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Vodafone wins long battle against India over Rs 20,000 cr retro tax demand

India told to bear 60% of Voda's legal costs amounting to over £4 million; FinMin tells govt to consult counsel and consider all options

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The Permanent Court of Arbitration at the Hague has upheld the plea of the Vodafone group in its long-pending case against the Income Tax Department's demand for Rs 20,000 crore for acquiring Hutchison Whampoa's stake in what was Hutchison-Essar in 2007 through an overseas deal. Experts say the order may benefit other tax disputes that are in arbitration such as those of Cairn and Vedanta.

"The Respondent's (India's) conduct in respect of the imposition on the Claimant (Vodafone) of an asserted liability to tax notwithstanding the Supreme Court judgement is in breach of the guarantee of fair and equitable treatment laid down in Article 4(1) of the agreement (for promotion and protection of investments), as is the imposition of interest on the sums in question and the imposition of penalties for non-payment of the sums in question," said the order by the panel, accessed by Business Standard.

The order further said Vodafone was entitled

Sources said the government might have to refund Rs 45 crore only if it does not go for appeal against the award.

to fair and equitable treatment in respect of its investment in mobile telecommunication in India in line with the bilateral investment treaty (BIT).

Any failure to comply with this by India will engage with its international responsibility, it said.

The panel also asked India to pay £4.32 million as 60 per cent cost that Vodafone bore for legal representation and 3,000 euros as 50 per cent fee the company paid the appointing authority.

The Income Tax Department had demanded Rs 7,990 crore in capital gains taxes in 2007, and it rose to Rs 22,100 crore after including interest and penalty by 2016.

TAX BATTLE

2007: Vodafone gets tax notice after buying Hutchison's India assets

Moves Bombay HC to challenge the notice

2008: Bombay HC dismisses petition

2010: Vodafone moves SC against HC decision

2012: SC verdict says tax can't be levied on the deal

Govt comes out with retrospective amendments allowing such deals to be taxed

2013: Vodafone gets ₹14,200-crore tax demand

Cabinet approves non-binding conciliation

2014: Vodafone serves arbitration notice under India-Netherlands BIPA after I-T dept withdraws conciliation offer

2016: Vodafone receives a ₹22,100-crore tax demand (including interest)

2020: Vodafone wins the arbitration case

The company said in a statement: "Vodafone confirms that the investment treaty tribunal found (the case) in Vodafone's favour. This was a unanimous decision, including India's appointed arbitrator Mr Rodrigo Oreamuno. The tribunal held that any attempt by India to enforce the tax demand would be a violation of India's international law obligations."

The finance ministry said in a statement the government would study the award.

A senior official, however, said, "Implementation of foreign tribunal award decisions is governed by the Indian Arbitration Act, and the government is not obliged to accept the award."

Finance ministry sources said the government had defended its position in the arbitration panel, saying it had sovereign right to tax capital gains on the transfer of assets located in India and was well within its right to take all measures to stop avoidance of taxes through indirect transfers via tax havens.

They said Parliament rightly clarified its intent through an amendment in the Income-Tax Act and therefore such measures could not be opposed by simply labelling it as a retrospective amendment. The question is, should the government have allowed such loopholes to continue, asked the sources. The answer is obviously no. "It (the government) is duty-bound to take all steps to protect public money and exchequer, and if there is any attempt to avoid the taxes by routing the transaction through a tax haven like Cayman Island, it was entitled to take all measures, including amendments to law, to stop such abuse," said a source.

Vodafone has not paid the department anything and hence the question of refund does not arise. But write-off is also ruled out and tax demand raised against the telecom major will remain, an official said. Together with the cost imposed on India by arbitration, this will be around Rs 85 crore only, the official said.

Sources said the government might have to refund Rs 45 crore only if it does not go for appeal against the award.

Anuradha Dutt, founder and senior partner at DMD Advocates, who represented Vodafone in arbitration, said: “Vodafone has got justice, first from the Supreme Court and now from an international arbitral tribunal.”

Akhilesh Ranjan, former member of the Central Board of Direct Taxes, said: “The decision raises questions on whether the government can accept the ruling and not enforce a tax demand raised under a law passed by Parliament. The government might seek a review of the ruling, but ultimately may have to decide whether and how to implement it. This issue of implementation may continue to be contested in courts under the Indian Arbitration Act.”

Rajesh Simhan, leader and head of the tax practice at Nishith Desai Associates, said, "The Vodafone order could benefit Vedanta and Cairn, which have initiated arbitration proceedings against the government's retrospective tax demands."

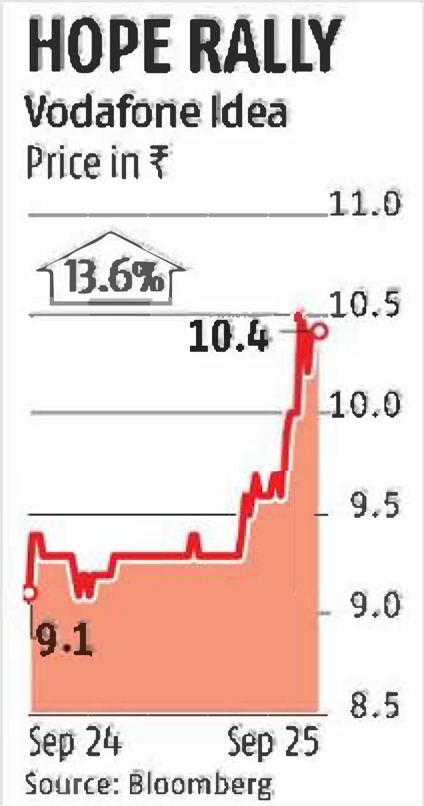
Amit Maheshwari, tax partner at AKM Global, said that for cases already going on, even though the Vodafone order might not be binding, in all probability this retrospective amendment would be seen as unfair.

Rakesh Nangia, chairman of Nangia Andersen India, said Vodafone had successfully relied on the fair and equitable treatment standard in BIT.

"It is time for the Government of India to review the legacy 2012 retrospective tax law, and ensure new beginnings, with tax certainty to become the order of the day," said Advocate Fereshte Sethna, founding & managing partner at DMD Advocates, who represented Vodafone in the matter.

Though the Supreme Court ruled in favour of Vodafone in 2012, saying that the department had “no jurisdiction” to levy tax on overseas transactions between companies incorporated outside India, the government, run by the United Progressive Alliance, passed an amendment to the Income Tax Act, giving it retrospective effect to bring deals done overseas within the tax net.

Vodafone had deposited Rs 2,500 crore with the Supreme Court and given a bank guarantee of Rs 8,500 crore in 2012. The deposit was refunded and bank guarantee discharged after it won the case at the Supreme Court.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