HIGH COURT OF JUDICATURE AT BOMBAY

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1454 OF 2014

M/s S.G.Asia Holdings (India) Pvt. Ltd. ...Petitioner
vs
Deputy Commissioner of Income Tax, Transfer Pricing-II(7) Mumbai & Ors. ...Respondents

.....

Mr Percy Pardiwala, Senior Counsel, Mr Sunil Moti Lala, Mr Gautam Gaikwad, S.Thacker i/b Mr Paras Sumtichandra Savla for the Petitioner
Mr Tejveer Singh for the Respondents

.....

CORAM : M.S.SANKLECHA
& S.C. GUPTE, JJ.

NOVEMBER 19, 2014

P.C. :

At the request of the learned Counsel, the Petition is taken up for final disposal at the stage of admission.

2 At the very outset, Mr Pardiwalla, learned Senior Counsel for the Petitioner, on instructions states that Petitioner undertakes that the objection filed by the Petitioner to the draft assessment order dated 31 January 2014 before the Dispute Resolution Panel (for short “DRP”) would be withdrawn by the Petitioner to the extent it relates to the issues raised in the present Petition. The undertaking is accepted. It is only thereafter that we proceed to consider the merits of this Petition.

3 This Petition challenges the following orders:-

a) The order dated 30 January 2014 passed under Section 92CA(3) of the Income Tax Act, 1961 (for short “the Act”) by Transfer Pricing Officer (for short “TPO”); and

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b) Draft Assessment Order dated 31 January 2014 passed by the Assessing Officer;

4 The challenge to the above impugned orders is that to the extent, the impugned orders have held that the difference between the ALP at which the equity shares had to be issued and the prices at which the equity shares have actually been issued, gives rise to the income chargeable to tax under the Act. Mr Pardiwala states that this Court in **Vodafone India Services Pvt. Ltd. Vs. Union of India, 368 ITR 1 (Vodafone-IV)**, concludes the issue in favour of the Petitioner. Mr Pardiwala further refers to the decision of this Court in Writ Petition No.589 of 2014 in **Vodafone India Services Pvt. Ltd Vs. Union of India (Vodafone V)** rendered on 13 October 2014 wherein the findings in Vodafone IV have been *inter alia* summarized as under:-

(I) *The sine-qua-non to apply Chapter X of the Act would be arising of Income under the Act out of an International Transaction. This income should be chargeable under the Act, before Chapter X can be applied;*

(II) *The definition of income does not include within its scope capital receipts arising out of capital account transaction unless so specified in Section 2(24) of the Act as income;*

(III) *There is no charge in the Act to tax amounts received and/or arising on account of issue of shares by an Indian entity to a non-resident entity in Sections 4,5,15,22,28,45 and 56 of the Act. This is as it arises out of Capital Accounts transaction and, therefore, is not income;*

(IV) *Chapter X of the Act does not contain any charging provision but is a machinery provision to arrive at ALP of a transaction between Associated Enterprises; and*

(V) *Chapter X of the Act does not change the character of the receipts but only permits re-quantification of income uninfluenced by the relationship between the Associated Enterprises."*

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5 Mr Tejveer Singh, learned Counsel for the Respondent very fairly states that the issue arising in the present Petition stands concluded in favour of the Petitioner by virtue of Vodafone IV.

6 In view of the above accepted position, we set aside the order dated 30 January 2014 of TPO to the extent it seeks to bring to tax the shortfall in the consideration received on issue of shares when compared to the ALP at which the shares ought to have been issued and the consequent deemed interest on the alleged shortfall, is quashed and set aside. As a consequence, Draft Assessment Order dated 31 January 2014 is also set aside to the extent the order of TPO dated 30 January 2014 is set aside. It is further clarified that all other issues raised by the Petitioner before DRP against the draft Assessment Order dated 31 January 2014 would be considered by DRP on its merits.

7 Accordingly, the Petition is allowed in above terms. There shall be no order as to costs.

(S.C.GUPTE J.) **(M.S.SANKLECHA J.)**

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