

आयकर अपीलिय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1961/PUN/2013

निर्धारण वर्ष / Assessment Year : 2009-10

Vodafone Cellular Ltd.,
(Formerly known as
Vodafone Essar Cellular Ltd.)
F.P.No.27, S.No.21,
The Metropolitan,
Old Mumbai Pune Highway,
Shivajinagar, Pune - 411005

.... अपीलार्थी/Appellant

PAN: AAACB8614L

Vs.

The Dy. Commissioner of Income Tax (TDS-1),
Pune

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : S/Shri Salil Kapoor / Rajat Soni
प्रत्यर्थी की ओर से / Respondent by : Ms. Nirupama Kotru, CIT

सुनवाई की तारीख / Date of Hearing : 28.12.2017	घोषणा की तारीख / Date of Pronouncement: 12.03.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This appeal is arises consequent to the order of Tribunal in Miscellaneous Application No.35/PUN/2017 arising out of ITA No.1961/PUN/2013, relating to assessment year 2009-10. Vide the said order, the Tribunal has recalled ground of appeal No.1 for adjudication. Consequently, the appeal was fixed for hearing.

2. The ground of appeal No.1 raised by the assessee in the appeal reads as under:-

“On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - V, Pune ('learned CIT (A')) has erred in passing the order under section 250 of the Income Tax Act, 1961 ('Act'), confirming the order passed by the Deputy Commissioner of Income Tax, TDS-1, Pune ('learned TDS Officer') under section 201 of the Act, wherein it has been held that the Appellant is liable to deduct tax at source on discount extended to its distributors of pre-paid SIM cards and talktime (by way of recharge vouchers, e-top up, etc.).

Each of the ground is referred to separately, which may kindly be considered independent of each other.

1. Ground No. 1 - The order is time barred and void-ab-initio

1.1. *On the facts and circumstances of the case and in law, the impugned order passed by the learned TDS Officer for Financial Year 2008-09, is bad in law and void-ab-initio since the order has been passed beyond the limitation period specified under section 201(3) of the Act, for passing an order treating a person as an assessee-in-default for non-deduction of tax at source under the Act.”*

3. The issue which arises in the ground of appeal No.1 is the jurisdictional issue raised by the assessee challenging the order passed under section 201(1) and 201(1A) of the Income Tax Act, 1961 (in short 'the Act') being passed beyond limitation period specified under section 201(3) of the Act.

4. Briefly, in the facts of the case, Survey under section 133A of the Act was conducted on 23.04.2008 for verification of compliance of TDS provisions for assessment years 2007-08 and 2008-09. The order under section 201(1) and 201(1A) of the Act was passed creating demand in the aforesaid assessment years. In assessment years 2009-10 and 2010-11, the said issue was taken up for verification. The assessee was engaged in business of providing cellular mobile phone services for Maharashtra and Goa Circles excluding Mumbai. The assessee was providing both prepaid and postpaid services. During the course of verification, it was noted that the assessee was paying commission to all

dealers except distributors. The explanation of assessee was that sale to the distributors was at MRP less trading margin and there was no commission being paid. The Assessing Officer however, held the assessee to be in default for not deducting tax at source out of discount allowed to the distributors, which fell within provisions of section 194H of the Act. The Assessing Officer raised demand under section 201(1) of the Act and also charged interest under section 201(1A) of the Act, which was confirmed by the CIT(A).

5. The assessee is aggrieved by the aforesaid orders of authorities below.

6. The learned Authorized Representative for the assessee in this regard pointed out that as per provisions of section 201(3) of the Act at the relevant time, the order raising demand under section 201(1) of the Act and interest under section 201(1A) of the Act had to be passed within two years from the end of financial year in which the statement was filed. The learned Authorized Representative for the assessee pointed out that the return for the first quarter was filed on 19.07.2008; for the second quarter on 15.10.2008 and for the third quarter on 15.01.2009. The return for fourth quarter was filed on 15.06.2009. He further stated that the argument was for first three quarters, wherein the order was passed by the Assessing Officer on 15.03.2012, whereas order could be passed up to 31.03.2011. He pointed out that quarter-wise returns were filed, wherein the first three returns for three quarters were filed within financial year 2008-09, so the order could be passed upto 31.03.2011. For the fourth quarter, where the return was filed in financial year 2009-10, the order was passed within time by the Assessing Officer. The learned Authorized Representative for the assessee stressed that limited plea was with regard to quarter Nos.1 to 3 which

were filed within financial year 2008-09 and the said proceedings were time barred, so, no question of raising the demand under section 201(1)/201(1A) of the Act. It was put to the learned Authorized Representative for the assessee that interest would be chargeable under section 201(1A) of the Act. The learned Authorized Representative for the assessee further referred to the amendment in the year 2014, wherein period of seven years is provided and the Memo explains the existing law and covers the anomaly in the Act. The learned Authorized Representative for the assessee also placed on record the copy of order of Kolkata Bench of Tribunal with lead order in the case of Vodafone East Ltd. Vs. DCIT in ITA Nos.1499-1502/Kol/2015, relating to assessment years 2010-11 & 2011-12, consolidated order dated 26.10.2017.

7. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the observations of Tribunal in para 37 and also the order of CIT(A) with special reference to para 9.

8. We have heard the rival contentions and perused the record. The issue raised by way of ground of appeal No.1 is placed for adjudication before us. The assessee is aggrieved by the order passed under section 201(1) of the Act and interest charged under section 201(1A) of the Act by the Assessing Officer in respect of first three quarters falling within financial year 2008-09. The case of assessee is that the said order had to be passed upto 31.03.2011 but has been passed on 15.03.2012 and is beyond the limit prescribed in section 201(3) of the Act at the relevant time. The order for the fourth quarter was also passed on 15.03.2012 but the assessee has no grievance against the same.

9. Under the provisions of section 201(1) of the Act, it is provided that where any person who is required to deduct any sum in accordance with the provisions of the Act or being an employer referred to in sub-section (1A) of section 192 of the Act, does not deduct or does not pay or after so deducting fails to pay, the whole or any part of tax as required under the Act; then such person is deemed to be the assessee in default in respect of such tax.

10. Section 201(3) of the Act provides the time limit within which the order deeming the person to be an assessee in default has to be passed. At the relevant time, sub-section (3) as amended by the Finance Act, 2012 with retrospective effect from 01.04.2010 read as under:-

“(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of –

- (i) two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed;*
- (ii) six years from the end of the financial year in which payment is made or credit is given, in any other case:*

Provided that such order for a financial year commencing on or before the 1st day of April 2007 may be passed at any time on or before the 31st day of March, 2011.”

11. The scheme of the Act provided that no order under section 201(1) of the Act shall be passed after expiry of two years from the end of financial year in which TDS statement had been filed. The assessee in the present case had filed the first TDS return for the first quarter on 19.07.2008, for the second quarter on 15.09.2008 and for the third quarter on 15.01.2009 i.e. returns were filed in the financial year 2008-09, hence the order under section 201(1) of the Act had to be passed upto 31.03.2011. However, the Assessing Officer has passed present

order on 15.03.2012 i.e. beyond the period prescribed in section 201(3) of the Act at the relevant time. The said section has been amended by Finance (No.2) Act, 2014 w.e.f. 01.10.2014 and the time limit provided in section 201(3) of the Act is now increased to seven years. The Memo explaining the provisions relating to Direct Taxes has clarified the earlier position of section 201(3) of the Act and it is provided that clause (1) of section 201(3) of the Act provided that no order under section 201(1) of the Act shall be passed after the expiry of two years from the end of financial year in which TDS statement had been filed. Then, it refers to processing of TDS statement and the computerized environment and TDS defaults in respect of transactions not reported in TDS statements and hence, it was proposed to omit clause (1) of section 201(3) of the Act, which provided time limit of two years for passing the order under section 201(1) of the Act for cases in which TDS statements had been filed. The present section 201(3) of the Act provides the limit for passing the order to be within seven years from the end of financial year in which the payment was made or credit was given. Accordingly, we hold that order passed by the Assessing Officer raising the demand under section 201(1) of the Act is beyond the limit provided in sub-section (3) of the Act for quarter Nos.1 to 3. However, the return for quarter No.4 was filed on 15.06.2009 i.e. in financial year 2009-10 and the order raising the demand under section 201(1) of the Act is passed on 15.03.2012 i.e. before expiry of two years from the end of financial year in which TDS return was filed and hence, the same has been filed within time. Thus, we direct the Assessing Officer to delete the demand raised for quarter Nos.1 to 3 and sustain the demand for quarter No.4. However, under section 201(3) of the Act, no limit is provided for passing order charging interest under section 201(1A) of the Act, hence the assessee is liable to pay interest under section 201(1A) of

the Act and the said order of Assessing Officer is upheld. The ground of appeal No.1 raised by the assessee is thus, partly allowed.

12. In the result, ground of appeal No.1 raised by assessee is partly allowed.

Order pronounced on this 12th day of March, 2018.

Sd/-
(ANIL CHATURVEDI)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)

न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 12th March, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-V, Pune;
4. The CIT(TDS), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune