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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 6352/2022 & C.M.Nos.19200/2022 & 29324/2022

M/S HUAWEI TELECOMMUNICATIONS (INDIA) COMPANY
PVT. LTD. Petitioner

Through: Mr.Arvind Datar and Mr.Tarun
Gulati, Sr.Advocates with Mr.Kishore
Kunal, Mr.Manish Rastogi and
Ms.Ankita Prakash, Advocates.

versus

THE DEPUTY DIRECTOR OF INCOME TAX (INV.)-4(3), NEW
DELHI & ORS. Respondents

Through: Mr.Zoheb Hossain, Sr.Standing
Counsel for the Revenue with
Mr.Vipul Agrawal and Mr.Parth
Semwal, Advocates.

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Date of Decision: 30th August, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J (ORAL):

1. Petitioner has filed the present modification application seeking deletion of para 9(iii) of order dated 21st April, 2022 passed by this Court which is as follows:



“(iii) The Petitioner shall not repatriate any money abroad till the next date of hearing without leave of this Court.”

2. By way of the order dated 06th July, 2022, this Court had noted the submissions of the learned senior counsel appearing for the Petitioner to the following effect:

“Present application has been filed on behalf of the Petitioner seeking partial modification of the order dated 21st April, 2022 passed by this Court in the present matter.

Learned senior counsel for the Applicant-Petitioner states that the Petitioner has been complying with the conditions laid down by this Court in the order dated 21st April, 2022. He also states that the Petitioner has filed an affidavit of compliance. He states that in the regular course of business, the Petitioner has been receiving orders from its customers (primarily being Indian telecom service providers) for purchase of telecom equipment/services in terms of the customer contracts, which require the Petitioner to import equipment and spare parts from its overseas suppliers. He further states that these orders are placed pursuant to long term contracts of the Petitioner and the Petitioner is under contractual and legal obligation to fulfil these orders.

Learned senior counsel for the Petitioner states that even though the Petitioner is required to place orders on the overseas suppliers for import of the equipment, on account of condition (iii) of the Order dated 21st April, 2022 imposed by this Court, the Petitioner is not in a position to make any payments to the said overseas suppliers. He assures and undertakes to this Court that neither dividend nor royalty will be repatriated without the leave of Court.

At this stage, learned senior counsel for the petitioner prays and is permitted to place on record additional documents within three working days.

Issue notice. Mr.Zoheb Hossain, learned counsel for the respondents, accepts notice.



Reply affidavit, if any, be filed within two weeks. Rejoinder affidavit, if any, be filed before the next date of hearing.”

3. This Court had issued notice on 06th July, 2022 and the Petitioner had placed an additional affidavit on record pointing out specific financial constraints on its business operations on account of the interim order. Pleadings are complete in the said application. The application of the Petitioner seeking partial modification of the interim order has been heard from time to time.

4. Learned senior counsel appearing for the Petitioner have made the following submissions: -

- a. That while the petitioner is receiving foreign exchange from its overseas customers, it is unable to make payments to its own suppliers which is causing grave prejudice to the business interests of the Petitioner. It is submitted that on account of the business activities of the Petitioner, substantial amounts of foreign exchange are being brought into India.
- b. That in view of the above submission, the Petitioner is seeking modification of the order dated 21st April, 2022 and praying for dispensation from the condition (iii) imposed by this Hon'ble Court vide order dated 21st April, 2022 thereby, permitting the Petitioner to make payments in order to continue its business operations.
- c. There is no demand at present for which a protection is sought by the Respondents. The future estimates of demand are without any basis. The powers under Section 132(9B) of the Income Tax Act, 1961 ('the Act') cannot be used to protect any unsubstantiated future demands. Further, the



track record of the Petitioner has been exemplary and there are no amounts due from the Petitioner of any outstanding tax dues.

d. The Respondents cannot be allowed to restrict the business of the Petitioner by exercising powers under Section 132(9B) which has to be used sparingly and as a last resort as held by the Hon'ble Supreme Court in ***Radhakrishnan Industries vs. State of Himachal Pradesh, 2021 (48) GSTL 113 (SC)*** and followed by several High Courts in the context of similar provisions.

e. The onus is on the Respondents to establish that such measures under Section 132 (9B) of the Act are proportionate and are required to protect the interest of revenue. The onus has not been discharged at all in the present case.

f. The allegation of non-submission of records is contrary to the record and is refuted by the Petitioners. They rely upon detailed lists of the documents and information submitted to the Respondents during and after the search.

g. The Petitioner has also undertaken to file a summary of the payments to be made and will further furnish the same before this Hon'ble Court on periodical basis.

h. It was further submitted that while the Petitioner will be deeply prejudiced if the above referred modification is not allowed, no prejudice will be caused to the Respondents inasmuch as, the interest of the revenue to the extent of Rs. 100 crores is already secured. Further, a refund of Rs.29,76,90,160/- is also pending with the Respondents. Thus, it was



submitted that no prejudice will be caused to the Respondents if the prayers made in the present application were to be allowed.

i. It was also submitted that the assessment proceedings may be made time bound to ensure early resolution of the disputes.

j. It was further submitted that even assuming there was a demand of Rs. 350 crores insofar as the statute itself provides an option of paying 20% of the demand if the Petitioner has filed an appeal against the assessment order before the Income Tax Appellate Tribunal under Section 254(2A) in terms of the Proviso therein.

5. *Per Contra*, the senior standing counsel for the Revenue has vehemently opposed any modification of the order dated 21st April, 2022 on the following grounds: -

a. During the course of search proceedings, the books of accounts were not produced before the authorised officers till 17th February, 2022, even after the commencement of search action on 15th February, 2022. It was submitted that the Petitioner is not complying with the legal requirement under the provisions of Section 128 of the Companies Act 2013 read with Rule 3 of Companies (Accounts) Rules, 2014, which prescribes that back-up of the books of account maintained in electronic mode, including at a place outside India is required to be kept in servers physically located in India. Neither such location was conveyed during search nor in response to the summons dated 31st May, 2022.

b. It has been submitted that there was huge quantum of the import transactions (exceeding Rs. 19,000 crores in the previous 6 years). In the absence of the books of accounts (though the same were stated to be produced as ERP dump of all the transactions undertaken by the company),



it was not possible to determine the veracity of the profit margin disclosed by the petitioner in the telecom/relevant segment, which includes such import transactions. If the profit margin in itself is suspect (in the absence of appropriate books of accounts), there is no reason to consider the transactions of import to be at arm's length based on such profit margin.

c. It was submitted that while the quantum of likely demand at Rs.350 crores had been determined on the basis of issues identified till date, actual demand is likely to be substantially more with a likely additional income of Rs.1270 crores over and above Rs.1000 crores on identified issues, in view of the large discrepancies *prima facie* identified in the books of accounts submitted by the petitioner before various authorities and the books of accounts to be constructed, based on the ERP data dump seized during search, which will have a bearing on the profit margin calculation for the telecom/relevant segment, which in turn would affect the arm's length price determination for the international transactions relating to imports of products by the petitioner from its associated enterprises. It was proposed that to facilitate business of the petitioner, circulating funds of Rs.300 crores may be allowed to the petitioner. The payments may be made by the Petitioner in the first instance to its associated parties and imported products be received in India, the products be then sold and funds received as realization of sale proceeds, upon which funds of Rs.300 crores may be paid again and the cycle can be repeated. For such a course of action, however, it was proposed that the petitioner may be required to provide security for a minimum sum of Rs.350 crores.

d. If the petitioner insists on complete removal of restriction on foreign payments, then suitable security-corresponding to tax on addition amount



of Rs.2300 crores (Rs 1000 crores on three identified issues and around Rs.1270 crores on the basis of difference of 5% in profit margins), which could be around Rs.800 crores with interest should be provided.

e. No leeway for 20% payment is required to be provided in either case, as the stay can be provided by ITAT only after examination of the facts in totality and if balance of convenience is shown to be with the taxpayer. In this case deliberate non-production of the books of accounts accompanied with huge discrepancies in the data submitted shows that the balance of convenience is in favour of the Department.

f. That the financials submitted by the petitioner shows that there is no financial hardship or shortage of cash flow and that when there is no such hardship, the obligation to secure the revenue cannot be denied.

g. Time-bound assessment, contrary to the statutory limitations, would not be possible since the case may require special audit as well as reference to the Transfer Pricing Officer and the petitioner may then want to avail the route of Dispute Resolution Panel (DRP) which are all statutorily time-bound and hence no reduction of such statutory time limits is warranted.

h. Lastly, it was prayed that this Hon'ble Court may appoint any independent expert to draw up the books of accounts of the petitioner on the basis of the ERP data dump seized during the search, especially considering claim of the petitioner that such data dump represents the prescribed books of accounts.

6. In rejoinder, the senior counsel on behalf of the Petitioner strongly refute the Revenue's contention that a demand of Rs.1000 crores is likely to be created by disallowing all the related party transactions of royalty, fees for technical services and business support services for the entire period of



ten years. It is contended that the basis of these purported additions have already been scrutinized and have also been added to the income of the Petitioner in the regular assessments.

7. Having heard the learned senior counsel for the Petitioner and the senior standing counsel for the Revenue, in view of the fact that the Petitioner has agreed to secure the Respondents, we do not wish to go into the merits of the allegations and contentions raised. Consequently, to balance the equities, without going into the merits of the contentions raised by the respective parties, the present writ petition is being disposed of and accordingly the previous orders dated 21st April, 2022 stands modified to the following extent: -

- (i) In addition to the Fixed Deposit Receipt of Rs. 100 crores which was directed to be made by order dated 21st April, 2022, the Petitioner shall prepare another Fixed Deposit Receipt of Rs.100 crores in Axis Bank Account No. 919020017328222, which shall be renewed automatically from time to time. A photocopy of the said FDR shall be filed with the Assessing Officer within a week. The Banker is also directed to ensure that the Petitioner and/or any of its officials/nominees/authorised representatives do not deal with the FDR in any manner. There shall be a lien in favour of the Department with respect to both the FDRs till conclusion of the assessment proceedings and thereafter the amount will be dealt in accordance with law. The Bankers will issue a letter to the AO acknowledging the lien in favour of the Department
- (ii) The Respondents are directed not to release any refund [which is stated to be to the tune of Rs.30 crores (approx.)] to the Petitioner till the



assessment proceedings are completed and thereafter the refund shall be dealt with in accordance with law.

- (iii) The Respondents are directed to complete the assessment as expeditiously as possible. The parties will be at liberty to apply to this Court to seek a variation of this order.
- (iv) The Petitioner shall not repatriate any royalty or dividend abroad. The Petitioner will be at liberty to approach this Court, in case the need so arises.
- (v) The Petitioner shall continue to file its monthly statement with the assessing officer of 'Payments Received as well as Made'.

8. Though a suggestion is made by the Counsel for the Respondent that the Assessing Officer will be free to take recourse having the books of accounts of the Petitioner audited by an expert, yet the said suggestion is strongly refuted by the senior counsel for the Petitioner. As indicated by us, we are not dealing with the merits of the rival contentions taken in these proceedings and the assessing officer will take such steps as are available to him, in accordance with law.

9. It is made clear that the above order has been passed on the basis of offer made by the Petitioner and will not be considered as a precedent in any other proceeding.

10. Accordingly, the attachment orders dated 17th February, 2022 and 19th February, 2022 and this Court's order dated 21st April, 2022 are modified in the manner stated above. However, this order shall come into effect from the date the Petitioner deposits the additional 100 crores in terms of para 7(i) above. Upon deposit of the said sum, the Assessing Officer will withdraw the attachment orders dated 17th February, 2022 and 19th February, 2022 and



will communicate the same to the parties to whom attachment orders were served. With the above directions, present writ petition and pending applications stand disposed of.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

AUGUST 30, 2022
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