

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 13TH DAY OF JUNE 2011

PRESENT

THE HON'BLE MR. JUSTICE V. G. SABHAHIT

AND

THE HON'BLE MR. JUSTICE RAVI MALIMATH

WRIT APPEAL No.3400 OF 2011 (T-IT)

BETWEEN:

M/s. RICHTER HOLDING LIMITED,
(A NON-RESIDENT COMPANY),
HAVING ITS OFFICE AT
No. 66, IPPOCRATOUS STREET,
P.C 1015 NICOSIA, CYPRUS,
REPRESENTED BY ITS
LAWFUL ATTORNEY,
SRI DEEPAK KUMAR,
AGED ABOUT 35 YEARS,
SON OF SRI BADRI PRASAD TIBREWAL.

... APPELLANT

(BY Dr. DEBI PRASAD PAL., SR. COUNSEL FOR
SRI S PARTHASARATHI, ADV.)

AND:

1. THE ASSISTANT DIRECTOR OF
INCOME-TAX, INTERNATIONAL
TAXATION, CIRCLE-II(1),
RASHTROTHANA BHAVAN,
6TH FLOOR,
14/3, NRUPATHUNGA ROAD,
BANGALORE – 560 001.

2. THE DEPUTY DIRECTOR OF
INCOME-TAX INTERNATIONAL
TAXATION, CIRCLE-1(1),
RASHTHANA BHAVAN,
6TH FLOOR,
14/3, NRUPATHUNGA ROAD,
BANGALORE - 560 001.
3. UNION OF INDIA,
THROUGH THE SECRETARY,
DEPARTMENT OF REVENUE,
MINISTRY OF FINANCE,
NORTH BLOCK,
NEW DELHI - 110 001.

... RESPONDENTS

(BY SRI M.V SESHACHALA, ADV. FOR R1-3)

THIS WRIT APPEAL IS FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE
THE ORDER PASSED IN THE WRIT PETITION
No.7716/2011 (T-IT) DATED 24/03/2011.

THIS WRIT APPEAL COMING ON FOR PRELIMINARY
HEARING THIS DAY, SABHAHIT J., DELIVERED THE
FOLLOWING:

J U D G M E N T

This appeal is filed by the petitioner in W.P. No.7716/2011 being aggrieved by the order dated 24.03.2011, wherein the learned single Judge of this Court has declined to interfere with the show cause notice issued by the first respondent dated 12.10.2009 as per Annexure 'B' to the writ petition.

2. The appellant herein filed W.P. No.7716/2011 averring that the petitioner is a non-resident Company limited by shares and is incorporated under the laws of Cyprus having its principal office at 66, Ippocratous Street, P.C. 1015 Nicosia, Cyprus. Respondents 1 and 2 are the Income Tax Authorities under Section 116 of the Income Tax Act, 1961 (hereinafter referred to as '**the Act**'), against whose action, the writ petition was filed. It is averred that the first respondent issued a show cause notice as per Annexure 'B' to the writ petition dated 12.10.2009 regarding proceedings under Section 201(1) and 201(1A) in respect of indirect acquisition of 51%

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shares of Sesa Goa Limited without deduction of TDS. The petitioner contended that the said show cause notice is not a show cause notice at all and the Assessing Officer has already prejudged the matter and wherefore, no useful purpose would be served in giving a reply to the show cause notice.

3. The learned single Judge, after considering the contentions of the learned counsel for the parties, held that the petitioner, having received the show cause notice should approach the first respondent – assessing officer and give its reply and all the contentions that were urged in the writ petition can be urged before the Assessing Officer and accordingly, declined to interfere with the show cause notice. The learned single Judge directed the petitioner to appear before the first respondent – authority pursuant to the show cause notice and the first respondent to consider the case of the petitioner and pass appropriate order in accordance with law. The petitioner was directed to appear before the first respondent – authority on

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25.04.2011. Being aggrieved by the said order, the unsuccessful petitioner has preferred this appeal.

4. Notice was issued to the respondents.

5. We have heard the learned senior counsel appearing for the appellant and the learned counsel appearing for the respondents.

6. The learned senior counsel appearing for the appellant submitted that the facts are not disputed and on the basis of the facts and documents that are produced along with the writ petition, the finding that has already been arrived at by the first respondent by issuing show cause notice can be decided by this Court and no useful purpose would be served by showing cause to the notice as the first respondent has already predetermined and concluded the matter. The direction issued to the petitioner – appellant herein to go and show cause before the first respondent would be an empty formality since jurisdictional fact can be answered by this Court in view of

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the decisions of the Hon`ble Supreme Court. He has taken us through the contents of the show cause notice, which is produced as per Annexure `B` to the writ petition and has emphasized certain opinions expressed in the said show cause notice, wherein the first respondent has observed that though the transaction took place in UK, as the underlying assets (51% shares and controlling interest in Sesa Goa Limited) are situated in India, the transaction should be taxable in India and has discussed the legal provisions in that regard. The first respondent has further observed as under:

" If you feel that the facts stated above are not correct, you are requested to give your version of facts with full corroborative evidence documentary or otherwise. Your objections /reply /details may be furnished before the next date of hearing as indicated in the last para of this letter. "

Regarding the other proposal made by the Assessing Officer also, the learned senior counsel has taken us through the contents of the show cause notice and submits

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that the Assessing Officer has already decided that there is a transfer under Section 2(47) of the Act and attracts capital gains tax under Section 45 of the Act. The learned senior counsel, in support of his contention that the transaction in the instant case cannot be considered as transaction under Section 2(47) of the Act and does not attract capital gains tax, has relied upon the decision of the Hon`ble Supreme Court in ORYX FISHERIES PRIVATE LIMITED Vs. UNION OF INDIA AND OTHERS ((2010) 13 Supreme Court Cases 427), wherein it is observed as under:

"31. It is of course true that the show-cause notice cannot be read hypertechnically and its is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony

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and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence. "

The learned senior counsel has also relied upon Advance Ruling A. No.P-5 of 1995, In re. (1997 Authority for Advance Rulings 379), wherein also same principles have been reiterated and advance ruling has been rendered having regard to the facts presented in the said case. He has also relied upon the decision of the Hon`ble Supreme Court in SIEMENS LTD. Vs. STATE OF MAHARASHTRA (2007 (207) E.L.T. 168 (SC)), wherein it is held as under:

9. The question as to whether jurisdictional fact existed for issuance of the said notice order passed by the respondent was in question in the said writ petition.

10. Although ordinarily a writ court may not exercise its discretionary jurisdiction in

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entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of Uttar Pradesh v. Brahm Datt Sharma and Anr. (AIR 1987 SC 943), Special Director and Another v. Mohd. Ghulam Ghouse and Another ((2004) 3 SCC 440) and Union of India and Another v. Kunisetty Satyanarayana (2006 (12) SCALE 262), but the question herein has to be considered from a different angle, viz, when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the courts directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose (see K.L. Shephard and Others v. Union of India and Others [(1987) 4 SCC 431: AIR 1988 SC 686]. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause. "

The learned senior counsel submitted that having regard to the principles laid down by the Hon'ble Supreme Court, it is clear that no useful purpose would be served by

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relegating the appellant to give reply to the show cause notice and directing the Assessing Officer to decide the question as the first respondent has already predetermined the matter and wherefore, the writ appeal may be allowed by setting aside the order of the learned single Judge and show cause notice may be quashed.

7. The learned counsel appearing for the respondents submitted that what is challenged by the appellant in the writ petition is only the show cause notice. Earlier, in respect of M/s. Sesa Goa Limited, show-cause notice dated 22.09.2008 had been issued by the Deputy Director of Income Tax (International Taxation) Circle - 1(1), Bangalore. The said show cause notice was challenged by M/s. Sesa Goa Limited in W.P. No.1386/2009 and in the said case, the following order was passed by this Court on 13.03.2009:

"10. As the respondent has sought for permission to withdraw the notice, particularly, as further proceedings after issue of the notice had been stayed by this court, the interim

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order granted earlier is vacated and the writ petition is dismissed with the observation that it is open to the respondent to withdraw the notice and to proceed in accordance with law. "

The learned counsel further submitted that in the show cause notice impugned in the instant case, the first respondent has only given a tentative opinion, which is subject to the objections that may be filed by the appellant. The first respondent has also made it clear that if the facts were found to be different, the same may be brought to his notice. The appellant is at liberty to submit about the validity of the opinion expressed by the first respondent in view of the contents of the show cause notice itself and the question of jurisdictional fact about the liability of the appellant has to be considered by the appropriate authority and not by the High Court in exercise of power under Article 226 of the Constitution of India. In similar circumstances, wherein a show cause notice had been challenged, the Bombay High Court in VODAFONE INTERNATIONAL HOLDINGS B.V. Vs. UNION OF INDIA AND ANOTHER ((2009) 311 ITR 46 (BOM)) has held that the question regarding taxability cannot be determined on the basis of affidavits in the writ proceedings in

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exercise of power under Article 226 of the Constitution of India and it has to be decided by the appropriate authority only. Having regard to the contents of the show cause notice, the Bombay High Court declined to interfere with the same by holding that where the question involved is as to the nature of the transaction depending on the construction of documents, the same is a mixed question of fact and law and it is for the fact finding authorities to go into the same, particularly when the law prescribes a particular procedure for ascertaining those facts and the same cannot be the subject-matter of a writ petition."

Being aggrieved by the said order, an appeal was filed before the Hon`ble Supreme Court and the Hon`ble Supreme Court by order dated 23.01.2009 in VODAFONE INTERNATIONAL HOLDINGS B.V Vs. UNION OF INDIA AND ANOTHER ((2009) 221 CTR (SC) 617), has held as follows:-

The jurisdictional fact can be decided by the Assessing Officer as a preliminary issue

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and if the assessee is aggrieved by the order on jurisdictional fact, he can approach the High Court under Article 226 of the Constitution of India and the High Court cannot go into the said question by deciding the subject matter on merits.

8. In reply, the learned senior counsel appearing for the appellant submitted that since the jurisdictional issue can be decided by this Court, the same may be decided and if the Court comes to the conclusion that the appellant should be relegated to the first respondent – authority to show cause, direction may be given to the first respondent to decide the jurisdictional fact as a preliminary issue with liberty to the appellant to approach this Court if it is aggrieved by the finding on the jurisdictional fact as observed by the Hon`ble Supreme Court in VODAFONE` s case (referred supra).

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9. We have given careful consideration to the contentions of the learned counsel appearing for the parties and scrutinized the material on record.

10. The material on record would clearly show that what is challenged in the writ petition is only a show cause notice issued by the first respondent and the said notice pertains to a transaction, wherein the appellant herein accepted the offer made by Vedanta Group and the acquirer companies and the offer was made to the retail share holders of Sesa Goa Limited. As per the offer, the Vedanta Group and the acquirer Companies undertook to buy additional 15% shares of Sesa Goa Limited from the retail share holders at the price of ₹.2036.30 (the price at which the Vedanta Group had earlier indirectly acquired 51% shares of Sesa Goa Limited). Vedanta Group had to make this offer because as per SEBI regulations, no person can acquire more than 15% share holding of an Indian listed Company without making such an offer. We do not find any merit in the contention of the learned senior counsel for the appellant that the contents of the show

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cause notice would reveal that the first respondent has already predetermined the matter and no useful purpose would be served by relegating the appellant to the first respondent to show cause to the notice issued by him as he has already predetermined the matter, as it is clear from the contents of the show cause notice itself that after expressing a tentative opinion in respect of reasoning given, the Assessing Officer has observed as follows:-

"If you feel that the facts stated above are not correct, you are requested to give your version of facts with full corroborative evidence documentary or otherwise. Your objections /reply /details may be furnished before the next date of hearing as indicated in the last para of this letter. "

Ultimately, at the end of the show cause notice, the Assessing Officer has observed as follows:-

" In view of the above mentioned legal provisions, it is clear that (M/s. Westglobe Ltd.) along with Richter Holdings Ltd. Cyprus jointly acquired indirectly 2,00,74,834 shares of Sesa

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Goa for total consideration of ₹.4087 crores on which capital gains deemed to accrues or arises in India as per above discussion. Therefore in accordance with provision of section 195 you ought to have made TDS on these payments to the Company i.e., Earlyguard.

You are hereby called upon to explain the reasons as to why tax was not deducted and deposited to the government in accordance with the provisions of Income Tax Act, 1961. "

Having regard to the contents of the show cause notice, it is clear that it is open to the appellant to urge all the facts including jurisdictional fact before the Assessing Authority by placing the version of the appellant with corroborative evidence, documentary or otherwise and wherefore, on a reading of the show cause notice, no person of ordinary prudence would come to the conclusion that no useful purpose would be served by remitting the matter to the first respondent. Further, in view of the decision of the Hon`ble Supreme Court in VODAFONE INTERNATIONAL

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HOLDINGS` s case (referred supra), the interest of the appellant can further be safeguarded by directing that the appellant shall appear before the first respondent by raising jurisdictional fact and the jurisdictional fact shall be tried as a preliminary issue and if the appellant is aggrieved by the finding on the preliminary issue relating to jurisdictional fact, it is open to the appellant to approach this Court under Article 226 of the Constitution of India as observed by the Hon`ble Supreme Court in VODAFONE` s case (referred supra). We hold that the impugned order passed by the learned single Judge is justified and the show cause notice issued by the first respondent dated 12.10.2009 (Annexure `B` to the writ petition) does not call for interference in exercise of writ jurisdiction of this Court. However, it is made clear that the appellant shall be entitled to raise the jurisdictional fact in the objections statement to be filed by the appellant to the show cause notice and if the jurisdictional fact is raised by the appellant, the same shall be tried as a preliminary issue by the first respondent and in the event of the appellant being aggrieved by the finding arrived at by the first respondent

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in respect of the jurisdictional fact, it is open to the appellant to approach this Court against the said finding.

Accordingly, the writ appeal is disposed of. Since the date given by the learned single Judge for appearance of the parties before the first respondent, who has issued the show cause notice dated 12.10.2009 (Annexure 'B' to the writ petition) has expired, the appellant shall file objections to the said show cause notice within four weeks from today and shall appear before the first respondent – authority on 18.07.2011.

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