

Sharayu Khot.

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

WRIT PETITION NO. 289 OF 2018

Vodafone India Limited

...Petitioner

Versus

**1. Deputy Commissioner of Income-tax
(TDS)2(3)**

2. Union of India

...Respondents

Mr. Jehangir Mistry, Senior Advocate, Mr. Fereshte Sethna, Ms. Mrunal Parekh, Mr. Adhiraj Malhotra, Ms. Divya Hirwat, for the Petitioner.

Mr. Suresh Kumar, for the Respondents.

**CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA, JJ.**

DATE : 20 February 2018

ORDER :

1. At the request of the parties, the Petition is disposed of finally, at the stage of admission.

2. This Petition under Article 226 of the Constitution of India, challenges an order dated 11 October 2017 passed by Respondent No. 1-Deputy Commissioner of Income Tax, withdrawing/cancelling the Certificate dated 18 May 2017 issued under Section 197 of Income Tax Act, 1961 (***The Act*** for short). The above Certificate dated 18 May 2017 had directed the parties mentioned therein obliged to deduct tax under various Sections of Chapter XVII-B of the Act, to deduct tax at lower rate of 0.39 percent instead of the normal rates.

3. It is an undisputed position before us that the facts arising in this case are identical to the facts arising in ***Tata Sky Limited Vs. Union of India (Writ Petition No. 2817 of 2017)*** and ***M/s. Tata Teleservices (Maharashtra) Limited Vs. The Deputy Commissioner of Income Tax & Ors. (Writ Petition 2701 of 2017)*** so far as the decision making process leading to the passing of the impugned order dated 11 October 2017 is concerned.

4. In this case, we find that the Show Cause Notice dated 30 August 2017 seeking cancellation/withdrawal of the Certificate dated 18 May 2017 issued under Section 197 of the Act was issued on the directions of Commissioner of Income Tax (TDS-2 Mumbai). In the aforesaid circumstances, as in the case of *Tata Sky Limited* (supra) *M/s. Tata Teleservices (Maharashtra) Limited* (supra), there would be no efficacious alternative remedy available to the Petitioner, as the Authority to whom the revision application under Section 264 of the Act, could be made is the very authority who has directed, the Respondent No. 1 to review the Certificate dated 18 May 2017 already granted. Besides on identical fact situation relating to *Tata Sky Limited* (supra) *M/s. Tata Teleservices (Maharashtra) Limited* (supra), the order passed therein were with the consonance of the Commissioner of Income Tax. Therefore, in the present facts, there is no efficacious alternative remedy available to the Petitioner. Thus, this also is a case where we exercise our extraordinary writ jurisdiction in the absence of an efficacious alternative remedy.

5. We find that in this case, as in ***Tata Teleservices (Maharashtra) Limited*** (supra), an order canceling a certificate issued under Section 197 of the Act, was passed on the ground that the aspect of pending demand has not been considered in the context of Rule 28AA of the Income Tax Rules, 1961 while granting the certificate under Section 197 of the Act. This, without furnishing a copy of the reasons recorded at the time of issuing the certificate under Section 197 of the Act. This non furnishing of copy of the reasons recorded was held by us to be a flaw in the decision making process. Thus, making the impugned order unsustainable.

6. In our order dated 25 January 2018 in ***Tata Teleservices (Maharashtra) Limited*** (supra), the reasons therein on the above aspect in paragraphs 19 to 22 thereof, on identical facts, are as under:-

“19 The Petitioner's primary grievance is that the impugned order dated 23 October 2017, canceling the certificate dated 4 May 2017 is completely without jurisdiction. It is not open to the Assessing Officer to

even initiate review proceedings in the absence of any change in circumstances which existed while granting certificate dated 4 May 2017. It is not disputed that Section 197(2) of the Act empowers the Assessing Officer to cancel the certificate issued under Section 197(1) of the Act with regard to lower and/or nil withholding tax issued under Section 197(1) of the Act. However, it is submitted that there is no change in the financial and other circumstances as existing when the certificate dated 4 May 2017 was issued and when the impugned order canceling the above certificate was passed. Therefore, the impugned order is without jurisdiction.

20 In the present facts, we note that impugned order dated 23 October 2017 cancels the certificate dated 4 May 2017 on the ground that it was issued by mistake i.e. not having considered Rule 28AA (2) of the Rules in the context of the pending demands. The Revenue has filed an affidavit in reply dated 11 January 2018 of Respondent No. 1- Mr. M. Ashok Babu, Joint Commissioner of Income Tax, opposing the admission and also relies upon it at the final hearing. We find that the order preceding the grant of the certificate has not been annexed to the affidavit filed by the Revenue. This Court in **Larsen & Toubro Ltd.**, (supra) has held that an issue of certificate must necessarily be preceded by an order under Section 197(1) of the Act. In fact the issue of certificate is the result of an order holding that the applicant is entitled to a certificate under Section 197 of the Act. It must of necessity be so, as in the absence of the reasons being recorded, the Certificate under Section 197 of the Act, would not be open to challenge by the Revenue, as it would be impossible to state that it is erroneous and prejudicial to the Revenue. The Revenue would be helpless. Therefore, the recording of reasons is necessary as only

then it could be subject to Revision by the Commissioner of Income Tax under Section 263 of the Act.

21 Therefore, it appeared to us while correcting the order which was dictated in Court on 16 January 2017 that the order prior to issuing the certificate dated 4 May 2017 ought to have been communicated to the Petitioner along with the notice, seeking to review the earlier certificate on account of mistake. In the above circumstances we kept the petition on board for directions on 23 January 2018 as this issue was not addressed by the Revenue at the hearing. In fact the petitioner had contended before us that the Respondent No. 1 had no jurisdiction to cancel the certificate dated 4 May 2017 in the absence of any change in the circumstances. However, we wanted to hear and consider the Revenue's response on the above aspect of jurisdiction. Therefore, on 23 January 2018 we expressed our prima faice view on the issue to the parties, particularly that the absence of the order leading to the grant of the certificate being given to the Petitioner, leads to an adverse inference against the Revenue i.e. all issues including Rule 28AA (2) of the Rules were considered in the order passed leading to the issuing of Certificate dated 4 May 2017. We specifically invited the attention of the Revenue to the specific observation found in para 7 of the decision of this Court in **Larsen & Toubro Ltd.** (supra) and also to the decision of the Apex Court in **Liberty Oil Mills Vs. U.O.I. 1984(3) SCC 465** which while construing the words "without assigning any reasons" held that it does not do away with the requirement of reasons existing for the decision, it only does away with communicating the same. In fact in this case the Section does not do away with requirement of issuing a reasoned order while issuing a Certificate under

Section 197 of the Act.

22 At the request of the Revenue the petition was posted for directions on 25 January 2018 to enable the Respondent to respond on the above issue. On 25 January 2018, the Revenue did not make any submission to counter our prima facie view including our drawing an adverse inference on account of non furnishing of the order/reasons leading to the issue of the certificate dated 4 May 2017. Therefore, we conclude that there would have been reasons recorded in the file before issuing a certificate dated 4 May 2017 and this ought to have been furnished to the party before resting its case in the impugned order on the ground that the aspect of Rule 28 AA of the Rules was not considered at the time of granting the Certificate. Further if the Revenue seeks to cancel the same on the ground that a particular aspect has not been considered then before taking a decision to cancel the certificate already granted, it must satisfy the requirement of Natural Justice by giving a copy of the same to the parties and hear them on it before taking decision to cancel the certificate. This is particularly so as in the present facts the show cause notices dated 16 August 2017 and 30 August 2017 seeking to review the Certificate dated 4 May 2017 did not indicate that the review is being done as the Certificate dated 4 May 2017 was granted without considering the applicability of Rule 28 AA of the Rules in the context of the petitioner's facts. Therefore, there was no opportunity/occasion for the petitioner to seek a copy of the reasons recorded while issuing a certificate dated 4 May 2017. Moreover, this becomes all the more important as we have found on examination of facts that there is no change in facts as existing on 4 May 2017 and as existing when the impugned order dated 23 October 2017 was passed. Thus, in the present

facts, according to us, there is a flaw in the decision making process which vitiates the impugned order dated 23 October 2017.”

7. The Revenue does not dispute that on the above issue, the facts are similar here and the dispute stands concluded against the Revenue by the above decision in the case of ***Tata Teleservices (Maharashtra) Limited*** (supra).

8. In the above view, the impugned order dated 11 October 2017 passed by the Respondent No. 1, which cancels the Certificate dated 18 May 2017 is quashed and set aside. It is made clear that the other contentions raised by the Petitioner and Revenue's objections to the same have not been considered by us for the purpose of disposing of this Petition.

9. Accordingly, the Writ Petition is disposed of in the above terms.

[RIYAZ I. CHAGLA J.]

[M.S. SANKLECHA, J.]