

HIGH COURT OF PUNJAB & HARYANA

Motorola Solutions India (P.) Ltd.

v.

Commissioner of Income -tax, Faridabad

RAJIVE BHALLA AND DR. BHARAT BHUSHAN PARSOON, JJ.

CIVIL WRIT PETITION NO.7652 OF 2013

OCTOBER 11, 2013

Ashok Aggarwal and Ashim Aggarwal for the Petitioner. Rupinder Khosla and T.K. Joshi for the Respondent.

ORDER

Rajive Bhalla, J. - The petitioner prays for issuance of a writ, order or direction quashing notices dated 25.03.2013 (Annexure P-16 & P-17), 26.03.2013 (Annexure P-19) and 28.03.2013 (Annexure P-20), issued by respondent no. 2 and for a direction to the respondents to refund Rs.26,26,87,000/- appropriated from the petitioner's bank account towards an alleged demand of tax, relating to assessment year 2005-06.

2. Counsel for the petitioner submits that execution of the treaty for avoidance of double taxation, the Mutual Agreement Procedure (MAP) and the Memorandum of Understandings (MOU) signed by the Government of India and the United States of America, are admitted. The instructions issued by the CBDT, are not denied. The Joint Secretary (respondent no. 3), the competent Indian Authority, has filed an affidavit that MAP proceedings are pending. The petitioner already having invoked the Double Taxation and Prevention of Fiscal Evasion Treaty in accordance with procedure prescribed by MAP, the forcible appropriation of Rs.26,26,87,000/- from the petitioner's bank account is a blatant violation of this inter governmental treaty. The arbitrary nature of the impugned notices and actions becomes apparent from the fact that vide letter dated 25.03.2013, the petitioner was asked to confirm whether MAP has been admitted. By way of the same letter, the officer recorded that intimation is being sought from Joint Secretary (FT&TR 1) to confirm whether MAP has been admitted, but in the same breath, the letter goes on to record that no intimation has been received. Even, if it is presumed, though, not accepted, that MAP was not "admitted", notice dated 25.03.2013, required the respondents to wait for confirmation from the Joint Secretary, before proceeding to forcibly appropriate this amount. The contents of the letters and notices have been found to be false as the Joint Secretary has confirmed, by way of his affidavit, that MAP is pending and meetings have been held, thereby rendering the impugned action null and void. It is further submitted that the respondents are under an apparent misconception that the Indian Competent Authority is required to "admit" a request for suspension of collection of outstanding tax. The treaty, the MOU, the MAP and instructions issued by the CBDT do not envisage "admission" as understood in ordinary legal parlance. An aggrieved party has to merely file an application in its country, of residence, which is then taken up by competent authorities of both countries. The reply filed by the Joint Secretary, respondent no. 3, the Indian Competent Authority that the application is under consideration, proves that MAP proceedings were pending. Respondent no. 2 had only to obtain confirmation regarding these facts but choose not to do so and by assuming that MAP has

not been "admitted" by the Indian Competent Authority, proceeded to arbitrarily violate an international treaty. It is further submitted that as pendency of MAP has been admitted by the respondents, they should, have instead of contesting the present petition, refunded the amount to the petitioner.

3. Counsel for the petitioner further submits that reference to non-renewal of a bank guarantee, is now being canvassed as a ground for raising the demand and appropriating money but is not referred to in the show cause notices or letters addressed by respondent no. 2. The plea with respect to expiry of bank guarantee is an after thought manufactured by the respondents when they realised their error. The plea with respect to bank guarantee has been raised despite Citi Bank having addressed a letter confirming validity of the bank guarantee. It is further submitted that power under Section 226 of the Income Tax Act can only be invoked against an assessee in default. The outstanding demand of tax having been duly secured by a subsisting and valid bank guarantee, there was no question of treating the petitioner as an assessee in default. It is further submitted that the bilateral agreement between two countries and instructions issued by the CBDT, cannot be violated by the revenue. Respondent no. 2 has not only violated a bilateral international treaty and agreement but circulars issued by the CBDT, provisions of the Act and, therefore, departmental action should be initiated against respondent no. 2.

4. It is further submitted that as per Clause-2 of the bank guarantee, if the tax payer does not renew the bank guarantee, the bank is obliged to serve a written notice upon the Government, 60 days prior to the expiry of the bank guarantee. The fact that no such notice was issued by the bank and the bank has instead addressed a letter dated 25.03.2013, reiterating the validity of the bank guarantee, there is no question of the bank guarantee having expired. If the bank guarantee had, as asserted by the respondents, expired on 28.02.2012, it is rather surprising that they waited for an year, i.e., the end of financial year 2012-13, to adopt coercive procedure. It is further submitted that as the affidavit filed by respondent no. 3 has clearly established that there is no provision for admission of MAP, which is pending consideration, the action of respondent no. 2, in appropriating the petitioner's money is illegal and should, therefore, be set aside with a direction to the respondents to restore the amount to the petitioner, with interest.

5. Counsel for the respondent submits, by reference to averments in the reply and orders passed by respondent no. 2, on the file, that stay granted by the Assistant Commissioner of Income Tax, Circle-12(1), Bangalore, on 22.02.2009, was subject to payment of two instalments of two crores each and furnishing of a bank guarantee, before 16.03.2009. The petitioner paid Rs.4 crores in two instalments and furnished bank guarantee No. 5679063528, dated 04.03.2009, for Rs.17.63 crores, valid upto 28.02.2012. The stay order dated 22.02.2009, stood vacated as the bank guarantee which expired on 28.02.2012, was not renewed. The petitioner was asked to furnish a fresh guarantee or substitute guarantees with respect to assessment years 2003-04, 2004-05 and 2005-06. The petitioner furnished bank guarantees for assessment years 2003-04, 2004-05 but did not furnish a bank guarantee for assessment year 2005-06, in the Model Draft Format. The stay order dated 22.02.2009, stood vacated with respect to assessment year 2005-06, thereby conferring a right upon the revenue to recover outstanding tax, payable by the petitioner. The expiry of the bank guarantees was conveyed by DCIT, Circle-II, Gurgaon, vide order sheet entry dated 25.03.2013, duly signed by Sh. Sant Dass, representative of the petitioner. The office entry dated 25.03.2013, refers to status of the MAP application, a letter written to Joint Secretary (FT&TR), CBDT, New Delhi to confirm admission of MAP and expiry of bank guarantee of Rs.17.63 crores. It is further submitted that the letter, written by the petitioner, in response to

notice dated 25.03.2013, clearly reveals that the petitioner was aware that the bank guarantee has expired as reference by the petitioner to letters written by its bank clearly reveals that the petitioner was aware of the revenue's stand that the bank guarantee has expired. The letter forwarded by the banker was not accompanied by a bank guarantee in the prescribed Performa. The respondents have rightly proceeded to recover tax payable by the petitioner. The mere pendency of MAP does not entitle the petitioner to claim that order dated 22.02.2009 subsists without proving that the bank guarantee was renewed, after 28.02.2012. In the absence of any fresh bank guarantee, the stay order stood vacated conferring power upon respondent no. 2 to issue a demand notice and recover the amount legally, in accordance with powers conferred by the Income Tax Act. The mere pendency of MAP, without complying with conditions of the stay order does not entitle the petitioner to any relief much less to assert that money has been wrongly appropriated or that it should be returned to the petitioner. It is further argued that letter issued by the Citi Bank, is vague as it only confirms that bank guarantee No.5679063528, dated 04.03.2009 was issued, on behalf of the petitioner in favour of the revenue. The letter is silent on the expiry/continuance of the bank guarantee. It is prayed that as the action of the respondent is bonafide and in accordance with law, the present petition should be dismissed.

6. It would be appropriate, at this stage, to make a brief reference to the rejoinder filed by the petitioner, to the reply filed by respondent no.2, wherein it is pleaded that the bank guarantee furnished on 16.03.2009 did not expire on 28.02.2012 and is valid till date. It is also averred that City Bank had vide letter dated 25.03.2013, intimated to the respondents that the bank guarantee is currently valid.

7. We have heard counsel for the parties, perused the pleadings and proceed to narrate the facts.

8. The petitioner is a subsidiary of Motorola Solutions International Capital LLC, USA and Motorola Solutions Inc. USA. The latter is registered as a company under the Indian Companies Act, 1956. The petitioner filed its return, for assessment year 2005-06, on 31.10.2005, at Bangalore, declaring a total income of Rs.207,013,290/- with a tax liability of Rs.75,751,339/- etc. The petitioner's case was taken up for scrutiny. A notice was served upon the petitioner under Section 143(2) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), by the Assistant Commissioner of Income Tax, Circle 12(1), Bangalore. The matter was, thereafter referred to the Transfer Pricing Officer under Section 92 CA of the Act. The Assessing Officer, vide order dated 29.12.2008, made certain additions to the income declared by the petitioner and raised a tax demand of Rs.8,56,91,161/-, which led to the issuance of a demand notice dated 29.12.2008, under Section 156 of the Act. The petitioner filed an appeal before the Commissioner of Income Tax (Appeals)-IV, Bangalore. A further demand of Rs. 13.06 crores was raised by a rectification order dated 10.02.2009.

9. The Government of India and the Government of United States of America have signed a Convention/Treaty for avoidance of double taxation and prevention of fiscal evasion. Article 27 of the convention provides for a Mutual Agreement Procedure (MAP), whereby a person aggrieved by taxation can present his case to the competent authority of the country of his residence. A Memorandum of Understanding (MOU) providing for deferment of assessment and/or suspension of collection of taxes, during pendency of MAP was signed between the Government of India and United States of America, on 25.09.2002. The MOU requires the assessing authority to suspend collection of taxes potentially payable till such time as MAP proceedings are disposed off. Clause 5 of the MOU provides that collection and assessment of

any interest or penalty levied shall also be suspended. Clause 2 of the MOU, requires the assessee to furnish an irrevocable bank guarantee, as security. The Central Board of Direct Taxes(CBDT) has issued instruction No. 2, dated 28.04.2003, directing that the tax would remain suspended during pendency of MAP. Vide instruction no. 10/2007, dated 23.10.2007, the CBDT extended applicability of the MOU to Indian resident entities during the course of pendency of MAP.

10. Motorola Solutions Incorporated USA, of which the petitioner is a 100% subsidiary, admittedly, invoked MAP for assessment year 2005-06 by filing an application, dated 28.01.2009, before the competent authority in the USA. The invocation of MAP was brought to the notice of the Indian competent authority i.e., the Joint Secretary (FT & TR-1), CBDT. The Joint Secretary, arrayed as respondent no.3 has admitted the pendency of MAP proceedings. The petitioner filed an application for stay before the Assistant Commissioner of Income Tax, Bangalore. Vide order dated 22.02.2009, the petitioner was required to deposit Rs. 4 Crores in two instalments, of Rs.2 Crores each and till such time as the MAP application is not decided, to furnish a bank guarantee, before 16.03.2009. Order dated 22.02.2009 reads as follows:-

"3. The assessee requested to stay the balance amount till the application filed before the Board under Mutual Agreement Procedure on 11.02.2009 and the required Bank Guarantee is produced by the company vide petition filed on 20.02.2009. The assessee's request is considered. Subject to the payment of the tax as per the above instalments, the assessee will not be deemed an 'Assessee in default' for the balance amount of demand till the application filed before the CBDT is considered by the Board and on production of Bank Guarantee by the assessee before 16.03.2009. If there is any failure on the part of the assessee in adhering to the above schedule, the demand will be recovered from the assessee as per the provisions of L. T. Act."

11. The petitioner paid Rs.4 crores in two equal instalments, without prejudice to its rights on 27.02.2009 and 16.03.2009, respectively and furnished a bank guarantee of Rs. 17.63 crores, in terms of the MOU as well as the stay order. It is, therefore, apparent that at the time of passing of order dated 22.02.2009, the pendency of MAP was accepted by the revenue.

12. The proceedings were, thereafter, transferred to Gurgaon, where respondent No.2, despite the stay order accepting the pendency of MAP, issued notice, dated 25.03.2013, under Section 221(1)of the Act, calling upon the petitioner to show cause why penalty should not be levied as tax determined has not been paid and it is not clear whether MAP has been admitted. Another letter dated 25.03.2013, followed, requesting the petitioner to deposit outstanding tax for assessment year 2003-04, 2004-05 and 2005-06. It would be appropriate at this stage, to reproduce the letter in its entirety as a major part of the controversy revolves around this letter-

"To

Dated: 25.03.2013

The Principal Officer,

Motorola India Electronics Pvt. Ltd.,

(Now K/a Motorola Solutions India Pvt. Ltd.)

415/2, Mehrauli Gurgaon Road,

Gurgaon-122001.

Sir/madam,

Sub:- Request to deposit the outstanding demand in your case for A.Y 2003-04, A.Y. 2004-05 and 2005-06-Reg.

From perusal of records, it is seen that there is a demand of Rs.27.15 Cr. is outstanding in your case for above A.Y's. The assessment records of this case were received from DCIT, circle 12(1), Bangalore on 06.12.2010. As per the Dossier folder, it has been stated that a MAP application has been filed by you before Hon'ble CBDT, New Delhi.

However, since it was not clear from their letter whether request for suspension of collection of outstanding taxes under MAP has been admitted or not by the Indian Competent Authority in terms of para 4 of Instruction No. 10/2007, which is a condition precedent to suspend collection of taxes, a letter has been written to the Competent Authority (i.e. Joint Secretary (FT&TR I) on 25.03.2013 requesting to intimate whether the request of the assessee for suspension of collection of outstanding taxes has been admitted in terms of para 4 of Instruction No. 10/2007, so that further necessary action in the matter may be taken.

However, no confirmation to the effect that request for suspension of collection for outstanding tax in terms of MOU has been admitted by the Indian Competent Authority, has been received from them.

In view of above facts, it is concluded that your request for suspension of collection of outstanding demand in your case has not been admitted by the Competent Authority, so far, you are, therefore, requested to-

- (i) To intimate whether you have any communication to the effect request for suspension of collection for outstanding tax in terms of MOU has been admitted by the Indian Competent Authority. If yes, please furnish a certified copy of the same, and
- (ii) Deposit the outstanding demand without any further delay. A notice u/s 221 in this regard is attached herewith so as to enable you to submit your reply in this regard.

Your reply with regard to above points must reach to the office undersigned on 26.03.2013, positively.

End. As above.

Sd/-Shahsi Kajle

(Shashi Kajle)

Deputy Commissioner of Income tax Circle-II, Gurgaon.

Recd.

Sd/- Santdas

25/03/2013"

13. A perusal of the letter reveals that respondent no. 2 has recorded that the dossier folder reveals that a MAP application has been filed before the CBDT, New Delhi, but, thereafter, goes on to record that it is not clear whether request for suspension of collection for outstanding tax under MOU has been "admitted" by the Indian Competent Authority in terms of paragraph 4 of instruction No. 10/2007. The letter also records that a letter has been addressed to the Joint Secretary (FT&TR 1) on 25.03.2013, requesting it to intimate whether request of the assessee for suspension of collection of outstanding tax has been admitted, but strangely enough records, in the same letter, that no confirmation has been received by 26.03.2013. The petitioner is, thereafter, called upon to intimate, whether it has any communication that request for suspension of collection of outstanding tax has been admitted by the Indian Competent Authority, by 26.03.2013.

14. In response to letter dated 25.03.2013, the petitioner addressed a letter dated 26.03.2013. A relevant extract from the letter, reads as follows:-

"We refer to your notice dated 25.03.2013 requesting the assessee to deposit the outstanding demands for the captioned assessment years. In this regard, the company submits as follows:-

1. For all the captioned years, the company has already furnished bank guarantees (BG) and invoked MAP in accordance with the Indo-US treaty law. We understand that one bank guarantee for a sum of Rs. 9 Crores is already in your files. A confirmation from our bankers (City Bank) to the effect that the second bank guarantee for Rs. 17.63 Crores is also continuing in your favour is enclosed as Annexure-1 to this petition. In view of the above, the requisite bank guarantees issued by the company in accordance with Indo-US treaty law have always been in place and part of your records.
2. It would also be appreciated that the company had invoked the BG route as per treaty law way back in 2007(for AYs 2003-04 and 2004-05) and then again in 2009 (for AY 2005-06). These were duly accepted by the Department and have since continued to be in force in favour of the Revenue and for which the assessee has been incurring recurring charges to keep the BGs alive. In view of the above, it is submitted that the Revenue had accepted the bank guarantees issued by the company for the captioned years and had consequently accepted the company's claim that its demands for the captioned years be kept in abeyance as long as the BGs are in force and its MAP application pending before the Competent Authorities of the two countries. Any allegation to the contrary at this stage (as is made out to be vide your captioned notice) would go against the principles of consistency and fair play, more so since the Department has accepted the BGs issued by the company for all these years without any objection whatsoever. This is without prejudice to the company's contention that it was always eligible to invoke the Indo-US treaty law and issue the bank guarantee for the requisite amount and obtain a stay in accordance with the treaty including the Board Instruction No. 10/2007. In this regard, the company is enclosing copies of MAP applications that it had filed with the CBDT stating that suitable MAP applications had been filed by it before the US Competent Authority for the captioned years in accordance with Article 27 of Indo-US tax treaty. It is thus clear that the company had complied with the requirements of Article 27 of the treaty and was entitled to invoke the

BG route which it did in 2007 and 2009 and was duly accepted by the tax department. It may not be out of place to mention here that this practice has been consistently adapted and accepted by the tax department for all US based taxpayers who have invoked the MAP/BG route from time to time to stay their demands through issuance of bank guarantee for the appropriate amounts."

15. It would be appropriate, at this stage, to point out that letter dated 25.03.2013 does not refer to failure of the petitioner to renew the bank guarantee but is confined to seeking information whether MAP has been admitted by the Indian Competent Authority. It, however, appears that in proceedings, in the office of respondent no. 2, certain objections were raised with respect to validity of the bank guarantee furnished by the petitioner.

16. A perusal of the petitioner's letter reveals that the petitioner asserted that it has already furnished bank guarantee and invoked MAP in accordance with the Indo-US treaty and a bank guarantee of Rs.9 crores is already on the file. The letter also records that the petitioner's banker (Citi Bank) has sent confirmation that the second bank guarantee of Rs. 17.63 crores (the relevant bank guarantee) is valid and continuing. It is further asserted that MAP application has been filed in accordance with the Indo-US treaty and is pending. The Citi Bank also addressed letter dated 25.03.2013, to the Assistant Commissioner, Income Tax Circle, Income Tax Dept, Ministry of Finance, Govt. of India, New Delhi, confirming the validity of the bank guarantee.

17. After receipt of the letter, respondent no. 2, issued notice, dated 26.03.2013, under Section 226(3) of the Act, calling upon the petitioner to forthwith deposit Rs.26,26,87,000/- in favour of Deputy Commissioner of Income Tax, Circle-2, Gurgaon, followed by another notice dated 28.03.2013, under Section 226(3) of the Act, to the Standard Chartered Bank, i.e. the petitioner maintained its account requiring it to remit Rs.26,26,87,000/-. The bank issued a Demand Draft of Rs.26,26,87,000/- in favour of the revenue for assessment year 2005-06.

18. The question that arises for adjudication from these facts is whether the revenue is justified in appropriating Rs.26,26,87,000/- from the account of the petitioner and as a corollary whether order dated 22.02.2009 stood vacated for non-admission of MAP and or for failure to re-renew the bank guarantee.

19. The controversy with respect to admission or pendency of MAP stands conceded in favour of the petitioner by the affidavit/reply filed by the Joint Secretary (Foreign Tax and Tax Research Division), Department of Revenue, Ministry of Finance, Central Board of Direct Taxes. The affidavit also clarifies the status of MAP, the mode and manner of filing an application, the procedure of the Double Taxation Agreement/Convention and the mode and manner of considering and deciding a MAP application. A relevant extract from the reply reads as follows:-

"3. As per paragraphs 1 and 2 of Article 27 of the Double Taxation Agreement(Convention) entered into between India and the USA, a request for MAP must be received from the US competent Authority, on that Competent Authority being satisfied that it is not itself able to arrive at a satisfactory solution to the issue of taxation which is not in accordance with the Convention. After receiving the MAP request from the US Competent Authority, the Indian Competent Authority calls for the relevant orders related to the MAP request from the concerned Chief Commissioner in order to verify details such as the name of the taxpayer, assessment year concerned, whether the tax demand/dispute exists and whether the MAP request has been filed with the US Competent Authority

within three years of the date of receipt of notice of the action which gives rise to the taxation in dispute. In cases where any discrepancies in such details are noticed, a clarification is sought from the US Competent Authority. Once the MAP application fulfils all the conditions of Article 27, the MAP proceedings are taken as pending and can be said to be "admitted". On receipt of the details, position paper is prepared and sent for the MAP negotiation. Rules 44G and 44H of the Income Tax Rules further prescribe the procedure for action to be taken by the Competent Authority of India. 4. That an MOU in this regard was entered into between India and USA. On receipt of the MAP request from the US Competent Authority, in the light of the MOU, FT&TR-I Division requests the Chief Commissioner of Income Tax concerned to consider the stay of demand. The conditions for suspension of collection of demand as per the MOU are provided vide Instruction No. 10/2007 dated 23.09.2007. It is clearly stated in paragraph 4 of the Instruction No. 10/2007, dated 23.10.2007, in a case involving Mutual agreement Procedure, a suspension of collection of tax is mandated only.

- (i) after obtaining a confirmation regarding pendency of MAP from the Foreign Tax and Tax Research Division of the Central Board of Direct Taxes and
- (ii) on receipt of a bank guarantee in the model draft format annexed to the MOU for an amount calculated in accordance with the manner indicated therein.

5. In light of the above discussion, the facts of the case for Assessment Year 2005-06 is stated herein under:

- (i) A MAP request in the case of M/s Motorola India Electronics Pvt. Ltd. (now merged with Motorola Solutions India Pvt Ltd.) for AY 2005-06 was received by the Indian Competent Authority from the US Competent Authority vide request dated 07.04.2009.
- (ii) After verifying all the conditions stated in paragraph 3 above, the MAP proceedings were taken as pending and subsequently MAP discussions were held by the Indian Competent Authority with the US Competent Authority in the MAP meetings dated September 16-18, 2009 and January 5-8, 2010.
- (iii) The collection of demand was required to be suspended as per the MOU for AY 2005-06 on satisfaction of conditions stated in Instruction No. 10/2007 dated 23.09.2007, as stated in Paragraph 4 above."

20. Sub-para (ii) of para 5 of the affidavit, contains an unequivocal admission that MAP proceedings were taken to be pending and discussions were held by the Indian Competent Authority with US Competent Authority on 16/18.09.2009 and 5/8.01.2010. It is also averred that collection of demand was required to be suspended on satisfaction of conditions, namely, furnishing of bank guarantee, and confirmation of pendency of MAP from the Foreign Tax and Tax Research Division of the Central Board of Direct Taxes. The Indian competent Authority having admitted pendency of MAP, puts at rest this part of the controversy thereby negating contents of the show cause notice, based upon failure to intimate "admission of MAP". It would be appropriate to once again point out that relating to this very demand of tax, the Assistant Commissioner of Income Tax, Circle 12(1), Bangalore, had already accepted pendency of MAP while granting stay of recovery of demand vide order dated 22.02.2009. It is rather surprising or

let us say distressing that respondent no. 2 drew an artificial distinction between "pendency" and "admitted" and using it as a device, proceeded to appropriate an amount, recovery whereof had already been stayed. The assumption of jurisdiction by respondent no. 2, in violation of the treaty is clearly erroneous and bordering on the malafide.

21. The matter, however, does not rest here as the respondents assert and it is apparent from proceedings in the office of the concerned officer and reply filed by the petitioner to the notices that the department had also asserted, though, not in their letters or notices that as the bank guarantee No.5679063528, dated 04.03.2009, had expired on 28.02.2012, it confers a right upon the revenue to raise a demand and recover Rs.26,26,87,000/- from the petitioner.

22. The question that remains is whether bank guarantee No.5679063528, dated 04.03.2009, had expired and the effect of letter dated 25.03.2013, issued by the Citi Bank to the respondents, confirming validity of the bank guarantee.

23. The show cause notice, issued under Section 226(3) of the Act, does not refer to expiry of the bank guarantee as it is based upon failure to intimate "admission" of MAP. However, in proceedings in the office, the respondents pointedly referred to expiry of the bank guarantee. In response, the petitioner addressed letter dated 26.03.2013 (which we have already reproduced) specifically asserting that the bank guarantee is in force and Citi Bank has addressed letter dated 25.03.2013, confirming validity of the bank Guarantee. The letter addressed by Citi Bank, on 25.03.2013, reads as follows:-

" Subject:- Confirmation for Issuance of Bank Guarantee No:5679063528 dated 04.03.2009.

We hereby confirm that we have on 04.03.2009 issued Bank Guarantee No. 5679063528 for Rs. 17,63,46,462 (Rupees Seventeen Crores Sixty three Lakhs Forty Six Thousand Four Hundred and Sixty Two only) in your favour, which is valid in our records and has been issued on behalf of Motorola India Private Limited and Mr. Dheeraj Jain and Mr. Arun Yadav have signed this guarantee who are authorised to sign the guarantees on behalf of the Bank."

24. The letter bearing the title "Confirmation for Issuance of Bank Guarantee No:5679063528 dated 04.03.2009" contains an unequivocal statement, by and on behalf of Citi Bank, affirming the validity of bank guarantee. The respondents, however, seek to interpret this letter as a mere confirmation of issuance of bank guarantee and not a renewal of the bank guarantee. Counsel for the respondents asserts that a perusal of the bank guarantee furnished on behalf of the petitioner reveals that the bank guarantee expired on 28.02.2012 and required the assessee and the bank to furnish a fresh bank guarantee. The absence of fresh bank guarantee or renewal, after 28.02.2012, establishes that the bank guarantee expired on 28.02.2012, thereby conferring a right upon the revenue to demand and recover tax from the petitioner.

25. The petitioner per-contra submits that a perusal of the bank guarantee reveals that the Citi Bank has undertaken that the bank shall renew the bank guarantee for another three years and in case the tax payer does not renew the agreement between the assessee and the bank, it shall inform the government 60 days prior to the expiry of the bank guarantee. The bank has, admittedly, addressed letter dated 25.03.2013, informing the respondents that bank guarantee remains in force, and is valid.

26. At this stage, it would be appropriate to appraise the bank guarantee and reproduce relevant paragraphs from the bank guarantee, which read as follows:-

" Whereas the Government has agreed that Motorola India Private Limited. Having its registered office at 415/2, MEC MG Road, Gurgaon, Haryana-122001 and permanent account number AAACM9243B (hereinafter called "The Assessee", which expression shall, unless excluded by or repugnant to the context, include its successors and assignees) shall furnish a bank guarantee in respect of a demand of INR 17,63,46,462(Indian Rupees Seventeen Crore Sixty Three Lacs Fourty Six Thousand Four Hundred Sixty Two only) for the assessment year (s) 2005-06, in lieu of which the recovery of any part of such demand shall not be enforced until 30 days after the assessing officer receives written notice of the MAP agreement between the competent authorities of the Governments of India and the United States, and the assessee will not be treated as in default for the above assessment year (s)...."

2. The bank further agrees that the guarantee herein contained shall remain in full force and effect from the date hereof, i.e., 4th March 2009, till 28th February 2012; and further agrees to renew this guarantee for another 3 years on the following terms: the bank will provide the government with written notice no later than 60 days prior to the expiration date of this bank guarantee if the taxpayer has not renewed the agreements between the assessee and the bank that underlie this bank guarantee for an additional period of 3 years. If the government does not receive a renewal of this bank guarantee or a substitute bank guarantee for the amounts of tax and interest in dispute prior to 30 days before the expiration date of this bank guarantee, the government may instruct the bank to pay the guaranteed amounts prior to expiration of the bank guarantee.

4. The obligation of the bank to the government under this bank guarantee will terminate upon the occurrence of any of the following for the taxable years in question: (I) The payment by the bank or the assessee to the government of the guaranteed amounts; (II) The payment by the assessee to the government of all amounts owed, as agreed to by the competent authorities in a MAP agreement; (III) a map agreement by the competent authorities that the government will not seek to recover any part of the previously demanded amounts; or (IV) the assessee furnishes to the government similar security from another bank."

27. A perusal of these paragraphs reveals that the bank guarantee was valid between 04.03.2009 and 28.02.2012. The bank, agreed that the bank guarantee would stand renewed for another three years except if "the bank will provide the government with written notice no later than 60 days prior to the expiration date of this bank guarantee if the taxpayer has not renewed the agreements between the assessee and the bank that underlie this bank guarantee for an additional period of 3 years. If the government does not receive a renewal of this bank guarantee or a substitute bank guarantee for the amounts of tax and interest in dispute prior to 30 days before the expiration date of this bank guarantee, the government may instruct the bank to pay the guaranteed amounts prior to expiration of the bank guarantee....." The bank has not sent any communication to the revenue that the assessee did not execute necessary documents in favour of the bank with respect to the bank guarantee, 60 days prior to expiry of the bank guarantee, thereby clearly proving that the bank guarantee stood renewed for a further period of three years. Clause 4 of the Bank Guarantee enumerates the circumstances in which obligation of the bank shall terminate upon

events. The revenue does not allege any of these events. It is, thus, apparent that the bank guarantee would be automatically renewed for a period of three years except if the assessee does not execute documents in favour of the bank that underline the bank guarantee or on the happening of events enumerated in Clause 4 of the Bank Guarantee. The revenue does not allege or assert that it received any communication from the bank at any time before the expiry date of 28.02.2012, informing it that the assessee has not executed documents in favour of the bank and the bank guarantee is to expire on 28.02.2012. The revenue does not allege or assert that even between 28.02.2012 and 25.03.2013 when the revenue issued notice of demand, though, not based upon expiry of the bank guarantee, it received any communication from Citi Bank that the assessee has not executed any document in favour of the bank with respect to the bank guarantee. The revenue does not allege the happening of any event referred to in Clause 4 of the Bank Guarantee. The Citi Bank has instead addressed a letter dated 25.03.2013, to the revenue, before the revenue appropriated the amount from the petitioner's account with Standard Chartered Bank, reiterating the validity of the bank guarantee. A reference to the letter, which we have already reproduced in a preceding paragraph of the judgment, cannot, as urged by counsel for the respondents, be read as a mere confirmation of issuance of the bank guarantee. A perusal of the letter reveals that the Citi Bank has clearly stated that the bank guarantee No.5679063528, dated 04.03.2009, for Rs. 17,63,46,462/- is valid in their records and has been issued on behalf of the "Motorola India Private Limited." It is not denied by the respondents that letter dated 25.03.2013, was received by the respondents before they appropriated money from the petitioner's account. It is, therefore, rather surprising as to how and why notices were issued, under Section 226(3) of the Act, treating the petitioner as an assessee in default and, thereafter, directing the Standard Chartered Bank to remit an amount of Rs.26,26,87,000/- to the department.

28. A further perusal of the aforesaid bank guarantee reveals that renewal does not require any formal format, as the clauses reproduced above clearly envisage an automatic renewal for a period of three years except if the assessee does not furnish requisite documents regarding the bank guarantee to the bank and the bank, thereafter intimates the government 60 days before expiry of the bank guarantee that the guarantee shall expire on 28.02.2012 or on the happening of events enumerated in Clause 4 of the bank guarantee. The revenue's contention that as the petitioner furnished bank guarantee for assessment years 2003-04, 2004-05 on 26.10.2012, but did not furnish a bank guarantee with respect to the bank guarantee, in dispute, in our considered opinion, is irrelevant in the absence of any intimation by the bank to the respondents that the assessee has not furnished documents in favour of the bank regarding the bank guarantee. The bank guarantee, therefore, stood automatically renewed for a further period of three years. The plea of not furnishing a bank guarantee in the prescribed format appears to be a mere after thought.

29. Before parting with the judgment, it would be necessary to point out that we would have relegated the petitioner to its alternative remedy available under the Act but as the matter involves a double taxation treaty and MAP proceedings that are admittedly pending and the notice relates to violation of terms and conditions of MAP, which are admittedly pending, we do not deem it appropriate in the facts and circumstances of the present case to relegate the petitioner to its alternative remedy.

30. In view of what has been stated hereinabove, we allow the writ petition, quash notices dated 25.03.2013 (Annexure P-16 & P-17), 26.03.2013 (Annexure P-19) and 28.03.2013

(Annexure P-20) and direct the respondents to refund Rs.26,26,87,000/- to the petitioner. The latter direction shall, however, be kept in abeyance and shall be subject to conclusion of MAP proceedings, which should be concluded within six months from receipt of a certified copy of this order.

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