

HON'BLE SRI JUSTICE G.CHANDRAIAH
&
HON'BLE SRI JUSTICE CHALLA KODANDA RAM
W.P. Nos. 2456, 2460, 2464, 2469 and 2472 of 2015

DATE: 25.08.2015

Between:

M/s. Vodafone South Limited .. petitioner

And

1. The Deputy Commissioner, TDS Circle-2(1)
2. The Deputy Commissioner, Circle-15(2)
3. The Commissioner of Income Tax (Appeals)
4. The Addl. Commissioner of Income Tax (TDS)..

Respondents

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COMMON ORDER:- (per Hon'ble Sri Justice G. Chandraiah)

Inasmuch as these five writ petitions are inter-related and filed by the same assessee questioning the Order dated 22.01.2015 passed by the 1st respondent, all these matters are taken up together for disposal by this Common Order.

By virtue of the order, dated 14.11.2014 passed by the 2nd respondent, the petitioner-company, which is an assessee, was declared to be an assessee in default under Section 220 of the Income-Tax Act, 1961 (for brevity "the Act") and a total demand of tax of Rs.17,42,97,709/- was made for the assessment years from 2010-2011 to 2014-2015. The demand was made with the allegation that the assessee failed to make TDS under Section 194(H) of the Act on the brokerage/commission paid to its dealers. The case of the assessee is that no commission / brokerage has been paid to its dealers and the transaction of the petitioner with the agents/dealers is one of selling the services at a discount and the discount amount cannot be treated as commission or brokerage, and hence, the question of

making any TDS itself would not arise. However, the petitioner admits that for the assessment years 2007-2008, 2008-2009 and 2009-2010 against the orders of the Tribunal holding that Section 194(H) of the Act can be made applicable, they preferred appeals before this Court, and this Court, by orders dated 31.07.2013, dismissed the appeals and the petitioner carried the matter in appeal to the Apex Court. The issue whether the discounts made by the petitioner to its dealers could be treated as brokerage / commission is pending before the Supreme Court in Special Appeals filed by the petitioner and others and the matters are listed for disposal on 10.09.2015 for hearing. Further, in similar circumstances, the Karnataka High Court in **M/s.Bharati Airtel Limited v. Deputy Commissioner** (I.T.A.Nos. 637 – 644 of 2013 and batch) had delivered an elaborate judgment dated 14.08.2014 holding that the discounts given by the petitioner and other similar operators are not commissions, and hence Section 194(H) of the Act has no application and the Department's appeal against the view taken by the Karnataka High Court is also pending before the Apex Court for consideration. In that view of the matter, the assessee prays that the impugned order dated 22.01.2015 treating the assessee as an assessee in default is unsustainable and the application dated 19.12.2014 filed by the assessee seeking grant of stay of collection of demanded tax ought to have been allowed

by the

1st respondent. Questioning the refusal order dated 22.01.2015, the present writ petitions are filed.

Sri Krishna Koundinya, learned senior counsel for the petitioner, while placing reliance on the judgment of the Karnataka High Court submits that the main issue itself is on board before the Supreme Court, and in fact, the matter is set for hearing on 10.09.2015 as a first case. Considering the fact that there are conflicting judgments of Calcutta, Kerala and Delhi High Courts holding in favour of the Revenue and the judgment of Karnataka High Court which was held in favour of the assessee, the issue is fluid and has not attained finality. In the circumstances, when these matters came up for admission on 09.02.2015, this Court adjourned them to 18.03.2015 taking into consideration the fact that the matters are being heard by the Supreme Court. Later, the cases were adjourned *sine die* with liberty to mention after disposal of similar appeals. Without considering these aspects, the 1st respondent, on 20.08.2015, threatened to take coercive action for recovery of the disputed tax. Hence, he prays for grant of stay of the demanded tax.

On the other hand, Sri B. Narasimha Sarma, learned senior Standing Counsel for Income-tax, has submitted that this Court, at the admission stage, did not consider it necessary to grant stay, and even at this state, this Court should not grant the relief sought for. He further submits

that as a matter of fact, this Court, in assessee's own cases in I.T.T.A.Nos.291, 313 and 314 of 2013 for the assessment year 2007-2008, dismissed the appeals affirming the finding of the Tribunal holding that the amounts paid in the name of discounts, are commissions/brokerage, as such, there is a default on the part of the assessee in not making TDS. Inasmuch as the petitioner has already approached the Apex Court in appeal and the issue whether the amounts paid by the petitioner as already held to be in the nature of commissions/brokerage for the subsequent years as well is under consideration, and there being no differentiating circumstances, the action of the authorities in not granting stay is justified and the impugned order is unassailable. The learned counsel further submits that whatever may be the view taken by the High Court of Karnataka, the fact remains that the jurisdictional High Court judgment is in favour of the Revenue. In that view of the matter, the learned Standing Counsel prays to dismiss the writ petitions.

We have considered the rival submissions and perused the material placed on record.

A careful reading of the judgments in I.T.T.A.No. 291 of 2013 and other appeals reveals that this Court did not discuss facts of the case, but merely affirmed the order of the Tribunal by following the judgment of Delhi High Court

reported in **C.I.T. v. Idea Cellular Ltd.**^[1], judgment of Kerala High Court in **Vodafone Essar Cellular Ltd. v. ACIT**^[2] and the judgment of Calcutta in **Bharti Cellular v. ACIT**^[3]. The judgment of this Court in I.T.T.A.No. 291 of 2013 is dated 17.07.2013. Later, the Karnataka High Court, by its judgment dated 14.01.2014, elaborately considered the issue and after analyzing the events in detail, came to a conclusion that Section 194(H) is not attracted to the transactions of the petitioner and similarly situated assesseees. It is an admitted fact that the matter is on board before the Supreme Court and listed for hearing on 10.09.2015. Even though this Court had affirmed the order of the Tribunal holding that there is no question of law which is required to be considered, the fact remains that the appeals are pending before the Supreme Court against the judgments delivered by this Court in I.T.T.A.Nos.291, 313 and 314 of 2013. It is also brought to the notice of this Court that the Supreme Court itself, by its orders dated 24.01.2011 in S.L.P.Nos.36446-36453 of 2010 and dated 23.08.2011 in S.L.P.No.22317 of 2011, directed that no coercive steps for recovery shall be taken. In other words, the issue is highly debatable and the matter is set for hearing.

Considering all these aspects and in the interest of justice, we are of the opinion that the 1st respondent-Deputy Commissioner ought to have exercised discretion

as enjoined on him under Section 220(6) of the Act and granted stay. Inasmuch as the matter is ripe for hearing before the Supreme Court on 10.09.2015, this Court, instead of setting aside the impugned order and remanding the matter back for fresh consideration, deems it appropriate to dispose of the writ petitions with the following direction:

“The 1st respondent – Deputy Commissioner of Income-tax, TDS Circle, is directed not to take any coercive steps for recovery of the total disputed tax demand of Rs.17,42,97,709/- for the assessment years from 2010-2011 to 2014-2015 subject to the condition that the petitioner deposits 40% of the demanded amount. Out of 40%, the petitioner shall pay 20% within a period of two weeks from the date of receipt of a copy of this order and remaining 20% shall be paid within a period of four weeks thereafter.”

With the above direction, these writ petitions are disposed of. No order as to costs.

As a sequel to disposal of the writ petitions, Miscellaneous Petitions, if any pending, shall stand disposed of as infructuous.

25.08.2015

G. CHANDRAIAH, J

**CHALLA KODANDA
RAM,J**

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- [\[1\]](#) 325 ITR 148 DEL
- [\[2\]](#) 332 ITR 255 Kerala
- [\[3\]](#) 244 CTR 185 Cal.