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

\+ W.P.(C) 13709/2022 & CM APPL. 41863/2022

M/S PORT OF ANTWERP-BRUGES INTERNATIONAL NV (AS ERSTWHILE SHAREHOLDER OF PORT OF ANTWERP INTERNATIONAL UK LIMITED) ..... Petitioner

Through: Mr. Percy Pardiwala, Sr. Adv. with Mr. Harsh Kolhari, Mr. Kishore Kunal and Ms. Ankita Prakash, Advs.

versus

THE DEPUTY COMMISSIONER OF INCOME-TAX, CIRCLE INTERNATIONAL TAX 2(2)(2) & ANR. ..... Respondents

Through: Mr. Sanjeev Menon, JSC for Mr. Zoheb Hossain, SSC.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% 19.03.2024

1. This writ petition has been preferred seeking the following reliefs:

> "a. this Hon'ble Court may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the Impugned letters, the Impugned Section 148 notice, the Impugned Section 142 notices, the Impugned show cause notice, the Impugned draft order, the Impugned assessment order, the Impugned notice of demand and the Impugned penalty notices and after going through the same and examining the question of legality thereof quash, cancel and set aside the Impugned letters dated 01.02.2021 **(ANNEXURE-P5 at Pg. No.** 74 to 75**,** 15.03.2021 (**ANNEXURE-P6 at Pg. No.** 76 **to** 77**)** and 20.03.2021 (**ANNEXURE-P7 at Pg. No.** 78 **to** 79**)**, the Impugned 148 notice dated 28.03.2021 **(ANNEXURE-P8 at Pg. No.** 80 to), the Impugned 142 notices dated 27.12.2021 **(ANNEXURE-P9 at**

Pg. No. 81 to 82**)** and 04.01.2022 **ANNEXURE-P10 at Pg. No.** 83 to 84**)**, the Impugned show cause notice dated 11.02.2022 **(ANNEXURE-P11 at Pg. No.** 85**)**, the Impugned draft order dated 24.03.2022 **(ANNEXURE-P13 at Pg. No.** 87 **to** 92**)**, the Impugned assessment order dated 10.05.2022 **(ANNEXURE-P16 at Pg. No.** 164 to 175**)**, the Impugned notice of demand dated 10.05.2022 **(ANNEXURE-P17 at Pg. No.** 176**)** and the Impugned penalty notices dated 10.05.2022 (**ANNEXURE-P18 at Pg. No.** 177**),** and 11.05.2022 **(ANNEXURE-P19 at Pg. No.** 178**)** and 11.05.2022 **(ANNEXURE-P20 at Pg. No.** 179 **);**

b. this Hon'ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing Respondent No. 1 to withdraw the Impugned letters dated 01.02.2021 **(ANNEXURE-P5 at Pg. No.** 74 **to 75,** 15.03.2021 (**ANNEXURE-P6 at Pg. No.** 76 **to** 77**)** and 20.03.2021 (**ANNEXURE-P7 at Pg. No.** 78 **to** 79**)**, the Impugned 148 notice dated 28.03.2021 **(ANNEXURE-P8 at Pg. No.** 80**)**, the Impugned 142 notices dated 27.12.2021 **(ANNEXURE-P9 at Pg. No. 81 to 82)** and 04.01.2022 **ANNEXURE-P10 at Pg. No.** 83 **to** 84**)**, the Impugned show cause notice dated 11.02.2022 **(ANNEXURE-P11 at Pg. No.** 85**)**, the Impugned draft order dated 24.03.2022 **(ANNEXURE-P13 at Pg. No.** 87 **to** 92**)**, the Impugned assessment order dated 10.05.2022 **(ANNEXURE-P16 at Pg. No.** 164 **to** 175**)**, the Impugned notice of demand dated 10.05.2022 **(ANNEXURE-P17 at Pg. No.** 176**)** and the Impugned penalty notices dated 10.05.2022 **(ANNEXURE-P18 at Pg. No.** 177**),** and 11.05.2022 **(ANNEXURE-P19 at Pg. No.** 178**)** and 11.05.2022 **(ANNEXURE-P20 at Pg. No.** 179**);**

c. this Hon'ble Court may be pleased to issue a Writ of Prohibition or any other writ order or direction under Article 226 of the Constitution of India ordering and directing Respondent No.1 not to take any action in furtherance to the Impugned assessment order dated 10.05.2022 **(Annexure-P16 at Pg. No.** 164 **to** 175**)**, the Impugned notice of demand dated 10.05.2022 **(Annexure-P17 at Pg. No.** 176**)** and the Impugned penalty notices dated 10.05.2022 **(Annexure- P18 at Pg. No.** 177**),** and 11.05.2022 **(Annexure-P19 at Pg. No.** 178**)** and 11.05.2022 **(Annexure-P20 at Pg. No.** 179**);**

d. that pending the hearing and final disposal of this petition Respondent No. 1, his successors in office, subordinates, servants and agents be restrained by an order and injunction of this Hon'ble Court from taking any steps pursuant to the Impugned assessment order dated 10.05.2022 **(Annexure-P16 at Pg. No.** 164 **to** 175**)**, the Impugned notice of demand dated 10.05.2022 **(Annexure-P17 at Pg. No.** 176**)** and the Impugned penalty notices dated 10.05.2022 **(Annexure-P18 at Pg. No.** 177**),** and 11.05.2022 **(Annexure-P19 at Pg. No.** 178 **)** and 11.05.2022 **(Annexure-P20 at Pg. No.** 179**);**

e. for ad-interim relief, if any;

f. for costs of the Petition;

g. for such further and other reliefs, as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case."

2. The record would reflect that although a challenge was additionally laid to the assumption of jurisdiction under Section 147 of the Income Tax Act, 1961 ["**Act**"], we are today faced with a final order of assessment dated 10 May 2022 pertaining to Assessment Year ["**AY**"] 2013-14. The solitary addition which is made is of a sum of INR 1,74,32,44,600/- and which is stated to have been the consideration paid by the petitioner/assessee for purchase of shares of Essar Ports Limited during Financial Year ["**FY**"] 2012-13.

3. We note that the issue of purchase of shares and securities and the same being on the capital account and thus not constituting "income" is no longer res integra having been settled by the Court in **Angelantoni Test Technologies SRL vs. Assistant Commissioner of Income Tax** [2023 SCC OnLine Del 8486]. In dealing with the aforesaid issue the Court in *Angelantoni* has 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:
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> > *"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*'."

4. In view of the aforesaid and in our considered opinion, the re-assessment as well as the additions sought and proposed to be made

would be liable to be set aside and quashed on this short ground alone. In view of the aforesaid we choose not to render any findings with respect to whether the petitioner was duly served nor do we go into the issues relating to its asserted liquidation during the pendency of the proceedings.

5. The writ petition is accordingly allowed. The impugned order referrable to Section 148 of the Act dated 28 March 2021 and the assessment order dated 10 May 2022 are accordingly quashed and set aside.

YASHWANT VARMA, J

PURUSHAINDRA KUMAR KAURAV, J

MARCH 19, 2024/kk