THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 05.04.2013

+ W.P.(C) 8645/2011 & CM 19553/2011

RPG CELLULAR INVESTMENT & HOLDINGS (P) LTD & ANR ... Petitioners

versus

ASSISTANT COMMISSIONER OF INCOME-TAX & ANR ... Respondents

Advocates who appeared in this case:
For the Petitioner : Mr Somnath Shukla for Mr Ajay Vohra
For the Respondents : Mr Abhishek Maratha with Ms Anshul Sharma

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the notice dated 30.03.2011 issued by the Assistant Commissioner of Income Tax, Circle- 15(1), New Delhi under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') seeking to re-open the assessment of the petitioner in respect of the assessment year 2004-05 on the allegation that income had escaped assessment within the meaning of Section 147 of the said Act.

2. The purported reason for initiating the proceedings under Section 148 were recorded on 28.03.2011 and a copy thereof was forwarded to the petitioner along with the impugned notice dated 30.03.2011 itself. The purported reason for the allegation that the income had escaped assessment was, *inter alia*, as under:-

> "1. The assessment of M/s RPG Cellular Investment and Holdings Pvt. Ltd. for the assessment year 2004-05 was completed after scrutiny under Section 143(3) on 26.10.2006 determining a loss of ₹ 3,04,45,816/-. After verifying the record it is seen that the assessee claimed and was allowed exemption of ₹ 1,30,86,32,213/- towards long term capital gain under Section 10(23g) of the Income Tax Act, 1961, though approval for claiming the exemption was not received from the Government. The omission resulted in underassessment of income of ₹ 1,30,86,32,213/-."
>
> (underlining added)

3. The petitioner furnished its objections to the said proposed re-assessment proceedings. Those objections were disposed of by virtue of an order dated 21.11.2011. In the said order dated 21.11.2011, which is also impugned in this writ petition, the Deputy Commissioner of Income Tax, Circle-15(1), New Delhi, inter alia, observed as under:-

> "6.1 From the above, it is clear that no approval was granted to the assessee company. The assessee company has furnished wrong evidence as the name of the assessee company appears

> on the certificate of M/s. RPG Cellular Services Ltd and not RPG Cellular Investment and Holding Pvt Ltd. Therefore, the assessee is not entitled for exemption under Section 10(23G) as the Notification filed by the assessee is not in the name of the assessee company."
>
> (underlining added)

4. It is the contention of the learned counsel for the petitioner that the purported reason for initiation of the re-assessment proceedings is non-existent. According to the learned counsel for the petitioner it appears that, as per the reason recorded on 28.03.2011, no approval had been obtained for exemption under Section 10(23G) of the said Act. It was not clear as to whether the revenue was referring to the approval to be given by the investee company (RPG Cellular Services Limited) or by the investor company (RPG Cellular Investment & Holdings Private Limited – the petitioner herein). However, the petitioner made it clear in its objections that the approval had been obtained by the investee company (RPG Cellular Services Limited), which was the requirement in law. In the present case, the petitioner is the investor company (RPG Cellular Investment and Holding Private Limited), whereas the investee company is M/s. RPG Cellular Services Limited.

5. The learned counsel for the petitioner also pointed out that the order dated 21.11.2011 and, in particular, paragraph 6.1 thereof is clearly erroneous inasmuch as the approval that is required for entitlement of exemption under Section 10(23G) is with regard to the investee company and not the investor company. However, in the said paragraph 6.1 of the order dated 21.11.2011, it has been noted that the certificate, which has been furnished, was wrong inasmuch as it was in the name of M/s. RPG Cellular Services Limited and not RPG Cellular Investment and Holding Private Limited, implying thereby that the approval should have been given in respect of the investor company and not the investee company.

6. We entirely agree with the submission made by the learned counsel for the petitioner that the approval and the certificate that is required for exemption under Section 10(23G) of the said Act has to have reference to the investee company and not the investor company. Section 10(23G), as it existed at the relevant time, to the extent relevant, is set out as under:-

> "(*23G*) any income by way of dividends, other than dividends referred to in section 115-O, interest or long-term capital gains of an infrastructure capital fund or an infrastructure capital company or a co-operative bank from investments made on or after the 1st day of June, 1998 by way

of shares or long-term finance in any enterprise or undertaking wholly engaged in the business referred to in sub-section (4) of section 80-IA or sub-section (3) of section 80-IAB or a housing project referred to in sub-section (10) of section 80-IB or a hotel project or a hospital project and which has been approved by the Central Government on an application made by it in accordance with the rules made in this behalf and which satisfies the prescribed conditions:

xxxx xxxx xxxx xxxx"

A plain reading of the said provision makes it clear that it is the investee company which has to have approval of the Central Government. This becomes further clear from a reading of the Rule 2E of the Income Tax Rules, 1962 ((hereinafter referred to as 'the said Rules'). Sub-rules (3) and (4) of Rule 2E are relevant. They are set out herein below:-

"(3) The Central Government shall approve an enterprise for the purposes of clause (*23G*) of section 10, if such enterprise is wholly engaged in the eligible business.

(4) The Central Government may, before approving an enterprise, call for such documents (including audited annual accounts) or information from the enterprise, as it thinks necessary in order to satisfy itself that such enterprise is wholly engaged in the eligible business and that Government may also make such enquiries as it may deem necessary in this behalf."

It is apparent that the approval that is to be granted by the Central Government is with respect to an enterprise which is wholly engaged in

the eligible business. 'Eligible business' has also been defined in the Explanation to Rule 2E as, *inter alia*, the business referred to in Section 80-IA(4) and which fulfils the conditions specified in Section 80-IA(4). In the present case, this has reference to the investee company which is M/s. RPG Cellular Services Limited. Therefore, the respondents were wrong in requiring the petitioner to furnish an approval with regard to the petitioner company, which is the investor company. Insofar as the investee company is concerned, the petitioner had already placed on record an approval under Section 10(23G) dated 18.11.2004, which is to the following effect:-

(TO BE PUBLISHED IN PART II SECTION 3(ii) OF THE GAZETTE OF INDIA)
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF DIRECT TAXES

New Delhi, the 18th November, 2004

NOTIFICATION

S. No. It is notified for general information that the approval to the enterprise, listed at para (3) below has been renewed by the Central Government for the purpose of section 10(23G) of the Income-tax Act, 1961, read with rule 2E of the Income-tax Rules, 1962 with effect from the Asstt. Year 2004-05 to the Asstt. Year 2015-16 (upto 29.11.2014) i.e. upto the end of period of 20 years as mentioned in Ministry of

Communications, Department of Telecommunications (VAS CELL) letter F. No. 842-47/2000-VAS/Vol.IV dated 29.01.2001 issued to amend the terms of licence agreement No. 842-21/93-TM dated 30th November, 1994 of earlier, in the event of violation of the terms of the agreement aforesaid.

2. The approval is subject to the conditions that –

(i) the enterprise/ undertaking will conform to and comply with the provisions of section 10(23G) of the Income-tax Act, 1961, read with rule 2E of the Income-tax Rules, 1962;

(ii) the Central Government shall withdraw this approval if the enterprise/ undertaking:-

(a) ceases to carry on the eligible business as defined in Explanation (b) to Rule 2E of I.T. Rules, 1962; or

(b) fails to maintain books of account and get such accounts audited by an accountant as required by sub-rule (6) of rule 2E of the Income-tax Rules, 1962; or

(c) fails to furnish the audit report as required by sub-rule (6) of rule 2E of the Income-tax Rules, 1962.

3. The enterprise/undertaking approved is –

M/s Aircel Cellular Limited (formerly M/s RPG Cellular Services Ltd and M/s Mobile Telecom Services Ltd), 5th Floor, Spencer Plaza, 769, Anna Salai, Chennai for their project of providing Cellular Mobile Telephone Service in Chennai Metro Service Area as per licence agreement No. 842-21/93-TM dated 30th November, 1994 and as amended vide Ministry of Communications, Department of Telecommunications (VAS

CELL) letters F. No. 842-47/2000-VAS/Vol. IV dt 29.01.2001 and 25.09.2001 consequent to Migration to revenue sharing regime of New Telecom Policy -19999 (F. No 205/56/2000-ITA-II) (Vol.I)

Sd/-
(Nidhi Singh)
Under Secretary to the Government of India
Central Board of Direct Taxes

Notification No. 282/2004 (F. No. 205/56/2000/ITA.II) (Vol.I)

To

The Manager,
Government of India Press,
Mayapuri, New Delhi.

Copy to:-

1. The applicant.
2. All CCsIT and DGsIT
3. C & AG of India
4. Joint Secretary and Legal Advisor, Ministry of Law, New Delhi.
5. Addl. Secretary (Admn.), Deptt. Of Revenue, New Delhi.
6. DIT (RSP & PR) (Bulletin Section), New Delhi.
7. Ministry of Communications, Department of Telecommunications, Govt. of India, New Delhi.

(Nidhi Singh)
Under Secretary to the Government of India
Central Board of Direct Taxes"

This notification had also been produced at the time of the original assessment under Section 143(3) of the said Act. Apart from this, we had asked the learned counsel for the petitioner to produce the original approval granted by the Central Government inasmuch as the notification

dated 18.11.2004 appears to be a renewal granted by the Central Government. The learned counsel for the petitioner has, today, placed before us a notification dated 16.01.2001, whereby the Central Government had granted the original approval for the purposes of Section 10(23G) of the said Act read with Rule 2E of the said Rules in respect of the assessment years 2001-02, 2002-03 and 2003-04. The said notification clearly applies to the investee company, namely, M/s. RPG Cellular Services Limited. The present case is concerned with the assessment year 2004-05 for which the approval had already been placed on record being the notification dated 18.11.20004.

7. In the aforesaid circumstances, there is absolutely no reason for re-opening the assessment under Section 147 of the said Act. The purported reason for re-opening does not exist. Consequently, we set aside and quash the notice dated 30.03.2011 as also the order dated 21.11.2011. The writ petition is allowed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

APRIL 05, 2013
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