

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on:
12.09.2022, 15.09.2022 and
19.09.2022
Date of decision: 20.09.2022

+ CRL.M.C. 4492/2022 & CRL.M.A. 18282/2022

DEPUTY DIRECTOR OF INCOME TAX (INV) UNIT – 4(3)
..... Petitioner

Through: Mr. Zoheb Hossain, Sr. Standing
Counsel with Mr. Vipul Agrawal &
Mr. Parth Semwal, Jr. Standing
Counsels.

versus

XIONGWEI LI Respondent

Through: Mr. Vijay Aggarwal, Mr. Nagesh
Behl, Mr. Hardik Sharma, Mr.
Abhiraj Ray & Mr. Mukul Malik,
Advocates.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

1. The petitioner, i.e., the Deputy Director of Income Tax (Inv) Unit-4(3), New Delhi, vide the petition Crl.M.C. No. 4492/2022 seeks the setting aside of the impugned order dated 29.8.2022 of the Court of the learned ACMM, Special Acts, Tis Hazari Courts, and vide Crl.M.A. No. 18282/2022 seeks the stay of the operation of the

impugned order dated 29.08.2022 whereby the application filed by the respondent herein seeking a quashing of the Look Out Circular (LOC) issued against him at the request of the Income Tax Officer (ITO) represented now by the present petitioner was allowed with conditions imposed thereby to the effect that in case of resignation, retirement or cessation of employment etc. of the respondent herein from the company M/s Huawei Telecommunications (India) Company Private Limited (HTICPL) (hereinafter referred to as the Company, of which the respondent herein was stated to have been the CEO), was directed to withhold the Severance Pay/Severance Package and other incentives/emoluments payable to respondent herein, which were directed not to be released without prior permission of the learned Trial Court, and an undertaking to this effect was directed to be submitted by the respondent from the said company to be filed with the Court under intimation to the Deputy Director of Income Tax (Inv) Unit-4(3), Delhi, i.e., the petitioner herein, with it having been directed that on filing of the said undertaking, the DDIT (Inv) Unit-4(3), Delhi was directed to take appropriate steps for withdrawing the lookout circular against the applicant and the same was directed to be withdrawn/recalled within 7 days of filing of the undertaking by the applicant. The respondent, in terms of the impugned order dated 29.08.2022 of the Court of the learned ACMM, Special Act, Central District, Tis Hazari, is stated to have submitted the undertaking. The aspect of the undertaking being in the form of compliance of directions dated

29.08.2022, is a matter to be ascertained by the learned Trial Court itself.

2. The petitioner i.e., the Deputy Director of Income Tax (Inv), has submitted through its petition that the respondent was the CEO of the said company, and that the said company was incorporated on 23.07.2002 and 90.11 % of its shares are held by the Netherland based Huawei Technologies Cooperatief U.A. (100% owned by Huawei Investment and Holding Co. Ltd.) and the remaining 9.89% by another Huawei Tech Investment Co. Ltd. The shareholding pattern of the said company has been put forth by the petitioner as being to the effect:-

<i>Sl. No.</i>	<i>Name of the Shareholder</i>	<i>Country</i>	<i>No. of Equity Shares Held</i>	<i>%</i>
1.	<i>Huawei Technologies Cooperatief U.A.</i>	<i>Netherlands</i>	<i>54,06,605</i>	<i>90.11</i>
2.	<i>Huawei Tech. Investment Company Limited</i>	<i>Hong-Kong</i>	<i>5,93,395</i>	<i>9.89</i>
		<i>Total</i>	<i>60,00,000</i>	<i>100</i>

3. The petitioner has further submitted that the Bangalore entity is also held by the group companies as per the shareholding pattern given below:

<i>Sl. No.</i>	<i>Name of the Shareholder</i>	<i>Country</i>	<i>No. of Equity Shares Held</i>	<i>%</i>
1.	<i>Huawei Tech. Investment</i>	<i>China</i>	<i>34119600</i>	<i>99.999955</i>

	<i>Company Limited</i>			
2.	<i>Huawei Technologies Netherlands BV</i>	<i>Netherlands</i>	<i>16</i>	<i>0.00005</i>
		<i>Total</i>	<i>34119616</i>	<i>100</i>

4. The petitioner submits that the HTICPL is stated to be engaged in the business of assembly and trading of telecom network equipment and providing installation, commissioning and other support services to the various customers in India, with international transactions with its associated enterprises summarized by the petitioner being to the effect:-

<i>FY</i>	<i>AGGREGATE VALUE</i>
<i>2015-16</i>	<i>1772,45 ,02, 115</i>
<i>2016-17</i>	<i>4408,94,42,856</i>
<i>2017-18</i>	<i>7517,11,54,996</i>
<i>2018-19</i>	<i>12191,99,17,354</i>

out of which, it has been stated by the petitioner, that the international transactions in the nature of purchase of traded goods and raw materials are summarised as under:

<i>FY</i>	<i>Transactions</i>	<i>Amount</i>
<i>2015-16</i>	<i>Purchase of raw materials</i>	<i>368,26,22,631</i>
	<i>Purchase of traded goods</i>	<i>2794,38,23,291</i>
<i>2016-17</i>	<i>Purchase of raw materials</i>	<i>529,34, 15,510</i>

	<i>Purchase of traded goods</i>	<i>2764 , 77,23,624</i>
<i>2017-18</i>	<i>Purchase of raw materials</i>	<i>247,79,37,325</i>
	<i>Purchase of traded goods</i>	<i>6355,36, 91,426</i>
<i>2018-19</i>	<i>Purchase of raw materials</i>	<i>191,10,18,161</i>
	<i>Purchase of traded goods</i>	<i>6696,63,55,915</i>

5. The petitioner has also put forth through the petition a summary of the profit margin of the relevant segment of the petitioner, the revenue base on which the profit margin has been calculated and the profit margin of the comparables, which is to the effect:-

<i>FY</i>	<i>Profit margin of the relevant segment of the petitioner</i>	<i>Revenue base on which the profit margin has been calculated</i>	<i>Profit margin of the comparables</i>
<i>2015-16</i>	<i>17.18%</i>	<i>3376,88, 90,268</i>	<i>2.79% to 8.83%</i>
<i>2016-17</i>	<i>8.84%</i>	<i>5991,48, 75,777</i>	<i>4.21%</i>
<i>2017-18</i>	<i>4.62%</i>	<i>7828,34,20,471</i>	<i>4.83%</i>
<i>2018-19</i>	<i>10.12%</i>	<i>8196,67, 57,755</i>	<i>2.10% to 8.74%</i>
	<i>Total</i>	<i>25393,39,44,271</i>	

6. The petitioner submits that the Search and Seizure action u/s 132 of the Income Tax Act , 1961 was conducted on 15.02.2022 in the case of ‘the Company’ and another group company M/s Huawei

Technologies India Pvt. Limited, Bengaluru, and that the statutory warrants of authorization were issued by the Competent Authority authorizing the officers to carry out any or all of the actions mentioned in sub-clauses (i) to (v) of clause (1) of section 132 of the IT Act, 1961 for various premises linked to the two said entities.

7. *Inter alia*, the petitioner has submitted that for the purposes of verification of the financial statements submitted by HTICPL to the Revenue Authorities, the Books of Account were demanded by the Authorized Officers, and it was also demanded by the said Authorized Officers that an access to the e-mail server and messenger be provided whereby the financial decisions were conveyed and taken by the management, and during the entire duration of search operation, M/s HTICPL and officials holding eminent position including the respondent willfully skirted the compliance and rather indulged in shifting the responsibility/accountability to next shoulder.

8. The petitioner has submitted that *prima facie* evidence was found indicating substantial tax evasion in the case of the company, the books of accounts were not being provided for such verification and a show cause notice was issued on 19.02.2022 against the company and its officers responsible for providing such access, for commencement of proceedings u/s 275B of the Income Tax Act, 1961, and that the company and its officers were not able to provide effective access to the books of accounts even though such books of accounts were claimed to be maintained at the office premises of the company at Gurgaon, as mentioned in Form 3CD, for the profit and

loss account for the period beginning from 01.04.2019 and ending on 31.03.2020.

9. *Inter alia*, the petitioner has submitted that the CFO of the company was not present in India at the time of the search action and request for cloning his e-mails, as he was stated to be the main decision maker for financial transactions, was denied on the ground that such e-mails may contain data of other entities also.

10. The petitioner has submitted that the non-provision of the books of accounts, non-provision of relevant e-mail dump of the CFO (main person handling financial transactions), sending of substantial funds (around Rs 750 crores) outside India as dividends just prior to search, coupled with the evidence indicating substantial tax evasion in the case were sufficient reasons for concluding that the economic security of the State could be adversely affected if the relevant Look Out Circular was not issued. The petitioner has submitted further that since the CFO was not present in India, the CEO, being the officer of the company responsible for providing the books of accounts and other details, would be required to be present in India for facilitating determination of taxable income of the company, and thus a Look Out Circular was issued against the respondent herein because of his conduct during the course of the Search Action demonstrated that he was a flight risk and that he did not wish to cooperate with the investigation proceedings at hand.

11. *Inter alia*, the petitioner submits that it made continuous efforts for the next few days to get meaningful details from various key personnel regarding Books of Accounts, E-mails and

Messenger but the same was stone walled by the Company wherein the respondent is the Chief Executive Officer, under a design to thwart lawful investigations being conducted by the complainant, and thus after examining the response of the company to the show cause notice, a complaint for launching of prosecution u/s 275B of the Income Tax Act was filed before the Court of competent jurisdiction on 18.05.2022 after completing of the procedural formalities, and the learned Trial Court took cognizance of the complaint on 26.05.2022.

12. The petitioner has submitted further that W. P (C) 6352/2022 filed by HTICPL against the petitioner herein was submitted challenging the provisional attachment orders u/s 132(9B) of the Income Tax Act, 1961, wherein the company had taken a plea that the provision of ERP dump (with millions of line by line financial transactions) was sufficient compliance to the provision of books of accounts.

13. The petitioner submits that it had been brought to the notice of the Court during the course of that petition, that the legal requirement under the provisions of Section 128 of the Companies Act, 2013 read with Rule 3 of Companies (Accounts) Rules, 2014, which prescribed that back-up of the books of account maintained in electronic mode, including a place outside India was required to be kept in servers physically located in India, had not been fulfilled by the company, with it having been submitted by the petitioner that neither such location was conveyed during search nor in response to the summons dated 31.05.2022 during post search proceedings.

14. The petitioner has further submitted that it has been brought to notice of the Court that such dump was not matching with the books of accounts for at least two financial years and the statutory auditor had also expressed inability in constructing books of accounts from such a dump.

15. Vide judgment dated 30.08.2022 in W.P (C) 6352/2022 of the Hon'ble Division Bench of this Court, the said W.P.(C) was disposed of to the effect:-

“.....

.....

7. Having heard the learned senior counsel for the Petitioner and the senior standing counsel for the Revenue, in view of the fact that the Petitioner has agreed to secure the Respondents, we do not wish to go into the merits of the allegations and contentions raised. Consequently, to balance the equities, without going into the merits of the contentions raised by the respective parties, the present writ petition is being disposed of and accordingly the previous orders dated 21st April, 2022 stands modified to the following extent: -

(i) In addition to the Fixed Deposit Receipt of Rs. 100 crores which was directed to be made by order dated 21st April, 2022, the Petitioner shall prepare another Fixed Deposit Receipt of Rs.100 crores in Axis Bank Account No. 919020017328222, which shall be renewed automatically from time to time. A photocopy of the said FDR shall be filed with the Assessing Officer within a week. The Banker is also directed to ensure that the Petitioner and/or any of its officials/ nominees/ authorised representatives do not deal with the FDR in any manner. There shall be a lien in favour of the Department with respect to both

the FDRs till conclusion of the assessment proceedings and thereafter the amount will be dealt in accordance with law. The Bankers will issue a letter to the AO acknowledging the lien in favour of the Department.

(ii) The Respondents are directed not to release any refund [which is stated to be to the tune of Rs.30 crores (approx.)] to the Petitioner till the assessment proceedings are completed and thereafter the refund shall be dealt with in accordance with law.

(iii) The Respondents are directed to complete the assessment as expeditiously as possible. The parties will be at liberty to apply to this Court to seek a variation of this order.

(iv) The Petitioner shall not repatriate any royalty or dividend abroad. The Petitioner will be at liberty to approach this Court, in case the need so arises.

(v) The Petitioner shall continue to file its monthly statement with the assessing officer of 'Payments Received as well as Made'.

8. Though a suggestion is made by the Counsel for the Respondent that the Assessing Officer will be free to take recourse having the books of accounts of the Petitioner audited by an expert, yet the said suggestion is strongly refuted by the senior counsel for the Petitioner. As indicated by us, we are not dealing with the merits of the rival contentions taken in these proceedings and the assessing officer will take such steps as are available to him, in accordance with law.

9. It is made clear that the above order has been passed on the basis of offer made by the Petitioner and will not be considered as a precedent in any other proceeding.

10. Accordingly, the attachment orders dated 17th February, 2022 and 19th February, 2022 and this Court's order dated 21st April, 2022 are modified in the manner stated above. However, this order shall come into effect from the date the Petitioner deposits the additional 100 crores in terms of para 7(i) above. Upon deposit of the said sum, the Assessing Officer will withdraw the attachment orders dated 17th February, 2022 and 19th February, 2022 and will communicate the same to the parties to whom attachment orders were served. With the above directions, present writ petition and pending applications stand disposed of."

Significantly, M/s Huawei Telecommunications (India) Company Private Limited is the petitioner of W.P (C) 6352/2022, which was disposed of vide judgment dated 30.08.2022 of the Hon'ble Division Bench of this Court referred to hereinabove.

16. The petitioner has further submitted that the W.P (C) 8048/2022 was filed by the respondent herein Li Xiongwei seeking the quashing/withdrawal of the Look Out Circular against him and the quashing of the Panchanama dated 16.02.2022, and vide order dated 26.07.2022 of the Hon'ble Division Bench of this Court, the petition was disposed of with liberty granted to the petitioner therein, i.e., the respondent to the present petition, to approach the learned Trial Court to decide the application as expeditiously as possible.

17. Vide the said order dated 26.07.2022 of the Hon'ble Division Bench of this Court in the said W.P (C) 8048/2022 filed by the respondent herein seeking the cancellation of the Look Out Circular issued against him (which is the subject matter of the present

petition also now), it is clarified that the Division Bench had not commented on the merits of the controversy and that the rights and contentions of all the parties were left open. The said order is as under:-

“Learned counsel for the Petitioner in the present proceedings confines his prayer to quashing of the Lookout Circular issued against the Petitioner by Respondent No.1. The Respondent no.1 in its counter affidavit has averred as under:-

“20 ... Furthermore, the prosecution complaint has already been filed and Ld. ACMM, Tis Hazari Court, Delhi has already summoned the petitioner to appear before the Hon’ble Court. Considering the same, the Petitioner may now approach the Ld. Trial Court with regards to bail and travel conditions of the Petitioner .

xxxx xxxx xxxx xxxx

43. That, the contents of Ground B6 are denied. It is again reiterated that, the prosecution has filed a complaint before Ld. ACMM and on the said complaint Ld. ACMM has taken the cognizance. Therefore, the Petitioner can approach the Ld. Trial Court and the Ld. Court can decide on the aspect of foreign travel of the Petitioner.”

Keeping in view the aforesaid averments as well as the law laid down by this Court in Sumer Singh Salkan vs. Assistant Director & Ors. reported in ILR (2010) VI Delhi 706, learned counsel for the Petitioner states that he would approach the Trial Court for cancellation of the Lookout Circular as well as for permission to travel abroad.

We, accordingly, grant liberty to the Petitioner-applicant to approach the Trial Court, which Court shall consider the application for cancellation of Lookout Circular as well as for permission to travel abroad in accordance with law.

In the event such an application is filed before the Trial Court within a week, the same shall be disposed of as expeditiously as possible, preferably, within four weeks.

This Court clarifies that it has not commented on the merits of the controversy. The rights and contentions of all the parties are left open.

(emphasis supplied)

With the aforesaid liberty and clarification, the present writ petition along with application stands disposed of.”

(emphasis supplied)

18. Pursuant to order dated 26.07.2022, the respondent herein filed an application before the learned Trial Court seeking *inter alia* the quashing of the Look Out Circular issued against him by the petitioner herein and the impugned order dated 29.08.2022 referred to elsewhere hereinabove was pronounced by the learned Trial Court.

19. The learned Trial Court vide the impugned order dated 29.08.2022 observed to the effect:-

“By this order, I shall dispose of an application filed on behalf of applicant Xiongwei Li for quashing of look out circular (LOC) issued against him at the request of Income Tax Office (ITO).

The events that necessitated the filing of this application are that on 15.02.2022 a search u/s 132

of The Income Tax Act, 1961 (hereinafter called 'The Act') was conducted by the officers of ITO at the Capital Cyberspace, Gurugran, Manesar, Urban Complex, Sector-59 office of M/s Huawei Telecommunications (India) Company Private Limited (in short the company'), wherein the books of accounts (as per the Form 3CD) were kept for the purpose of verification and determination of income chargeable to tax. During the course of search, applicant Xiongwei Li deliberately did not comply with the provisions of sub section (1) of section 132 of The Act. The officers of ITO were not given adequate facility and co-operation for inspection of books of accounts. Even the documents sought by the officers of ITO were not supplied by the applicant and other personnel of the company. The statement of the applicant was recorded u/s 132 (4) of The Act and apparently, the applicant deliberately chose to give vague answers to some of the questions, efforts were made to confuse the authorized state officers conducting the search. The answers given by the applicant and the other employees of the company were incongruous to each other.

Unnecessarily long time was sought by personnel of the company to furnish documents which otherwise ought to have been readily available with the company. The applicant is the CEO of the company but he did not comply with the directions issued by the officers of ITO. A complaint case was filed by the ITO against the company and its personnel (including the applicant) alleging commission of offence punishable u/s 275B r/w section 278B of the Act. It appears that pursuant to search conducted by ITO on 15.02.2022, a request for issuance of look out circular was made to the authority concerned by the Deputy Director of Income Tax (Inv) Unit 4(3), Delhi for issuance of lookout circular against the applicant. On

01.05.2022 when applicant went to Delhi airport to board a Thai Airways International Flight for traveling to Bangkok, he was not allowed to board the flight and was later informed that a look out circular was issued against him. By moving the present application, the applicant seeks quashing of that look out circular.

It is submitted by the ld. counsel for the applicant that applicant was traveling to Bangkok to attend an internal meeting of the company but he was not able to reach Bangkok thereby dealing a huge blow to the reputation of the applicant as well as of the company. He contended the offence alleged to have been committed by the applicant is punishable with maximum imprisonment for a period of two years, so the same is non-cognizable and bailable, therefore an LOC could not have been opened with regard to this offence. He claimed that the LOC issued against the applicant is bad in law and the same is in violation of article 14 & 21 of The Constitution of India. He submitted that the LOC shall be quashed as the same is not issued as per the extant judicial pronouncements and circulars issued by the Union Government. Written submissions were placed on record by the applicant.

Reply to this application was filed by ITO wherein it informed that the investigation qua the company and its officers including the applicant is going on. It alleged that till date, all data and books of accounts sought from the company, its personnel and representatives have not been provided. It is also averred that the issue of arm's length price of related party transactions during the course of Transfer Pricing proceedings is being investigated and if may require re-examination of the applicant by the officers conducting investigation and may also result in filing of subsequent prosecution against company and/or its officials. He relied upon the statement of

Amit Kumar i.e. the Statutory Auditor of the company, to show that the data provided to the department is insufficient to reconcile the same with the financial statements of the company. He contended that in case the look out circular is withdrawn then the applicant being a Chinese national may leave India and never come back, thereby jeopardizing not only the proceedings in complaint case but also adversely affecting the investigation being conducted by the IT. He submitted that the application be dismissed being devoid of merit.

In compliance of an order passed by this court, the ITO placed on record (in closed envelope) copy of the letter written to the authority concerned for issuance of look out circular, the proforma for issuance of LOC and the proposal for issuance of LOC.

Submissions of the Id. SPP for (TO and Id. counsel for the applicant were heard at length on previous occasions. Entire material available on record has been perused. My observations on the application are delineated hereinafter.

The investigation regarding the search u/s 132 of The Act conducted at the office of the company is still in progress. No doubt, the complaint filed by the ITO before this court is for commission of offence punishable u/s 275 B read with 278B of The Act which is a non-cognizable and bailable offence. Except these two proceedings, no other criminal proceeding exists on date wherein the presence of applicant is required. In Sumer Singh Salkan v. Asst. Director & Ors. 2010 (4) JCC 2401 while dealing with a reference sent by court of Ld. ACMM, Delhi, regarding LOC, the High Court of Delhi formulated the following questions:-

- a) What are the categories of cases in which the investigating agency can seek recourse of Look-out-Circular and under what circumstances?*
- b) What procedure is required to be followed by the investigating agency before opening a Look-out-Circular?*
- c) What is the remedy available to the person against whom such Look-out-Circular has been opened?*
- d) What is the role of the concerned Court when such a case is brought before it and under what circumstances the subordinate Courts can intervene?*

The answers to these questions were provided by the High Court, which are reproduced in verbatim:-

- a) Recourse to LOC can be taken by investigating agency in cognizable offences under IPC or other penal laws, where the accused was deliberately evading arrest or not appearing in the trial court despite NBWs and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest.*
- b) The Investigating Officer shall make a written request for LOC to the officer as notified by the circular of Ministry of Home Affairs, giving details & reasons for seeking LOC. The competent officer alone shall give directions for opening LOC by passing an order in this respect.*
- c) The person against whom LOC is issued must join investigation by appearing before I.O. or should surrender before the court concerned or should*

satisfy the court that LOC was wrongly issued against him. He may also approach the officer who ordered issuance of LOC & explain that LOC was wrongly issued against him. LOC can be withdrawn by the authority that issued and can also be rescinded by the trial court where case is pending or having jurisdiction over concerned police station on an application by the person concerned.

d) LOC is a coercive measure to make a person surrender to the investigating agency or Court of law. The subordinate courts jurisdiction in affirming or cancelling LOC is commensurate with the jurisdiction of cancellation of NBWs or affirming NBWs.

It is evident from perusal of the answers in the aforementioned reference that LOC can only be issued by investigating agency in case of cognizable offences under IPC or other penal laws on fulfilment of two conditions; (i) where the accused was deliberately not appearing before the court despite issuance of NBWs and other coercive measures or he was deliberately evading arrest, and (ii) there was likelihood of accused leaving the country to evade trials/arrests. Both these conditions are cumulative. Since, the complaint pending against the applicant is for commission of non-cognizable offence, therefore, the LOC could not have been issued citing that complaint. Moreover, no coercive process was issued against the applicant by this court, rather a summon for appearance was ordered to be issued.

Perusal of letter written to the authority concerned by officer of ITO for issuance of LOC against applicant shows that the officer was of prima facie view that commission of other offences under

the Act was disclosed and thorough investigation was required to be conducted. The applicant being the CEO of the company would be required to appear before the investigating officer for purpose of investigation. The reason for issuance of LOC seems to be to ensure that the applicant does not escape from India. Hence, it appears from the documents produced in closed envelope that LOC was issued not due to the pendency of the complaint case but for reason of ongoing investigation against the company.

It is not the case of the ITO that the applicant did not appear before the investigating officer as and when directed to do so. It is also not the case that the applicant was trying to evade the arrest. In fact, in the complaint case the applicant appeared and was admitted to bail. He made a statement before the court that he shall inform the concerned officer of ITO at least seven days prior to leaving India in the event of quashing of LOC by the court.

The view expressed in the case of Sumer Singh Salkan (supra), was incorporated by FRRO in Office Memorandum dated 27.10.2010. This office memorandum has been amended by Office Memorandum No. 25016/10/2017 -IMM dated. 05.12.2017 which made the following additional to the extant guidelines:

In exceptional cases, LOCs can be issued even in such cases, as would not be covered by the guidelines above, whereby departure of a person from India may be declined at the request of any of the authorities mentioned in Clause (b) of the above-referred OM, if it appears to such authority based on inputs received that the departure of such person is detrimental to the sovereignty or

security or integrity of India or that the same is detrimental to the bilateral relations with any country or to the strategic and/or economic interest of India or if such person is allowed to leave, he may potentially indulge in an act of terrorism or offences against the State and/or that such departure ought not be permitted in the larger public interest at any given point of time.

The applicant does not come within this additional criteria, as the departure of applicant cannot be stated to be detrimental to sovereignty, security and integrity of India, it is also not detrimental to bilateral relations with any other country or to strategic and/or economic interest of India. It is highly unlikely that the applicant will indulge in act of terrorism or offence against Indian state. Thus, an apprehension that the applicant may leave India and may never come back cannot be ground to keep him in India till the culmination of all legal proceedings, which may emanate from the search conducted on 15.02.2022. As such, legal proceedings are likely to take a long time to conclude. It has already been six months since the issuance of letter of request for opening of LOC against applicant and the investigation appears to be nowhere near completion. There is a likelihood that the applicant may leave India on the pretext of some business meeting or any personal work and may never come back but this possibility of absconding is always there whenever any person is admitted to bail in any criminal case. In Rana Ayyub v. Union of India & Anr. W.P.(CRL)714/2022 decided on 04.04.2022 the High Court of Delhi quashed the LOC as there was no cogent reason to presume that the petitioner would not appear before the

investigating agency. The applicant is also entitled to equality before the law. The applicant cannot be treated differently solely on the ground of his nationality and cannot be restricted from international travel by issuance of LOC, when Indian Nationals facing legal proceedings in more serious offence are allowed to travel outside India.

The company is not a fly by night operator and considering the fact that it generates considerable revenue from India, it is prudent that a condition be imposed upon payment of salary, bonus, ESOPs and other benefits to the applicant by the accused company, so as to exercise some degree of control over him. There is no ground to keep the LOC open against the applicant and the LOC against the applicant is liable to be set aside. At this juncture, it is apposite to advert to the observation made by High Court of Delhi in Shri Sathish Babu Sana v. Central Bureau Of Investigation W.P.(CRL) 249/2019 decided on 28.01.2022:-

10. The petitioner thus satisfies the test laid down by this Court in Sumer Singh Salkan (supra) as he has neither deliberately evaded arrest nor failed to appear before the Trial Court despite the non-bailable warrants nor has any coercive action been taken against him and he has travelled abroad number of times with the permission of the Court, which concession he did not misuse and therefore there is no justification in continuing with the LOC opened against the petitioner. Hence the respondent is directed to recall its request for opening the LOC against the petitioner. It is further directed that that the petitioner will continue to join the investigation as

and when directed by the Investigating Officer and any condition that is imposed by the learned Special Judge in the complaint lodged pursuant to the ECIR, when the petitioner seeks permission to travel abroad will also be applicable in the abovenoted RC No.224/2017/A-001, till the charge-sheet is filed and thereafter, if the petitioner is charge-sheeted and summoned as an accused.

From the perusal of the aforementioned extract, it is evident that the court at the time of quashing the LOC may impose conditions upon the applicant. This court is cognizant of the fact that the applicant does not have any movable or immovable assets in India except his bank account. Moreover, none of the family members and relatives of the applicant permanently reside in India, hence, there is little incentive for the applicant to come to India once he leaves the country with an intent to not return back. It is also doubtful 'whether the sureties would be in a position to compel the applicant to come to India should he decide against coming back for facing prosecution in complaint case or for appearing before the investigating officer. In these circumstances, it is ordered that in case of resignation, retirement or cessation of employment etc. of the applicant, the company shall withhold the Severance Pay/Severance Package and other incentives/emoluments payable to applicant and the same shall not be released without prior permission of this court. An undertaking to this effect shall be procured by the applicant from the company and the same shall be filed with this court under intimation to Deputy Director of Income Tax (Inv) Unit- 4(3), Delhi.

Upon filing of undertaking, DDIT (Inv) Unit-4(3), Delhi shall take appropriate steps for withdrawing the lookout circular against the applicant and the same shall be withdrawn/recalled within 7 days of filing of undertaking by the applicant. The application stands disposed of.

Copy of this order be given dasti, free of cost to both the parties.”

20. The petitioner has submitted that the OM's under which the LOC had been issued are not under consideration nor under challenge and that in terms of the verdict of this Court in “**Sumer Singh Salkhan v. Asst. Director and Ors.**” **ILR (2010) Del 706**, an LOC can be issued by an investigating agency in cognizable offences where the accused is deliberately evading arrest or failing to appear before the Trial Court, and where there is a likelihood of the accused leaving the Country to evade trial/arrest. Inter alia, the petitioner has submitted that the 2010 OM was amended in 2017 vide OM dated 05.12.2017 permitting an LOC to be issued without complying with all earlier requirements, in exceptional circumstances, if it appears to the issuing authority based that, inter alia, the departure of such a person is detrimental to the economic interests of India and that several Courts have invoked the amended OM of 2017 while upholding the power of issuance of LOC where the economic interests of India are involved.

21. The petitioner has thus submitted that the learned Trial Court had failed to consider the amendment to the OM's carried out in India wherein to safeguard economic interest of India all conditions of the earlier Office Memorandum need not to be fulfilled. The

petitioner has further submitted that the said LOC was issued on 19.02.2022 in accordance with the OM No. 25016/31/2010-Imm dated 27.10.2010 issued by the Ministry of Home Affairs which was amended vide OM No. 25016/10/2017-Imm(Pt.) dated 05.12.2017, wherein it is stated as follows:

"In exceptional cases, LOCs can be issued even in such cases, as would not be covered by the guidelines above, whereby departure of a person from India may be declined at the request of any of the authorities mentioned in Clause (b) of the above-referred OM, if it appears to such authority based on inputs received that the departure of such person is detrimental to the sovereignty or security or integrity of Indian or that the same is detrimental to the bilateral relations with any country or to the strategic and/or economic interests of India or if such person is allowed to leave, he may potentially indulge in an act of terrorism or offences against the State and/or that such departure ought not be permitted in the larger interest at any given point in time."

22. The petitioner has further submitted that on 22.02.2021, fresh guidelines were issued for the issuance of LOCs wherein it was stated that no LOC shall be deleted automatically and the LOC shall remain in force until and unless a deletion request is received from the Originator. The petitioner has further submitted that the scope of judicial review against an LOC would be limited to whether prima facie, on the basis of the materials disclosed on affidavit, the economic interest of India is so involved and whether the actions are taken in accordance with law or not. The petitioner has thus, placed reliance on the verdict of the Hon'ble High Court of Madras

in “*S. Martin v. Deputy Commissioner of Police*” 2014 SCC Online Mad 426 with specific observations in paragraphs 24, 26 and 45 thereof, which read to the effect:-

“24. The Learned Public Prosecutor for the Respondents contends that the Petitioner/A2 is often to leave the jurisdiction without permission from the Investigating Officer and when the investigation of the case in Crime No. 304 of 2012 is pending, there is a reasonable apprehension on the part of the Petitioner that he may tamper the material witnesses.

...

26. Added further, it is the pivotal contention of the Learned Public Prosecutor for the Respondents that as per Guideline No. 8(j) laid down in the Office Memorandum dated 27.10.2010 issued by the Government of India, Ministry of Home Affairs, (Foreigners Division) that ‘In exceptional cases, LOCs can be issued without complete parameters and/or case details against CI suspects, terrorists, anti-national elements, etc. in larger national interest and in view of the fact that the Petitioner was arrayed as A2 in Crime No. 304 of 2012 based on the confession of A1 to the effect that ‘the Petitioner/A2 was dealing with lottery tickets of Sikkim and Nagaland which were banned in Tamil Nadu and they were printing and selling such lottery tickets to innocent purchasers and thereby cheating the public and keeping the above said amount as unaccounted one and obtained as unlawful gain’ etc., the said act of the Petitioner/A2 along with other two accused (Nagarajan-A1 and Moorthy-A3) comes within the ambit of an exceptional case and as such, notwithstanding the fact that original LOC dated 06.10.2012 opened against the Petitioner for a period of one year was extended for six months till 26.05.2014 in terms of the letter of the DC/CCB dated 16.12.2013 beyond a period of one year, as an legally tenable one

and therefore, the contra plea taken by the Petitioner cannot stand a moment scrutiny in the eye of law.

....

....

45. Admittedly, as against the Petitioner/A2 the investigation is pending in respect of the Crime No. 304 of 2012 originally on the file of the 3rd Respondent and later on transferred to the file of 2nd Respondent. It is the stand of the Respondents that only because of the attitude of the Petitioner/A2, they are unable to proceed further in regard to the investigation of the case. Considering the gravity of charges levelled against the Petitioner/A2 in Crime No. 304 of 2012 by the Respondents and in view of the Guideline No. 8(j) of the Office Memorandum dated 27.10.2010 (relating to the issuance of LOC in respect of Indian citizen and foreigners) by the Government of India, Ministry of Home Affairs (Foreigners Division) based on the existing practice, even though the LOC dated 06.10.2012 opened for a year against the Petitioner for a period from 06.10.2012 to 05.10.2013 was extended for six months till 26.05.2014 by the Bureau of Immigration, (MHA), Government of India, Chennai - 6 through communication dated 27.01.2014 (which is beyond the period of one year from the date of issue), yet, the extension of LOC dated 27.01.2014 for a further period of six months till 26.05.2014 and the earlier LOC issued on 06.10.2012 for a period of one year (in respect of the Petitioner) are valid and tenable ones, in the considered opinion of this Court. Certainly, the Respondents can take recourse to the issuance of LOC to prevent likelihood of the Petitioner/A2 leaving the country to evade trial. After all, the said LOC is nothing but coercive tool enabling the Petitioner either to surrender before the Investigating Agency or to co-operate with the Investigating Agency in regard to the pending completion of investigation in Crime No. 304 of 2012.

Further, the Petitioner/A2 comes within the ambit of the term 'exceptional case/cases' and therefore, there is no impediment in law for the concerned authorities to issue LOC against him without complete parameters."

to submit to the effect that even during pending investigation, the LOC was upheld by invoking the category of exceptional circumstances submitting to the effect that the said case was a case where the petitioner was arrayed as an accused for dealing in lottery tickets which were banned in Tamil Nadu and for keeping the unaccounted and unlawfully acquired money.

23. The petitioner has further placed reliance on the verdict of the Division Bench of the Hon'ble High Court of Allahabad in ***"GSC Rao v. State of UP" (2019) 106 ACC 437*** with specific observations in paragraph 11 thereof, which reads to the effect:-

"11. We are not inclined to extend the benefit to the revisionist-accused of the law laid down in the judgment of Karti P. Chidambaram (Supra) because in the present case, the LOC has been issued with a view to interrogating the revisionist in the matter at hand wherein the FIR has already been lodged and the investigation is going on. Merely because the revisionist so far had been cooperating with the investigation, may not lead us to believe that he would not evade his arrest in future. If some incriminating evidence comes on record against him, the possibility cannot be ruled out in this case of his fleeing abroad."

submitting to the effect that it dealt with a case which related to the misappropriation and diversion of bank loans by the company of the accused and it is in this context a plea was taken that the persons

under investigation have so far been cooperating and the LOC should be quashed and that the Hon'ble High Court of Allahabad held that keeping in mind the huge financial scam of Rs. 100 crore in that case and the ongoing investigation, the possibility of the accused fleeing could not be ruled out, dismissed the petition.

24. Inter alia, the petitioner has submitted that it is well settled that economic offences involving the huge public funds need to be viewed seriously as they affect the economy of the country as a whole and pose a serious threat to the financial health of the country as a whole, as was stated by the Hon'ble Supreme Court in ***“YS Jagan Mohan Reddy v. CBI” 2013 7 SCC 439***. The petitioner has inter alia submitted that in view of the glaring facts of this case and the huge economic fraud coupled with the fact that the respondent is on bail, in connected cases, the present LOC deserves to be continued in the instant case.

25. The petitioner has further placed reliance on the verdict of the Hon'ble Supreme Court in ***“C. Sivasankaran v. Foreigner Regional Registration Officer and Ors.” 2019 SCC Online Mad 9045***, wherein it is submitted that it was held that there was no case to lift the LOC just because the accused had been cooperating with the investigating agencies as it was found to be beyond the credulity of the court that the Petitioner would return to India obediently and submit himself to the legal process in strict adherence to his undertaking. It has been submitted on behalf of the petitioner that this verdict was upheld by a Division Bench of the Hon'ble Madras High Court in ***“C. Sivasankaran v. Foreigner Regional***

Registration Officer and Ors.” 2020 SCC Online Mad 2656

wherein it was held to the effect:-

“17. In our opinion, the issuance of a Look Out Circular is an exercise of authority under the Office Memorandum dated 27.10.2010 and such a circular can be issued in larger public interest, as already held by the Ld. Single Judge after taking into account the amendment in the said memorandum.”

26. The petitioner has further placed reliance on the verdict of the Hon’ble High Court of Bombay in ***“Suman Gupta v. Union of India and Ors.”*** in WP (Crl.) 1313/2020, to submit to the effect that in that case, the petitioner thereof had sought to travel abroad for medical treatment and it was held therein that a LOC would not be quashed where there are allegations of economic offences of a serious nature which deal with siphoning of public funds and it was further held that the 2010 OM following the 2017 amendment included within its scope cases of such persons whose departure would be detrimental to the “economic interest of India.”

27. The petitioner has further placed reliance on the Co-ordinate Bench of this Court in ***“Rajesh Dhanda v. Union of India”*** in Writ Petition (Crl.) No. 1588/2021, a verdict dated 24.01.2022, wherein, it was observed to the effect:-

“3. By this petition, the petitioner has sought various directions to the respondents including proper investigation under Section 5 read with Section 3 of the PMLA and Section 83 of the CGST Act by a Special Investigating Team (SIT) etc. on the complaint filed by the petitioner dated 29th July, 2021.

4. Learned counsel for the petitioner refers to the counter affidavit filed by the respondent no. 7, the Income Tax Department wherein affidavit notes that the Income Tax Department has initiated its investigation and taken series of actions against Vikas Chaudhary, Sudhir Gulati and number of companies. According to the affidavit, during the course of search and survey operations incriminating documents/digital evidences relating to over invoiced exports, trade-base money laundering, fictitious purchases, fraudulent availing of export incentives, duty drawback and sharing them with other exporters were found. It was stated that one Avtar Singh Kocchar was found to be running a hawala racket and in his statement, he admitted that he helped in getting a telegraphic transfer to one of the entities of Vikas Chaudhary, who had made exports to various companies out of which the department was able to find out evidences for few companies which also involved money laundering. Further, one Manoj Garg was also found to be involved in the international hawala transactions as was evident from the documents seized during the search at the premise of Vikas Chaudhary. Further, export incentives have been fraudulently earned by the company controlled by Vikas Chaudhary and bogus purchases were identified to be made in the three entities, namely, Mis Aashtha Apparels Pvt. Ltd., M/s JBB Apparels Pvt. Ltd. and M/s JBN Apparels Pvt. Ltd. Digital evidences seized showed a draft agreement for an offshore company in the name of M/s Centurion International Limited registered in the Jebel Ali Free Zone, Dubai of which Vikas Chaudhary bought 10% share for Rs.1,65,00,000 AED or INR 30 crores as per the trust deed from one Amit Agarwal in the name of his daughter. Thus, huge income tax evasion was also found.

5. Further, investigation from the search and seizure of Sudhir Gulati revealed that he owns and operates a group of companies involved in the export of readymade garments. The search and seizure carried out on the business and residential premises of Sudhir Gulati, Avtar Singh Kochhar and others on 6th February, 2019, also revealed over invoiced exports, trade-based money laundering, fictitious purchases, fraudulently availing of export incentives, etc.

6. Learned counsel appearing on behalf of the Income Tax Departments states that assessment proceedings are going on against Vikas Chaudhary and other co-accused and any further action will be taken pursuant to the outcome of the assessment proceedings.

8. An affidavit has been filed even on behalf of the respondent no.4, ORI, according to which it initiated its investigation on 11th September, 2019 into a case of 'undue avilment of duty drawback and other export incentives by resorting to over valuation by the following export companies owned and controlled by Mr Vikas Chaudhary and his relatives, and his associates, namely, M/s Nautilus Metal Craft Pvt. Ltd., M/s Aashtha Apparels Pvt. Ltd., M/s JBB Apparels Pvt. Ltd. and M/s JBN Apparels Pvt. Ltd.

9. It is thus evident that in the complaints referred in the present petition, investigations by the Income Tax Department, DDGI and ORI have been conducted, however, as regards SFIO there is no investigation carried out. As per the affidavit filed on behalf of the SFIO since under Sections 210, 212 and 213 of the Companies Act, the Central Government has to direct investigation into the affairs of the company and since no such direction has been received, the SFIO cannot investigate the affairs of the company. The Central Government,

which has been impleaded as respondent no.1, Ministry of Corporate Affairs will treat the present petition as a representation and consider whether any direction is required to be issued to the SFIO for investigating the offences in terms of Sections 210 and 212 of the Companies Act and a report in this regard be filed before the next date of hearing.

10. No affidavit has been filed by the respondent no. 5, Enforcement Directorate. Learned counsel appearing on behalf of the ED submits that the Enforcement Directorate is inquiring into the matter and at this stage it would not be proper for the Enforcement Directorate to file an affidavit and he be permitted to file a Status Report in sealed cover.

11. Status Report in sealed cover in respect of the inquiry being carried out by the ED be placed on the record of this Court before the next date of hearing."

28. Inter alia, the petitioner has submitted that the learned Trial Court had failed to appreciate that the accused is a foreign National with no roots in India and that neither does he have movable or immovable assets in India other than his bank account nor do any of his family members and relatives are a permanent residents of India submitting thus that the respondent is a flight risk.

29. The petitioner has further submitted that the learned Trial Court had erred in observing that withholding of the severance package safeguarded the interests of revenue which would potentially run into more than 600 crores. Inter alia, the petitioner has further submitted that vide the impugned order, the learned Trial court had observed that the facts of the case do not support the conclusion that there was any detriment to the economic security of

the State, however the detailed facts mentioned therein would clearly convey the opposite. The petitioner has also placed reliance on the observations of the Hon'ble Division Bench of this Court in LPA No.78/2022 in ***"Income Tax Department v. Vikas Choudhary"***, an order dated 03.02.2022, wherein, it has been observed to the effect:-

"Ongoing investigation has revealed that there are proposed additions upwards of Rs.14,83,93,68,372/- and penalties upwards of Rs.2,66,13,000/-. It is also submitted that the Appellant is investigating into the offences under the Black Money {Undisclosed Foreign Income and Assets} and Imposition of Tax Act, 2015 and has submitted FT& TR references to the authorities in Dubai and under special enactments such as this Act, an FIR is not a pre-requisite for commencement of the investigation and on a complaint being filed, it is treated as a complaint case. It is thus urged by the learned counsel for the Appellant that if the impugned judgment quashing the LOC is not stayed, grave prejudice shall be caused to the investigation and if Respondent No.1 is permitted to travel abroad, it shall be detrimental to the core economic interests of the country and will be a contravention of the very object for which OM's dated 05.12.2017 and 22.02.2021 have been issued. It is emphasised that the OM dated 05.12.2017 was issued by the Government of India, Ministry of Home Affairs- Foreigners Division {Immigration Section}, amending the OM dated 27.10.2010 and expanding its scope to issue LOCs against persons impacting the economic interests of India and the OM dated 22.02.2021 was issued laying down fresh Guidelines for issuance of LOCs and it is clearly stipulated therein that no LOC shall be deleted automatically and shall remain in force till a deletion request is received from the

Originator. Learned Senior Counsels appearing for Respondent No.1, on the other hand, refute the contentions of the Appellant and submit that the Learned Single Judge has rightly quashed the LOC. It is also submitted that Respondent No.1 is a businessman and is required to travel frequently for the conduct of his business and there is no question of his fleeing from the country or evading the process of law. It is also submitted that a detailed reply shall be filed by Respondent No.1, which will bring forth the falsity of the stand of the Appellant, including the fact that the figures cited by them are highly exaggerated. Having heard the learned counsel for the Appellant and the learned Senior Counsels for Respondent No.1, in our view, Appellant has made out a prima facie case for grant of interim relief. The balance of convenience is also in favour of the Appellant and in case the impugned judgment is not stayed, irreparable loss shall be caused to the Appellant. We, accordingly, stay the operation, implementation and execution of the impugned judgment dated 12.01.2022, passed by the learned Single Judge in W.P.(C) 5374/2021, till the next date of hearing. Respondent No.1 is hereby directed to deposit his passport with the learned Registrar General of this Court, latest by 5.00 PM on 04.02.2022. The passport shall be kept by the Learned Registrar General in safe custody in a sealed cover."

30. Through the written submissions dated 14.9.2022 submitted by the petitioner it has been submitted that the prosecution complaint filed against the respondent though for an offence under Section 275B of the Income Tax Act, 1961, which is a non-cognizable and bailable offence, nevertheless from the file noting submitted before this Court in a sealed cover on 12.09.2022, it is indicated that the investigation is ongoing with respect to a non-

bailable offence under Section 276C of the Income Tax Act, 1961, which relates to wilful attempt to evade taxes and is punishable with a maximum sentence of 7 years of imprisonment and fine, which is evident from the letter issued by the Income Tax Department to the Bureau of Immigration on 19.02.2022, requesting issuance of Look out Circular.

31. Inter alia the petitioner reiterates that even at the stage of the investigation, a Look-out Circular can be issued to secure the presence of an accused during investigation. The petitioner further submits that the learned Trial Court has committed an error in ignoring the 2017 amendment to the O.M. of 2010 and has failed to construe the expression "Economic Interest of India" in a correct manner. The petitioner submits that where more than Rs. 600 Crores of tax dues on a potential income tax addition of Rs. 2200 Crore is likely to be made, based on incriminating seized materials, it cannot be said that the "Economic Interest of India" is not involved. The petitioner has reiterated the reliance on the verdict of the Division Bench of this Court, in LPA 78/2022, and order dated 3.2.2022 therein already referred to herein above. The petitioner submitted that the findings of the Trial Court are thus not in consonance with the prima facie view of the Division Bench of this Court in LPA 78/2022. The petitioner reiterates that economic offences involving huge public funds need to be viewed seriously as they affect the economy of the country as a whole and pose a serious threat to the financial health of the country as a whole. The petitioner further submits that in view of the glaring facts of this case and the huge

economic fraud coupled with the factum that the respondent is on bail in connected cases, the present LOC deserves to be continued.

32. Inter alia, the petitioner has submitted that the contention of the respondent that the prosecution complaint has been filed for a bailable offence under Section 275B of the Income Tax Act, 1961, which is only a technical offence which reads as under:

“[275B. Failure to comply with the provisions of clause (iib) of sub-section (1) of section 132:-- If a person who is required to afford the authorised officer the necessary facility to inspect the books of account or other documents, as required under clause (iib) of sub-section (1) of section 132, fails to afford such facility to the authorised officer, he shall be punishable with rigorous imprisonment for a term which may extend to two years and shall also be liable to fine.]”,

has nevertheless submitted that the main offence investigated, is Section 276C which is a non-bailable offence and thus it makes no difference that the prosecution complaint is filed for a bailable offence when a non-bailable offence under section 276C(1)(i) of the Income Tax Act, 1961 is the subject matter of investigation for which a look out circular has been issued.

33. The petitioner has further submitted that the respondent is a Chinese national with no relatives or assets or roots in India and hence is thus a 'flight risk'. The petitioner further submits that the Trial Court's direction to the company to not release the severance pay/severance package and other emoluments payable to the respondent is meaningless as the same would be a drop in the ocean

as compared to the huge tax demand of more than Rs. 600 crores which is likely to arise of qua which there has been a wilful evasion to pay taxes.

34. On behalf of the respondent whilst opposing the prayer made by the petitioner it was vehemently urged as also submitted through the written submissions submitted on behalf of the respondent dated 13.9.2022 that in terms of the verdict of this Court in *Sumer Singh Salkan Vs. Assistant Director & Ors.* [2010 (4) JCC 2401] an LOC could not have been issued at all, and that the petitioner herein has concealed the bail order in the instant case and thus this Court ought to consider whether any relief at all ought to be granted to the petitioner who had indulged in concealment of facts.

35. The respondent further submits that a heavy amount of a personal bond and two Indian citizens as sureties has been imposed by the learned Trial Court as a condition of bail and the respondent has placed reliance on the order dated 17.8.2022 of the learned Trial Court granting bail to the applicant.

36. Vide order dated 17.8.2022 the learned Trial Court of the ACMM (Special Act) Central District, Tis Hazari Courts, had observed as under:

“The application seeking bail u/s 436 Cr.PC is pending disposal.

Reply filed by the complainant opposing the said application has been perused. Submissions made by counsels for the respective parties have been considered. The offence being bailable in nature, the accused Xiongwei Li is admitted to bail on his furnishing personal bond in the sum of Rs.5,00,000/- with two sureties in like

amount, to the satisfaction of this court/ Link MM/Duty MM as the case may be. Both sureties shall be Indian citizen. The applicant is a foreign national and in case he leaves India and decides not to return, then his personal bond may practically become worthless, hence, to guard against such a scenario. the applicant shall place on record an interest bearing FDR of Rs.5,00,000/- in the name of Learned Principal District and Sessions Judge, HQ, Tis Hazari, Delhi which may be appropriated in case the personal bond is forfeited. Personal bond furnished by the accused is accepted till the next date of hearing. Both the surety bonds are accepted. The FDR in the name of Learned Principal District and Sessions Judge, HQ, Tis Hazari, Delhi, shall be deposited on NDOH.

*In response to the application for quashing of lookout circular issued against the applicant/accused, a reply was filed by the Income Tax Office on last date of hearing. It is canvassed in the reply that further investigation is being conducted by the complainant in connection with search conducted on 15.02.2022 at Capital Cyberspace, Gurugram Manesar, Urban Complex, Sector 59, Ullahwas, Haryana premises of M/s Huawei Communications (India) Co. Pvt. Ltd. and the applicant's presence may be required in the ongoing investigation. Considering the facts and circumstances, this court deems it appropriate to direct the complainant to place on record, in sealed cover the letter of request as well as the LOC proforma(s) submitted for issuance of LOC against the applicant, on or before **24.08.2022 at 3 p.m.** The applicant/accused has given an undertaking to inform the complainant 7 days prior to leaving India, in case the LOC is quashed."*

37. The respondent thus submits that vide order dated 17.8.2022 granting bail to the respondent there is no restriction with regard to foreign travel except that the respondent has to give intimation one

week prior to the date of travel and there can thus be no embargo on the travel and that the conditions imposed by the learned Trial Court have been complied with by the respondent and that the requisite undertaking in terms of order dated 29.8.2022 has already been submitted.

38. The respondent further submits that he has given intimation of his proposed travel from 13.09.2022 and the next date of hearing in the criminal complaint before the learned Trial Court is 25.11.2022 and that the petitioner has not challenged the bail order.

39. The respondent further places reliance on the verdict of this Court in *Nimmagadda Upendranath vs. Union of India & Anr* [W.P. (CRL.) 2609/2021] submitting to the effect that in that case this Court had suspended the LOC and allowed the petitioner therein to travel abroad and that there was no coercive order passed in that case by the High Court of Andhra Pradesh also and that in the instant case also the Trial Court had grant bail to the respondent.

40. The respondent has further submitted that it was the petitioner who had himself submitted before the Division Bench that the respondent can approach the Trial Court with regard to bail and travel conditions and placed reliance on the order dated 26.7.2022 of the Division Bench of this Court in W.P.(C) No. 8048/2022 wherein it has been observed as under:

“ The respondent No.1 in its counter affidavit has averred as under:

20 . Furthermore, the prosecution complaint has already been filed and Ld. ACMM, Tis Hazari Court, Delhi has already summoned

the petitioner to appear before the Hon'ble Court. Considering the same, the Petitioner may now approach the Ld. Trial Court with regards to bail and travel conditions of the Petitioner.

xxxx xxx xxx xxx xxx

43. That, the contents of Ground B6 are denied. It is again reiterated that, the prosecution has filed a complaint before Ld. ACMM and on the said complaint Ld. ACMM has taken the cognizance. Therefore, the Petitioner can approach the Ld. Trial Court and the Ld. Court can decide on the aspect of foreign travel of the Petitioner."

*Keeping in view the aforesaid averments as well as the law laid down by this Court in **Sumer Singh Salkan vs. Assistant Director & Ors. Reported in ILR (2010) VJ Delhi 706**, learned counsel for the Petitioner states that he would approach the Trial Court for cancellation of the Look out Circular as well as for permission to travel abroad.*

We, accordingly, grant liberty to the Petitioner-applicant to approach the Trial Court, which Court shall consider the application for cancellation of Lookout Circular as well as for permission to travel abroad in accordance with law.

In the event such an application is filed before the Trial Court within a week, the same shall be disposed of as expeditiously as possible, preferably, within four weeks.

This Court clarifies that it has not commented on the merits or the controversy. The rights and contentions of all the parties are left open.

With the aforesaid liberty and clarification, the present writ petition along with application stands disposed of."

41. The respondent has further submitted that in the Counter Affidavit before the Division Bench the petitioner had itself submitted that the respondent would approach the Trial Court with regard to bail and travel conditions and reliance has been placed on behalf of the respondent on paragraphs 20,41, and 43 and the counter affidavit of the petitioner herein before the Division Bench of this Court in W.P.(C) No. 8048/2022:

“20. The contents of para 3.15 are also denied. It is submitted that, the Show Cause Notice was issued to HTICPL. The Petitioner is the Chief Executive Officer of the company and is responsible for the affairs of the company. Furthermore, the prosecution complaint has already been filed and Ld. ACMM, Tis Hazari Court, Delhi has already summoned the petitioner to appear before the Hon'ble Court. Considering the same, the Petitioner may now approach the Ld. Trial Court with regards to bail and travel conditions of the Petitioner.

Xxx xxx xxx xxx

41. That, in response to the Ground B4, it is submitted that, the Petitioner has been summoned by the Ld. ACMM and he can very well approach the Ld. Trial Court and explain the circumstances requiring him to travel abroad. That the Petitioner is not an unencumbered individual and has been summoned by the Ld. Trial Court for offence committed as per Section 275B of IT Act.

Xxx xxx xxx xxx

43. That, the contents of Ground B6 are denied. It is again reiterated that, the prosecution has filed a complaint before Ld. ACMM and on the said complaint Ld.

ACMM has taken the cognizance. Therefore, the Petitioner can approach the Ld. Trial Court and the Ld. Court can decide on the aspect of foreign travel of the Petitioner.”

42. Inter alia, it has been submitted by the respondent that in the first round of litigation it was the petitioner who had submitted that the Trial Court may decide on the issue of travel. The respondent further submits that the reasons now sought to be argued before this Court were not argued on behalf of the petitioner on previous three occasions before the Division Bench; in the reply to the Trial Court nor whilst making the request for the LOC and that the most important documents were ordered by the learned Trial Court to be submitted in a sealed cover. The respondent thus submits that there can be no relief granted for a new reason sought to be put forth by the petitioner when the said reason was not put forth in the request sent for opening of the LOC and reliance in relation thereto is placed on behalf of the petitioner in ***Opto Circuit India Ltd Vs. Axis Bank and Ors***; a verdict of the Hon’ble Supreme Court in Crl.Appeal 102/2021 decided on 3.2.2021. The respondent places reliance on observations in para 13 of the said verdict which reads as under:

“13. The action sought to be sustained should be with reference to the contents of the impugned order/communication and the same cannot be justified by improving the same through the contention raised in the objection statement or affidavit filed before the Court. This has been succinctly laid down by this Court in the case of Mohinder Singh Gill and

Anr. v. The Chief Election Commissioner, New Delhi and Ors; (1978) 1 SCC 405 as follows;

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji:”

43. Inter alia, the respondent submits that vide order dated 17.8.2022 the Trial Court had directed the petitioner to place on record in a sealed cover the letter of LOC request as well as the LOC proforma(s) submitted for issuance of LOC against the Respondent but the petitioner had not enclosed the same with the present and had concealed the same.

44. The respondent further submits that the company of the respondent had informed the petitioner that the company had duly appointed Mr.Long Cheng as CFO of the company but this fact was also concealed from this Court and it had been wrongly stated in the appeal that presently there is no CFO.

45. The respondent further submits that fresh or additional grounds cannot be permitted for the first time in an appeal as held by the Hon’ble Supreme Court in *M/s Jindal Industries Vs State of Haryana* 1991 Supp (2) SCC 587, with reliance placed on observations in paragraph 7 to the effect:

“ 7. Although in the special leave petition, a specific allegation is made that the withdrawal of the exemption by the notification of August 23, 1977 was a mala fide act on the part of the new government. there is no such averment made admittedly in the writ petition which was filed before the High Court. Except a bare statement of the event in paragraph 15 which we have reproduced verbatim above, we do not find any averment with regard to the mala fides or any contention on that behalf in the petition. The mala fides are essentially question of fact and they have not only to be alleged but have also to be supported by the relevant material Since not even an averment was made in that behalf in the writ petition, the point cannot be permitted to be taken up for the first time in this appeal.”

46. The respondent further submits that reasons for opening LOC was not “Economic Interest of India” and additional pleadings cannot be brought forth for the first time before the Court. The respondent places reliance on observations in the impugned order of the learned Trial Court dated 29.8.2022 wherein it had been observed vide paragraph 5 of the said order to the effect:

“Perusal of letter written to the authority concerned by officer of ITO for issuance of LOC against applicant shows that the officer was of prima facie view that commission of other offences under the Act was disclosed and thorough investigation was required to be conducted. The applicant being the CEO or the company would be required to appear before the investigating officer for purpose

of investigation. The reason for issuance of LOC seems to be to ensure that the applicant does not escape from India. Hence, it appears from the documents produced in closed envelope that LOC was issued not due to the pendency of the complaint case but for reason of ongoing investigation against the company.”

47. It is further submitted by the respondent that in the impugned order dated 29.8.2022 the reasons for opening of the LOC were not “Economic Interest of India” and now additional pleadings cannot be brought forth for the first time in the appeal and new facts were not placed before the Trial Court.

48. The respondent has further submitted that the petitioner herein in W.P.(C) No. 8048/2022 before this Court did not mention anything about the “Economic Interest” at all in its counter affidavit/ Court argument and rather it was the petitioner herein who had agreed before this Court that only the Trial Court was competent to deal with the LOC matter and had got the matter referred back to the Trial Court under the directions of this Court. The respondent reiterates that before the Trial Court only a complaint under Section 275B read with Section 279B of the Income Tax Act, 1961, is pending and there is no complaint with regard to Economic Interest of India.

49. The respondent relies on the counter affidavit filed by the petitioner before this Court to contend to the effect that the petitioner did not make any mention about the “Economic Interest”

at all in its counter affidavit and refers to paragraph 6(o) on page 128 of the appeal which reads to the effect:

“ o) In view of the above mentioned factors a Look Out Circular was issued against the Petitioner because of his conduct during the course of the Search Action demonstrated that he was flight risk and that he did not wish to cooperate with the investigation proceedings at hand.”

50. Likewise, the respondent places reliance on paragraph 38 on page 138 of the appeal which reads to the effect :

“for initiation of proceedings against an individual. The LOC has been issued as the actions of the Petitioner clearly demonstrate that the petitioner intended to not comply with the proceedings at hand and the investigation into the finances of HTICPL.”

as well as on paragraph 44 at page No. 139 of the appeal which reads to the effect:

“ That, the content of Ground B7 are denied. It is submitted that, it is submitted that, Look-Out Circulars are issued only in the case of exceptional circumstances and in the current case, issuance of LOCs was resorted to considering the actions of the Petitioner and the company of which he is the Chief Executive Officer. The Petitioner has consistently denied and delayed the proceedings at hand even to the point of not providing access to the emails of the CFO of the company who remains outside of India. It further submitted that rights of an individual needs to be balanced with safeguarding the interest of the Prosecuting and investigating agencies.”

as well as on paragraph 45 at page No. 140 of the appeal which reads to the effect:

“ 45. That the contents of Ground B8 are denied. It is submitted that, the impugned LOC has been issued after considering the actions of the Petitioner which leads to a substantial belief that the Petitioner wishes to evade the investigation being carried out against HTICPL.”

51. The respondent further submits that a circular cannot override the ratio of the judgment of the High Court/Supreme Court as held in ***Commissioner of Central Excise, Bolpur V. Ratan Melting & Wire Industries***; (2008) 13 SCC 1 wherein it has been categorically observed vide paragraph 7 thereof to the effect:

“ 7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

52. Reliance has also been placed on behalf of the respondent on the verdict of this Court in *Priya Parameswaran Pillai Vs Union of India And Ors*; placing reliance on observations in paragraphs 10, 12.1, 12.2, 13.9 as under:

“ 10. In view of the aforesaid facts, the following issues arise for consideration:

....

(ii) Whether the 2010 O.M. would constitute a “law” within the meaning of Article 13(3)(a) of the Constitution?..”

....

12.1 I must, however note, before I proceed further that, Ms Indira Jaising has argued, with much vehemence, that the respondents’ stand, that the, power to issue an LOC can be traced to the 2010 O.M., or, those which precede the said O.M., is unsustainable, as it cannot be described as “law”, within the meaning of Article 13(3)(a) of the Constitution. This submission, I must confess, has much merit in view of the decisions of the Supreme Court both in *Maneka Gandhi* case as well as in the case of *A.K. Gopalan*. Both judgements take the view that “law” referred to in Article 21, would mean “enacted law”.

12.2 in the petition, there is no relief sought to strike down the 2010 O.M. One of the reasons, perhaps for this would be that Ms Pillai was never furnished a copy of the LOC. ...

....

13.9 The actions of the respondents do not fall within the ambit of reasonable restriction, as articulated in Clause (2) of Article 19. Clause (2) of Article 19 protects a

“law” which imposes reasonable restrictions on the exercise of rights conferred upon a citizen under Article 19(1)(a), in the interest of: sovereignty and integrity of India, the security of State, friendly relations with foreign States, public order, decency, morality or in relation to contempt of court, defamation or incitement to an offence. As indicated above, even if I were to assume that 2010 O.M. has the status of law, qua which I have a serious doubt, the action of the respondents in issuing an LOC vis-a-vis Ms Pillai cannot be categorized as a reasonable restriction, as it is not a restriction which falls in any of the limitations articulated in clause (2) of Article 19.”

53. The respondent further submits that the petitioner’s concern of a probable demand of Rs.600 crores is already secured by the Company vide a judgment of the Division Bench of this Court and that further the CEO is only an employee of the company and the demand is not payable by the CEO. Inter alia, the respondent submits that the impugned order relates to an application of the CEO of the company, i.e., the respondent and now there is a CFO in the company and the claim will be against the company and not against the CEO and that the company has already given Rs.230 crores as deposit in terms of the order of the Division Bench of this Court dated 30.8.2022 in W.P.(C) No. 6352/2022 wherein it has been observed in paragraph 7 of the said verdict to the effect:

“ 7. Having heard the learned senior counsel for the Petitioner and the senior standing counsel for the Revenue, in view of the fact

that the Petitioner has agreed to secure the Respondents, we do not wish to go into the merits of the allegations and contentions raised. Consequently, to balance the equities, without going into the merits of the contentions raised by the respective parties, the present writ petition is being disposed of and accordingly the previous orders dated 21st April, 2022 stands modified to the following extent: -

(i) In addition to the Fixed Deposit Receipt of Rs. 100 crores which was directed to be made by order dated 21st April, 2022, the Petitioner shall prepare another Fixed Deposit Receipt of Rs. 100 crores in Axis Bank Account No. 919020017328222, which shall be renewed automatically from time to time. A photocopy of the said FDR shall be filed with the Assessing Officer within a week. The Banker is also directed to ensure that the Petitioner and/or any of its officials /nominees/authorized representatives do not deal with the FDR in any manner. There shall be a lien in favour of the Department with respect to both the FDRs till conclusion of the assessment proceedings and thereafter the amount will be dealt in accordance with law. The Bankers will issue a letter to the AO acknowledging the lien in favour of the Department”

54. The respondent thus reiterates that “ the Company” has already given an FDR of Rs.200 Crores and Rs.30 Crores of refund is withheld and that thus revenue is secured by Rs.230 crores against the probable demand of Rs.600 crores and in terms of the

Office Memorandum of the Ministry of Finance issued vide F.No. 404/72/93-ITCC, the demand would stand stayed till the pendency of the appeal by paying 20% of the demand and thus, against Rs.120 crores ‘the Company’ has already given 230 crores to the Revenue.

55. The respondent has further submitted that there can be no discrimination between a foreign National and an Indian National with it having been submitted by the respondent that the right to protection of life and personal liberty (right guaranteed against State Action) is available even to a foreign citizen in terms of Article 21 of the Constitution of India. Reliance in relation thereto has been placed on behalf of the respondent on the verdict of this Court in **Anil Mahajan vs. Commissioner of Customs & Anr.**, 2000 CrI.L.J. 2094 with specific reliance on observations in paragraph 14 (o) thereof which is to the effect:

“ (o) Law does not authorize or permit any discrimination between a foreign National and an Indian national in the matter of granting bail. What is permissible is that considering the facts and circumstances of each case, the Court can impose different conditions which are necessary to ensure that the accused will be available for facing trial. It cannot be said that an accused will not be granted bail because he is a foreign national.”

56. Inter alia, the respondent submits that the judgments relied upon by the petitioner relate to non-bailable offences inclusive of the verdict in **Income Tax Department V. Vikas Chaudhary and Ors.** (LPA 78/2022) which related to the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 qua which the offence is punishable upto 10 years of imprisonment and

that the offence is a non-bailable offence. The respondent further submits that the other judgments relied upon by the petitioner in *C. Sivasankaran vs Foreigner Regional Registration* relates to an offence punishable under Section 120B read with Sections 409/420 of the Indian Penal Code, 1860 read with Section 13(2) and 13(1) (d) of the Prevention of Corruption Act, 1988, and the said offences are also cognizable and non-bailable.

57. The respondent further submits that the ratio of the verdict of this Court in *Sumer Singh Salkan* (supra) has been followed in

- a. Judgment dated 23.07.2018 *Karti P. Chidambaram Vs Bureau of Immigration*, W.P. No. 21305 of 2017,
- b. *Dhruv Tewari vs. Directorate of Enforcement* on 4th July, 2022
- c. *Shri Sathish Babu Sana vs Central Bureau of Investigation* (W.P.(Crl) 249/2019,
- d. order dated 20.05.2020 in W.P. (Crl.) 829/2020 titled '*Jerambhai Vanmalibhai Patel & Anr. vs The State of NCT Of Delhi & Ors*'

58. The respondent further submits that after the issuance of the circular in 2017, the Trial Court of the Special Judge (PC Act), CBI-18, Rouse Avenue Court in the case of *CBI V. Moser Baer India Ltd. & Ors*, had quashed the LOC and the said order was upheld by of this Court in Crl.M.C. No. 254/2021.

59. The respondent has further submitted that the likely demand is on “the Company” and not the respondent and it would take 2-3 years in the final assessment of the demand and in the meantime in terms of the order of the Division Bench of this Court in W.P.(C) 6352/2022 the Company had already agreed to secure the interest of the Petitioner and had deposited a sum of Rs.230 crores and thus

the respondent submits that even if it is presumed that there is any concern of “Economic Interest”, the Company of the respondent had already secured the interest of the revenue and that has already been decided by this Court.

60. The respondent submits that he has already informed his family and his family is also joining him in Thailand; that the respondent has wife, a 13 year old son and a 3 year old daughter. Inter alia, the respondent submits that the Trial Court had passed the impugned order on 29.8.2022 whereby the Trial Court had been pleased to recall the LOC issued against the respondent but that the petitioner filed the appeal only on 9.9.2022 and got it listed for 12.9.2022 and came to the Court at the last moment. The respondent submits that he has already filed his intimation for going abroad in terms of the bail order dated 17.8.2022 and as per the intimation the respondent had to travel to Thailand on 13.9.2022 and it was to show and create an urgency, the petitioner filed the appeal at the last moment for which if there had been an urgency the petitioner ought to have filed it earlier.

61. The respondent has submitted that this Court ought not to tolerate an indolent litigant in as much as delay defeats equity and places reliance on paragraph 14 of the verdict of the Hon’ble Supreme Court in *Hameed Joharan (D) and others vs. Abdul Salam*: AIR 2001 SCC 3404 wherein it has been laid down as under:

“ 14. Needless to record that engrossment of stamped paper would undoubtedly render the decree executable but that does not mean and imply however, that the enforceability of the

decree would remain suspended until furnishing of the stamped paper – this is opposed to the fundamental principle of which the statutes of limitation are founded. It cannot, but be the general policy of our law to use the legal diligence and this has been the consistent legal theory from the ancient times. Even the doctrine of prescription in Roman Law prescribes such a concept of legal diligence and since its incorporation therein, the doctrine has always been favoured rather than claiming disfavour. Law Courts never tolerate an indolent litigant since delay defeats equity. The Latin maxim ‘vigilantibus non dormientibus jure subveniunt’ (law assists those who are vigilant and not those who are indolent). As a matter of fact, lapse of time is a species for forfeiture of right. Wood, V. C. in Manby v. Bewicke (1857) 3 K and J 342 at 352) stated;”

62. The respondent reiterates that he is an employee of the company and that he is not a financial/tax expert and does not look into the tax matters of the company by himself that he is just an employee of the company and reiterates that the demand would be on the company and it would take 2 to 3 years in finalization of the assessment.

63. The respondent submits that the petitioner may have a case against him as an employee and the respondent is ready to face the trial. The respondent submits that after the search was conducted the petitioner was not even summoned once and submits that the LOC in the instant case has been rightly quashed. Reliance was placed on behalf of the respondent on the verdict of the Hon’ble Supreme

Court in ***MCD Vs. State of Delhi***; (2005) 4 Supreme Court Cases
605 wherein it was observed vide para 21 to the effect:

“21. This apart, the respondent did not also disclose the fact in the criminal revision filed before the High Court that he has also been convicted in another Criminal Case No. 202 of 1997 by the Court of Metropolitan Magistrate, Patiala House, New Delhi. Thus, the contesting respondent has come to the High Court with unclean hands and withholds a vital document in order to gain advantage on the other side. In our opinion, he would be guilty of playing fraud on the Court as well as on the opposite party. A person whose case is based on falsehood can be summarily thrown out at any stage of the litigation. We have no hesitation to say that a person whose case is based on falsehood has no right to approach the court and he can be summarily thrown out at any stage of the litigation. In the instant case, non-production of the order and even non-mentioning of the conviction and sentence in Criminal Case No. 202 of 1997 tantamounts to playing fraud on the Court. A litigant who approaches the court is bound to produce all documents which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party. The second respondent, in our opinion, was not justified in suppressing the material fact that he was convicted by the Magistrate on an earlier occasion. Since the second respondent deliberately suppressed the crucial and important fact, we disapprove strongly and particularly, the conduct of the second respondent and by reason of such conduct, the

second respondent disentitled himself from getting any relief or assistance from this Court. We, however, part with this case with a heavy heart expressing our strong disapproval of the conduct and behaviour but direct that the second respondent to pay a sum of Rs 10,000 by way of cost to the appellant herein.”

64. The petitioner vide its written submissions dated 14.9.2022 filed after the written submissions filed by the respondent on 13.9.2022 inter alia whilst urging that the impugned order be set aside, whilst refuting the contentions of the respondent has submitted that the verdict relied upon on behalf of the respondent in ***Opto Circuit India Ltd. V. Axis Bank & Ors.***; (supra) has no applicability to the facts of the instant case for the reason that in the letter issued by the Income Tax Department to the Bureau of Investigation, it was clearly stated that the department is investigating into the offence of a wilful attempt to evade taxes, which is the offence under Section 276C of the Income Tax Act and that the offence under Section 276C of the Income Tax Act, 1969, being punishable with a maximum sentence for 7 years, is a non-bailable offence in terms of the Part II of the First Schedule under the Code of Criminal Procedure and the petitioner submits that there is no improvement upon the original request for the issuance of the LOC.

65. Inter alia, the petitioner has submitted that the contention raised on behalf of the respondent that the circular cannot override the ratio of the judgment in the case of **Sumer Singh Salkan** (supra) cannot be examined in the present proceedings, since the

O.M. of 2010 (as amended in 2017) is not under challenge, nor is its validity under consideration before this Court in the present proceedings. The petitioner however does not refute that the relief not prayed for cannot be granted even in exercise of writ jurisdiction and places reliance on ***Bharat Amratlal Kothari v. Dosukhan Samad khan Sindhi***; (2010) 1 SCC 234.

66. Inter alia, the petitioner submits that the Ministry of Home Affairs which has issued the Office Memorandum is not even a party to the present proceedings and that a challenge to these OMs is pending before a Coordinate Bench of this Court in W.P. (C) No. 10482/2022 and other batch of cases.

67. The petitioner further denies that the Income Tax Department's entire likely demand of Rs. 600 crores stands secured and rather submits that the Division Bench of this Court vide order dated 30.8.2022. in W.P.(C) 6352/2022 was only to balance the equities and thus the Division Bench had passed an order securing the revenue with only Rs. 230 crores and not the entire likely demand of Rs. 600 crores and that there is still a deficit of Rs. 370 crores.

68. The petitioner has further submitted that the Courts have consistently taken a stricter view insofar as suspending an LoC in the case of a foreign national for the reason that a foreign national has no roots in India and is presumed to be a flight risk and the petitioner has further submitted that the reliance placed by the respondent in the case of ***Karti P. Chidambaram*** (supra) is inapplicable in the present case as he is an Indian national and travel

to him was allowed by the Hon'ble Supreme Court only on deposit of Rs. 10 Crores and reliance has been placed by the petitioner on the order dated 7.5.2019 of the Hon'ble Supreme Court in I.A. No. 68510/2019 in T.C. (Crl.) No. 03/2018.

69. The petitioner has further submitted that the right to travel is not an absolute right and the need of the presence of an accused during investigation is a reasonable restriction and a valid reason for issuance of a Look-out Circular.

70. The petitioner has further submitted that the contention that the petitioner is just an employee of the company, fails to consider that he is liable to be proceeded against in terms of Section 278B of the Income Tax Act, 1961, which provides as under:

“ Offences by companies:

278B. (1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly”

71. The petitioner further submits that the argument of the respondent that the Chief Financial Officer ("CFO") of the company is available for investigation and thus the respondent should be allowed to leave the country, is specious, as the current CFO does not have access to the earlier CFOs email and the petitioner seeks that the entire email dump of the company in question be provided to the petitioner department. The petitioner further submits that if

the respondent is allowed to travel in terms of the order of the Trial Court, neither the required information would be provided, nor the concerned person would be available to aid the investigations.

72. The petitioner further submits that if further information is required by the department during investigation and the respondent is allowed to leave the country, the presence of the current CFO would be meaningless as though he has been present throughout he has been designated as the CFO only a few days ago and he has confirmed in his statement during search that all financial decisions were being taken by the ex CFO whom he has replaced and his designation as CFO only seems to satisfy the technical requirement of the CFO being present in India. The petitioner thus seeks that the impugned order be set aside.

73. In terms of the directions dated 12.9.2022 during the course of the hearing of the present petition it was directed as under:

“
On a perusal of the impugned order, it is indicated that the petitioner has placed before the learned Trial Court, in a closed envelope, a copy of the letter written to the authority concerned for issuance of the look out circular and the proforma for issuance of the LOC and the proposal for issuance of the LOC. It is essential that that this Court peruses the said document which, it is submitted on behalf of the petitioner, would be submitted during the course of the day. The same be submitted accordingly.”

Pursuant to the said directions the petitioner has placed on record the copy of the letter written to the authority concerned for issuance

of the Look out circular and the proforma for issuance of the LOC and the proposal for issuance of the LOC in a sealed cover.

ANALYSIS

74. On a consideration of the submissions made on behalf of either side, it is considered essential to advert to the observations in the impugned order dated 29.8.2022 of the Court of the learned Additional Chief Metropolitan Magistrate, (Special Acts), Central District, Tis Hazari Courts. Vide the said order it was observed as under:-

“By this order, I shall dispose of an application filed on behalf of applicant Xiongwei Li for quashing of look out circular (LOC) issued against him at the request of Income Tax Office (ITO).

The events that necessitated the filing of this application are that on 15.02.2022 a search u/s 132 of The Income Tax Act, 1961 (hereinafter called 'The Act') was conducted by the officers of ITO at the Capital Cyberspace, Gurugram, Manesar, Urban Complex, Sector-59 office of M/s Huawei Telecommunications (India) Company Private Limited (in short 'the company'), wherein the books of accounts (as per the Form 3CD) were kept for the purpose of verification and determination of income chargeable to tax. During the course of search, applicant Xiongwei Li deliberately did not comply with the provisions of sub section (1) of section 132 of The Act. The officers of ITO were not given adequate facility and co-operation for inspection of books of accounts. Even the documents sought by the officers of ITO were not supplied by the applicant and other personnel of the company. The statement of the applicant was recorded u/s 132 (4) of The Act

and apparently, the applicant deliberately chose to give vague answers to some of the questions, efforts were made to confuse the authorized state officers conducting the search. The answers given by the applicant and the other employees of the company were incongruous to each other.

Unnecessarily long time was sought by personnel of the company to furnish documents which otherwise ought to have been readily available with the company. The applicant is the CEO of the company but he did not comply with the directions issued by the officers of ITO. A complaint case was filed by the ITO against the company and its personnel (including the applicant) alleging commission of offence punishable u/s 275B r/w section 278B of the Act. It appears that pursuant to search conducted by ITO on 15.02.2022, a request for issuance of look out circular was made to the authority concerned by the Deputy Director of Income Tax (Inv) Unit 4(3), Delhi for issuance of lookout circular against the applicant. On 01.05.2022 when applicant went to Delhi airport to board a Thai Airways International Flight for traveling to Bangkok, he was not allowed to board the flight and was later informed that a look out circular was issued against him. By moving the present application, the applicant seeks quashing of that look out circular.

It is submitted by the ld. counsel for the applicant that applicant was traveling to Bangkok to attend an internal meeting of the company but he was not able to reach Bangkok thereby dealing a huge blow to the reputation of the applicant as well as of the company. He contended the offence alleged to have been committed by the applicant is punishable with maximum imprisonment for a period of two years, so the same is non-cognizable and

bailable, therefore an LOC could not have been opened with regard to this offence. He claimed that the LOC issued against the applicant is bad in law and the same is in violation of article 14 & 21 of The Constitution of India. He submitted that the LOC shall be quashed as the same is not issued as per the extant judicial pronouncements and circulars issued by the Union Government. Written submissions were placed on record by the applicant.

Reply to this application was filed by ITO wherein it informed that the investigation qua the company and its officers including the applicant is going on. It alleged that till date, all data and books of accounts sought from the company, its personnel and representatives have not been provided. It is also averred that the issue of arm' length price of related party transactions during the course of Transfer Pricing proceedings is being investigated and if may require re-examination of the applicant by the officers conducting investigation and may also result in filing of subsequent prosecution against company and/or its officials. He relied upon the -statement of Lalit Kumar i.e. the Statutory Auditor of the company, to show that the data provided to the department is insufficient to reconcile the same with the financial statements of the company. He contended that in case the look out circular is withdrawn then the applicant being a Chinese national may leave India and never come back, thereby jeopardizing not only the proceedings in complaint case but also adversely affecting the investigation being conducted by the ITO. He submitted that the application be dismissed being devoid of merit.

In compliance of an order passed by this court, the ITO placed on record (in closed envelope) copy of the letter written to the authority concerned for issuance of look out circular, the proforma for

issuance of LOC and the proposal for issuance of LOC.

Submissions of the Id. SPP for (TO and Id. counsel for the applicant were heard at length on previous occasions. Entire material available on record has been perused. My observations on the application are delineated hereinafter.

The investigation regarding the search us 132 of The Act conducted at the office of the company is still in progress. No doubt, the complaint filed by the ITO before this court is for commission of offence punishable u/s 275 B read with 278B of The Act which is a non-cognizable and bailable offence. Except these two proceedings, no other criminal proceeding exists on date wherein the presence of applicant is required. In Sumer Singh Salkan v. Asst. Director & Ors. 2010 (4) JCC 2401 while dealing with a reference sent by court of Id. ACMM, Delhi, regarding LOC, the High Court of Delhi formulated the following questions:-

- a) What are the categories of cases in which the investigating agency can seek recourse of Look-out-Circular and under what circumstances?*
- b) What procedure is required to be followed by the investigating agency before opening a Look-out-Circular?*
- c) What is the remedy available to the person against whom such Look-out-Circular has been opened?*
- d) What is the role of the concerned Court when such a case is brought before it and under what circumstances the subordinate Courts can intervene?*

The answers to these questions were provided by the High Court, which are reproduced in verbatim:-

a) Recourse to LOC can be taken by investigating agency in cognizable offences under IPC or other penal laws, where the accused was deliberately evading arrest or not appearing in the trial court despite NBWs and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest.

b) The Investigating Officer shall make a written request for LOC to the officer as notified by the circular of Ministry of Home Affairs, giving details & reasons for seeking LOC. The competent officer alone shall give directions for opening LOC by passing an order in this respect.

c) The person against whom LOC is issued must join investigation by appearing before I.O. or should surrender before the court concerned or should satisfy the court that LOC was wrongly issued against him. He may also approach the officer who ordered issuance of LOC & explain that LOG was wrongly issued against him. LOC can be withdrawn by the authority that issued and can also be rescinded by the trial court where case is pending or having jurisdiction over concerned police station on an application by the person concerned.

d) LOC is a coercive measure to make a person surrender to the investigating agency or Court of law. The subordinate courts jurisdiction in affirming or cancelling LOC is commensurate with the jurisdiction of cancellation of NBWs or affirming NBWs.

It is evident from perusal of the answers in the aforementioned reference that LOC can only be issued by investigating agency in case of cognizable offences under IPC or other penal laws on fulfilment of two conditions; (i) where the accused was deliberately not appearing before the court despite issuance of NBWs and other coercive measures or he was deliberately evading arrest, and (ii) there was likelihood of accused leaving the country to evade trials/arrests. Both these conditions are cumulative. Since, the complaint pending against the applicant is for commission of non-cognizable offence, therefore, the LOC could not have been issued citing that complaint. Moreover, no coercive process was issued against the applicant by this court, rather a summon for appearance was ordered to be issued.

Perusal of letter written to the authority concerned by officer of ITO for issuance of LOC against applicant shows that the officer was of prima facie view that commission of other offences under the Act was disclosed and thorough investigation was required to be conducted. The applicant being the CEO of the company would be required to appear before the investigating officer for purpose of investigation. The reason for issuance of LOC seems to be to ensure that the applicant does not escape from India. Hence, it appears from the documents produced in closed envelope that LOC was issued not due to the pendency of the complaint case but for reason of ongoing investigation against the company.

It is not the case of the ITO that the applicant did not appear before the investigating officer as and when directed to do so. It is also not the case that the applicant was trying to evade the arrest. In fact, in the complaint case the applicant appeared and was admitted to bail. He made a statement before the court that he shall inform the concerned officer of

ITO at least seven days prior to leaving India in the event of quashing of LOC by the court.

The view expressed in the case of Sumer Singh Salkan (supra), was incorporated by FRRO in Office Memorandum dated 27.10.2010. This office memorandum has been amended by Office Memorandum No. 25016/10/2017 -IMM dated. 05.12.2017 which made the following additional to the extant guidelines:

In exceptional cases, LOCs can be issued even in such cases, as would not be covered by the guidelines above, whereby departure of a person from India may be declined at the request of any of the authorities mentioned in Clause (b) of the above-referred OM, if it appears to such authority based on inputs received that tile departure of such person is detrimental to the sovereignty or security or integrity of India or that the same is detrimental to tile bilateral relations witll any country or to the strategic and/or economic interest of India or if such person is allowed to leave, he may potentially indulge in an act of terrorism or offences against the State and/or that such departure ought not be permitted in the larger public interest at any given point of time.

The applicant does not come within this additional criteria, as the departure of applicant cannot be stated to be detrimental to sovereignty, security and integrity of India, it is also not detrimental to bilateral relations with any other country or to strategic and/or economic interest of India. It is highly unlikely that the applicant will

indulge in act of terrorism or offence against Indian state. Thus, an apprehension that the applicant may leave India and may never come back cannot be ground to keep him in India till the culmination of all legal proceedings, which may emanate from the search conducted on 15.02.2022. As such, legal proceedings are likely to take a long time to conclude. It has already been six months since the issuance of letter of request for opening of LOC against applicant and the investigation appears to be nowhere near completion. There is a likelihood that the applicant may leave India on the pretext of some business meeting or any personal work and may never come back but this possibility of absconding is always there whenever any person is admitted to bail in any criminal case. In Rana Ayyub v. Union of India & Anr. W.P.(CRL)714/2022 decided on 04.04.2022 the High Court of Delhi quashed the LOC as there was no cogent reason to presume that the petitioner would not appear before the investigating agency. The applicant is also entitled to equality before the law. The applicant cannot be treated differently solely on the ground of his nationality and cannot be restricted from international travel by issuance of LOC, when Indian Nationals facing legal proceedings in more serious offence are allowed to travel outside India.

The company is not a fly by night operator and considering the fact that it generates considerable revenue from India, it is prudent that a condition be imposed upon payment of salary, bonus, ESOPs and other benefits to the applicant by the accused company, so as to exercise some degree of control over him. There is no ground to keep the LOC open against the applicant and the LOC against the applicant is liable to be set aside. At this juncture, it is apposite to advert to the observation made by High Court of Delhi in Shri Sathish Babu Sana v.

Central Bureau Of Investigation W.P.(CRL)
249/2019 decided on 28.01.2022:-

10. The petitioner thus satisfies the test laid down by this Court in Sumer Singh Salkan (supra) as he has neither deliberately evaded arrest nor failed to appear before the Trial Court despite the non-bailable warrants nor has any coercive action been taken against him and he has travelled abroad number of times with the permission of the Court, which concession he did not misuse and therefore there is no justification in continuing with the LOC opened against the petitioner. Hence the respondent is directed to recall its request for opening the LOC against the petitioner. It is further directed that that the petitioner will continue to join the investigation as and when directed by the Investigating Officer and any condition that is imposed by the learned Special Judge in the complaint lodged pursuant to the ECIR, when the petitioner seeks permission to travel abroad will also be applicable in the abovenoted RC No.224/2017/A-001, till the charge-sheet is filed and thereafter, if the petitioner is charge-sheeted and summoned as an accused.

From the perusal of the aforementioned extract, it is evident that the court at the time of quashing the LOC may impose conditions upon the applicant. This court is cognizant of the fact that the applicant does not have any movable or immovable assets in India except his bank account. Moreover, none of the family members and relatives of the

applicant permanently reside in India, hence, there is little incentive for the applicant to come to India once he leaves the country with an intent to not return back. It is also doubtful 'whether the sureties would be in a position to compel the applicant to come to India should he decide against coming back for facing prosecution in complaint case or for appearing before the investigating officer. In these circumstances, it is ordered that in case of resignation, retirement or cessation of employment etc. of the applicant, the company shall withhold the Severance Pay/Severance Package and other incentives/emoluments payable to applicant and the same shall not be released without prior permission of this court. An undertaking to this effect shall be procured by the applicant from the company and the same shall be filed with this court under intimation to Deputy Director of Income Tax (Inv) Unit- 4(3), Delhi.

Upon filing of undertaking, DDIT (Inv) Unit-4(3), Delhi shall take appropriate steps for withdrawing the lookout circular against the applicant and the same shall be withdrawn/recalled within 7 days of filing of undertaking by the applicant. The application stands disposed of.

Copy of this order be given dasti, free of cost to both the parties."

75. It is essential to observe that as rightly observed by the learned Trial Court the offences alleged against the respondent are non-cognizable and bailable in relation to the allegations levelled against the respondent in the complaint filed by the complainant wherein he is arrayed as accused No.2 with it having been averred in the said complaint that it had been filed qua commission of offences punishable under Section 275B read with Section 278B of

the Income Tax Act, 1961, wherein it had been averred to the effect that there had been a non-congregation on part of the accused company through its team persons, namely, “ Mr. Li Xiongwei, Chief Executive Officer; Mr. Long Cheng, in-charge of Transfer Pricing matters; Mr. Sandeep Bhatia, Deputy CFO; and Mr. Amit Duggal, Head of Taxation” on account of denial of the adequate facility to the Authorized officers empowered u/s 132 of the Income Tax Act. The said accused no.l/company is assessed for A.Y 2020-21 with office of Circle 1(1), Gurgaon. Subsequently the case has been centralized with Central Circle 02 under the jurisdiction of CCIT (Central) Delhi.

76. It is further stated through the said complaint that (para 2 of the complaint)

“ That a search u/s 132 of Income Tax Act, 1961 dated 15.02.2022 was carried out upon M/s Huawei Telecommunication (India) Company Pvt. Ltd. (hereinafter referred to as HTICPL) during the course of which warrants of authorization were issued in favour of officers/team empowering them to carry out the actions as envisaged in sub-clauses (i) to (v) of clause (1) of section 132 of Income Tax Act covering the premises of the accused company; along with two of such warrants issued for the corporate offices of HTICPL located at 9th, 10th and 11th Floor, Capital Cyberscape, Gurugram Manesar, Urban Complex, Sector-59, Ullahwas, Gurugram, Haryana- 122011; wherein the books of accounts as per Form 3CD of the company as per latest audited ITR for A.Y 2020-21 were kept for the purposes of verification of financial accounts of the company and determination of

the income chargeable to tax. The copy of the Gazette Notification dated 13.11.2014 assigning jurisdiction to the Directors General of Income Tax/Principal Directors of Income Tax over the territorial areas of whole of India to conduct a Search Action u/s 132 of the Income Tax Act, (Part of Chapter -III) is attached as Annexure - D.

3. That as per the provisions of section 44AB of the Income Tax Act, any entity with a turnover of over Rs. 1 crore is required to get the financials audited in the prescribed form as provided under sub-rule 1 of Rule 6G of Income Tax Rules, 1962. In furtherance to the same, the audited report is to be submitted in Form 3CA wherein the particulars as prescribed by Form 3CD are required to be furnished. That as per point no. 11(b) of Form 3CD the list w.r.t the availability of books of accounts of the entity at their respective addresses is required to be submitted. On perusal of the audit report dated 08.06.2020, the books of accounts as per prescribed Form 3CD of the accused company in the Profit and Loss Account for the period between 01.04.2019 to 31.03.2020 being General Ledger, Journal Book, Monthly payroll records, Inventory Ledger, Fixed assets register were all kept in computerized form along with various relevant documents of the company being bills, vouchers, receipts, Debit note, Credit note, Inventory register, Agreements, orders, etc and maintained at 9th Floor, Capital Cyberscape, Gurugram Manesar, Urban Complex, Sector-59, Ullahwas, Gurugram, Haryana- 122011. The said certified copy of Form 3CA for AY 2020-21 is annexed herewith as Annexure -E.

4. That during the course of the search so carried out in 9th, 10th and 11th Floor, Capital

Cyberscape, Gurugram Manesar, Urban Complex, Sector-59, Ullahwas, Gurugram, Haryana- 122011, the accused company through active connivance and aide of its eminent officials ,responsible for its day to day functions and affairs (as arraigned herein) wilfully and deliberately deflected /skirted to comply with the provisions of sub- clauses (i) to (v) of clause (1) of Section 132 of Income Tax Act, 1961. The accused having acted in concert with each other willfully failed to provide adequate facility to the Authorized Officers to inspect the books of accounts besides access to underlying relevant documents of the accused company. The said factual matrix is duly corroborated by statements of said officials of the company holding imminent positions with ample power, control, dominion and authority to assist the officers.

5. That as per section 275-B of the Income Tax Act, 1961, any person who is required to afford the facility to the Authorized Officers to inspect the books of accounts and other documents required during the search under clause (iib) of sub-section (1) of section 132 of the Income Tax Act, 1961 fails to afford such facility to the authorized officers as empowered; then such persons are said to be liable to be prosecuted for the commission of offence u/s 275-B of the Income Tax Act, 1961.

6. That the accused No. 1 is the accused company; the accused No. 2 Mr. Li Xiongwei is the Chief Executive Officer of the accused company; accused No. 3 Mr. Sandeep Bhatia is the Deputy Chief Financial Officer of the accused company; accused No. 4 Amit Duggal is the Head of Tax; and accused No. 5 Mr. Long Cheng is the in-charge of transfer pricing issue

under the tax team of the accused company. Each of the above persons hold key managerial and imminent position in the accused company to have been able to assist the authorized officers of the department empowered u/s 132 of the Income Tax Act for the verification and scrutiny of its financials and books of accounts. Their apparent non-compliance resulted in obstructing/stifling the search action by not affording the facility to the authorized officers. Therefore, they have rendered themselves liable for prosecution u/s 275-B r/w section 278-B of the Income Tax Act, 1961.

7. That during the course of the search the statement of accused nos.5 was recorded, which establish the deliberate effort on the part of these officials of the accused no.1 /company were in deep cahoots to frustrate the search proceedings and failure to present the books of accounts of the company along with the relevant documents i.e affording the facility required to carry out the search effectively to the Authorized Officers duly empowered and authorized u/s 132 of the Income Tax Act, 1961.

8. That as per the statement of Mr. Sandeep Bhatia (Deputy CFO of the accused company) recorded u/s 132(4) of the Income Tax Act dated 16.02.2022; he deposed that the financials of the company were recorded on ERP software wherein the financial data of books of accounts were maintained containing the Balance Sheet, Profit and Loss A/c, trial balance, schedules and backup of trial balance, with some of the documents kept in digital form. He further stated that the necessary reports can be downloaded as per the requirement and are in possession of the India finance team; maintained in the ERP Oracle financial system the location of the

servers of which are not in his knowledge (relevant question no(s) being 11, 12 and 13) Certified copy of statement of Sandeep Bhatia (Deputy CFO of the accused company) recorded u/s 132(4) of the Income Tax Act dated 16.02.2022 is annexed herewith as **Annexure - F**.

9. That during the statement of Mr. Amit Duggal (Head of Tax of the accused company) recorded u/s 132(4) of Income Tax Act recorded from 15.02.2022; he stated that the books of accounts were maintained with the department headed by Mr. Sandeep Bhatia (Deputy CFO). The said version corroborates /points out to the fact that Mr. Sandeep Bhatia feigned deliberate ignorance towards furnishing the required books of accounts and documents of the accused company to the Authorized Officers. Mr. Amit Duggal during the course of the investigation further stated that he cannot provide the access to the email(s) of the CFO of the company as the same was beyond his power. He further stated that he was not aware of the person(s) who are responsible for the preparation of Profit and Loss A/c and Balance Sheet from ERP data. It is interesting to note that Mr. Amit Duggal while being the "Head of Tax" is not aware of the person responsible for preparation of the books of accounts of the company; on the basis of which the tax liability of the company is calculated. Thereby establishing the deliberate withholding of material information on part of Mr. Amit Duggal to not provide the Authorized Officers to conduct the search and verify the

*financials of the company and its compliance to, in consonance with various statutory provisions. The certified copy of statement of Mr. Amit Duggal (Head of Tax of the accused company) recorded u/s 132(4) of the Income Tax Act dated 15.02.2022 is annexed herewith as **Annexure - G.***

10. That both the Deputy CFO/accused no. 3 and the Head of Tax/ accused no.4 of the accused company have simply shifted their burden w.r.t.the maintenance besides giving access to the financials of the company upon each other; whilst both of them are/were in control and hold office of high authority within the accused company concerning the financial department. It is further impossible for the company carrying out such quantum of business on a global scale to function without daily maintenance and updation of its books of accounts. That withholding the financials of the company on part of these officers concerned point to the fact that the delay w.r.t bringing forth the financial statements of the accused company is/was orchestrated for the only reason to present sanitized and amended version of books in order to project as if the compliance(s), accounts are /were being maintained strictly as mandated by the statute(s).

11. That statement of Mr. Long Cheng (in-charge of transfer pricing issues of the accused company) was also recorded u/s 132(4) of the Income Tax Act recorded from 17.02.2022; and he stated that the books of accounts of the

company are maintained by the "Finance Team". However, he could not provide the details of the same. He further stated that he was not even aware of where the books of accounts of the company are kept. Upon being asked to furnish the documents pertaining to transfer pricing issue, Mr. Long Cheng stated that the complete data would require several weeks to find and that he can only provide sample data within 4-5 hours, feigning further ignorance on part of the officer to present the relevant financial data at the time of the search to the Authorized Officers. This response is /was in stark defiance of and contrary to declaration and compliance as per Form 3CD of the company i.e the financial books of the accused company were /ought to have been available at 9th Floor, Capital Cyberscape, Gurugram. However, the accused 2-5, successfully remained non-compliant on this count. The certified copy of statement of Mr. Long Cheng (in-charge of transfer pricing issues of the accused company) recorded u/s 132(4) of the Income Tax Act recorded w.e.f 17.02.2022 is annexed herewith as **Annexure -H**.

12. That statement of Mr. Li Xiongwei (CEO of the accused company) was also recorded u/s 132(4) of the Income Tax Act at the office premises of the company from 17.02.2022 wherein he was specifically asked about and to provide the financial data of the accused company to the Authorized Officers .However, he sought adjournment of 3 days to provide the dump data for F.Y. 2020-21 in 3CD format ; and

*another 6 weeks to provide the financial data of the company from for FY 2014-15 to FY 2019-20 from the Finance Team. The said exercise was /is in the direction of not affording facility to the Authorized Officers as mandated. The certified copy of statement of Mr. Li Xiongwei (CEO of the accused company) recorded u/s 132(4) of the Income Tax Act recorded w .e.f 17.02.2022 is annexed herewith as **Annexure -I**.*

13. That on the basis of the above facts, and the continuing failure of the accused company to provide even basic digitally maintained data w.r.t their financial books /data during the search operation. The accused seeking extensive time in furnishing the same a Show Cause Notice u/s 279 of the Income Tax Act, 1961 for initiation of prosecution u/s 275-B of the Income Tax Act, 1961 against the accused company was issued on 18.02.2022 by the Principal Director of Income Tax (Inv.)-2, Delhi.

14. That a reply dated 21.02.2022 was filed on behalf of the accused company wherein the accused company took the stance that necessary financial information including the books of accounts of the company along with notes to those accounts, trial balance and detailed ledgers were provided to the Authorized Officers by the company to conduct their necessary inspection u/s 132 of the Income Tax Act. However, the same was found untenable and are contrary to the statements of the individuals holding key positions in the said company. The certified copy of the Show Cause Notice u/s 279

of the Income Tax Act, 1961 for initiation of prosecution u/s 275-B of the Income Tax Act, 1961 against the accused company issued on 18.02.2022 by the Principal Director of Income Tax (Inv .)-2, Delhi along with its reply dated 21 .02.2022 are collectively annexed herewith as Annexure -J (In Colly).

*15. That even on the day of issuance of the Show Cause Notice for initiation of prosecution u/s 279 of the Income Tax Act, 1961 there was complete failure and non-compliance on t he part of the Mr. Li Xiongwei (CEO of the accused company) for providing the required data of the company as sought by the Authorized Officers. The same stands amplified by the statement of Mr. Li Xiongwei recorded u/s 132(4) of the Income Tax Act, 1961 (as amended up to date) which continued on 18.02.2022 wherein he stated that he requires 7 days to provide the forex earnings of the company. Regarding the treatment of various provisions and the underlying documentary evidence and notes thereto for the creation of such provisions in the accounts, Li Xiongwei stated that the same would be provided by 11.03.2022. That Mr. Li Xiongwei while being the CEO of the company stated that he was unsure if he can provide the details of the email dump of the CFO(s) of the accused company. (PISrefer to Question No 34, 35 etc) of **Annexure -I**).*

16. That willful disobedience of the company and its officials /accused named above to afford facility to the relevant financial data/books even

*alter filing of its reply to the SCN u/s 279 of the Income Tax Act is evident from the statement of accused Mr. Amit Duggal which was again recorded on 22.02.2022 u/s 132(4) of the Income Tax Act, 1961 wherein he stated that 6 weeks are required to provide the inventory ledger of the company; while as per the form 3CD/3CA as filed by the company, the same is declared and disclosed to be maintained and available at 9th Floor, Capital Cyberscape, Gurugram Manesar Road. That upon being asked to provide the details of the provisions created in the company's balance sheet and Profit and Loss A/c he stated that the same would also require more than 10 days to be furnished before the Authorized Officers; while Mr. Li Xiongwei upon being confronted with this statement of Mr. Amit Duggal feigned further ignorance and stated that only Mr. Amit Duggal would be better aware of these matters. The certified copy of statement of Mr. Amit Duggal (Head of Tax of the accused company) dated 22.02.2022 u/s 132(4) of Income Tax Act, 1961 is annexed herewith as **Annexure- K**. The report of the authorized officer is placed as **Annexure L**.*

17. That a subsequent reply to the SCN u/s 279 of the Income Tax Act, 1961 was filed by the accused company on 08.03.2022 wherein they sought the reports of the Authorized Officers of the Department that have attracted the charges u/s 275B of the Income Tax Act, 1961. The company further stated that all the compliances

were adhered to and followed by the accused company as well as its employees in providing and complying with the furnishing of the relevant information. It is reiterated that from the aforementioned factual matrix of the matter, it is evident that such a reply is not tenable and rather militates against the accused officials as well the company itself.

18. That Section 278B of I. T. Act of the Income Tax Act, clearly stipulates as reproduced here:

“Section 278B. (1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to, be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence.”

19. The guilt of the accused shall be proved both by oral and documentary evidence.

PRAYER

It is prayed that accused no. 1 to 5 be summoned to stand trial u/s 275-B r.w.s 278B of the Income Tax Act, 1961 and they be convicted and

sentenced in accordance with the provisions of law.”

77. Thus the complaint that the petitioner filed inter alia against the respondent herein arrayed as accused no.2 relates only to the commission of a non-cognizable and bailable offence for allegedly non-affording the authorized officers under the Income Tax Act, 1961, the necessary facility to inspect the books of accounts or other documents as required in terms of Section 132 (1)(iib) of the said enactment of the company, M/s Huawei Telecommunications (India) Company Private Limited (HTICPL) of which the respondent No.2 was the Chief Executive Officer during the relevant assessment period of the year 2020-21.

78. The Office Memorandum dated 27.10.2010 issued by the Ministry of Home Affairs; Foreigners' Division, in para 8 (g) & (h) has detailed as under:

*“ g) Recourse to LOC is to be taken in cognizable offences under IPC or other penal laws. The details in column IV in the enclosed Proforma regarding ‘reason for opening LOC’ must invariably be provided without which the subject of an LOC will not be arrested/detained.
h) In cases where there is no cognizable offence under IPC or other penal laws, the LOC subject cannot be detained/arrested or prevented from leaving the country. The originating agency can only request that they be informed about the arrival/departure of the subject in such cases.”,*

this Office Memorandum takes into account the verdict of this Court in ***Sumer Singh Salkan v. Assistant Commissioners & Ors.*** W.P.(Crl.) No. 1315/2008 and in Crl. Reference 1/2006-***The Court***

on its own Motion Re: V. State Vs. Gurnek Singh Etc. wherein the questions in para 6 of the Office Memorandum to the effect:

- “ a) What are the categories of cases in which the investigation agency can seek recourse of Look-out-Circular and under what circumstances?*
- b) What procedure is required to be followed by the investigating agency before opening a Look-out-Circular?*
- c)What is the remedy available to the person against whom such Look-out-Circular has been opened?*
- d)What is the role of the concerned Court when such a case is brought before it and under what circumstances the subordinate courts can interevene?”*

were answered in ***Sumer Singh Salkan***(Supra) vide judgment dated 11.08.2010 to the effect:

“A. Recourse to LOC can be taken by investigating agency in cognizable offences under IPC or other penal laws, where the accused was deliberately evading arrest or not appearing in the trial court despite NBWs and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest.

B. The Investigating Officer shall make a written request for LOC to the officer as notified by the circular of Ministry of Home Affairs, giving details & reasons for seeking LOC. The competent officer alone shall give directions for opening LOC by passing an order in this respect.

C. The person against whom LOC is issued must join investigation by appearing before I.O. or should surrender before the court concerned or should satisfy the court that LOC was wrongly issued against him. He may also approach the officer who ordered issuance of LOC & explain that LOC was wrongly issued against him. LOC can be withdrawn by the authority that

issued and can also be rescinded by the trial court where case is pending or having jurisdiction over concerned police station on an application by the person concerned.

D. LOC is a coercive measure to make a person surrender to the investigating agency or Court of law. The subordinate courts' jurisdiction in affirming or cancelling LOC is commensurate with the jurisdiction of cancellation of NBWs or affirming NBWs."

whereafter in terms of order dated 11.08.2010 of this Court, the guidelines, were laid down vide O.M. dated 27.10.2010 No. 25016/31/2010-IMM by the Government of India, Ministry of Home Affairs, Foreigners Division regarding issuance of LOCs with regards to Indian citizens and foreigners.

79. Thus undoubtedly in terms of the said OM dated 27.10.2010 no LOC could have been issued in relation to an alleged commission of a non-cognizable offence.

80. Though vide the guidelines incorporated at 8J of the said Office Memorandum, it was observed to the effect:

" In exceptional cases, LOCs can be issued without complete parameters and/or complete details against CI suspects, terrorists, anti national elements, etc in larger national interest."

81. The said OM dated 27.10.2010 was amended vide OM NO. 25016/10/2017-IMM (PT) dated 5.12.2017 which has been referred to else where in above wherein it had been stated to the effect that in exceptional cases LOC can be issued even in such cases as would not be covered by the guidelines above whereby the departure of a person from India may be declined at the request of the any of the

authorities as mentioned in Clause 8(b) of the above referred OM i.e., the OM No. 25016/31/2010-IMM dated 27.10.2010, if it appears to such authority based on inputs received that the departure of such person is detrimental to the sovereignty, security or integrity of India or that the same is detrimental to the bilateral relations with any country or to the strategic and/or economic interest of India or if such person is allowed to leave or he may potentially indulge in an act of terrorism or offences against the State and/or that such departure ought not be permitted in the larger interest at any given point in time. Apparently as rightly observed by the learned Trial Court the allegations against the petitioner do not relate to any aspect of the departure of the respondent being detrimental to the sovereignty or security or integrity of India nor to the bilateral relations with any country nor to the strategic interest of the country nor is it brought forth in any manner by the petitioner that the respondent was potentially likely to indulge in any act of terrorism or offences against the State or that his departure ought not be permitted in the larger interest at any given point in time.

82. The petitioner too does not contend qua the applicability of the said conditions delineated herein above but submits that vide the impugned order dated 29.8.2022 the learned Trial Court did not take into account the factum that permitting the departure of the respondent would affect the economic interest of the country, in as much as, the aspect of investigation into the evasion of taxes of more than Rs.600 crores by the company M/s Huawei Telecommunications (India) Company Private Limited (HTICPL) is

in progress and the respondent having been the Chief Executive Officer; at the relevant time of the alleged commission of the tax evasion to the tune of more than Rs.600 crores, in terms of Section 278B of the Income Tax Act, 1961, is liable to be guilty of the offence committed by the company and to be proceeded against accordingly qua the alleged commission of the offence punishable under Section 276C(1)(i) of the said enactment which is a non-bailable offence punishable with a maximum sentence of 7 years.

83. In terms of the order dated 12.9.2022 in the present petition, the petitioner placed on record in a sealed cover the proposal for the Look Out Circular inter alia in relation to the respondent and the approval thereof as well as the communication dated 19.2.2022 to the Deputy Director, Immigration, Bureau of Immigration (BOI), seeking the issuance of the LOC qua the respondent with Passport No. ED1033977 and the opening of the regular LOC against the respondent on 19.2.2022 whereby the said LOC qua the respondent issued by communication was to remain in force until and unless a deletion request was received from the BOI from the originator itself.

84. The proforma for issuance of the Look Out Circular indicates the nationality of the respondent to be that of China. As per the communication dated 19.2.2022 apart from the aspect of M/s Huawei Telecommunications (India) Company Private Limited (HTICPL) and M/s Huawei Technologies India Private Ltd. having been alleged to make a wilful attempt to evade tax, it had been alleged in the proposal for issuance of the Look Out Circular that

during the course of the search, the companies and their officers/employees had failed to provide the adequate opportunity to the authorized officers for furnishing and examination of the Books of Accounts of the companies thus impeding the authorized officers from discharging their duties and that thus the presence of the Chief Executive Officer (the respondent herein) of M/s Huawei Telecommunications (India) Company Private Limited (HTICPL) inter alia was necessary during the course of further investigation which would be carried out and that the on going investigation into various violations submitted by the companies would take ample time due to the examination of extensive evidences that had been seized and due to offences committed by the companies and their employees thus necessitating the issuance of the LOC inter alia against the respondent. The approval accorded on 19.2.2022 to the issuance of the LOC takes into account the aspect of the respondent being a flight risk from whom a number of details are stated to be required.

85. Taking into account the factum that the investigation into the alleged commission of the offence punishable under Section 276C(1)(i) of the Income Tax Act, 1961, by the Companies involved allegedly including M/s Huawei Telecommunications (India) Company Private Limited (HTICPL) of which the respondent at the relevant time is stated to have been the CEO, would apparently take considerable time, the respondent herein having been alleged to have committed only a non-cognizable and bailable offence who *per se* himself cannot be attributed to have

committed acts detrimental to the economic interest of India especially coupled with the factum that the petitioner has not alleged that the respondent is a shareholder of the said 'company' and in relation to the which the company M/s Huawei Telecommunications (India) Company Private Limited (HTICPL) vide directions dated 30.8.2022 of the Hon'ble Division Bench of this Court in W.P.(C) 6352/2022 has adhered to the directions therein of a fixed deposit of Rs.200 crores which is to be renewed automatically from time to time apart from refund of Rs.30 crores to the petitioner having not been directed to be released to the petitioner of that writ petition by the respondent i.e., the Deputy Director of Income Tax (INV.)-4(3), New Delhi i.e., the petitioner herein, the aspect of atleast 230 crores out of the alleged tax evasion of 600 crores as averred in the written submissions of the petitioner dated 14.9.2022 alleged by the accused No.1 in the criminal complaint filed by the petitioner before the ACMM, Special Acts Central District, Tis Hazari Courts stand secured.

86. Undoubtedly vide observations in para 9 of the verdict dated 30.8.2022 in W.P.(C) No. 6352/2022 it had been observed as under:

“9. It is made clear that the above order has been passed on the basis of offer made by the Petitioner and will not be considered as a precedent in any other proceeding.”

and thus the contention raised on behalf of the petitioner that the observation made in Writ Petition(C) No. 6352/22, cannot thus be considered in relation to any other proceeding, nevertheless the factum of Rs.200 crores having been deposited by the company M/s

Huawei Telecommunications (India) Company Private Limited (HTICPL) with the petitioner herein with an additional refund of Rs.30 crores to the company having been prevented to be made vide order dated 30.8.2022 in W.P.(C) No. 6352/2022 cannot be overlooked.

87. Undoubtedly taking into account the factum that there is no extradition treaty of our country with China, the respondent thus falls within the category of a flight risk, but, the factum that he is alleged to have committed only a non-cognizable and an alleged bailable offence can also not be overlooked. The verdicts that the petitioner has relied upon all relate to alleged commission of non-bailable offences in which the issuance of the LOCs have been upheld in as much as they relate to offences inter alia punishable under the Prevention of Money Laundering Act, 2002, Prevention of Corruption Act, 1988, the Central Goods and Services Tax Act, 2017 and the non bailable offences under the Indian Penal Code, 1860.

CONCLUSION

88. In the circumstances, though it is not considered appropriate by the Court to set aside the impugned order dated 29.8.2022 of the learned Trial Court which has set aside the LOC against the respondent in addition to the conditions imposed by the learned Trial Court to the effect that in case of resignation, retirement or cessations of employment etc. of the respondent company, M/s Huawei Telecommunications (India) Company Private Limited (HTICPL) shall withhold the severance pay/severance package and

other incentives/emoluments payable to the respondent and the same shall not be released without permission of this Court to which effect an undertaking has been directed to be submitted of the company to be filed before the Trial Court under intimation to the petitioner which the respondent submits has already been so submitted copy of which has also been submitted before this Court, the appropriateness of the undertaking being in consonance with the order dated 29.8.2022 of the learned Trial Court is an aspect to be considered by the Trial Court as has already observed herein above, it is considered appropriate to direct further in addition to the effect:

- that the respondent shall further submit an undertaking to the Trial Court that he shall continue to join the investigation as and when directed by the Investigating Officer through video conferencing and furthermore,
- the respondent shall submit an undertaking to the Trial Court that on commencement of the trial, if any, against him, he shall appear before the Trial Court as and when directed and in the mode directed by the Trial Court;
- that the respondent be permitted to travel out of India only subject to the respondent submitting an FDR to the tune of Rs.5 crores drawn on a nationalized Indian bank in the learned Trial Court which on deposit is to be renewed in an automatic renewal mode which on the failure of the respondent to join the investigation twice shall stand forfeited and which also on failure to appear before the Trial Court as and when directed by the Trial Court shall be forfeited;

- the release of the said FDR would be subject to the determination and adjudication of the criminal complaint filed by the petitioner against the respondent herein;
- further the respondent shall also adhere to the conditions imposed vide order dated 17.8.2022 in the bail order of the learned Trial Court of informing the complainant seven days prior to leaving India.

89. The directions qua the imposition of the conditions of deposit of an FDR of an amount of Rs.5 Crores drawn on a nationalized Indian Bank and forfeiture thereof on non-joining of the investigation and non-appearance as and when directed by the Trial Court have been imposed to take into account the eventuality of the alleged commission of an offence punishable under Section 276C(1)(i) of the Income Tax Act, 1969 read with Section 278B(1) of the Income Tax Act, 1969, if any, committed by the respondent.

90. The petition Crl. M.C. No. 4492/2022 seeking the setting aside of the order dated 29.8.2022 of the Court of the ACMM (Special Acts), Central District, Tis Hazari Courts, and the prayer made vide Crl.M.A. No. 18282/2022 by the petitioner seeking the stay of the operation of the impugned order dated 29.8.2022, are thus declined. The impugned order dated 29.8.2022 is however modified as directed herein above.

ANU MALHOTRA, J.

SEPTEMBER 20, 2022
HA/NC/SV