IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1079 OF 2016

M/s Triton Trading Co. Pvt. Ltd.]
(As successor of Lexus Holding &]
Finance Pvt. Ltd.)]
Temple Terrace, 55, Forjett Street,]
Mumbai – 400 036.]... Petitioner

Versus

1. **Deputy Commissioner of Income-tax,**]
Circle 2(3)(1), Room No.552,]
Aayakar Bhavan, Maharishi Karve Road,]
Mumbai 400 020.]

2. **The Commissioner of Income-tax-2,**]
Room No.344, 3rd Floor,]
Aayakar Bhavan, Maharshi Karve Road,]
New Marine Lines, Mumbai – 400 020.]

3. **Union of India,**]
through the Secretary,]
Department of Revenue, Ministry of Finance,]
Government of India, North Block,]
New Delhi-110 001.]...Respondents

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Mr.Rohan Deshpande with Mr.Upendra Lokegaonkar i/b Mint & Confreres, Advocate for petitioner.

Mr.Suresh Kumar, Advocate for respondents.

CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, J.J.

DATE : 9th MARCH, 2023.

PER DHIRAJ SINGH THAKUR, J. :

1. The petitioner challenges the notice, dated 25th March 2015

issued under section 148 of the Income Tax Act, 1961 ('the Act') relevant to the assessment year 2008-09 *inter-alia* on the ground that the same was issued in the name of a non-existing company.

2. Briefly stated the material facts are as under :

That a notice dated 25th March 2015 under section 148 of the Act was issued in the name of M/s. Lexus Holding & Finance Pvt. Ltd.) seeking to reopen the assessment for the assessment year 2008-09 on the ground that the Assessing Officer had reasons to believe that the income chargeable to tax for the said assessment year had escaped assessment within the meaning of section 147 of the Act.

Upon receipt of the notice under section 148, the petitioner, vide communication dated 10th April 2015, informed the respondent No.1 that M/s. Lexus Holding & Finance Pvt. Ltd. had amalgamated with M/s.Vijayshree Holdings Pvt. Ltd., with effect from 1st April 2010 as per the Scheme of Amalgamation approved by the Bombay High Court and further that M/s.Vijayshree Holdings Pvt. Ltd. also got amalgamated with Triton Trading Co. Pvt. Ltd. (the petitioner, herein) with effect from 1st April 2013, as per the Scheme of Amalgamation approved by the Bombay High Court. It was, therefore, urged that the notice having been issued against a non-existing company, the reassessment proceedings were not legally maintainable.

3. The Deputy Commissioner of Income Tax, Circle 2(3)(1), Mumbai had considered the objections to the reopening of assessment and rejected the same. However, in the order dated 10th February 2016, while the Assessing Officer laid much emphasis justifying the reopening of the assessment, the objections with regard to the reopening against a non-existing company was not dealt with at all.

4. It is in the aforementioned background, learned counsel for the petitioner, urged that the entire proceedings initiated by the respondents for reassessment were unsustainable in law.

5. Affidavit-in-reply has not been filed, despite repeated opportunities. The averments made by the petitioner in regard to the amalgamation of M/s.Lexus Holding & Finance Pvt. Ltd., therefore, remains unrebutted. Even the Assessing Officer, in its order disposing of objections, had not dealt with the issue of amalgamation at all and chose not to deal with the objections regarding the legality of the notice under section 148 of the Act issued against a non-existing company.

We, therefore, proceed on the premise that M/s.Lexus Holding & Finance Pvt. Ltd. was a company which had ceased to exist with effect from 1st April 2010 as per the Scheme of Amalgamation approved by the Bombay High Court.

6. The legality of a notice issued against a non-existing company is no longer *res-integra* and has been held to be clearly untenable in view of the Apex Court judgment in ***Saraswati Industrial Syndicate Ltd. v/s. CIT***[1], wherein the following principles were formulated:

> "5. Generally, where only one company is involved in change and the rights of the shareholders 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 shareholders of each blending company become substantially the shareholders 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 volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or

1. 186 ITR 278 (SC).

> 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."

In the case of ***Spice Entertainment Ltd. V/s. CST*** [2]**,** a Division Bench of the Delhi High Court held that once the factum of amalgamation of a company had been brought to the notice of the Assessing Officer, despite which the proceedings are continued and an order of assessment passed in the name of a non-existing company, the order of assessment would not merely be a procedural defect but would render it void.

7. Recently, the Apex Court in the case of ***Principal Commissioner of Income Tax, New Delhi V/s. Maruti Suzuki India Ltd.*** [3] reiterated the aforementioned principles and held as under:

> "33. 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

2. 2012 (280) ELT 43 (Delhi)
3. [2019] 107 taxmann.com 375 (SC).

> 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 ***Spice Entertainment.***

8. A similar view has been taken by this Court in the case of ***Pico Capital Private Limited Vs. Deputy Commissioner of Income-tax & 2 Ors.*** [4].

9. The factum of amalgamation had not only been brought to the notice of the Assessing Officer during the course of reassessment proceedings but also before that, and according to the petitioner, the respondents stood intimated initially upon the amalgamation of M/s. Lexus Holding & Finance Pvt. Ltd. into M/s. Vijayshree Holdings Pvt. Ltd. vide communication dated 27th July 2011 and subsequently, M/s.Vijayshree Holdings Pvt. Ltd. getting amalgamated with the petitioner, vide communication dated 6th August 2014. There was thus no occasion for the respondents to issue the notice impugned under section 148 of the Act against a non-existing company as it would not satisfy the jurisdictional requirement of service of notice in terms of section 148, on an assessee company which had since ceased to exist.

4 Writ Petition (Lodg.) No.33202 of 2022 dt.9-3-2023

10. For the reasons mentioned above, the petition is allowed. The impugned notice under section 148 of the Act, dated 25th March 2015, the impugned order, dated 10th February 2016 and all proceedings connected therewith are hereby quashed. No costs.

[KAMAL KHATA, J.] **[DHIRAJ SINGH THAKUR, J.]**