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

% *Date of Decision: 05.09.2023*

+ **W.P.(C) 11789/2023**

ORION SECURITY SOLUTIONS P. LTD Petitioner
Through: Mr Salil Aggarwal, Sr Adv. with Mr
Ravi Pratap Mall and Mr Uma
Shankar, Advs.

versus

DCIT CIRCLE 19 (1) NEW DELHI & ORS. Respondents
Through: Mr Sunil Agarwal, Sr Standing
Counsel with Mr Shivansh B. Pandya,
and Mr Utkarsh Tiwari, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

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

CM Appl.46041/2023

1. Allowed, subject to just exceptions.

W.P.(C) 11789/2023 & CM Appl.46040/2023

2. Issue notice.

2.1 Mr Sunil Agarwal, learned senior standing counsel, accepts notice on behalf of the respondent/revenue.

3. In view of the directions that we propose to pass, Mr Agarwal says that a counter-affidavit need not be filed in the matter and that he will argue based on the record presently available with the court.



- 3.1 Therefore, with the consent of the learned counsels for the parties, the writ petition is taken up for final hearing and disposal at this stage itself.
4. The short issue which arises for consideration in this writ petition is as to how the Central Board of Direct Taxes (CBDT)'s Office Memorandum dated 29.02.2016, read with the amendment made on 25.08.2017, is to be interpreted.
5. The facts and figures set forth in the writ petition are supported by documents, which currently are not in dispute.
6. The record shows that *qua* the Assessment Year (AY) in issue i.e., AY 2021-22, the petitioner/assessee had filed a Return of Income (ROI) on 15.03.2022, wherein it had declared its taxable income as Rs.1,04,06,610/-.
- 6.1 The Assessing Officer (AO), however, while processing the return, made an addition amounting to Rs.146,72,96,789/- *via* the assessment order dated 19.12.2022. This assessment order was passed under Section 144 read with Section 144B of the Income Tax Act, 1961 [in short, "Act"].
7. Resultantly, the aggregate tax liability of the petitioner/assessee was pegged at Rs.44,10,05,569/-.
8. The petitioner/assessee claims that after adjustments were made with regard to the tax deducted at source (TDS) and tax collected at source (TCS) amounting to Rs.11,03,97,170/- and Rs.25,463/- respectively, the total tax liability of the petitioner/assessee was scaled down to Rs.33,05,82,936/-.
9. There is no dispute that this is the very amount which is mentioned in the notice of demand dated 19.12.2022 issued under Section 156 of the Act.
10. We may also note that there is no dispute that the refund payable to the petitioner/assessee for AY 2022-23, amounting to Rs.14,11,32,594/-, has



been adjusted against the tax demand raised for AY 2021-22.

11. Therefore, the total amount, which has been adjusted against the aggregate tax liability of the petitioner/assessee (which, as noticed above, Rs.44,10,05,569/-) is an amount equivalent to Rs.25,15,55,227/-; this is inclusive of Rs.11,04,22,633/- [Rs.11,03,97,170/- + Rs.25,463/-] and Rs.14,11,32,594/-.

12. Based on the aforesaid, it is submitted by Mr Salil Aggarwal, learned senior counsel, who appears on behalf of the petitioner/assessee, that contrary to the prescription of the aforementioned OM, the respondents/revenue have recovered by way of taxes, an amount in excess of 20%, even while the petitioner/assessee's appeal is pending adjudication before the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"].

13. On the other hand, Mr Sunil Agarwal, learned senior standing counsel, who appears on behalf of the respondents/revenue, submits that if the aforementioned OM is applied, then the amount that the respondents/revenue could have recovered would be 20% of the balance demand, which is Rs.33,05,82,936/-, in addition to the amount recovered as TDS and TCS.

13.1 In support of this plea, Mr Sunil Agarwal draws our attention to paragraph 2 of the aforementioned OM. For the sake of convenience, paragraph 2 of the OM is extracted hereafter:

"2. In part 'C' of the Instruction, it has been prescribed that a demand will be stayed only if there are valid reasons for doing so and that mere filing of an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. It has been further prescribed that while granting stay, the field officers may require the assessee to offer a suitable security (bank guarantee, etc.) and/or require the assessee to pay a reasonable amount in lump sum or in installments."



14. Based on the language of para 2 of the aforementioned OM, Mr Sunil Agarwal says that the expression ‘demand’ has to be understood in the backdrop of Section 156 of the Act. It is, therefore, Mr Sunil Agarwal’s submission that the demand would include any tax, interest, penalty, fine, or any other sum payable in consequence of any order passed under the Act.

14.1 In other words, it is Mr Sunil Agarwal’s submission that the amount mentioned in the notice of demand issued under Section 156 of the Act would form the basis for calculating 20% of the sum that can be recovered by the respondents/revenue while the appeal is pending adjudication.

14.2 Mr Sunil Agarwal, thus, says that a certain amount beyond 20% would perhaps be refundable, but not an amount which the petitioner/assessee seeks as refund, which is, Rs.16,08,25,490/-.

15. We have heard the learned counsels for the parties and perused the record.

16. As indicated hereinabove, the facts and figures placed on record by the petitioner/assessee are not in dispute.

17. The aggregate tax liability which got crystallized for the AY in issue, i.e., AY 2021-22, was Rs.44,10,05,569/-. Therefore, in our view, any amount towards tax recoverable, either directly or indirectly, would fall within the stipulation of 20%, as indicated in the aforementioned OM.

18. What is not in dispute is that Rs.11,04,22,633/- has already been deposited by the payers of the petitioner/assessee in the form of TDS and TCS.

19. Likewise, the respondents/revenue have also recovered



Rs.14,11,32,594/-, which was payable to the petitioner/assessee as refund qua AY 2022-23.

20. As noticed above, the total sum which the respondents/revenue have recovered against the crystallized tax liability of Rs.44,10,05,569 is Rs.25,15,55,227/- [Rs.11,04,22,633/- + Rs.14,11,32,594/-]. The said amount is 57.04% of the crystallized tax liability which, as indicated above, is Rs.44,10,05,569/-.

21. Therefore, unless the conditions prescribed in paragraph 4(B) of the aforementioned OM kicked in, the respondents/revenue could have recovered only 20% of the crystallized demand of Rs.44,10,05,569/-.

22. It is not the case of the respondents/revenue that the conditions prescribed in paragraph 4(B) of the aforementioned OM are applicable in this case.

23. The argument advanced by Mr Sunil Agarwal that the expression 'demand' in paragraph 2 of the aforementioned OM would mean the amount referred to in the notice of demand is untenable as Section 156 of the Act defines the ingredients of demand. The ingredients of the demand are tax, interest, penalty, fine, or any other sum payable by the assessee, in consequence of any order passed under the Act.

23.1 The order passed under the Act is the order framing the assessment i.e., the order dated 09.12.2022. As per the said order, the crystallized tax liability of the petitioner/assessee was Rs.44,10,05,569/-.

23.2 Therefore, 20% can only be calculated against the said amount and not against the scaled-down amount i.e., Rs.33,05,82,936/-; which is a figure arrived at, after giving credit to the petitioner/assessee in respect of tax



deposited by the third parties. In other words, contrary to the contention of Mr Sunil Agarwal and respondents/revenue, the amount that an assessee would need to deposit for the purposes of obtaining stay on the demand pending the decision in the appeal will have to factor in TDS and TCS.

24. Given the foregoing reasons, we are inclined to direct the respondents/revenue to refund the amount, which is in excess of 20% of Rs.44,10,05,569/- after carrying out the requisite verifications. The amounts already collected by TDS and TCS will have to be adjusted against the amount arrived at by applying the rate of 20% against tax crystallised as per the assessment order.

25. The amount payable, if any, will be remitted to the petitioner/assessee within the next four (4) weeks.

26. Needless to add, the amount remitted will include applicable interest.

27. The writ petition is disposed of, in the aforesaid terms.

28. Consequently, the pending interlocutory application shall stand closed.

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

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

SEPTEMBER 5, 2023/pmc