

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.02.2015

CORAM:

The Honourable Mr. Justice S.VAIDYANATHAN

Writ Petition No.3145 of 2013

M/s.Jyothy Laboratories Ltd.,
Vyasarpadi, Chennai 39
(As transferee company into which
M/s.Henkel India Limited has merged),
Rep. by its Manager Mr.Bakthavatchalam K.

.. Petitioner

Vs.

- 1.The Deputy Commissioner of Income Tax,
Large Tax Payer Unit-II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar, Western Extension,
Chennai-600 101.
2. The Joint Commissioner of Income Tax,
Large Tax Payer Unit-II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar, Western Extension,
Chennai-600 101.
3. The Commissioner of Income Tax,
Large Tax Payer Unit-II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar, Western Extension,
Chennai-600 101.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of a writ of Mandamus, to direct the respondents to stay the entire disputed outstanding demand of Rs.10,00,00,000/- pursuant to order dated 28.1.2015 for assessment year 2010-11 pending disposal of the appeal by the (IT(A)).

For Petitioner : Mr.Venkataraman, SC
for Mr.K.Harishankar
For Respondents : Mr. K.Pramod Kumar Chopda
Sr.Standing counsel for
Income Tax Department.

ORDER

This Writ Petition has been filed, praying for the issuance of a writ of Mandamus, to direct the respondents to stay the entire disputed outstanding demand of Rs.10,00,00,000/- and also grant interim injunction restraining the respondents from taking coercive action in recovering the demand pursuant to order, dated 28.01.2015 for assessment year 2010-11, pending disposal of the appeal by the CIT (A).

2. Shorn of all unnecessary details, the fact of the matter is as under:

The petitioner company is an assessee on the file of the first respondent. It has filed its Return of Income for the assessment year 2010-11 on 30.09.2010, declaring a total income of Rs.NIL, inter alia, in the computation of income, the assessee had shown at a loss of Rs.26,12,03,142/-. In the assessment proceedings under Section 143 of the Income-tax Act, 1961 (in short, the Act), a notice under Section 143(2) of the Act was issued on 6.9.2011 and also notice under Section 142(1), dated 15.7.2014 along with questionnaire was issued by the Assessing Officer. Pursuant to the same, the petitioner's representatives appeared and submitted the details. During the course of scrutiny proceedings, it is reflected that the assess had entered into international transaction with its associated enterprises abroad and the value of the same exceeds Rs.15 Crores, hence, after obtaining approval from the Commissioner of Income Tax, Large Taxpayer Unit, Chennai, the case was referred to Transfer Pricing Officer-I, Chennai for determining arms length price of the international transactions of the assess company for the assessment year 2010-2011. Thereafter, the Transfer Pricing Officer-V, Chennai has given a finding that an adjustment of Rs.11,32,55,061/- has been proposed in the case of petitioner company and accordingly, held that an upward adjustment of Rs.5,90,27,,202/- was considered as necessary towards brand promotion fees and disallowance of management fees to the tune of Rs.5,42,27,859/-. Subsequently, it appears that a draft assessment dated 31.3.2014 was forwarded to the petitioner company, wherein, apart from the adjustment of Rs.11,32,55,061/-, certain other

additions/disallowances were made. Thereafter, since no objections were filed in respect of draft assessment, the assessment proceedings were completed as per Section 143(3) read with Section 144C(3) of the Act, assessing total income of Rs.19,51,92,486/- after adjusting the brought forward losses the assessed income was NIL. In the said assessment order, addition was made towards Arms Length Price as determined by the Transfer Pricing Officer, amount to Rs.11,32,55,061/-, disallowance on loss of sale of assets amount to Rs.6,82,90,387/-, disallowance of wrong claim of VRS compensation under Section 35 DD at Rs.5,24,39,887/- and addition on capital gain of Rs.1,13,984/-. Consequently, by invoking explanation (7) to Section 271(1) (c) of the Act, penalty proceedings were initiated in respect of adjustments made by the Transfer Pricing Officer under Section 92CA(4) of the Act. By proceedings, dated 28.11.2014, the first respondent, imposed penalty in terms of Section 271(1)(C) of the Act, for furnishing inaccurate particulars and concealing the income in respect of all the disallowances as stated above. It has been held by the first respondent that the petitioner company had intentionally and willfully made an incorrect claim, which warrants levy of penalty leviable 300% of the tax, which comes to Rs.23,85,94,851/-, however, considering the facts of the case, the first respondent imposed penalty at Rs.10,00,00,000/-.

3. Being aggrieved by the said imposition of penalty, the petitioner company preferred an appeal under Section 246A of the Act before the Commissioner of Income Tax (Appeals), Chennai. Pending disposal of the appeal, the petitioner moved a stay petition under Section 220(6) of the Act before the Deputy Commissioner of Income-tax, the first respondent herein. By proceedings, dated 28.1.2015, the first respondent has disposed of the stay application, inter alia granted partial stay of outstanding demand of Rs.5,00,00,000/- till 30.9.2015 or disposal of appeal whichever is earlier, but refused to grant in respect of entire outstanding demand of Rs.10,00,00,000/-. Aggrieved over the same, the petitioner has come forward with the present writ petition.

4. On 09.02.2015, after hearing both sides, this Court passed the following:

"The 1st respondent is directed to proceed with the matter till the final orders are passed in this writ petition and the amount need not be insisted upon. The 1st respondent is also directed to proceed with the matter on day-to-day basis and the pendency of this writ petition is not a bar for it to decide the matter on merits. Call after two weeks for orders."

5. Heard the learned counsel and perused the entire materials available on record.

6. At the out set, it is curious enough to note that the petitioner has not challenged the order of the first respondent, dated 28.1.2015, who granted partial stay in respect of total outstanding demand, but only sought for mandamus, to direct the respondents to stay the entire disputed outstanding demand of Rs.10,00,00,000/- pending disposal of the appeal. As the said order has not been challenged, it could be presumed that the petitioner has accepted the said order, of-course, partially. However, while the said order was in force, the petitioner cannot seek stay for entire outstanding by way of a direction to the respondents from this Court and even assuming that the relief as sought for by this Court is entertained, the authority cannot be expected to comply with the direction unless and until the earlier order is set aside. Admittedly, the petitioner has not filed the present writ petition for grant of Writ of Certiorarified Mandamus. Therefore, on this ground, this Court is of the view that the relief sought for by the petitioner cannot be granted.

7. However, Mr.R.Venkataraman, learned senior counsel appearing for the petitioner would contend that the first respondent has committed error in levying the penalty in respect of issues, viz., adjustment on Arm's length price, disallowances of loss on sale of assets, disallowance of excess claim of VRS compensation and income under Section 50C, etc., without properly appreciating the claim made by the petitioner towards the above said aspects. He pointed out that the petitioner has not concealed the particulars of the income or deliberately furnished inaccurate particulars of such income, which warrants levy of penalty under Section 271(1)(c) of the Act. The learned senior counsel contended that already the petitioner has preferred the appeal challenging the order of the first respondent passed under Section 271(1)(c) and the petitioner is having a good case and there would be fair chances in succeeding the appeal and therefore, when the issue regarding the liability of payment of penalty imposed by the first respondent is the subject matter pending in the form of appeal before the 1st respondent, wherein, the finality would reach on disposing of the said appeal, there is no justification for the 1st respondent in granting the partial interim stay of outstanding demand of Rs.5,00,00,000/- instead of entire outstanding demand of Rs.10,00,00,000/-. Therefore, the learned senior counsel would contend that though the said order was not challenged, considering the peculiar circumstances of the case, this Court, while exercising its extraordinary jurisdiction under Article 226, can act ex debito justitiae and render real and substantial justice. Therefore, the learned senior counsel for the petitioner- assessee, urged that the entire disputed demand should be kept in abeyance till the appeal filed by the assessee is decided on merits, which he submitted that was likely to succeed in toto as the penalty levied by the Authority was not justified at all. He, however, further submitted that till such appeal is decided on merits and if no stay is granted against such recovery, the very purpose of filing

of the appeal would be frustrated and the petitioner company already in financial crises, would not be in a position to comply with the conditions imposed by the authority granting partial stay.

8. On the other hand, the learned counsel appearing for the Revenue would contend that the authority, while exercising his discretionary power, has rightly imposed the penalty and though as per the statute the maximum penalty leviable is 300% which comes to Rs.23,85,94,851/-, however considering the facts of the case, imposed minimum penalty at Rs.10,00,00,000/- and considering this fact as well as the other issues, the authority has rightly rejected to grant stay of outstanding amount, which requires no interference.

9. Though the learned counsel raised very many contentions regarding the imposition of penalty which according to him, does not warrant in the circumstances under which, the assessee has not concealed the particulars of income deliberately, but committed only an inadvertent and bona fide error which can be corrected by the authority, etc., this Court is refrained from dealing with all these contentions inasmuch as admittedly, the writ petitioner has not challenged the issue of levying penalty by the first respondent invoking Section 271(1)(c) of the Act.

10. On a perusal of the order, dated 28.1.2015, it transpires that the first respondent passed the order in interim stay petition, exercising his discretion by invoking Section 220(6) of the Act, while entertaining the appeal filed by the petitioner under Section 246 of the Act, treating the petitioner as not being in default in respect of the amount in dispute in the appeal.

11. The Income Tax Act, 1961 is a self-contained and comprehensive code in itself. Chapter XVII deals with "Collection and Recovery of tax", which is divided in six parts, viz. A to G, of which, Part D refers 'collection and recovery'. It is relevant to extract the Section 220(6) of the Act, which reads as under:

"220. When tax payable and when assessee deemed in default.

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"(6) Where an assessee has presented an appeal under Section 246 1 [or Section 246A,] the 2 [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."

12. A perusal of the above, it is explicit that the authority has been conferred with the power to treat the assessee as not being in default in respect of the amount in dispute in the appeal, however subject to conditions as he may think fit to impose. The word 'as he may think fit to impose' if read harmoniously, it would definitely mean that the power vested in the authority is amplitude and wide enough and can be exercised according to his discretion. In fact, the above said provision enables the authority only to treat the assessee as not being in default in respect of amount in dispute in the appeal, however, it is to be noted that there is no power is vested in the authority to grant stay under the Act nor empowers the authority to permit the assessee to pay the tax in instalments. It is implied that once the authority, having satisfied with the facts and circumstances of the case in appeal, treated the assessee as not a defaulter for a particular amount, it is automatic that stay in respect of such amount has been granted. Therefore, the legislature has left it to the discretion of the authority in the matter of imposing the conditions on the assessee while treating him as not a defaulter. The discretionary power conferred upon the authority is in effect and substance one to give or not to give stay and it works both ways depending upon the manner in which it is exercised. If the authority treats the assessee as not being in default, the assessee will not be proceeded against till the appeal is disposed of and the State will be restrained to collect the amount till the outcome of the appeal. If he refuses to exercise his discretion, the assessee will be subjected to coercive process and the State will be in a position to recover the tax immediately.

13. In the land mark decision delivered on 11.03.1968, the three Judges bench of Hon'ble Supreme Court in the case of "ITO versus M.K.Mohammed" reported in AIR 1969 SC 430, in unanimous opinion authored by Grover, J, dealing with words "as he may think fit", which were available to the Income Tax Officer and ITAT also while deciding appeals before it and in the face of absence of clear provisions for grant of stay against the disputed demand of tax, the Apex Court held that such power is inherent. The conclusions of the Hon'ble Supreme Court in para 13 and 14 of the judgment are quoted below for ready reference:-

"13. Section 255 (5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion the Appellate Tribunal must be held to have the power to grant stay as incidental or S.B. Civil Writ Petition No.1264/2011 M/s Maheshwari Agro Industries Vs. Union of India & Ors. Judgment dt: 15/12/2011 44/69 ancillary to its appellate jurisdiction. This is particularly so when section 220 (6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that when section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its executions and that the statutory power carries with it the duty in proper cases to make such orders for staying proceedings as will prevent the appeal if successful from being rendered nugatory. 14. A certain apprehension may legitimately arise in the minds of the authorities administering the Act that, if the Appellate Tribunal proceed to stay recovery of taxes or penalties payable by or imposed on the assessee as a matter of course, the revenue will be put to grant loss because of the inordinate delay in the disposal of appeals by the Appellate Tribunal. It is needless to point out that the power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the Tribunal will consider whether to stay the recovery proceedings and on what conditions, and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal."

14. Therefore, the power under Clause (6) of Section 220 is indeed a discretionary one. However, it is one coupled with a duty to be exercised judiciously and reasonably, based on relevant grounds. It should not be exercised arbitrarily or capriciously or based on matters extraneous or irrelevant. The Income-tax Officer should apply his mind to the facts and circumstances of the case relevant to the exercise of the discretion, in all its aspects. He has also to remember that he is not the final arbiter of the disputes involved but only the first amongst the statutory authorities. Questions of fact and of law are open for decision before the two appellate

authorities, both of whom possess plenary powers. In exercising his power, the Income-tax Officer should not act as a mere tax-gatherer but as a quasi-judicial authority vested with the power of mitigating hardship to the assessee. The Income-tax Officer should divorce himself from his position as the authority who made the assessment and consider the matter in all its facets, from the point of view of the assessee without at the same time sacrificing the interests of the Revenue.

15. Coming to the case on hand, the first respondent, having considered the facts and circumstances under which, the petitioner has intentionally concealed the particulars of the income and deliberately furnished inaccurate particulars of such income, by giving sufficient reasons in respect of the issues in dispute, viz., adjustment on Arm's length price, disallowance of loss on sale of assets, etc., has granted partial stay of outstanding demand of Rs.5,00,00,000/- till 30.9.2015 or disposal of appeal whichever is earlier, but refused to grant in respect of entire outstanding demand of Rs.10,00,00,000/-. He has also specifically stated that any refund that may arise to the assessee subsequently for any other assessment year would be adjusted against the said demand. On going through the same, I am of the considered view that the first respondent has rightly imposed the conditions while exercising his discretion in a justifiable and reasonable manner, which does not warrant interference. It is settled law that if the Tribunals or the functionaries appointed under the special Acts do not perform their duties, they may be compelled by an appropriate writ to do so. Where, however, they are acting within the limits of the powers assigned to them by the Legislature and have exercised their discretion in a justifiable and reasonable manner, this Court will not sit in judgment over them and will not ordinarily interfere unless the discretion has been exercised so capriciously or in such an outrageous manner so as to attract the extraordinary jurisdiction of this Court.

16. Discretion has been defined as the freedom or authority to make judgments and to act as one sees fit, i.e. to say free exercise of power as regards the ability to choose from different ways to achieve a particular goal or result. Administrative discretion would mean choosing from various available alternatives but with reference to rules of reasons and justice and not according to personal whims. Invariably, in all systems of jurisprudence, it is an accepted norm that the Court will not interfere with the action pursued by such authorities in exercise of their administrative discretion. It cannot be expected of the Courts to have the time and competence to judge each and every matter, let alone substitute its wisdom for that of the authority concerned. The Courts, certainly will not allow discretionary power to assume the garb of arbitrary power. The

Courts have to ensure that discretion is exercised strictly within the conditionalities laid down by the law while exercising such discretion.

17. It is worthwhile to refer the observation regarding the subject matter 'discretion' made in the decision reported in ""Vatcha Sreeramamurthy versus ITO reported in 1956 (30) ITR 252", reads thus,

"The scope of a discretionary power conferred on a public authority is the subject matter of treatises and decisions. In Maxwell on the Interpretation of Statutes, both edition, the following passage appears at page 239 :

"Statutes which authorise persons to do act for the benefit of other, or as it is sometimes said for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In inaction that they may or shall if they think fit or shall have power. or that it shall be lawful for them to do such acts a statute appears to use the language of mere permission but it has been so often decided as to have become an axiom that in such cases such cases such expression may have, to say the least a composer force and so would seem to be modified by judicial exposition."

At page 248, the author deals with cases where the power is qualified by express references to the desecration of the authorised person. The author gives illustration of powers qualified by words "if they should so think fit", "if deemed advisable" and similar words and comes to the conclusion that the power is limited by the duty. A summary of the mode of exercise of desecration is given at page 123 :

"According to his discretion means, it has been said, according to the rules of reason and justice, not private opinion, according to law and not humour; it is to be not arbitrary, vague and fanciful, but legal and regular; to be exercised, not capriciously. But on judicial grounds and for substantial reasons. And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself, that is, within the limits and for the objects intended by the legislature. These dicta may be summed up in the statement of Lord Esher that the discretion must be exercised without taking into account any reason which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the

guidance of their discretion, then in the eye of the law they have not exercised their discretion."

The result of the aforesaid passages may be stated thus : The discretionary statutory power conferred upon an authority for the public good is coupled with a duty to perform it under relevant circumstances. The fact that the exercise of the power is left to the discretion of the authorised person does not exonerate him from discharging his duty. If the discretionary power so conferred is exercised arbitrarily, capriciously or unreasonable or by taking into consideration extraneous and irrelevant consideration, in the eye of law, the authority concerned must be deemed not to have exercised the discretion at all, that is, he has not discharged his duty. If the Court on the facts placed before it comes to a definite conclusion that a particular authority has not exercised his duty for one or other of the aforesaid reasons, it will compel the authority to discharge his duty, or, to put it differently, to exercise his discretion honestly and objectively.

There is also an essential distinction between refusal to exercise the discretion and the manner of its exercise. If the authority fails to discharge his duty by refusing to exercise his discretion when facts calling for its exercise exist, or, if he exercises discretion under the circumstances mentioned above, which is not an exercise of discretion in law, the Court will compel him to do so. If the authority concerned exercises his discretion honestly and in the spirit of the statute, no mandamus will be issued directing him to exercise his discretion in a particular way. See *Lord Krishna Sugar Mills Ltd. v. Income-tax Officer, Ambala*, *Julius v. Bishop of Oxford*, *Allcroft v. Lord Bishop of London*."

18. In the above said decision, the assessee therein, had to file a writ petition because the realisation of the tax assessed had not been stayed during the pendency of an appeal before the Tribunal. The controversy centred in that case mainly on the scope of the discretionary power conferred by Section 45 of the Indian Income Tax Act, 1922, on the Income Tax Officer. It was held that a writ petition to compel the Income Tax Officer to exercise his discretion under Section 45 or to exercise it honestly and objectively was not barred. But on the merits the court declined issue a writ. Viswanatha Sastri, J., in his separate judgment made the following observations at p. 271:

"Lastly it has to be observed that Section 45 of the Income Tax Act is somewhat cryptic in its terms and merely gives the Income Tax Officer power to declare a person to be not in default pending the appeal. There is no provision for stay similar to Order 41, Rules 5 & 6 of the Civil Procedure Code. There is no conferment of an express power of granting a stay of realisation of the tax, though the effect of an order in favour of the assessee under Section 45 of the Act is a stay. Nor is there a provision for allowing the tax to be paid in instalments or for taking security for deferred payment. Neither the Appellate Assistant Commissioner nor the Appellate Tribunal is given the power to stay the collection of tax. Whether the law should not be made more liberal so as to enable an assessee who has preferred an appeal, to obtain from the appellate forum, a stay of collection of the tax, either in whole or in part, on furnishing suitable security, is a matter for the legislature to consider."

The above decision was also extracted by the Hon'ble Supreme Court in its decision reported in "ITO versus M.K.Mohammed Kunhi" reported in AIR 1969 SC 430.

19. Further, it is a settled principle of law that the writ Court is not certainly sitting in appeal over each and every order passed by the statutory authority. The task of the writ Court to examine the decision-making process was found in the decision reported in "State of UP versus Maharaja Dharmedar Prasad Singh" reported in AIR 1989 SC 997. The writ Court is averse to interfere with the acts and actions of the statutory authorities unless those are beyond jurisdiction or in excess of jurisdiction. The Writ Court will certainly interfere if the impugned orders are contrary to the principles of natural justice causing effect manifest injustice. Unless those ingredients are present, the Writ Court will be slow to interfere in the matter.

20. In view of the above discussion, this Court is of the considered view that the first respondent has not exercised arbitrarily or capriciously in order to upset the order passed by him by imposing conditions to pay Rs.5 crores while granting partial stay and that no reasonable grounds are made out to direct the respondents to grant stay in respect of entire disputed outstanding demand or to grant injunction from taking coercive action in recovering the demand and hence, the contention raised on behalf of the petitioner that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal, cannot be accepted.

In the result, the Writ Petition is dismissed. No costs.

-s/d-

Assistant Registrar(CO)

Dt:3/3/2015

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Sub-Assistant Registrar

To

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+ 2 ccs to Mr.K.Harishankar, Advocate SR 9786

+ 1 cc to Mr.T.PramodKumar Chopda, Sr.Standing Counsel for Income
Tax, High Court, Madras SR 9679

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