

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1021 OF 2016**

M/s Andrew Telecommunications India Pvt.
Ltd., Plot No. N-2, Phase IV, Verna Industrial
Estate, Verna, Salcette, Goa-403 722, India.
PAN-AABCA8820A, represented by its
Managing Director, Antonio A Do Rego. Petitioner

Versus

1. Principal Commissioner of Income Tax,
Aayakar Bhavan, Plot No. 5, EDC
Complex, Patto Plaza, Panaji, Goa – 403
001, India.
2. Assistant Commissioner of Income Tax
Circle 2(1), Aaykar Bhavan, Patto,
Panaji, Goa – 403 001.
3. Joint Commissioner of Income Tax
Range 2, Aaykar Bhavan, Patto, Panaji,
Goa – 403 001.
4. The Union of India, Through the
Secretary, Ministry of Finance, North
Block, New Delhi-110 001, India. Respondents

Shri Jehangir D.J. Mistri, Senior Advocate with Ms. Priyanka Kamat,
Advocate for the Petitioner.

Ms. Asha Desai, Advocate for the Respondents.

**Coram : SMT. R.P. SONDURBALDOTA &
C.V. BHADANG, JJ.**

RESERVED ON:- 6th DECEMBER, 2016

PRONOUNCED ON:-13th DECEMBER, 2016

JUDGMENT: (Per C.V. Bhadang, J.)

Rule made returnable forthwith. The learned Counsel for the respondent, waives service. Heard finally by consent of parties.

2. The petitioner is a Company engaged in the business of manufacturing base station antennas, microwave antennas, R.F. cables, jumpers and connectors and trading in related products.

3. On 30.11.2012, the petitioner filed a return for the Assessment Year 2012-13, declaring loss of Rs.10,23,16,807/-. It appears that the case of the petitioner was selected for scrutiny and as per the final assessment order dated 06.05.2016, the petitioner was served with a notice of demand for Rs.16,90,79,380/-. In short, against a returned loss of Rs.10,23,16,807/-, the respondents have raised a demand of

Rs.16,90,79,380/-. Undisputedly, the petitioner has challenged the said assessment in an appeal, which is pending before the learned CIT (A).

4. It further appears that the petitioner applied to the respondent no. 2 for stay of the demand, till the appeal filed by the petitioner, is decided by the learned CIT (A). The respondent no. 2 rejected the stay application on 21.06.2016. The petitioner then applied to respondent no. 3, for stay. On 04.07.2016, respondent no. 3 directed the respondent no. 2 to reconsider the petitioner's request for stay in the light of the office instructions dated 29.02.2016 issued by Central Board of Direct Taxes (CBDT). On 13.07.2016, the petitioner applied to respondent no. 1, seeking an unconditional stay on the demand as made. Respondent no. 1 directed respondent no. 2, to adjust the refund, which is due to the petitioner, for the Assessment Years 2006-07 and 2007-08 against the aforesaid demand. The petitioner sought for personal hearing, which was not acceded to. On 04.10.2016, the respondent no. 1 has rejected the application for stay, which brings the petitioner to this Court.

5. We have heard Shri Jehangir Mistri, the learned Senior Counsel for the petitioner and Ms. Asha Dessai, the learned Counsel for the respondents.

6. It is submitted on behalf of the petitioner that under the O.M. dated 29.02.2016, the assessing officer is obliged to grant stay of the demand on payment of 15% of the disputed amount. The learned Senior Counsel has referred to para 4(A) of the said O.M. It is submitted that the present case does not fall under para 4(B) of the said O.M. The learned Senior Counsel was at pains to point out that as per para 4(E)(iii) of the O.M., 15% of the amount can be adjusted against any pending refund. The learned Senior Counsel has pointed out that admittedly, a total refund of Rs.12,25,45,340/- is due and payable to the petitioner for the Assessment Years 2006-07 and 2007-08. It is submitted that the impugned demand is *ex-facie*, illegal and unwarranted and thus, it is a case for grant of an unconditional stay. The learned Senior Counsel, however, in all fairness has submitted that 15% of the demand, which comes to Rs.2,53,61,907/- can be recovered/adjusted from out of the refund, which is outstanding.

It is submitted that the stand taken by the respondents that the entire amount of refund be adjusted against the outstanding demand, is illegal and unjust and is against the O.M. dated 29.02.2016. On behalf of the petitioner, reliance is placed on the decision of the Punjab and Haryana High Court in the case of **M/s Jindal Steel and Power Limited Vs. The Principal Commissioner of Income Tax** (Civil Writ Petition No. 13146/2016 decided on 21.09.2016).

7. On the contrary, it is submitted by Ms. Asha Desai, the learned Counsel for the respondents that the impugned orders passed by the competent authorities, refusing to grant stay, are passed by the respondents, what she calls to be on the administrative side. It is submitted that the petitioner has filed an appeal, which is pending before the CIT (A) and the petitioner can seek appropriate order of stay in the appeal and in view of this, the petition may not be entertained. The learned Counsel in this regard has pointed out the decision of this Court in the case of **Ulhas Jewellers Pvt. Ltd. Vs. PR. Commissioner of Income Tax, Panaji and Another** (Writ Petition No. 906/2016 decided on

29.09.2016). It is submitted that the refund, which is said to be due to the petitioner, is under process and that is for a different assessing year and has nothing to do with the impugned demand for the Assessment Year 2012-13.

8. We have carefully considered the rival circumstances and the submissions made. The impugned demand is for Rs.16,90,79,380/-. Admittedly, the petitioner has challenged the said demand in an appeal, which is pending before the CIT (A). According to the respondents, the impugned order refusing to grant stay is passed on the administrative side. Be that as it may, the O.M. dated 29.02.2016, to the extent relevant, reads thus:

4. In order to streamline the process of grant of stay and standardize the quantum of lump sum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT (A), the following modified guidelines are being issued in partial modification of Instruction No. 1914:

(A) In a case where the outstanding demand is disputed before CIT (A), the assessing officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in para (B) hereunder:

(B)

(C)

(D)

(E) In granting stay, the Assessing Officer may impose such conditions as he may think fit. He may, inter alia,:

(i) require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled;

(ii) reserve the right to review the order passed after expiry of reasonable period (say 6 months) or if the assessee has not cooperated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority

or court alters the above situations;
(iii) reserve the right to adjust refunds arising, if
any, against the demand, to the extent of the
amount required for granting stay and subject to
the provisions of Section 245."

9. It can thus be seen that under para 4(A) of the O.M., a case where outstanding demand is disputed before the CIT(A) (as in the present case), the assessing officer shall grant stay of demand, till the disposal of the first appeal on payment of 15% of the disputed demand, unless the case falls in category discussed in para 4(B). It is not in dispute that the present case would not fall in the category as provided in para 4(B) of the O.M. and thus, would be governed by para 4(A).

10. It is further not in dispute that a refund for Rs.12,25,45,340/- is pending before the Principal CIT for the Assessment Years 2006-07 and 2007-08. It is further undisputed that the said refund is pending since 20.01.2016 (Assessment Year 2006-07) and since 20.04.2016 (Assessment Year 2007-08).

11. It would further appear that para 4(E) contemplates some additional conditions, which may be imposed by the assessing officer, while granting stay, which includes a right to adjust the refund, if any, to the extent of demand required for granting stay and subject to the provisions of Section 245. It was not disputed during the course of the arguments at bar that such a demand can be adjusted against the pending refund for the previous year, if any. The dispute is really about the extent of such adjustment. While it is claimed by the respondents that the entire amount of the refund shall be adjusted as against the impugned demand as a condition for stay, on behalf of the petitioner, it is contended that 15% of the impugned demand may be adjusted, out of the total amount due, which is in excess of Rs. 12 crores. Presently, we are only concerned with the issue of grant of stay of the impugned demand. Considering the overall circumstances and para 4(A) of the O.M., we find that the impugned order can be stayed, subject to an amount of Rs. 2,53,61,907/- (15% of the total demand of Rs. 16,90,79,380/-) being adjusted out of the refund, which is due for the Assessment Years 2006-07 and 2007-08.

12. Thus, the petition is partly allowed. The impugned communication/order, rejecting the application for stay, is set aside. There shall be interim stay of the impugned demand, pending disposal of the appeal before the CIT (A), on condition of an amount of Rs. 2,53,61,907/-, from out of the refund for the Assessment Years 2006-07 and 2007-08, being retained towards 15% of the amount as stipulated in O.M. Dated 29.02.2016. This shall be subject to the final order that may be passed in the appeal. In the circumstances, there shall be no order as to costs.

C.V. BHADANG, J.

R.P. SONDURBALDOTA, J.

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