IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 16453 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS JUSTICE SONIA GOKANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VODAFONE WEST LIMITED FORMERLYKNOWN AS VODAFONE ESSAR....Petitioner(s)

Versus

ASSISTANT COMMISSIONER OF INCOME TAX....Respondent(s)

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Appearance:

MR SN SOPARKAR, SENIOR COUNSEL WITH MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

MS PAURAMI B SHETH, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**

and
HONOURABLE MS JUSTICE SONIA GOKANI

Date : 05/03/2013

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Heard learned counsel for the parties for final disposal of the petition.

2. The petitioner has challenged notice dated 7.3.2012 for reopening of assessment for the assessment year 2005-2006 which was previously framed by the Assessing Officer after scrutiny. Such notice thus was issued beyond a period of four years from the end of relevant assessment year. The Assessing Officer supplied his reasons recorded for reopening the assessment at the insistence of the petitioner. Such reasons read as under :

"A survey action u/s.133A of the Income Tax Act was carried out in the case of certain telecom companies including M/s. Vodafone Essar Ltd., in Mumbai.

Non-deduction of TDS on prepaid mobile SIM cards and recharge vouchers :

During the survey in the case of M/s. Vodafone Essar Ltd., it is seen that they were offering mobile cellular service to their customers under both prepaid categories as well as post paid services. In the course of survey it was found that in the case of postpaid services, the initial sale of SIM cards is done through a network of distributors acting as agents of the

telecom companies and for each SIM-card sold (subscriber added), a certain amount around Rs.400-500/- per connection is paid to the distributor as commission. Further during the survey, on examination of the accounts, it was found that TDS is paid on this amount of discount paid for postpaid connection u/s.194H.

The survey revealed that the modus operandi in the case of prepaid SIM cards was very much the same, in the sense that prepaid SIM cards and recharge vouchers were again sold through the network of distributors and agents who remit the sale proceeds back to the telecom companies, after retaining an amount of approximately 3-4% which is termed as “discount” in the industry. This “discount” represents the income of the distributor on account of the services provided for the sale of SIM-cards and re-charge vouchers and the monies received by the telecom companies are net of such discount. Thus the facts pertaining in this regard are para material with that of post post cards in respect of sale of SIM-cards.

Because the same channel of distributors selling the post paid SIM-cards, also sell the prepaid and recharge vouchers and thus the services being offered by the distributors are identical. Thus, the nature of income earned by distributors, in its very substance and effect, is commission which is paid for services rendered by the net-work of distributors. On analysis of facts, it is clear that in the case of the telecom operators, the margin retained by the distributors which is termed as ‘discount’ is nothing but commission payment for the services rendered by the distributors on which, like in the case of postpaid connections, TDS is required to be deducted u/s.194H on margin retained by distributors on sale of prepaid SIM-cards and recharge vouchers.

On this very issue, the Kerala High Court, the Calcutta High Court and the Delhi Bench of the ITAT have given the decisions in favour of the Department in the following cases :

(i) Idea Cellular Ltd. Vs. DCIT
208-TIOL-739-ITAT,Delhi
(ii) Vodafone Essar Cellular Ltd. Vs. ACIT
2010-TIOL-655-HC-Kerala-IT
(iii)Bharti Cellular Ltd. Vs. ACIT(2011)
ITA No.222 of 2006(Calcutta)

In the Calcutta High Court's decision which is the most recent, the Hon'ble High Court has observed :

(i) Property of pre-paid Coupons even after transfer remains with the telecom companies only.

(ii)Distributors acted only as facilitators for providing services by the tax payer(telecom companies)

(iii)Every thing was regulated and guided by the tax payer(telecom companies) and the distributor did not have free choice to send.

(iv) Rate of pre-paid coupons was also fixed by the tax payer(telecom companies)

Accordingly, the Hon'ble High Court has held that the relationship between the tax payer(telecom companies) and distributors are of principal to agent. The Hon'ble High Court therefore, had supported the contention of the Department that as per the wording of sec.194H of the Income Tax Act, 1961, commission or brokerage may be received or receivable indirectly also by a person acting on behalf of another person. Therefore, it is clear that the discount given by the tax payer (telecom companies) was in the real sense commission paid to the distributors indirectly and the same is covered u/s.194H of the Income Tax Act, 1961.

However, in the case of Vodafone Essar Gujarat Ltd for A.Y. 2005-06 TDS has not been deducted on such payments made to distributors/agents. Consequently, the entire expenditure claimed by the assessee in his books needs to be disallowed u/s.40(a)(ia) of the Act. The assessee has

neither disclosed this fact nor filed any details in respect of the fact that the TDS has not been deducted on such expenditure during the assessment/reassessment proceedings. Therefore, the assessee has not made full and true disclosure of all material facts necessary for his assessment.

Non-deduction of TDS on roaming charges:

During the course of survey, it is also seen that the assessee was not deducting TDS on roaming charges. The charges paid on account of roaming charges are similar to the interconnectivity charges, in the sense that these charges are paid for making use of the network of another operator whose services are utilised for connecting the call. In the present survey, it was seen that TDS was being deducted by the assessee on interconnectivity charges but not TDS was being deducted on roaming charges. There does not appear to be any justification for this discrimination.

The payment made by Vodafone Essar Gujarat Ltd. on account of interconnectivity charges is in the nature of payment for fees for technical services and TDS needs to be deducted on it. Since the services rendered for which roaming charges and interconnectivity charges paid are essentially the same, TDS needs to be deducted for roaming charges in the case of Vodafone Essar Mobile Services Ltd. However, TDS has not been deducted on such payments (roaming charges). Consequently, the entire expenditure claimed by the assessee in his books needs to be disallowed u/s40(a)(ia) of the Act. The assessee has neither disclosed this fact nor filed any details in respect of the fact that the TDS has not been deducted on such expenditure during the assessment/reassessment proceedings. Therefore, the assessee has not made full and true disclosure of all material facts necessary for his assessment."

3. The petitioner raised detailed objections to such proposal for reopening the assessment under

communication dated 22.5.2012. In such objections, the petitioner contended inter-alia that the petitioner had made true and full disclosures. The issues were examined by the Assessing Officer in the original assessment. Reopening beyond a period of four years therefore, would not be permissible.

4. The Assessing Officer however, rejected such objections by his order dated 16.11.2012. Hence this petition.

5. Taking us through the reasons recorded by the Assessing Officer and the assessment proceedings, counsel for the petitioner contended that reopening beyond four years was not permissible. The petitioner had disclosed truly and fully all material facts relevant for assessment.

5.1) It was pointed out that in the reasons, the assessment was sought to be reopened on two counts. Firstly, that no TDS was deducted on the discount paid by the petitioner on prepaid SIM-card and recharge vouchers to various dealers which was in the nature of commission. Second ground was that no tax at source was deducted on roaming charges paid by the petitioner to other telecom service providers. Drawing our attention to the various documents on record, counsel submitted that both these issues were at large before the Assessing Officer in the original

assessment. No disallowance was made in the assessment so framed. Reopening of the assessment therefore, was not permissible that too beyond a period of four years from the end of relevant assessment year.

6. On the other hand, learned counsel Ms Paurami Seth for the Revenue opposed the petition contending that after recording proper reasons, the Assessing Officer had issued the notice. The petitioner had though supplied the details of those dealers who received the commission in excess of Rs.50 lakhs, the details regarding other dealers who may have received such payments below Rs.50 lakhs was not supplied. According to the counsel, this would be the failure on part of the petitioner to disclose true and full facts.

7. Having thus heard learned counsel for the parties, to our mind, issues are quite clear. As noted, notice for reopening was based on two reasons. First was that according to the Assessing Officer, the petitioner having given discount to various dealers on prepaid SIM-cards and recharge vouchers, the petitioner had the liability to deduct the tax at source. Since discount was in the nature of commission, he relied on certain case laws in this aspect. Second reason was that like-wise though the petitioner was required to deduct tax at source for roaming charges paid to other telecom operators, same was not done.

8. In the original assessment, we notice that the assessee in response to the queries raised by the Assessing Officer under communication dated 6.12.2007 provided various details including the details of dealers' commission and the list of dealers who received such commission in excess of Rs.50 lakhs during the period under consideration. In such letter, the petitioner conveyed to the Assessing Officer as under :

"(iv) Dealer Commission : Commission is paid to dealer on activation of the new subscriber and recharge by the existing prepaid subscriber. During the financial year 2004-05 total 11.59 lacs gross subscriber were added as against the 9.90 lacs in the financial year 2003-04. Further, due to cutthroat competition rate of commission was also increased compared to last year. Further, increase in prepaid base results into higher recharge and hence higher commission."

As stated in the said communication the petitioner also supplied a list of dealers who received such commission in excess of Rs. 50 lakhs. Such list was as under :

Name of Dealer	Amount(Rs.)
PRARTHANA COMMUNICATION	5,140,577.00
NEST TELECOM	5,192,858.00
ASCENT COMMUNICATION	6,320,530.00
CELFONE COMMUNICATION	6,508,710.00
SMART COMMUNICATION	6,596,745.00
MEX TELECOM	6,766,101,00
CEL-LINK	7,744,364.00
Total	44,269,885.00

9. Like-wise with respect to roaming charges paid by the petitioner to other telecom service providers, we find that the Assessing Officer had under his communication dated 3.10.2007 raised several written queries, one of them was as under :

7. Provide the details of the "Roaming charges". Please provide the comparative justification for the roaming charges paid to/received from the related parties (such as Hutchison Max telecom Ltd. Hutchison Essar ltd, Aircel digilink India ltd.) and non related concerns (e.g. BSNL/IDEA) in the following manner :

Sr. No.	Name of the party	Payment/ Receipt (P/R)	Name of the circle for which roaming charges paid/received	Rate of payment/ receipt	Total payment/ receipt

In respect to such question, the assessee under communication dated 8.11.2007, conveyed as under: "7) the details are as per the annexure attached"

10. Such details were also attached along with letter dated 8.11.2007. Since such details run into several pages, it would be too cumbersome for us to reproduce the same in this order. Suffice it to note that the petitioner provided the details of large number of such service

providers and instances of payment of roaming charges for different telecom circles totalling to Rs.34.10 crores(rounded off) towards roaming revenue and Rs.29.54 crores(rounded off) towards roaming expenses.

11. From the above, it becomes abundantly clear that on both the issues, the Assessing Officer now proposed to reopen the assessment beyond a period of four years from the end of relevant assessment year, there was full and true disclosure on part of the petitioner. With respect to the first issue of discount/commission, the Assessing Officer called for the details of such payments in excess of Rs.50 lakhs. Such details were promptly provided. No further questions arose from the Assessing Officer in this regard. Like-wise, during the assessment, the Assessing Officer also called upon the petitioner to supply full details of the roaming charges paid to various telecom operators. Such details were also made available.

12. If at that stage, the Assessing Officer was of the opinion that such charges paid by the petitioner incurred the liability of deducting tax at source, he could surely have expressed such opinion in his assessment order or if he had any doubt about further details, he could have as well called for the same. Surely, it was not the responsibility of the assessee to raise the

contention that such tax at source was not required to be deducted and justify the same by pointing out legal provisions and judgements, if any. The fact that tax at source was not deducted on such payments made by the petitioner was part of the returns filed. There was no dispute nor disguise in this respect. When full facts recording such charges been paid having come on record during such proceedings, it cannot be stated that in the present case there was failure on part of the petitioner to disclose true and full material facts.

13. In case of **Calcutta Discount Co. ltd. v. Income-Tax Officer** reported in 41 ITR 191, the Constitution Bench of Supreme Court held and observed that to confer jurisdiction on assessee to issue notice of reopening of assessment beyond a period of four years, two conditions are required to be simultaneously satisfied. Such conditions are that the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have been under-assessed and the second is that he must also have reason to believe that such under-assessment has occurred by reason of either omission or failure on part of the assessee to make return of his income or omission or failure on part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to

be satisfied before the taxing officer could have jurisdiction to issue notice for the assessment or reassessment beyond a period of four years. It was further observed that such duty would not extend beyond true and full disclosure of material facts. Once such primary facts are before the Assessing Officer, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for the assessee to tell the assessing authority what inferences, whether of facts or law, should be drawn. It is not necessary to list the long line of decisions along this line. We may however, refer a recent decision of Division Bench in case of **GVK Gautami Power Ltd . v. Assistant Commissioner of Income-tax(OSD) and another** reported in 336 ITR 451, wherein referring to large number of authorities on the question of reopening the assessment, Division Bench culled out various principles, relevant of which read as under :

"(xiv). The words failure to disclose fully and truly all material facts necessary for his assessment, in the first proviso to Section 147, postulate a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. (Calcutta Discount Co. Ltd. (1961)41 ITR 191(SC).

(xv). Every disclosure is not, and cannot be treated to be, a true and full disclosure. A disclosure may be false or true. It may be a full

disclosure or it may not. A partial disclosure may very often be misleading. What is required is a full and true disclosure of all material facts necessary for making assessment for that year. (Sri Krishna Pvt. Ltd.(1996) 221 ITR 538(SC)

(xvii). The expression "material facts" refers only to primary facts which the assessee is duty bound to disclose. There is no duty cast on the assessee to indicate or draw the attention of the Income Tax Officer to the inferences which can be drawn from the primary facts disclosed. (Calcutta Discount Co. Ltd.(1961) 41 ITR 191(SC) and Associated Stone Industries (Kotah) Ltd.(1997)224 ITR 560(SC)

(xviii). What facts are material, and necessary for assessment, will differ from case to case. (Calcutta Discount Co. Ltd.(1961) 41 ITR 191(SC)

(xx). The assessee's obligation, to disclose all material facts necessary for his assessment fully and truly, is in the context of the two requirements - called conditions precedent - which must be satisfied before the Income Tax Officer gets jurisdiction to re-open the assessment under Section 147/148. This obligation can neither be ignored nor watered down. (Sri Krishna Pvt. Ltd.(1996) 221 ITR 538(SC)"

14. Coming back to the facts of the case, we are convinced that there was no failure on part of the assessee to disclose truly and fully all material facts. Though an attempt on behalf of the Revenue was made before us to contend that by supplying the list of only those dealers who received commission in excess of Rs. 50 lakh, the petitioner failed to discharge such onus of disclosing true and full facts, we are afraid such a contention cannot be accepted for variety

of reasons. Firstly, this issue is nowhere borne out from the reasons recorded. Secondly, the petitioner replied to a query of the Assessing Officer and supplied such details in this regard which were called for. Thirdly, with respect to liability to deduct tax at the source, there is no distinction even suggested by the Assessing Officer on the basis whether such payment was in excess of Rs. 50 lakhs or below.

15. In the result, petition is allowed. Impugned notice dated 7.3.2012 is quashed. Petition is disposed of accordingly.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

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