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

\+ W.P.(C) 4664/2022

CAIRNHILL CGPE LIMITED .....Petitioner

Through: Mr. Vishal Kalra & Ms. Snighdham Gautam, Advs.

versus

THE ASSISTANT COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) CIRCLE 1(2)(1) NEW DELHI .....Respondent

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar, Mr. Nikhil Jain & Mr. Rishabh Nangia, Advs.

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\+ W.P.(C) 4665/2022

CAIRNHILL CIPEF LIMITED .....Petitioner

Through: Mr. Vishal Kalra & Ms. Snighdham Gautam, Advs.

versus

THE ASSISTANT COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) CIRCLE 1(2)(1) NEW DELHI .....Respondent

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, Mr. Pratyaksh Gautam, JSCs & Ms. Aditi Sabharwal, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **25.07.2024**

1. These writ petitions have been preferred seeking the following reliefs:

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> **a)** issue a Writ of Certiorari, or a Writ in the nature of Certiorari, or any other appropriate Writ, Order or Direction under Articles 226 and 227 of the Constitution of India, issue a writ of and/or

order and or directions in the nature of certiorari, prohibition, or any other appropriate writ, order or direction quashing impugned notice dated 31 March 2021 issued under section 148 of the I.T. Act, the purported "reasons for reopening" dated 25/30 March 2021 (Served on 15 January 2022) and the impugned order · dated 01 March 2022 (ANNEXURE 1, 2, & 3);

b) issue a Writ of Prohibition or a Writ in the nature of Prohibition or any other appropriate Writ, Order or Direction under Articles 226 and 227 of the Constitution prohibiting the Respondent from continuing with proposed reopening/ reassessment proceedings and/or from passing any further order;

c) that pending the hearing and final disposal of this Petition, the

Respondent by himself, his officers, subordinates, servants and agents be directed by an interim order and injunction of this Hon'ble Court to forthwith stay the operation, execution and implementation of the impugned notice dated 31 March 2021 under section 148 of the Act, impugned reasons dated 25/30 March 2021 (Served on 15 January 2022) and the impugned order dated 01 March 2022 issued by Respondent and any proceedings for recovery in pursuance or in furtherance thereof;

d) that the Petitioner may be granted the cost of Petition; and

e) Pass such other order/orders as this 'Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

f) And issue any other writ, Order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case to give complete relief to the Petitioner.

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a) issue a Writ of Certiorari, or a Writ in the nature of Certiorari, or any other appropriate Writ, Order or Direction under Articles 226 and 227 of the Constitution of India, issue a writ of and/or order and or directions in the nature of certiorari, prohibition, or any other appropriate writ, order or direction quashing impugned notice dated 31 March 2021 issued under section 148 of the IT. Act, the purported "reasons for reopening" dated 25/30 March 2021 (Served on 15 January 2022) and the impugned order dated 01 March 2022 (ANNEXURE 1,2, & 3);

b) issue a Writ of Prohibition or a Writ in the nature of Prohibition or any other appropriate Writ, Order or Direction under Articles 226 and 227 of the Constitution prohibiting the Respondent from continuing with proposed reopening/reassessment proceedings and/or from passing any further order;

c) that pending the hearing and final disposal of this Petition, the Respondent by himself, his officers, subordinates, servants and agents be directed by an interim order and injunction of this Hon'ble Court to forthwith stay the operation, execution and implementation of the impugned notice dated 31 March 2021 under section 148 of the Act, impugned reasons dated 25/30 March 2021 (Served on 15 January 2022) and the impugned order dated 01 March 2022 issued by Respondent and any proceedings for recovery in pursuance or in furtherance thereof;

d) that the Petitioner may be granted the cost of Petition; and

e) Pass such other order/orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

f) And issue any other writ, Order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case to give complete relief to the Petitioner.

2. As is manifest from the record, the reassessment action is based upon the acquisition by the petitioners of shares in an Indian company namely, M/s Mankind Pharma Ltd. from M/s Monet Ltd. in Assessment Year [“**AY**”] 2016-17. It is in the aforesaid backdrop that the assessees takes the position that the capital gains arising in the hands of M/s Monet Ltd. on the sale of those shares would be exempt under the India-Mauritius Direct Taxation Avoidance Treaty [“**DTAA**”]. The petitioners also appear to have taken the position that the dividend income which was earned from those shares will clearly be exempt under Section 10(34) of the Income Tax Act,1961 [**“Act”**].

3. The respondents, however, have while proposing to initiate reassessment action recorded the following reasons:

“An information from DCIT Circle-I(I)(I) International Taxation-2, New Delhi has been received vide F.No. DCIT/Intl.Tax./Cir-I(I)(I)/ Tr. Information/2020-21/404 dated 18.03.2021. As per the information, ITO(IT), TDS Ward-2(2)(1), Delhi (in original) passed an information regarding foreign remittances of Rs. 1206,22,472/- received on account of sale of shares of Mankind Pharma Limited to M/s Cairnhill CIPEF Limited and Chairnhill CGPE Ltd.

The transaction of sale of shares(investment) by M/s Monet limited gives arise to income under the head capital gain under section 45 of the Income Tax Act in the hands of Monet Limited and the above remittance was made without any withholding tax. Further, all the three entities namely M/s Monet limited, M/s Cairnhill CIPEF & M/s Chairnhill CGPE Limited are Mauritius entities inspite of that the money transfer was done through Indian Bank.

In view of the above, I have reason to believe that the remittances of Rs. 1206,22,62,472/- was chargeable to TDS and the provisions of TDS were not complied with. Therefore, as defined u/s 147 of the Income Tax Act, 1961 for the Assessment year 2016-17 by reason of failure on part of the assessee to disclose fully and truly all material facts. Therefore, it is fit case for initiating proceedings u/s 147 of the Income Tax Act, 1961. Accordingly, notice u/s 148 of the Act may be issued in this case.

In this case, the assessee has failed to furnish a report in respect of any international transaction which was required under section 92E. In light of the above provisions, this case is opened within four years from the end of the assessment year under consideration. Approval u/s 151(2) of the Act is solicited. Accordingly, put for your kind perusal and approval please."

4. It is thus manifest that the solitary ground on which Section 148 of the Act was sought to be invoked was the transaction of sale of shares.

5. We note that the sale of shares or to put it differently the acquisition of those shares by the petitioners would clearly not fall within the meaning of the expression 'income' as held in **Angelantoni Test Technologies SRL vs. Assistant Commissioner of Income Tax** [2023 SCC OnLine Del 8486]. While dealing with an identical challenge to reassessment, the Court in *Angelantoni* had observed as follows:

> "**6.** It is settled law that investment in shares in an Indian subsidiary cannot be treated as 'income' as the same is in the nature of "capital account transaction" not giving rise to any income. In *Nestle SA* v. *Assistant Commissioner of Income Tax* (W.P.(C) No. 12643/2018), this Court held that the allegation of the Revenue that the investment in the shares of Indian subsidiary amounted to 'income' is flawed. The relevant portion of the said judgment is reproduced hereinunder:

"24. The principal objection of the Petitioner that its investment in the shares of its subsidiary cannot be treated as 'income' is well founded. The decision of the Bombay High Court in Vodafone India Services Pvt. Ltd. *v.* Union of India *(supra) holding such investment in shares to be a 'capital account transaction' not giving rise to income was accepted by the CBDT. Para 2 of Instruction No. 2 of 2015 dated 29th January, 2015 reads thus:*

> *"2. It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned Writ Petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this issue is involved. This may also be brought to the notice of the ITAT, DRPs and CIT (Appeals)."*

25. Therefore, the fundamental premise of the Respondent that the above investment by the Petitioner in the shares of its subsidiary amounted to 'income' which had escaped assessment was flawed. The question of such a transaction forming a live link for reasons to believe that income had escaped assessment is entirely without basis and is rejected as such."

7. Further, the action of the Respondents is in contravention of the CBDT Instruction No. 2 of 2015 dated 29th January, 2015 reiterating the view expressed by the Bombay High Court in *Vodafone India Services Pvt. Ltd.* v. *Union of India* ((2014) 368 ITR 1 (Bom)) that no income arises on investment in shares since it is a capital account transaction.

8. In fact, the judgment of the Bombay High Court was accepted by the Union Cabinet and a press note dated 28th January, 2015 was issued by the Press Information Bureau, Government of India. The relevant portion of the said press note is reproduced hereinbelow:

*"**Acceptance of the Order of the High Court of Bombay in the case of*** Vodafone India Services Private Limited

The Union Cabinet, chaired by the Prime Minister Shri Narendra Modi, in a major decision, has decided to accept the order of the High Court of Bombay in the case of Vodafone India Services Private Limited (VISPL) *dated 10.10.2014. This is a major correction of a tax matter which has adversely affected investor sentiment.*

Based on the opinion of Chief Commissioner of Income-tax (International Taxation), Chairperson (CBDT) and the Attorney General of India, the Cabinet decided to

i. accept the order of the High Court of Bombay in WP No. 871 of 2014, dated 10.10.2014; and not to file SLP against it before the Supreme Court of India;

ii. accept of orders of Courts/IT AT/DRP in cases of other taxpayers where similar transfer pricing adjustments have been made and the Courts/IT AT/DRP have decided/decide in favour of the taxpayer.

The Cabinet decision will bring greater clarity and predictability for taxpayers as well as tax authorities, thereby facilitating tax compliance and reducing litigation on similar issues. This will also set at rest the uncertainty prevailing in the minds of foreign investors and taxpayers in respect of possible transfer pricing adjustments in India on transactions related to issuance of shares, and thereby improve the investment climate in the country.

The Cabinet came to this view as this is a transaction on the capital account and there is no income to be chargeable to tax. So applying any pricing formula is irrelevant.

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VISPL filed a 2nd Writ Petition in the High Court of Bombay. The High Court, on 10.10.2014, has amongst other things observed:

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e) The issue of shares at a premium is on Capital account and gives rise to no income. The submission on behalf of the revenue that the shortfall in the ALP as computed for the purposes of Chapter X of the Act is misplaced. The ALP is meant to determine the real value of the transaction entered into between AEs. It is a re-computation exercise to be carried out only when income arises in case of an International transaction between AEs. It does not warrant re-computation of a consideration received/given on capital account."

9. Further, this Court in *Divya Capital One Private Limited (Earlier Known as Divya Portfolio Private Limited)* v. *Assistant Commissioner of Income Tax Circle 7(1) Delhi*, 2022 SCC OnLine Del 1461 held that '*Whether it is "information to suggest" under amended law or "reason to believe" under erstwhile law the benchmark of "escapement of income chargeable of tax" still remains the primary condition to be satisfied before invoking powers under Section 147 of the Act'."*

6. Following the aforesaid decision, we find ourselves unable to sustain the impugned reassessment actions.

7. We, accordingly, allow the writ petitions and quash the notices dated 31 March 2021 referrable to Section 148 of the Act.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

JULY 25, 2024/kk