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

WRIT PETITION NO. 566 OF 2022

Vodafone India Services Pvt. Ltd. … Petitioner

vs.

Assistant Commissioner of Income Tax Circle 8(3)(2), Mumbai & Ors. …Respondents

Ms. Fereshte Sethna a/w. Ms. Mrunal Parekh, Mr. Ameya Pant, Mr. Ashish Mishra, Ms. Coral Shah, Mr. Abhishek Tiwari, Ms. Snighdha Mishra i/b. DMD Advocates for the petitioner.
Mr. Suresh Kumar for the respondents.

CORAM: G. S. KULKARNI &
SOMASEKHAR SUNDARESAN, JJ.
DATED: 18 June, 2024

P.C.

1. This petition under Articles 226 and 227 of the Constitution challenges an order dated 19 July, 2021 of the Income-tax Appellate Tribunal (for short **"The Tribunal"**), by which the Tribunal had rejected an application filed by the petitioner seeking a blanket unconditional stay on collection/recovery of tax and interest demands aggregating to Rs.1128.46 crores, which is in pursuance of an assessment order passed against the petitioner under section 143(3) read with section 144C of the Income-tax Act, 1961 (for short **"the Act"**), for the assessment year 2014-15, until the disposal of the related appeal filed before the Tribunal. The Tribunal, considering the rival contentions, has

rendered the impugned order whereby it has granted a conditional stay on collection of the impugned tax and interest demands in the following terms:

> "……. we deem it fit and proper to grant a stay on collection of the impugned tax and interest demands on the condition that (i) **the assessee will pay** Rs.230 crores, which works out to approximately 20% of the disputed tax demand, within 30 days from today; (ii) **the assessee will furnish** a corporate guarantee from an associate company, which has unencumbered assets in India in excess of the balance disputed demands, i.e., Rs.900 crores; and (iii) **the assessee will fully cooperate in expeditious disposal** of the appeal in question, as also other appeals which are tagged and clubbed with this appeal, and in case of any lapses on the part of the assessee in this regard, this **stay shall stand vacated forthwith**. This order shall remain in force for six months from today or till further orders – whichever is earlier. The assessee and the income tax department are also directed to furnish the details of all the related appeals, which may have any bearing with the issues in this appeal, so that the matter is placed before the bench, at the earliest possible, for tagging and clubbing, with a view to ensure that all the related matters are taken up for hearing together in a holistic manner, if necessary, on a day to day basis and at the earliest possible. Ordered accordingly."
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> (emphasis supplied)

2. The Tribunal has briefly referred to the facts of the case as can be seen from paragraphs 2 and 3 of the impugned order. We do not intend to burden this order by reiterating the facts. Suffice it to observe that the primary contention of the petitioner before the Tribunal in praying for a blanket stay of the assessment order under which the demand in question was made, was on the ground as to what has transpired in relation to the Revenue taking a similar position for the prior assessment years, namely, 2008-09, 2010-11, 2011-12 and 2012-13 as indicated in the following chart as placed before us:

AY	Returned Income (Rs. Crores)	Transaction Value (Rs. Crores)	s.92C ALP*** adjustment (Rs.crores)	% of high pitched adjustment to returned income	Demand as per assessment order (Rs. In crores)	Amount paid/payable adjusted* (Rs. Crores)	Amount secured/to be secured by Corporate Guarantee (Rs. Crores)	%	Status
2008-09	**27.71**	**NIL**	**6,105.44**	**220.33**	**3,738.49**	**200**	**3,538.49**	**12.25%**	**SC**
2010-11	60.58	862.86	3,031.43	50.04	1,087.54	212.23*	-	6.01%	ITAT
2011-12	17.89	722.98	1,180.29	65.97	423.88	50	373.88	2.34%	ITAT
2012-13	**22.91**	**24.25**	**1588.85**	**69.35**	**430.86**	**100**	**737.84**	**2.77%****	**GHC**
2014-15	39.09	1,241.32	1,967.15	50.32	1,128.19	230	900	3.90%	ITAT

*ADJUSTMENT IN PROTECTIVE ASSESSMENT OF CASH DEPOSIT MADE IN AY 2008-09

3. Ms. Sethna, learned counsel for the petitioner has laid emphasis on the fact that insofar as the assessment year 2008-09 was concerned, the petitioner had returned an income of Rs.27.71 crores with transaction value in relation to exercise of put and call options being Nil. However, the revenue had arrived at a figure of Rs.6,105.44 crores under the provisions of Section 92C of the Act in determining the value of the transactions (put and call options), which were said to be assigned to the petitioner. She has submitted that the percentage of high pitched adjustment to returned income was 220.33%, in respect of which a tax demand was made against the petitioner as per the assessment order was of an amount of Rs.3738.49 crores. It is contended that the petitioner had assailed the assessment order before the Tribunal. The Tribunal had rejected the petitioner's appeal against which the petitioner had preferred an appeal before this Court, which came to be allowed by a decision dated 8 October, 2015 of Division Bench of this Court (Vodafone India Services P. Ltd. vs.

Commissioner of Income-tax and Anr.,)[1]. It is contended that such decision of this Court was assailed by the Revenue before the Supreme Court in a Special Leave Petition, on which the Supreme Court has granted leave by an order dated 13 May, 2016 and the proceedings are subjudice. Be that as it may, Ms. Sethna would not dispute that insofar as such proceedings for A.Y. 2008-09 were concerned in pursuance of the interim order passed by the Tribunal, the petitioner was directed to deposit an amount of Rs.200 crores, which was deposited by the petitioner and for the balance demand, it had submitted a corporate guarantee of Rs.3538.49 crores from the petitioner's ultimate parent company, i.e., Vodafone International Holdings BV, Netherlands. According to her, the Tribunal ought to have appreciated that there was sufficient security available with the department so as not to insist on a further deposit in relation to the impugned assessment order, which is for the assessment year 2014-15. Such argument of Ms. Sethna is also premised on the fact that what stands covered by the order passed by this Court and now against which the proceedings are pending before the Supreme Court, pertains to the assignment of options (put/call) of the value of 12.25% out of 15.03% in Hutchison Essar Ltd. (now Vodafone India Ltd.). It is submitted that for the assessment year 2010-11, 2011-12 and 2012-13, put/call options exercised were to the extent of 6.01%, 2.34% and 2.77% and for the assessment year 2014-15, which is the

1 (2016) 385 ITR 169 Bom.

assessment year in question, it was 3.90%. On such basis, it is contended that when the equity interest which was to the extent of 12.25% itself was covered by the orders accepting the corporate guarantee, a different standard ought not to be applied for the assessment year 2014-15. This, according to Ms. Sethna, has been overlooked by the Tribunal in passing the impugned order, more particularly, considering that the deposit of Rs.200 crores for the assessment year 2008-09 has been adjusted by the revenue towards the demand for the assessment year 2010-11 as and by way of protective adjustment.

4. It is hence Ms. Sethna's contention that the Tribunal ought not to have deviated from the position in the prior assessment years as indicated by her in the chart. According to her, there is hardly any difference in the situation as prevailing except the variation of percentage of the transactions as fell for consideration of the department under which the department subjected these transactions to apply the provisions of Section 92C of the Act. It is thus Ms. Sethna's submission that the approach of the Tribunal for the assessment year in question (2014-15) ought to be similar and in fact the corporate guarantee as furnished by the petitioner for the assessment year 2008-09 needs to be reckoned for the purpose of interim stay in regard to the proceedings for the assessment year 2014-15.

5. Ms. Sethna has also submitted that condition no. (ii) of the impugned order necessarily needs to be interfered with inasmuch as in the facts and circumstances of the case, certainly it was neither feasible nor practicable to comply such condition to furnish a corporate guarantee from an associate company which has unencumbered assets in India in excess of the balance disputed demands, i.e. Rs.900 crores. According to her, such condition has been coined for the first time and would amount to a gross departure from the orders which were passed from the prior assessment years not only by the Tribunal but also accepted by this Court and Gujarat High Court as seen from the chart.

6. Mr. Suresh Kumar, learned counsel for the revenue in opposing the petition has drawn our attention to the impugned order passed by the Tribunal to submit that in paragraph 5 of the impugned order, detailed observations are made to pass the order in question. It is submitted that considering the facts of the case and by applying the settled principles of law the Tribunal has exercised jurisdiction in passing the impugned interim order. He submits that in the absence of any perversity or any gross illegality, the observations as made in the impugned order would not call for interference, as the view taken by the Tribunal in the facts of the case directing legitimate deposit of the amount as per the provisions of Section 254(2A) of the Act is an appropriate exercise of the discretion. It is submitted that the impugned order apart from being a

plausible order, is a discretionary order and accordingly it ought not to be interfered with.

7. Ms. Sethna would submit that the contentions of Mr. Suresh Kumar ought not to be accepted more particularly considering the observations of the Tribunal, which according to her, are objectionable when the Tribunal observed that "*when an income is added on a substantive basis in one year and on a protective basis in the other year, the year in which protective addition is made becomes the year of substantive assessment the moment the original substantive addition does not meet judicial approval. In any event, the triggers for taxation in the subsequent years are different*". It is her contention that such observations made by the Tribunal would entitle the petitioner to take the benefit of deposit of corporate guarantee made for the assessment year 2008-09 and which ought to be reckoned for the purpose of stay application in question, which is for the subsequent year 2014-15.

8. We have heard learned counsel for the parties and with their assistance, have perused the record. At the outset, we may observe that the emphasis of Ms. Sethna relying on the orders passed in regard to the previous assessment years may not assist the petitioner, firstly for the reason as we note that for the assessment year 2011-12 when the percentage of transactions in respect of which the put/call option was exercised was 2.34% of the total holding in

respect of which an assessment order came to be passed applying the provisions of Section 92C of the Act, an amount of Rs.50 crores was directed to be deposited at the interim stage for stay of the assessment order. Similarly, for the assessment year 2012-13, the proceedings in that regard are pending before the Gujarat High Court, the petitioner was directed to deposit an amount of Rs.100 crores. Both such orders were accepted by the petitioner and the amount was deposited, without any grievance. This is also clearly seen from the chart as tendered by Ms. Sethna, which we have extracted hereinabove.

9. We are also not inclined to accept Ms. Sethna's contentions on the observations made by the Tribunal which we have extracted hereinabove in paragraph 8. We may observe that such observations as made by the Tribunal would not assist the petitioner. It is in fact factually correct that the assessment year 2008-09, being a substantive assessment, the assessment for the year 2010-11 would be required to be treated as a protective assessment. However, the events which have triggered taxation in the subsequent period are different, as it pertains to 6.01% of the holding in respect of call and put options being actually exercised. Hence, such observations of the Tribunal cannot be regarded to be in any manner warranting interference with the impugned order. In any event, the Tribunal has clearly observed that what was relevant for the impugned order to be passed, is the events of taxation for

the subsequent years are different from what was the position in the year 2008-09. This is clear from the following observations:

> "*…. In any event, the triggers for taxation in the subsequent years are different. The impugned ALP adjustment, therefore, cannot be treated as merely on the protective basis, and, for this reason, the collection of disputed demands cannot be deferred till the Hon'ble Supreme Court decides the matter for the assessment year 2008-09. All these factors taken together, in our considered view, this is a case deserving a blanket stay by the Tribunal".*

10. We are thus not persuaded to accept the petitioner's contention that in the facts of the case, the recovery being in the nature of a protective recovery, it was not permissible for the Tribunal to pass the impugned order considering the decisions of the orders passed for assessment year 2008-09 as substantive year. In other words, the contention is that assessment year 2014-15 cannot be treated to be substantive, as there is no finality of adjustment. In such context, we may observe that although the Tribunal has made the observations as noted by us above, however, considering the orders passed on the subsequent assessment years (A.Ys. 2010-11, 2011-12, 2012-13), we are of the opinion that it would not be correct for the petitioner to raise a contention that the recovery as sought to be made for assessment year 2014-15 would be in the nature of a protective recovery. If such argument is accepted, orders that have been accepted by the petitioner in depositing the demands for the assessment years 2011-12 and 2012-13, (which is Rs.50 crores and Rs.100 crores respectively)

could not have been passed. Moreover, such orders are accepted by the petitioner.

11. Further, it is the petitioner's contention that the assessment for the year in question, being a high-pitched assessment, such a demand would warrant a blanket stay. In the facts of the case, we are not inclined to accept such contention considering as to what has transpired for the previous years, i.e., A.Ys. 2008-09, 2010-11, 2011-12 and 2012-13. In such context, the petitioner's reliance on the decision of the Delhi High Court in ***Valvoline Cummins Ltd. vs. Dy. Commissioner of Income-tax, Circle 17(1)*** [2] would also not assist the petitioner, as the facts are completely distinct from the facts in hand.

12. In the present proceedings, we are concerned with the interim order passed by the Tribunal on the stay application as filed by the petitioner, which is purely a discretionary order. We do not find that the discretion has been exercised by the Tribunal perversely or in the manner which the law would palpably not recognize.

13. Although we are not inclined to interfere with the impugned order insofar as it directs the petitioner to deposit an amount of Rs.230 crores, being the lowest/minimum amount of 20% of the disputed tax demand, which in our opinion, is clearly in consonance with the provisions of Section 254(2A) of

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2 (2008) 171 Taxman 241 (Delhi)

the Act, we find substance in Ms. Sethna's contention that a partial interference is called for in condition no. (ii) as imposed by the Tribunal. The Tribunal has directed the petitioner to furnish a corporate guarantee from an associate company which has unencumbered assets in India in excess of the balance disputed demands, i.e., Rs.900 crores. In this context, we are of the opinion that such condition ought not to have been directed by the Tribunal in the facts and circumstances of the case and more particularly considering the interim orders passed for the prior years based on the same triggers of exercise of options. Such condition, therefore, is hereby substituted by directing the petitioner to furnish a corporate guarantee of its ultimate parent, namely, Vodafone International Holdings BV, Netherlands as accepted by the revenue in the assessment year 2008-09.

14. Before parting, we may observe that although there are some more decisions which are cited on behalf of the petitioner on the aforesaid issues, however to avoid prolix, we have not discussed these decisions. The position of law laid down in these decisions is well-settled, however, considering the facts of this case, such decisions are not applicable.

15. In the light of the above discussion, except what has been modified by us in relation to condition no. (ii) as imposed by the impugned order, we are not inclined to interfere in the impugned order.

16. Let the order passed by the Tribunal be complied within a period of four weeks from today.

17. Disposed of in the above terms. No costs.

(SOMASEKHAR SUNDARESAN, J.) (G. S. KULKARNI , J.)