheme of amalgamation as passed at the meetings of the shareholders of both the Holding and the Subsidiary Companies. "Transferor company"

> is defined to mean the "Subsidiary company" and the expression "Transferee Company" is defined to mean the "Holding Company". The expression "this scheme" is defined to mean "this scheme in the present form or with any modifications approved or imposed by the High Court of Judicature at Tamil Nadu and/or by the High Court of Judicature at Calcutta". The expression "the transfer date"

is defined to mean "1st January, 1982" and the expression "the operative date" means the date on which the certified copies of the orders of the High Courts of Tamil Nadu and Calcutta under Sections 391(2)/394(2) of the Act shall have been filed with the Registrars of Companies in Tamil Nadu and Calcutta respectively. The expression "terminal date" is defined to mean the date immediately preceding the operative date. The scheme refers to the capital structure of the Transferor and the Transferee Companies, the object of the scheme underlying the agreement between the parties and then states:

> "1. The undertaking of the Transferor company shall, with effect from and including the transfer date and without further act or deed, be transferred to the Transferee Company pursuant to Sections 391(2) and 394(2) of the Act and vest in the Transferee Company with all the estate and interest of the Transferor Company but subject, nevertheless, to all charges affecting the same and on the charges affecting the same and on the said date, the Transferor Company shall be amalgamated with the Transferee Company.
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> 6. (a) The excess of the value of the net assets of the Transferor Company, based on the Balance Sheet of the Transferor Company as at the date immediately proceeding the transfer date over its Subscribed and Paid Up Capital shall, to the extent of the amount appearing as Development Rebate Reserve, Investment Allowance Reserve and Investment Allowance Reserve (Utilised) in such Balance Sheet of the Transferor Company, be the Development Rebate Reserve Investment Allowance Reserve and Investment Allowance Reserve (Utilised) to the Transferee Company.
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> (b) The Transferor company shall, with effect from the Transfer Date, be deemed to have carried on its business for and on behalf of the Transferee Company, and accordingly the Profits and Losses of the Transferor Company for the period commencing from the Transfer Date shall be deemed to be the profits or losses of the Transferee Company and shall be available to the Transferee Company for disposal in any manner including the declaration of any dividend by the Transferee Company after the Operative Date, subject to the provisions of the Act.
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> 7. The implementation of this scheme is conditional upon this Scheme being sanctioned under Section 391 of the Act and the appropriate orders for implementation of this Scheme being made under Section 394 of the Act by the High

courts of Tamil Nadu and Calcutta.

8. The implementation of this Scheme is conditional also upon shareholders holding not less than nine-tenths in value of the shares in the Transferor Company (other than shares already held therein immediately before the amalgamation by the Transferee Company) becoming shareholders of the Transferee Company by virtue of the amalgamation."

A reading of the above clauses of the scheme shows that according to the scheme, the entire undertaking of the Subsidiary Company shall be transferred to the Holding Company with effect from the transferred date and that the Subsidiary Company shall be amalgamated with the Holding Company with effect from the said date. Clause (6) states clearly that the implementation of the said scheme "is conditional upon the scheme being sanctioned under Section 391 of the Act and the appropriate orders for the implementation of this scheme being made under Section 394 of the Act by the High Courts of Tamil Nadu and Calcutta". Clause (8) further provides that the implementation of the said scheme "is conditional also upon shareholders holding not less than nine-tenths in value of the shares in the Subsidiary company becoming shareholders of the Holding Company by virtue of the amalgamation". It is one the basis of the language of clauses (7) and (8) that the High Court has opined that the scheme takes effect only on and from the date it was sanctioned by the High Courts of Madras and Calcutta coupled with the date on which the shareholders of the Subsidiary Company becomes the shareholders of the Holding Company as provided in the sub-clauses. The High Court has opined that the transfer date mentioned in the scheme viz., January 1, 1982 is "totally artificial and arbitrary" [for the reason that on the said date neither the company nor their shareholders had even thought of amalgamation] and that it has no legal significance. According to the High Court, therefore, the date on which the amalgamation should be deemed to have come into being is not January 1, 1982 but January 20, 1984/February 24, 1984, on which dates the Madras and Calcutta High Courts respectively approved the scheme. In other words, the High Court has taken the view that in the absence of any date being specified in the order of the High Court as the date of amalgamation, the date of the order of the High Court [Company Courts] shall be taken as the date of amalgamation. For arriving at the said view, the High Court followed an earlier Full Bench decision of that Court in Sahayanidhi (Virudhnagar) Ltd. v. A.R.S. Subramanivam Nadar [(1950) 20 Company Cases 214]. The High Court also opined that the decision of the Bombay High Court in Swastik Rubber Products Ltd. is of no assistance to the appellant. On this basis, the High Court has upheld the validity of the notices issued by the Income Tax Officer, which notices were impugned in the writ petition, and dismissed the writ petition. The question is whether the view taken by the High Court is correct.

Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz., January 1, 1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it - as has happened in this case - it should follow

that the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with affect from the transfer date, the Transferor Company (Subsidiary Company) shall be deemed to have carried on the business for and on behalf of the Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the Courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is the necessary and the logical consequence of the court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the court before the Registrar of Companies, the allotment or shares etc. may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. The Bank of Upper India Ltd. [A.I.R.1919 P.C.9].

Counsel for the Revenue contended that if the aforesaid view is adopted when several complications will ensue in case the Court refuses to sanction the scheme of amalgamation. We do not see any basis for this apprehension. Firstly, an assessment can always be made and is supposed to be made on the Transferee Company taking into account the income of both the Transferor and Transferee Company. Secondly, and probably the more advisable course from the point of view of the Revenue would be to make one assessment on the Transferee Company taking into account the income of both of Transferor or Transferee Companies and also to make separate protective assessments on both the Transferor and Transferee Companies separately. There may be a certain practical difficulty in adopting this course inasmuch as separate balance-sheets may not be available for the Transferor and Transferee Companies. But that may not be an insuperable problem inasmuch as assessment can always be made, on the available material, even without a balance- sheet. In certain cases, best-judgment assessment may also be resorted to. Be that as it may, we need not purpose this line of enquiry because it does not arise for consideration in these cases directly.

In the light of the view taken by us on the principal question, it is not necessary to consider the alternate submission urged by Shri Poddar.

For the above reasons, the appeals are accordingly allowed. The writ petitions filed by the appellant in the High Court shall be deemed to have been allowed. We, however, make it clear that we have not expressed any opinion on the plea of the learned counsel for the Revenue that the amalgamation itself is a device designed to evade the taxes legitimately payable by the subsidiary company. If the Income Tax authorities think that, they are entitled to raise this question in the proceedings under the Income Tax Act, it is open to them to do so by way of a separate proceeding according to law.

No costs.