$~19

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

\+ ITA 417/2023

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-2 .....Appellant
Through: Mr. Sanjay Kumar, Ms. Easha & Ms. Hemlata, SCs.

versus

M/S MONDON INVESTMENT LTD. .....Respondent
Through: Dr. Rakesh Gupta, Mr. Somil Agarwal & Mr. Dushyant Agarwal, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% 11.07.2024

1. Having heard Mr. Kumar and Mr. Gupta, learned counsels appearing for respective sides, we note that the principal issue pertains to the applicability of Article 11 of the Indian Cyprus Double Taxation Avoidance Agreement [**'DTAA'**].

2. The question itself arises in the context of the assessee on 30 November 2007 having subscribed to 15% Fully Convertible Debentures of a face value of Rs.100/-. Those debentures were issued by the following Indian entities :-

a. Apogee Reality Ventures Pvt. Ltd.

b. Perigee Reality Ventures Pvt. Ltd.

c. Symmetree Realty Ventures Pvt. Ltd.

d. Energy Realty Ventures Pvt. Ltd.

3. The record would reflect that the debentures were subsequently converted into 0% Fully Convertible Debentures with effect from 01 January 2009. It is in the aforesaid backdrop that the Tribunal has chosen to follow its decision rendered for Assessment Year **['AY']** 2009-2010 and the relevant extracts whereof are reproduced hereinbelow:-

> "**20.** The aforesaid para envisages that for taxing the interest income in the hands of a non-resident, it is necessary that the interest should arise in a contracting state, i.e., twin conditions of accrual as well as the payment are to be satisfied. If there is no accrual or actual payment received same is to be decided within the scope of Article at the TPO/AO have sought to tax is that, assessee as sip used to receive interest of 18%, if the contingent event o d have arisen, i.e., if in the event, the option was exercised by the assessee to sell its converted shares to the promoters of investee company at an option price then it would have given the return of 18%. Thus, entire edifice of the TPO/AO was based on fixation of contingent event which assessee was supposed to receive. It is also matter of record, no such conversion was actualised and assessee remained invested even during the year under consideration. The transfer pricing adjustment has been made on this hypothetical amount of interest receivable. Whether such notional income can be brought to tax even under the transfer pricing provision, has been dealt by the Hon'ble Bombay High Court in the case of Vodafone India Services (P) Lid. vs. Union of India (supra), wherein their Lordships have held that even income arising from international transaction must satisfy the test of income under the Act and must find its home in one of the charging provisions. Here in this case, nowhere the TPO/AO has been able to establish that notional interest satisfy the test of income arising or received under the charging provision of Income Tax Act. If income is not taxable in terms of section 4, then chapter X cannot be made applicable, because section 92 provides for computing the income arising from international transactions with regard to the ALP. Only the interest income chargeable to tax can be subject matter of transfer pricing in India. Making any transfer pricing adjustment on interest which has neither been received nor accrued to the assessee cannot be held to be chargeable in terms of the Income Tax Act read with Article 11(1) of DTAA. Here it cannot be the case of accrual of interest also, because none of the investee companies have acknowledge that any interest payment is due, albeit they have been requesting for waiving of interest of even coupon rate of 4%, leave alone the return of 18% which was dependent upon some future contingencies. Assessee despite all its efforts has acceded to

such request. Further, in the India Cyprus DTAA wherein similar phrase has been used pertaining to FTS and Royalty in India Cyprus DTAA, Hon'ble Bombay High Court held that assessment of royalty or FTS should be made in the year in which amount have actually received and not otherwise. The coordinate bench of Mumbai ITAT in the case of Pramerioe ASPF II Cyprus Holding Ltd. vs. DCIT (supra) on exactly similar set of facts, addition on account of notional interest was made the Tribunal has held that the interest income in question can only be taxed on payment /receipt basis. The relevant observation has already been incorporated above. The Hon'ble Bombay High Court has confirmed the said finding, Similar view has been taken by the ITAT Chennai Bench in the case of DCIT vs. Inzi Control India Limited (supra). Thus, in view of Article 11(1) we hold that, only the interest which actually been received can only be subject matter of taxation and no TP adjustment can be made on some hypothetical receivable amount which was contingent upon certain event which has actually not been taken place during the year. Thus, the order of the Direction of the DRP is upheld and the grounds raised by the revenue are dismissed."

4. Mr. Kumar, learned counsel prays for time to place his Brief Synopsis of Submissions on record in order to address further arguments.

5. List again on 01.10.2024.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 11, 2024/*sk*