

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 654 OF 2018

Vodafone M-Pesa Limited

....Petitioner

V/s.

Principal Commissioner of
Income-Tax and 6 Ors.

....Respondents

* * * * *

Ms. Fereshte Sethna, Mr. Mrunal Parekh, Mr. Adhiraj
Malhotra, Ms. Divya Hirawat i/by. DMD Advocates, for
the petitioner.

Mr. N.C. Mohanty, Advocate for the respondents.

CORAM :-

M.S. SANKLECHA, &

SANDEEP K. SHINDE, JJ.

DATE :-

1ST MARCH, 2018.

P.C. :-

1. At the request of the Counsel, the petition is being disposed of finally at the stage of admission.
2. This petition challenges the order dated 23rd

February, 2018 passed by the Principal Commissioner of Income Tax. By the impugned order, the petitioner's representation made under Section 220(6) of the Income Tax Act, 1961 ("the Act" for short) seeking complete stay of the demand of Rs.62.38 crores arising out of the assessment order dated 21st December, 2017 relating to Assessment Year 2015-16 till the petitioner's pending appeal is disposed off by the Commissioner of Direct Taxes (Appeals) (CIT (A)), was partly rejected by directing the petitioners to pay 50% of the demand.

3. For the Assessment Year 2015-16, the Assessing Officer passed an assessment order dated 21st December, 2017 under Section 143(3) of the Act determining a tax demand of Rs.62.38 crores. Being aggrieved, the petitioners filed an Appeal on 23rd January, 2018 to the CIT (A). On 25th January, 2018 the petitioner filed an application to the Assessing Officer under Section 220(6) of the Act seeking stay of the complete demand

raised by assessment order dated 21st December, 2017. By an order dated 29th January, 2018 the Assessing Officer rejected the petitioner's application for complete stay of the demand under Section 220(6) of the Act till the disposal of the Appeal by the CIT (A) and directed the petitioners to pay 20% of the demand and approach him later for deciding the schedule for payment of the balance demand.

4. Being aggrieved by the order dated 29th January, 2018, the petitioners approached this Court by way of a Writ Petition No. 389 of 2018. This Court, by an order dated 9th February, 2018 adjourned the hearing of the petition to 16th February, 2018. In the meantime, the petitioners were directed to file its application for stay before the Commissioner of Income Tax. This was in view of the Circular dated 29th February, 2016 issued by the Central Board of Direct Taxes which provides that in case, the petitioner's application for stay in terms of Section

220(6) of the Act is rejected by the Assessing Officer, the Assessee was directed to approach the Commissioner of Income-Tax in his administrative capacity for relief. In the above view, on 14th February, 2018 the petitioners filed an application before the Commissioner of Income-Tax seeking a stay of the demand of Rs.62.38 crores till its Appeal is disposed off by the Commissioner of Income-Tax (Appeals). On 16th February, 2018 the Writ Petition No. 389 of 2018 was disposed of and the respondents were restrained from adopting any coercive proceedings till the disposal of its application dated 14th February, 2016 by the Commissioner of Income Tax.

5. Now the impugned order dated 23rd February, 2018 has been passed by Commissioner of Income Tax. The fundamental basis of the petitioners application for stay before the Commissioner of Income Tax was that the Assessment order dated 21st December, 2017 of the Assessing Officer raising the demand of Rs.62.38 crores

was without jurisdiction. This demand was raised on account of the fair market value of the shares which had been issued at a premium to its holding Company for purposes of Section 56(2)(viib) of the Act. This for the reason that the Assessing Officer had for purposes of determining the fair market value of the shares issued to its holding Company substituted the Discounted Cash Flow (DLF) method by the Net Asset Value (NAV) method. This was contrary to Rule. 11UA of the Income Tax Rules, 1902 (Rules) as it provides an option to the Assessee to arrive at a fair market value of the shares either by the method as prescribed in Rule 11UA(2)(a) of the Rules i.e. NAV Method or in terms of Rule 11(2)(b) of the Rules i.e. DCF Method.

6. In exercise of the above option, the petitioners had provided a valuation report dated 11th March, 2015 as required of a Merchant Banker which determines the fair market value of shares at Rs.24.79 on adoption of

DCF Method. The Assessing Officer did not accept the valuation report dated 11th March, 2015 as provided by the Merchant Banker to arrive at the fair market value of the shares on the DCF Method as according to him, the report was not credible. However, the Assessing Officer without any justification gave a complete go-by to the DCF Method and adopted the NAV Method to determine the fair market value of the shares. This according to the petitioner was in the face of Rule 11(UA)(2) of the Rules which gives an option to an Assessee to determine the fair market value of shares by either of the two methods i.e. the NAV or the DCF Method. It is submitted that the Assessee having opted for the DCF Method, the Assessing Officer, if at all not satisfied with the valuation report could have called for fresh valuation or even independently determined the fair market value, but this could only be done by adopting the DCF Method. Therefore, it was submitted that, ex-facie the impugned order was in face of the statutory provisions and could

not be upheld. Therefore, an unconditional stay was sought of a demand arising from Assessment order dated 21st December, 2017.

7. Mr. Mohanty, the Learned Counsel appearing for the Revenue in support of the impugned order states that the Assessing Officer is entitled to examine the correctness of the Valuation Report submitted by the Assessee. The DCF Method is worked out on the basis of the projected figures of sales. These figures of sales, atleast for three years i.e. Assessment Years 2015-16, 2016-17 and 2017-18 were found infact inflated at the time when he was passing the Assessment order. Although, he does concede that at the time the Valuation Report dated 11th March, 2015 was prepared, except for some idea in respect of Assessment Year 2015-16, the sales of the other years were as on the basis of estimate. Therefore, at the time the Assessment order was passed on 21st December, 2017, the actual sales for three years

appeared to be much lower than the projected sales. This inflation of projected sales had resulted in enhancing the fair market value of the shares by the DCF Method thus not proper. It is submitted that, even if the DCF method is applied on the basis of the correct figures, some amount of demand would still be payable.

8. Before dealing with the merits, it must be noted that the impugned order dated 23rd February, 2018 has enhanced the payment of 20% of the disputed demand as directed by the Assessing Officer in his order dated 29th January, 2018 to 50% of the demand arising out of the assessment order dated 21st December, 2017. This power of suo-moto enhancement of the payment which has been ordered by the Assessing Officer is not available to the Commissioner of Income Tax in terms of the CBIT Circular dated 29th February, 2016. This enhancement by the Commissioner of Income Tax in terms of the above Circular can be done only on a reference by the Assessing

Officer to the Administrative Principal Commissioner of Income-Tax that the party should be asked to deposit in excess of 20% of the demand for stay of the balance demand. Thus, prima-facie, the direction on the part of the Commissioner directing payment of 50% of the demand of Rs.62.38 crores payable consequent to the order dated 22nd December, 2017 is bad in law.

9. We note that, the Commissioner of Income-Tax in the impugned order dated 23rd February, 2018 does not deal with the primary grievance of the petitioner. This, even after he concedes with the method of valuation namely, NAV Method or the DCF Method to determine the fair market value of shares has to be done/adopted at the Assessee's option. Nevertheless, he does not deal with the change in the method of valuation by the Assessing Officer which has resulted in the demand. There is certainly no immunity from scrutiny of the valuation report submitted by the Assessee. Therefore, the

Assessing Officer is undoubtedly entitled to scrutinise the valuation report and determine a fresh valuation either by himself or by calling for a final determination from an independent valuer to confront the petitioner. However, the basis has to be the DCF Method and it is not open to him to change the method of valuation which has been opted for by the Assessee. If Mr. Mohanty is correct in his submission that a part of demand arising out of the assessment order dated 21st December, 2017 would on adoption of DCF Method will be sustained in part, the same is without working out the figures. This was an exercise which ought to have been done by the Assessing Officer and that has not been done by him. Infact, he has completely disregarded the DCF Method for arriving at the fair market value. Therefore, the demand in the facts need to be stayed.

10. However, in view of the fact that the petitioner's Appeal is pending before the CIT (A) and the

issue of the fair market value of the shares issued at a premium by the petitioners to its holding Company would be an issue which would be subject matter of consideration in the appeal and would be appropriately dealt with by him in appeal. Further, it is the petitioner's contention that the assessment order is without jurisdiction as it has ignored the DCF Method to arrive at fair market value of its shares, it would be open to the petitioners to file an application for stay of the order dated 21st December, 2017 passed by the Assessing Officer to the CIT (A) in its pending Appeal. In the above circumstances, there would be a stay of the order dated 21st December, 2017 to the extent of the demand raised for a period of 4 weeks from today. In case, the petitioner files a stay application to the CIT (A) within a period of 4 weeks from today, the demand of Rs.62.38 crores arising consequent to the impugned order dated 21st December, 2017 is stayed till the stay application is disposed of and for a further period of 2 weeks thereafter.

11. It is made clear that, the above direction will not inhibit CIT (A) to dispose off the entire Appeal alongwith the stay application after notice to the parties. This is so as the controversy appears within a narrow compass.

12. The petition is disposed of in above terms.
No order as to costs.

(SANDEEP K. SHINDE, J)

(M.S. SANKLECHA, J)