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

+ W.P.(C) 15928/2023 & CM APPL. 64160-64161/2023

M/S ANGELANTONI TEST TECHNOLOGIES SRL Petitioner

Through: Mr. Ved Jain, Ms. Nischay Kantoor,
Ms. Soniya Dodeja, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE INT
TAX 1(1)(1) & ORS. Respondents

Through: Mr. Ruchir Bhatia, Sr. Standing
Counsel

+ W.P.(C) 7021/2023 & CM APPL. 27339/2023

DAICEL CORPORATION Petitioner

Through: Mr. Salil Kapoor, Ms. Ananya
Kapoor, Mr. Sumit Lalchandani, Mr.
Vibhu Jain, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE INT
TAX 1-2-2 Respondent

Through: Mr. Aseem Chawla, Sr. Standing
counsel with Ms. Pratishtha
Choudhary, Ms. Nivedita, Mr. Aditya
Gupta, Advocates for Revenue
Mr. Ruchir Bhatia, Sr. Standing
Counsel

+ W.P.(C) 7543/2023 & CM APPL. 29234/2023

CREATION INVESTMENTS INDIA III, LLC Petitioner

Through: Mr. Kamal Sawhney, Mr. Nikhil
Agarwal, Mr. Nishank Vashishtha,
Mr. Puru Medhira, Advocates

versus



ASSISTANT COMMISSIONER OF INCOME TAX Respondent
Through: Mr. Ruchir Bhatia, Sr. Standing
Counsel

+ W.P.(C) 7836/2023 & CM APPL. 30212/2023

ELARA TECHNOLOGIES PTE LTD. , NOW KNOWN AS REA
INDIA PTE LTD. Petitioner
Through: Mr. Tarun Gulati, Sr. Advocate with
Ms. Ishita Farsaiya, Mr. Apoorv
Shukla, Mr. Pursoth Kannan,
Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION CIRCLE, 1.2.2, NEW
DELHI & ORS. Respondents
Through: Mr. Ruchir Bhatia, Sr. Standing
Counsel
Mr. Sunil Agarwal, Sr. Standing
Counsel with Mr. Shivansh B.
Pandya, Mr. Utkarsh Tiwari,
Advocates for Revenue

+ W.P.(C) 7859/2023 & CM APPL. 30293/2023

HYDREQ PTE LIMITED Petitioner
Through: Mr. Ruchesh Sinha, Ms. Monalisa
Maity, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE INT.
TAX. 2(1)(1) DELHI & ANR. Respondents
Through: Mr. Ruchir Bhatia, Sr. Standing
Counsel
Mr. Sanjay Kumar, Ms. Heemlata
Rawat, Advocates for Revenue



+ W.P.(C) 9482/2023 & CM APPL. 36223/2023

FK MYNTRA HOLDINGS PRIVATE LIMITED Petitioner

Through: Mr. Kumar Visalaksh, Mr. Udit Jain,
Mr. Arihant Tater, Mr. Ajitesh Dayal
Singh, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE INT
TAX 1-3-1, NEW DELHI Respondent

Through: Mr. Ruchir Bhatia, Sr. Standing
Counsel

+ W.P.(C) 9493/2023 & CM APPL. 36254/2023

FLIPKART MARKETPLACE PRIVATE LIMITED Petitioner

Through: Mr. Kumar Visalaksh, Mr. Udit Jain,
Mr. Arihant Tater, Mr. Ajitesh Dayal
Singh, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME-TA INTERNATIONAL
TAXATION CIRCLE 1- 3- 1, DELHI Respondent

Through: Mr. Ruchir Bhatia, Sr. Standing
Counsel

+ W.P.(C) 11331/2023

SMITH AND NEPHEW ASIA PACIFIC PTE LTD Petitioner

Through: Mr. Nishant Thakkar, Mr. Nikhil
Ranjan, Mr. Hiten Thakkar, Ms.
Jasmin Amalsadwala, Mr. Kamal
Arya, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX
& ANR. Respondents

Through: Mr. Ruchir Bhatia, Sr. Standing
Counsel
Mr. Santosh Kumar Pandey, Sr. Panel
Counsel for UOI



**CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MINI PUSHKARNA**

ORDER

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19.12.2023

1. Present writ petitions have been filed seeking quashing of the impugned notices issued under Section 148A (b) of the Income Tax Act, 1961 (the “Act”), impugned orders passed under Section 148A(d) of the Act, and notices issued under Section 148 of the Act, and all consequential actions thereto. Petitioners also challenge the legality and constitutional validity of Explanation 1 to Section 148 of the Act.
2. Though a common question of law arises in the present batch of matters, yet facts of each case differ slightly. Just to give a glimpse of the factual scenario, the background facts of *M/s Angelantoni Test Technologies SRL Versus Assistant Commissioner of Income Tax, Circle Int Tax 1(1)(1) & Ors.* being *W.P.(C) 15928/2023* are mentioned, namely, that the petitioner is a foreign company and is a resident of Italy. Learned counsel for petitioner states that during FY 2018-19, the petitioner had subscribed to 15,00,000 shares at face value of Rs. 10 each by making foreign inward remittance of Rs. 1,50,00,000 in its wholly owned Indian subsidiary namely, Angelantoni Test Technologies India Pvt. Ltd. in accordance with applicable regulations. He further states that since the Petitioner had not earned any income from any source in India, the Petitioner did not file return of income in India.
3. Learned counsel for the Petitioners submit that the transactions in question are capital account transactions which are incapable of generating any income. They contend that the impugned orders and notices have been



passed merely to verify the transactions without any tangible material in possession of the Respondent to indicate escapement of income. They further state that there is no information/ material including the name of the company whose shares were purchased, referred to or relied upon in the impugned notice, which could trigger 'suspicion' of escapement of income chargeable to tax. In fact, the common argument in the present batch of matters is that investment of shares of another entity cannot be construed as income which is chargeable to tax and/or has escaped assessment.

4. Learned counsel for the respondents-revenue state that notices under Section 148A(b) had been issued in the present batch of matters in accordance with the Risk Management Strategy formulated by the Central Board of Direct Taxes ("CBDT") in terms of Explanation 1 to Section 148 of the Act.

5. The admitted facts in the present batch of matters are that the assesseees are foreign companies who have made remittances/investment in shares of their Indian subsidiaries. It is an admitted position that the transactions in question are capital account transactions. Though there is a doubt expressed that the transactions in question may be a consequence of round tripping, yet no evidence or proof of the said allegations have been stated or annexed with the impugned orders and notices.

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 Versus 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. Versus 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) vs. Assistant Commissioner of Income Tax Circle 7(1) Delhi & Anr., 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’.

10. Consequently, the impugned orders under Section 148A (d) of the Act and the notices passed under Section 148 of the Act and all consequential action taken thereto are set aside. It is clarified that if any material becomes subsequently available with the Revenue, it shall be open to it to take proceedings in accordance with law. The challenge to the vires to Explanation 1 to Section 148 of the Act is left open. With the aforesaid directions, the present batch of writ petitions is disposed of.

ACTING CHIEF JUSTICE

MINI PUSHKARNA, J

DECEMBER 19, 2023

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