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

% *Date of decision: 24th February, 2014*

\+ W.P.(C) 1235/2014, C.M. APPL. 2576/2014

SONY INDIA PVT. LTD. ..... Petitioner

Through: Sh. Deepak Chopra, Sh. Harpreet Singh and Sh. Amit Shrivastava, Advocates.

versus

ADDL. COMMISSIONER OF INCOME TAX AND ANR. ..... Respondents

Through: Sh. Rohit Madan, Sh. Akash Vajpai and Sh. P. Roy Choudhry, Advocates.

\+ W.P.(C) 1178/2014, C.M. APPL. 2465/2014

SONY MOBILE COMMUNICATIONS (INDIA) PVT.LTD ..... Petitioner

Through : Sh. Deepak Chopra, Sh. Harpreet Singh and Sh. Amit Shrivastava, Advocates.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX & ANR. ..... Respondents

Through : Sh. Kamal Sawhney, Sr. Standing Counsel with Sh. Sanjay Kumar and Sh. Raghvendra Singh, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

WP(C) 1178/2014

This writ petition has been filed by Sony Mobile communications (India) Pvt. Ltd. ("Sony Mobile" hereafter) a company which has now merged with Sony India Pvt. Ltd., the petitioner in WP(C) No.1235/2014 ("Sony India", hereafter). The claim in the petitions is for issuance of a writ quashing the attachment order passed by the first respondent i.e., the Additional Commissioner of Income tax under section 226(3) of the Income Tax Act, 1961 for the assessment year 2009-10. The impugned order was passed on 17.2.2014 in the circumstances narrated below.

2. Sony Mobile was incorporated on 23.4.2007 as a subsidiary of Sony Ericson Mobile Communications of Sweden. It is engaged in the business of importing, buying and selling a wide range of mobile phones in India and providing after-sales support services. In respect of the assessment year 2009-10, it filed a return of income declaring a total income of Rs.31.13 crores. The first respondent i.e. the Assessing officer, scrutinised the return after issuing notice under Section 143(2) and referred the return to the transfer pricing officer (TPO) requiring him to determine the arm's length price of the international transactions of the petitioner. The TPO recommended the adjustment of Rs.70.15 crores on account of excess advertising, marketing and promotion

expenses (AMP expenses) incurred by the petitioner in respect of the brand owned by the foreign parent company. A draft assessment order was accordingly prepared by the first respondent on 26.3.2013 proposing to make a transfer pricing adjustment of Rs.70.15 crores on account of AMP expenses and disallowance of advertisement and marketing expenses of Rs.12.27 crores on the footing that such expenses were capital in nature.

3. Sony Mobile filed objections to the draft assessment order before the dispute resolution panel (DRP) which gave some minor relief in respect of the transfer pricing adjustment but dismissed the other objections. In terms of the directions of the DRP, a final assessment order was passed by the first respondent on 10.1.2014 computing the total income of the petitioner at Rs.113.56 crores and raised a tax demand of Rs.43,87,90,358/-.

4. On receipt of the assessment order, an appeal was preferred against it before the Income Tax Appellate Tribunal, Delhi Bench on 13.2.2014 and the same was registered as ITA No.836/Del/2014. On 17.2.2014, a stay application was filed before the Tribunal seeking stay of the disputed demand and it is claimed that on the same day it informed the respondents about the filing of the stay application and

requested that no coercive action may be taken till the Tribunal disposed of the stay application. In the meantime, on 14.2.2014, an application had been filed before the AO under section 220(3) of the Act seeking stay of the recovery of the demand of tax. On this, the AO passed an order on 17.2.2014. There, he observed that the demand became payable in the month of February, 2014 but no payment was made by Sony Mobile against the same. The AO also noted the statement of the petitioner that it was in the process of filing an appeal as well as a stay application before the Tribunal and the request that till the disposal of the appeal the proceedings should be kept in abeyance. He however observed that the stay application cannot be accepted for the following reasons :

> *"01. Mere filing of an appeal with the ITAT is not ground enough for the stay of recovery proceedings.*
>
> *02 From perusal of your latest return of income filed, it is observed that your financial condition is stable and you have liquid funds at your disposal. Since you are in a position to pay the outstanding demand, and it will not cause any genuine hardship on you, your stay petition is rejected.*
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> *The stay petition is therefore, rejected. You are again requested to pay the outstanding demand immediately. In case of failure, coercive measures will be taken to recover the outstanding demand, without giving any opportunity of being heard."*

5. On the same day on which he rejected the application filed by the petitioner, i.e. on 17.2.2014, the Deputy Commissioner, Circle 9(1), New Delhi issued a notice under section 226(3) to the Branch Manager, Citi Bank (Parliament Street Branch) calling upon it to pay any amounts which Citi Bank had to pay the account holder, Sony Mobile. The relevant details of the amount of tax due from the petitioner were also given. Thus, the Citi Bank was garnished from making any payment of the monies which the petitioner had in its bank account with the said bank.

6. On 19.2.2014 (wrongly written as 19.3.2014) the Citi Bank wrote to the Deputy Commissioner of Income Tax reporting compliance and enclosing the demand draft in favour of the Deputy Commissioner of Income Tax, Circle 9(1), new Delhi for an amount of Rs.43,87,90,358/-.

7. On the same day, the Deputy Commissioner of Income Tax wrote to City bank that the bank account may be released from attachment since the assessee has made sufficient payment.

WP(C) 1235/2014

8. This writ petition, by Sony India Pvt. Ltd. seeks the same reliefs as in WP(C) 1178/2014. For the sake of completeness of the record we may notice the following facts. Sony India was incorporated in India on 17.11.1994; it was a subsidiary of Sony Holding (Asia), B.V., Netherlands and Sony Gulf FZE. It is engaged in the business of importing and disputing a wide range of consumer electronic products in India and providing after-sales support services. In respect of the assessment year 2009-10, it filed a return of income on 29.9.2009 declaring a loss of Rs.24.72 crores. After issue of a notice under section 143(2) of the Act, the AO referred the matter to the TPO for determination of the ALP of the international transactions. The TPO made an adjustment of Rs.149.35 crores on account of excess AMP expenses and another adjustment of Rs.5.98 crores on account of additional compensation for software services transactions. The AO prepared a draft assessment order on 26.3.2013 on the basis of the recommendations of the TPO and after making further disallowances, determined the total income of the petitioner at Rs.161.56 crores. Objections were filed by Sony India before the DRP which gave some minor reliefs but substantially dismissed the objections.

9. On 13.1.2014 the AO passed the final assessment order computing the total income of Sony India at Rs.137.26 crores, against which it preferred an appeal before the Income tax Appellate Tribunal, Delhi Bench in ITA 837/Del/2014. The said appeal was filed on 13.2.2014; a stay application was also filed before the Tribunal on 18.2.2014.

10. In the meantime on 14.2.2014, Sony India filed an application for stay of the payment of tax under section 220(3) of the Act. On 19.2.2014 Sony India appears to have met the officer in connection with the stay of demand and informed the latter of the stay application field before the Income Tax Appellate Tribunal. It further appears that the first respondent did not dispose of the stay application filed before him. A garnishee order was passed under section 226(3) attaching the bank account of Sony India. The latter apprehends that as in the case of WP(C) No.1178/2014, in the present case too the first respondent may follow the same course and it may withdraw the disputed tax demand from the garnished bank accounts.

11. Both the appeals and the stay applications filed before the Tribunal are stated to be pending and no orders have been passed thereon.

12. The argument of the counsel for the petitioner in both the petitions is that the assessing officer was not justified in passing garnishee orders under section 226(3) of the Income Tax Act even while being aware that the petitioners have filed appeals and stay applications before the Tribunal. It is contended that the AO has shown unseemly haste in withdrawing the money from the Citi Bank without waiting for the outcome of the stay applications filed before the Tribunal. According to the counsel for the petitioners, this shows lack of faith in the judicial process and should be deprecated. He accordingly requests that the respondents should be restrained from withdrawing the monies from the bank account in WP(CP 1235/2014 and should be directed to return/reverse the same in WP(C) 1178/2014, where the amount was already withdrawn from the bank account. He also claims directions to the Tribunal to dispose of the stay applications at the earliest.

13. The learned standing counsel for the revenue submitted that the respondent was well within his rights in appropriating the amount of Rs.43.87 crores. He submitted that the assessed tax demand became payable as soon as a period of 30 days from the date on which the notice of demand issued under Section 156 of the Act was served on the petitioner expired; since the demand notice was served on 17.1.2014, the

tax became due for payment on the expiry of 30 days thereafter, i.e. 16.2.2014 and since the petitioner did not pay the same until that period, the assessing officer rightly resorted to recovery proceedings. He further pointed out that there was no impropriety in the assessing officer taking coercive measures to recover the tax, including attachment/garnishee orders under section 226(3) passed on 17.2.2014, since such step was taken after the stay applications filed by the petitioners were rejected; moreover the petitioner filed stay applications before the Tribunal on 17.2.2014 and 18.2.2014 which fact was not known to the assessing officer when he passed the orders under section 226(3). In these circumstances, it was submitted by the learned standing counsel that there was no illegality or impropriety in recovering the amounts due from the petitioners under section 156 of the Act.

14. We have carefully considered the facts and the material on record in the light of the rival submissions. Section 156 of the Act provides for the service of the notice of demand in the prescribed form pursuant to the framing of the assessment. This section does not provide for the period of 30 days within which tax is to be paid, failing which steps for recovery of the same can be taken. The period of 30 days is prescribed in section 220(1). The proviso to section 220(1) empowers the assessing

officer, for sufficient reasons, to curtail the period of 30 days, if in his opinion the grant of 30 days will be detrimental to the revenue. Sub-section (3) of Section 220 empowers the assessing officer, on an application made by the assessee before the expiry of the due date under sub-section (1), to extend the time for payment or allow payment by instalments, subject to such conditions as he may think fit to impose in the circumstances of the case. Sub-section (4) says that if the tax demand is not paid within the period of 30 days or within the extended period, the assessee shall be deemed to be in default. Sub-section (6) confers a discretion upon the assessing officer to be exercised subject to such conditions as he may think fit to impose in the circumstances of the case, to treat the assessee as not being in default in respect of the amount in dispute in the appeal, if an appeal has been presented by the assessee under Section 246/ 246A even though the time for payment has expired; the discretion can be exercised by the assessing officer as long as the appeal remains undisposed of.

15. Technically section 220(3) requires an application for extension of time to pay the tax demanded or for permission to pay the same in instalments to be filed before the expiry of the due date for payment. In the present case, the petitioners filed the applications under Section

220(3) before the assessing officer on 14.02.2014, which satisfies the sub-section. This is not disputed. 14.02.2014 happened to be a Friday, and 15.02.2014 and 16.02.2014 were Saturday and Sunday. The next working day therefore was only 17.02.2014 and it was on this day that the assessing officer rejected the applications. The same day, he issued the garnishee order under Section 226(3) to the Citi Bank. It was on 17.02.2014 that Sony Mobile submitted a stay petition before the Tribunal seeking stay of the disputed tax demand in the appeal filed in ITA No.836/Del/2014 on 13.02.2014. Sony India Pvt. Ltd. seems to have filed an appeal before the Tribunal on 13.02.2014 in ITA No.837/Del/2014 but the stay application was filed before the Tribunal on 18.02.2014. At least in the case of Sony India Pvt. Ltd., the respondent could not have known that a stay application would be filed before the Tribunal on the next day. In the case of Sony Mobile, it is a moot question whether the assessing officer, at the time of passing the garnishee order and rejecting the stay application on 17.2.2014, was aware of the stay application filed by the petitioner on that day. His letter dated 17.2.2014 in this case states that mere filing of an appeal with the Tribunal is not good ground for the stay of the recovery proceedings.

16. Having said that this is a case in which technically no fault could be found with the assessing officer, we feel that there was an element of impropriety in his action in issuing the garnishee order under section 226(3) on 17.2.2014, the very day on which he rejected the stay application filed by the petitioner under section 220(3). It is expected of him, having rejected the stay application, to wait for a reasonable period before he takes coercive steps to recover the amounts since the petitioner, faced with an order rejecting the stay application, may need some time to make arrangements to pay the entire tax demand or come up with proposals for paying the same in instalments. That opportunity was not afforded by the assessing officer in the present cases. The assessing officer is a prospector of the revenue and he is no doubt expected to protect the interests of the revenue zealously, but such zeal has to be tempered with the rules of fair play and an anxiety to ensure that a opportunity is not lost to the assessee to make alternative arrangements for clearing the tax dues, once the stay applications filed under section 220(3) are rejected. Taking away the amount of Rs.43.87 crores from the bank account of the petitioner may perhaps not be legally faulted, but taking into account the haste with which the assessing officer acted in the present case it seems to us that there was

an element of arbitrariness in the action of the assessing officer. In our opinion, since the stay applications filed by the petitioners are pending before the Tribunal, the more appropriate course would be to issue the following directions :

a) the assessing officer shall reverse the amount of Rs.43.87 crores recovered from the bank account in Citi Bank and credit the same in the account of the petitioner;

b) the petitioner however will not be entitled to draw from the said bank account any amount that may reduce the balance in the account to an amount below Rs.43.87 crores – in other words the petitioner shall maintain a balance of Rs.43.87 crores in the said account;

c) the Income Tax Appellate Tribunal, Delhi Bench before which the appeals and stay applications are pending is directed to hear the stay applications on 28.2.2014 (Friday) and pass such orders thereon as it may think fit after hearing both the sides;

d) the parties shall abide by the orders passed by the Tribunal; and

e) the respondents shall not take any coercive steps to recover the tax till the Tribunal disposes of the stay applications;

f) the appeals filed by the assessee before the Tribunal shall be disposed of as expeditiously as possible.

The writ petitions are disposed of in the above terms with no order as to costs.

Dasti.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

FEBRUARY 24, 2014
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