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

DECIDED ON: 16.10.2012

+ W.P. (C) 4671/2012

GENPACT INDIA

..... Petitioner

Through: Mr. S. Ganesh, Sr. Advocate with
Ms. Anuradha Dutt, Mr. Pawan Sharma,
Ms. Madhuri Swaroop and Ms. Roohina Dua,
Advocates.

versus

ASSISTANT COMMISSIONER OF
INCOME-TAX

..... Respondent

Through: Mr. Sanjeev Sabharwal, Sr. Standing
Counsel with Ms. Gayatri Verma, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% The writ petitioner seeks direction *inter alia* that an amount of ₹ 22,04,34,854/- is refundable by virtue of the order of the CIT (A) in respect of AY 2005-06.

2. The petitioner renders IT enabled services and has established STP Units entitled to the benefit under Section-10A of the Income Tax Act, 1961. During the concerned assessment year i.e. 2005-06, the respondent apparently levied penalty under Section-271 (1) (c) to the tune of ₹ 40 Crores for AY 2003-04 stating that the assessee had furnished inaccurate particulars. The petitioner's refund - which it became entitled subsequently on 27.04.2012 - was in respect of AY 2005-06. Aggrieved by the penalty order made by the AO, an appeal was preferred. The petitioner apparently sought for stay of the demand for

₹ 40 Crores levied as penalty, by an application dated 03.05.2012 in its pending appeal (against the order of the AO levying the penalty dated 30.03.2012). This was subsequently followed in several other applications.

3. On 09.07.2012, the respondents issued an order under Section-250/143 (3) of the Act giving effect to the order of the CIT (A) for AY 2005-06. Instead of making the refund of ₹ 22,04,34,854/-, the said amount was adjusted against the penalty demand of ₹ 40 Crores. The appellant is aggrieved by the adjustment sought to be made by the impugned notice/communication dated 9.7.2012. It is contended that the procedure prescribed by law i.e. issuance of notice under Section-245 followed by an order after considering the contentions, has not been followed.

4. It is not denied by the Revenue in these proceedings that the procedure prescribed by Section-245 was not followed. What is instead sought to be relied upon is the notice/intimation dated 20.07.2012 stating that the adjustment would be made in respect of AY 2003-04.

5. It is brought to the notice of this Court that the ruling in *Glaxo Smith Kline Asia P. Ltd. v. Commissioner of Income-Tax and Others*, (2007) 290 ITR 35 (Delhi) emphasises that the power to make such adjustment carries within it the duty upon the concerned officer to issue appropriate notice and hear the assessee in this regard. The relevant observations are as follows: -

“28. As already noticed, this discretionary power has to be exercised after giving an opportunity to the assessee of being heard preceded by an intimation to the assessee in writing of the action proposed to be taken under section 245. A further implicit requirement is that the Revenue will have to be satisfied that the assessee will not be in a position to satisfy the demand of tax and that but for the set off, the outstanding tax amount cannot be recovered at all.”

6. The assessee also informed that in respect of AY 2003-04, another order was made in WP (C) 6915/2011 directing refund but expressly stating that in the event an adjustment was sought to be made, notice had to be issued. The observations of this Court in that case i.e. WP (C) 6915/2011 decided on 08.12.2011 titled as *M/s Genpact India v. Asstt. Commissioner of Income Tax*, are as follows: -

“5. The position which emerges is that the said adjustment/recovery was

of an amount of demand relating to an issue which was decided in favour of petitioner by the ITAT order and also the judgment of this court in petitioner's own case for the assessment year 2004-05. Such a recovery of demand relating to an issue covered by the judgment in favour of the petitioner is directly contrary to CBDT Circular No.1914 of 1993 which provides that a stay of demand could be granted in the following situations:

“a. if the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier; or

b. if the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under whose jurisdiction the Assessing Officer is working); or

c. if the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment.”

Such a recovery is also contrary to the judgments of the Supreme Court in the case of Gopal Sugar v. ITO, 40 ITR 618 and Union of India v. Kamalakshi, AIR 1992 SC 711.

5. As per the aforesaid position in law, the demand made by the assessing officer on re-assessment in respect of assessment year 2003-04 itself becomes invalid and, therefore, no question of adjustment thereof arises. It is for this reason that we have observed that no purpose would be served in remitting the case back to the assessing officer.

6. We, thus, allow this writ petition and direct the assessing officer to release the aforesaid amount to the petitioner within a period of four weeks from today in case any outstandings are due and payable by the petitioner and the revenue has right to adjust this amount against such other dues, if payable. In that eventuality, it would be open to the assessing officer to issue notice under Section 245 of the Act and proceed with the matter.”

7. In view of the above discussion, this Court is of the opinion that the impugned adjustment sought to be made unilaterally without intimating the assessee or without being preceded by hearing is untenable in law. The said intimation to the extent it directed adjustment of the sum of ₹ 22,04,34,854/- payable as refund is hereby quashed.

8. The Writ Petition is allowed; the amount concerned shall be paid within four weeks from today. This is subject to the Revenue's powers to make any adjustment, provided it does so in accordance with law as spelt out above.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

OCTOBER 16, 2012
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