

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI J BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President), and
Vikas Awasthy (Judicial Member)]**

SA No 111/Mum/ 2020
Arising out of ITA No. 7708/Mum/2019
Assessment year: 2014-15

Vodafone India Services LimitedAppellant

(formerly known as 3 Global Services Private Limited)
1201, 12th floor, Indiabulls Finance Centre
Tower1, Senapati Bapat Road, Elphinstone
Mumbai 400 001[PAN: AAACZ1849D]

Vs

Assistant Commissioner of Income Tax
Circle 8(3)(2), MumbaiRespondent

Appearances by

Fereshthe Sethna, along with Hansmukh Ravaria and Mrunal Pareth, for the applicant
Mahesh Shah for the respondent

Date of concluding the hearing : July 16, 2021
Date of pronouncement of the order : July 19, 2021

O R D E R

Per Pramod Kumar, VP:

1. By way of this application, the assessee-applicant seeks a stay on collection/ recovery of the tax and interest demands, aggregating to Rs 1128.46 crores, in the matter of assessment under section 143(3) r.w.s. 144C of the Income Tax Act, 1961, for the assessment year 2014-15, till the disposal of the related appeal before us.

2. Briefly stated, some material facts, as culled out from the material on record, are as follows. As we set out our understanding of facts, we must make it clear that as this exercise has been conducted without the benefit of a detailed hearing on these aspects, there may be unreconciled minor variations in our perceptions vis-à-vis that of the assessee, but then, given the limited purposes for which the facts are being set out, nothing much really turns on these variations, even if any. Be that as it may, the assessee company, incorporated in India in March 1999, as 3 Global Services Pvt Ltd, is owned by a Mauritian company now known as Vodafone Tele-Services (India) Holdings Limited [**Vodafone Services- M**, in short], which, in turn, is owned by a Cayman Islands-based company by the name of CGP Investments (Holdings) Limited [**CGP- Cayman**, in short]. CGP-Cayman, as a result of the acquisition of its ownership by Vodafone International Holdings BV [**VIH-BV**, in short] which itself is a fully owned subsidiary of the global telecom giant Vodafone Group plc, UK [**Vodafone-UK**, in short] which carries on telecommunication business in India, through its operating

company Vodafone India Limited [**Vodafone-India**, in short] and entire shareholding of Vodafone-India is owned by a number of subsidiaries and associated entities controlled by CGP-Cayman Islands, and, during the process of change in ownership and on account of compliance requirements with domestic FDI regulation, through call and put options controlled, directly or indirectly, by CGP-Cayman Islands. Quite unlike what the name of the assessee company may subliminally suggest to a layman, the assessee before us is a small unlisted private company with an authorised capital of Rs. 3 crores and it's almost entire revenues are generated from the associate enterprise on account of shared services. The importance of the assessee company is thus not in its independent business operations but perhaps in the strategic role it played in structuring the financial transactions for the Vodafone Group, a description typically answered by the companies which are used as a conduit in the process of financial manoeuvrings. It is in this backdrop that the assessee disclosed the following international transaction in the form 3CB filed by the assessee:

Pursuant to Framework Agreement dated 5 July 2007, Analjit Singh and Neelu Analjit Singh (collectively referred to as AS) held a put option, i.e. a right to require the company, or a person nominated by the company, to purchase any or all of the shares held by AS in Scorpio Beverages Pvt Ltd (SBP) constituting 51% of the equity capital of SBP. This put obligation obligated the company, or a person nominated by the company, to purchase the SBP shares when required by AS.

The company nominated CGP India Investments Limited as the person who will be obligated to the SBP shares.

The aforesaid nomination by the company of CGP India Investments Limited as the person obligated to buy the aforesaid SBP shares is neither an international transaction or does it have any effect on the income of the company. This disclosure has been made out of abundant caution and without prejudice.

3. On a reference being made to the Transfer Pricing Officer, the matter was probed further. It was found that the CGP India Investments Limited, Mauritius [**CGPI- M**, in short] is a Mauritius based company that is fully owned by **CGP-Cayman Islands**. In effect thus, it would seem that as a result of the exercise of the above option, the **CGP-Cayman Islands** has been able to increase shareholdings in Vodafone India inasmuch as the importance of Scorpio Beverages Pvt Ltd [**Scorpio Beverages-** in short] lies in the fact that, through several fully owned subsidiaries of Scorpio Beverages layered in between, Scorpio Beverages owned substantial shareholding in Telecom Investments India Pvt Ltd [**TII**, in short] which holds significant equity capital of Vodafone India Limited. In effect, thus, it could be said that the assessee company's nomination of CGPI-M for buying shares in Scorpio Beverages held by Analjeet Singh Group, resulted in an increase of equity shareholding of CGP Cayman Islands in the Vodafone India. It may be noted that Analjeet Singh and his associate, as also two other persons who were playing a similar role under the Framework Agreement- namely Asim Ghosh Group and IDFC Group, were seemingly independent but *de facto* under full control of CGP-Cayman Islands. It was also noted that as a result of CGPI-M being nominated to purchase 51% shares of Scorpio Beverages, the CGPI-M was enabled to buy 4.53% equity in Vodafone India at a price of Rs 1,241 crores, whereas the market price of this shareholding was Rs 2,285 crores in excess. It was also noted that while the assessee has

already paid the premium of Rs 45.69 crores in connection with these options, the assessee parted with the right to buy the shares at a rate much lower than market value (Rs 1,241 crores, as against Rs 2,285 crores in excess) without any consideration. It was thus noted that as a result of the exercise of nomination for the put option, the profit and loss of the assessee company was directly affected. It was thus held that the assessee's nominating the CGPI-M for the acquisition of shares in Scorpio Beverages was not an arm's length transaction inasmuch as it put the CGPI-M at an undue advantage of buying the Vodafone India shares at a price much below the market rate, without any corresponding benefit to the assessee and at the specific costs incurred by the assessee, and inasmuch as there was no commercial justification for the assessee giving up the right to make clear profits, in favour of its AE abroad- namely CGPI-M. Accordingly, an ALP adjustment was proposed, aggrieved by which assessee raised the objections before the Dispute Resolution Panel but without any success. In view of the case history and partial use of option rights in other assessment years, the substantive addition was Rs 1,967 crores and the protective addition was Rs 317.77 crores. The Assessing Officer also disallowed depreciation on goodwill amounting to Rs 10,99,11,067 and expenses under section 14A amounting to Rs 18,300, and on these aspects also the grievances of the assessee were dismissed by the DRP. The Assessing Officer had also disallowed Rs 11,08,635 out of club membership expenses, but the assessee did not raise any grievance against the same. The assessee is in appeal before us and has also filed this stay petition seeking a stay on collection/ recovery of the amounts disputed in the appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. While we refrain from making any observation on the merits of the case, we may state that on the face of it, while many of the facets of the main issue, i.e. ALP adjustment on account of assignment of the call or put options, raised in this appeal, so far as the ALP adjustment in respect of options rights are concerned, seem to be covered against by a decision of the coordinate bench, in assessee's own case for the assessment year 2012-13- reported as **Vodafone India Services Pvt Ltd Vs DCIT [(2018) 169 ITD 375 (Ahd)]** which was authored by one of us (i.e. the Vice President), there are many issues raised in the appeal which are *prima facie* worth serious consideration and the assessee thus has an arguable case in appeal. We have also noted that almost 98% of the impugned demand is in respect of this ALP adjustment. We have also taken note of learned counsel's submission that the assessee has already provided a corporate guarantee by its ultimate parent company, i.e. Vodafone International Holdings BV, for an amount of Rs 3,538.48 crores for the assessment year 2008-09 and this guarantee is yet to be returned by the income tax department and that this guarantee adequately covers the amount disputed in the appeal. However, when we pointed out that the guarantee is specifically for the assessment year 2008-09 and so far as that assessment year is concerned, as things stand now, the matter is resolved in favour of the assessee by Hon'ble jurisdictional High Court, learned counsel submits that as the matter is pending before Hon'ble Supreme Court, the guarantee is very much alive and, being in possession of the income tax authorities anyway, it can very well be enforced by the income tax authorities. She submits that in case the income tax department is to take the stand that this guarantee is no longer valid, they should as well withdraw the appeal before the Supreme Court. Learned counsel has also made elaborate submissions on inconsistencies in the stand of the revenue authorities. She then makes elaborate submissions on the proviso to Section

254(2A) to justify her claim that the payment of at least 20% of the disputed tax demands is not a condition precedent for the grant of stay. She also submits that there are refunds pending for the other years that have not yet been granted to the assessee, and, therefore, it cannot be open to the income tax department to press this demand. However, none of these submissions really impress us. In our considered view, the corporate guarantee is not really relevant as it is specific to the assessment year 2008-09, on the directions of this Tribunal, and as the related litigation before the Tribunal is already concluded, this corporate guarantee is meaningless so far as the present litigation is concerned. We have also noted that in any case, Vodafone International Holdings BV has huge tax dues payable to India, perhaps in excess of Rs 20,000 crores, which are under litigation. An undertaking from such an entity, in our considered view, would probably be too low a choice as security. As we say so, it will probably be appropriate to recall that when the assessee, aggrieved by this coordinate bench decision against the assessee, approached the Hon'ble High Court, while Their Lordships admitted the appeal on substantial questions of law, Their Lordships granted the stay of disputed demands on the condition that the assessee makes **further payment "which would be approximately 20% of the outstanding disputed tax demand"** and that **"the corporate guarantee which has been provided by the parent company to cover the unpaid amount would continue with this adjustment"**. As regards the inconsistencies in the approach of the income tax authorities, all those aspects will surely be considered at the stage of disposal of the appeal, and we are also alive to the fact that the litigation of the assessee with respect to the transaction, which involves a complex web of arrangements involving a large number of entities in several jurisdictions and is spread over several assessment years, is being conducted at different locations in a fragmented manner, and, given such a situation, it is indeed possible that there may be some contradictions due to variety of factors but these contradictions *per se*, even if that be so, cannot be put against the *bonafides* of the impugned tax demands at this stage. As regards the arguments on the first proviso to Section 254(2A), whether the said proviso is applicable or not, the Tribunal is not denuded of the powers to direct that the part payment of demands even in excess of 20% be made by the assessee before the stay is granted in a fit case. While it may be argued, whatever be the legally sustainable merits of such a proposition, that the limitation placed by the first proviso to Section 254(2A) comes in the way of the Tribunal granting a blanket stay or a stay, on payment of less than 20% of the disputed demands, but then even this proposition is highly contentious. In any event, that is not the case here. Given the factual matrix as discussed above, given the fact that the coordinate bench decision seems to be against the assessee on many of the facets of the main issue raised in this appeal, and given the fact that Hon'ble High Court, in assessee's own case on somewhat material facts, has directed the payment of 20% of the disputed demands, we do not think it is a fit case for grant of blanket stay. We have also noted that out of the total demand of Rs 1128,46,08,324 raised on the assessee, which includes undisputed tax demand of Rs 4,17,036- as stated in column 6(c) of the stay application, the assessee has not paid any tax dues at all- not even of the undisputed tax. As for the issue being raised that there cannot be a substantive addition in this year as the original substantive addition was made in the assessment year 2008-09, which even though decided in favour of the assessee by Hon'ble Bombay High Court, is now being pursued in appeal by the income tax authorities before Hon'ble Supreme Court, all the subsequent years can only be treated as protective, and the collection of the tax levied on protective basis must therefore be kept in abeyance, we are unable to see merits in this plea either. When an income is added on a substantive basis in one year and on a protective basis in the other year, the year in which protective addition is made becomes the year of substantive assessment the moment

the original substantive addition does not meet judicial approval. In any event, the triggers for taxation in the subsequent years are different. The impugned ALP adjustment, therefore, cannot be treated as merely on the protective basis, and, for this reason, the collection of disputed demands cannot be deferred till the Hon'ble Supreme Court decides the matter for the assessment year 2008-09. All these factors taken together, in our considered view, this is not a case deserving a blanket stay by the Tribunal.

6. On a careful consideration of all these factors, as also bearing in mind the entirety of the case, **we deem it fit and proper to grant a stay on collection of the impugned tax and interest demands on the condition that (i) the assessee will pay Rs 230 crores, which works out to approximately 20% of the disputed tax demand, within 30 days from today; (ii) the assessee will furnish a corporate guarantee from an associate company, which has unencumbered assets in India in excess of the balance disputed demands, i.e. Rs 900 crores; and (iii) the assessee will fully cooperate in expeditious disposal of the appeal in question, as also other appeals which are tagged and clubbed with this appeal, and in case of any lapses on the part of the assessee in this regard, this stay shall stand vacated forthwith. This order shall remain in force for six months from today or till further orders- whichever is earlier.** The assessee and the income tax department are also directed to furnish the details of all the related appeals, which may have any bearing with the issues in this appeal, so that the matter is placed before the bench, at the earliest possible, for tagging and clubbing, with a view to ensure that all the related matters are taken up for hearing together in a holistic manner, if necessary, on a day to day basis and at the earliest possible. Ordered, accordingly.

7. In the result, the stay application is partly allowed in the terms indicated above. Pronounced in the open court today on the 19th day of July, 2021.

Sd/-
Vikas Awasthy
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 19th day of July, 2021

Copies to: (1) The appellant (2) The respondent
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai