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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Decision delivered on: 09.08.2023

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W.P.(C) 10485/2023 & CM APPL.40642/2023

BANYAN REAL ESTATE FUND MAURITIUS Petitioner

Through: Mr Indruj Singh Rai with Mr Bharat
Jain and Ms Aanchal Jain, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE

INTERNATIONAL TAX 1 1 2 & ANR. Respondents

Through: Mr Puneet Rai, Sr Standing Counsel
with Mr Ashvini Kumar, Ms Madhavi
Shukla, Standing Counsels along with
Mr Nikhil Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM APPL. 40641/2023

1. Allowed, subject to just exceptions.

W.P.(C) 10485/2023 & CM APPL. 40640/2023*[Application filed on
behalf of the petitioner seeking interim relief].*

2. This writ petition concerns Assessment Year (AY) 2016-17.

3. The record, as presently made available to us, shows that there has
been no application of mind by the Assessing Officer (AO).

4. Evidently, the petitioner was issued a notice dated 24.03.2023 under
Section 148A(b) of the Income Tax Act, 1961 [in short, "The Act"].

5. The allegation levelled against the petitioner concerned the following
two aspects:



(i) First, it had remitted monies to non-resident/foreign company.

(ii) Second, it had paid Rs.1 lakh or more, for acquiring shares.

5.1 Insofar as remittances were concerned, in the notice under Section 148A(b) of the Act, there are two amounts mentioned i.e. Rs. 36,70,31,500/- & Rs. 8,98,87,560/-.

5.2 Insofar as the allegations concerning the monies paid by the petitioner for acquiring shares was concerned, it was pegged at Rs. 10,18,59,480/-.

6. As required in the aforesaid notice, the petitioner filed a response dated 04.04.2023, whereby it was conveyed that a serious error was committed by the AO.

7. It was pointed out that the petitioner had, in fact, received monies upon the sale of shares, and not, as alleged, remitted monies through a non-resident/foreign company.

7.1 In this regard, the petitioner indicated that it had sold shares of two entities i.e., Landmark Hi Tech Development Private Limited and Safari Retreats Private Limited.

7.2 Insofar as the amount received on sale of share of Landmark Hi Tech Development Private Limited was concerned, it was asserted that the petitioner had received Rs. 36,70,31,500/-, and, likewise upon sale of shares of Safari Retreats Private Limited, it was averred that the petitioner had received Rs. 8,98,87,560/-.

7.3 Therefore, the cumulative amount that the petitioner claimed it had received on sale of the shares was Rs. 45,69,19,060/-.

8. As regards the other allegation, which is that it had paid Rs.10,18,59,480/- for acquiring shares, the petitioner submitted that it had,



in the first instance, acquired 1,41,47,150 shares from a company going by the name Treasured Developers Pvt. Ltd. (TDPL).

8.1 The petitioner further averred that, against these shares, it was allotted 70,73,575. bonus shares. Thus, at the given point of time, the petitioner held 2,12,20,725 equity shares in TDPL.

8.2 The petitioner claims that an amalgamation took place between TDPL and another company, namely, Suncity Dhoot Colonizers Private Limited. It is stated that the scheme of amalgamation concerning these companies was sanctioned *via* an order dated 22.06.2015 passed by the Delhi High Court in Company Petition No. 417/2015.

8.3 The petitioner claims that, consequent to the amalgamation, it was allotted 1,01,85,948 shares of Suncity Dhoot Colonizers Private Limited, bearing a face value of Rs. 10 per share.

8.4 Thus, the explanation given was that the amount which was flagged by the AO, was nothing but the face value of the aforementioned shares amounting to Rs.10,18,59,490/-.

9. The petitioner also brought to the notice of the AO that the allotment of shares in a scheme of amalgamation was not construed as transfer under the Act. In this regard, the provisions of Section 47(vii) of the Act was mentioned by the petitioner.

10. According to the petitioner, the allegations stemmed from the erroneous assumption in the notice dated 24.03.2023 issued under Section 148A(b) of the Act that the petitioner had not filed its Return of Income(ROI).

11. Mr Indruj Singh Rai, learned counsel, who appears on behalf of



petitioner, says that the entire transaction was disclosed by the petitioner in the ROI.

12. In this behalf, our attention was drawn to the copy of the ROI placed on record by the petitioner. A perusal of the ROI shows that the petitioner had disclosed the sale of shares and had also claimed exemption on the long term capital gain earned by it.

13. The AO, while noticing the reply filed by the petitioner, seems to have continued on the course embarked upon by him i.e., continuing with the reassessment proceedings, without any course correction.

13.1 It is quite obvious that the AO has muddled up the facts and thus made allegations which, *prima facie*, don't appear to be correct.

14. Furthermore, as pointed out by the Mr Indruj Singh Rai, for the first time, in the Section 148A(d) order, the AO seems to have flagged the issue that the petitioner was attempting to take benefit of the Double Tax Avoidance Agreement (DTAA) executed between India and Mauritius, and, in this context, stated that it had failed to provide the audited balance sheets of Indian entities, whose shares were sold in the AY in issue.

15. Furthermore, on this aspect, the AO also made observations that the details concerning the Directors, shareholding patterns of the Indian entities, the Minutes of Board Meeting and the valuation report as per Section 50 of the Act, read with rule 11UA, had not been submitted.

16. A bare perusal of the notice dated 24.03.2023 issued under Section 148A(b) of the Act would show that these aspects were not adverted to by the AO.

17. However, on being queried, Mr Indruj Singh Rai, did concede that the



benefit of the DTAA has been denied to the assessee for AY 2014-15. It is, however, stated by the Mr Indruj Singh Rai that this aspect is pending adjudication before this Court in W.P(C) No. 4652/2022.

18. Mr Puneet Rai, learned senior standing counsel, who appears on behalf of respondent/revenue says that he would have to file a counter-affidavit in the matter.

19. Accordingly, issue notice.

19.1 Mr Puneet Rai, learned senior standing counsel accepts notice on behalf of the respondents/revenue.

20. Counter affidavit will be filed within six weeks.

20.1 Rejoinder thereto, if any, will be filed, at least five days before the next date of hearing.

21. List the matter on 12.02.2024.

22. In the meanwhile, operation of the impugned order dated 27.04.2023 passed under Section 148A(d) of the Act and the consequent notice of even date i.e., 27.04.2023 issued under Section 148 of the Act shall remain stayed.

23. Parties will act based on the digitally signed copy of the order.

**RAJIV SHAKDHER
JUDGE**

**GIRISH KATHPALIA
JUDGE**

AUGUST 9, 2023/RV