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

+ W.P.(C) 14750/2023 and CM APPL. 58671/2023 (Interim Relief)

BOEING SINGAPORE PTE. LTD.

.....Petitioner

Through: Mr. Sachit Jolly, Ms. Disha Jham & Mr. Rishabh Malhotra, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION, CIRCLE 1 -1- 2 & ANR.

.....Respondents

Through: Mr. Ruchir Bhatia, SSC with
Mr. Anant Mann & Mr. Abhishek Anand, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

28.11.2024

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1. The challenge in the instant writ petition is to the initiation of action under Section 148 of the Income Tax Act [“**Act**”] and pertains to Assessment Year [“**AY**”] 2019-20.
2. As is manifest from the notice under Section 148A(b) as also the final order passed under Section 148A(d) of the Act, the entire action of reassessment is based on a transaction relating to the purchase of shares in the concerned AY. Before us, learned counsel for parties are *ad idem* that the challenge raised is liable to be answered in favour of the writ petitioner bearing in the mind our judgment in **Angelantoni Test Technologies SRL vs. Assistant Commissioner of Income Tax** [2023 SCC OnLine Del 8486].
3. Dealing with an identical challenge, we had in *Angelantoni*



observed as under:-

“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’.*”

4. Following the reasoning assigned in the aforesaid judgment, we allow the instant writ petition and quash the impugned order under Section 148A(d) of the Act and notice referable to Section 148 of the Act, both dated 21 April 2023.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

NOVEMBER 28, 2024
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