IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3617 OF 2024
AND
WRIT PETITION NO. 2476 OF 2024

Thermax Limited (Successor to Former Thermax Babcock and Wilcox Limited) having its address at 14, New Thermax House, Bombay Pune Road, Wakdewadi, Pune – 5. PAN AAACT3910D) **...Petitioner**

Vs.

1. **National Faceless Assessment Centre Assessment Unit**, Income Tax Department, Government of India, Ministry of Finance, Delhi.)

2. **Assistant Commissioner of Income-tax, Circle 8, Pune** 3rd Floor, Pratyaksha Kar Bhavan, Dr. Ambedkar Marg, Near Akurdi Railway Station, Pune – 411 044.)

3. **Additional Commissioner of Income-tax Pune-3,** 3rd Floor, Pratyaksha Kar Bhavan, Dr. Ambedkar Marg, Near Akurdi Railway Station, Pune – 411 044.)

4. **Principal Commissioner of Income-tax, Pune 3,** 3rd Floor, PMT Commercial Complex, Shankar Shet Road, Swargate, Pune – 411 037.)

5. **Union of India, through the Joint Secretary And Legal Adviser**, Branch Secretariat, Department of Legal Affairs, Ministry of Law and Justice, 2nd Floor, Aayakar Bhavan, M. K. Marg, New Marine Lines, Mumbai – 400020) **...Respondents**

Mr. Sanjiv M. Shah with Ms. Rutuja Pawar for Petitioner.
Mr. Vikas Khanchandani for Respondents.

CORAM: G. S. KULKARNI &
ADVAIT M. SETHNA, JJ.
DATED: 27 NOVEMBER 2024

Oral Judgment (Per G. S. Kulkarni, J.) :-

1. Rule, returnable forthwith. Respondents waive service. By consent of the parties, heard finally as a short issue of law is involved.

2. A short issue is involved in both these petitions, which pertain to the assessment years 2018-19 and 2019-20 respectively. The challenge as mounted in the present writ petitions is to an action initiated by the respondents against the petitioner under the provisions of Section 148A of the Income Tax Act, 1961 (for short, the "IT Act") by issuance of a notice under Section 148A(b) of the IT Act and in passing an order under Section 148A(d) so as to reopen the assessment for these assessment years. Consequent thereto, a notice under Section 148 of the IT Act was issued as also an assessment order is passed under Section 147 read with Section 144B of the IT Act.

3. Except for the different dates, there is also an assessment order dated 11 January 2024 passed in the companion petition, which is for the Assessment Year 2019-20.

4. In both these petitions, legality of the assessment orders is questioned by the petitioner on the ground, that such assessment orders are passed against the "then assessee" namely "Thermax Babcock and Wilcox Limited" (for short, "Thermax Babcock") which is a non-existing entity, as also seen from the assessment orders.

5. It is the petitioner's case that the petitioner 'Thermax Limited' is the successor to Thermax Babcock in pursuance of an amalgamation order dated 09 December 2005 passed by this Court in the proceedings of Company Petition No. 634 of 2005 (Thermax Babcock & Wilcox Limited-petitioner). The petitioner contends that the intimation of such amalgamation was also issued to the department/Assessing Officer, as also a reference to the same was made and placed on the record of the department, when Income Tax Return was filed by the petitioner for the assessment year 2006-07, being the assessment year in which the amalgamation order dated 01 April 2005 came to be passed. There was a revised return filed by the petitioner for the assessment year 2006-07 which also indicated the amalgamation having taken place. The petitioner has placed on record documents, not only for the subsequent assessment year i.e. 2006-07, but for several other years, which disclose and take into account that the erstwhile 'Thermax Babcock' was a non-existing company being amalgamated with the petitioner.

6. Mr. Shah, learned counsel for the petitioner has drawn our attention to the proceedings which were initiated against Thermax Babcock, although addressed to the petitioner namely of a notice issued under Section 148A(b) of the IT Act. This notice was responded by the petitioner pointing out that Thermax Babcock had ceased to exist with effect from 01 April 2005 in pursuance of an order dated 09 December 2005 passed by this Court on the amalgamation proceedings (supra). Considering such response from the petitioner, the Assessing Officer was pleased to pass an order under Section 148A(d) of the IT Act when he held that the erstwhile Thermax Babcock and Wilcox Limited had stood amalgamated with the petitioner (Thermax Limited, PAN: AAACT3910D) with effect from 01 April 2005 and for such reason, issuing notice to Thermax Babcock would be void *ab initio* as it was a non-existing entity, accordingly the Assessing Officer held that it is not a fit case for issuance of notice under Section 148 of the IT Act for Assessment Year 2020-21. The relevant observations of the Assessing Officer are required to be noted which read thus:-

> "07. Finding of the A.O.: The information and material available on record has been analysed, and the following observations are made:-
>
> A. The assessee has submitted that transactions mentioned above are of Thermax Ltd (AAACT3910D), and are not related to PAN AAACT3908K as mentioned in the notice which is related to erstwhile Thermax Babcock and Wilcox Limited which was amalgamated with Thermax Limited (PAN: AAACT3910D) w.e.f. 01/04/2005. The assessee further submitted that the bank, after cross verification of their record, confirmed that they mentioned

wrong PAN while reporting and the above transactions are pertaining to PAN AAACT3910D which is related to Thermax Ltd., and the transactions are not related to PAN AAACT3908K. In support of its claim, the assessee has also submitted letter from the bank confirming that these transactions are of Thermax Ltd. (AAACT3910D) and not Thermax Babcock and Wilcox Limited. Since the company was amalgamated in FY 2005-06, there has not been a single transaction carried out by assessee under this PAN AAACT3908K after 31st March 2006.

B. So, it is to be noted that that erstwhile Thermax Babcock and Wilcox Limited have been amalgamated with Thermax Limited (PAN: AAACT3910D) w.e.f. 01/04/2005 and transactions are reported against this PAN. So, issuing notice in this case will be void ab initio as it is non existing entity. So, notice u/s. 148 need not be issued in this case.

C. However, as claimed by the assessee himself, these transactions are related with Thermax Ltd. (AAACT3910D). though the assessee in its submission has claimed that these transactions have been considered while filing ITR for AY 2020-21, it needs verification. Notice to Thermax Ltd. (AAACT3910D) cannot be issued as no proceedings are pending against this assessee. So, this information is being uploaded against the PAN of Thermax Ltd. (AAACT3910D) for AY 2020-21.

Hence, the case of erstwhile Thermax Babcock and Wilcox Limited having PAN AAACT3908K is not a fit case for issuance of notice u/s. 148 of the Income Tax Act, 1961 for AY 2020-21."

7. It thus appears to be a concluded position on the record of the Assessing Officer that Thermax Babcock was not an existing entity for the assessment years in question (Assessment Years 2018-19 and 2019-20) and that no proceedings could be taken up against a non-existing entity. Mr. Shah would submit that the principles of law in this regard are well settled. In such context, he would refer to the decision of the Supreme Court in the case of **Principal Commissioner of Income-Tax v. Maruti Suzuki India Ltd**.[1] as also decision of this Court in **Teleperformance Global Services Private**

1 [2019] 416 ITR 613 (SC)

Limited vs. Assistant Commissioner of Income-Tax, Central Circle 25(1), New Delhi[2]. The Courts have categorically held that once the amalgamating company had ceased to exist as a result of the scheme of amalgamation approved by the NCLT, there was no warrant in law for the Assessing Officer to proceed against a non-existent company.

8. Mr. Shah would draw our attention to a recent decision of the Division Bench of this Court in **Uber India Systems Private Limited vs. Assistant Commissioner of Income & Ors.**[3] decided on 08 October 2024 by a co-ordinate Bench of this Court of which one of us (G. S. Kulkarni, J.) was a member. In such decision, in similar circumstances, the Court taking into consideration the decision of the Supreme Court in *Principal Commissioner of Income-Tax v. Maruti Suzuki India Ltd.* (supra) had quashed and set aside similar action initiated by the department. The Court, in such context has made the following observations:-

> "11. Now coming to the challenge to the impugned notice as raised by the Petitioner. Having perused the record as also the decisions as relied by Mr. Mistri, we are persuaded to accept Mr. Mistri's contentions that Respondent No.1 could not have issued the impugned notices under section 148 A(b) and pass an order thereon under sub-section (d), as also issue notice under Section 148 of the Act to the assessee as it was a non-existent entity. In such context, Mr. Mistri's reliance on the decision of the Supreme Court in **Principal Commissioner of Income Tax, New Delhi v. Maruti Suzuki India Ltd**. (supra) is apposite. In such decision the Supreme Court has held that once the amalgamating company had ceased to exist as a result of the scheme of amalgamation approved by the NCLT, there was no warrant in law for the Assessing Officer to proceed against a non-existent company. The relevant

2 [2021] 127 taxmann.com 46 (Bombay)
3 Writ Petition (L.) No. 23562 of 2024

observations of the Supreme Court in the said decision are required to be noted which reads thus:-

> 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 co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Enfotainment (supra) on 2 November 2017. The decision in Spice Enfotainment 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 Enfotainment (supra).

12. The decision of the Supreme Court in **Maruti Suzuki India Ltd**. (supra) is followed by a Co-ordinate Bench of this Court to allow **Teleperformance Global Services (P.) Ltd**. (supra), the facts therein being identical to the case in hand. The relevant observations of this Court in the decision of Teleperformance Global Services (P.) Ltd. (supra) are required to be noted which read thus:-

> "22. The Supreme Court in the case of Maruti Suzuki India Ltd. (supra) had considered that income, which was subject to be charged to tax for the assessment year 2012-13 was the income of erstwhile entity prior to amalgamation. Transferee had assumed liabilities of transferor company, including that of tax. The consequence of approved scheme of amalgamation was that amalgamating company had ceased to exist and on its ceasing to exist, it cannot be regarded as a person against whom assessment proceeding can be initiated. In said case before notice under section 143(2) of the Act was issued on 26-9-2013, the scheme of amalgamation had been approved by the high court with effect from 1-4-2012. It has been observed that assessment order passed for the assessment year 2012-13 in the name of non-existing entity is a substantive illegality and would not be procedural violation of Section 292(b) of the Act. The Supreme Court in its aforesaid decision, has quoted an extract from its decision in

> Saraswati Industrial Syndicate Lid. v. CIT [1990] 53 Taxman 92/186 ITR 278. The Supreme Court has also referred to decision of Delhi high court in the case of CIT v. Spice Enfotainment Ltd. [2018] 12 ITR-OL 134 (SC) and observed that in its decision Delhi high court had held that assessment order passed against non-existing company would be void. Such defect cannot be treated as procedural defect and mere participation of appellant would be of no effect as there is no estoppel against law. Such a defect cannot be cured by invoking provisions under section 292B. The Supreme Court had also taken note of decision in Spice Entertainment Ltd. (supra) was followed by Delhi high court in matters, viz. CIT v. Dimension Apparels (P.) Ltd. [2014].52 taxmann.com 356/[2015] 370 ITR 288, CIT v. Micron Steels (P.) Ltd. [2015] _59 taxmann.com 470/233 Taxman 120/372 ITR 386 (Mag.); CIT v. Micra India (P.) Ltd. [2015]_57 taxmann.com 163/231 Taxman 809 and in CIT v. Intel Technology India Ltd. [2016] 380 UTE 272 Karnataka high court has held, if a statutory notice is issued in the name of non-existing entity, entire assessment would be nullity in the eye of law. It has also been so held by Delhi high court in the case of Pr. CIT v. Nokia Solutions & Network India (P.) Ltd. [2018].90 taxmann.com 369/253 Taxman 409/402 ITR 21.

> 13. In the light of the above discussion, we are of the clear opinion that there was neither a legal basis nor jurisdiction with Respondent No.1 to issue the impugned notice under Section 148 A(b) and pass an order thereon and further to issue the impugned notice under Section 148 to a non existing entity- "Uber India Research and Development Private Limited". Such notices at the threshold were illegal, invalid and non-est."

9. In the present case, there is no dispute in regard to the amalgamation order having taken effect from 01 April 2005 and which was in pursuance of the order passed by this Court in the proceedings of Company Petition No. 634 of 2005. In this view of the matter, the impugned action under Section 148 of the IT Act leading to passing of the assessment order, as impugned, was wholly without jurisdiction, non-est and a nulity. The petitions are

accordingly required to be allowed. We accordingly pass the following order:-

ORDER

i. The notice issued to the petitioner under Section 148A(b) of the IT Act, the order passed under Section 148A(d) and the consequent assessment order passed in respect of Assessment Year 2018-19 and Assessment Year 2019-20 are quashed and set aside.

ii. Consequential actions of issuing a penalty notice also stands quashed and set aside.

iii. Rule is made absolute in the aforesaid terms. No costs.

iv. Writ Petitions stand allowed.

v. We may clarify that as the petitioner has succeeded on the grounds as discussed hereinabove, we are not required to adjudicate on the other grounds as such grounds are obviously inconsequential.

(ADVAIT M. SETHNA, J.) **(G. S. KULKARNI, J.)**