

SCH. NO. 94, RING ROAD, INDORE
(MADHYA PRADESH)

.....PETITIONER

*(SHRI SUMIT NEMA, LEARNED SENIOR ADVOCATE ASSISTED BY
MS.PREENA SALGIA, COUNSEL FOR THE PETITIONER).*

AND

OFFICE OF INCOME TAX OFFICER ITO
1(1) INDORE AAYKAR BHAWAN, OPP.
1. WHITE CHURCH ROAD, RESIDENCY
AREA, INDORE (MADHYA PRADESH)

PRINCIPAL COMMISSIONER OF
INCOME TAX 1 AAYKAR BHAWAN, OPP.
2. WHITE CHURCH ROAD, RESIDENCY
AREA, INDORE (MADHYA PRADESH)

THE UNION OF INDIA THROUGH THE
3. SERETARY MINISTRY OF FINANCE
NORTH BLOCK, NEW DELHI (DELHI)

.....RESPONDENTS

(MS. VEENA MANDLIK, COUNSEL FOR THE RESPONDENTS NO. 1 AND 2).

Reserved on : 16.10.2023

Pronounced on : 03.11.2023

*These petitions are coming on for admission, heard finally this day,
Justice Sushrut Arvind Dharmadhikari passed the following:*

ORDER

This order shall govern disposal of aforesaid writ petition Nos. 11190/2022, 13915/2023 and 10676/2023. Regard being had to the similitude of the controversy involved in the aforesaid petitions, they have been heard analogously and disposed of by this singular order.

2. For the sake of convenience, facts of W.P. No. 11190/2022 are taken.

3. In this petition under Article 226/227 of the Constitution of India, the petitioner is challenging notice dated 15.03.2022 issued under Section 148A of the Income Tax Act, 1961 ('the Act'), order dated 31.03.2022 issued under Section 148A(d) of the Act and notice dated 31.03.2022 issued under Section 148 of the Act by respondent No.1 for the Assessment Year 2018-19 *inter-alia* on the ground that the same were issued against an entity which has been amalgamated with another entity with effect from 01.04.2017 and by virtue of which has ceased to remain in existence. Therefore, the notices and order having been issued against a non-existent entity are without jurisdiction, bad in law, contrary to settled principles in law.

4. Brief facts of the case are that, the petitioner Jhansi Baran Pathways Pvt. Ltd. (JBPPL) was the wholly owned subsidiary of Prakash Asphaltings and Toll Highways (India) Ltd. (PATH). For strategic and other purposes, it was decided to merge (JBPPL) and one Udaipur Pathways Pvt. Ltd. with (PATH). A consolidated scheme of merger (Annexure P/2) was prepared and the same was approved by the Regional Director, Ahmedabad in CP (CA) No. 26/2017 vide order No. RD (NWR)/233/(022)/2017/235 dated 17.04.2018 (Annexure P/1). Prior to the approval, notice dated 31.01.2018 (Annexure P/3) inviting objections / suggestions to the amalgamation was also sent to the Income Tax Officer / Assistant Commissioner, Indore/respondent No.1, however, no objections were given by the respondent. The scheme approved on 17.04.2018, was to take effect from

01.04.2017. Pursuant to the approval, the Registrar of Companies also issued fresh certificates of registration dated 17.04.2018 stating that (JBBPL) had been amalgamated into (PATH).

5. Despite being aware of the aforesaid fact, a show-cause notice dated 15.03.2022 under Section 148A was issued in the name of (JBPPL) seeking to reopen the assessment for (JBPPL) for the assessment year 2018-19 on the ground that the Assessing Officer had reasons to believe that the income chargeable to tax for the said assessment year 2018-19 has escaped assessment within the meaning of Section 147 of the Act. It was stated that as per the information available with the IT department, (JBPPL) had engaged in certain transaction in the A.Y. 2018-19 and had not filed its income tax return for the same. Upon receipt of the show-cause notice, reply was submitted by the petitioner informing that since amalgamation had taken effect from 01.04.2017, all incomes and expenditures of (JBPPL) was recorded in the merged entity i.e. (PATH) and the same has been taxed in the merged entity. Copies of the relevant documents were also provided to the revenue authorities along with the reply. Even after filing reply, respondent No. 1 passed the order dated 31.03.2022 under Section 148A(d) of the Act, wherein inspite of acknowledging the fact that the (JBPPL) stood amalgamated with another entity, it was decided that, *'however, to verify whether transactions done on the PAN of the assessee were accounted for or not in the books of the Prakash Asphaltings and Toll Highways (India) Ltd.,*

notice u/s 148 may be issued.' Consequently, notice under Section 148 of the Act dated 31.03.2022 was issued against (JBPPL). Being aggrieved, the petitioner has filed this petition.

6. Learned Senior Counsel for the petitioner contended that the impugned notice is unsustainable in as much as (JBPPL) has already been amalgamated with Prakash Asphaltings and Toll Highways (India) Ltd. with effect from 01.04.2017. It is urged that the action of the respondents in initiating re-assessment proceedings against an amalgamated company and hence non-existent entity was *void ab initio* and bad in law. This is clearly untenable in view of the Apex Court judgment in case of ***Saraswati Industrial Syndicate Ltd. vs. CIT, 1991 AIR 70***, wherein the following principles were formulated :

"5. Generally, where only one company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the share holders of each blending company become substantially the share holders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an

acquisition. See: Halsbury's Laws of England, 4th Edition Vol. 7 Para 1539. Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."

7. It is a settled position in law that assessment/re-assessment proceedings cannot be initiated against amalgamated entities as they cease to remain in existence by virtue of amalgamation. Learned Senior Counsel placed reliance on the judgment of the Supreme Court in case ***Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki (India) Ltd. (2020) 18 SCC 331*** wherein it is held that, upon the amalgamation, the company ceases to exist, it cannot be regarded as a person under Section 2(31) of the Act against whom assessment proceedings can be initiated or an order of assessment passed.

8. It is further contended that respondent No.1 failed to consider the fact that the re-assessment was sought to be done for A.Y. 2018-19 (i.e. F.Y. 2017-18), whereas the amalgamation took effect from 01.04.2017. Thus, the petitioner company having ceased to have an independent existence, could not have filed any return of income for A.Y. 2018-19. In support of his case, he has also placed reliance on the judgment in case of ***Calcutta Discount Company Ltd. Income Tax Officer, Companies District, I & Ors. AIR 1961 SC 372.***

9. Per contra, learned counsel appearing for the respondents submits that after appointed date, various transactions were made by the PAN of the assessee (JBPPL), which were not accounted for. Therefore, notices were issued for reopening of the assessment for the assessment year 2018-19. Learned counsel further contended that in case of any grievance, the petitioner has the remedy of challenging the same in terms of Section 246 of the Income Tax Act, wherein provision of appeal before the appellate authority is available to the petitioner. Hence, the present petition against the show-cause notices is not maintainable in view of the alternative efficacious remedy available to the petitioner. Learned counsel for the respondents has placed on the judgments rendered by the Apex Court in case of *Salil Gulati vs. Assistant Commissioner of Income Tax & Ors.* [2023] 455 ITS 29 (SC); *Ajay Gupta vs. Income Tax Officer* [2023] 454 ITR 794 (SC), *Seema Gupta vs. Income Tax Officer* [2023] 455 ITR 504 (SC) and *Anshul Jain vs. Principal Commissioner of Income Tax & Anr. Special Leave to Appeal (C) No. 14823/2022.*

10. Learned Senior Counsel for the petitioner has vehemently opposed the contentions in respect of availability of alternative remedy. It is contended that no notice can be issued against a non-existent entity, therefore, the notice *per se* is *non est* in the eyes of law since inception. Therefore, the writ is the only efficacious remedy. In this regard he has placed on the order passed by the Supreme Court in case of *Red Chillis International Sales vs. Income*

Tax Officer & Anr. in Special Leave to Appeal (C) No. 86/2023 wherein the Apex Court had set aside the order of Punjab & Haryana High Court on 02.06.2022 in C.W.P. No. 10073 of 2022 remanding the case to the High Court which had dismissed the petition *in limine* on the ground of non-availing of the statutory remedy under Section 246 of the Income Tax Act. He also referred to the judgment of the Apex Court in case of ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors (1998) 8 SCC 1*** wherein it is held that the alternative remedy is not a bar, at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the virus of the Act is challenged.

11. Heard learned counsel for the parties.

12. So far as argument raised by counsel for the respondent regarding availability of alternative remedy of appeal, is concerned, it is well settled that when the order is without jurisdiction and appears to be passed in blatant exercise of powers and the same is against the principles of natural justice, then the question of availability of alternative remedy does not come in the way for exercising jurisdiction under Article 226 of the Constitution of India. In the present case, the notices/order has been issued against a non-existent / amalgamated entity. Hence, the objection regarding availability of alternative

remedy of appeal is overruled.

13. Secondly, in the present case, it is clear that the reassessment proceedings have been initiated against Jhansi Baran Pathways Pvt. Ltd for the assessment year 2018-19, which had indeed ceased to exist with effect from 01.04.2017 based upon the scheme of amalgamation having been approved on 17.04.2018.

14. The Apex Court in case of ***Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki (supra)*** has held as under:

*“36. In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Entertainment on 2 November 2017. The decision in Spice Entertainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in ***CIT vs. Spice Entertainment Ltd. (2012) 247 CTR (Del) 500***.”*

15. Hence, the controversy involved in the present petition is no longer *res integra*. The Apex Court in case of ***Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki (supra)*** has categorically held that if the company has ceased to exist as a result of the approved scheme of amalgamation, then in that case, the jurisdictional notice issued in its name

would be fundamentally illegal and without jurisdiction. It is also held that upon amalgamating entity ceasing to exist, it cannot be regarded as a person under sub section (31) of Section 2 of the Act against whom assessment proceedings can be initiated. The participation by the amalgamated company in the proceedings would be of no effect as there is not *estoppel* against law.

16. In view of the settled law, from the appointed date, under the scheme of amalgamation, the existence of the transferor company had merged into the transferee company. Mere activation of PAN number may not give a right to the respondents to issue notice to a non-existent entity after appointed date i.e. 01.04.2017. Admittedly, the order under Section 148A(d) of the Income Tax Act has been passed by the respondents against a non-existent entity. Therefore, the impugned notices and orders are bad in the eyes of law.

17. Accordingly, the notices, orders and all consequential proceedings in the name of amalgamated company/assessee are null and void and consequently, the impugned notice dated 15.03.2022 issued u/s 148A of the Act, order dated 31.03.2022 passed u/s 148A(d) of the Act and notice dated 31.03.2022 issued u/s 148 of the Act in **W.P.No. 11190/2022**; notice dated 02.03.2023 issued u/s 148A of the Act, order dated 22.03.2023 passed u/s 148A(d) of the Act and notice dated 22.03.2023 issued u/s 148 of the Act in **W.P.No. 13915/2023**; notice dated 26.02.2023 issued u/s 148A of the Act,

order dated 29.03.2023 passed u/s 148A(d) of the Act and notice dated 29.03.2023 issued u/s 148 of the Act in **W.P.No. 10676/2023** are quashed and set aside and all actions in furtherance thereto are prohibited. Resultantly, the petitions are allowed.

18. With the aforesaid, the petitions are finally disposed of.

19. A copy of this order be kept in the record of all other connected writ petitions.

(S. A. DHARMADHIKARI)
JUDGE

(PRANAY VERMA)
JUDGE

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