IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2686 OF 2013

Hindustan Unilever Limited ..Petitioner

Vs.

Deputy Commissioner of Income Tax-1(1)
and Ors. ..Respondents

....

Mr. Nishant Thakkar a/w Rajesh Poojari, Advocates i/b Mulla & Mulla & CBC for Petitioner.
Mr. Arvind Pinto, Advocate for Respondent.

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CORAM : M.S. SANKLECHA &
N.M. JAMDAR, JJ.
DATED : 25th JUNE 2015

Oral Judgment: (Per: M.S. Sanklecha, J.)

On 11 June 2015, at the joint request of the counsel, petition was kept at the bottom of the admission board for final disposal today. Accordingly Rule. Rule made returnable forthwith. Respondent waives services. Taken up for final disposal.

2. The challenge in this petition under Article 226 of the Constitution of India is to the manner in which the Assessing Officer has under Section 245 of the Income Tax Act, 1961 (the 'Act')

adjusted the demands aggregating to Rs. 43 crores for the Assessment Years 2004-05, 2007-08 and 2008-09 out of the refund of Rs.129crores admittedly due to the petitioner for the Assessment Year 2006-07. Besides the challenge is also to the consequential three orders dated 22 August ,2013 passed under Section 220(2) of the Act demanding interest on the delayed payment of the adjusted demands for the Assessment years 2004-05, 2007-08 and 2008-09.

Facts:-

3. For the Assessment Year 2006-07, the petitioner filed its return of income declaring Rs.366.94 crores as income and computing the tax payable thereon Rs.123.51 crores. The Assessing Officer consequent to the directions of the Dispute Resolution Panel passed an order dated 7 October 2010 under Section 143(3) r/w Section 144C of the Act enhancing the taxable income from Rs.366.94crores to Rs.937.86crores. A part of the enhancement was attributable to transfer pricing adjustment of Rs.369crores. This further addition on account of transfer pricing led to a tax demand of Rs.124crores.

4. Being aggrieved, the petitioner carried the above order in appeal to the Income Tax Appellate Tribunal(Tribunal). By an order dated 10 December 2012 the Tribunal partly accepted plea of the petitioner including on account of transfer pricing adjustment. The Tribunal by the above order dated 10 December 2012 restored some of the issues to the Assessing officer who by order dated 29 May 2013 while giving effect to the order of Tribunal reduced the petitioner's income to Rs.442crores leading to a refund of Rs.129crores.

5. In the meantime, for the Assessment Years 2007-08 and 2008-09, the Assessing Officer by orders dated 28 January 2011 and 31 January 2012 passed assessment orders resulting in demand of Rs.83crores for the Assessment Year 2007-08 and Rs.135crores for the Assessment Year 2008-09. Being aggrieved by the two assessment orders, the petitioner filed appeals for the Assessment Year 2007-08 and 2008-09 to the Commissioner of Income Tax (Appeals) (the 'CIT (Appeals)'). Pending the disposal of the appeals by the CIT (Appeals), the petitioner filed application for stay of demand on 10 February 2011 for Assessment year 2007-08 and on

2 March 2012 for a stay of demand Assessment year 2008-09 with the Assessing Officer in terms of Section 220(6) of the Act.

6. So far as Assessment Year 2007-08 is concerned, in response to the petitioner's application dated 10 February 2011 for stay to the Assessing Officer, the the Commissioner of Income Tax passed an order dated 22 March 2011 grant a partial stay of Rs.18crores on the petitioners depositing an amount of Rs.65.25 crores out of demand of Rs.83.25crores. So far as Assessment Year 2008-09 is concerned, the Assessing Officer by an order dated 9 March 2013 granted a partial stay to the extent of Rs.25 crores out demand of Rs.135 crores. This partial stay for assessment years 2007-08 and 2008-09 was in respect of amount of demand attributable to transfer pricing adjustment identical/ similar to the issues now decided in favour of the petitioner by the Tribunal for the Assessment year 2006-07. It is pertinent to note that neither of the two orders of stay dated 22March 2011 and 9 March 2012 make any reference to any adjustment out of refunds due for Assessment year 2006-07.

7. Consequent to the orders of stay under Section 220(6) of the Act for the Assessment Years 2007-08 and 2008-09, the balance demand of Rs.65.25crores for the Assessment Year 2007-08 and Rs.110 crores for the assessment year 2008-09 was admittedly paid by the petitioner to the revenue. The appeals before the CIT(Appeals) for Assessment year 2007-08 and 2008-09 are still awaiting disposal.

8. On 31 July 2013(received by petitioner on 2 August 2013), the Assessing Officer in terms of Section 245 of the Act informed the petitioner of his proposal to adjust out of the refund of Rs.129 crores due to the petitioner for the Assessment Year 2006-07 with the pending demands which were as under:

A.Y.	Amount of demand (exclusive of interest)
2004-05	Rs.3,76,985/-
2007-08	Rs.17,98,92,047/-
2008-09	Rs.24,98,64,327/-

9. The petitioner by letter dated 5 August 2013, objected to to the proposed adjustment pointing out that the demand for the

Assessment Year 2004-05 has already been adjusted on 10 January 2011 out of the refund due to the petitioner for the Assessment Year 2004-05 itself. So far as Assessment Years 2007-08 and 2008-09 were concerned, the petitioner pointed out that demand for Rs.18 crores for the Assessment Year 2007-08 and the demand for Rs. 25 crores for Assessment year 2008-09 had been stayed by the order of Commissioner dated 22 March 2011 and the order of the Assessing officer dated 9 March 2012 respectively till the disposal of its appeals by CIT (Appeals). It was pointed out that the appeals for Assessment years 2008-08 and 2008-09 are still awaiting disposal at the hands of the CIT(Appeals). Thus it was submitted that adjustment as proposed was not justified/warranted.

10. The Assessing Officer appears to have proceeded with the adjustment for Assessment year 2004-05, 2007-08 and 2008-09 as proposed in the notice dated 31July 2013 without taking notice of the petitioner's communication dated 5 August 2013. Consequently, issuing a refund order dated 22 August 2013 for the balance amount of Rs. 77.13 crores after adjustment of demands for earlier

Assessment years in accordance with the notice dated 31 July 2013 and the interest payable. In fact, on 22 August 2013 itself the Assessing officer passed three orders under Section 220(2) of the Act, demanding interest on the delayed payment of the demands for Assessment Years 2004-05, 2007-08 and 2008-09 and also adjusted the same out of refund of Rs.129crores for Assessment Year 2006-07. The interest demanded by the three impugned orders dated 22 August 2013 is Rs.1.05 lakhs for Assessment year 2004-05, Rs.5.03 crores for Assessment Year 2007-08 and Rs 3.99 crores for Assessment year 2008-09 aggregating to Rs.9.07crores. Thus the Revenue kept back/adjusted an amount in the aggregate of Rs.52 crores (Rs.43 crores demand and Rs.9 crores interest) out of the refund of Rs.129 crores due for Assessment Year 2006-07.

Submissions:-

11. Mr. Nishant Thakkar, the learned Counsel for the petitioner submits as under:

(a) The action of the Assessing officer in adjusting the demand for Assessment years 2004-05,2007-08 and 2008-09 out of refund due for Assessment year 2006-07 under Section 245 of the Act is without jurisdiction. This is factually so as there is no demand outstanding for Assessment year 2004-05 and the demands for Assessment years 2007- 08 and 2008-09 have been stayed. Thus on the date of the intimation i.e. 31 July 2013 as well as on 22 August 2013 no amounts were payable for the three assessment years. The issue it is submtted is concluded in favour of the petitioner by the decision of Delhi High Court in ***Maruti Suziki India Ltd. Vs. DCIT*** reported in ***347 ITR 43***;

(b) The procedure provided under Section 245 of the Act for adjustment of demands payable out of refunds to an assessee has to be preceded by an intimation of the proposed action. This intimation enables the party concerned to correct any errors in the basis, for the proposed action. The giving of intimation before taking any action implies that the Assessing Officer would consider the objections before carrying out the proposed adjustment.; and

(c) So far as the three orders dated 22 August 2013 demanding interest are concerned the same is consequential to unsustainable adjustment. Therefore need to be quashed.

12. Per contra, Mr. Arvind Pinto, the learned Counsel for the Revenue submits as under:

(a) It is accepted that there is no demand payable by the petitioner for Assessment year 2004-05. Thus there is no occasion to adjust the same from the refund due to the petitioner for A.Y.2006-07. Consequently, no occasion to demand interest for the amount adjusted for A.Y. 2004-05 as done by the order dated 22 August 2013 can arise;

(b) So far as demands for the Assessment Year 2007-08 and 2008-09 are concerned the same is payable under the Act by the petitioner. The stay obtained only keeps recovery in abeyance. Therefore, the action of Assessing officer is completely justified in adjusting the same out of the refund for the Assessment Year 2006-07;

(c) The stay that has been granted under Section 220(6) of the Act. The grant of such a stay is in absolute discretion of the Assessing Officer, thus a party has no right to it. So far as the Assessment Year 2007-08 is concerned, the stay has been granted by the Commissioner of Income Tax and not by the Assessing Officer. So also the stay granted for Assessment year 2008-09 is by the Assessing officer yet the same can be reviewed by him in his absolute discretion; and

(d)As the adjustment of the demands for Assessment year 2007-08 and 2008-09 out of refunds due for Assessment year 2006-07 is in order, the demands for interest under Section 220(2) of the Act by orders dated 22 August 2013 for the above two years calls for no interferance.

13. Sections 156, 220 (1), (6) and 245 of the Act which are relevant for adjudication are as under:

> "Section 156. When any tax, interest, penalty, fine or other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable:"
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> "Sec. 220(1). Any amount, otherwise than by way of advance tax, specified as payable in a notice of demand under section 156 shall be paid within thirty days of the service of the notice at the place and to the person mentioned in the notice."
> (2) to (5)........

> "(6) Where an assessee has presented an appeal under Section 246 or Section 246A the Assessing Officer may, in his discretion and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of."

> "Sec. 245. Set off refunds against tax remaining payable. Where under any of the provisions of this Act, a refund is found to be due to any person, the Assessing Officer, Deputy Commissioner (Appeals), Commissioner (Appeals) or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section."

Consideration:

14. Section 245 of the Act, empowers the revenue to adjust refunds due to an assessee against any tax payable(of the same character as the refund due) by him. The exercise of this power is discretionary as is evident from the use of the word "may" therein. Besides the requirement of giving notice/intimation of the proposed action of adjustment out of the refund due is also an indication

of discretionary nature of power not mandatory. This notice/intimation is required to be given so as to enable a party to point out not only factual errors but also point out why such a power should not be exercised in the facts of the case, such as the demand sought to be adjusted is still a subject matter of appeal and the issue is covered by decisions of higher forums etc. On consideration of the same, it is open to the officer of the revenue concerned to exercise its discretion, to adjust or not. This giving of prior intimation has been held by this Court in ***A.H. Shaikh and Ors v. Suresh B Jain 165 ITR 86*** to be mandatory before any adjustment can be made. The exercise of powers under Section 245 of the Act being discretionary has also been so held by the Delh High Court in ***Glaxo Smith Kline Asia (P) Ltd. Vs. CIT 290 ITR 35***. We respectfully concur with the above view of the Delhi high Court that the power under Section 245 of the Act is discretionary. Thus the exercise of a power of adjusting demands out of refunds due would depend upon the facts and circumstances of each case.

15. In view of the above, as held by this Court in A.H.Shaikh (supra) the giving of prior intimation under Section 245 of the Act

is mandatory. The purpose being to enable the party to point out that there are factual errors or some further developments, if any, for example a stay of the demand, Supreme Court decision covering the demand which is still a subject matter of a pending appeal etc which would warrant not adjusting the refund against the pending demand. Thus when a party does raise such issues in response to a prior intimation, the officer of the revenue exercising powers under Section 245 of the Act must apply his mind to it and must record reason why the objection is not sustainable and also communicate it to the party. This before or at the time of adjusting the refund. This alone would ensure that that the power of adjustment under Section 245 of the Act is not exercised arbitrarily. Such a procedure would cause no prejudice to the revenue as the occasion to grant the refund would not arise till the objection to the intimation is disposed of. Of course the objections should be disposed of expeditiously as undue delay in granting of refund would cause prejudice to the party entitled to the refund.

16. In the present facts, intimation dated 31 July 2013 under Section 245 of the Act was received by the petitioner on 2 August

2013. The Petitioner filed its objections on 5 August 2013 inter alia pointing out that no demand is outstanding for A.Y. 2004-05 and stay of the demand granted under Section 220(6) of the Act in appeals pending before the Commissioner of Income tax(Appeals) for A.Y. 2007-08 and 2008-09. Theses objections of the petitioner were not considered as is apparent from the fact that even though no demand was due for the A.Y.2004-05 yet adjustment took place from the refund due and a demand for interest was also made by order dated 22 August 2013. The entire object of giving prior intimation as provided under the Act has been rendered superfluous. Thus the decision making process was flawed and the adjustment of the refund against the demands due as well as the consequent demand for interest are unsustainable.

17. It is an admitted position that there is no demand outstanding/payable for Assessment year 2004-05. Thus no occasion to adjust any part of the refund due to the petitioner for Assessment year 2005-06 to meet a non existing demand for A.Y. 2004-05 can arise. Consequent demanding of interest under Section 220(2) of the Act as demanded by order dated 22 August

2013 for A.Y.2004-05 would not arise. Therefore in view of above agreed position the Revenue is directed to hand over the sum of Rs.3.76 lakhs retained/adjusted out of the refund due for the alleged dues of A.Y.2004-05 to the petitioner along with interest in accordance with the Act. So also we set aside the impugned order dated 22 August 2013 being Exhibit P to the the petition demanding interest of Rs.1.05 lakhs.

18. So far as the Assessment Year 2007-08 is concerned, the demand of Rs.18 crores had been stayed by the order of Commissioner dated 22 March 2011 under Section 220(6) till the disposal of the petitioner's appeal before the CIT (Appeals). The appeals are still pending. Further, stay was granted in respect of the demands attributable to transfer pricing adjustment which was an issue of dispute even for the Assessment Year 2006-07 and was finally resolved in favour of the petitioner. The contention of Mr.Pinto is that as the order of stay was granted by Commissioner of Income Tax and not by the Assessing Officer, therefor has no force in law. Therefore according to Mr. Pinto the above

communication could be ignored while adjusting the demand out of refunds due to the petitioner. It must be pointed out that the petitioner had made an application for stay to the Assessing Officer. In response to the petitioner's application for stay under Section 220(6) of the Act, to the Assessing officer, his superior viz. the Commissioner of Income Tax granted partial stay to the extent of the demand relating to transfer pricing adjustment. We are unable to understand how an order passed by an officer superior to the Assessing Officer granting stay would not be binding upon the Assessing Officer. In fact the Commissioner of Income Tax is the administrative head and does exercise jurisdiction over the entire Commissionerate. Thus, even today, the order Commissioner of Income Tax staying the demand of Rs.17.98 crores is in force .

19. So far as Assessment Year 2008-09 is concerned, the Assessing Officer by an order dated 9 March 2012 stayed the demand of Rs.25 crores attributable to transfer pricing adjustment done in the assessment order till the disposal of the petitioner's appeal by the CIT(Appeals). These transfer pricing dispute are

identical to the issue in A.Y. 2006-07 and the same are now resolved in favour of the petitioner by the order of the Tribunal. The appeals are still pending before the CIT (Appeals) and consequently the stay for the Assessment Year 2008-09 is in force even today.

20. However it is the contention of the Revenue, that grant of stay by the authorities under the Act is immaterial as it would not obliterate the demand which is payable under the Act. It is submitted that the Revenue has jurisdiction to adjust the demands which are payable under the Act and as of today the demands for A.Y. 2007-08 and 2008-09 are payable. The grant of stay under Section 220(6) of the Act only prevent the Revenue from recovering the amounts which have been confirmed by the Assessing Officer. However the amount continues to be payable under the Act by the petitioners to the Revenue. Thus it is submitted that no interference is warranted.

21. Section 245 of the Act provides that when refund is due to any person then in lieu of payment, the revenue can set

off/adjust the amount to be refunded against any sum remaining payable under the Act by the person concerned. Therefore in the present facts, we would have to examine whether any demands/sums were remaining payable under the Act. Normally under the Act after orders of Assessment is passed, a notice of demand is issued to the party concerned under Section 156 of the Act. This notice under Section 156 of the Act specifies the period(normally 30 days) within which the payment is to be made failing which the person concerned is treated as an Assessee in default. It is only after the expiry of time limit to make the payment is the recovery provision triggered under Section 220 onwards of the Act. However where a stay is granted under Section 220(6) of the Act, in view of pending appeal before the CIT(Appeals) then such an assessee would not be treated in default even after the expiring of the period of 30 days. It therefore follows that the time to make the payment stands extended and the person is not to be deemed to be an Assesee in default for the recovery provisions to be set in motion. The words “remaining payable under the Act” would mean where the assessee has not paid within the time available and has becomes an Asseessee in default. In this case in view of the stay under Section 220(6) of the Act, the time to make the payment stands extended till the disposal of the appeal by CIT (Appeals).

22. Thus as on 31 July 2013 the demand was “not remaining payable under the Act”, because of the unconditional stay granted under Section 220(6) of the Act. Therefore Section 245 of the Act will not be invocable. The stay order could have excluded any set-off/adjustment out of any refund due to an Assessee. Such is not the case in the present facts. An adjustment under section 245 of the Act is also a mode of recovery of the tax. It is an unilateral action on the part of the Revenue to recover the amounts due from a party by adjusting the refund due to it.

23. By virtue of orders of stay passed under Section 220(6) of the Act for the Assessment Years 2007-08 and 2008-09, no amount are payable under the Act. This protection would continue till such time as the CIT (Appeals) before whom the appeals are pending disposes the appeals or the Assessing Officer in exercise of its power under Section 220(6) of the Act varies the order of stay granted to

the petitioners. The orders of stay are undisturbed till this date. Consequently, it is not open to the Revenue to adjust the recovery of amount which has been stayed by orders of stay.

24. The Delhi High Court in the case of Maruti Suzuki India Ltd. (supra) had an occasion to deal with a similar contention as is being raised by the Revenue in the present case namely the recovery of tax cannot and would not include adjustment under Section 245 of the Act and the stay of recovery under Section 220(6) of the Act would not fetter the rights of the Revenue to adjust the demands out of refund due to the assessee. This submission was negatived by the Delhi High Court holding that recovery could be made by various modes including adjustment under Section 245 of the Act. The Delhi High Court held that where an authority grants a stay of recovery under Section 220(6) of the Act, it could provide in that order granting stay of the recovery that the same would not be extended to adjustment of refund. In cases where the stay order is in absolute terms, it would be inappropriate on the part of the Revenue to adjust the demand by way of adjustment. The Delhi High Court observed as under:

> "…. However, when an order of stay of recovery in simplistic and absolute terms is passed, it would be improper and inappropriate on the part of the Revenue to recover the demand by way of adjustment. In case of doubt or ambiguity, an application for clarification or vacation/modification of stay to allow adjustment can be, and should be filed. But no attempt should be made and it should not appear that the Revenue has tried to overreach and circumvent the stay order. Obedience and compliance with the stay order in letter and spirit is mandatory. A stay order passed by an appellate/higher authority must be respected. No deviance or breach should be made."
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> (Emphasis supplied)

We are in respectful agreement with this view.

25. Therefore the Revenue should have approached the appellate authority before whom the appeals were pending to expedite the hearing or alternatively seek to vary the order of stay after giving a hearing to the party concerned before the adjustment under Section 245 of the Act is carried out. This has admittedly not been done.

26. The power under Section 245 is discretionary. The orders of stay have to be honoured before adjustment of the demand out of refund is done by the Revenue. If the Assessing Officer did not accept the assessee's contention at the time of making the adjustment, the petitioner should have been informed as to why the objections of the assessee to the adjustment is not sustainable. Unless the Assessing Officer exercising power under Section 245 of the Act subjects himself to this discipline, he would be exercising his powers in an arbitrary manner.

27. In reply, the Assessing Officer has asserted at various places stated that the power vested in him under Section 220(6) of the Act to grant or not to grant a stay is in the absolute discretion and power of the Assessing Officer. The Assessing Officer is clearly laboring under some archaic notions. Under our system of rule of law no officer has an absolute power or absolute discretion. The power has to be used within the limits laid down by law and the discretion has to judicially exercised. This Court in the case of ***KEC Vs. B.R. Balkrishnan*** reported in ***251 ITR 158*** has spelt out the parameter for grant of stay under Section 220(6) of the Act.

28. In these circumstances, the refund of Rs.129crores due to the petitioners is payable in its entirety and no adjustment of any demand for the Assessment Year 2007-08, 2008-09 and 2004-05 was permissible. This for the reason, that factually there was no due outstanding for the Assessment Year 2004-05 and the demand for the Assessment Years 2007-08 and 2008-09 had been stayed pending disposal of the petitioner's appeal before the CIT (Appeals). Consequently, Revenue is directed to hand over the balance amount of Rs.52 crores out of Rs.129 crores of refund due for A.Y.2006-07 to the petitioners. The petitioner is not an assessee in default under Section 220 of the Act, till such time as its appeals are decided. Consequently no occasion to charge interest at this stage under Section 220(2) of the Act can arise. Consequently, the orders dated 22 August 2013 for the Assessment Year 2004-05, 2007-08 and 2008-09 being Exhibit N, O and P are quashed and set aside.

29. In the aforesaid circumstances, rule is made absolute in terms of prayer clause 'A' and 'B'.

[N.M. JAMDAR, J] **[M.S. SANKLECHA, J.]**