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

\+ **W.P.(C) 12643/2018 & and CM APPL. 49097/2019**

M/s. NESTLE SA ..... Petitioner

Through: Mr. Porus Kaka, Sr. Advocate with Mr. Prakash Kumar and Mr. Divesh Chawla, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), CIRCLE-2 (2) (2), NEW DELHI ..... Respondent

Through: Mr. Raghvendra K. Singh, Sr. Standing Counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R

% 07.08.2019

Dr. S. Muralidhar, J.:

1. Nestle SA, a company established under the laws of Switzerland and a tax resident of Switzerland, has filed this petition under Article 226/227 of the Constitution seeking the quashing of a notice dated 26th March, 2018 issued to it by the Assistant Commissioner of Income Tax (International Taxation), Circle-2 (2) (2), New Delhi (the Respondent) under Section 148 of the Income Tax Act, 1961 ('Act') requiring it to file a return of income. The petition also challenges an order dated 23rd October, 2018 passed by the Respondent rejecting the Petitioner's objections to the said notice.

2. The Petitioner states that it is the world's largest food and beverage company with annual consolidated revenue of CHF 90 Billion and profits of CHF 7 Billion. The Petitioner states that it had total retained earnings and reserves of CHF 88 Billion and 80 Billion for the years ending December 2010 and 2011 respectively.

3. The Petitioner has its subsidiary in India by the name of Nestle India Ltd. ('Nestle India') incorporated under the Companies Act, 1956. During the Assessment Year ('AY') 2011-12, the Petitioner's receipts of Rs. 158 crores approximately from India from its subsidiary Nestle India consisted of dividend and interest on which tax was duly deducted at source in accordance with the provisions of the Act. The Petitioner states that it has received approximately Rs. 419 crores from Nestle India as dividend and interest over the past three years.

4. During AY 2011-12, the Petitioner purchased an additional 8,85,125 shares of Nestle India for Rs.282 crores approximately (CHF 60 million in value) at market price through a recognised stockbroker, registered with the Securities and Exchange Board of India (SEBI), and through the National Stock Exchange and Bombay Stock Exchange after payment of Securities Transaction Tax. For this purchase through the open market in accordance with the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, the Petitioner obtained approval from the Reserve Bank of India (RBI). It is stated that the transaction was also in line with the applicable regulations in India including those pertaining to foreign investment and foreign exchange. The relevant documents granting such

approvals and those filed by the authorized bank with the RBI have been enclosed with the petition.

5. On 5th April 2018, after the expiry of four years but before the expiry of six years from the end of relevant AY, the Petitioner received the impugned notice under Section 148 of the Act stating that the Respondent had reasons to believe that the Petitioner's income chargeable to tax for the said AY had escaped assessment within the meaning of Section 147 of the Act. The Respondent stated in the impugned notice that he proposed to assess/reassess the income of the Petitioner for the said AY and required the Petitioner to deliver to him within 30 days from the date of notice a return in the prescribed form for the said AY.

6. The Petitioner states that it filed a letter with the Respondent on 4th May 2018, requesting him to furnish the reasons recorded for the issuance of notice under Section 148 of the Act and the required sanction obtained under Section 151 of the Act. The Petitioner states that 'on the basis of goodwill and cooperation' it also enclosed the return of income in its response and requested that it be treated as a return in response to Section 148 of the Act. The Petitioner also requested that the procedure laid down by the Supreme Court in ***GKN Driveshafts (India) Ltd. v. Income Tax Officer (2003) 259 ITR 19 (SC)*** should be considered and followed.

7. The Petitioner was furnished with the reasons for reopening of the assessment in which it was stated that a list of 'non-filers' had been generated by the Non-filers Monitoring System ('NMS') module of

i-tax.net, in which it was found that the Petitioner had not filed its return income for AY 2011-12. It was explained that the NMS was implemented as a pilot project to prioritize action on non-filers with potential tax liabilities. A reference was made to the CBDT Instruction No.14 of 2013 dated 23rd September, 2013 setting down the Standard Operating Procedure (SOP) that was required to be adopted in this regard.

8. The reasons stated were that the Petitioner had been identified as a foreign company in the NMS category and that during Financial Year (FY) 2010-11 relevant to AY 2011-12 it had entered into a share transaction amounting to Rs.2,79,23,68,985/-. It was stated that 'in the absence of details for non-filing of return of income', the source of income of the above investment could not be substantiated. It was further stated that there was no material on record to examine such source of income and whether it was offered to tax and that from the said discussion it was clear that the Petitioner had not offered the details of 'income of Rs.2,79,23,68,985/-.' Accordingly, the Respondent stated that he had reason to believe that income in the above sum, which was chargeable to tax, escaped assessment by reason of the failure on part of the Petitioner to fully introduce all material facts.

9. The Petitioner on 26th July, 2018 through its authorized representative submitted its objections to the above notice dated 26th March, 2018. As regards the non-filing of return of income, it was pointed out that the Petitioner's income from India consisted only of dividend and interest on which TDS has been deducted in accordance with the Act and/or the Double Taxation Avoidance Agreement ('DTAA') between India and Switzerland.

It was pointed out that the Petitioner, a tax resident of Switzerland (i.e. non-resident for Indian tax purpose), was specifically exempted from filing of return under Section 115A (5) of the Act. It was further pointed out that the CBDT Instruction No.14 of 2013 clearly stated the procedure to be followed in cases of such non-filing of return. As far as the purchase of shares of Nestle India was concerned, it is pointed out that shares were of its subsidiary and were purchased at the extant market price through recognised stock exchanges. It is pointed out that share purchase was a 'capital account' transaction and could not be treated as income. The Petitioner pointed out that the line in the 'Reason for Reopening' to the effect that the Petitioner had 'no assets located outside India' was factually incorrect. It was submitted that the reasons did not indicate any sound basis for income escaping taxation and in fact no income had escaped assessment.

10. The above objections were rejected by the Respondent by the impugned order dated 23rd October 2018. The Respondent observed that the case of the Petitioner had been selected for scrutiny because there was no material on record to examine the source of its 'income/stock expenditure/stock investment' in the above sum in the Annual Information Report ('AIR') as the Petitioner had not filed its return of income for AY 2011-12.

11. On 27th November, 2018 when this petition was first heard, the following order was passed:

> "1. Issue notice. Mr. Ruchir Bhatia, Standing Counsel for accepts notice.
>
> 2. The applicant/petitioner's grievance is that the impugned re-

assessment notice is contrary to law and was issued without application of mind. It points out that as a foreign company it derives income of dividend and interest income, both of which have received tax treatment in India appropriately [first as exempt and second subject to TDS], and it was exempted from the obligation to file returns under Section 115A of the Income Tax Act and the relevant departmental instructions. In these circumstances, "reasons to believe" in support of re-assessment notice, it is pointed out, do not disclose any tangible material other than the income derived by the assessee [exempted income and tax deducted income].

3. Prime facie the Court is of the opinion that the petitioner's arguments are merited. The respondents are consequently restrained from passing the final orders in the re-assessment proceedings during the pendency of the present petition.

4. List on 20th February, 2019."

12. Pursuant to the above notice a counter-affidavit has been filed by the Respondent in which, *inter alia*, the stand taken is more or less the same as stated in the reasons for issuance of the notice under Section 147 of the Act. Apart from standard defences that the Petitioner has an efficacious alternative remedy and that the Respondent at this stage is to only form a *prima facie* view that income has escaped assessment, it is asserted that 'as long as there is a live link between the material which was placed before the Assessing Officer at the time when reasons for reopening were recorded, proceedings under Section 147 of the Act would be valid'.

13. Mr. Porus Kaka, learned Senior Counsel appearing for the Petitioner submitted that this is a case of non-application of mind by the Respondent to the undisputed facts that the Petitioner was not required to file any return for

the AY in question in terms of Section 115A (5) of the Act, as further clarified in para 5 of the CBDT Instruction No.14 of 2013. A fundamental error had been committed by treating the investment made by the Petitioner in its subsidiary as 'income.' He pointed out that it was a settled position in law that a share transaction was a 'capital account transaction.' He referred to the decision of the Bombay High Court in ***Vodafone India Services Pvt. Ltd. v. Union of India (2014) 368 ITR 1 (Bom)*** holding to the above effect, which decision has been accepted by the Central Board of Direct Taxes (CBDT), which issued an Instruction No. 2 of 2015 dated 29th January, 2015 stating that the said decision must be adhered to by the Field Officers in all cases.

14. Mr. Kaka further submitted that in the counter-affidavit there is no denial of the basic facts, including the fact that during the AY in question the only income earned was through dividend and interest on which TDS had been deducted and, therefore, there was no question of any escapement of income whatsoever. The reference to Explanation 2(b) below Section 147 of the Act in the reasons supplied by the Respondent further reflected non-application of mind, since that provision had no application. It was Explanation 2 (a) that applied, but then again Section 115A (5) of the Act was completely overlooked. He pointed out that none of the objections raised by the Petitioner were in fact dealt with by the Respondent in the impugned order dated 23rd October 2018.

15. Mr. Raghvendra Singh, Senior Standing Counsel for the Revenue, submitted that a high value transaction of investment of Rs.2,79,23,68,985/-

within a short span of 14 days in the shares of the Petitioner's subsidiary by the Petitioner got automatically picked up by the NMS. It was correctly detected that the Petitioner had not filed any return. He referred to Section 147, Explanation 2(a) where the circumstance of non-filing of return of income would be deemed to be a case where income chargeable to tax has escaped assessment. He submitted that the notice was therefore issued bonafide and based on the undisputed fact of non-filing of return by the Petitioner.

16. Mr. Singh further submitted that the fact that the Petitioner had filed its return in response to the impugned notice was an indication that it accepted that it was obliged to do so in law. He also adverted to the possibility of the subsidiary of the Petitioner being a permanent establishment (PE) of the Petitioner and income being attributable on that basis which may have escaped assessment. He submitted that at this stage no interference was called for and all defences could be raised by the Petitioner in the assessment proceedings before the Respondent.

17. The above submissions have been considered. At the outset, it requires to be noticed that in the counter-affidavit filed by the Respondent there was no denial of the fact that the Petitioner is a company established under the laws of Switzerland and that it is a tax resident of Switzerland. It is undisputed that the Petitioner is entitled to protection under India's DTAA with Switzerland. The averments in para 6 of the petition where the Petitioner, enclosing its financials for the years ending 31st December, 2010 and 31st December, 2011 showing its consolidated revenue of CHF 109

Billion and 83 Billion respectively have not been disputed by the Respondent. The averments in para 7 of the petition that during the AY in question its receipts from its Indian subsidiary was to the tune of Rs.158 crores comprising 'only of dividend and interest on which tax is deductible at source and has been deducted in accordance with the provisions of the Act' has also not been disputed by the Respondent. It is also not disputed that the Petitioner is specifically exempted from filing of return under Section 115A (5) of the Act. To be precise, in response to the averments in paras 6 and 7, it is stated in the counter-affidavit that the contents of the above two paragraphs are 'a matter of fact and hence need no reply.'

18. Merely because the notice issued to the Petitioner was a system generated notice since the NMS detected the Petitioner as a non-filer does not automatically mean that the Petitioner has to be issued a notice under Section 147 of the Act. Even assuming that at the time notice was issued the Respondent was perhaps not fully aware of all the relevant facts, once the Petitioner submitted its objections drawing his attention to the specific legal position, it was obligatory for the Respondent to have applied his mind to those points. The order passed by the Respondent rejecting the objections on 23rd October, 2018 shows that there is no reference whatsoever to the specific objections of the Petitioner. Even a cursory examination of those objections would have dissuaded the Respondent from persisting with the proceedings consequent upon the impugned notice dated 26th March, 2018.

19. In particular, the Respondent failed to notice that under Section 115A (5) read with Section 115A (1) (a) there was no need for the Petitioner to file a

return of income under Section 139(1) of the Act. The relevant portions of the said provisions read as under:

> "115A. (1) Where the total income of—
>
> (a) a non-resident (not being a company) or of a foreign company, includes any income by way of—
>
> (i) dividends other than dividends referred to in section 115-O; or
>
> (ii) interest received from Government or an Indian concern on monies borrowed or debt incurred by Government or the Indian concern in foreign currency not being interest of the nature referred to in sub-clause (iia) or sub-clause (iiaa); or
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> (iia) interest received from an infrastructure debt fund referred to in clause (47) of section 10; or
>
> (iiaa) interest of the nature and extent referred to in section 194LC; or
>
> (iiab) interest of the nature and extent referred to in section 194LD; or
>
> (iiac) distributed income being interest referred to in sub-section (2) of section 194LBA;
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> (iii) income received in respect of units, purchased in foreign currency, of a Mutual Fund specified under clause (23D) of section 10 or of the Unit Trust of India,
>
> the income-tax payable shall be aggregate of—
>
> (A) the amount of income-tax calculated on the amount of income by way of dividends other than dividends referred to in section 115-O, if any, included in the total income, at the rate of twenty per cent;

(B) the amount of income-tax calculated on the amount of income by way of interest referred to in sub-clause (ii), if any, included in the total income, at the rate of twenty per cent;

(BA) the amount of income-tax calculated on the amount of income by way of interest referred to in sub-clause (iia) or sub-clause (iiaa) or sub-clause (iiab) or sub-clause (iiac), if any, included in the total income, at the rate of five per cent;

(C) the amount of income-tax calculated on the income in respect of units referred to in sub-clause (iii), if any, included in the total income, at the rate of twenty per cent; and

(D) the amount of income-tax with which he or it would have been chargeable had his or its total income been reduced by the amount of income referred to in sub-clause (i), sub-clause (ii), sub-clause (iia), sub-clause (iiaa), sub-clause (iiab), sub-clause (iiac) and sub-clause (iii) ;

….

(5) It shall not be necessary for an assessee referred to in sub-section (1) to furnish under sub-section (1) of section 139 a return of his or its income if —

(a) his or its total income in respect of which he or it is assessable under this Act during the previous year consisted only of income referred to in clause (a) of sub-section (1); and

(b) the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income."

20. The above provisions have to be read together with the CBDT Instruction No.14 of 2013 which sets down the SOP for cases under the NMS. Para 5 of the said instruction reads as under:

"If no return is required to be filed in the case (non-resident etc.), the Assessing Officer should mark "No return is

> required" and mention reason for the same in NMS which needs to be confirmed by Range head."

21. Far from actually referring to these specific objections of the Petitioner the Respondent wrongly adverted to Clause (b) of Explanation 2 when this was a case of no return having been filed and the case if at all would fall under Clause (a). Explanations 2(a) and (b) below Section 147 reads as under:

> "Explanation 2. For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-
>
> (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;
>
> (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;"

22. The above deeming fiction is a rebuttable one. It is not that every notice issued under Section 147 of the Act has to be carried to its logical end of an assessment. It is to avoid such a consequence which could end up being a futile exercise that the Supreme Court has devised a procedure in ***GKN Driveshafts (India) Ltd. v. Income Tax Officer*** (*supra*). The procedure outlined by the Supreme Court reads thus:

> "We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice

> under Section 148 of the Income tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking Order before proceeding with the assessment in respect of the abovesaid five assessment years."

23. The above procedure has to be mandatorily followed by the Respondent. It is the above procedure that required the Petitioner to file a return in order to be provided with the reason for issuing notice. Therefore, the filing of the return by the Petitioner could not have been construed as an admission by it of a legal obligation to file a return. In the Petitioner's case, the admitted facts make it abundantly clear that there was no obligation on the Petitioner to file a return of income for the AY in question.

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.

26. For the aforementioned reasons, this Court sets aside the impugned notice dated 26th March, 2018 and the impugned order dated 23rd October, 2018. The writ petition is allowed in the above terms, but in the circumstances, there is no order as to costs. The application is disposed of.

CM APPL. 49098/2019 (exemption)

27. Allowed, subject to all just exceptions.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 07, 2019
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