

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION NO.2036 OF 2019

Vodafone Idea Ltd.

... Petitioner

Vs

Dy. Commissioner of income Tax, CPC,
Bangalore & Ors.

... Respondents

Mr.J.D. Mistri, Senior Advocate with Mr.Nitesh Joshi i/b Mr.Atul
Jasani for the Petitioner

Mr.N.C. Mohanty for Respondents

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

DATED: SEPTEMBER 3, 2019

P.C. (Per Akil Kureshi, J.):

1. Heard the learned Counsel for the parties for final disposal of the petition at the stage of admission.
2. The petitioner has challenged the action of the respondents, i.e., the authorities of the Income Tax department of not releasing petitioner's refund of a sum of Rs.207 crores (rounded off) arising out of an intimation under section 143 (1) of the Income Tax Act, 1961 ('the Act' for short) dated 26.10.2018 in relation to the petitioner's return for AY 2016-2017.

3. Brief facts are as under:

The petitioner is a company registered under the Companies Act and is engaged in the business of providing communication services. For the AY 2016-2017, the petitioner had filed return of income declaring a loss of Rs.2,561 crores (rounded off). Since the assessing officer was not processing the return of the petitioner, the petitioner had previously approached this Court by filing Writ Petition No.2146 of 2018 which was disposed of by an order dated 1.10.2018. In the context of the grievance of the petitioner that the return was not being processed promptly, the Court made the following observations in the said order:

“7. The communication, copy of which is at Annexure-A makes interesting reading with regard to assessment year 2016-2017. It is solemnly stated that the return for this assessment year has been processed but it is pushed to what is stated as and styled as the Centralized Processing Center. That is stated to be forwarded for computation.

8. We fail to understand as to why somebody who is in-charge of making and framing assessment, namely, the Assessing Officer can process the return and ordinarily empowered to finalize it as well but must forward it or push it to this center for computation. If computation such a difficult, if not an important task, why it cannot be performed by this Assessing Officer, is not clarified to us at all. It is evident that, after it is pushed to this center, from the centre's communication, copy of which is handed over Mr.Mohanty

dated 7th August, 2018, it is apparent that this center has done nothing in relation to this computation. The said letter dated 7th August, 2018 is taken on record and marked "X" for identification. It may be lying with it until such time as the law permits holding up of the further proceedings or till the last date. We only remind the Revenue of the inherent risk in such an exercise. Far from making things simpler, we are of the opinion that such complications and confusions often prejudice the interest of the Revenue. It can then very well be managed with such centers and officials manning the same that they sit on files and thereafter returns are processed as it is or there is nothing left to be done in relation thereto. They would definitely have to be then accepted in the manner forwarded by the Assessee. That would be indeed prejudicial to the interest of the Revenue if not necessarily harassing the Assessee. A balance has to be created and this procedure, cumbersome as it is, does not facilitate the same. In such circumstance, we direct this Centralized Processing Center-ITR to forthwith take a decision and as regards the computation. The decision be taken and communicated to the concerned Assessing Officer within a period of four weeks from today.

9. Any opinion on the merits of the issue would prejudice both sides. We do not think and as rightly urged by Mr.Pardiwala that the whole exercise would necessarily result in either a refund or a demand. We expect the authorities to take a decision and not delay the matters. Even if there is any exercise and warranting an adjustment, there is no reason to delay that, by sitting on the files and forcing the Assessee like the Petitioner to approach this Court in its writ jurisdiction. It is as if the authorities wait for a writ Court to issue direction so that they can take and pull files out of the turn and grant necessary reliefs.

10. As far as this aspect is concerned, we express no opinion. We clarify that on merits this Court has neither expressed any view in favour of a refund or against it."

4. It was pursuant to this order that the return was processed which gave rise to refund of Rs.180 crores (rounded off) and with interest, it came to Rs.207 crores (rounded off). In ordinary course, the petitioner should have received the refund from the department. However, under section 245 of the Act, the competent authority has right to claim the set-off of such refund against any tax remaining payable even if it arises out of any other assessment year. Under section 281B of the Act, the competent authority subject to following proper procedure also has a power to provisionally attach any property of an assessee to protect the interest of the revenue under certain circumstances. The refund would undoubtedly be covered within the said expression - any property belonging to the assessee. We would take a closer look at those sections later.

5. For the time being, we may record that the respondents while intimating the processing of the return under section 143(1) of the Act, appended a following note to the said communication:

“NOTE:- As per the records of CPC, the following demands are outstanding. An intimation under Section 245 of the Income Tax Act, 1961 has been issued separately proposing to adjust the outstanding demands against the refund determined as per this order. Since, the release of the

refundable amount will be considered on the basis of your response/compliance to the Intimation U/s 245, you are requested to submit your response expeditiously.”

6. As per this note, thus, the respondents proposed to adjust the said refund against outstanding tax demands in terms of section 245 of the Act and called upon the petitioner to respond to such proposal. This note also contained a table of various outstanding tax demands of the petitioner for different assessment years.

7. The petitioner responded to such note under a communication dated 29.11.2018. Referring to each of the seven outstanding tax demands, as per the table appended to the note, the petitioner pointed out that such demands were stayed by the Income Tax Appellate Tribunal (‘Tribunal’ for short) under various orders. The respondents served yet another communication to the petitioner proposing to invoke section 245 of the Act in order to deny the release of the refund. This communication dated 1.2.2019 contained specific reference to four outstanding tax demands. The petitioner replied to such communication under letter dated 5.3.2019, once again pointing out that each of the above mentioned demands has been stayed by the Tribunal.

8. The attempt to adjust petitioner's refund was abandoned at this stage. The Deputy Commissioner of Income Tax, Mumbai, instead passed the impugned order dated 19.7.2019 invoking section 281B which reads as under:

“Order u/s 281B of the I T Act 1961

The following refunds for AY 2016-17 in the above cases determined after processing the return of income u/s 143(1) are hereby provisionally attached up to 31.12.2019: -

1	Vodafone India Ltd now amalgamated with Vodafone Idea Ltd AAACH5332B	143(1) / CPC	Rs.180,09,04,670
2	Idea Cellular Ltd now known as Vodafone Idea Ltd AAACB2100P	143(1) / CPC	Rs.12,68,47,537

The order has been passed with the prior approval of the Pr. Commissioner of Income Tax 5, Mumbai.”

9. At that stage, the petitioner has filed this petition challenging the action of the department in not releasing the refund, seeking setting aside of the said order dated 19.7.2019 and making a further prayer that the respondents be directed to release the said refund with statutory interest.

10. The learned Counsel Shri Mistri, appearing for the petitioner, submitted that the action of the department is wholly illegal and unlawful. Originally, the department refused to process the return for the AY 2016-2017. When the High Court directed the department to do so, the refund was not released arising out of intimation on the ground that previous tax demands were outstanding. When it was pointed out that these demands were stayed by the Tribunal, the authorities invoked the power of provisional attachment under section 281B of the Act, without there being any justifiable reason.

11. On the other hand, the learned Counsel Shri Mohanty submitted that when the High Court previously ordered expeditious processing of the petitioner's return under the order dated 19.10.2018, it was clarified that the High Court has not examined the merits of the petitioner's claim of refund. He submitted that the demands are stayed by the Tribunal for various assessment years without entering into the merits of the assessments which were confirmed by the appellate Commissioner. He submitted that a scrutiny assessment of the petitioner's return for AY 2016-2017 would be over shortly. In this year also, there is every likelihood of

sizeable tax demands arising in relation to the petitioner's international transactions and other issues which are already examined in the earlier assessment years. The department is, therefore, justified in carrying a bonafide belief that the assessment of the said return is likely to give rise to sizeable tax demands. In order to protect the interest of the revenue, the impugned order has been passed provisionally attaching the petitioner's refund. He submitted that the final assessment after scrutiny alone, can give a legal shape to the petitioner's ultimate tax liability.

12. Having heard the learned Counsel for the parties and having perused the documents on record, the facts of the case present a curious sequence. As noted, previously, the petitioner had filed a Writ Petition before this Court complaining about the department not showing sufficient urgency in processing the petitioner's return for AY 2016-2017 which the petitioner expected would give rise to sizeable refund. The High Court directed the respondents to complete the process expeditiously. Consequently, the intimation under section 143(1) of the Act gave rise to refund of a sum of Rs.180 crores. With interest, this refund came to approximately

Rs.207 crores. Immediately, the department raised the possibility of invoking section 245 of the Act in order not to release the refund. The petitioner pointed out that the tax demands referred to in the communications proposing to invoke section 245 of the Act have all been stayed by the Tribunal under different interim orders.

13. Section 245 of the Act pertains to set-off of refunds against the tax remaining payable and reads as under:

“245. Where under any of the provisions of this Act, a refund is found to be due to any person, the Assessing Officer, Deputy Commissioner (Appeals), Commissioner (Appeals) or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section.”

14. Under this provision, thus, where under any of the provisions of the Act, a refund is found to be due to any person, it would be open for the competent authority mentioned in the said provision to, in lieu of payment of refund, set off the amount to be so refunded or any part thereof against the sum remaining payable under the Act by the person to whom the refund is due and

payable. This provision thus, could have been applied if the tax demand was due and recoverable from the petitioner. In the present case, admittedly, all such tax demands were suspended by the Tribunal. Enabling the department to adjust such tax demands against the petitioner's refund would amount to overreaching the interim orders passed by the Income Tax Appellate Tribunal. As long as the stay against the recoveries was in operation issued by the competent appellate authority, Tribunal or Court, it would not be open for the department to enforce the recoveries through the aid of section 245 of the Act. Perhaps, it was not necessary for us to elaborate on this since advisedly, the department has given up this line of action for refusing refund to the petitioner.

15. These brief comments were however, necessary since the department seeks to press in service the power of provisional attachment under section 281B of the Act and in context of which, the Counsel for the department has taken us through the nature of interim orders passed by the Tribunal. Section 281B of the Act pertains to provisional attachment by the revenue in certain cases. Subsection (1) of section 281B reads as under:

“281B. (1) Where, during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the Assessing Officer is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, he may, with the previous approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director, by order in writing, attach provisionally any property belonging to the assessee in the manner provided in the Second Schedule.”

16. Under sub-section (1) of section 281B of the Act thus, where during the pendency of any proceedings for assessment or reassessment, the assessing officer is of the opinion that for the purposes of protecting the interest of revenue, it is necessary so to do, he may with the previous approval of the higher authority pass an order in writing provisionally attaching the property belonging to the assessee. These are drastic powers permitting the assessing officer to attach any property of an assessee even before the completion of assessment or reassessment. These powers are thus in the nature of attachment before judgment. They have provisional applicability and in terms of sub-section (2) of section 281B of the Act, a limited life. Such powers must, therefore, be exercised in appropriate cases for proper reasons. Such powers cannot be exercised merely by repeating the phraseology used in

the section and recording the opinion of the officer passing such order that he was satisfied for the purpose of protecting the interest of revenue, it was necessary so to do.

17. It was in this context that we had heard the learned Counsel for the department as to the reason why such an order came to be passed, particularly when the order itself does not cite the reasons for the said authority to hold such an opinion. In this context, the Counsel for the department had argued before us that in the present assessment year i.e., AY 2016-2017, the issues where the assessing officer believes that there will be sizeable tax demands are common as in the earlier assessment years and which are subject matter of appeals before the Tribunal and in which the Tribunal has passed interim orders preventing the department from carrying out a recovery. He emphasized that what the Tribunal has stayed is recoveries and not the orders.

18. Even if it were to be believed that by going by his previous assessments, the assessing officer is most likely to confirm the demands while carrying out the final assessment of the petitioner's return for the AY 2016-2017, we cannot lose sight of the fact that the demands for the previous assessments have been stayed by

the Tribunal. The Tribunal has given reasons why it was persuaded to pass such interim orders. It is not possible for us to dissect the reasons of the Tribunal and come to the conclusion that in the final analysis, such demands would be confirmed. Permitting the department to provisionally attaching the petitioner's refund for the current year on the ground that in the final assessment, the demands are likely to be confirmed, would amount to ignoring the hard fact that for the earlier assessment years, the Tribunal has suspended the recoveries arising out of the demands made by the assessing officer on similar issues. It may be that before doing so, the Tribunal has either put the petitioner to some terms or has found itself satisfied that the deposits already made are sufficient. Nevertheless, looked from any angle, the occasion for the competent authority to exercise the drastic power under section 281B of the Act has not arisen. We do not doubt his power, however, we do not find proper justification for exercise of such power.

19. Under the circumstances, the impugned order dated 26.10.2018 is set aside. The respondents shall release the refund arising out of the intimation under section 143(1) of the Act for the

AY 2016-2017 with further statutory interest, if any, to be paid within two weeks from the date of receipt of a copy of this order.

20. With these directions, the petition is disposed of.

(S.J. KATHAWALLA, J.)

(AKIL KURESHI, J.)