

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

WRIT PETITION NO.1205 OF 2013

M/s. Shell India Markets Pvt. Ltd.

...Petitioner.

vs.

The Assistant Commissioner of
Income Tax LTU and ors.

...Respondents.

Mr. P. J. Pardiwala, Senior Counsel along with Mr. Mukesh Butani, Mr. Vishal Kalva and Mr. Rahul Yadav i/by M/s. M. P. Savla and Co. for the Petitioner.

Mr. Girish Dave for Respondent No.1.

Mr. Tejveer Singh for Respondent No.3 and 4.

**CORAM : M. S. SANKLECHA AND
S.C. GUPTA, JJ.**

DATE : 18 NOVEMBER, 2014

ORAL JUDGEMENT : (Per M.S. Sanklecha, J.)

This petition under Article 226 of the Constitution of India challenges the order dated 30 January 2013 passed by the Transfer Pricing Officer (TPO) under Section 92CA(3) of the Income Tax Act, 1961 ("the Act") and the Draft Assessment Order dated 28 March 2012 passed by the Assessing Officer. The assessment year involved is

A.Y. 2009-10.

2) Mr. Pardiwala, learned Senior Counsel appearing for the petitioner states that after having filed this petition on issue of jurisdiction as a matter of abundant caution objections to the Draft Assessment Order were filed before the Dispute Resolution Panel (DRP) on various issues including issue of jurisdiction raised in the present proceeding. Mr. Pardiwala, learned Senior Counsel on instructions undertakes that objections filed with the DRP in respect of the issues raised herein would be withdrawn by them. Undertaking accepted. Therefore, the challenge to the jurisdictional issue viz. the jurisdiction of the revenue to bring to tax amounts received on capital account namely issue of equity shares to its non resident Associated Enterprises under Chapter X of the Act is being challenged only before this Court. It is only after accepting the undertaking given by the petitioner that the merits of the issues raised in this petition are being considered.

3) Mr. Percy Pardiwala, learned Senior Counsel appearing for

the petitioner at the very outset submitted that the issue raised in this petition viz. the jurisdiction of the revenue to tax under Chapter X of the Act capital account transactions not giving rise to income is no longer res integra in view of the decision of this Court in Vodafone India Services Pvt. Ltd. vs. Union of India 368 ITR Page-1. (Vodafone-IV).

4) Mr. Dave, learned Counsel appearing for the respondent revenue, while accepting the fact that the issue raised in this petition is in principle covered by the decision in Vodafone IV, yet submits that there are certain distinguishing features in this case which would warrant this Court not extending the benefits of the decision in Vodafone-IV to the present petitioner.

5) Before considering the rival submissions, it would be appropriate to reproduce the broad summary of the findings in Vodafone IV as culled out in the decision rendered in W.P. No.583 of 2014 filed by Vodafone Services Pvt. Ltd. vs. Union of India (Vodafone-V) on 13 October 2014. The findings in Vodafone -IV have been summarized in Vodafone V as under:-

- “(i) The sine-qua-non to apply Chapter X of the Act would be arising of Income under the Act out of an International Transaction. This income should be chargeable under the Act, before Chapter X can be applied;
- (ii) The definition of income does not include within its scope capital receipts arising out of capital account transaction unless so specified in Section 2(24) of the Act as income;
- (iii) There is no charge in the Act to tax amounts received and/or arising on account of issue of shares by an Indian entity to a non-resident entity in Sections 4,5,15,22,28,45 and 56 of the Act. This is as it arises out of Capital Accounts transaction and, therefore, is not income;
- (iv) Chapter X of the Act does not contain any charging provision but is a machinery provision to arrive at ALP of a transaction between Associated Enterprises; and
- (v) Chapter X of the Act does not change the character of the receipts but only permits re-quantification of income uninfluenced by the relationship between the Associated Enterprises.”

6) Brief facts leading to this petition are:-

a) The petitioner is an affiliate of and belonging to the Shell

group of companies head quartered in Holland.

b) On 27 March 2009 and 30 March 2009, the petitioner issued equity shares to its non resident Associated Enterprises (AE). The petitioner had issued in the aggregate 85,88,34,369 shares to two of its non resident AE's at a face value of Rs.10/- per share.

c) Alongwith its Return of Income for the A.Y.2009-10 the petitioner filed Form 3CEB (Transfer Pricing Report) under Section 92E of the Act. In its Form 3CEB the petitioner disclosed various international transactions with its AE's. However, the petitioner did not disclose the issue of equity shares to its non resident AE's as it was of the view that in the absence of income arising it was not an International Transaction.

d) The Assessing Officer in terms of Sections 92CA(1) of the Act referred the International Transactions disclosed by the petitioner in Form 3CEB to the TPO. This was for the purpose of computation of Arms Length Price (ALP) of the transaction reflected in Form 3CEB.

f) The TPO during the course of proceedings before it

noticed the transaction of issue of shares by the petitioner to its AE's. Therefore, the TPO issued a show cause notice dated 24 January 2013 to the petitioner. The above notice called upon the petitioner to show cause as to why the ALP should not be determined at Rs.622/- per share in respect of the issue of equity shares by it to its nonresident AE's at Rs.10/- per share.

g) On 28 January 2013 the petitioner responded to the above show cause notice dated 24 January 20123. In its reply the petitioner inter alia pointed out that Chapter X of the Act would have no application as the transaction of issue of equity shares to non resident AE's would not give rise to any income. This for the reason that the transaction of issue of shares is on capital account not giving rise to any income.

h) On 30 January 2013, the TPO passed the impugned order under Section-92CA(3) of the Act holding that in view of Chapter X of the Act, once a transaction between the parties is an international transaction, adjustments to transfer pricing can be done

even on capital account (balance sheet items). The impugned order of the TPO held that the shares were allotted to the AE's at a price which was lower than the ALP of issue of shares which resulted in short receipt of consideration. In the above view, the impugned order computes on the basis of ALP, an enhancement of the issue price of shares from Rs.10 per share to Rs.183.44 per share and also charges interest on the amount short received resulting in transfer pricing adjustment of Rs.15220 crores on the above account.

i) Consequent to the above, on 30 January 2000 itself, the Assessing Officer issued a show cause notice to the petitioner. By the above notice, the petitioner was called upon to explain why the assessment should not be completed in terms of the order dated 30 January 2013 passed by the TPO.

j) The petitioner responded to the show cause notice and amongst other contentions submitted that the amounts received on issue of share capital including share premium is a capital receipt and not chargeable to tax under the Act. The petitioner, in particular,

assailed the order of the TPO on the ground that in the absence of any income arising, there could be no occasion to apply Chapter X of the Act to the transaction of issue of shares.

k) Notwithstanding the above, on 28 March 2013, the Assessing Officer passed a Draft Assessment Order under Section 143(3) read with 144 C(1) of the Act. So far as the primary contention of the petitioner that no income arose on issue of equity shares to its holding company was concerned, the same was negated by holding as under:-

“Further, the TPO can also carry out an adjustment even if the income was notional as section 2(24) of the Income Tax Act used an inclusive definition of income. Hence, income of the assessee would include income on account of adjustment for short receipt of price for issued additional share capital”.

The draft assessment order dated 28 March 2013 makes adjustments as directed in the order dated 30 January 2013 of the TPO.

7) At this stage the petitioner approached this Court.

8) As pointed out above, it is an agreed position between the

parties that the decision in Vodafone IV would cover the issue in principle. In fact, Mr. Dave learned Counsel for the Revenue does not dispute the fact that the issue with regard to chargeability to tax in respect of amounts not received on issue of shares to non resident AE's being on capital account stands covered so far as this Court is concerned. However, the revenue reserves its right to contest the decision of this Court in Vodafone (IV) and (V) before the Hon'ble Supreme Court. Nevertheless, according to Mr. Dave, learned Counsel appearing for the Revenue, the decision in Vodafone IV should not be applied in this case in view of the following distinguishing features:-

- a) The petitioner has an alternative remedy of prosecuting its grievances with the DRP. It is submitted that, in fact, the petitioner has also filed an application before the DRP raising an identical grievance. In these circumstances, this petition ought not to be entertained .
- b) The petitioner in its Form 3CEB had not disclosed its transaction of issue of shares to a non resident AE's even though it is

an international transaction. This failure on the part of the petitioner to disclose the same in Form 3CEB filed should by itself disentitle the petitioner to any relief from this Court; and

c) In the present facts, the issue of shares by the petitioner to its non resident AE's the value of Rs.10/- per share would in view of inter se change in share holding amongst the AE's in the petitioner would be covered by the definition of International Transactions as given in clause (e) in Explanation to the Section 92B of the Act. This is so as it would amount to restructuring and/or reorganizing of the petitioner. In support attention was invited to Para 15 of the affidavit in reply dated 23 September 2013 which shows the change in share holding pattern amongst AE's in the petitioner during the assessment year 2009-10.

9) We shall now consider the above submissions on behalf of the Revenue. So far as the availability of alternative remedy is concerned, the petitioner has at the beginning of today's hearing itself undertaken to withdraw its objection on the issue of jurisdiction before

the DRP. This was accepted by us before considering the issue on merits. Moreover, this petition was filed on 24 April 2013 challenging the impugned orders dated 30 January 2013 of the TPO and the Draft Assessment Order dated 28 March 2014 of the Assessing Officer, on the issue of jurisdiction. This issue has been decided in Vodafone IV and would be binding on all authorities within the State till the Apex Court takes a different view on it. Therefore, in view of the fact that the Revenue does not dispute that the issue on merits stands covered by the decision of Vodafone IV it would serve no useful purpose by directing the petitioner to prosecute its objections before the DRP and the DRP disposing of the same in accordance with Vodafone IV. Thus, in the present facts the distinction sought to be made on the ground of alternative remedy is not such as to warrant not entertaining the petition.

10) The second distinguishing feature from that of Vodafone IV, as canvassed by the Revenue, is that Form 3CEB in respect of the transaction of issue of shares to its AE's, is not disclosed as an

International Transaction. This the petitioner was obliged to do as the transaction is an International Transaction. This was in fact done by the petitioners in Vodafone IV. This stand by the revenue is a little curious as in Vodafone IV the revenue contended that as the petitioners therein had filed Form 3CEB in respect of issue of shares to its AE, they had submitted to the jurisdiction of Chapter X of the Act and cannot now contend that the proceeding to tax such shortfall on Capital account is without jurisdiction. In this case, an exactly opposite stand is being taken by the State. The State is expected to be consistent and not change its stand from case to case. Be that as it may, the petitioner herein had not disclosed the transaction in Form 3CEB as according to the petitioner it was not an international transaction for the reason that it did not give no rise to any income. The fact that the petitioner chose not to declare issue of shares to its non resident AE's in Form 3CEB as in its understanding it fell outside the scope of Chapter X of the Act now stands vindicated by the decision of this Court in Vodafone IV. If the petitioner did not file a particular transaction in Form 3CEB when

so required to be filed, the consequences of the same as provided in the Act would follow. However, the mere not filing of Form 3CEB on the part of the petitioner would not give jurisdiction to the revenue to tax an amount which it does not have jurisdiction to tax. Therefore, we do not find any substance in this objection also.

11) The last objection taken by the Revenue was that in view of the variation in share holding pattern amongst different share holders of the petitioner during the year clearly brought the issue of shares within the clause (e) of Explanation to Section 92B of the Act. In terms of the above provision an international transaction would include a transaction of restructuring entered into by an enterprise with an AE. Mr. Pardiwala, learned Counsel appearing for the petitioner points out that there has been no restructuring of the organization but there has been a mere change in the share holding of different share holders of the petitioner. However, in the present facts we need not examine this for the reason that even if it is assumed that it is an International Transaction, the jurisdictional requirement for Chapter X of the Act to be

applicable is that Income must arise. In this case, admittedly following Vodafone IV no income has arisen. Thus, the jurisdictional requirement for application of Chapter X of the Act is not satisfied.

12) As held in Vodafone IV, the jurisdiction to apply Chapter X of the Act would occasion only when income arises out of International Transaction and such income is chargeable to tax under the Act. The issues raised in the present petition are identical to the issues which arose for consideration before this Court in Vodafone IV. Therefore, following the aforesaid decision we set aside the order dated 30 January 2013 of the TPO to the extent it holds that ALP of issue of equity shares is Rs.183.44 per share as against Rs.10 per share as declared by the petitioner and consequent deemed interest brought to tax on the amount not received when benchmarked to the ALP. Accordingly, we set aside the draft assessment order dated 30 March 2013 to the extent it seeks to bring to tax the ALP of the share issued by the petitioner to its non resident AE's and also deemed interest which is sought to be brought to tax on the ground of non

receipt of the consideration equivalent to the ALP by the petitioner on issue of equity shares. It is further clarified that the petitioner's objection before DRP filed on 25 April 2013 on all issues save and except the issue covered by this order would be considered by the DRP on its own merits.

Accordingly, Rule is made absolute in the above terms.

(S.C. GUPTE, J.)

(M.S. SANKLECHA, J.)