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

% *Date of decision: 07.11.2023*

+ **ITA 610/2023**

COMMISSIONER OF INCOME TAX (INTERNATIONAL
TAXATION)-2

..... Appellant

Through: Mr Sanjay Kumar, Sr. Standing
Counsel with Ms Easha, Standing
Counsel.

versus

CAIRNHILL CIPEF LTD.

..... Respondent

Through: Ms Snigdha Gautam, Advocate for
Mr Vishal Kalra, 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)

CM APPL. 57567/2023

1. Allowed, subject to just exceptions.

CM APPL. 57566/2023 *[Application filed on behalf of the appellant seeking condonation of delay of 114 days in filing the appeal]*

2. This application has been moved on behalf of the appellant/revenue, seeking condonation of delay in filing the appeal.

2.1 According to Mr Sanjay Kumar, senior standing counsel, who appears on behalf of the appellant/revenue, there is a delay of 114 days.

3. Ms Snigdha Gautam, counsel who appears on behalf of the



respondent/assessee, says that she would have no objection if the delay is condoned.

3.1 It is ordered accordingly.

4. The application is disposed of, in the aforesaid terms

ITA 610/2023

5. This appeal concerns Assessment Year (AY) 2016-17.

6. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 19.12.2022 passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].

7. In order to adjudicate the appeal, the following broad facts are required to be noticed:

7.1 A share purchase agreement was executed between three entities i.e., Cairnhill CIPEF Ltd., Cairnhill CGPE Ltd., and Monet Ltd. concerning the shares of a public limited company incorporated in India named, Mankind Pharmaceutical Ltd. [in short, “Mankind Ltd.”], for the sale of shares to Cairnhill CIPEF Ltd. and Cairnhill CGPE Ltd.

7.2 The record shows that on 12.12.2018, an assessment order was passed *qua* Monet Ltd., which had sold the shares to Cairnhill CIPEF Ltd. and Cairnhill CGPE Ltd.

7.3 The record also shows that Monet Ltd. was, at the relevant time, a 100% subsidiary of another entity company incorporated in Mauritius i.e., Chryscapital IV LLC.

7.4. It appears that the aforementioned assessment order took note that Monet Ltd. had sold 2157534 shares of Mankind Ltd., @ Rs.5590.76 per share, to Cairnhill CIPEF Ltd. and Cairnhill CGPE Ltd.

8. As a result of the said sale of shares, Monet Ltd. registered Long



Term Capital Gain (LTCG) amounting to Rs.10,02,92,15,510/-, after setting off a loss amounting to Rs.1,06,35,77,482/-. Monet Ltd., however, set off the LTCG against brought forward loss amounting to Rs.1,06,35,77,482/-. Consequently, Monet Ltd. had declared its income as “NIL” for the AY in issue i.e., AY 2016-17. The Return of Income (ROI) *qua* which the aforementioned assessment order was framed was filed on 28.09.2016. Importantly, insofar as the LTCG amounting to Rs.10,02,92,15,510/- was concerned, Monet Ltd. claimed exemption by taking recourse to Article 13 of India-Mauritius Double Taxation Avoidance Agreement [in short, “India-Mauritius DTAA”].

9. The record shows that before framing the assessment order dated 12.12.2018, Monet Ltd.’s case was selected for scrutiny under CASS and accordingly, a notice dated 18.07.2017 was issued under Section 143(2) of the Income Tax Act, 1961 [in short, “the Act”]. However, thereafter the aforementioned assessment order dated 12.12.2018 was passed, whereby the ROI filed by Monet Ltd. was accepted.

9.1. The fact that the Assessing Officer (AO) had applied his mind to the sale of shares and the brought forward loss that had been set off, is evident upon perusal of paragraph 3 of the assessment order dated 12.12.2018.

10. The record also discloses, something which is also not in dispute, that on 19.12.2018 Monet Ltd. ceased to exist, an aspect which has been recorded by the Tribunal in paragraph 19 of the impugned order. For convenience, paragraph 19 of the Tribunal’s order is set forth hereafter:

“19. Vide order dated 19.12.2018, Corporate and Business Registration Department of Port Louis ordered as under:

"Take notice that the Category 1 Global Business Company Money Limited bearing File No. C60444 has been removed from the



register u/s 308 of the Companies Act, 2001 as from today."

11. The record also shows that the appellant/revenue avers that the Commissioner of Income Tax (CIT) passed an order dated 27.03.2021 under Section 163 of the Act concerning the respondent/assessee. *Inter alia*, via this order, which, however, has not been placed on record, the respondent/assessee i.e., Cairnhill CIPEF Ltd. was treated as an agent of Monet Ltd. Having treated the respondent/assessee i.e., Cairnhill CIPEF Ltd. as an agent of Monet Ltd., the CIT revised the assessment order dated 12.12.2018 by passing an order dated 31.03.2021.

12. Being aggrieved, the respondent/assessee i.e., Cairnhill CIPEF Ltd. preferred an appeal with the Tribunal. The Tribunal allowed the appeal which impelled the appellant/revenue to prefer the instant appeal.

13. A perusal of the impugned order would show that the Tribunal's conclusion is based on two principal grounds.

(i) First, the order under Section 263 of the Act dated 31.03.2021 was passed against the respondent/assessee i.e., Cairnhill CIPEF Ltd. and Cairnhill CGPE Ltd., when Monet Ltd. had already ceased to exist. As noticed above, Monet Ltd. ceased to exist on 19.12.2018.

(ii) Second, the order under Section 163 of the Act dated 27.03.2021 was passed by the Commissioner, who, according to the Tribunal, did not have the requisite authority.

14. In reaching this conclusion, the Tribunal took note of the provision of Section 246A, which is a provision that sets out orders which are appealable before the Commissioner (Appeals).

14.1. One such order which is appealable before the Commissioner (Appeals) is set forth in Clause (d) of Sub-Section (1) of Section 246A. This



provision adverts to an order passed under Section 163 of the Act i.e., the order whereby the respondent/assessee i.e., Cairnhill CIPEF Ltd. was treated as an agent of the non-resident i.e., Monet Ltd.

15. The Tribunal's conclusion was that if the CIT (as in this case), seeks to revise the assessment order by treating the respondent/assessee as an agent of the non-resident Monet Ltd., then an appeal under the said provision could not be lodged with the Commissioner (Appeals) as he was an officer of co-equal rank/ jurisdiction. The conclusion, thus, was that the order under Section 163 of the Act should have been passed by an officer who was lower in rank than the Commissioner.

16. Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the appellant/revenue, seeks to assail the impugned order before us on the following grounds:

- (i) The CIT has concurrent powers with those which are vested in the AO and, therefore, he could have taken recourse to the provisions under Section 163 of the Act.
- (ii) The respondent/assessee i.e., Cairnhill CIPEF Ltd. would be liable only to the extent of the benefit it received by way of acquisition of shares in Mankind Ltd.
- (iii) Section 263 of the Act brings the assessment order within its sway and, therefore, even if Monet Ltd. ceased to exist, the CIT had the power to revise the assessment order dated 12.12.2018.

17. Having heard Mr Kumar, we are unable to persuade ourselves to accept any of the submissions made hereinabove. Although one cannot quibble with the submission made by Mr Kumar that the CIT exercises powers which are concurrent to that of the AO, the fundamental issue which



arises for consideration is whether the CIT could have exercised powers against the respondent/assessee i.e., Cairnhill CIPEF Ltd. when the principal had ceased to exist. Concededly, as noticed by us, Monnet Ltd. ceased to exist on 19.12.2018, whereas, the CIT exercised its revisionary power much later i.e., on 31.03.2021.

17.1. The other submission made by Mr Kumar that the revisionary power under Section 263 of the Act is directed towards the assessment order is also, in our view, an untenable submission for the reason that the assessment order is framed *qua* “an assessee”. In this case, the assessee was Monet Ltd. and before exercising the power under Section 263 of the Act, notice would have to be issued to Monet Ltd. and in some cases (where principal, perhaps, is not found available) to its agent by exercising powers under Section 163 of the Act.

18. In this particular case, the record shows that it is not the appellant’s/revenue’s assertion that Monet Ltd. was not available. The record, however, indicated, as alluded to above, that Monet Ltd. had ceased to exist, therefore, the submission that the CIT could revise the assessment order dated 12.12.2018 when Monet Ltd. was not in existence, in our view, is untenable in law.

19. The third submission made that the respondent/assessee i.e., Cairnhill CIPEF Ltd. would be liable only to the extent of the benefit it received i.e., by way of acquisition of shares of Mankind Ltd., is again, in our view, misconceived because it ignores the fact that under Section 163 of the Act, it is only when an entity/person is treated as an agent of a principal, which is in existence, such approach is acceptable in law.

20. The arguments of Mr Kumar, in sum, veers around the proposition



that Section 163 of the Act recognizes a person or an entity as an agent, irrespective of whether or not the principal is in existence.

21. In the usual and normal course, the expression “agent” suggests that there is a principal in existence, on whose behalf the agent acts. The fact that an entity or a person is treated as an agent only buttresses this point of view.

22. In our opinion, none of the submissions made persuade us that the impugned order requires interference.

23. Accordingly, the appeal is dismissed as according to us, no substantial question of law arises for our consideration.

24. The pending application shall also stand closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 07, 2023 / tr