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

\+ W.P.(C) 5238/2022

NAVILITH HOLDINGS LTD. .....Petitioner

Through: Mr. Gautam Jain & Mr. Manish Yadav, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE INT. TAX. 2(2)(2) & ORS. .....Respondents

Through: Mr. Debesh Panda, SSC with Ms. Zehra Khan, JSC & Mr. Ojaswa Pathak, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MS. JUSTICE TARA VITASTA GANJU

ORDER

% **29.07.2024**

1. This writ petition impugns the reassessment action initiated by the respondents pursuant to a notice under Section 148 of the **Income Tax Act, 1961**[1] dated 28 March 2021 concerning **Assessment Year**[2] 2014-15.

2. The petitioner is stated to be a company incorporated on 16 November 2007 under the laws of Cyprus and is a tax resident of that nation. Pursuant to the issuance of notice under Section 148 on 28 March 2021, the petitioner furnished its Return of Income dated 26 April 2021 declaring its income to be "Nil".

3. While responding to further queries, the petitioner disclosed that while it had acquired bonds/ debentures amounting to INR 50,59,53,000/-, the same would not be subject to tax under the Act and consequently the initiation of proceedings was untenable.

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[1] Act
[2] AY

4. The petitioner in its objections which were filed in response to the notices issued by the respondents had also taken the categorical position that investments in bonds/debentures would be a transaction on the capital account and thus not liable to be construed as “income”. It was on the aforesaid premise that it contended that the question of invocation of Section 148 of the Act would not even arise.

5. The respondents have ultimately and in terms of the order of 16 March 2022, while disposing of the objections which were tendered, observed that notwithstanding the aforesaid stand as struck by the petitioner, in the absence of disclosures having been made with respect to the source of funds for acquisition of the shares in question, the proceedings are liable to be continued and that the same would in any case constitute sufficient reason to believe that income had escaped assessment.

6. In the counter affidavit, it has been additionally averred that since the petitioner was a non-filer, the respondents should be accorded the opportunity to examine and review the Return as submitted and that there would be no justification for this Court to interdict the inquiry by interfering with the impugned proceedings at this stage.

7. We note that insofar as investments in bonds/ debentures or other such securities being transactions of a capital character can no longer be questioned in light of the decision of this Court in **Angelantoni Test Technologies SRL vs. Assistant Commissioner of Income Tax**[3]. Our Court, while dealing with this aspect in *Angelantoni*, had observed as follows:-

[3] 2023 SCC OnLine Del 8486

"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:*
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> > *"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)."*
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> *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'."*

8. In our considered opinion, once it was be established that the investments made by the petitioner were in the capital account and would consequently not amount to income, the provisions of Section 148 of the Act would not stand attracted.

9. We additionally note that this objection although specifically taken, has been perfunctorily brushed aside by the respondent by merely observing that further verification with respect to source of funds for the investments made would merit further inquiry.

10. We find ourselves unable to sustain that line of reasoning since once it was admitted that the investments would not constitute income, the question of verification of source of funds could not have been made the basis for continuing the exercise of reassessment. This more so since the original show cause notice was not premised on the source of funds.

11. We consequently allow the instant writ petition and quash the notice referrable to Section 148 of the Act dated 28 March 2021 as well as the order disposing objections dated 16 March 2022**.**

YASHWANT VARMA, J

TARA VITASTA GANJU, J

JULY 29, 2024/neha