

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.11.2014

<i>Date of Reserving the Judgment</i>	<i>Date of Pronouncing the Judgment</i>
24.11.2014	26.11.2014

Coram

The Hon'ble Mr. Justice **T.S. SIVAGNANAM**

W.P. Nos.30650 to 30652 of 2014 &
Connected Mps.

Vodafone Cellular Limited .. Petitioner in all W.Ps.

Vs

1.The Commissioner of Income Tax (Appeals) II
63-A, Race Course Road,
Coimbatore.

2.The Deputy Commissioner of Income Tax
TDS Circle,
46, 63, Race Course Road
Coimbatore.

.. Respondents in all Wps.

Common Prayer :- Petitions filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified Mandamus to call for the records comprised in order bearing Ref.C.No.CIT (A)(II)/PDL/6/CMBB03049E/14-15 dated 17.10.2014, passed by the Respondent No.1, and quash the same and consequently direct the respondents to forbear from acting in pursuance or in furtherance of assessment orders dated 29.03.2014 & 30.12.2013 & made in TAN No.CMBB03049E under section 201(1) and 201(A) of the Act by the Respondent No.2, for the Assessment years 2012-13, 2014-15 & 2013-14, pending disposal of the Appeal filed before the Respondent No.1 against the said assessment order.

For petitioner .. Mr.Arvind (P) Datar,Sr.Counsel
for Mr.Satish Parasaran

For Respondents .. Mr.T.Pramod Kumar Chopda

COMMON ORDER

Since the prayer sought for in all these Writ Petitions are identical these Writ Petitions were heard together and are disposed of by this common order.

2(a)The petitioner in these writ petitions seeks for issuance of writ of certiorari to quash the order passed by the first respondent dated 17.10.2014, rejecting the Stay Petition filed by the petitioner, praying for grant of stay of the demands payable pursuant to the orders of assessment under the Income Tax Act, 1961 for the assessment years 2012-13, 2013-14 & 2014-15.

(b)Pursuant to the survey conducted under section 133 A of the Income Tax Act, 1961 ('Act'), on 17.09.2013, the petitioner was issued a notice by the second respondent stating that there was omission on their part to deduct tax at source in respect of the

Commission payments on pre-paid charges and it is proposed to raise demands in respect of such commission payments as in the previous years. It was further stated that as the proposed order under sections 201(1) and 201(1A) of the Act will be in respect of the default under section 194H of the Act, the petitioner was directed to submit their objections to the said notice dated 21.10.2013, pertaining to the financial years 2012-13 & 2013-14.

(c) By communication dated 16.12.2013, the petitioner submitted certain details which information was sought for by the second respondent during the course of personal hearing on 10.11.2013. Thereafter, assessment orders were passed for the assessment years 2012-13, 2013-14 & 2014-15 on 30.12.2013. The petitioner filed a Stay Petition before the second respondent under section 220(6) of the Act on 31.01.2014, in respect of the demands made pursuant to the assessment orders dated 30.12.2013, for the assessment years 2013-14 & 2014-15. The petitioner preferred Appeals to the first respondent against the assessment orders dated 30.12.2013, passed by the second respondent in respect of the assessment years 2013-14 & 2014-15 on 03.02.2014.

(d)The second respondent passed an order rejecting the Stay Petition by an order dated 07.02.2014. Thereupon the petitioner filed a Petition before the first respondent praying for stay of demand till the disposal of the Appeals, which were pending as Appeal Nos. 305/13-14 and 308/13-14, for the financial years 2012-13 and 2013-14.

(e)With regard to the assessment year 2012-13, the second respondent passed order of assessment on 29.03.2014, confirming the proposal and a notice of demand was issued on 29.3.2014, demanding a sum of Rs.10,05,75,866/- for the assessment year 2012-13. The petitioner preferred an appeal to the first respondent against the said order of assessment dated 29.03.2014 for the assessment year 2012-13. On 30.4.2014, the petitioner filed a Stay Petition under section 220(6) of the Act in respect of the demand made in terms of the assessment order for the assessment year 2012-13. The second respondent by an order dated 20.6.2014, following its earlier order dated 07.02.2014, for the assessments years 2013-14 and 2014-15, rejected the Stay Petition. Thereupon, the petitioner filed a Stay Petition before the first respondent on 01.07.2014. The Stay Petition filed by the petitioner for the three assessment years were considered

by the first respondent and by order dated 17.10.2014, the same came to be rejected. Challenging the said order, these Writ Petitions have been filed.

3.Mr.Arvind P Datar, learned Senior counsel appearing for the petitioner made an elaborate reference to the nature of transaction done by the petitioner with its customers in the matter of sale of prepaid sim cards and the distinction between the transaction in respect of prepaid sim cards and post-paid sim cards were placed for the consideration of this Court.

4.It is submitted that the authority without considering the Stay Petition in a proper perspective and without assigning any reason, much less proper reasons, has rejected the Stay Petition. It is submitted by way of illustration that if the cost of the pre-paid sim card is Rs.100/-, the petitioner would sell the same to his Wholesale Distributor at Rs.80/- and the Distributor further distributes the same to his Sub-Distributors, which could contain discounts and the Distributor does not *ipso facto* earn income just by purchasing the coupons from the petitioner and only if he is able to distribute them will it be treated as income earned by the Distributor. Hence there is

no fixed amount of income from the distribution agreement. Further it is submitted that the transaction between the petitioner and its pre-paid Distributor as being on principal to principal basis, the question of deducting TDS does not arise. Further, it is submitted with regard to the decision of Income Tax Appellate Tribunal on the TDS liability for the assessment years 2007-2008 and 2008-09, the same is pending before this Court in T.C.Appeal Nos. 308 & 309 of 2011 and conditional interim order has been granted and 50% of the demand has been paid.

5.Learned Senior Counsel after inviting the attention of this Court to the averments in the Stay Petition, submitted that the petitioner placed reliance on the decisions of the Kerala High Court in the case of *M/S HAMEED AND OTHERS v. DIRECTOR OF STATE LOTTERIES 7 OTHERES* [249 ITR 186]; the decision of the Gujarat High Court in the case of *AHMEDABAD STAMP VENDORS ASSN. v. UNION OF INDIA* [(2002) 257 ITR 202]; the decision of the Allahabad High Court in the case of *JAGRAN PRAKASHAN LIMITED* [345 ITR 288] and the decision of the Kerala High Court in the case of *KERALA STATE STAMP VENDORS ASSOCIATION v. OFFICE OF THE ACCOUNTANT GENERAL AND ORS* [282 ITR 7], however, without reference to those

decisions, the first respondent mechanically rejected the Stay Petition, without considering the three essential requirements viz. *prima facie* case, balance of convenience and irreparable hardship.

6. Further it is submitted that the issue with regard to liability to effect TDS on discount on prepaid coupons is pending before the Hon'ble Supreme Court in the case of other telecom operators and the Hon'ble Supreme Court has also granted interim relief in those cases.

7. Further the decision of the Gujarat High Court in the case of *AHMEDABAD STAMP VENDORS ASSN.(supra)*, has been confirmed by the Hon'ble Supreme Court in the case of *COMMISSIONER OF INCOME TAX AND ORS. v. AHMEDABAD STAMP VENDORS ASSOCIATION [(2012) 348 ITR 378 (SC)]*, which was delivered by the Hon'ble Supreme Court on 06.0.2012 and that should have been taken note by the authority while considering the Stay Petition. Further, it is submitted that in respect of Stamp Vendors Association, in respect of Milk Vendors Association and transactions relating to Soft Drinks, the Hon'ble Supreme Court has taken a view that there is no requirement of deduction of TDs in identical type of transactions and therefore the petitioner having established a *prima facie* case and the balance of

convenience being in their favour, the first respondent ought to have stayed the demand till the disposal of the Appeals.

8.Per contra, Mr. T.Pramod Kumar Chopda, assisted by Mr.S.Rajkumar, appearing for the Revenue, submitted that the order passed in respect of the earlier assessment orders of the petitioner/ assessee, is now pending before this Court in T.C.Nos. 308 & 309 of 2011 and the tax case has been admitted on 09.09.2009 and interim order has been granted subject to deposit of 50% of the demand. It is submitted that the effect of the decision in the case of *AHMEDABAD STAMP VENDORS ASSN.(supra)*, and the types of transaction done by the petitioner/assessee has to be decided by the Hon'ble Supreme Court and as on date, the first respondent was fully justified in following the earlier order passed in respect of the assessment years 2007-08 and 2008-09, which has been decided in favour of the Revenue.

9.Further, the respondent cannot ignore its earlier orders. It is submitted that though hearing notice was given to the petitioner and they were directed to produce required details, they have not produced the same and at present they cannot contend that the accounts are on

all India basis, etc. and having not produced the accounts as called for, the petitioner cannot claim that matter should be remanded for fresh consideration before the authority.

10. Heard the learned counsel appearing on either side and perused the materials placed on record.

11. So far as the assessment years 2009-10, 2010-11 and 2011-12, the Commissioner of Income Tax (Appeals), has upheld the orders of the Assessing Officer, wherein identical issue has arisen for consideration. In so far as assessment years 2007-08 and 2008-09, Commissioner of Income Tax (Appeals) has confirmed the order of the Assessing Officer and the Income Tax Appellate Tribunal has rejected the petitioner's appeal and the petitioner has filed Tax Case (Appeals) before this Court and it is pending consideration and a conditional order of stay has been granted.

12. The question which falls for consideration in these Writ Petitions is as to whether the first respondent ignoring its earlier order in respect of the assessment years 2009-10 to 2011-12 is required to pass an order on the Stay Petition to stay the demand pursuant to the assessment orders relevant to these Writ Petitions.

13. Before considering this issue, it has to be noted that a notice was issued to the petitioner on 19.9.2014, calling upon the petitioner to produce copies of Books of Accounts maintained by them, to verify the balances/fund available as on date. The petitioner did not produce the same and even after expiry of two weeks, the petitioner did not produce the cash position so as to examine the matter regarding their financial constraint claimed by the petitioner for non-payment TDS. The first respondent appears to have drawn an adverse inference and in my view, rightly so. Learned Senior counsel appearing for the petitioner also states that all was not well as to the manner in which the petitioner seeks to justify the non production of Accounts.

14. Be that as it may, unless and until the petitioner places materials before the first respondent, pleading financial incapacity or inability to pay the demand, pending decision of the Appeal, the authority who is consider the Stay Petition cannot be faulted for having taken a decision that the petitioner/applicant has not established a *prima facie* case.

15. The sheet anchor of the contentions raised by the learned Senior Counsel appearing for the petitioner is that the decision in the

case of *AHMEDABAD STAMP VENDORS ASSN.(supra)*, has been upheld by the Hon'ble Supreme Court and that transaction is akin to that of the sale of prepaid sim cards and the Hon'ble Supreme Court has held that there was no error in the discount given to the Stamp Vendors for purchasing stamps in bulk quantity and the same is in the nature of cash discount and in the circumstances the transaction is a sale and consequently, section 194 H of the Income Tax Act, 1961, has no application. By placing reliance on the decision, it is submitted that the Officer should have considered this issue when the petitioner has relied on the decision of the Gujarat High Court.

16.It is to be pointed out that in respect of the petitioner, for the assessment year 2004-05 to 2007-08, identical issues arose for consideration before the Kerala High Court. One of the issue which fell for consideration in those cases is regarding the payments made for services rendered by the Distributors under the pre-paid scheme. The appellant therein took a stand that the supply of sim cards, recharge coupons etc., under the prepaid scheme is sale of goods at discounted price by the Assessee and besides the discount given at the time of sale of these items, Assessee is not paying any commission or crediting any commission in the account of the distributors and so

much so, Assessee is not liable to deduct and remit tax at source in terms of Section 194H of the Act. Considering the said submission, the Division Bench of the Kerla High Court held as follows:

"6. Senior counsel appearing for the assessee has relied on several judgments, particularly two decisions of this court in M.S.HAMEED V. DIRECTOR OF STATE LOTTERIES reported in (2001) 114 TAXMAN 394 (KER.) and KERALA STATE STAMP VENDORS ASSOCIATION V. OFFICE OF THE ACCOUNTANT GENERAL reported in (2006) 150 TAXMAN 30(KER.), the decision of the Gujarat High Court in AHMEDABAD STAMP VENDORS ASSOCIATION V. UNION OF INDIA reported in (2002) 124 TAXMAN 628 (GUJ.), and the decision of the Bombay High Court in COMMISSIONER OF INCOME TAX V. QUTAR AIRWAYS in I.T.A. No.99 of 2009 dated 26.3.2009. The first decision of this court pertains to sale of lottery tickets wherein this court held that the commission given by way of discount at the time of sale of lottery tickets is not a commission on which tax is deductible under Section 194G of the Act. The second decision of this court pertains to sale of stamp paper by the licensed stamp vendors wherein also the finding of this court following the decision of the Gujarat High Court in AHMEDABAD STAMP VENDORS' case is that the transaction is sale of goods and so much so, no deduction of tax is called for under Section 194G of the Act. So far as the lottery ticket is concerned, the transaction is different and the Supreme Court has held that the transaction is sale of goods and so much so, the decision rendered by this court has no application in regard to commission paid by the assessee to the distributors in the form of discount which we have found to be in essence and substance for rendering services. The next judgment relied on by the petitioner which is in KERALA STAMP VENDORS ASSOCIATION case rendered by one of us (C.N.Ramachandran Nair, J.), relates to sale of stamp paper by the licensed vendors. Here again, this court by relying on decision of the Gujarat High Court in AHMEDABAD STAMP VENDORS case held that the transaction is a sale. On a reconsideration of this judgment, we feel this court's judgment may require reconsideration because consideration received by the stamp vendors for the stamp paper does not really represent it's value but is nothing but stamp duty. Value of each stamp paper may be fifty paise or even a rupee, whatever be it's quality, but what is collected depends on the amount stamped thereon which is nothing but

stamp duty recovered by the State from the ultimate user in terms of the Stamp Act. Rightly or wrongly this court held that the transaction is sale because loss of stamp paper is to the account of the stamp vendors, if it is lost in their custody. The Government also treats the transaction as sale of goods and specific exemption is granted from payment of sales tax in terms of provisions of the Sales Tax Act. Therefore, the finding that Section 194H is not applicable is on the specific finding in that case that the transaction is sale of goods, whereas in this case following the Division Bench judgment of this court we have found that the distributor is paid commission in the form of discount for services rendered to the assessee. Therefore, none of these decisions relied on by the assessee applies to the facts of this case which is payment of commission by way of discount for services rendered by the distributor. Senior counsel for the assessee has in support of his contentions relied on the following decisions of the Supreme Court also, ADDITIONAL COMMISSIONER OF INCOME TAX V. SURAT ART SILK CLOTH MANUFACTURERS ASSOCIATION reported in (1980) 121 ITR 1, KEDARNATH JUTE MANUFACTURING CO. V. COMMISSIONER OF INCOME TAX reported in 82 ITR 363, COMMISSIONER OF INCOME TAX V. MOTORS 7 GENERAL STORES (P) LTD. (1967) 66 ITR 692, COMMISSIONER OF INCOME TAX V. AJAX PRODUCTS LTD. (1965) 55 ITR 741, COMMISSIONER OF INCOME TAX V. B.C.SRINIVASA SETTY (1981) 128 ITR 294, TUTICORIN ALKALI CHEMICALS & FERTILIZERS LTD. V. COMMISSIONER OF INCOME TAX (1997) 227 ITR 172 and decisions of House of Lords in INLAND REVENUE COMMISSIONERS V. WESLEYAN GENERAL ASSURANCE SOCIETY reported in (1948) 16 ITR 101 and another decision in REVENUE COMMISSIONERS V. DUKE OF WESTMINSTER reported in (1936) A.C. 1. However, on going through these judgments we do not find any of the judgment has any direct application to the facts of this case. The very scheme of deduction of tax at source under the Income Tax Act is to trace recipients of income and their accountability to the department for payment of tax on various transactions. In fact, major portion of the income tax collection is through recovery of tax at source and but for the mechanism, there would have been massive evasion of tax by the recipients of various kinds of income. The trend in legislation is to increase coverage for recovery of tax at source and on a steady basis various services are brought under the TDS scheme so that tax evasion is avoided. We have already taken note of the provision under Section 197 of the Act which mitigates against hardship if any in recovery of tax in as much as a payee is entitled to approach the department and apply for certificate to receive any amount which would be otherwise subject to deduction of tax at source without recovery of any tax or on

recovery at lesser rates. We are of the view that the grievance if any against recovery of tax by the assessee is on the distributors, and they are already on the roles of the department because assessee is making deduction of tax at source for payment of commission made under the post paid scheme. As already pointed out, if distributors have any grievance against assessee recovering tax for the commission paid in the form of discount in respect of prepaid services, any such distributor is free to approach the department for getting his grievance redressed by filing an application under Section 197 of the Income Tax Act. However, we make it clear that this is not the ground on which we have held the assessee liable for recovery of tax at source under Section 194H which is only because we have clearly found that the discount paid to the distributors is for service rendered by them and the same amounts to "commission" within the meaning of that term contained under Explanation (i) to Section 194H of the Act. The impugned orders issued under Section 201(1) and 201(1A) of the Act are only consequential orders passed on account of default committed by the assessee under Section 194H and, therefore, those orders were rightly upheld by the Tribunal. We, therefore, dismiss all the appeals filed by the assessee. "

It is submitted that as against the Judgment of the Kerala High Court, the petitioner has preferred an Appeal and the matter is now pending before the Hon'ble Supreme Court.

17.It is to be stated that the decision of the Kerala High Court in the case of the petitioner/assessee referred supra was followed by the Delhi High Court and Calcutta High Court. Learned Senior counsel submits that Karnataka High Court has taken a different view. However, as on date in the assessee's own case, the decision of the Kerala High Court supports the stand of the Revenue. In such circumstances, the first respondent while considering the Petition for

Stay, took note of the earlier orders for the assessment years 2009-10 to 2011-12, which was on the same issue and pending as Appeal before the Tribunal and in respect of assessment years 2007-08 and 2008-09, it has been affirmed by the Tribunal and in the absence of production of Bank Accounts and fund availability, etc., rejected the Stay Petition. Thus, while applying the three cardinal principles while considering the Stay Petition, the decision in the assessee's own case as on date stands concluded in favour of the Revenue. Therefore, to that extent the petitioner has not been able to establish a *prima facie* case.

18. So far as the balance of convenience and hardship is concerned, despite opportunity, the petitioner did not produce the records nor there was any attempt made by the assessee to seek for further time to produce the records and it appears that there was no specific pleading in the Stay Petition about the financial capacity, even before the second respondent when the first petition for stay was presented on 31.12.2014.

19. Section 220 of the act would treat an assessee to be an assessee in default when he does not meet the tax liability in respect of the demand raised by demand notice under section 156 of the Act. The discretion conferred on the Assessing Officer under sub section (6)

of Section 220 of the Act, is not an arbitrary power, but a power coupled with responsibility and the assessing officer concerned should take all the circumstances into account and all the considerations that could be urged by the assessee as to why he should not be treated as "not being in default" and then make an order as is provided to the facts of the case. [see *Mahalingam Chettiyar (MLM) vs. ITO* [(1967) 66 ITR (Madras)].

20.The other principle which has to be borne in mind is with regard to the fair chance of success of the assessee in its appeal, apart from hardship which the assessee will be put to or financial soundness of the assessee. Further more, when the demand in dispute relates to issues which was decided in favour of the Revenue by the Appellate Authority and the Tribunal in the assessee's own case, then it would have a direct bearing on the case of the assessee in respect of the subsequent demand against which appeal has been preferred. However, the underlying principle is that the grant of stay is a matter of discretion, mere pendency of the appeal before the appellate authority will not amount to automatic stay of the demand.

21.A contention was raised by the learned Senior Counsel for the petitioner stating that the impugned order is not a speaking order and

devoid of reasons. The assessing officer on that matter, the appellate authority should take into consideration the facts placed by the assessee and the factors and circumstances pleaded by them. In the instant case, it is not in dispute that in the assessee's own case for the earlier assessment years, the order of assessment has been upheld by the Commissioner of Income Tax (Appeals). However, in respect of the anterior period i.e. for 2007-08 and 2008-09, the Tribunal confirmed the order passed by the Commissioner of Income Tax (Appeals), against which the petitioner has preferred Tax Case Appeal Nos.308 & 309 of 2011, which has been admitted by the Hon'ble Division Bench of this Court on 09.09.2011 and an order of interim stay has been granted, subject to the condition the petitioner pays 50% of the demand.

22. Therefore, in my view though the reasoning of the first respondent while rejecting the Stay Petition cannot be faulted in its entirety, but the fact that on the date when the order was passed, the Commissioner of Income Tax (Appeals) ought to have noted that the appeal arising out of the assessment orders for the years 2007-08 and 2008-09, has been entertained by the Hon'ble Division Bench of this Court in TCA No. 308 & 309 of 2011 and appeals have been admitted

on 09.09.2011 and interim order has also been granted.

23.This undoubtedly would be a very relevant factor to consider two of the cardinal tests viz. *prima facie* case and balance of convenience. If the legal issue is now pending before the Hon'ble Division Bench of this Court and order of interim stay has been granted, subject to certain conditions, that should have been considered by the first respondent while passing the impugned order dated 17.10.2014.

24.In the light of the above discussion, this Court is not inclined to interfere with the impugned order on the grounds raised by the petitioner stating that the decision of the Gujarat High Court ought to have been taken note of by the Commissioner of Income Tax (Appeals), despite the fact that in the assessee's own case, the Division Bench of the Kerala High Court has held against the assessee. However, considering the fact that in respect of the earlier assessment year 2007-08 and 2008-09, in respect of the identical transaction TCA Nos. 308 & 309 of 2011 are pending before the Hon'ble Division Bench of this Court and have been admitted on the following questions of law viz.

"1. Whether the Tribunal was right in holding that the transaction between the appellant and the distributors of its prepaid SIM cards and recharge coupons was a contract of agency and not on a principal-to-principal basis ?

2. Whether the Tribunal was right in holding that the discount offered on provision of Prepaid SIM cards and pre-paid recharge coupons (refill/recharge slip, refill/recharge cards, e-topup) i.e. pre-paid talk-time is a commission envisaged under section 194H of the Income Tax Act ?

3. Whether the Tribunal was right in holding that tax deduction provisions can be applied to unascertained or indeterminable amounts in view of the unworkability of computation provisions in such cases ?

4. Whether the Tribunal was right in holding that Section 194H will apply to cases where a person neither makes payment nor credits any sum to account to another person ?"

and conditional order of stay has been granted, this Court is of the view that the petitioner has made out a case for grant of interim order subject to certain conditions.

25. Accordingly, the Writ Petitions are partly allowed by directing the petitioner to deposit 50% of the entire demand in respect of all the three assessment years viz. 2012-13, 2013-14 and 2014-15, within a

period of four weeks from the date of receipt of a copy of this order and if such direction is complied with, the remaining amount demanded shall remain stayed till the disposal of the appeal by the first respondent. If the direction is not complied with, within the time permitted, the benefit of this order will not enure to the petitioner and the Writ Petition would stand dismissed without further reference to this Court. No costs. Consequently, connected Miscellaneous Petitions are closed.

26.11.2014

rpa

Index :Yes/No

Internet:Yes/No

To

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TDS Circle,
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Pre-delivery O r d e r in
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