* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 29.03.2017

\+ **W.P.(C) 2539/2017, C.M. APPL.10957-10958/2017**

M/S. TELENOR (INDIA) COMMUNICATIONS PRIVATE LIMITED (EARLIER KNOWN AS M/S. TELEWINGS COMMUNICATIONS SERVICES PRIVATE LIMITED

..... Petitioner

Through: Sh. Balbir Singh, Sr. Advocate with Sh. Prakash Kumar, Ms. Rubal Maini and Ms. Rashmi Singh, Advocates.

Versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 25(1), NEW DELHI AND ORS. ..... Respondents

Through: Sh. Sanjay Jain, ASG with Sh. Rahul Chaudhary, Sr. Standing Counsel, Ms. Lakshmi Gurung, Jr. Standing Counsel, Ms. Rhea Verma and Sh. Kartik Rai, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner's grievance is that this court's order in W.P.(C) 1874/2017 (decided on 1st March, 2017) has not been given effect to. It contends that the Assessing Officer (hereafter "AO", one of the respondents arrayed in these writ proceedings) whilst seemingly giving effect to the directions in that order, has deprived it of the previous relief given by him.

2. The petitioner had sought benefit of stay of recovery of demands for Assessment Year (AY) 2014-15, to the tune of ₹ 4,18,13,06,110/- subject to its depositing ₹ 62,71,95,920/-. The petitioner had relied on instructions of

the Central Board of Direct Taxes embodied in its Office Memorandum (OM) dated 29.02.2016, to say that it was entitled to the facility of stay of demand in excess of 15% in the exceptions spelt out in Para 4B(b),which reads as under:-

> *"(b) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case when addition on the same issue has ken confirmed by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessees, etc.) - the assessing officer shall refer the matter to the administrative Pr.CIT/CIT, who after considering all relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand."*

3. In its writ petition, the petitioner had previously contended that the AO had not considered the top line credit adjustment which the petitioner was previously reflecting in its books towards substantial services rendered till the end of any financial year but for which the contractual and legal liability to render services in respect of the unutilized consideration subsisted. It was then argued that this amounted to a substantial sum of about ₹ 220 crores. It was further argued, besides, that the license fee adjustment on account of the telecom policy in the wake of the Supreme Court's judgment in 2G Spectrum's case, the amount set off i.e. ₹ 600 crores out of the unutilized license fee for the issuance of a new Spectrum License in terms of the policy. The revenue's treatment of that amount as 'capital' is contested. The petitioner also complained that the AO had not taken into account the refund standing to the credit of the petitioner to the tune of about ₹ 27 crores.

4. After considering the parties' submissions, this court had disposed of the petition, in terms of the following operative order:

> *"8. We have considered the submissions of the parties. The impugned order dated 22.02.2017, undoubtedly, has given effect to the OM, relied upon by the petitioner in the sense that the demand has been stayed subject to substantial relief of 85%. However, the circular - as noticed earlier and highlighted by the petitioner also carved out an expenditure in regard to certain "covered matters" or in regard to other contentious issues, the condition of 15% pre-deposit can be relaxed. The petitioner contentions in this regard are three fold. The impugned order does not disclose whether the AO had an occasion to consider or examine these issues. In these circumstances, the Court is of the opinion that the AO should consider and make an order under Section 220(6) of the Act specifically dealing with the three arguments urged by the petitioner and reflected in this order. The AO shall pass appropriate orders in this regard, after giving such necessary opportunity to the petitioner as he deems expedient in the circumstances, with the approval of the competent officer i.e. the concerned Principal CIT/Commissioner of Income Tax (Appeals), within two weeks from today.*
>
> *9. In the meanwhile, on instructions from the concerned Assessing Officer Mr. Mandeep Panwar, who is present in Court, the revenue would not take any coercive measures to enforce the outstanding demand till such order is made.*
>
> *10. The writ petition along with pending application stands disposed off in the above terms."*

5. After the remand by this court, the AO made a fresh order ("the impugned order") on 14th March 2017. In this, the AO considered the issue of stay virtually afresh and stated as follows:

> *"It is important to note that the above stated paragraph of O.M. dated 26.02.2014 is not applicable in the instance case of*

assessee. The assessee failed to provide any instance where addition on this issue has been deleted by appellate authorities in their own case or the decision of Supreme Court or jurisdictional Hon'ble High Court is in favour of the assessee. But the assessee has quoted that in the case of M/s. Shyam Telelinks Ltd. 2013 (31 Taxman.Com. 239) the issue has been favorably covered by the Hon'ble Delhi ITAT. The issue related to unearned revenue remains contentious. Therefore, the resulted demand on this issue shall remain unenforceable till the disposal of appeal at the first appellate authority.

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In light of above discussion, depreciation as claimed by assessee on increased cost of spectrum will remain non-enforceable till disposal of appeal at the first appellate authority.

(iii) Consideration of refund available for the future years.

Vide letter dated 10.03.2017 the assessee submitted that the following:-

> *"That the Hon'ble High Court in its has directed that while passing the fresh stay order, your goodself should consider & refund, as per the return of income filed, aggregating to INR 27,93,09,100/- (A. Y.2016-17 INR 12,70,24,560/- and A.Y.2015-16 INR 15,22,84,540/-) due to the company."*

In this regard it is pertinent to mention section 143(1D) which clearly says that the following:-

"Notwithstanding anything contained with sub section 1 the processing of a return shall not be necessarily, where a notice has been issued to the assessee under sub section (2)".

4. In light of above discussion the processing of ITR for the A.Y.2015-16 cannot be done as notice u/s 143(2) has already been issued to the assessee. Vide notice dated 22.04.2016. ForA.Y.2016-17 the CPC has not forwarded the necessary ticket for processing of ITR. Hence, the above mentioned refund cannot be taken under consideration for passing order u/s220(6) of the Income Tax Act, 1961.

5. The balance of the addition to the total income returned of the assessee; particularly the addition relating to capital gains is based on assessee own submission that the amount is indeed in nature of capital receipts. There is no contrary decision of the Hon'ble ITAT, Hon'ble High Court or Hon'ble Supreme Court. Neither this issue has been subject matter of considerations of earlier years in assessee own case. In view of the above and for the detailed reason recorded in the assessment order the additions will in all likelihood will stand the test of judicial scrutiny.
Accordingly, I do not find any reason for stay of demand attributable to the addition on account of this issue.

6. Without prejudice to the above it has also been reported in Media that they are in advance stage of negotiation with M/s.Bharti Airtel Ltd. for merger of the assessee.

7. In view of the above facts the future existence and the finances of the assessee M/s. Telenor (India) Communication Pvt. Ltd. is highly uncertain. Hence, the risk of recovery has increased. Therefore, to safe guard the interest of revenue and in view of para 4(b)(a) of office memorandum issued by CBDT dated 29.02.2016. The assessee is directed to make entire payment of adjusted demand of Rs. 2,30,24,19,520/-

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> *8. Total enforceable tax liability comes to Rs. 2,30,24,19,520/- in this refund claimed by the assessee though not entitled comes to Rs.27.22Cr. even if this amount of refund is considered the total adjusted tax liability comes to Rs.203 Cr, which is enforceable. Hence, the assessee is directed to pay this amount in three equal installments on or before the following dates…."*

6. The petitioner is aggrieved by the above order, and states that this amounts to a review of the previous order, which had clearly expressed the revenue's opinion that relief of upto 85% stay of demand was warranted. The court had remitted the question of considering whether the petitioner's plea for stay beyond 15% was warranted, having regard to the provisions of the OM, Para 4 (B) (b). The court, in its previous order, dated 1st March, 2017 too felt that there was substantial merit in this regard and consequently directed the AO to examine the matter in the light of facts to say whether and if so, to what extent such relief could be given. This, however, did not mean that the AO was to be given complete relief, nor could it say that it was entitled to it as a matter of right. It is submitted that the AO exceeded the scope of remand, inasmuch as the impugned order has resulted in unfairly depriving the benefit of the previous order, which had required the assessee paying only ₹ 62 crores. However, the impugned order requires a pre-deposit of ₹ 203 crores after adjusting ₹ 27 crores refund.

7. The learned Additional Solicitor General (ASG) urged this court not to interfere with the impugned order, which has examined each of the issues that the petitioner had a grievance with, on account of additions made by the AO, on its merits, to determine the *prima facie* strength of the case in appeal. The mere fact that the demand was based on a high pitch assessment did not mean that assessees who are to pay the tax due after a valid assessment, are

to expect stay automatically, if the demand is high. No doubt the OM allows such discretion, but that has to be used judiciously. Having regard to the overall circumstances of the case, the AO was justified in saying that the important issues which the assessee had complained of in its appeal justified a demand for ₹ 220 crores; after adjusting ₹ 27 crores the assessee had to pay ₹ 203 crores in three easy installments. The ASG cautioned that this court's powers under Article 226 are circumscribed; unless there is illegality or procedural irregularity or unfairness in the order, the discretion used, - at least in the facts of this case, cannot be faulted with, or reviewed on its merits. It was submitted that this court should not strictly construe the OM as though it were a statute, but consider whether broadly the revenue adopts a reasonable approach in its interpretation. As long as such a reasonable and judicious approach is discernable, the court should not interfere with the discretion to grant or refuse, or grant conditional interim relief.

8. There is, in the opinion of this court, considerable merit in the petitioners' grievance that after the remit by this court, in its order of 1st March, 2017, the AO had to confine the focus of his inquiry *only and only to* whether to grant relief in excess of 85% exemption from compliance with the demand to pay tax. Now, the court cannot go into the merits of the matter, since the appeal is pending before the Appellate Commissioner. However, what is apparent is that when the AO made his first order, he was decidedly of the opinion that the petitioner/assessee was entitled to the facility of paying 15% of the amounted demanded, to secure a stay of demand during pendency of its appeal. He granted that relief. The petitioner wanted more, and contended that the AO had overlooked three points and could well have invoked the power to grant relief in excess of 85%, i.e could

have even completely absolved it of the liability to pay anything towards the tax demand, since its case fell within the provision in the concerned circular.

9. The Central Board of Direct Taxes (CBDT) had previously issued instruction No. 1914 dated 02.12.1993. This was clarified by later instructions dated 21.03.1996. The instruction contains the guidelines issued by the Board regarding the procedure to be followed for recovery of the outstanding demand including the procedure for grant of stay of demand. Further instructions titled Office Memorandum (F.No.404/72/93-ITCC) dated 29.02.2016 were issued in order to streamline the process of grant of stay. It is necessary to set out the entire Office Memorandum for this matter turns essentially on our interpretation of it. It reads as follows:-

> *"Office Memorandum F.No.404/72/93-ITCC], Dated 29-2-2016*
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> *Instruction No. 1914 dated 21-3-1996 contains guidelines issued by the Board regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand.*
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> *2. In part 'C' of the Instruction, it has been prescribed that a demand will be stayed only if there are valid reasons for doing so and that mere filing of an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. It has been further prescribed that while granting stay, the field officers may require the assessee to offer a suitable security (bank guarantee, etc.) and/ or require the assessee to pay a reasonable amount in lump sum or in instalments.*
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> *3. It has been reported that the field authorities often insist on payment of a very high proportion of the disputed demand before granting stay of the balance demand. This often results in hardship for the taxpayers seeking stay of demand.*

4. In order to streamline the process of grant of stay and standardize the quantum of lump sum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT (A), the following modified guidelines are being issued in partial modification of Instruction No. 1914:

A) In a case where the outstanding demand is disputed before CIT (A), the assessing officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in para (B) here under.

(B) In a situation where,

(a) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted (e.g. in a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of Revenue or addition is based on credible evidence collected in a search or survey operation, etc.) or,

(b) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.), the assessing officer shall refer the matter to the administrative Pr. CIT/CIT, who after considering all relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand.

(C) In a case where stay of demand is granted by the assessing officer on payment of 15% of the disputed demand and the assessee is still aggrieved, he may approach the jurisdictional

administrative Pr. CIT/CIT for a review of the decision of the assessing officer.

(D) The assessing officer shall dispose of a stay petition within 2 weeks of filing of the petition. If a reference has been made to Pr. CIT/CIT under para 4 (B) above or a review petition has been filed by the assessee under para 4 (C) above, the same shall also be disposed of by the Pr. CIT/CIT within 2 weeks of the assessing officer making such reference or the assessee filing such review, as the case may be.

(E) In granting stay, the Assessing Officer may impose such conditions as he may think fit. He may, inter alia,-

(i) require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled;
(ii) reserve the right to review the order passed after expiry of reasonable period (say 6 months) or if the assessee has not co-operated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations;
(iii) reserve the right to adjust refunds arising, if any, against the demand, to the extent of the amount required for granting stay and subject to the provisions of section 245."

10. No doubt, the AO has a discretion of referring the matter to the CIT if he is of the opinion that the assessee's case in any given matter, deserves consideration for relief beyond the mandated 15% pre-deposit: evident from the phrase *"the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.)"* . In the present case, no doubt the AO did not in the first

instance so refer the matter to the higher official; however, this court's order had clearly stated that the issue with respect to such relief should be reconsidered. If the AO felt constrained by the terms of the circular, he could have sought a clarification; at worst, he could have referred the matter to the Commissioner, if he thought that he did not have the power to grant such relief. What he could not have done was to revisit the entire issue as to whether the relief to the extent of 85% waiver of demand deposit could be given. This is for the reason that the previous order, whereby that relief was given, clearly took note of the relevant facts and granted the benefit to the assessee, as can be seen from the following extract (of the AO's previous order dated 22.02.2017):

> *"Considering the facts and circumstances of the case and CBDT's instruction dated 22-2-2016 which modified the existing instruction no. 1914 dated 21-03-1996 to provide that where an appeal against the assessment order is pending with the first appellate authority the AO shall grant the stay of demand till the disposal of appeal, if the assessee has deposited 15% of outstanding demand. In your case the demand for the A.Y. 2014- 15 of Rs.4,18,13,06,110/- will be stayed till the disposal of appeal by CTT(A) subject to payment of 15% of the demand i.e. Rs.62,71,95,920/-.*
> *This is subject to the following conditions…"*

11. The order of this court did not set aside the above order of the AO and direct him to look into the matter afresh. What it did require him to do was to exercise discretion and consider whether <u>further relief could be granted.</u> The scope of remand by a higher court or authority limits and correspondingly circumscribes the jurisdiction of the lower authority exercising its powers. This was explained in the Supreme Court judgment reported as *Nainsingh v Koonwarjee* AIR 1997 SC 997 in the following words:

> *"The first appellate court reversed the findings of the trial court on those issues. It came to the conclusion that the civil court had jurisdiction to entertain the suit. It further held that though in view of the abolition of the jagirs, the suit properties had vested in the State, it was for the State to get itself impleaded if it is interested in this litigation and as the State had not chosen to get itself impleaded, it was open to the plaintiff to press the suit. In view of those conclusions, the appellate court set aside the decree of the trial court and remanded the suit to the trial court for deciding the other issues left undecided. After the remand, the trial court negatived every one of the contentions taken by the defendants and decreed the suit as prayed for. In appeal that decree was confirmed. In second appeal the High Court of Madhya Pradesh agreed with the trial court and the appellate court on the findings given on all issues excepting the issue relating to the effect of abolition of the jagirs on the suit. On that issue, it came to the conclusion that in view of the abolition of jagirs under the Jagir Abolition Act, the plaintiff had lost his title to the suit properties and therefore he could not get a decree for possession of the suit properties. It rejected the contention of the plaintiff that that issue is concluded by the decision of the appellate court made before remand as the same had not been appealed against. It opined that the court had inherent power to consider the correctness of that order. It accordingly allowed the appeal and dismissed the suit. The High Court, in our opinion, erred in holding that the correctness of the remand order was open to review by it. The order in question was made under rule 23, Order 41, Civil Procedure Code. That order was appealable under Order 43 of that Code. As the same was not appealed against, its correctness was no more open to examination in view of s. 105 (2) of the Code which lays down that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness."*

12. In view of this position, the court's view is that the AO could not have revisited the matter, as if there were a fresh or open remand. The court

notices that the AO – after rejecting the assessee's claim for benefit (i.e beyond 85% waiver) directed payment of ₹ 203 crores after adjusting ₹ 27,93,09,100/- refund. This relief (of adjustment of ₹ 27,93,09,100/- refund) had not been considered in the earlier order. In these circumstances, it is held that the impugned order, to the extent it reviewed the previous order (dated 22nd February, 2017) cannot be sustained. The relief granted (i.e adjustment of refund amount of ₹27,93,09,100/-) is, however, upheld. Accordingly, the impugned order, to the extent it reviewed the previous order of 22nd February 2017 and directed payments of ₹ 62,71,95,920/- is set aside. However, to the extent that it granted relief under Para (E) of the instruction (which the AO was within his rights to grant in terms of the remand) is upheld. Therefore, the assessee is directed to deposit the balance amount, i.e. ₹34,78,86,820/- (₹ 62,71,95,920/- minus ₹27,93,09,100/-) within two weeks, which would be sufficient compliance of the orders.

13. The writ petition partially succeeds and is allowed in the above terms, without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

MARCH 29, 2017