

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 15.02.2013

+ **W.P.(C) 325/2013 & CM No. 673/2013**

VODAFONE MOBILE SERVICE LTD AND ANR ... Petitioners

versus

UNION OF INDIA AND ORS

... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr N. Venkataraman, Sr. Adv. with Mr Tarun Gulati,
Mr K. Gulati, Mr Sparsh Bhargava and
Mr Rohan Batra, Advocates
For the Respondents : Mr N.P. Sahni, Adv. with Mr R. Sinha,
Mr Amrit Pal Singh, Adv. with
Mr Rupinder Pal Singh, Adv. for UOI/R-1.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the order dated 03.01.2013 passed by the Additional Commissioner of Income-tax, Range-17, New Delhi and it pertains to the demand allegedly outstanding on account of the orders passed by the assessing officer under section 154 of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act') pertaining to the assessment years 2004-05 and 2005-06. A demand of ₹. 288,41,16,037/- is said to be outstanding against the petitioner in respect

of the said assessment years pursuant to the orders passed under section 154 of the said Act. The said amount is broken up into ₹. 92,54,79,604/- for the assessment year 2004-05 and ₹.195,86,36,433/- for the assessment year 2005-06. We may point out that, in fact, the figure was higher by ₹. 30 crores but the petitioner/assessee has already paid a sum of ₹. 30 crores and, therefore, we are left with the total figure of ₹. 288,41,16,037/-.

2. The petitioner is aggrieved by the fact that despite its application for stay no relief has been given to the petitioner by virtue of the impugned order dated 03.01.2013 except to the extent of directing the petitioner to pay the said amount of ₹. 288.41 crores in instalments. The first instalment was due on 22.01.2013 and was for ₹. 150 crores, the second instalment was due today, that is, on 15.02.2013, and was to be of ₹. 100 crores and the balance payment was to be made on or before 15.03.2013.

3. The learned counsel for the petitioner submitted that insofar as the assessment year 2004-05 is concerned, the entire demand of ₹. 92,54,79,604/- is time barred. He submitted that the assessment was completed under section 143(3) on 29.12.2006 which meant that the end of the financial year in which the assessment was completed would be 31.03.2007. The period of limitation for rectification under section 154(7) of the said Act is four years from the end of the financial year in which the assessment is completed. In other words, the last date was 31.03.2011. However, the notice itself has been issued beyond that date on 02.03.2012 and the order under section 154 has been passed on

23.03.2012 and therefore the entire demand of ₹. 92,54,79,604/- is time barred. We have heard the learned counsel for the respondent also on this aspect of the matter. He submitted that the petitioner has already filed an appeal against the said order under section 154 and the same is pending. He also submitted that an appeal has also been filed by the petitioner against the original assessment order dated 29.12.2006 pertaining to the assessment year 2004-05 and that is yet to be adjudicated upon. Therefore, this court ought not to accept the plea of the petitioner with regard to the entire demand being time barred.

4. We make it clear that we are not expressing any final view on the matter. This is only a matter in which we are deciding the question of stay of the demand raised by the petitioner. This would obviously be only a prima facie view and it would be open to the appellate authority to take a decision in accordance with law without being influenced by what we are observing herein. In our view, which, we reiterate, is only a prima facie view, the entire demand of ₹. 92,54,79,604/- in respect of the assessment year 2004-05 is time barred because the notice itself under section 154 was issued after four years from the end of the financial year in which the assessment had been originally framed.

5. We now come to the other assessment year and, that is, the year 2005-06. Insofar as this assessment year is concerned, the demand had been initially quantified at ₹. 225.86 crores which has been reduced by a sum of ₹. 30 crores because, as mentioned above, the petitioners have paid the said sum in March 2012. The balance is, therefore, ₹. 195,86,36,433/-.

6. The original demand of ₹. 225.86 crores comprised of two components as per the petitioner. The two components were ₹. 114 crores towards the alleged principal tax liability and ₹. 110 crores towards the purported interest liability. We shall first consider the ₹. 110 crores interest liability. According to the learned counsel for the petitioner the said figure of ₹. 110 crores can be broken up into three components. The first component being an amount of ₹. 75 crores which has been raised as per the demand notice under section 156 dated 16.03.2012 under section 220(2) of the said Act. If we examine the said demand notice, the said demand has been raised on 16.03.2012 for a period prior to the date of notice. More particularly, for a period of 50 months prior to the date of the notice, which would entail the period beginning February 2008 and ending on March 2012. It is the contention of the learned counsel for the petitioner that this demand is ex facie bad inasmuch as section 220(2) contemplates charging of interest for non-payment of a demand raised under section 156 and that, too, after 30 days thereof. In the present case the demand itself was raised on 16.03.2012 therefore there cannot be any interest charged for a period prior to it. We are in agreement with this submission made by the learned counsel for the petitioner. We make it clear that this is only a prima facie view. And, this view is based on a plain reading of the provisions of section 220(2) of the said Act.

7. We now come to the next component of interest demanded, which is of ₹. 15 crores. The same has been demanded under section 234B of the said Act. The learned counsel for the petitioner has placed before us

a decision of the Madras High Court in the case of *CIT v. Abdul Wahid and Co.: Tax Case (Appeal) Nos. 396 and 398 of 2010 dated 22.06.2010*. The judgment was delivered by F.M. Ibrahim Kalifulla J. as his Lordship then was. In the said decision, the court has observed as under:-

“3. We are in full agreement with the principles stated by the Tribunal while upholding the order of the Commissioner (Appeals). When the liability for payment of additional tax itself was created for the first time, based on the subsequent amendment, in the year 2005, with retrospective effect from 01.04.1998, it would be incongruent to expect the assessee to have satisfied the requirement of payment of advance tax as prescribed under Section 234(B) of the Income Tax Act. Therefore, while the liability for additional tax by virtue of the amendment was found to be satisfied by the respondent/assessee, the payment of interest under Section 234(B) for failure to pay advance tax in anticipation of such liability created on a future year, based on an amendment cannot be made. We are, therefore, convinced that the conclusion arrived at by the C.I.T. (Appeals) as well as that of the Tribunal cannot be found fault with. We therefore do not find any scope to entertain these appeals. The substantial question of law raised in these tax case appeals are answered in favour of the assessee. Connected miscellaneous petition is closed.”

8. We are now informed by the learned counsel for the petitioner that the matter was taken in appeal by way of a Special Leave Petition before the Supreme Court. The Supreme Court by an order dated 15.04.2011

has dismissed the said Special Leave Petition. Thus, according to the learned counsel for the petitioner the said demand of ₹. 15 crores by way of interest under section 234B would also be liable to be set aside. Here again, taking a prima facie view, we agree with the contention raised by the learned counsel for the petitioner. That leaves us with a balance sum of ₹. 20 crores out of the total interest demand of ₹. 110 crores with which we shall deal later.

9. As regards the principal tax demand of ₹. 114 crores, we have already indicated that this figure has already been reduced by a sum of ₹. 30 crores leaving a figure of ₹. 84 crores. Out of this, a sum of ₹. 30 crores has been demanded on the basis of disallowance of the annual licence fee amount on the issue of whether the same was capital or revenue in nature. The Tribunal, in the case of the assessee itself, in respect of the assessment year 1997-98 has decided this question in ITA Nos. 1751-1752/Mds/2004 on 03.08.2012 in favour of the assessee. An appeal has been preferred by the revenue before this court and the same is pending. Of course no stay has been granted by this court. Therefore, the learned counsel for the petitioner states that insofar as the lower authorities are concerned they are bound by the decision of the Tribunal in the case of the assessee itself for the said assessment year 1997-98 whereby the decision has gone in favour of the assessee. Consequently, the said demand of ₹. 30 crores on the issue of annual licence fee would have to be ignored. Here again, after hearing the learned counsel for the parties, we prima facie are of the view that the said sum of ₹. 30 crores would have to be kept aside from the demand raised by the revenue for

the purposes of stay. As such, a balance sum of ₹. 54 crores remains on account of the demand for tax.

10. The learned counsel for the petitioner sought to set off this sum of ₹. 54 crores against a payment of ₹. 87 crores for the assessment year 2008-09. However, we are not inclined to accept that submission of the learned counsel for the petitioner inasmuch as our focus is on the two assessment years 2004-05 and 2005-06 and this was not the issue when the impugned order dated 03.01.2013 was passed. Consequently, there is an outstanding alleged demand of ₹. 54 crores on account of tax and ₹. 20 crores on account of interest which is, prima facie, recoverable from the petitioner.

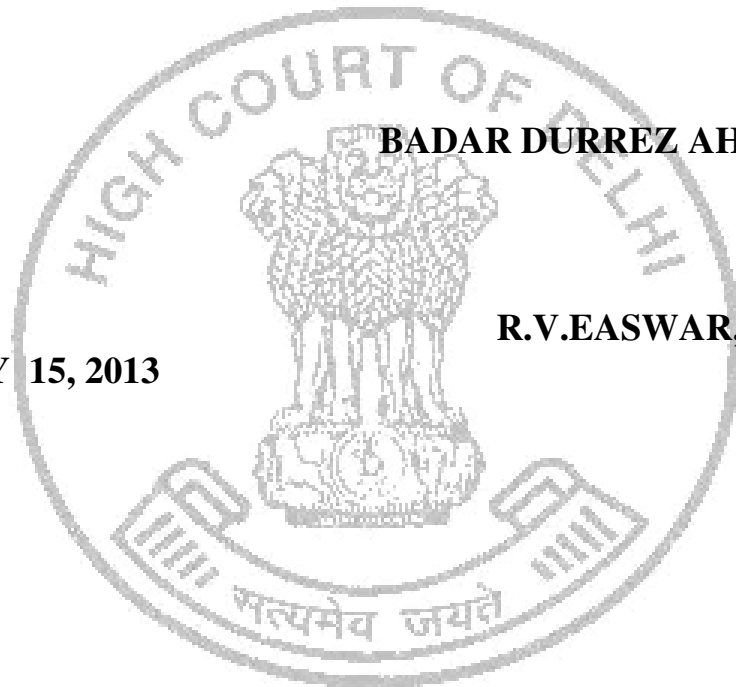
11. Thus, prima facie, a demand of ₹. 74 crores would possibly be sustainable at the present stage. Since the issue is still debatable, we feel that the petitioner should deposit 75% of this figure of ₹. 74 crores which would roughly come to ₹. 55.5 crores which we are rounding off to ₹. 56 crores. Consequently, we direct the petitioner to deposit a sum of ₹. 56 crores out of which ₹. 30 crores shall be deposited within a week from today and the balance amount of ₹. 26 crores by 15.03.2013. On such deposits being made the rest of the demand pursuant to the orders under section 154 pertaining to the assessment years 2004-05 and 2005-06 shall remain stayed till the disposal of the appeals. The observations that we have made in this order are only prima facie observations and for the purposes of this writ petition which is only concerned with the stay of the demand. We have not expressed our views on the merits of the matter,

which the appellate authorities, before whom the appeals are pending, would be free to decide in accordance with law.

12. We also feel that the appeals themselves should be decided by the appellate authority within a period of three months from today and, by appeals, we mean all the appeals of the petitioner presently pending with the appellate authority.

13. The writ petition stands disposed of.

FEBRUARY 15, 2013
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BADAR DURREZ AHMED, J

R.V.EASWAR, J