Vodafone India Services Pvt .Ltd. vs Union Of India on 15 April, 2019

Author: Harsha Devani

Bench: Harsha Devani, Bhargav D. Karia

C/SCA/17033/2018 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 17033 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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VODAFONE INDIA SERVICES PVT .LTD.

Versus

UNION OF INDIA & 2 other(s)

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Appearance:
MR SN SOPARKAR, SENIOR ADVOCATE with MR MRUNAL PAREKH and
MR B S SOPARKAR(6851) for the Petitioner(s) No. 1
MR MR BHATT, SENIOR ADVOCATE with MRS MAUNA M BHATT(174) for
the Respondent(s) No. 1,2,3

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CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 15/04/2019

ORAL JUDGMENT

C/SCA/17033/2018 JUDGMENT (PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this petition under article 226 of the Constitution, the petitioner has challenged the order dated 25.10.2018 passed by the Deputy Commissioner of Income Tax (respondent No.3 herein) and seeks stay of further recovery pursuant to the order of penalty dated 27.9.2018.

2. The facts as stated briefly are that the petitioner filed a return of income for assessment year 2012-13 declaring total income of Rs.19,27,93,617/- and book profits/(loss) under section 115JB of the Income Tax Act, 1961 (hereinafter referred to as "the Act") at Rs.9,94,13,659/-. The petitioner filed a revised return on 26.2.2014, declaring total income of Rs.22,91,83,000/- and book profits/(loss) under section 115JB of the Act at Rs.9,94,13,659/-. Subsequently, pursuant to an Advance Pricing Agreement dated 27.2.2017 entered into by the petitioner with the Central Board of Direct Taxes, a modified return of income was filed by the petitioner. By an order dated 17.1.2017, assessment came to be framed by the third respondent under section 143(3) read with section 144C (13) of the Act resulting into additions aggregating Rs.1617,23,67,987/-.

2.1 Being aggrieved, the petitioner went in appeal before the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"). By an order dated 23.1.2018, the Tribunal inter alia held as follows:

"a) Purported compensation of Rs.1478,92,93,304/-

determined by the Transfer Pricing Officer to be receivable by the petitioner on transfer of options by virtue of a purported transfer pricing adjustment was C/SCA/17033/2018 JUDGMENT upheld, and held taxable as capital gains after indexation benefit;

b) Depreciation on goodwill claim of Rs.19,53,97,454/- was remanded to Respondent No.3 for fresh adjudication;

c) Disallowance under section 14A was deleted;

d) Disallowance of certain club expenditure was allowed on amortized basis over the seven-year tenure of the membership; and

e) Claim for other club expenditure was remanded to Respondent No.3 for verification whether membership expenditure was incurred in the relevant previous year in entirety."

2.2 The revenue had also filed cross objections contending that the purported compensation receivable on transfer of options was taxable as 'business income' (rather than under the head of 'capital gains') in the hands of the petitioner. By an order dated 24.7.2018, the said objections came to be disposed of as infructuous. Pursuant to the order dated 23.1.2018, the third respondent passed an order dated 25.1.2018 giving effect to the order of the Tribunal computing the total income at Rs.1502,08,58,787/- and determined the tax payable at Rs.430,86,99,090/-. Against the order dated 23.1.2018, the petitioner preferred an appeal before this court under section 260A of the Act wherein the petitioner also filed an application seeking stay of recovery of the demand. By an order dated 21.3.2018, this court directed the petitioner to pay a further sum of Rs.23.13 crores after considering the taxes paid of Rs.76.87 crores, thereby recording that it would amount to total tax payment aggregating to Rs.100 crores, which is approximately 20% of the disputed tax demand. The petitioner paid the sum of Rs.23.13 crores on 28.3.2018 as per challan of the same date.

C/SCA/17033/2018 JUDGMENT 2.3 Based on the order of the Tribunal remanding the matter to the third respondent on issues of depreciation and club expenditure, notice came to be issued to the petitioner which culminated into an assessment order dated 19.9.2018. Being aggrieved by the assessment order, on 18.10.2018, the petitioner preferred an appeal under section 246A before the Commissioner of Income tax (Appeals)-8, Ahmedabad.

2.4 By show cause notices dated 6.7.2018, 10.8.2018 and 19.9.2018, the third respondent initiated penalty proceedings, in response to which the petitioner filed submissions and attended the hearings, which culminated into an order dated 27.9.2018 imposing penalty of Rs.326,38,45,396/- under section 271(1)(c) of the Act.

2.5 The petitioner filed an application dated 22.10.2018 under section 220(6) of the Act before the third respondent seeking unconditional stay of the demand arising out of the penalty order dated 27.9.2018. By the impugned order dated 25.10.2018, the third respondent directed the petitioner to pay 20% of the demand of Rs.326.38 crores within three days from receipt of the letter and rejected the petitioner's application for unconditional stay of the demand.

2.6 Being aggrieved, the petitioner filed a review application dated 26.10.2018 before the administrative head of the third respondent, that is, the Principal Commissioner/Commissioner of Income Tax (the second respondent herein). A copy of the review application was also endorsed to the third respondent.

C/SCA/17033/2018 JUDGMENT 2.7 By a letter dated 26.10.2018, the third respondent intimated the petitioner regarding adjustment of refund due to the petitioner for assessment year 2013-14 of Rs.8,27,80,220/- against the demand of Rs.326.38 crores.

2.8 Being aggrieved, the petitioner has filed the present petition seeking the relief noted hereinabove.

3. In response to the averments made in the petition, the third respondent has filed an affidavit-in-reply wherein various decisions of the Supreme Court and High Courts have been cited

and more particularly, the decisions of the Supreme Court in the case of Siliguri Municipality and others v. Amalendu Das and others, (1984) 146 ITR 624 and in the case of Assistant Collector of Central Excise v. Dunlop India Limited and others, (1985) 154 ITR 172. It is averred that as the petitioner had multiple alternative remedies available, the writ petition should not be entertained and that on merits the case does not warrant stay without payment of 20% of demand till disposal of appeal. It is further stated that the condition of depositing 20% of the total demand for availing stay is reasonable inasmuch as this High Court under order dated 21.3.2018 rendered in Civil Application (OJ) No.1 of 2018 in Tax Appeal No.52 of 2018 in the petitioner's own case granted stay against the demand arising out of quantum additions by directing the petitioner to deposit further amount to arrive at benchmark of 20% of the total outstanding amount. It is further averred that the petitioner has not stated or demonstrated any financial hardship in paying 20% of the demand raised and that on perusal of the record it is seen that the petitioner has sufficient funds to pay the demand to the C/SCA/17033/2018 JUDGMENT tune of 20%. It is stated that the record shows that as on 31.3.2018, the petitioner had total bank balance of Rs.1093.33 crores, which includes bank balance of Rs.15.89 crores, demand deposits of Rs.141 crores and other bank balances of Rs.936.39 crores and that a comparative study of the cash and cash equivalents of the petitioner for different years reveal that annual increase in cash assets over those in immediately preceding year is of the order of Rs.150 - 200 crores every year. Therefore, it can be seen that the petitioner has sufficient ready funds at its disposal to make the payment of 20% of the total demand, that is, Rs.65 crores approximately and such payment shall not cause any financial hardship or otherwise prejudice the petitioner.

4. Mr. S.N. Soparkar, Senior Advocate, learned counsel with Mr. Mrunal Parekh, and Mr. Bandish Soparkar, learned advocates for the petitioner, invited the attention of the court to sub-section (6) of section 220 of the Act, to submit that the Assessing Officer has discretion whether or not to require the applicant to deposit any part of the demand for the purpose of granting stay. Attention was invited to Instruction No.1914 dated 2.2.1993 issued by the Central Board of Direct Taxes (CBDT) with reference to section 220 of the Income Tax Act, 1961 wherein under paragraph 2. B. thereof instructions have been issued in respect of stay petitions and more particularly to clause (iii) thereunder which inter alia says that a higher superior authority should interfere with the decision of the AO/TRO only in exceptional circumstances e.g. where the assessment order appears to be unreasonably high-pitched or where genuine hardship is likely to be caused to the assessee. Referring to paragraph C which provides for guidelines for C/SCA/17033/2018 JUDGMENT staying demand, it was pointed out that clause (i) thereof gives illustrations of cases where demand can be stayed, and the illustrative situation provided under sub-clause (a) thereof is if the demand in dispute relates to issues that have been decided in the assessee's favour by an appellate authority or court earlier. Reference was made to clause (v) thereof which says that while considering an application under section 220(6) of the Act, the Assessing Officer should consider all relevant factors having a bearing on the demand raised and communicate his decision in the form of a speaking order.

4.1 Reference was also made to the instructions issued vide Office Memorandum dated 29.2.2016 wherein it has been observed that it has been reported that the field authorities often insist on payment of a very high proportion of the disputed demand before granting stay of the balance

demand. This often results in hardship for the taxpayers seeking stay of demand. It is further provided therein that in case where the outstanding demand is disputed before CIT (A), the Assessing Officer shall grant stay of demand till final disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in paragraph (B) thereunder. Reference was also made to the office memorandum dated 31.7.2017 whereby the standard rate of 15% of the disputed amount has been raised to 20% of the disputed amount. It was submitted that the administrative guidelines laying a standard of 20% of the disputed amount are not the law and the department has discretion under section 220(6) of the Act to grant unconditional stay. In support of such submission, reliance was placed upon the decision dated 8.8.2017 of the Delhi High Court rendered in C/SCA/17033/2018 JUDGMENT the case of L. G. Electronics India Private Limited v. Pr. Commissioner of Income Tax in WP. (C) No.6778 of 2017 wherein the court has set aside the order impugned before it with a direction that the petitioner's application will once again be heard by the PClT on merits and without reference to the OM dated 31st July, 2017, which on the face of it, appears to curtail his discretion. It was pointed out that this decision was challenged by the revenue before the Supreme Court, which by an order dated 20th July, 2018 made in Civil Appeal No.6850 of 2018, has clarified that in all cases like the case before it, it will be open to the authorities, on the facts of individual cases, to grant deposit orders of a lesser amount than 20%, pending appeal.

4.2 It was submitted that the present case falls under sub- clause (a) of clause (i) of paragraph C of Instruction No.1914 dated 2.2.1993 issued by the CBDT, which provides that if the demand in dispute relates to issues that have been decided in the assessee's favour by an appellate authority or court earlier the stay could be granted. It was submitted that the issues involved in the quantum appeal are covered on merits in favour of the petitioner. The attention of the court was invited to the order giving effect to the order dated 25.1.2018 of the Income Tax Appellate Tribunal as well as the assessment order, to point out that, in all, there are three additions on account of: (i) TP adjustments treating termination of option rights as capital gain, (ii) Club membership expenses; and (iii) depreciation on goodwill. It was submitted that insofar transfer pricing adjustment is concerned, the issue is covered in the petitioner's own case for the earlier year by the decision of the Bombay High Court in the case of Vodafone India Services C/SCA/17033/2018 JUDGMENT Pvt. Ltd. v. Commissioner of Income Tax, [2016] 385 ITR 169 (Bom). Referring to the order of the Tribunal in the quantum appeal, it was submitted that the Tribunal has not considered the issue in proper perspective. Reference was made to the order dated 21st March, 2018 passed by this court in the quantum appeal to submit that considering the nature of the issues in the quantum matter no penalty be recovered at this stage.

4.3 Reliance was placed upon the decision of this court in Commissioner of Income Tax v. Prakash S. Vyas, [2015] 232 Taxman 352 (Gujarat), wherein the court held that the sole ground on which the Tribunal was persuaded to delete the penalty was that the issue on which the penalty was based, was carried in appeal before the High Court and High Court had admitted the assessee's appeal and framed substantial questions of law. In the view of the Tribunal, this fact itself was sufficient to hold that the issue was debatable and, therefore, no penalty could be sustained under section 271(1)(c) of the Act. The court further held that unless there is any indication in the order of admission passed by the High Court, simply because the tax appeal is admitted, would give rise to a presumption that

the issue is debatable and, therefore, penalty should be deleted. The court further observed that this is not to suggest that no such intention can be gathered from the order of the court even if so expressed either explicitly or in implied terms. It was submitted that recovery of quantum demand of an amount of approximately Rs.400 crores has been stayed by this court in the quantum appeal and, therefore, when the quantum demand is suspended, the requirement to pay 20% of penalty is bad. It was submitted C/SCA/17033/2018 JUDGMENT that levy of penalty is not automatic upon additions having been made, there have to be reasons.

4.4 Reference was made to the contents of the application under section 220(6) of the Act made by the petitioner. Inviting attention to the impugned order dated 25.10.2018, it was submitted that the same is contrary to the instructions issued by the CBDT as well as the decision of the Delhi High Court which says that a speaking order has to be passed. It was contended that the fact that the quantum appeal is admitted and the disputed demand is suspended after bipartite hearing as well as considering the order of admission, the same are sufficient to show that the demand deserves to be stayed and hence, the petitioner ought to have been given stay as a matter of course. The attention of the court was invited to the order dated 1.11.2018 passed by this court at the time of issuing notice in this petition whereby the court granted ad interim relief and prevented the respondents from carrying further recovery of the penalty.

4.5 Alternatively it was submitted that the issues are covered in favour of the petitioner by the decision of the Supreme Court in Vodafone International Holdings B.V. v. Union of India and another, 341 ITR 1, and therefore, by virtue of the Board Circular the petitioner is entitled to stay of recovery. It was submitted that the issues are highly disputed and contested and every facet would be required to be examined. It was submitted that even if the first two contentions are not accepted, the issues are highly contested and serious questions of law arise, therefore, there was no question of imposing penalty. It was urged that the order is bad as it is a C/SCA/17033/2018 JUDGMENT non-speaking order without hearing the petitioner and, therefore, the whole order is bad and is required to be quashed and set aside.

4.6 It was pointed out that the initially against the impugned order, the petitioner had approached the Principal Commissioner of Income Tax in terms of the CBDT instructions, however, in view of the fact that by the impugned order dated 25.10.2018, the Assessing Officer rejected the stay petition granting three days time to make payment, and thereafter in undue haste, without even waiting for three days for the petitioner to make payment, on 26.10.2018, had recovered Rs.8,27,80,220/- towards penalty by adjusting such amount from the refund due to the petitioner, the petitioner was constrained to approach this court by way of this petition. It was submitted that in view of the fact that an amount of Rs.8,27,80,220/- already stands recovered, at this stage, no further amount be directed to be paid.

5. Vehemently opposing the petition, Mr. M. R. Bhatt, Senior Advocate, learned counsel for the respondent, submitted that in this case the order of the Transfer Pricing Officer has been confirmed by Disputes Resolution Panel as well as by the Tribunal because of which there is recovery. It was submitted that the decisions of the Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India and another (supra) as well as the Bombay High Court in the case of Vodafone

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Commissioner of Income Tax (supra) which according to the learned counsel for the petitioner are squarely applicable to this case are in fact not applicable. The attention of the court C/SCA/17033/2018 JUDGMENT was invited to the facts of the case before the Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India and another (supra) and the facts of the present case to point out the distinction between the two cases as well as a few major distinguishing factors between the facts of the case before the Bombay High Court in Vodafone India Services Pvt. Ltd. v. Commissioner of Income Tax (supra) and the facts of the present case.

5.1 Reference was made to the relevant provisions of law and the order of the Tribunal in the quantum appeal wherein such issues have been discussed. It was submitted that it cannot be said that the judgment of the Tribunal is perverse or that it does not consider the above referred decisions of the Supreme Court and Bombay High Court. It was urged that when three layers of authorities have held that this transaction is covered by the transfer pricing mechanism, to say that the case is not covered is not tenable.

5.2 Referring to Instruction No.1914 dated 2.2.1993 issued by the CBDT, it was pointed out that under clause (iii) of paragraph B thereof review is available only for limited purpose to the higher officer. Referring to clause (i) of paragraph C thereof, it was submitted that none of the illustrative cases are applicable to the facts of the present case. Referring to the subsequent instructions dated 29.2.2016 and 31.7.2017 which provide for a standard rate of 15% and 20% of the disputed demand respectively, it was submitted that 15% of the disputed amount and then 20% of the disputed amount is a benchmark. There can be a variation on the higher side or lower side. In either eventuality, the petitioner is C/SCA/17033/2018 JUDGMENT required to refer to the case to the PCIT who will then review the order. It was emphatically argued that in this case the assessee moved the review application before the PCIT and thereafter straight away came before this court by way of this writ petition. Therefore either the petitioner seeks the benefit of the circular or it wants to invoke the writ jurisdiction of this court under article 226 of the Constitution. If it seeks the benefit of the circular, it has to follow the spirit of the circular. It was submitted that the Assessing Officer has granted relief and the petitioner has gone to the PCIT and then abandoned that procedure and has come to this court. If the petitioner does not want the benefit of the circular then under section 220(6) of the Act, it would be the discretion of the Assessing Officer and would not be a jurisdictional issue as it would amount to supplementing the discretion exercised by the Assessing Officer. It was contended that if the petitioner wants the benefit of the circular it has to go to the PCIT and that the requirement of review before the PClT cannot be hived off and that for variation in the amount below the benchmark of 20%, the petitioner has to satisfy the requirements of clause (b) of paragraph 4B of the Instructions. According to the learned counsel, none of the requirements are satisfied in this case.

5.3 It was argued that when there is a remedy by way of review before the PCIT in terms of the Instruction dated 2nd February, 1993, as amended from time to time, this writ petition under article 226 of the Constitution of India is not maintainable. It was submitted that on merits also, no variation below 20% is warranted. Referring to the order passed on the stay application in the

quantum appeal, it was pointed out that the court has required the benchmark of 20% to be complied C/SCA/17033/2018 JUDGMENT with. It was submitted that if in the quantum appeal there is a benchmark of 20%, this case does not fall under the variation clauses and that the petitioner does not deserve any special treatment towards reduction. Referring to the decision of this court in Commissioner of Income Tax v. Prakash Vyas (supra), it was submitted that the court has held that unless there is any indication in the order of admission passed by the High Court simply because the tax appeal is admitted, it would give rise to the presumption that the issue is debatable and that therefore, penalty should be deleted. Reference was made to the findings recorded by the third respondent in the penalty order, to submit that after duly appreciating the merits of the case it was found that the petitioner had furnished inaccurate particulars in respect of all the three additions and hence, the petitioner does not have a good case on merits.

5.4 The attention of the court was invited to the averments made in paragraphs 10 to 13 and 16 of the affidavit-in-reply filed by the third respondent. It was pointed out that the petitioner has neither stated nor demonstrated any financial hardship in paying 20% of the demand raised and that on perusal of the records of the petitioner, it is seen that the petitioner has sufficient funds to pay the demand of 20% of the penalty amount. It was submitted that the record shows that as on 31.3.2018, the petitioner had a total bank balance of Rs.1093.33 crores, and hence, had sufficient funds at its disposal to make payment of 20% of the total demand, that is Rs.65 crores approximately and such payment will not cause any financial hardship or otherwise prejudice the petitioner. It was urged that the petitioner is not affected liquidity wise and at best there is a fair chance of succeeding even as per the C/SCA/17033/2018 JUDGMENT version of the petitioner.

5.5 In support of his submission, the learned counsel placed reliance upon the decision of this court in Jagdish Gandabhai Shah v. PCIT, [2017] 247 Taxman 414 (Gujarat) wherein the court has held thus:

> "8.2 In case, the Assessing Officer is of the view that any deviation from clause 4 [A] is warranted ie., if the Assessing Officer is of the opinion that case falls within parameters of Clause 4 [B](a) ie., the Assessing Officer is of the opinion that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted, in that case, the Assessing Officer is required to refer the matter to the administrative Principal CIT/CIT, who shall, after considering the relevant facts, decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand. In case the Assessing Officer is of the opinion that the case falls within the parameters of Clause 4 [B](b) of the modified instruction dated 29th February 2016 ie., if the Assessing Officer is of the view that the nature of addition resulting in the disputed demand is such that payment of lump sum amount lower than 15% is warranted, in that case also, the Assessing Officer is required to refer the matter to the administrative Principal CIT/ CIT, who after considering all the relevant facts, shall decide the quantum/proportion of the demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand. Therefore, the submissions made on behalf of the Revenue that only when the case falls under Clause 4 [B] [(b),

> in that case only, the Assessing Officer is required to refer the matter to the administrative Principal CIT/CIT and not in case when the case falls under Clause 4 [B](a), the aforesaid has no substance. Between clause 4 [B](a) and clause 4 [B] (b), the word used is "or" and therefore, in both the eventualities ie., in case of Clause 4 [B](a) and in case of Clause 4 [B](b) ie., in case the Assessing Officer is of the opinion that the assessee is required to deposit either above 15% or less than 15% of the disputed demand, in that case, the Assessing Officer is C/SCA/17033/2018 JUDGMENT required to refer the matter to the Principal CIT/CIT and thereafter, the Principal CIT/CIT is required to take appropriate decision, after considering all the relevant facts and determine the lump sum payment to be made by the assessee for granting stay of the balance demand."

5.6 Reliance was also placed upon the decision of the Kerala High Court in St. Joseph's Granites v. Assistant Commissioner of Income Tax, [2018] 92 taxmann.com 372, wherein the court refused to exercise writ jurisdiction under article 226 of the Constitution of India against an order directing payment of 10% of the demand as the amount directed to be paid was a meagre portion of the demand.

5.7 Reliance was also placed upon the decision of this court in Ashokbhai Jagubhai Kheni v. Deputy Commissioner of Income Tax, [2018] 97 taxmann.com 104 Gujarat, wherein it has been held that ordinarily the court would be slow in interfering with such discretionary exercise of powers by the Commissioner. In the facts of the said case, the court found that even 15% of the disputed tax dues would run into several crores of rupees and after considering the merits of the submissions advanced by the counsel for the respective parties reduced the amount to 7.5% of the demand with a further condition that the petitioner shall offer immoveable security for the remaining 7.5% to the satisfaction of the assessing authority. It was submitted that thus the court has safeguarded the interest of the revenue by providing a condition of security. It was submitted that if at all the court is inclined to interfere with the impugned order some reasonable amount may be ordered to be paid and the department may be put to terms that the amount be forthwith paid back in case C/SCA/17033/2018 JUDGMENT the petitioner succeeds. In conclusion, it was submitted that the petitioner has sufficient liquidity and the three criteria for grant of relief, namely, prima facie case, balance of convenience and irreparable injury are not made out and hence, no case is made out for grant of any relief and that the petition deserves to be dismissed.

6. In rejoinder, Mr. Soparkar submitted that in the application under section 220(6) of the Act, the petitioner had pleaded hardship if it is directed to make payment of any amount under the penalty order. Reliance was placed upon the decision of the Delhi High Court in Taneja Developers & Infrastructure Ltd. [2010] 324 ITR 247 (Delhi) as well as the decision of the Karnataka High Court in the case of Flipkart India (P) Ltd. (2017) 79 Taxman 159 (Kar), for the proposition that even where the assessee's finances do not indicate hardship, the question of genuine hardship must be taken into consideration.

7. Before adverting to the merits of the case, reference may be made to the provisions of sub-section (6) of section 220 of the Act, which reads thus:

"220. When tax payable and when assessee deemed in default-

(6) Where an assessee has presented an appeal under section 246 or section 246-A the Assessing Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as Iong as such appeal remains undisposed of."

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8. Thus, under section 220(6) of the Act, the Assessing Officer may, in his discretion and with or without imposing any conditions, make an order not treating the assessee as in default in respect of such disputed amount till the time the appeal may remain pending before the first appellate authority. It is well settled that every discretionary power vested in an authority must be exercised in a just, reasonable and fair manner. Moreover, the CBDT in exercise of powers under section 119 of the Act has issued instructions providing guidelines for stay of demand at the first appeal stage.

9. In Instruction No.1914 dated 02.12.1993, the Board has expressed the view that, as a matter of principle, every demand should be recovered as soon as it becomes due and that the demand may be kept in abeyance for valid reasons only in accordance with the guidelines stated therein.

Paragraph B thereof provides for "Stay Petitions". Clause (iii) thereof states that the decision in the matter of stay of demand should normally be taken by Assessing Officer/TRO and his immediate superior. A higher superior authority should interfere with the decision of the AO/TRO only in exceptional circumstances, for example, where the assessment order appears to be unreasonably highpitched or where genuine hardship is likely to be caused to the assessee. Paragraph C thereof, which is relevant for the present purpose, reads thus:

"C. GUIDELINES FOR STAYING DEMAND.

(i) A demand will be stayed only if there are valid reasons for doing so. Mere filing an appeal against the assessment order will not be sufficient reason to stay the recovery of demand. A few illustrative situations where stay could be granted are-

(a) If the demand in dispute relates to issues that have been decided in assessee's favour by an C/SCA/17033/2018 JUDGMENT appellate authority or court earlier; or

(b) if the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under whose jurisdiction the Assessing Officer is working); or

(c) if the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment.

It is clarified that in these situations also, stay may be granted only in respect of the amount attributable to such disputed points. Further, where it is subsequently found that the assessee has not cooperated in the early disposal of appeal or where a subsequent pronouncement by a higher appellate authority or court alters the above situation, the stay order may be reviewed and modified. The above illustrations are, of course, not exhaustive.

(ii) In granting stay, the Assessing Officer may impose such conditions as he may think fit. Thus he may,

(a) require the assessee to offer suitable security to safeguard the interest of revenue;

(b) require the assessee to pay towards the disputed taxes a reasonable amount in lumpsum or in instalments;

(c) require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled;

(d) reserve the right to review the order passed after expiry of reasonable period, say upto 6 months, or if the assessee has not cooperated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations;

(e) reserve a right to adjust refunds arising, if any against the demand.

(iii) Payment by instalments may be liberally allowed so as to collect the entire demand within a reasonable period not exceeding 18 months.

(iv) Since the phrase 'stay of demand' does not occur in Section 220(6) of the Income-tax Act, the Assessing C/SCA/17033/2018 JUDGMENT Officer should always use in any order passed under Section 220(6) [or under Section 220(3) or Section 220(7)], the expression that occurs in the section viz. that he agrees to treat the assessee as not being in default in respect of the amount specified, subject to such conditions as he deems fit to impose.

(v) While considering an application under Section 220(6), the Assessing Officer should consider all relevant factors having a bearing on the demand raised and communicate his decision in the form of a speaking order."

10. Vide Office Memorandum dated 29.2.2016, it has been provided that in case where the outstanding demand is pending before CIT(A), the Assessing Officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless his case falls in the category discussed in paragraph B thereunder. Subsequently, vide Office Memorandum dated 31.7.2017, the Board has decided that the standard rate of 15% of the disputed demand is found to be

on the lower side and has decided the standard rate prescribed in OM dated 29.2.2016 be revised to 20% of the disputed demand, where the demand is contested before CIT(A).

11. The impugned order dated 25.10.2018 has been made by the third respondent Deputy Commissioner of Income tax, Circle-4(1)(2), Ahmedabad, on the application made by the petitioner requesting to stay demand of Rs.326,38,45,396/- arising out of penalty order dated 27.9.2018 under section 271(1)(c) of the Income Tax Act, 1961 for assessment year 2012-13. By the said order, the application has been rejected on the ground that it is not accompanied by any scheme for payment of demand and no reasons other than pendency of C/SCA/17033/2018 JUDGMENT appeal are mentioned in the same. Another reason is that the additions have been confirmed by the ITAT. However, keeping in view the CBDT's Office Memorandums dated 29.2.2016 and 31.7.2017, the Assessing Officer has directed the petitioner to pay 20% of the demand immediately and has further recorded that from the ITD system and record available it is seen that the petitioner has not made any payment of demand in dispute and has therefore, requested it to pay at least 20% of the demand and produce the copy of challan to him within three days of receipt of the letter. The application for stay of demand is disposed of accordingly.

12. Being aggrieved by the order dated 25.10.2018, the petitioner filed a review application before the second respondent on 26.10.2018. However, on 26.10.2018 itself, the third respondent issued a purported intimation under section 245 adjusting the amount of Rs.8,27,80,220/- from the refund due to the petitioner for assessment year 2013-14 against the demand of Rs.326.38 crores in spite of knowledge of the review application filed by the petitioner.

13. It may be noted that against the order passed by the Tribunal in the quantum appeal, the petitioner has preferred an appeal being Tax Appeal No.52 of 2018 before this court. By an order dated 21.3.2018, this court has admitted the appeal and framed six substantial questions of law. In the quantum appeal, the petitioner had filed a civil application for stay of the recovery. By a reasoned order dated 21.3.2018, a coordinate bench has stayed further recovery pursuant to the disputed demand. The court has recorded that the tax liability arising out of the judgment of the Tribunal is in the vicinity of C/SCA/17033/2018 JUDGMENT Rs.507.74 crores. It has further recorded that it has been informed that the assessee had deposited Rs.76.87 crores. The court has stayed coercive recovery arising out of the order of the Tribunal on the condition that a further sum of Rs.23.13 crores is deposited with the department which would bring the total to Rs.100 crores which would be approximately 20% of the outstanding tax demand. The court has further observed that the corporate guarantee which has been provided by the parent company to cover the unpaid amount would continue with the adjustment.

14. In the above backdrop the validity of the impugned order is required to be examined.

15. The learned counsel for the respective parties, have referred to the merits of the order passed by the Tribunal in the quantum appeal. The learned counsel for the petitioner has submitted that the issues involved in the quantum appeal stand concluded by decisions of the Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India and another (supra) and the Bombay High Court in the case of Vodafone India Services Pvt. Ltd. v.

Commissioner of Income Tax (supra) in favour of the petitioner and that the Tribunal has failed to appreciate the controversy in proper perspective while not following the said decisions, whereas the learned counsel for the revenue has taken pains to point out that the Tribunal has duly considered both the decisions and found that they are not applicable to the facts of the present case.

16. Insofar as the distinction sought to be drawn between the facts of the case before the Supreme Court in Vodafone C/SCA/17033/2018 JUDGMENT International Holdings B.V. v. Union of India and another (supra) and before the Bombay High Court in Vodafone India Services Pvt. Ltd. v. Commissioner of Income Tax (supra), and the facts of the present case is concerned, all these questions arise in the quantum appeal wherein the court has admitted the appeal on substantial questions of law and has granted stay on the application for stay of recovery subject to the petitioner depositing a further amount of Rs.23.13 crores so that the total amount comes to approximately 20% of the demand. This court after bipartite hearing, while granting stay against recovery has observed thus:

> "Tax Appeal arises out of judgment of the Income Tax Appellate Tribunal, Ahmedabad ["Tribunal" for short] concerning taxing the assessee for capital gain applying transfer pricing provisions contained in the Income-tax Act, 1961. The issue arises in the background of complex web of corporate structure and transfer of shares and controlling rights over different companies. To put in the nutshell, the Revenue desires to tax transactions in the nature of assignment of call options in favour of the TII so as to benefit one SMMS Investment Private Limited. According to the Revenue, the assessee-company held such call options. Instead of exercising such call options and acquiring shares of the said SMMS Private Limited at a very small pre-agreed sale consideration, the assessee paid a sum of Rs. 21.25 Crores to the shareholders. Eventually, there was increase in the share capital of SMMS and the shares were alloted to TII. Revenue argues that the market value of SMMS at the relevant time was more than Rs. 1600 Crores.
>
> On the other hand, case of the assessee is that no taxing event has taken place. The transaction is not exigible to capital gain tax, and in any case, the transfer pricing provisions would not apply. This issue and similar other issues have been examined by the Supreme Court in the case of Vodafone International Holdings B.V. vs. Union of India & Anr., reported in [2012] 341 ITR 1 (SC) as well as C/SCA/17033/2018 JUDGMENT by the Bombay High Court in the case of Vodafone India Services P. Limited. v. Commissioner of Income-Tax & Anr., reported in [2016] 385 ITR 169 (Bom).
>
> Inevitably, reference would be made to the following judgments viz., [i] Vodafone International Holdings B.V v. Union of India & Anr., reported in [2010] 329 ITR 126 [Bom] and [ii] Vodafone International Holdings B.V v. Union of India & Anr., reported in [2012] 341 ITR 1 [SC] and [iii] Vodafone India Services P. Limited v. Commissioner of Income-tax & Anr., reported in [2016] 385 ITR 169 [Bom].

> In the case of Vodafone International Holdings B.V v. Union of India & Anr. [329 ITR 126], the Bombay High Court had examined certain transactions of transfer of shares by a nonresident to another non-resident company in the context of charging capital gain tax in India and upheld the Revenue's view point. This decision of Bombay High Court was carried in appeal by the assessee. The Supreme Court in the case of Vodafone International Holdings B.V vs. Union of India & Anr. [341 ITR 1], while reversing the judgment of the Bombay High Court had held that the controlling interest in the company is an incident of ownership of shares in a company, something which flows out of the holding of shares. A controlling interest is, therefore, not an identifiable or distinct capital asset independent of the holding of shares. The control and management is a facet of the holding of shares. The Court held that the case on hand concerns straightforward share sale. The Court further observed that the Bombay High Court failed to notice that till the date call options [which are not transferred in the present case] had remained unencashed, and therefore, even if it is assumed that such options under the frame work agreement could be considered to be property rights, there had been no transfer or assignment of options till the date. Even if, it is assumed that the High Court was right in holding that the options constitute capital assets, even then Section 9 [1](ii) of the Income-tax Act was not applicable, as these options had not been transferred till then.
>
> As is well-known, this judgment of the Supreme Court gave rise to certain amendments in the Income-tax Act, 1961. Revenue would heavily rely on amendment in C/SCA/17033/2018 JUDGMENT Section 2 [14] of the Act where the term, "Capital Asset"

has been defined and the following explanation was added to the said section.

> "Section 2 [14] Explanation - For the removal of doubts, it is hereby clarified that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian Company, including rights of management or control or any other rights whatsoever."

Likewise, Explanation 2 was added to Section 2 [47] which defines the term "Transfer". Such explanation reads as under:-

> "Section 2 [47] Explanation - 2 : For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always been included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement [whether entered into in India or outside India] or otherwise, notwithstanding that such transfer of rights has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India."

We may note that these amendments came up for consideration before the Bombay High Court in the case of Vodafone India Services P. Limited vs. Commissioner of Income-tax & Anr. [385 ITR 169] [Supra]. It was held that option to purchase or sell shares is not capital asset.

In the context of controversy noted above and the judicial pronouncements and statutory changes, the question of taxability in the present case would certainly arise. Before the Revenue can succeed, answers to some of the questions would have to be in the affirmative. Such as, whether the transaction in question would give rise to transfer of capital asset; whether the transaction C/SCA/17033/2018 JUDGMENT involved any international transaction and whether the asset; even if considered to be capital asset, can be assigned any cost of acquisition and whether the Tribunal was correct in assigning its market value on the basis of what the Revenue would refer to as comparable sale instance. The tax liability arising out of the judgment of the Tribunal is in the vicinity of Rs. 507.74 Crores.

We are informed that the assessee has so far deposited Rs. 76.87 Crores. Under the circumstances, further coercive recovery arising out of the judgment of the Tribunal would be stayed on condition that the applicant deposits a further sum of Rs. 23.13 Crores with the Department latest by 20th April 2018. This would make the total deposit by the applicant including so far made, to Rs. 100 Crores which would be approximately 20% of the outstanding tax demand. Application stands disposed of accordingly."

17. In the opinion of this court, while considering the merits of the order of the third respondent on the stay application filed by the petitioner against the order imposing penalty under section 271(1)(c) of the Act, it may not be necessary to go into the merits of the order of the Tribunal in the quantum appeal for the reason that a co-ordinate bench of this court in the above order dated 21.3.2018 passed in the stay application filed in the quantum appeal, has duly taken into consideration the Supreme Court decision in the assessee's own case as well as the decision of the Bombay High Court rendered after the coming into force of the amendments in section 2(14) and Explanation 2 added thereto.

18. It may further be noted that insofar as the stay against recovery in the quantum appeal is concerned, it was a case where the assessee had lost till the Tribunal, despite which this court had stayed recovery beyond 20% of the demand. In the present case, what the petitioner seeks is stay of recovery in C/SCA/17033/2018 JUDGMENT connection with the penalty order passed by the Assessing Officer against which appeal has been preferred before the Commissioner (Appeals). Moreover, in the quantum appeal the assessee sought stay against recovery of tax, whereas in the present case the petitioner seeks stay against recovery of penalty, and hence, the parameters for grant of interim relief would be different.

19. Tax is defined under section 2(43) of the Income Tax Act, 1961 to mean in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year, income tax chargeable under the provisions of this Act, and in relation to any other assessment year income tax and super tax chargeable under the provisions of the Act prior to the aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent

assessment year includes the fringe benefit tax payable under section 115-WA. On a plain reading of the definition of tax, it is evident that the same does not take within it sweep penalty imposed under any provision of the Act. Thus, while the computation of penalty may be based upon the tax payable, it does not take the character of tax though the mode and method of recovery may be the same. The decisions of the Supreme Court in Siliguri Municipality v. Amalendu Das (supra) and Assistant Collector of Central Excise v. Dunlap India Ltd. (supra) on which reliance has been placed on behalf of the respondents in the affidavit-in-reply for the purpose of contending that no stay should be granted against recovery, are both cases which relate to stay against recovery of tax wherein it has been held that ordinarily recovery of tax should not be stayed. However, in the present case, we are not C/SCA/17033/2018 JUDGMENT concerned with recovery of tax but recovery of penalty. In the opinion of this court, penalty cannot be equated with tax. Moreover, when in the quantum appeal which relates to recovery of tax, this court after hearing the parties has thought it fit to stay the recovery subject to payment of approximately 20% of the demand and has stayed recovery of more than Rs.400 crores, in this case where the penalty order is based upon the orders made in the quantum appeal, and the appeal is pending at the stage of the first appellate authority, the petitioner has made out a strong case for grant of the relief as prayed for in the petition. Apart from the fact that in this case the petitioner seeks stay of recovery of penalty and not tax as was the case in the stay application filed in the quantum appeal, in that case the assessee had lost before three authorities, whereas in this case the petitioner has preferred appeal before the first appellate authority, and hence, on this count also this case cannot be considered on a par with the stay order granted in the quantum appeal.

20. On behalf of the respondents, it has been contended that the Assessing Officer having exercised discretion and ordered stay of recovery on condition that the petitioner deposits 20% of the disputed amount in terms of the benchmark laid down by the CBDT in the instructions referred to hereinabove, this court would not interfere with such discretion and substitute its own opinion in place of that of the Assessing Officer. In this regard it may be germane to refer to the impugned order, a perusal whereof shows that the third respondent has made a short shrift of the matter without applying his mind to the relevant factors while considering the application made by the petitioner under section 220(6) of the Act. A perusal of the C/SCA/17033/2018 JUDGMENT application shows that detailed submissions have been made on the merits as well as on the question of hardship, however, the third respondent has brushed them aside by stating that the request for not starting recovery proceedings cannot be accepted because it is not accompanied by scheme for payment of demand and no reasons other than pendency of appeal are mentioned in the same. Further the reasons mentioned in the stay application for seeking stay of demand are not acceptable especially in view of the additions confirmed by the Tribunal. Thus, it is amply clear that the third respondent has miserably failed to apply his mind to the submissions made by the assessee and has mechanically passed the impugned order directing the petitioner to pay 20% of the demand. The order passed by the third respondent, in the considered opinion of this court, does not meet with the requirements of paragraph C (v) of Instruction No.1914 dated 2.2.1993 issued by the CBDT which postulates that while considering an application under section 220(6) of the Act, the Assessing Officer should consider all relevant factors having a bearing on the demand raised and communicate his decision in the form of a speaking order. The impugned order is totally bereft of any reasons as to why the submissions of the petitioner were not acceptable to the Assessing Officer

and cannot be termed as a speaking order.

21. Insofar as the maintainability of this petition is concerned, at the cost of reiteration, it may be stated that the facts reveal that in the impugned order dated 25.10.2018 the third respondent granted the petitioner three days time to pay at least 20% of the demand and produce a copy of the challan to him. Thus, though the instruction provides for review before C/SCA/17033/2018 JUDGMENT the PCIT, sufficient time was not granted to the petitioner. Not only that, the Assessing Officer did not even wait for three days for the petitioner to comply with the directions issued by him and with undue haste, on the very next day that is, on 26.10.2018, recovered Rs.8,27,80,220/- by way of adjustment from the refund payable to the petitioner while giving effect under section 254 of the Act in case of assessment year 2013-

14. Thus, since the Assessing Officer had started making recovery without giving any time till the application for review filed by the petitioner before the PCIT could be heard, the petitioner approached this court by way of this petition.

22. In the opinion of this court, considering the conduct of the third respondent and the urgency of the matter, no fault can be found in the conduct of the petitioner in invoking the writ jurisdiction of this court. The third respondent, by his very conduct in not waiting for even three days in terms of the order passed by him and making coercive recovery, has created a situation which has compelled the petitioner to discard the remedy of review before the PCIT and approach this court for relief. Considering the totality of the facts as emerging from the record, in the opinion of this court, this petition under article 226 of the Constitution of India is maintainable. Besides, in the light of the statement made before this court, the petitioner has withdrawn the review application filed before the PCIT.

23. Insofar as the contention that if the petitioner wants to avail of the benefit of the Instructions issued by the CBDT, it has to avail of the remedy before the PCIT and that the remedy under section 220(6) of the Act being discretionary, no C/SCA/17033/2018 JUDGMENT jurisdictional question arises, is concerned, in the opinion of this court, when section 220(6) of the Act confers discretion upon the Assessing Officer while considering an application thereunder, it goes without saying that such discretion has to be exercised in a reasonable and proper manner. If the exercise of such discretion is arbitrary or capricious or suffers from the infirmity of non-application of mind, it is always open for the aggrieved person to knock the doors of this court. This contention therefore, does not merit acceptance.

24. In the light of the above discussion, this court is of the considered view that the petitioner has made out a strong case for grant of stay against recovery of the disputed amount. Considering the fact that the third respondent has already recovered an amount of Rs.8,27,80,220/- by adjusting the refund due to the petitioner for assessment year 2013-14, no further recovery is warranted having regard to the facts and circumstances of the case. However, taking a cue from the order dated 21.3.2018 passed on the civil application for stay in the quantum appeal, wherein the court has observed that the corporate guarantee which has been provided by the parent company to cover the unpaid amount would continue with the adjustment, the petitioner shall furnish a corporate

guarantee for the balance disputed amount.

25. In the result, the petition succeeds and is, accordingly, allowed. The impugned order dated 25.10.2018 passed by the third respondent is hereby quashed and set aside. The application made by the petitioner under section 220(6) of the Act is hereby allowed. The petitioner is granted stay against further recovery pursuant to the penalty order dated 27.9.2018 C/SCA/17033/2018 JUDGMENT passed by the third respondent till the final disposal of the appeal by the first appellate authority. The parent company shall provide a corporate guarantee for the balance amount under the penalty order which shall subsist till the final disposal of the appeal within a period of three weeks from today. Rule is made absolute accordingly to the aforesaid extent with no order as to costs.

(HARSHA DEVANI, J) (BHARGAV D. KARIA, J) Z.G. SHAIKH