

Income Tax Appellate Tribunal - Bangalore

Vodafone South Ltd, Bangalore vs Assessee on 8 January, 2016

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH : BANGALORE

BEFORE SHRI N.V.VASUDEVAN, JUDICIAL MEMBER

And

SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

Stay Petn. Nos.113 & 114/Bang/2015
(In IT(IT)A Nos.1160 & 1161/Bang/2015)
(Assessment years: 2013-14 & 2014-15)

M/s.Vodafone South Ltd.,
Maruthi Infotech Centre,
11/1, 12/1,Koramangala,
Amarjyothi Layout,
Bangalore-560071.
PAN: AABCB 5847 L

... Petitioner

Vs.

Deputy Director of Income-tax
(International Taxation),
Circle 1(1),
Bangalore.

... Respondent

Petitioner by: Shri Rajan Vora, CA.
Respondent by: Shri Arvind, Standing Counsel for Revenue

Date of hearing : 08/01/2016
Date of pronouncement: 08/01/2016

O R D E R

Per N.V.VASUDEVAN, JM:

These are petitions/applications filed by the Assessee praying for an order of stay of recovery of outstanding demand of Rs.125,67,64,196/- arising out of orders passed u/s.201(1) & 201(1A) of the Income Tax Act, 1961 (Act) for AY 2013-14 & 2014-15.

2. The particulars of the outstanding demand are as follows:

SP Nos.113 & 114/Bang/2015 Particulars Principal Interest Total tax demand
Demand raised as per order under AY 2013-14 66,88,98,048 19,55,75,894
86,44,73,978 sec.201 of the Act AY 2014-15 81,62,00,557 14,06,87,853 95,68,88,410
Total 1,48,50,98,641 33,62,63,747 1,82,13,62,388 Demand as per rectification order
AY 2013-14 69,32,54,409 20,28,27,266 89,60,81,675 passed under sec.154 of the Act
AY 2014-15 81,93,00,742 14,13,81,779 96,06,82,521 Total 1,51,25,55,151 34,42,09,045
1,85,67,64,196 60,00,00,000 Less: Amount paid as per High Court's directions

Balance outstanding demand 1,25,67,64,196

3. The Assessee/Applicant is a subsidiary of Vodafone Mobile Services Ltd. (VMSL). The Assessee is engaged in the business of providing international Long Distance (ILD) services to its subscribers/subscribers of its customers, pursuant to the ILD license granted by the Department of Telecommunication (DOT). As part of its ILD telecommunication services business, the Assessee is responsible for and provides connectivity services in respect of the calls originating/terminating outside India. Vodafone South Limited (hereinafter referred to as 'the Applicant'), a subsidiary company of Vodafone Mobile Services Limited ('VMSL'), was incorporated in India on December 7, 1995 under the Companies Act, 1956 and is inter-alia engaged in provision of International Long Distance ('ILD') services to its subscribers/subscribers of its customers, pursuant to the ILD license granted by the Department of Telecommunication ('DoT') As part of its ILD telecommunication services business, the Applicant is responsible for and provides connectivity services in respect of the calls originating/ terminating outside India. The Applicant, as a telecom operator holding ILD license, takes the call traffic originating from India to outside India (outbound calls) and also receives call traffic originating outside India into India (inbound calls).

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4. For provision of these ILD services, the Applicant obtains carriage services from foreign carriers for carriage of outbound call traffic outside India. Accordingly, the Applicant has entered into agreements with the foreign carriers for provision of carriage services outside India. In consideration of the services so rendered by the foreign carriers, the Applicant pays carnage charges [hereinafter referred to as Interconnect Usage Charges ('IUC')] to such carriers.

5. In a similar manner, the Applicant has also entered into agreements with foreign carriers for provision of bandwidth services, which entail provision of dedicated telecommunication capacity by the foreign carriers to the Applicant for transmission of telecommunication traffic of the Applicant's subscribers and the subscribers of its customers to/from locations outside India. The essence of these agreements, similar to interconnection agreements, is provision of carriage services for transmission of telecommunication traffic outside India, except that the Applicant makes fixed lump-sum payment to the NTOs and not on a per call basis.

6. For Financial Years ('FYs') 2007-08 to 2011-12, the learned Deputy Commissioner of Income Tax (International Tax), Circle 1(1), Bangalore Officer ('Officer') passed an order dated January 28, 2013 inter-alia holding the Applicant as an assessee-in- default for non- deduction of tax at source from IUC payments made to foreign carriers during such years and raising therein aggregate tax and interest demand of INR 257.57 Crores. The Hon'ble Tribunal has also confirmed the demand raised against the Applicant for earlier years by holding that IUC payments made by the Applicant as royalty for use of process.

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7. Based on the order passed for FYs 2007-08 to 2011-12, the learned Officer issued a notice under section 201 of the Act asking the Applicant to provide details of ITJC payments made to the foreign carriers during FY 2012-13 and FY 2013-14 and to show cause for non-deduction of tax at source under section 195 of the Act from such payments. According to the Assessee, the operation of the order dated December 30, 2014 passed by this Hon'ble Tribunal FYs 2007-08 to 2011-12, which has been relied upon by the lower authorities while passing the order for the subject FY, has been stayed by the Hon'ble Karnataka High Court vide interim order dated April 25, 2015.

8. The Applicant filed a detailed reply in response to the above notice, submitting therein the details with respect to the IUC and bandwidth payments made to the foreign carriers and duly substantiating that such payments are not chargeable to tax in the hands of the foreign carriers in India. It was, therefore, submitted that the Applicant is not under an obligation to deduct tax at source thereon under section 195 of the Act.

9. However, the learned Officer passed an order dated February 18, 2013 under section 201(1) read with 201(1A) of the Act, where, on a complete misunderstanding of the facts of the case, the nature of payments and relying on the order passed for earlier years, the learned Officer has concluded that IUC and bandwidth payments are subject to tax withholding under section 195 of the Act, since such payments are taxable in the hands of the foreign carriers as Fee for technical services ('FTS')/ Fee for Included Services ('FIS'), Royalty as also Income from other Sources under the provisions of the Act as well as the applicable Double Taxation Avoidance Agreements ('DTAAs').

SP Nos.113 & 114/Bang/2015 Accordingly, the Applicant has been held as an 'assessee in default' for non-deduction of tax at source from the above IUC and bandwidth payments made to foreign carriers and aggregate tax and interest demand of Rs.185,67,64,169/- was raised against the Applicant for FY 2012-13 & 2013-14.

10. In the aforesaid order, the learned Officer accepted the contention that section 206AA of the Act cannot be applied in relation to the IUC and bandwidth payments made to foreign carriers having a PAN in India. However, the learned Officer enhanced the demand (by approximately INR 8.70 crores for FYs 2012-13 and 2013-14) raised against the Applicant by applying surcharge and education cess to the tax demand raised under section 201 of the Act, even in case of payments which were covered by the DTAAs. It may be noted here that no opportunity of the being heard was provided by the learned Officer to the Applicant before enhancing the demand for the subject FYs.

11. Aggrieved by the impugned order passed by the learned Officer under section 201 of the Act, the Applicant preferred an appeal before the Commissioner of Income-tax (Appeals) -- 12, Bangalore, inter-alia on the following grounds:

(i) The Applicant is not liable to deduct tax at source on IUC and bandwidth payments made to the foreign carriers.

(ii) The impugned order is untenable in law since payment of a particular kind cannot be taxed under three different provisions.

(iii) IUC and bandwidth payments cannot be said to accrue or arise in India under section 5(2) of the Act, merely because the payments are made from India.

(iv) IUC payments and bandwidth payments do not qualify as Royalty or FTS or income from other sources, neither under the provisions of the Act and nor under the applicable DTAA's.

(v) Provisions of section 206AA of the Act cannot be invoked in relation to payments covered by DTAA's.

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(vi) Higher rate of 25% under section 11 5A of the Act cannot be applied to payments covered by DTAA's.

12. The learned CIT(A) has passed an order dated June 24, 2015 (received on July 3, 2015), wherein the appeal of the Applicant has been partly allowed by holding that (i) IUC and bandwidth payments cannot be said to accrue or arise in India; and (ii) IUC and bandwidth payments cannot be held taxable as income from other sources. An appeal has, therefore, been preferred by the Applicant before the Hon'ble Income-tax Appellate Tribunal, Bangalore ('Tribunal') on 17.08.2015

13. Even prior to the expiry of the 30 days period from the date of communication of the demand notice under section 156 of the Act, the learned Officer issued a letter dated March 11, 2015 asking the Applicant to pay the entire demand once it falls due. The Applicant filed a stay application dated March 16, 2015 before the learned Officer during the pendency of the appeal before the learned CIT(A). Simultaneously, apprehending coercive measures from the learned Officer, the Applicant also filed an application before the learned CIT(A) on March 17, 2015 requesting him to grant stay from recovery of the demand raised by the learned Officer. Subsequently, based on the discussions with the tax authorities and apprehending coercive measures for recovery of the impugned demand upon expiry of the 30 days period specified for payment of the demand, the Applicant filed a writ petition before the Hon'ble Karnataka High Court on March 20, 2015 with a prayer to issue directions to the learned Officer for non-recovery of the impugned demand. The Applicant also informed the learned Officer about filing of the writ petition vide its letter dated March 20, 2015. During subsequent discussions with the learned CIT(A) on March 23, 2015, the learned CIT(A) rejected the stay application filed by the Applicant by holding that his office does not have jurisdiction to grant stay.

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14. Further, during the discussion with the learned Officer, the Applicant was asked to pay 50% of the aggregate demand for both the years. However, post conveyance of the inability of the Applicant to deposit 50% of the demand, the learned Officer passed a stay rejection order on March 24, 2015

asking the Applicant to deposit the entire demand by March 26, 2015.

15. In the meanwhile, writ petition filed by the Applicant before the Hon'ble High Court came up for hearing on March 26, 2015. After hearing both the parties and the submissions made by the Applicant, the Hon'ble Court was pleased grant stay in relation to the impugned demand subject to the following conditions: Deposit of INIZ 60 Crores (i.e. approx. of 32% of the aggregate demand of 1NR 185.67 Crores for FY 2012-13 and 2013-14) in two instalments of INR 20 Crores by March 31, 2015 and INR 40 Crores by April 30, 2015; and Furnishing a bank guarantee for the balance amount of INR 1,25,67,64,196.

16. The aforesaid stay is valid for a period of 60 days from the date of communication of the appellate order passed by the learned CIT(A) in the appeals filed by the Applicant (i.e. September 1, 2015 since the order of the learned CIT(A) was received on July 3, 2015).

17. It is not in dispute that the Applicant has duly complied with the aforesaid directions of the Hon'ble High Court and has deposited INR 60 Crores (INR 30 Crores for FY 2013-14) out of the aggregate demand of INR 185.67 Crores raised against the Applicant for FYs 2012-13 and 2013-14 and also furnished the required bank guarantee.

18. According to the Assessee, one of the primary and significant factors, which was considered by and weighed upon the mind of SP Nos.113 & 114/Bang/2015 the learned single judge bench of the Hon'ble Karnataka High Court while granting of stay of demand for the subject AY was that in the earlier years i.e. FYs 2007-08 to 2011-12, in relation to TDS demand (of INR 257.5 Crores) raised against the Applicant on similar issues, the Applicant was granted stay for INR 185.57 Crores (i.e. approx. 71% of the aggregate demand) subject to payment of INR 75 Crores (i.e. approx. 29% of the aggregate demand) and furnishing of bank guarantee for the balance demand.

19. The Learned counsel for the assessee submitted before us that the facts and circumstances under which the Hon'ble High Court granted an order of stay of recovery of outstanding demand remain the same. Therefore, the Tribunal should also grant an order of stay of recovery of outstanding demand. It has been further submitted that the Hon'ble High Court, while passing its order dated 26/3/2015, was satisfied regarding existence of prima facie case, balance of convenience and undue hardship and had granted an order of stay. It was submitted that the interests of revenue are protected as the assessee already given a bank guarantee in respect of remaining outstanding demand. It was pointed out that the impugned order of the CIT(A) was passed based on the decision rendered by the Tribunal for assessment years 2008-09 to 2012-13 and since the aforesaid order of the Tribunal has been questioned by the assessee before the Hon'ble High Court of Karnataka and the same is pending, the correctness of the decision of the Hon'ble Tribunal for assessment years 2008-09 to 2012-13 cannot be said to have attained finality and it is in these circumstances that the assessee is approaching this Tribunal for grant of an order of stay of recovery of outstanding amount, as there is an eminent threat of recovery.

20. The learned Standing Counsel for the Department Shri K.V.Arvind, however, pointed out that the order of stay SP Nos.113 & 114/Bang/2015 granted by the Hon'ble High Court of Karnataka was

valid only till the passing of the order by the CIT(A) and therefore, the said order should not be taken as conclusive in the matter. He also pointed out that there was no stay of the operation of the order of the Tribunal for assessment years 2008-09 to 2012-13, as is sought to be made by the learned counsel for the assessee. In this regard, he pointed out that a Division bench, by its order 25/4/2015, no doubt, stayed the order of the Tribunal dated 30/12/2014 for assessment years 2008-09 to 2012-13. It was an ex-parte order and the revenue moved the division bench for vacating the said ex-parte order and by another order dated 11/6/2015, the ex-parte order was vacated. In the first ex-parte order passed dated 25/4/2015 there was a direction to deposit Rs.75 crores and furnish bank guarantee for the remaining outstanding demand. By the second order dated 11/6/2015, the said order was vacated. However, on further appeal by the assessee, the Hon'ble Supreme Court, in SLP(C) Nos.16874 to 16878/2015, order dated 16/8/2015 only modified the order dated 11/6/2015 by permitting the revenue to withdraw Rs.75 crores deposited by the assessee and held that the bank guarantee will continue to remain till disposal of the appeals by the Hon'ble High Court of Karnataka. According to him, there was no order of stay of operation of the Tribunal's order dated 30/12/2014, as the Supreme Court has not said anything about the stay of operation of the Tribunal's order.

21. We have given a very careful consideration to the rival submissions. It is not in dispute before us that the facts and circumstances under which the appeal of the Assessee for AY 2013-14 & 2014-15 arise for consideration are identical to the appeal pending before the Hon'ble High Court for AY 2008-09 to 2012-13. In fact the CIT(A) in the impugned orders for AY 2013- 14 & 2014-15 has followed the decision of the Tribunal rendered for AY 2008-09 to 2012-13. We find that the outstanding SP Nos.113 & 114/Bang/2015 demand for AY 2008-09 to 2012-13 was a sum of Rs.257.57 Crores and the Hon'ble High Court had granted stay of recovery of the said order subject to payment of a sum of Rs.75 Crores and furnishing of bank guarantee for remaining outstanding sum. In AY 2013-14 & 2014-15 the outstanding demand, (without considering the claim of the Assessee that the outstanding demand would get reduced if Sec.206AAA provisions are considered as not applicable to Rs.95,22,11,050) would be Rs.125,67,64,196. The Assessee has already paid a sum of Rs.60 Crores and has furnished bank guarantee for the remaining outstanding demand. In fact this condition was considered as sufficient by the Hon'ble Karnataka High Court while granting order of stay of recovery of outstanding demand pending decision by the Hon'ble CIT(A). The CIT(A) had no option but to follow the ruling of the Hon'ble Tribunal in Assessee's case for AY 2008-09 to 2012-13. That order of the Hon'ble Tribunal is also under challenge before the Hon'ble Karnataka High Court. In the given scenario, we feel that the existence of prima facie case, balance of convenience and relative hardship, should be considered as being in favour of the Assessee. Keeping in mind the terms on which stay of recovery of outstanding demand was granted by the Hon'ble Karnataka High Court for AY 2008-09 to 2012-13 and for AY 2013-14 & 2014-15, we are of the view that the interests of the revenue would be sufficiently safeguarded by directing the Assessee to continue the bank guarantee already furnished for the remaining outstanding sum. Subject to the above condition, we hold that there shall be an order of stay of recovery of outstanding demand that is sought to be stayed through these petitions, for a period of 180 days from to-day or till disposal of the appeals by the Tribunal, whichever is earlier.

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22. In the result, the stay petition is allowed on the terms stated above.

Pronounced in the open court on 08th January, 2015.

sd/-
(Inturi Rama Rao)
ACCOUNTANT MEMBER

sd/-
(N.V.Vasudevan)
JUDICIAL MEMBER

eksrinivasulu,sps

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore