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

% *Date of decision: 25.07.2023*

+ **W.P.(C) 9710/2023 & CM APPL. 37209/2023**

CAIRNHILL CGPE LIMITED

..... Petitioner

Through: Mr Percy J. Pardiwala, Senior Advocate with Mr Vishal Kalra and Ms Snigdha Gautam, Advocates.

versus

THE COMMISSIONER OF INCOME TAX, (INTERNATIONAL TAXATION)-2, NEW DELHI

..... Respondent

Through: Mr Prashant Meherchandani, Senior Standing Counsel.

+ **W.P.(C) 9745/2023 & CM APPL. 37346/2023**

CAIRNHILL CIPEF LIMITED

..... Petitioner

Through: Mr Percy J. Pardiwala, Senior Advocate with Mr Vishal Kalra and Ms Snigdha Gautam, Advocates.

versus

THE COMMISSIONER OF INCOME TAX, (INTERNATIONAL TAXATION)-2, NEW DELHI

..... Respondent

Through: Mr Ruchir Bhatia, Senior Standing Counsel with Ms Deeksha Gupta, Advocate.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

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

RAJIV SHAKDHER, J.: (ORAL)

1. These writ petitions concern Assessment Year (AY) 2016-17.



2. Via these writ petitions, the petitioners seek to assail the notice dated 26.03.2021 (which apparently has not been served, as yet) and the order dated 27.03.2021 issued under Section 163 of the Income Tax Act, 1961 [in short, “the Act”].

3. Broadly, these petitions have been filed in the backdrop of the following facts and circumstances.

3.1 The petitioners appear to have purchased shares of an entity going by the name Mankind Pharmaceuticals Limited [in short, “Mankind”]. The subject share, it appears, were purchased of shares was made from another entity, namely Monet Limited [in short, “Monet”], which is incorporated in Mauritius.

3.2 The number of shares purchased by the petitioners, as per the record, was 21,57,534. We are told that the shares purchased from Monet are subject matter of the Share Purchase Agreement dated 31.03.2015.

3.3 We are also told that an assessment order dated 12.12.2018 was passed *qua* Monet under Section 143(2) of the Act.

3.4 It appears that Monet had resorted to the provisions of the Article 13(4) of the India-Mauritius Double Taxation Avoidance Agreement (DTAA), and thus claimed that it was not exigible to levy of tax.

3.5 The Assessing Officer (AO) appears to have accepted this stand taken by Monet, and assessed it at the returned income. (See Annexure P-6, appended at Page 157 of the case file).

3.6 Evidently, Monet was dissolved in and about 2018.

3.5 Notice dated 25.03.2021 was issued under Section 263 of the Act, in so far as Monet was concerned.

3.6 Since the respondent/revenue sought to treat the petitioner as the agent



of Monet, the impugned notice dated 26.03.2021 was issued, as indicated above.

3.7 Furthermore, as noticed right at the outset, an order under Section 163 was passed *qua* the petitioner on 27.03.2021.

4. The Commissioner of Income Tax (CIT) passed an order dated 31.03.2021, wherein he, *inter alia*, made the following crucial observations:

“9. In view of the discussion made earlier this share transfer transaction, prima-facie appears to be a tax avoidance arrangement to avoid paying taxes in India. Therefore, the acceptance by the Assessing Officer of the Long-term capital gain income of Rs. 1002,92, 15,510/-in the hands of M/ s Monet Limited for the F.Y. 2015-16 is erroneous and pre-judicial [sic] to the interests of revenue.

10. Further reliance is placed on Malabar Industrial Co. Ltd. v. Commissioner of Income-tax [CIVIL APPEAL NO. 3646 OF 1993 FEBRUARY 10, 2000] where Hon'ble Supreme Court upheld the proceeding u/s 263 of the Act and held that "Whether if due to an erroneous order of ITO, revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to interests of revenue - Held, yes" AND "Whether, where Assessing Officer had accepted entry in statement of account filed by assessee, in absence of any supporting material without making any enquiry, exercise of jurisdiction by Commissioner under section 263(1) was justified - Held, yes"

11. Since the Share Purchase Agreement dated 31.05.2015 does not clearly mention the number of shares purchased by M/s CAIRNHILL CIPEF LIMITED, Mauritius and M/ s CAIRNHILL CGPE LIMITED, Mauritius therefore, both the representative assessee i.e. Party-1 and Party-2 are held jointly and severally liable for the Income Tax proceedings and any liability related to Income Tax proceedings.”

[Emphasis is ours]

4.1 Consequently, *via* this order, the CIT(A) cancelled the assessment order dated 12.12.2018, concerning Monet, directing the AO to carry out a *de novo* exercise.

4.2 Pertinently, the petitioner was held to be jointly and severely liable *qua* the proceeding, having been held as the “representative assessee”.

5. The record shows that the petitioner carried the matter in appeal to the



Income Tax Appellate Tribunal [in short, “the Tribunal”]. The Tribunal, *via* order dated 19.12.2022, allowed the appeal preferred by the writ petitioner.

6. While allowing the appeal, the Tribunal quashed the order issued under Section 163 of the Act, which is evident from the following extract:

“16. In light of the provisions of section 163 of the Act considered in light of the aforementioned discussion, order passed u/s 163 of the Act by the CIT, International-2 deserves to be quashed and treated as nonest. The ld. CIT assumed jurisdiction u/s 263 of the Act on the basis of order passed u/s 163 of the Act.

17. Sublato Fundamento Cadit Opus, meaning thereby, that in case the foundation is removed, the super structure falls. Since the very basis [order u/s 163 of the Act] has been removed, the super structure i.e. order u/s 263 of the Act must fall.”

[Emphasis is ours]

7. Having regard to the operative directions issued by the Tribunal, according to us, these writ petitions would not lie, as obviously, the court cannot quash something, which has already been quashed by the Tribunal.

7.1 However, in case the respondent/revenue were to prefer an appeal to this court, at that stage perhaps, the petitioners could seek liberty to take recourse to an appropriate measure, *albeit* in accordance with the law.

8. The writ petitions are disposed of, in the aforesaid terms.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

JULY 25, 2023/v

Click here to check corrigendum, if any