

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
AMARJIT SINGH, JUDICIAL MEMBER**

SA NOS. 436 & 437/MUM/2018 : **A.Ys : 2016-17 & 2017-18**
(arising out of ITA NOS. 5862 &
5863/MUM/2018)

Uber India Systems Pvt. Ltd.,
Unit 41/46, Floor 3 Paragon,
Phoenix Market City, LBS Marg,
Kurla (W), Mumbai 400 070.
PAN : AABCU6223H (Applicant)

Vs. JCIT(TDS)(OSD)-(2)(3),
Mumbai
(Respondent)

Applicant by : **Shri J.D. Mistry/Hiten Chande**
Respondent by : **Shri D.G. Pansari**

Date of Hearing : **28/09/2018**

Date of Pronouncement : **28/09/2018**

ORDER

PER RAJESH KUMAR, AM :

By way of these stay applications, assessee seeks the stay of demand of Rs.24,92,16,591/- and Rs.84,13,13,665/- for Assessment Years 2016-17 and 2017-18 respectively.

2. The brief facts of the case are that the assessee is a company incorporated under the provisions of the Companies Act, 1956 on 16.08.2013 and is engaged in the business of providing marketing and support services to Uber B.V. a company incorporated under the laws of Netherlands and is a tax resident of Netherlands. During the year, Uber B.V has engaged the appellant to provide various services under Inter-Company Service Agreement. On 12.01.2018, a survey was conducted

u/s 133A(2A) of the Income Tax Act, 1961 (in short „the Act“) at the registered office of the assessee-company and it was observed that the assessee has not complied with TDS provisions which has resulted in non-compliance of provisions of Sec. 194C of the Act on the payouts/dues to the Driver-Partners. Accordingly, the assessee was treated in default and the above demands were raised on the assessee for two assessment years as referred to above qua which the assessee has moved these stay petitions.

3. The Id. AR vehemently argued before the Bench that the provision of TDS u/s 194C of the Act were not applicable to the assessee and therefore the order passed by the CIT(A) is wrong and against the facts on records. The Id. AR submitted that the assessee is not a „person responsible for paying“ u/s 204 of the Act and thus the provisions of section 194C of the Act. The said contention has not been dealt by either of the authorities below as assessee is providing only support services and acting as collection and remittance agent and disburses the payment as per the instructions from Uber B.V. The Id. AR also submitted that considering the facts that all Driver-Partners are residents of India having PANs/bank accounts and most likely earning below the threshold limit as prescribed under Sec. 44AD of the Act and accordingly not liable to tax at all . The Id. AR further submitted that the liability under Chapter XVII-B of the Act is a vicarious liability, the same arises only if the payment results in taxable income in the hands of the recipient and if the amount paid is not chargeable to tax in the hands of the recipient, there is no obligation under Chapter XVII-B of the Act, as held by the apex court in the case of *GE India Technology Centre vs CIT, 327 ITR 456 (SC)*. Therefore, fastening the tax liability of Users/Riders/Driver-Partners on the assessee has put the assessee to unnecessary burden and adversely impacted the business operations of the assessee without necessary verification such as whether the Driver-Partners have discharged their due taxes or not or whether they are assessable or not. The Id. AR further submitted that even on merit, assessee has all probability to succeed in the appeal before the ITAT as it has a very good case on merits and, therefore, demand raised

u/s 201(1) & 201(1A) should be stayed pending the hearing of appeal by the hon'ble tribunal. The Id. AR also invited the attention of the Bench to the penalty proceedings initiated u/s 271C and 206AA of the Act and stated that the JCIT(TDS) is in undue haste to impose the penalty under the said proceedings/provisions even when the application of provisions of tax deduction at source is disputed. The Id. AR prayed that the assessee is apprehending imposition of huge penalty by the Revenue authorities, which would jeopardize its entire business operations of the assessee. The Id senior counsel submitted the provisions of 194C are not applicable to the assessee as the contract is between Uber B.V. and drivers and the assessee is only a facilitator. The Id. AR submitted that in the interest of justice and fair play, the said proceedings may kindly be stayed till the disposal of the appeal by the Tribunal. The Id Sr counsel submitted that to stay the penalty proceedings pending the disposal of appeal the outcome of which would decide whether the penalty is imposable or not. In other words the penalty proceedings are consequential in nature. In support of his contentions the Id Sr counsel relied on the decisions of Assistant Commission of Income Tax Vs GE India Industrial (P) Ltd (2014) 46 taxmann.com 374(Gujarat) and CIT Vs Wander Pvt. Ltd (2014)44 taxmann.com 103(Bombay) and submitted that the tribunal is well within its jurisdiction to direct the stay of penalty proceedings as these proceedings are totally dependent upon the outcome of the appeal which is sub-judice before this honble bench. Lastly , the Id. AR prayed before the Bench that the appeal may be listed on out-of-turn basis so that it could be disposed off on merit forthwith.

4. The Id. DR, on the other hand, strongly opposed the arguments of the Id. AR and submitted that the demand has been created u/s 201(1) and 201(1A) of the Act for committing default u/s 194C of the Act and until and unless the order is reversed by the higher authorities, the demand of tax is lawfully due and the assessee should be asked to deposit the same immediately. On stay of penalty proceedings u/s 271C and 206AA of the Act, the Id. DR prayed that the

proceedings are initiated as per the provisions of the Act and it would be premature to stay the proceedings at this stage.

5. We have heard the rival submissions and perused the material on record. It has been pleaded before us that assessee is providing marketing and support services to a foreign company, Uber B.V, which is incorporated in Netherlands. Assessee is collecting the payments on behalf of the said company and making disbursements to Driver-Partners as per the directions of Uber B.V, a Netherland company. According to the Assessing Officer (TDS), assessee is liable to deduct TDS u/s 194C of the Act, which assessee has defaulted. The AO accordingly treated the assessee in default and created demand on account of TDS and interest thereon of Rs.24,92,16,591/- and Rs.84,13,13,665/- for Assessment Years 2016-17 and 2017-18 respectively. At this juncture we are not going into the merits of the cases and are confining ourselves to stay of the demand and the penalty proceedings initiated upon the assessee u/s 271C and 206AA of the Act. The assessee has denied liability to deduct TDS u/s 194C of the Act on the ground that assessee is not a „person responsible for making payment“ to the Driver-Partners as the contract is between Uber B.V and Driver-Partners. The assessee is merely working on the directions of the said company and passing on payments to the Driver-Partners as per the directions of Uber B.V. During the course of hearing, the assessee submitted that the *modus operandi* of collecting the payments by the assessee on behalf of the Netherland company which are made by way of debit or credit cards or collecting by the Driver-Partners directly from the customers. It was also stated that there are practical difficulties as it is not possible for the assessee to collect TDS on the cash payments received by the Driver-Partners directly. During the hearing the ld counsel for the assessee proved that the facts of the case were not properly and thoroughly examined and verified by the lower authorities. We earnestly of the view that the demand raised by the revenue should be stayed subject to deposit of Rs. 20.00 Cr till the disposal of appeal by the tribunal so that the business of the assessee is not adversely impacted. We, therefore, are staying

the demand for both the years subject to payment of Rs.20 crores to be paid in three installments two Rs. 6.5 Cr on 15.10.2018 and 15.11.2018 and Rs. 7.00 Cr on 15.12.2018. The case of the assessee is also listed on an out-of-turn hearing on 11.12.2018. Subject to the above conditions the demand is stayed for a period of 180 days and the assessee would not seek adjournment without any sufficient reason failing which the stay is subject to vacation by the bench hearing the appeals.

5. So far as the penalty proceedings are concerned, the assessee has made out a *prima facie* case in favour of the assessee proving that the outcome of the appeal before ITAT will directly impact the proceedings which are hurriedly being finalized by the authorities below, which may entail huge liability by way of penalty on the assessee. In our opinion, so long as the appeal is pending before the Tribunal, the Revenue authorities should be restrained from passing any order imposing penalty on the assessee u/s 271C and 206AA of the Act however the proceedings may continue. While deciding so, we are supported by the decision of the Jurisdictional High Court in the case of *CIT vs Wander Pvt. Ltd.*, (2014) 44 *Taxman.com* 103 (Bombay) and *ACIT vs GE India Technology Pvt. Ltd.* (2014) 46 *Taxmann.com* 374 (Gujarat). We, therefore, respectfully following the decision of the Hon'ble Gujarat High Court, direct the Addl. CIT (TDS)/revenue authorities not to pass orders imposing penalty for a period of six months from the date of this order or disposal of appeal by the tribunal whichever is earlier, however, the proceedings may be continue during this period.

7. The stay applications are disposed off as directed hereinabove and revenue authorities directed not to pass orders imposing penalty u/s 271C and 206AA for a period of six months from the date of this order or disposal of appeal whichever is earlier.

The above decision was pronounced in the open court in the presence of both the parties at the conclusion of the hearing on 28th September, 2018.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Mumbai, Date : 28th September, 2018

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "F" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai