

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.RAJA

W.P.Nos.24097 and 24098 of 2018
and

W.M.P.Nos.28082 to 28087 of 2018

Dishnet Wireless Limited,
Rep. by Mr.K.P.Varadharajan,
5th Floor, Spencer Plaza,
No.769, Anna Salai,
Chennai-600 002. .. Petitioner in W.P.No.24097 of 2018

Aircel Limited,
Rep. by Mr.K.P.Varadharajan,
5th Floor, Spencer Plaza,
No.769, Anna Salai,
Chennai-600 002. .. Petitioner in W.P.No.24098 of 2018

Vs.

1. The Deputy Commissioner of Income Tax,
International Taxation-2(2),
II Floor, Annexure Building,
121, Nungambakkam High Road,
Chennai-600 034.
2. The Assistant Commissioner of Income Tax,
International Taxation-2(2),
121, Nungambakkam High Road,
Chennai-600 034.

.. Respondents in both the Writ Petitions

Writ Petitions filed under Article 226 of the Constitution of India, praying for issuance of Writs of Certiorari to call for the records of the second respondent comprised in the impugned order and the consequential demand notice, both dated 31.03.2018 issued by the second respondent and quash the same as being without jurisdiction, arbitrary, illegal and violative of the Constitution of India and the provisions of the Income Tax Act, 1961.

For petitioners : Mr.Vishnu Mohan

For respondents: Ms.Hema Muralikrishnan,
Sr. Panel Counsel for Income Tax for RR-1 and 2

ORDER

The petitioner-Companies have filed the above Writ Petitions praying for issuance of Writs of Certiorari to call for the records of the second respondent comprised in the impugned orders and the consequential demand notices, both dated 31.03.2018 issued by the second respondent and quash the same as being without jurisdiction, arbitrary, illegal and violative of the Constitution of India and the provisions of the Income Tax Act, 1961.

2. Learned counsel for the petitioner-Companies submitted that the petitioner-Companies are engaged in the business of providing cellular mobile services pursuant to their Service Licences granted by the Department of Telecommunications, Government of India within various Telecom Circles notified across India. While so, the respondents have initiated action simultaneously in respect of the two group of companies, of which the petitioner-Companies form part of, on a pre-determined basis to recover the demand made. The petitioner-Companies were served with a notice dated 26.02.2018 and 27.02.2018 respectively from the respondents intimating their proceedings under Section 201(1) and 201(1-A) of the Income Tax Act being initiated for the alleged failure on the part of the petitioners to deduct the Tax Deducted at Source (TDS) on certain foreign remittances.

3. To the above notice(s), the petitioner-Companies submitted a detailed reply in the form of e-mail, dated 29.03.2018 informing that the petitioners have obtained an order of stay from this Court for TDS on international roaming and a copy of the stay order was also attached with the e-mail. It is further stated in the e-mail that there was Saudi Telecom AAR ruling on equipment capacity and they have obtained order of stay from High Court against AAR ruling on applicability of TDS on the matter and any proceedings under Section 201 of the Income Tax Act and requested the respondents to drop further proceedings in the matter.

4. Learned counsel for the petitioner-Companies further submitted that the petitioners have also initiated proceedings under Section 10 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC') seeking initiation of Corporation Insolvency Resolution Process (CIRP) and sought for further time from the respondents.

5. It is further stated by the learned counsel for the petitioner-Companies that on 12.03.2018 / 19.03.2018, the National Company Law Tribunal (for short, 'the NCLT'), Mumbai,

had admitted the applications preferred by the petitioners and initiated CIRP against the petitioner-Companies and declared "Moratorium" in terms of Section 14 of the IBC. Since the order has already been passed by the NCLT on 12.03.2018 / 19.03.2018, granting Moratorium by virtue of Section 14 of the IBC, no recovery proceedings could be initiated against the petitioner-Companies' properties. Moreover, as per Section 14(1)(a) of the IBC, no suit or continuation of pending suits or proceedings shall be initiated against the corporate debtor including execution of any judgment, decree or order in any Court of law, Tribunal, arbitration panel or other authority. Therefore, the learned counsel for the petitioner-Companies prayed that the impugned orders passed by the second respondent taking action including coercive action against the petitioners for recovery of the amount(s), are liable to be interfered with by this Court.

6. In support of his submissions, learned counsel for the petitioners also relied on a decision of the Delhi High Court reported in 2017 SCC Online Delhi 12759 (Pr. Commissioner of Income Tax-6 Vs. Monnet Ispat and Energy Limited), wherein it is held by a Division Bench of the Delhi High Court in that case that, the NCLT (which by virtue of Section 5(1) of the IBC is the Adjudicating Authority) has by its order dated 18.07.2017 therein, admitted the petition under Section 7 of the IBC filed by the State Bank of India therein against the respondent-Assessee therein and prohibited inter-alia "the institution of suits or continuation of pending suits or proceedings" against the respondent therein and this would include the appeal filed before the Delhi High Court by the Income Tax Department against the order of the Income Tax Appellate Tribunal (ITAT) in respect of the tax liability of the respondent-assessee therein. Learned counsel for the petitioner-Companies also relied on a decision of the Supreme Court reported in 2018 SCC Online SC 984 (Pr. Commissioner of Income Tax Vs. Monnet Ispat and Energy Limited), in which the said order of the Delhi High Court was confirmed by the Apex Court and in that case, the Supreme Court, while dealing with Section 238 of the IBC, held that IBC will over-ride anything inconsistent contained in any other enactment including the Income Tax Act, and it was further observed by the Apex Court, while referring to the case of Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co., reported in 2000 (5) SCC 694 that the Income Tax dues, being in the nature of Crown Debts, do not take precedence even over secured creditors, who are private persons.

7. In his arguments, learned counsel for the petitioners also submitted that by virtue of Section 238 of the IBC, the provisions of the IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Hence, learned counsel for the petitioners submitted that the impugned orders cannot be passed

by the second respondent and prayed for quashing the impugned orders passed by the second respondent.

8. Learned Standing Counsel appearing for the respondents filed detailed counter affidavits in both the Writ Petitions and submitted that Section 201(1-A)(3) of the Income Tax Act does not refer to either Section 14 or Section 238 of the IBC. Referring to Section 153 of the Income Tax Act, learned Standing Counsel appearing for the respondents stated that when time limit for completion of assessment has been made, it is clear that no order of assessment shall be made under Section 143 or Section 144 of the Income Tax Act at any time after the expiry of 21 months from the end of the assessment year in which the income was first assessable. She further contended that the second respondent, as per the time limit imposed against him, has completed the assessment. Moreover, as alleged by the respondents, the respondents have not proceeded to take any coercive steps for recovery of the demand arrived at in the impugned proceedings after making adjustment of the amounts due to the petitioners as refund. When the respondents are not going to take any coercive measures, and they are going to treat the impugned orders as only intimation of demand, without enforcing the demand and the impugned orders are only the orders passed under Section 201(1-A)(3) of the Income Tax Act, and since the financial year of the petitioners is 2010-2011, as per Section 201(1-A)(3) of the said Act, the respondents, before expiry of seven years, namely on or before 31.03.2018, should make an order under Section 201(1) of the said Income Tax Act and in default for failure to deduct the whole or any part of tax from a person who is resident in India, the second respondent, after giving notice, has passed the present impugned orders and since the impugned orders are passed under Section 201(1) and 201(1-A) of the Income Tax Act, it is to be treated only as an intimation of the existing demand sent to the assessee holding PIN, and hence, it cannot be construed as coercive measures being taken against the petitioner-companies.

9. Be that as it may. When there has been an order passed by the NCLT, Mumbai on 12.03.2018 / 19.03.2018, giving Moratorium, the case of the petitioners is governed by Sections 14 and 238 of the IBC, which read as follows:

"Section 14: Moratorium: - (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order

in any Court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

"Section 238: Provisions of this Code to override other laws:- The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or

any instrument having effect by virtue of any such law."

10. A perusal of the above provisions clearly tells us that once an order of moratorium is granted by the NCLT, the legal fiction under Section 14 of the IBC will come to the rescue of the corporate debtor. Therefore, taking into consideration all the abovesaid provisions of law and also the ratio laid down by the Apex Court in the abovesaid case, as also the Delhi High Court holding that when once the Moratorium is granted by the NCLT, it will continue till the completion of Corporate Insolvency Resolution Process or until it approves the resolution plan under Section 31(1) of the IBC or passes an order of liquidation of corporate debtor under Section 33 of the IBC, as the case may be, the present Writ Petitions shall stand disposed of, directing the respondents to keep the impugned orders in respect of both the petitioners, in abeyance, till the disposal of the proceedings pending before the NCLT, Mumbai and also the further appeal(s), if any that may be filed by any of the parties to these Writ Petitions. No costs. Consequently, W.M.Ps. are closed.

Sd/-
Assistant Registrar(CS -III)

//True copy//

Sub Assistant Registrar

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To

1. The Deputy Commissioner of Income Tax,
International Taxation-2(2),
II Floor, Annexure Building,
121, Nungambakkam High Road, Chennai-600 034.

2. The Assistant Commissioner of Income Tax,
International Taxation-2(2),
121, Nungambakkam High Road,
Chennai-600 034.

+1cc to Mr.Hema Muralikrishnan, Advocate SR.No.88211

+1cc to Mr.R.parthasarathy, Advocate SR.No.88045

W.P.Nos.24097 & 24098 of 2018

RSV(CO)

GMV(24/01/2019)