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

+ **ITA 806/2023**

THE COMMISSIONER OF

INCOME TAX - CENTRAL-1

.....Appellant

Through: Mr. Ruchir Bhatia, SSC and
Mr. Anant Mann, Mr. Pratyush
Gupta, JSCs.

versus

NEW DELHI TELEVISION LTD.

.....Respondent

Through: Mr. Sachit Jolly, Ms. Disha
Jham, Ms. Soumya Singh, Mr.
Rishabh Malhotra, Mr. Devansh
Jain and Mr. Raghav Dutt,
Advocates.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

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08.08.2024

CM APPL. 67013/2023 (480 days delay in refilling)

Bearing in mind the disclosures made, the delay of 480 days in refilling the appeal is condoned. The application shall stand disposed of.

ITA 806/2023

1. This appeal is directed against the order of the Income Tax Appellate Tribunal ['**Tribunal**'] dated 16 June 2020. As is manifest from our order dated 22 December 2023, the solitary question which was reserved for further consideration was question 2.8.

2. That question reads as under:-



“2.8 Whether the Id. ITAT has erred on the facts and in the law by deleting the addition of Rs. 10,57,89,1251/- made on account of non-genuine transaction by ignoring the discrepancies of the valuation report of the M/s Astro Awani, a loss making company?”

3. The dispute itself pertains to the acquisition of shares of M/s Astro Awani Networks Limited [**‘M/s Astro Awani’**] at INR 46.55/- by the respondent-assessee. The shares were sold after 13 months to the subsidiary of the assessee, namely, M/s NDTV Emerging Markets BV at INR 544.38/-. It is this which led to the Assessing Officer [**‘AO’**] doubting the genuineness of the transaction.

4. We note that the AO, while dealing with this aspect has observed as follows:-

“10.4.2 The perusal of the Balance Sheet of M/s Astro Awani indicates the following turnover / profits ;
Astro Awani Network Ltd.

	Period ending 31.01.2007	31.01.2008
	USD	USD
Income/Turnover	NIL	39,96,607/-
Cost of Sales	NIL	66,64,929/-
Administrative & Other Expenses	35,32,763/-	37,13,025/-
Operating Profit/Loss	(-) 35,32,763/-	(-) 67,81,501/-

10.4.3 The perusal of facts as mentioned in para 10.4.1 and 10.4.2 indicates that the assessee company acquired the shares of M/s Astro Awani Networks Ltd (AANL) @ Rs. 46.55 and within a span of barely 13 months, sold these shares to M/s NDTV Emerging Market BV (subsidiary of assessee company) @ Rs. 544.38. These shares were actually transferred on 29.10.2010 and subsequently, the subsidiary company transferred these shares on 20.12.2011 to M/s Astro Entertainment SDN BMP (a group company of M/s Astro Awani) through a swapping arrangement.

10.4.4 It is unbelievable and no prudent businessman would buy the shares of increasingly loss making company for Rs. 544.38 per Share, which had been sold just 13 months before for a value of Rs.



46.55 per share. It is to be taken note of that the shares of M/s Astro Awani are not listed shares. It is simply a corporate business restructuring whereby the assessee company has sold the shares which otherwise had no value / worth, to its subsidiary at highly inflated rate to boost up the profit and cash flow of the assessee company.

10.4.5 The complete picture of the transaction clearly indicates that the transaction has been concluded at a value on which no other unrelated party would ever buy. It is seen that the assessee has not reported this international transaction in its Form 3CEB also; as such the issue remained unexamined by the TPO also. Had this transaction been conducted with a company other than a parent company, then the NDTV Emerging Market BV, a company incorporated with the motive of earning profit, would have not bought shares of a loss making enlisted company at a price of Rs. 544.3:8 per share, which its parent company bought for Rs. 46.55 per share just 13 months before.

10.4.6 In this regard, the valuation report of M/s INMAC filed alongwith the reply dt. 19.12.2011 was also examined. It is seen the entire report is based on presumptions and assumptions the valuation report itself has stated certain key risks on the valuation estimates for Astro Awani. The key risks given in the valuation report are briefly discussed as under:

- i) The report is based on financial statements as provided by Awani / NDTV management. It is not based on audited financial statements of Astro Awani.
- ii) The assessee did not provide initial ratings and performance of channel Astro Awani in Malaysia and Indonesia.
- iii) The Astro's Brand name (already established channel) multiple has been applied to Astro Awani also. Despite the reservation expressed in the valuation report that "Astro Awani is expected to operate as a standalone channel compared to Astro which operates a bouquet of channels hence, applying Astro multiple to Awani may not be completely appropriate".

10.4.7 Thus looking to the key risks analysis and the observation of valuer as discussed in para 10.4.6 above it is clear that the valuation report of shares of Astro Awani is not reliable. If the valuation report of shares of Astro Awani is considered by any other unrelated prudent

businessman, he would never buy the shares of unlisted loss making private Ltd company at such an highly inflated value. It was only because of the fact that M/s NDTV Emerging Market BV is a subsidiary company of the assessee that it was able to sell the shares at a highly inflated value of RS. 54.44 per share, which had been purchased by a parent company for Rs. 46.55, barely 13



months before.

10.4.7 Looking to the losses of Astro Awani and key risks pointed out by the valuer in M/s INMAC, no prudent businessman would buy the shares of M/s Astro Awani at Rs. 544.38 per share, which had been sold for Rs. 46.55 just 13 months before, to its ultimate parent company. On these facts a prudent businessman would not buy the shares of M/s Astro Awani even for Rs. 46.55 i.e. the rate at which the assessee company had purchased the shares 13 months before. In fact, the valuation of shares of M/s Astro Awani would have been zero or at least less than Rs. 46.55 as on March, 2008. The NDTV Emerging Market BV purchased these shares at the valuation of Rs. 544.38 only at the instance of its holding company i.e. M/s NDTV Ltd. These transactions of sale of shares of M/s Astro Awani have not been done on prices at which unrelated parties would have conducted/concluded the deal of purchase and sale of shares. Under these circumstances the consideration received over and above the purchase price of M/s Astro Awani shares is nothing but corporate business restructuring to boost up its profit and cash flow of the company, without any cost of taxation.”

5. As is manifest from the above, the AO chose not to accept the valuation report which was submitted by M/s INMAC and ultimately came to hold that no prudent businessman would have paid the price at which transfer was effected.

6. When the matter reached the Tribunal, it had essentially reversed the decision of the AO as well as the Commissioner of Income Tax (Appeals), while resting its decision on two CBDT Circulars dated 29 February 2016 and 16 May 2016.

7. It becomes pertinent to note that insofar as those circulars pertain to non-listed securities, they made the following provisions:-

“Circular dated 29 February 2016:-

Sub-section (14) of Section 2 of the Income-tax Act, 1961 ('Act') defines the term "capital asset" to include property of any kind held by an assessee, whether or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/ trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the nature of a capital asset or stock-in-trade, is essentially a



fact-specific determination and has led to a lot of uncertainty and litigation in the past.

2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No.4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations.

3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (Le. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following

- a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,
- b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;
- c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.

4. It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain / Short Term Capital Loss or any other sham transactions.

5. It is reiterated that the above principles have been formulated with the sale objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant



provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities .

Circular Dated 02 May 2016

Regarding characterisation of income from transactions in listed shares and securities, Central Board of Direct Taxes ('CBDT') had issued a clarificatory Circular no. 6/2016 dated 29th February, 2016, wherein with a view to reduce litigation and maintain consistency in approach in assessments, it was instructed that income arising from transfer of listed shares and securities, which are held for more than twelve months would be taxed under the head 'Capital Gain' unless the tax-payer itself treats these as its stock-in-trade and transfer thereof as its business income. It was further stated that in other situations, the issue was to be decided on the basis of existing Circulars issued by the CBDT on this subject.

2. Similarly, for determining the tax-treatment of income arising from transfer of unlisted shares for which no formal market exists for trading, a need has been felt to have a consistent view in assessments pertaining to such income. It has, accordingly, been decided that the income arising from transfer of unlisted shares would be considered under the head 'Capital Gain', irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach.

3. It is, however, clarified that the above would not be necessarily applied in the situations where:

- i. the genuineness of transactions in unlisted shares itself is questionable; or
 - ii. the transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil; or
 - iii. the transfer of unlisted shares is made along with the control and management of underlying business
- and the Assessing Officer would take appropriate view in such situations.

The above may be brought to the notice of all for necessary compliance."

8. In our considered opinion, the circulars themselves factor various exceptions in which case the valuation of the transactions may itself be open to doubt. Notwithstanding the aforesaid, we note that before the AO itself, the Balance Sheet of M/s Astro Awani had been placed and it showed that although its income at the time of acquisition of the stock was Nil, by the time the sale transaction came to be entered into, it had income/turnover of USD 39,96,607/-. In our



considered opinion, notwithstanding the said entity having shown an "operating" profit or loss, the same would not have detracted from the valuation which was proffered.

9. Quite apart from the above, we note that the AO even if it were doubting the valuation of M/s INMAC, the statute itself empowered it to undertake an exercise to ascertain the Fair Market Value of the shares. That exercise was never undertaken. We are further informed, and which fact is also manifest from a reading of the assessment order itself, that while ultimately treating the income from that transaction as 'income from other sources', the very same valuation report, namely of M/s INMAC, had been taken into consideration by the respondents.

10. On an overall consideration of the aforesaid, we find that the appeal fails to raise any substantial question of law. It shall consequently stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 8, 2024/vp