

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Civil Writ Petition No. 13146 of 2016

Date of Decision: 21.09.2016

M/s Jindal Steel and Power Ltd. through its authorized signatory
Mr. Ajay Sehgal.

..Petitioner

versus

The Principal Commissioner of Income Tax, Gurgaon and another

..Respondents

**CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE.
 HON'BLE MR. JUSTICE DEEPAK SIBAL, JUDGE.**

Present : Mr. Ajay Vohra, Senior Advocate with
 Mr. Rohit Jain, Advocate, for the petitioner.

Mr. Yogesh Putney, Advocate, for the respondents.

S.J.VAZIFDAR, CHIEF JUSTICE

The petitioner has challenged an order of respondent No.1- Principal Commissioner of Income Tax (Pr.CIT) dated 14.06.2016 rejecting its application to stay the recovery of the demand of about Rs.277 crores till the disposal of its appeal before the Commissioner of Income Tax (Appeals). By a further order dated 26.08.2016, respondent No.1 rejected the petitioner's application for clarification/modification. A copy of this order was tendered in Court.

2. The petitioner sought a stay of the recovery of the demand of about ₹ 277 crores till the disposal of its appeal before the Commissioner of Income Tax (Appeals). In the alternative and based on instructions issued by the CBDT dated 29.02.2016 the petitioner sought a stay of the demand upon

its paying a reasonable part of the demand not exceeding 15% of the total demand. By the main order dated 14.06.2016, the petitioner was granted a stay subject to it depositing Rs.41.64 crores which constituted 15% of the total demand. The order further permitted the Assessing Officer to adjust any refund which may arise in favour of the assessee company in any assessment year. The petitioner contends that this right to adjust the refund is limited to the amount of Rs.41.64 crores directed to be deposited as a condition of stay. The authorities, however, interpreted the order to authorize them to adjust any refund against the total tax demand of about Rs.277 crores. The petitioner, therefore, sought a clarification of the order dated 14.06.2016. By an order dated 26.08.2016, respondent No.1 while rejecting the application did not interpret the order dated 26.08.2016 but instead relying upon the instructions dated 02.02.1993 issued by the CBDT held that the Assessing Officer/Department may reserve the right to adjust the refund against demand. We have held that in any event the same would be contrary to the instructions issued by Central Board of Direct Taxes (CBDT) dated 29.02.2016 which modified the circular dated 02.02.1993.

3. As the petitioner seeks a stay of the demand, it is necessary to refer to the facts only briefly.

4. The original assessment order is dated 27.12.2010. The total tax due was computed at ₹ 230.57 crores. The total tax paid was about ₹ 181.24 crores. The Assessing Officer initiated proceedings of penalty under section 271(1)(C) of the Income Tax Act, 1961 (for short 'the Act').

Mr. Vohra, the learned senior counsel appearing on behalf of the petitioner invited our attention to the observation in the assessment order to the effect that the books of account were produced and checked. He also

relied upon the assessment order in so far as it dealt with the petitioner's case for deductions under sections 80IA and 80IB of the Act in considerable detail. The petitioner's claim for deduction under section 80IA of Rs.429 crores was restricted to Rs. 203.80 crores. Similarly, the petitioner's claim for deduction under section 80IB was restricted to Rs. 65.75 crores.

5. The petitioner's appeal against the assessment order was disposed of by the order of the Commissioner of Income Tax (Appeals) dated 11.07.2011. Thereafter the revisionary jurisdiction under section 263 of the Act was invoked on issues other than under section 80IA and 80IB. Mr. Vohra relied upon the proceedings under section 263 of the Act to indicate that the petitioner's record had been examined more than once. He relied upon the order of the CIT(A) to contend that as the assessment order had merged into the order of the CIT(A) and that, therefore, the reassessment proceedings were barred.

6. By a letter dated 24.03.2015 the Assessing Officer informed the petitioner that he had reason to believe that its income for the assessment year 2008-09 had escaped assessment within the meaning of section 147 of the Act. The assessee was directed to file a return within 30 days.

7. Under cover of a letter dated 23.07.2015 the Assessing Officer forwarded to the petitioner the reasons recorded for reopening the assessment. The petitioner's objections were invited by 27.07.2015. The main reason was that the petitioner had not maintained separate books of account. It was also noted that the petitioner had not explained how the value of coal mines, rejected coal, cost of steam, direct and overhead expenses had been computed and that there were no details and bills/vouchers (with costing) in respect of the coal and iron-ore purchases

and unitwise use thereof. The Assistant Commissioner of Income Tax also mentioned that there was no record to show that various aspects had been examined before the Assessing Officer made the original assessment order. He stated that he had reason to believe that on account of the petitioner having failed to disclose fully and truly all material facts necessary for its assessment the income had escaped assessment for the assessment year 2008-09.

8. The petitioner filed its objections. The petitioner inter-alia contended that the claim for deduction under section 80IA and 80IB had been verified during the original assessment proceedings as also in respect of the previous assessment years commencing from 2000-01; that there was no failure to disclose the material facts; that the reassessment was based only on change of opinion; that the reassessment was barred under the third proviso to section 147 in view of the order of CIT(A) dated 11.07.2011 and that the reassessment was barred under section 149 as the reasons alongwith the notice under section 148 and sanction under section 151 were not communicated.

9. The Assessing Officer dismissed the objections by an order dated 28.03.2016. Thereafter the Assessing Officer passed the reassessment order dated 31.03.2016 disallowing the entire claim for deduction under section 80IA and 80IB of an aggregate amount of about 492 crores.

10. We do not wish to express any opinion on the correctness of these grounds of challenge as they are the subject matter of appeal before the CIT(A) against the order dated 28.03.2016 dismissing the petitioner's objections and the reassessment order dated 31.03.2016.

11. The petitioner filed Civil Writ Petition No. 6983 of 2016 against the reassessment order. The Writ Petition, however, was disposed of by an order and judgment dated 09.05.2016. The Division Bench relegated the petitioner to the alternative remedy of an appeal before the CIT(A). The merits of the matter were not dealt with.

12. It is in these circumstances that the petitioner filed an appeal before the Commissioner of Income Tax (Appeals) against the reassessment order dated 31.03.2016.

13. On 29.04.2016, the petitioner made an application for stay before the Assessing Officer which was disposed of by an order dated 09.05.2016. The order contains no reasons whatsoever. It only observed that the mere filing of an appeal did not entitle the appellant to a stay. It is not necessary to deal with the correctness of this order for ultimately the petitioner carried the matter to the first respondent-Principal, Commissioner of Income Tax, Gurgaon (Pr. CIT) who passed the impugned order dated 14.06.2016.

14. Before referring to the impugned order it is necessary to refer to Section 220 and a circular issued under section 119 of the Act in respect of the provisions of section 220(6) of the Act. Section 220(6) of the Act reads as under:-

“When tax payable and when assessee deemed in default.

220 (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.”

15. The Central Board of Direct Taxes (CBDT) had initially issued instruction No. 1914 dated 02.02.1993 which was clarified by instructions dated 21.03.1996. They contain the guidelines issued by the Board regarding the procedure to be followed for recovery of the outstanding demand including the procedure for grant of stay of demand. Further instructions titled 'Office Memorandum (F.No.404/72/93-ITCC)' dated 29.02.2016 were issued in order to streamline the process of grant of stay. It is necessary to set out the entire Office Memorandum for this matter turns essentially on our interpretation of it. It reads as follows:-

“OFFICE MEMORANDUM [F.NO.404/72/93-ITCC], DATED 29-2-2016

Instruction No. 1914 dated 21-3-1996 contains guidelines issued by the Board regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand.

2. In part 'C' of the Instruction, it has been prescribed that a demand will be stayed only if there are valid reasons for doing so and that mere filing of an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. It has been further prescribed that while granting stay, the field officers may require the assessee to offer a suitable security (bank guarantee, etc.) and/ or require the assessee to pay a reasonable amount in lump sum or in instalments.

3. It has been reported that the field authorities often insist on payment of a very high proportion of the disputed demand before granting stay of the balance demand. This often results in hardship for the taxpayers seeking stay of demand.

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) here under.

(B) In a situation where,

(a) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted (e.g. in

a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of Revenue or addition is based on credible evidence collected in a search or survey operation, etc.) or,

(b) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.), the assessing officer shall refer the matter to the administrative Pr. CIT/CIT, who after considering all relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand.

(C) In a case where stay of demand is granted by the assessing officer on payment of 15% of the disputed demand and the assessee is still aggrieved, he may approach the jurisdictional administrative Pr. CIT/CIT for a review of the decision of the assessing officer.

(D) The assessing officer shall dispose of a stay petition within 2 weeks of filing of the petition. If a reference has been made to Pr. CIT/CIT under para 4 (B) above or a review petition has been filed by the assessee under para 4 (C) above, the same shall also be disposed of by the Pr. CIT/CIT within 2 weeks of the assessing officer making such reference or the assessee filing such review, as the case may be.

(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 co-operated 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."

16. We will interpret the circular after referring to the impugned order dated 14.06.2016 read with the order dated 26.08.2016 on the petitioner's application for modification/clarification. These orders were

passed on the petitioner's application dated 16.05.2016 to the first respondent. The application inter-alia referred to the stay application dated 29.04.2016 filed before the Assessing Officer and various instructions/circulars issued by the CBDT. It stated that the said order passed by the Assessing Officer dated 09.05.2016 did not deal with the various contentions raised in the application for stay and that it was in these circumstances that the petitioner had filed the application before the Pr.CIT. The application thereafter proceeds to raise the preliminary objections as to the jurisdiction and deals with the case on merits as well. The contentions were presumably to establish a strong prima-facie case in support of the application for stay.

The petitioner sought a stay of the entire demand. Alternatively, the petitioner submitted that the stay may be directed to be granted subject to its meeting a reasonable part of the demand not exceeding 15% of the demand. This case was based essentially on the aforesaid circulars and in particular the instructions contained in the Office Memorandum dated 29.02.2016.

17. We mentioned earlier that one of the main reasons for rejecting the assessee's application for deduction under sections 80IA and 80IB was that it did not maintain separate books of account. We had by an order and judgment dated 02.09.2016 in *The Commissioner of Income Tax, Panchkula v. M/s Micro Instruments Company* in ITA No. 958 of 2008 and other connected matters held that it was not mandatory for an assessee to maintain separate books of account in order to maintain a claim of deduction under sections 80IA and 80IB. We observed as under:-

“29. Even as a matter of law, keeping separate books of account is not a condition precedent to a claim for a

deduction under Section 80-IB. There was no statutory provision making it mandatory for an assessee to maintain separate books of account. That it may be easier for an assessee to establish a claim for deduction under Section 80- IB in the event of separate books of account being maintained is another matter altogether. That is a question of evidence and not a legal obligation.

30. Section 80-IB itself does not expressly require an assessee to maintain separate books of account to maintain a claim for a deduction thereunder. Nor do we find anything in the section that implies such a requirement. So long as an assessee fulfills all the conditions stipulated in sub-section (2), the section would be applicable. These conditions do not require an assessee to maintain separate books of account in respect of the new undertaking. Nor does sub-section (3), stipulate such a condition. As we will shortly see, where an assessee is required mandatorily to fulfill a particular condition, the legislature expressly included a condition to that effect.

31. As we mentioned earlier, where an assessee keeps separate books of account that fact would, along with other facts, be relevant while considering whether the assessee fulfills all the conditions of Section 80-IB and, in particular, sub-section (2) thereof. It would be relevant, for instance, while considering whether the industrial undertaking concerned is formed by splitting up or a reconstruction of a business already in existence or not. If separate books of account are kept in respect of the new industrial undertaking, it would certainly be a factor in favour of the assessee. That, however, relates to the question of evidence in support of the claim and not to the statutory requirement to maintain separate books of account.”

18. The petitioner has, therefore, made out a prima-facie case on merits. Added to this is the fact that the petitioner is undergoing a liquidity crunch. The audit result indicates a loss of about ₹ 1759 crores.

Certain agencies have downgraded the petitioner's rating to the default category. These aspect would in our opinion justify a partial stay but not a stay of the entire demand.

19. Firstly, the petitioner's financial difficulties indicate a need to secure the Revenues outstanding claims. More important, prima-facie at least even assuming that our judgment is applicable to the petitioner's case, it is possible that the appellate authorities may remand the matter to enable the Assessing Officer to consider the application for deduction afresh based on the material available. It cannot, therefore, be stated at this stage that there is no possibility of any part of the claim for deduction being disallowed. We are, therefore, not inclined to grant a stay of the entire demand.

20. The Pr.CIT rightly did not grant a complete stay but considered the petitioner's application in the alternative for a stay subject to its paying 15% of the outstanding demand in terms of the Office Memorandum dated 29.02.2016. Considering the facts of the case, the financial position of the petitioner and having regard to the said guidelines dated 29.02.2016, the Pr.CIT granted the petitioner a stay of the demand till the disposal of the appeal before the CIT(A) subject to the petitioner paying 15% of the outstanding demand, namely, ₹ 41.64 crores in the installments stipulated. In paragraph-5, the petitioner's request for adjusting a refund of ₹ 15.14 crores in respect of the assessment year 2008-09 was accepted. The assessee was accordingly directed to pay the balance amount of ₹ 26.18 crores in varying installments between 20th June, 2016 and 20th March, 2017. The concluding portion of the order passed by respondent No.1 reads as under:-

“5. It may be mentioned that installments in the initial months have been kept at lower side considering the assessee’s request for lower installments on account of pressing financial position. The assessee shall make the payment by 20th day of each month and furnish the copy of the challan before the AO. On payment of 15% of outstanding demand as stated above, the assessee shall not be treated as the assessee in default in respect of the balance demand till the disposal of appeal of the learned CIT(A) and the AO shall not take any coercive measure to recover the said demand. However, the Assessing Officer is free to adjust any refund which may arise in favour of the assessee company in any assessment year.

6. In case the assessee company does not comply with the above directions and does not adhere to the above payments of installments, the AO shall be free to take steps as per law to recover the demand.”

21. It is clear that the stay was granted subject to the assessee paying the said amounts which constituted 15% of the total demand and nothing more. There is, however, a dispute regarding the last sentence in paragraph-5. It entitles the Assessing Officer “to adjust any refund which may arise in favour of the assessee company in any assessment year”. The petitioner contends that this liberty to adjust is only in respect and to the extent of the balance of the said 15%, namely, ₹ 26.18 crores which was to be paid in the said installments and on the other it could be to the extent of the entire demand. The Assessing Officer, however, interpreted the order to mean that he was entitled to adjust the refund that the petitioner may be entitled to against the entire demand. This compelled the petitioner to seek a clarification before the Pr.CIT. The Pr.CIT by the said order dated 26.08.2016 referred to the guidelines and to the previous order. In particular

a reference was made to Clause-C of the original instructions dated 02.02.1993 which reads as under:-

“C. GUIDELINES FOR STAYING DEMAND.

- (i)
- (ii) *In granting stay, the Assessing Officer may impose such conditions as he may think fit. Thus he may,-*
 - a) Require the assessee to offer suitable security of safeguard the interest of revenue;*
 - b) Require the assessee to pay towards the disputed taxes a reasonable amount in lump sum or in installments;*
 - c) Require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled;*
 - d) Reserve the right to review the order passed after expiry of reasonable period, say upto 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 situation;*
 - e) Reserve a right to adjust refund arising, if any, against the demand.”***

After quoting the above provision, the order dated 26.08.2016 concludes as under:-

“4. From the above instruction issued by the CBDT, it is clear that for granting of stay of outstanding demand the Department may impose such conditions, which inter-alia includes that the Assessing Officer/Department may reserve the right to adjust the refund arising, if any, against the demand.

5. In view of the above, the request of the assessee company to amend the stay order dated 14.06.2015 is hereby rejected.”

22. The order dated 26.08.2016 does not clarify the order dated 14.06.2016. It does not state that the order dated 14.06.2016 entitled the Assessing Officer to adjust the refunds against the entire demand. The order merely states that in view of Clause-C of the original instructions dated 02.02.1993 the Department has a right to do so. This was not a clarification.

23. We will assume that the Department's interpretation of the orders is correct. In any event the order dated 26.08.2016 does not construe the further Office Memorandum dated 29.02.2016. The Office Memorandum forms a part of the original instruction No. 1914 dated 02.02.1993. This is clear from paragraphs-1 and 4 thereof. Paragraph-4 expressly states that the modified guidelines contained in the Office Memorandum were being issued "in partial modification of the instruction No.1914". Instruction No. 1914 dated 02.02.1993 as clarified by instruction No.1914 dated 21.03.1996 must, therefore, be read together with the Office memorandum dated 29.02.2016.

24. It is necessary now to interpret the Office Memorandum dated 29.02.2016. Under clause-4A where the outstanding demand is disputed before the CIT(A), the Assessing Officer "shall" grant a stay of the demand on payment of 15% of the disputed demand unless the case falls in para-B of Clause-4. In the case before us, the demand is disputed before the CIT(A). The present case does not fall under para(B) either. Clause-4(B)(a) provides that in a situation where the Assessing Officer is of the view that the nature of the addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted, the Assessing Officer shall refer the matter to the Administrative Pr.CIT/CIT who after considering all the relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as lump-sum payment for granting a stay of the balance

demand. Admittedly, a reference under clause 4(B)(a) was not made by the Assessing Officer to the Pr.CIT. In that event, Clause-4(A) alone would operate. As we mentioned earlier, clause 4(A) provides that where the outstanding amount is disputed before the CIT(A), the Assessing Officer “shall” grant stay of demand till disposal of the first appeal on payment of 15% of the disputed demand. In other words, the Assessing Officer is bound to grant a stay of the entire demand on payment of 15% of the disputed demand unless the case falls under category-B of clause-4. The Assessing Officer is not entitled to insist upon the assessee depositing a higher amount.

25. Faced with this, Mr. Putney relied upon clause-4(E)(iii). He submitted that the Assessing Officer is entitled to impose such conditions as he thinks fit. A plain reading of the clause, however, militates against the submission on behalf of the Department. It entitles the Assessing Officer to reserve the right to adjust the refunds arising “to the extent of the amount required for granting stay.....” Therefore, the right to adjust the refund is limited to the amount to be deposited by the assessee as a condition for the stay.

26. The Assessing Officer in the order dated 26.08.2016 referred to guidelines-C(ii)(e) which we set out earlier. It provides that in granting a stay the Assessing Officer may impose such conditions as he may think fit and that he may reserve a right to adjust the refund arising, if any, against the demand. However, this guideline stands modified by the Office Memorandum dated 29.02.1996 which entitles the Assessing Officer to reserve the right to adjust the refund arising “to the extent of the amount required for granting stay.....” . Clause-4 of the Office Memorandum expressly stated that the guidelines therein were issued in partial

modification of the instruction No. 1914. Thus guideline-C(e) of the original instructions dated 02.02.1993 stood modified by para-4(e)(iii) of the Office Memorandum.

27. As we observed earlier in the present case by the impugned order dated 14.06.2016 the petitioner was required to deposit 15% of the outstanding demand, namely, ₹ 41.64 crores. This figure attained finality. At the cost of repetition, the Assessing Officer did not refer the matter to the Administrative Pr.CIT for an amount higher than 15% of the amount to be deposited as a condition for stay. This infact indicates that the last sentence in paragraph 5 of the order dated 14.06.2016 granted the Assessing Officer the right to adjust any refund which may arise in favour of the assessee in respect and to the extent of the said 15% of the demand only. In any event, even if it entitles the Assessing Officer to adjust any refund against the entire tax demand, it would be contrary to the instructions of the CBDT contained in the Office Memorandum dated 29.02.2016.

28. Lastly, Mr. Putney submitted that the Assessing Officer has unbridled powers under section 220(6) of the Act. However, in view of the circular dated 02.02.1993 as clarified by the circular dated 21.03.1996 and modified by the Office Memorandum dated 29.02.2016 the Assessing Officer's powers have been circumscribed to the extent provided therein.

29. We quite see the force in Mr. Putney's contention that the department must safeguard its interest and that its interest may be jeopardized if the petitioner is entitled to avail of the refund and at the same time enjoy the benefit of the stay. However, the Department is bound by the circular as modified by the Office Memorandum. Had the circulars/Office

Memorandum not been in force, it may have been a different matter altogether.

30. In the circumstances, the writ petition is disposed of by holding that the petitioner shall be entitled to a stay of the demand subject to its depositing the installments as required by the order dated 14.06.2016 and that the future refunds can be adjusted only to the extent of the balance amount directed to be paid as a condition for the stay.

The respondents shall, however, be entitled to withhold the refund(s) upto and including 31.10.2016 to enable them to challenge this order.

(S.J.VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

21.09.2016
'ravinder'

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No