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

% *Date of Decision: 19.09.2023*

+ **W.P.(C) 9809/2017**

UNITECH WIRELESS (TAMIL NADU)
PRIVATE LIMITED

..... Petitioner

Through: Mr Deepak Chopra with Mr Ankul
Goyal, Advs.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX-IX, NEW
DELHI & ORS.

.....

Respondents

Through: Mr Abhishek Maratha, Sr Standing
Counsel with Mr Parth Semwal, Adv.

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. This writ petition is directed against the order dated 06.10.2017, passed by the Income Tax Settlement Commission [in short, "Commission"] under Section 245D(2C) of the Income Tax Act, 1961 [in short, "Act"].
2. The principal grievance articulated on behalf of the petitioner by Mr Deepak Chopra is that the Commission misdirected itself in law by rejecting its application.
- 2.1 It is pointed out by Mr Chopra that the rejection of the application filed on behalf of the petitioner was predicated on two grounds:



(i) First, there should be an obligation to pay tax amounting to Rs.10 lakhs or above, which, according to the Commission, was not satisfied.

(ii) Second, the Commission's inability to examine issues concerning transfer pricing in the absence of power vested in it in that behalf.

3. The Commission concluded that the transfer pricing issues which fell under Chapter X of the Act is a code in itself, therefore the powers vested in the concerned officer could not be exercised by the Commission.

4. In this regard, Mr Chopra submitted that the petitioner had deposited by way of an additional tax, Rs.1,41,44,457/- and also offered to withdraw excessive deductions, which were claimed as Return of Income (ROI) for Assessment Years (AYs) 2012-13 to 2016-17.

4.1 In support of his plea that the application filed before the Commission was viable, Mr Chopra drew our attention to the order dated 11.08.2017 passed by a coordinate bench of this court in W.P.(C) 11256/2016.

4.2 Furthermore, Mr Chopra submitted that the petitioner had closed down its business, contrary to the conclusion arrived at by the Commission.

4.3 According to Mr Chopra, the Commission failed to take into account, *inter alia*, the following documents filed in this behalf by the petitioner:

- (i) Audited financial statements for Financial Years (FYs) 2014-15 and 2016-17;
- (ii) settlement application; and
- (iii) affidavit and other pieces of evidence.

5. We may note that these documents sought to be relied upon by Mr Chopra demonstrate that since the petitioner's business had been closed, it could not have claimed set off of cumulative losses and brought forward depreciation.



6. Mr Chopra also pointed out that the petitioner had, in fact, transferred its business to Telenor India Communication Pvt. Ltd. in FY 2014-15 and therefore, was not engaged in any business activity since then.

7. Insofar as the other ground on which the Commission had decided not to entertain the petitioner's application, which was that it could not deal with transfer pricing issues, Mr Chopra informed us that the Transfer Pricing Officer (TPO) had made upward adjustments with regard to the international transaction concerning corporate guarantee for AYs 2012-13 and 2013-14, which in any event, had been accepted by the petitioner.

7.1 In this context, our attention was drawn by Mr Chopra to the remand report dated 19.09.2017 emanating from the office of the TPO.

8. In sum, it was Mr Chopra's contention that as far as the transfer pricing issue is concerned, it is no longer *res integra* as the petitioner has accepted the upward adjustment made by the TPO.

9. As regards the other issues flagged by the Commission, it was Mr Chopra's contention that the material placed on record, which was ignored, ought to have been examined and it could be examined by the Commission if the matter was remanded by the Court.

10. On the other hand, Mr Abhishek Maratha, learned senior standing counsel, who appears on behalf of the respondents/revenue, says that the assessment proceedings could continue and the submissions made by the petitioner could be examined by the Assessing Officer (AO).

11. We have heard the learned counsel for the parties.

12. What has come through clearly is the fact that the Commission refused to entertain the application on the two grounds referred to hereinabove.



12.1 Insofar as these two grounds are concerned, the observations made by the Commission may have to be re-examined in the light of the documents placed on record by the petitioner, in particular, the observations made by the auditor in the balance sheets ending as on 31.03.2015 and 31.03.2016.

12.2 The observations made by the statutory auditors in the said balance sheets are set forth hereafter:

Observations made by the auditor as on 31.03.2015:

“2. Discontinuation of Operations

The Hon'ble Supreme Court of India vide its order dated February 2, 2012 had cancelled the 2G licenses issued pursuant to the press release of January 10, 2008 issued by DoT and accordingly, UASLs granted by DOT to the private applicants on or after January 10, 2008 and subsequent allocation of spectrum to the

*W.P.(C) 9809/2023
of 5*

page 3

licensees were also cancelled. As a consequence of this order, 22 UASLs of the Company were also cancelled.”

Observations made by the auditor as on 31.03.2016:

“2. Discontinuation of Operations

The Hon'ble Supreme Court of India vide its order dated February 2, 2012 had cancelled the 2G licenses issued pursuant to the press release of January 10, 2008 issued by DOT and accordingly, UASLs granted by DOT to the private applicants on or after January 10, 2008 and subsequent allocation of spectrum to the licensees were also cancelled. As a consequence of this order, 22 UASLs of the Company were also cancelled.”

13. A perusal of the aforesaid extract, along with the assertion of the petitioner to the effect that it has transferred its business to Telenor Communications Pvt. Ltd. since FY 2014-15 and that since then, it has not engaged in any business activity requires to be examined.

13.1 The reason for the same is simple, which is that if the business activity had stopped, then certainly the petitioner cannot possibly carry



forward cumulative losses and depreciation coupled with the fact that the petitioner has paid by way of additional tax an amount equivalent to Rs.1,41,44,457/-.

14. Given this position, the Commission in its new avatar i.e., Interim Board, would have to examine whether the petitioner meets the threshold criteria prescribed under Section 245C(1)(ia)(B)(ii) of the Act.

15. The other ground which persuaded the Commission not to entertain the petitioner's application that it was not vested with powers concerning the TP issues does not survive any longer as the petitioner on its own showing has accepted the upward adjustment made by the TPO.

16. Therefore, we are of the opinion that the matter requires re-examination by the Commission [now, the Interim Board].

17. Accordingly, the impugned order is set aside with a direction to the Interim Board to re-examine the application filed by the Petitioner, *albeit* on merits, for the periods in issue i.e., AYs 2012-13 to 2016-17.

18. Needless to add, since we have not examined the merits of the matter, the Interim Board will be at liberty to rule on the merits of the application without being burdened by the observations made herein.

19. The writ petition is disposed of, in the aforesaid terms.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

SEPTEMBER 19, 2023/pmc