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

Reserved on: March 03, 2016
Date of Decision: March 09, 2016

\+ **W.P.(C) 8535/2011 & CM APPLS 19305/2011, 9781/2012**
\+ **W.P.(C) 8536/2011 & CM APPLS 19307/2011, 9778/2012**
\+ **W.P.(C) 8537/2011 & CM APPLS 19309/2011, 9776/2012**

VODAFONE ESSAR MOBILE SERVICES LIMITED
(NOW KNOWN AS VODAFONE MOBILE
SERVICES LIMITED) ..... Petitioner

Through: Mr. M.S. Syali, Senior Advocate with Ms. Sonia Mathur, Mr. Aseem Mowar, Mr. Mayank Nagi, Mr. Rakshit Thakur, Ms. Husnal Syali and Mr. Tarun Singh, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr. Anuj Aggarwal with Mr. Subhanshu Gupta, Advocates for UOI.

Mr. Dileep Shivpuri, Senior Standing Counsel and Mr Zoheb Hossain, Junior Standing Counsel for the Revenue.

\+ **W.P.(C) 8641/2011 & CM APPLS 19537/2011, 10666/2013**
\+ **W.P.(C) 8642/2011 & CM APPL 19541/2011**
\+ **W.P.(C) 8643/2011 & CM APPL 19545/2011**
\+ **W.P.(C) 8644/2011 & CM APPL 19549/2011**
\+ **W.P.(C) 8647/2011 & CM APPL 19557/2011**

TATA TELESERVICES LTD. ..... Petitioner

Through: Mr. M.S. Syali, Senior Advocate with Ms. Surekha Raman, Mr. Anuj Sarma,

Mr. Mayank Nagi, Mr. Debarshi Bhuyan, and Ms. Husnal Syali, Advocates.

versus

THE ASSISTANT COMMISSIONER OF INCOME TAX & ORS ..... Respondents

Through: Mr. Dileep Shivpuri, Senior Standing Counsel and Mr. Zoheb Hossain, Junior Standing Counsel for the Revenue.

Mr Umesh Sharma, CGSC for Respondent.

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JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G M E N T

% **09.03.2016**

S. MURALIDHAR, J.:

1. The common question that arises for consideration in these writ petitions concerns the validity of the action initiated by the Respondent Income Tax Department ('Department') against the Petitioners under Sections 201(1) and 201(1A) of the Income Tax Act, 1961 ('the Act') for non-deduction of tax at source ('TDS') for periods earlier than four years prior to 31st March, 2011. These petitions in turn involve the interpretation of the proviso to sub-section (3) of Section 201 of the Act, which was inserted with effect from 1st April, 2010.

2. Although the facts of these cases are more or less similar, the facts pertaining to Tata Teleservices Limited ('TTSL'), the Petitioner in WP

(C) No. 8642/2011, are first discussed. TTSL is a company registered under the Companies Act, 1956, engaged in the business of providing telecommunication services across the country. TTSL has a central office in New Delhi. It provides post-paid and pre-paid telecommunication services for which it entered into agreements with various channel partners (distributors). In the pre-paid segment, TTSL sells products such as Recharge Coupon Vouchers (RCVs) and Starter Kits to channel partners. The RCVs are the pre-paid vouchers used for selling validity and talk time to the pre-paid subscribers. The Starter Kits are the new connections containing Removable User Identity Module (RUIM) cards for providing telecommunication connection.

3. The products are sold by TTSL to the channel partners under valid tax invoices. TTSL recovers sales tax and service tax for the said transactions. The channel partner thereafter sells these products to the retailers. It is stated that there is no remuneration/consideration that flow from TTSL to the channel partners for effecting sale of such products. TTSL proceeded on the basis that in terms of the above arrangement that the retailers cannot charge to the consumer an amount exceeding the Maximum Retail Price ('MRP'). The difference between MRP charged from consumers and price charged to channel partners by TTSL is nothing but the maximum amount of business income available for channel partners and retailers taken together. Further, the amount that is realised by channel partners or retailers separately is not known to TTSL at any point of time.

4. According to TTSL, the transaction between it and the channel partner is on a principal to principal basis. It is explained that under a principal and agent relationship, commission is paid subsequent to the happening of the incident, i.e. post the recovery of the MRP price, and thus it is termed as commission. However, under a principal to principal relationship as that is followed in the prepaid business, the discount allowed flowing out from the MRP price, which happens before the happening of the incident, i.e. recovery of the price from customers.

5. Accordingly to TTSL, in terms of the above arrangement, Section 194H of the Act concerning deduction of TDS towards commission or brokerages does not apply to the above transaction with the channel partners. TTSL filed its TDS return/statement under Section 200 of the Act in each of the relevant Assessment Years (AYs) [for WP (C) No. 8642/2011 the relevant AY being 2001-2002]. It may be noticed at this stage that the Karnataka High Court in a decision ***Bharti Airtel Ltd. Vs. Deputy Commissioner of Income-Tax (2015) 372 ITR 33 (Kar)*** held that no TDS is recoverable from the payments made by cell phone companies to the distributors where the products sold were pre-paid cards.

6. Section 201 as it stood prior to the amendment [which introduced sub-section (3) with effect from 1st April, 2010] did not contain a provision stipulating a time limit for initiation of the proceedings thereunder. The said provision reads as under:

> "**Consequences of failure to deduct or pay.**
> 201. (1) Where any person, including the principal officer of a company,—

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192 , being an employer,

does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.

(1A)Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at [one per cent for every month or part of a month] on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid and such interest shall be paid before furnishing the quarterly statement for each quarter in accordance with the provisions of sub-section (3) of section 200.

(2) Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in subsection (1A) shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1)."

7. In ***CIT vs. NHK Japan Broadcasting Corporation (2008) 305 ITR 137 (Del.)*** the question that arose was whether the Department could seek to initiate proceedings under Sections 201(1) and 201(1A) of the Act for a period beyond four years after the end of the relevant AY. In that case the relevant AY was 1990-91. The Assessee there was a Government Company of Japan, which was carrying on business in

India. It paid salary in Indian Rupees to its employees in India. It also paid 'global salary' to its employees in Japan. While it deducted TDS from the salaries paid to the employees in India, it did not deduct TDS from the 'global salary'. These facts came to light when the Department undertook a survey on 19th November, 1998. In December, 1999, the Assessee was asked to explain why it should not be treated as an Assessee in default. After the reply was filed by the Assessee, the AO passed an order treating the said Assessee as an Assessee in default for the purposes of Section 201 of the Act and this was upheld by the Commissioner of Income Tax (Appeals) [CIT(A)]. However, the Income Tax Appellate Tribunal ('ITAT') came to the conclusion that the proceedings against the Assessee for treating it as an Assessee in default under Section 201 of the Act were not initiated within a reasonable period of time.

8. The Court in ***CIT vs. NHK Japan Broadcasting Corporation*** (*supra*) noted that there was no provision in the Act, which stipulated a time limit regarding initiation of the proceedings under Section 201 of the Act. It referred to Section 153(1)(a) of the Act, which required an assessment to be completed within two years from the end of the AY in which income was first assessable. It also noted that the ITAT had in a series of decisions taken the view that four years would be a reasonable time for initiating action, in case where no limitation is prescribed. In ***CIT vs. NHK Japan Broadcasting Corporation*** (*supra*), the ITAT had applied the same aspect and reversed the decision of the CIT(A). This Court then held as under:

> "21. We are not inclined to disturb the time limit of four years prescribed by the Tribunal and are of the view that in terms of the decision of the Supreme Court in ***Bhatinda District Co-op. Milk Producers Union Ltd. [2007] 9 RC 637; 11 SCC 363*** action must be initiated by the competent authority under the Income Tax Act, where no limitation is prescribed as in Section 201 of the Act within that period of four years."

9. It was further observed in ***CIT vs. NHK Japan Broadcasting Corporation*** (*supra*) as under:

> "25. We may also note that under Section 191 of the Act, the primary liability to pay tax is on the person whose income it is that is the deductee. Of course, a duty is cast upon the deductor, that is the person who is making the payment to the deductee, to deduct tax at source but if he fails to do so, it does not wash away the liability of the deductee. It is still the liability of the deductee to pay the tax. In that sense, the liability of the deductor is a vicarious liability and, therefore, he cannot be put in a situation which would prejudice him to such an extent that the liability would remain hanging on his head for all times to come in the event the Income Tax Department decides not to take any action to recover the tax either by passing an order under Section 201 of the Act or through making an assessment of the income of the deductee."

10. The decision in ***CIT vs. NHK Japan Broadcasting Corporation*** (*supra*) was followed by this Court in ***Commissioner of Income Tax v. Hutchison Essar Telecom Ltd. [2010] 323 ITR 230 (Del.)***. There the Court held that proceedings under Section 201(1) and 201(1A) of the Act "can be initiated only within three years from the end of the Assessment Year or within four years from the end of the relevant Financial Year."

11. In the meanwhile, by way of Finance (No. 2) Act, 2009 with effect from 1st April, 2010 sub-sections (3) & (4) along with provisos were inserted, the relevant extract of which 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) four 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.
>
> (4) The provisions of sub-clause (ii) of sub-section (3) of section 153 and of Explanation 1 to section 153 shall, so far as may, apply 'to the time limit prescribed in sub-section (3)."

12. The Statement of Objects and Reasons of the Finance (No. 2) Bill, 2009 in relation to the amendment to Section 201 of the Act read as under:

> "Sub-clause (b) of clause 65 seeks to provide time limit for passing of order under sub-section (1) of section 201 in case of resident tax payers. It provides that no order shall be made under sub-section (1) of section 201, deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax in the case of a person resident in India, at any time after the expiry of 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. It further provides that in any other case such order shall not be made at any time after four years from the end of the financial year in which payment is made or

credit is given. It further provides that such order for a financial year commencing on or before 1st day of April, 2007 may be passed at any time on or before the 31st day of March, 2011. The sub-clause also provides that the provisions of sub-clause (ii) of sub-section (3) of section 153 and of Explanation 1 to section 153 shall, so far as may apply to the time limit prescribed in proposed sub-section (3) of section 201."

13. There was a memorandum explaining the provisions of Finance (2) Bill, 2009, which was in the form of a circular issued by the Central Board of Direct Taxes (CBDT), which reads as under:

> "**f. Providing time limits for passing of orders u/s 201(1) holding a person to be an assessee in default**
> Currently, the Income Tax Act does not provide for any limitation of time for passing an order u/s 201(1) holding a person to be an assessee in default. In the absence of such a time limit, disputes arise when these proceedings are taken up or completed after substantial time has elapsed.
>
> In order to bring certainty on this issue, it is proposed to provide for express time limits in the Act within which specified order u/s 201(1) will be passed.
>
> It is proposed that an order u/s 201(1) for failure to deduct the whole or any part of the tax as required under this Act, if the deductee is a resident taxpayer shall be passed within two years from the end of the financial year in which the statement of tax deduction at source is filed by the deductor. Where no such statement is filed, such order can be passed up till four years from the end of the financial year in which the payment is made or credit is given. To provide sufficient time for pending cases, it is proposed to provide that such proceedings for a financial year beginning from 1st April, 2007 and earlier years can be completed by the 31st March, 2011.
>
> However, no time-limits have been prescribed for order under sub-section(1) of section 201 where—

> (a) the deductor has deducted but not deposited the tax deducted at source, as this would be a case of defalcation of government dues,
>
> (b) the employer has failed to pay the tax wholly or partly, under sub-section (1A) of section 192, as the employee would not have paid tax on such perquisites,
>
> (c) the deductee is a non-resident as it may not be administratively possible to recover the tax from the non-resident.

It is proposed to make these amendments effective from 1st April, 2010. Accordingly it will apply to such orders passed on or after the 1st April, 2010."

14. It is claimed that, therefore, as far as the Department was concerned it understood the insertion of the proviso to Section 201(3) as providing "sufficient time for pending cases" in respect of which the proceedings were to be completed by 31st March, 2011.

15. However, it appears that contrary to the above understanding by the Department itself depicted in the above circular issued by the CBDT, the Department understood the above amendment as permitting it to initiate proceedings under Section 201 of the Act for treating an Assessee as an Assessee in default even in respect of alleged failure to deduct TDS for a period more than four years earlier to 31st March, 2011.

16. This question, after the amendment to Section 201 of the Act brought about by the Finance (No. 2) Act, 2009 with effect from 1st April, 2010 came up for consideration by this Court in ITA No.57/2015

[***CIT (TDS)-I v. CJ International Hotels Pvt. Ltd.***]. One of the questions addressed by the Court in the said case in its judgement dated 9th February, 2015 concerned the initiation of proceedings against the Assessee for declaring an Assessee to be an Assessee in default. The discussion in the said judgement on this issue is contained in paras 6 to 10, which read as under:

> "6. It is evident from the above discussion that the assessee was sought to be proceeded against Section 201 as one in default, after the period of four years. This Court is conscious that the text of the provision nowhere limits the exercise of powers. Equally, there are several provisions of enactment, i.e., Sections 143 (2), 147, 148 and 263, and even through introduction of specific provisions in Section 153 of the Act, where the time limit is specifically prescribed. At the same time, this Court in NHK Japan (supra) was of the opinion that the power to treat someone as assessee in default is too drastic, vague and oppressive since it is conditioned by some measure of limitation. In these circumstances, the Court had insisted that for the purpose of initiation of proceedings under Section 201, the AO has to act within four years. In NHK Japan, the Court did take note of the judgment in *State of Punjab v. Bhatinda District Co-op Milk Producers Union Ltd. (2007) 9 RC 637*.
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> 7. The judgment in *NHK Japan* to a certain extent was limited by the amendment to Section 201 by substitution of Section 201 (3) w.e.f. 1.4.2010 by Finance Act No.2/2009. This substitution was in turn amended w.e.f. 1.10.2014 – by Finance Act No.2/2014. As a result, the provision which exists as on date is as follows: -
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>> "201. (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 seven years from the end of the financial year in which payment is made or credit is given."

8. Secondly, Section 201 itself was amended by introduction of sub-section 1 (A) - with retrospective effect, from 1.4.1966. The provision underwent legislative changes on different occasions. The decision in *NHK Japan* was rendered on 23.04.2008. The Revenue's appeal was rejected on 3.7.2014. Although, the Supreme Court had granted special leave and has apparently stated in its final order rejecting the Revenue's appeal that the question is left open, the mere circumstance that the Parliament did not spell out any time limit before it did eventually in 2009 - and subsequently in 2014 – would not lead to the sequitur that this Court's ruling in *NHK Japan* requires consideration. In that judgment, the Division Bench had given various reasons, including the application of the rationale in **Bhatinda District** (*supra*). In *NHK Japan*, the Court had noticed that the facts in *Bhatinda District* (*supra*) judgment concern exercise of jurisdiction by a statutory authority in the absence of specific period of limitation. The Court in *Bhatinda District* (*supra*) held as follows:

> "17. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors.
>
> 18. Revisional jurisdiction, in our opinion, should ordinarily be exercised within a period of three years having regard to the purport in terms of the said Act. In any event, the same should not exceed the period of five years. The view of the High Court, thus, cannot be said to be unreasonable. Reasonable period, keeping in view the discussions made hereinbefore, must be found out from the statutory scheme. As indicated hereinbefore, maximum period of limitation provided for in Sub-section (6) of Section 11 of the Act is five years."

9. More recently in *Commissioner of Income Tax-III v. Calcutta Knitwears, Ludhiana (2014) 362 ITR 673 (SC)*, the Supreme

Court had the occasion to deal with the correct position in law as to the initiation of income tax proceedings. Although, the context of the dispute was in respect of recording of a satisfaction note as to the initiation of proceedings against third parties under erstwhile Section 158BD of the Act which did not prescribe the period of limitation and left it to the discretion of the AO to decide on being satisfied that such proceedings were required to be initiated, the Court limited such discretion in the following terms:

> "44. In the result, we hold that for the purpose of Section 158BD of the Act a satisfaction note is sine qua non and must be prepared by the assessing officer before he transmits the records to the other assessing officer who has jurisdiction over such other person. The satisfaction note could be prepared at either of the following stages: (a) at the time of or along with the initiation of proceedings against the searched person under Section 158BC of the Act; (b) along with the assessment proceedings under Section 158BC of the Act; and (c) immediately after the assessment proceedings are completed under Section 158BC of the Act of the searched person."

10. An added reason why the submission of the Revenue is unacceptable is that had the Parliament indeed intended to overrule or set aside the reasoning in *NHK Japan* (*supra*), it would have, like other instances and more specifically in the case of Section 201 (1A), brought in a retrospective amendment, nullifying the precedent itself. That it chose to bring Section 201 (3) in the first instance in 2010 and later in 2014 fortifies the reasoning of the Court. Accordingly, the issue is answered against the Revenue."

17. It appears to the Court that the above decision settles the question whether to declare an Assessee to be an Assessee in default under Section 201 of the Court could be initiated for a period earlier than four years prior to 31st March, 2011.

18. Mr. M.S. Syali, the learned Senior Advocate for the Petitioners states that although the challenge in these petitions is also to the vires of the proviso to Section 201(3) of the Act as inserted by the Finance (No. 2) Act, 2009, the Petitioners would be satisfied if the interpretation sought to be advanced by them on the scope and ambit of proviso to sub-section (3) of Section 201 of the Act is accepted by the Court. In other words what has been canvassed on behalf of the Petitioners is that the proviso to Section 201(3) of the Act has to be read consistent with the law explained by the Court in ***CIT vs. NHK Japan Broadcasting Corporation*** (*supra*) and should be held not to permit the Department to initiate proceedings for declaring Assessees to be Assessees in default for a period more than four years prior to 31st March, 2011.

19. Mr. Dileep Shivpuri, the learned Senior Standing Counsel for the Revenue, however, seeks to advance a different line of argument. According to him the action taken by the Department was pursuant to a decision in ***CIT v. Idea Cellular Ltd. (2010) 325 ITR 148 (Del)*** where the amounts paid to the channel partners for the pre-paid cards and other products was held to be 'commission' by the Court within the meaning of Section 194H of the Act. It is stated that it is consequent upon the said decision that the Department issued the impugned notices to these Petitioners and that this was permissible in terms of Section 153(3)(ii) of the Act.

20. The above submission of Mr. Shivpuri cannot be accepted if Section 153 is perused carefully. It reads as under:

> "153. Time limit for completion of assessments and reassessments
> ......
> (3) The provisions of sub- sections (1), (1A), (1B) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of sub-section (2A), be completed at any time-
> ......
> (ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act."

21. In the first place, what the said provision does is to not apply the time limit of two years for completing the assessment from the end of the financial year "where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order........ or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act." This can apply only to the Assessee in whose case such an order is made by a Court. For instance, if the above decision was qua Idea Cellular Ltd. then it certainly cannot form the basis for initiating proceedings qua other Assessees.

22. Secondly there has to be a finding or directions as regards the issue in question viz., the non-deduction of TDS resulting in an Assessee having to be declared an Assessee in default under Section 201 of the Act. In ***Rajender Nath v. CIT (1979) 120 ITR 14 (SC)***, it was held that the existence of an order disposing of a case qua an Assessee containing specific directions of the Court was a *sine qua non* for invoking the

powers under Section 153(3)(ii) of the Act. Even in the case relied upon by Mr. Shivpuri, i.e., ***CIT v. Idea Cellular Ltd.*** (*supra*), there is no such finding or direction to the Department by the Court requiring it to initiate proceedings for declaring the Assessee to be an Assessee in default. The Court is, therefore, of the view that the reliance by the Department on Section 153(3)(ii) of the Act and the decision in ***CIT v. Idea Cellular Ltd.*** (supra) to justify initiation of the proceedings in the present case against the Petitioner is misconceived.

23. It was then contended by Mr. Shivpuri, that the decision in ***CIT vs. NHK Japan Broadcasting Corporation*** (*supra*) would not hold good after 1st April, 2010 and that the decision of this Court in ***CIT (TDS)-I v. CJ International Hotels Pvt. Ltd.*** (*supra*) was not correctly understood by the Petitioners herein. In his reading of the decision in ***CIT (TDS)-I v. CJ International Hotels Pvt. Ltd.*** (*supra*), the Court did not categorically state therein that the Department was prohibited from initiating proceedings in declaring an Assessee to be an Assessee in default for a period earlier than 31st March, 2011.

24. The Court is unable to agree with the above submission of Mr. Shivpuri. As the Court sees it, its decision in ***NHK Japan Broadcasting Corporation***(*supra*) deals precisely with the situation where proceedings were sought to be initiated more than four years prior to 31st March, 2011. That law explained in ***NHK Japan Broadcasting Corporation*** (*supra*) has not changed by the introduction of proviso to sub-section (3) to Section 201 by the Finance (No. 2) Act, 2009. Mr. Shivpuri was unable to explain how the Circular No.5 of 2010 issued by the CBDT is

not favourable to the Petitioners. With reference to the expression "pending cases", in respect of which orders have to be passed in terms of the proviso to Section 201(3) before 31st March 2011, Mr. Shivpuri sought to suggest that the Circular has to be harmoniously construed with Section 201(3) of the Act to glean an intention to permit the Department to initiate cases four years earlier than 31st March, 2011. The only requirement was that orders had to be passed by 31st March, 2011.

25. The Court is unable to agree with this approach of the Department either. There is no question of 'harmonious construction' of a CBDT Circular issued by the CBDT. At best, it is an external aid of construction of Section 201(3) and the proviso thereto. The Circular also gives an instance of contrary understanding of the legal position by the Department itself. It is well settled that if a Circular issued by the Department favours an Assessee then it should be so done even where such interpretation goes contrary to the legislative intent.

26. In this regard reference may be made to the decision in ***K.P. Verghese v. Income Tax Officer AIR 1981 SC 1922***. There the Supreme Court was considering the correctness of the stand of the Department that for the purpose of Section 52 (2) of the Act it was not necessary that the Assessee should have under-stated the sale consideration and that to attract Section 52 (2) it was sufficient if, as on the date of the transfer, the fair market value of the property exceeded the full value of the consideration declared by the Assessee by an amount of not less than 15% of the value so declared. The Supreme

Court held in favour of the Assessee, and in doing so referred to the fact that there were two CBDT circulars on the interpretation of Section 52 (2) of the Act that supported the case of the Assessee. The Court observed:

> "These two circulars of the Central Board of Direct Taxes are, as we shall presently point out, binding on the Tax Department in administering or executing the provision enacted in sub-section (2), but quite apart from their binding character, they are clearly in the nature of *contemporanea expositio* furnishing legitimate aid in the construction of sub-section (2). The rule of construction by reference to *contemporanea expositio* is a well established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. This rule has been succinctly and felicitously expressed in Crawford on Statutory Construction (1940 ed) where it is stated in paragraph 219 that "administrative construction (i. e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight; it is highly persuasive." The validity of this rule was also recognised in *Baleshwar Bagarti v. Bhagirathi Dass (1914) ILR 41 Cal 69* where Mookerjee, J. stated the rule in these terms:
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> > "It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it."
>
> and this statement of the rule was quoted with approval by this Court in Deshbandhu Gupta & Co. v. Delhi Stock Exchange Association Ltd. (1979) 3 SCR 373 It is clear from these two circulars that the Central Board of Direct Taxes, which is the highest authority entrusted with the execution of the provisions of the Act, understood sub-section (2) as limited to cases where the consideration for the transfer has been under- stated by the

assessee and this must be regarded as a strong circumstance supporting the construction which we are placing on that sub-section.

But the construction which is commending itself to us does not rest merely on the principle of contemporanea expositio. The two circulars of the Central Board of Direct Taxes to which we have just referred are legally binding on the Revenue and this binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of subsection (2) and they depart or deviate from such construction. It is now well-settled as a result of two decisions of this Court, one in Navnitlal C. Jhaveri v. K. K. Sen AIR 1965 SC 1922 and the other in Ellerman Lines Ltd. v. Commissioner of Income-tax, West Bengal AIR 1972 SC 524 that circulars issued by the Central Board of Direct Taxes under section 119 of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provisions of the Act."

27. Recently in a decision in ***Spentex Industries Ltd. v. Commissioner of Central Excise (2016) 1 SCC 780***, the Supreme Court explained the maxim *contemporanea expositio*. In the said decision, the Court referred to its earlier decision in ***Desh Bandhu Gupta & Co. And Ors. v. Delhi Stock Exchange Association Ltd. (1979) 4 SCC 565*** in which it was observed as under:

"It may be stated that it was not disputed before us that these two documents which came into existence almost simultaneously with the issuance of the notification could be looked at for finding out the true intention of the Government in issuing the notification in question, particularly in regard to the manner in which outstanding transactions were to be closed or liquidated. The principle of *contemporanea expositio* (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the question of construction.

(Maxwell 12th Edn. p.268). In Crawford on Statutory Construction (1940 Edn.) in para 219 (at pp. 393-395) it has been stated that administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight; it is highly persuasive. In *Baleshwar Bagarti v. Bhagirathi Dass (supra)* the principle, which was reiterated in *Mathura Mohan Saha y. Ram Kumar Saha 35 Ind Cas 305* has been stated by Mukerjee J. thus:

> 'It is a well-settled principle of construction that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. I do not suggest for a moment that such interpretation has by any means a controlling effect upon the Courts; such interpretation may, if occasion arises, have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a Court would without hesitation refuse to follow such construction."
>
> Of course, even without the aid of these two documents which contain a contemporaneous exposition of the Government's intention, we have come to the conclusion that on a plain construction of the notification the proviso permitted the closing out or liquidation of all outstanding transactions by entering into a forward contract in accordance with the rules, bye-laws and regulations of the respondent.'"

28. Circular 5 of 2010 of CBDT clarifying that the proviso to Section 201(3) of the Act was meant to expand the time limit for completing the proceedings and passing orders in relation to 'pending cases'. The said proviso cannot be interpreted, as is sought to be done by the Department, to enable it to initiate proceedings for declaring an

Assessee to be an Assessee in default under Section 201 of the Act for a period earlier than four years prior to 31st March, 2011.

29. With respect to Vodafone Essar Mobile Services Limited (VEMSL), Mr. Shivpuri sought to contend that in these cases the initiation of the proceedings was triggered by the order dated 12th August 2010 passed by the Supreme Court in Civil Appeal No. 6692 of 2010 which pertained to the AY 2002-2003.

30. As rightly pointed out by Mr. Syali while the Supreme Court had sent the matter back for further proceedings for AY 2002-2003, as far as the orders under challenge in these writ petitions are concerned, they pertain to AYs 2003-2004, 2004-2005 and 2005-2006 in respect of which no orders have been passed by the Supreme Court. These notices, therefore, sought to initiate proceedings for declaring VEMSL to be an Assessee in default earlier than four years prior to 31st March, 2011.

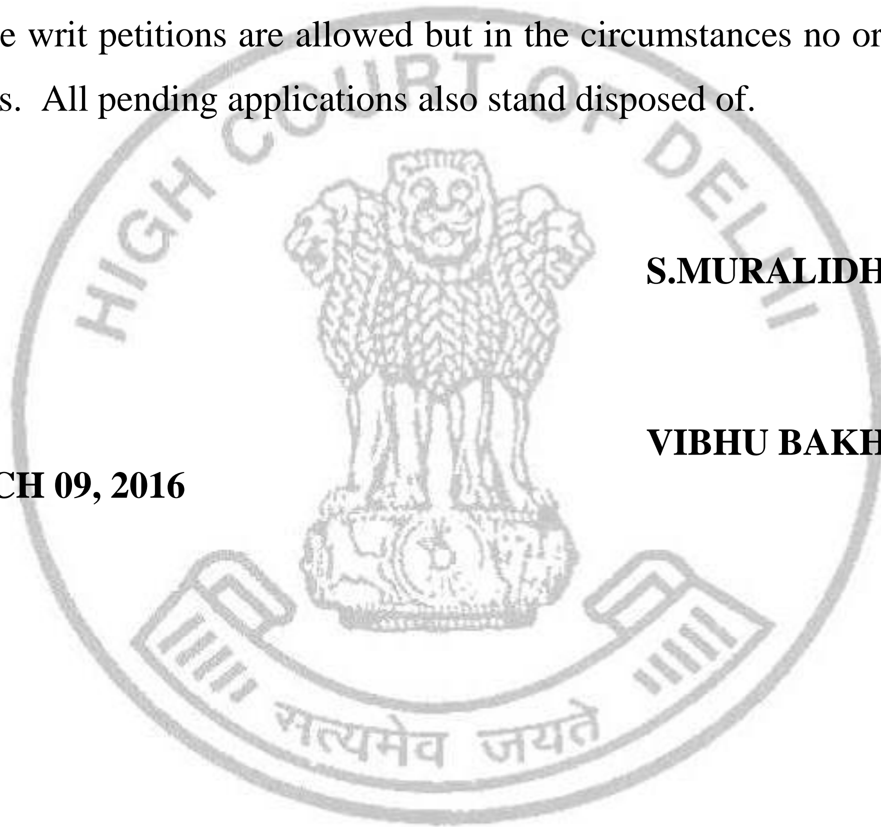
31. The Court agrees that the notices issued to VEMSL for the aforementioned AYs are not covered by the order of the Supreme Court for AY 2002-2003. Accordingly, insofar as the notices for AYs 2003-2004, 2004-2005 and 2005-2006 are concerned, they are held to be unsustainable in law on the interpretation of Section 201(3) of the Act by the Court.

32. In view of the above conclusion, the Court does not consider it necessary to address the question of constitutional validity of Section 201(3) of the Act or the proviso thereto. In any event, the Petitioners

also did not press for that relief in view of the acceptance of their submission on the interpretation of the said provision by the Court.

33. Consequently, the notices impugned in the present petitions issued by the Department seeking to initiate proceedings against the Petitioners for declaring them to be Assessees in default under Section 201(3) of the Act are hereby quashed.

34. The writ petitions are allowed but in the circumstances no orders as to costs. All pending applications also stand disposed of.



S.MURALIDHAR, J.

VIBHU BAKHRU, J.

MARCH 09, 2016
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