Santosh

# IN THE HIGH COURT OF BOMBAY AT GOA

## WRIT PETITION NO.439 OF 2017

**VEDANTA LIMITED,**
NO.20, Sesa Ghor, EDC Complex,
Patto, Panaji, Goa-403 001 ... **PETITIONER**

**~ VERSUS ~**

1 **ASST. COMISSIONER OF INCOME TAX**
Circle (1), Aayakar Bhavan, EDC Complex, Patto, Panaji, Goa 403001.

2 **PRINCIPAL COMISSIONER OF INCOME TAX**
Aayakar Bhavan, EDC Complex, Patto, Panaji, Goa 403001.

3 **JOINT COMISSIONER OF INCOME TAX**
Range 1, Aayakar Bhavan, EDC Complex, Patto, Panaji, Goa 403001. ...**RESPONDENTS**

**APPEARANCES**

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|---|---|
| FOR THE PETITIONER | **Mr PJ Pardiwala, Senior Advocate,** *with RG Ramani* |
| FOR THE RESPONDENTS | **Mr K Aravinda,** *Senior Standing Counsel* |

**CORAM : GS PATEL &**
**NUTAN D SARDESSAI, JJ**

**DATED : 19th September 2017.**

**ORAL JUDGMENT (per G.S. Patel J)**

**1.** Rule, returnable forthwith. The Respondents waive service. By consent, taken up for hearing and final disposal forthwith.

**2.** The petition is directed against an order dated 24th March 2017 of the Assistant Commissioner of Income Tax, Circle 1(1), Panaji. By this order the ACIT, Respondent No.1, rejected the Petitioner's application for permission under Section 281 of the Income Tax Act, 1961.

**3.** We have heard learned Counsel for the Petitioner and the Revenue. Mr. Pardiwala for the Petitioner has drawn our attention to the provisions of Section 281. It is clear that this is a section that is meant to protect the interest of the Revenue, and, specifically to guard against fraudulent transfers designed to defeat recovery by the revenue. There are almost exactly parallel provisions in the Companies Act. Section 281 of the Income Tax Act reads thus :

> "**SECTION 281 CERTAIN TRANSFERS TO BE VOID**
>
> (1) Where, during the pendency of any proceedings under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee **creates a charge on, or parts with the possession** (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of **any of his**

> **assets** in favour of any other person, **such charge or transfer** shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise:
>
> Provided that such charge or transfer shall not be void if it is made
>
> (i) For adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee; or
>
> (ii) **With the previous permission of the Assessing Officer**.
>
> (2) This section applies to cases where the amount of tax or other sum payable or likely to be payable exceeds five thousand rupees and the assets charged or transferred exceed ten thousand rupees in value.
>
> ***Explanation***: In this section, "assets" means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the assessee."

(*Emphasis added*)

**4.** We are here required to examine the impugned order in the context of sub-clause (ii) of the proviso to sub-Section (1). The section is asset-specific and transfer- or charge-specific. The section demands, above all, precision. An application is for prior permission to create *a* charge or effect *a* transfer in respect of a defined asset. Such an application cannot be disposed of by resorting to generalities ("likelihood", "huge demands", "might be revoked", etc). There is no room in considering an application under Section 281 for a response that is speculative, predicated on imponderables and unknowns such as litigation outcomes, or on suppositions that all stay orders obtained by an assessee are bound to be vacated and an assessee's appeals lost. Nothing in our experience suggests this to be remotely true.

**5.** We have considered Mr. Pardiwala's submission in regard to the tenability of the impugned order. We agree with him that it cannot be sustained for the precise reasons we have outlined, and which we find unacceptable. There is no discussion on the merits of any particular application, proposed transfer or individual asset.

**6.** Hence, keeping the contentions of both sides open, and without rendering a decision on the merits of the application by the Petitioner, we will set aside the impugned order and direct the 1st Respondent to consider the Petitioner's application afresh, uninfluenced by the previous order and subject to certain conditions that we will set out hereafter.

**7.** The 1st Respondent will consider the Petitioner's application (including subsequent correspondence) under Section 281 *de novo* by 17th November 2017 (we have extended time because of the intervening Diwali holidays). The 1st Respondent will indicate whether he requires any clarifications or further documents or materials from the Petitioner. If so, this will be communicated in writing by 17th November 2017. The Petitioner will have until 15th

December 2017 to respond and forward the necessary material. The Petitioner will not seek extensions of time. On the material that is finally made available to the 1st Respondent, the 1st Respondent will dispose of the application under Section 281 by 12th January 2018. We have somewhat extended these timelines, and we have done so in order to ensure that there is no room for complaint on either side regarding inadequacy of time.

**8.** Finally we trust that both sides will have regard to not only Section 281, but also the provisions of Circular No.4/2011 dated 19th July 2011 setting out the guidelines for the grant of prior permission under Section 281.

**9.** We will note at this stage Mr Pardiwala's submission that the Petitioner has available assets in excess of Rs.80,000 crores of which roughly assets of Rs.49,000 crores assets have some form of encumbrance on them, while the remaining are not so encumbered. We have noted this not with a view to predetermine the 1st Respondent's decision, but to assist the 1st Respondent in more precisely formulating and identifying the information and documentation that he requires, and also to draw attention to the wording of Section 281 and the circular. Therefore, once the Petitioners' application specifies an asset, its value and the nature of the proposed transaction or charge, it will be for the 1st Respondent to assess why that particular asset or transaction should or should not be denied permission. At the cost of repetition, it will not be open to the 1st Respondent to generally say that *no* proposed transaction or charge over any asset, though unencumbered, can be permitted because there is a possibility of another demand, or on account of the vagaries of litigation, etc. What the section and the circular require of the 1st Respondent is to ensure that the known claims of the revenue are sufficiently secured, and the circular itself provides ample guidelines how this is to be achieved or done.

**10.** Rule is made partly absolute in these terms. There will be no order as to costs.

**NUTAN D. SARDESSAI J.** **G. S. PATEL J.**