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

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Decision delivered on: 08.12.2022

+ **W.P.(C) 12600/2022 & CM Nos.38193-94/2022**

VODAFONE MAURITIUS LIMITED

..... Petitioner

Through: Ms Fereshte D. Sethna, Ms Anuradha Dutt, Mr Mrunal Parekh, Mr Ameya Pant and Mr Sohum Dua, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME-TAX, CIRCLE
INTERNATIONAL-TAX 3(1)(1), DELHI & ANR. Respondents

Through: Mr Sunil Agarwal, Sr. Standing Counsel and Mr Tushar Gupta, Jr. Standing Counsel with Mr Utkarsh Tiwari, Adv. for R-1/Revenue.
Mr Ravi Prakash, CGSC with Ms Shruti Shiv Kumar and Ms Usha, Advs. for R-2/DOI

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE MINI PUSHKARNA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM No.38194/2022

1. Allowed, subject to just exceptions.

W.P.(C) 12600/2022 & CM No.38193/2022 [*Application filed on behalf of the petitioner seeking interim relief*]

2. The substantive prayers made in the writ petition read as follows :

“(a) that this Hon'ble Court be pleased to issue a writ of certiorari or writ of mandamus or any other appropriate writ, order or

direction in the nature of certiorari/mandamus, under Article 226/227 of the Constitution of India, calling for all the papers and proceedings of Respondent No.1 pertaining to the Impugned Order dated 28 July 2022 and Impugned Notice dated 29 July 2022, and after examining the validity, legality and propriety thereof, to quash and set aside the Impugned Order and Impugned Notice.

(b) Pending the hearing and final disposal of the writ petition, for an order restraining the Respondents, its officers, subordinates, agents from relying upon and/or taking any coercive or other steps in connection with escapement proceedings initiated against the Petitioner in pursuance of the Impugned Notice.”

3. Ms Fereshte D. Sethna, who appears on behalf of the petitioner, says that the principal allegation against the petitioner is that the petitioner, which is a foreign company incorporated under the laws of Mauritius, had sold shares worth Rs.1295 crores, of an Indian company going by the name Bharti Infotel Pvt. Ltd, against which TDS was not deducted.

3.1. Ms Sethna goes on to state that the consideration was paid by another entity, namely, Bharti Enterprises (Holding) Pvt. Ltd.

4. The record shows that this transaction occurred in Financial Year (FY) 2015-2016, relatable to Assessment Year (AY) 2016-2017.

5. It is Ms Sethna's submission that no TDS was deducted by the aforementioned Indian company.

6. Ms Sethna also states that the petitioner has, in its possession, a tax residency certificate issued under the laws of Mauritius, and therefore, is entitled to take benefit of the provisions of Article 13 of the Double Taxation Avoidance Agreement [in short, "DTAA"] forged between India and Mauritius.

6.1 Besides this, according to Ms Sethna, the petitioner has registered a loss on the said transaction amounting to Rs.28,73,49,89,247/-.

7. In sum, it is Ms Sethna's contention that notwithstanding the fact that no return was filed by the petitioner, the concerned assessing officer (AO) had no jurisdiction to trigger the impugned proceedings.

8. Mr Sunil Agarwal, who appears on behalf of respondent no.1/revenue, contends, based on the unamended provision of Section 147 of the Income Tax Act, 1961 [in short, "Act"], that since the return was not filed, the concerned AO was within his jurisdiction to commence proceedings under Section 147/148 of the Act.

8.1 In this behalf, Mr Agarwal has drawn our attention to Explanation 2 appended to the unamended Section 147 of the Act.

8.2 In other words, it is Mr Agarwal's contention that this was a case of deemed escapement of income chargeable to tax, as no return was filed by the petitioner.

9. As indicated above by us, there is no dispute that the petitioner/assessee has not filed its return for AY 2016-2017. Therefore, in our opinion, the objections raised by the petitioner/assessee with regard to the aspects referred to hereinabove, can be dealt with by the AO.

9.1. We have put this aspect to Ms Sethna; Ms Sethna says that while the matter can be remitted to the concerned AO, she/he should deal with the objections which have been articulated in detail in the writ petition.

10. Apart from anything else, it is Ms Sethna's contention that the broad aspects referred to hereinabove with regard to the fact that the petitioner has in its possession a tax residency certificate, which allows it to take benefit of Article 13 of the DTAA, is a facet which is required to be dealt with by the AO.

10.1. We may note that in support of her submission, Ms Sethna also relies

upon the judgment rendered by the Supreme Court in *Union of India v. Azadi Bachao Andolan* (2004) 10 SCC 1.

11. Having regard to the submissions made by learned counsel for the parties, the writ petition is disposed of with the following directions:

- (i) The matter is remitted to the concerned AO.
- (ii) The concerned AO, before moving ahead in the matter, will determine as to whether this is a fit case for exercising jurisdiction, having regard to the objections articulated in the writ petition. In particular, the concerned AO will deal with the aspects referred to hereinabove.
- (iii) The concerned AO will accord personal hearing to the authorized representative of the petitioner and grant liberty to file written submissions in support of the pleas made before her/him.
- (iv) The AO will pass a speaking order, both, with regard to the objections raised by the petitioner and on merits.
- (v) In case the decision taken by the AO is adverse to the interests of the petitioner, the petitioner will have liberty to take recourse to an appropriate remedy, albeit, as per law. However, if such an eventuality arises, the said decision will not be given effect to for four weeks from the date when the order is served on the petitioner

12. At this stage, Ms Sethna draws our attention to the following observations made in the order passed by the AO under Section 148A(d) of the Act:

“... The assessee has furnished TRC as its proof of residence in Mauritius. But it must be appreciated that Tax residency Certificate (TRC) is not conclusive proof to determine whether the assessee is resident of Mauritius as per DTAA and whether benefit of the said DTAA would be allowed to assessee or not. The same position has been upheld by various judicial pronouncements....”

12.1. Mr Agarwal says that the aforementioned observations extracted from the order passed under Section 148A(d) of the Act are only tentative and not final.

13. Given this position taken by the respondents/revenue, as indicated by us hereinabove, the AO will take a decision with regard to whether or not this is a fit case for triggering reassessment proceedings.

14. Consequently, the pending application shall stand closed.

15. Parties will act based on the digitally signed copy of the order passed today.

RAJIV SHAKDHER, J

MINI PUSHKARNA, J

DECEMBER 8, 2022

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[Click here to check corrigendum, if any](#)