$~36

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

\+ W.P.(C) 10731/2022 & CM APPL. 31141/2022

TATA TELESERVICES LIMITED ..... Petitioner

Through: Mr.Kamal Sawhney with Mr. Prashant Meharchandani, Mr. NishankVashishtha and Mr. Nikhil Aggarwal, Advocates.

versus

COMMISSIONER OF INCOME TAX (IT) DELHI-3 & ORS. ..... Respondents

Through: Mr. Sunil Kumar Agarwal, Sr. Standing Counsel, Mr.Tushar Gupta, Jr. Standing Counsel and Mr.Utkarsh Tiwari, Advocate.

% Date of Decision: 18th July, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. The petitioner has filed the present writ petition impugning the order dated 2nd June, 2022 passed by CIT (IT), Delhi-3. The petitioner further seeks a direction to the respondents for granting complete and unconditional stay against the demand of INR 42,40,72,259/- arising out of the order dated 8th December, 2021 for relevant assessment year 2016-17 issued by

respondent No. 2 under Section 201(1)/201(1A) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), till the disposal of the appeal currently pending before CIT(Appeals) and to not treat the petitioner as an assessee in default. The petitioner also seeks a direction to the CIT (A) to dispose of the petitioner's appeal within eight (8) weeks from the order of this Court.

2. Learned counsel for the petitioner states that the disputed demand has arisen on account of the failure of the petitioner to deduct tax at source on the interest payments made to China Development Bank (hereinafter referred to as 'CDB'), which as per the petitioner was a bank wholly owned by the Government of China. He submits that as per article 11(3) of India-China Double Taxation Avoidance Agreement (DTAA), any interest income which arises in India and is payable to a financial institution wholly owned by the Government of China, would be exempt from tax in India. He states that therefore the petitioner was acting in accordance with the said DTAA when it did not make deductions towards withholding tax while making interest payments to CDB in the assessment year 2016-17.

3. He reiterated CDB is a financial institution wholly owned by the Government of China. He states that the impugned order erroneously records the ownership of Government of China in CDB only as 36.54%. He states that the balance 63.46% is also held by Government of China in as much as 61.87% shareholding is held by two (2) companies, which are in turn wholly owned by Government of China; and remaining 1.59 % is held by the National Council of Social Security Fund, which again is a part of the Government of China. He states that the aforesaid shareholding/ownership is duly disclosed in the Annual Report of the CDB for the year 2016, which

has been placed on record before the respondents.

4. Learned counsel for the petitioner states that the amended Protocol of India-China DTAA which was entered into on 5th June, 2019 and made applicable from 1st April, 2021 makes it further clear that CDB was and remains a 100% Government owned entity.

He further submits that the ownership of CDB before and after the amendment of the Protocol has not changed and the CDB is therefore, eligible to get exemption under the India-China DTAA. He has also drawn our attention to the Annual Report of the CDB for the year 2020 in support of his contention that the shareholding of the CDB remains unchanged and stands as it did in assessment year 2016-17.

5. Learned counsel for the petitioner states as is evident from the record its application seeking stay of the demand was summarily rejected by the assessing officer on the ground that as per the CBDT OM No. F. No. 404/72/93/-ITCC dated 29th February, 2016, AO cannot grant a stay until 20% of the disputed payment is paid. He submits that against the said rejection by the AO, the petitioner filed a review application before the CIT on 7th March, 2022 which was rejected by the CIT vide an unreasoned order dated 14th March, 2022. The said order of the CIT was challenged by the petitioner before this Court in W.P.(C) No. 4660/2022 wherein this Court vide order dated 23rd March, 2022 set aside the orders challenged therein observing the same are non-reasoned and remanded the review application with a direction to the CIT to decide the said application in accordance with the settled principles.

6. The CIT after giving an opportunity of hearing to the petitioner has dismissed the review application by the impugned order and upheld the

direction of the assessing officer directing the petitioner to deposit Rs. 8.48 crores (approx.) i.e. 20% of the total demand of Rs. 42.40 crores.

7. Learned counsel for the petitioner submits that CIT has made a verbatim reproduction of the assessment order to conclude that the petitioner has no *prima facie* case. The learned counsel for the petitioner states that the CIT has failed to deal with the contentions raised by the petitioner and has not applied its independent mind to the submissions of the petitioner with respect to the remaining 63.46% ownership of the CDB vesting in the Government of China despite the documents evidencing ownership of CDB being placed on record. He states that the respondent has failed to adjudicate the *prima facie* case on ownership of CDB before rejecting the application. He, further, submits that while deciding the stay application, the respondent has failed to consider the plea of financial hardship faced by the petitioner. In this regard he placed reliance upon the Income Tax Return (ITR) of the petitioner for the Assessment Year 2021-2022 as well as the extracts of financial statements for the year ending 31st March, 2021. He submitted that the petitioner has reported tax losses and unabsorbed depreciation of INR 34,706.78 crores as on 31st March, 2021 and he relied upon the ITR return to state that for the assessment year 2021-22, the petitioner has brought forward business losses of INR 9,671.83 crores. The petitioner also contended that the respondent has erred in considering the illustrations in the CBDT OM No. F. No. 404/72/93/-ITCC dated 29th February, 2016 as exhaustive and he submitted that stay can be granted by the respondent even if the case of the petitioner did not satisfy the said conditions.

8. The respondent appeared on advance service and accepted notice. At the outset, the learned counsel for the respondent submitted that he has no

objection if the petitioner's prayers seeking direction to CIT (A) to dispose of the petitioner's appeal in a time bound manner is allowed. He, however, submitted that the petitioner in this writ petition is seeking an order from this Hon'ble Court on the *prima facie* merits of the case as regards the ownership of CDB, which is impermissible since this issue has to be determined in the pending appeal. He stated that the contention raised by the petitioner as regards the ownership of the China Development Bank is an issue of fact which should be determined in the appeal by the Appellate Authority after appreciation of evidence on record. He submitted that this Court must not make any *prima facie* observations as regards the said issue of ownership as it would prejudice the parties herein. He submitted that there is no error committed by the CIT in the impugned order as admittedly the two conditions of the CBDT OM No. F. No. 404/72/93/-ITCC dated 29th February, 2016 are not attracted in the facts of this case. With respect to the amended protocol, he submits that the said amended protocol is prospective and will be applicable from 1st April, 2020 which fact is not disputed by the learned counsel for the petitioner. The respondent contends that the facts of the present case will be determined with respect to the un-amended protocol.

9. With respect to the Annual Reports of the CDB, the learned counsel contends that as is evident from the Annual Report of the CDB, 61.87% of the shareholding is held by two companies. He contends that a company owned by a state is not a state and therefore the provisions of DTAA were not attracted. He further states that neither condition set out in CBDT OM No. F. No. 404/72/93/-ITCC dated 29th February, 2016 is satisfied in this case.

10. He, further, submitted that plea of hardship was duly considered by

the CIT and it has been held that no case of hardship has been made out by the petitioner as observed in the impugned order in view of the fact that the amount required to be deposited is a sum of 8.48 crores which is within the means of the petitioner. He states that the petitioner is a group company of the prestigious TATA business group and therefore, the submission of hardship cannot be countenanced. He, therefore, submitted that there was no case made out for interference in the present proceedings.

11. We have heard the parties and we find force in the submissions of the counsel for the respondents that this Court cannot at this stage cannot arrive at any conclusion, *prima facie* or otherwise with respect to ownership of the CDB, which will be determined in the present appeal after due consideration of the documents relied upon by both the parties. The respondents do not admit the inference of ownership drawn by the petitioner on the basis of the documents placed on record by the petitioner being the annual reports of the CDB. The ownership of the CDB being a disputed question of fact cannot be decided by this Court and it cannot be a matter of *prima facie* determination as it is the material fact to be determined in the appeal filed by the petitioner.

12. In this regard, the judgment of the Hon'ble Delhi High Court in ***GE Capital Mauritius Overseas Investments v. Deputy Commissioner of Income Tax and Another*** reported in ***2021 SCC OnLine Del 2784*** has observed as under:-

> *"**13.** The counsels were heard on 23rd September, 2020, 9th October, 2020 and 4th December, 2020, when orders were reserved. The contentions of the counsels are on two aspects. Firstly, on the timing of the order under Section 241A of the Act and secondly qua the reasons stated in the order under Section 241A aforesaid, with:*
>
> *...*

E. the senior counsel for the petitioner in sur-sur-rejoinder contending that the counsel for the respondents has not furnished any explanation whatsoever for the delay in refund and in issuing notice under Section 241A of the Act. 13. We have considered the rival contentions and are of the view:

...

VIII. The AO and the Principal Commissioner, in exercise of powers under Section 241A, are required to take a prima facie view of the outcome of the assessment pursuant to notice under Section 143(2). They are also the authorities vested with the power of assessment. The authority vested with the power of final determination is the best authority to take a prima facie view. Moreover, the statute provides statutory remedies in the form of appeals, against the final determination by such authority. In such statutory scheme, under Section 260A, appeal lies to the High Court against orders of the Income Tax Appellate Tribunal. A determination of tax liability in a challenge to an order under Section 241A would set at naught the entire statutory scheme of assessment and appeals, ultimately to this Court, opening the doors to every assessee to whom a notice under Section 143(2) of the Act is issued, to approach this Court contending that the ITR filed and being processed under Section 143(1) of the Act admits/permits of no scrutiny and should be accepted. This Court would then be appropriating to itself the entire statutory mechanism of assessment, First Appeals and Appeals to Income Tax Appellate Tribunal and thereafter to this Court.

IX. Section 241A of the Act, though in the nature of attachment before judgment, but owing to the determination of tax liability being not in the domain of this Court, save under Section 260A, but in the domain of the statutory scheme under the Income Tax Act, this Court in writ jurisdiction while entertaining a challenge to an order under Section 241A of the Act, will ordinarily not enter into the correctness of reasons given for holding that the assessee may be ultimately found liable for tax. The Courts, when in exercise of powers of attachment before

> *judgment, go into the question of prima facie merits of the claim of the party seeking attachment before judgment, are empowered to do so because the ultimate decision in the said respect also rests in the Court. However the Court does not have jurisdiction qua the determination of tax and which jurisdiction is exercised by this Court only in exercise of powers under Section 260A of the Act, on a substantial question of law arising and not otherwise. When this Court has not been empowered to assess tax liability in the first instance, it would ordinarily not form a prima facie view even, of what it is not finally empowered to do."*
>
> (Emphasis Supplied)

The observations made by the Court in the said judgment though were in the context of Section 241A of the Act which was challenged by the petitioner therein in the writ proceedings would also be attracted in the facts of the present case wherein the petitioner seeks a *prima facie* determination of its claims on merits from this Court.

13. With respect to the plea of hardship, it is noted from the petitioner's standalone statement of profit & loss that its earnings before interest, tax, depreciation and amortisation for the year ended 31st March, 2021 is Rs. 330.76 crores. It is further noted that the revenue from operations of the petitioner for the same year stand at Rs. 1604.66 crores. So also the current assets of the petitioner are reported as Rs. 4,930.34 crores. With respect to the contention of the petitioner as regards brought forward losses of Rs. 9,671.83 crores as reported in its ITR for AY 2021-22, it is noted that out of the same, Rs. 7167 crores have been set off in the AY 2021-22. The petitioner has not suffered any operational losses in the relevant financial year. In these circumstances, the plea of hardship as raised by the petitioner is not made out.

14. Accordingly, the impugned order dated 2nd June, 2022 does not call

for any interference. We, however, direct the Commissioner (Appeals) to dispose of the appeal within a period of 12 weeks from today.

15. Writ petition and the pending application(s) are accordingly disposed of.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

JULY 18, 2022/msh