

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved : 19.04.2017

Orders Delivered : 26.04.2017

CORAM:

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.Nos.7937 and 7990 of 2017

and

WMP Nos.8687 to 8690 and 8730 and 8731 of 2017

The Chennai Central Cooperative Bank Ltd.,
Rep. By General Manager G.Balakrishnan,
215, Prakasam Salai,
Broadway, Chennai 600 108.

..Petitioner
in W.P.7937/17

M/s.The LIC Employees Co-operative Bank Ltd.,
Rep. By its President Mr.AE Muthukumar,
No.8, United India Building, Esplanade Road,
Chennai 600 108.

..Petitioner
in W.P.7990/17

Vs

The Assistant Commissioner of Income Tax,
Non Corporate Circle 11,
Chennai 600 006.

The Assistant Commissioner of Income Tax,
O/o.The Assistant Commissioner of Income Tax,
Non Corporate Circle 11,
Chennai 600 006.
W.Ps.

..R1 in both

The Manager,
The Tamilnadu State Apex Cooperative Bank Ltd.,

233 N.S.C.Bose Road,
Chennai 600 001.

..R2 in W.P.7937/17

The Deputy General Manager,
The Tamilnadu State Apex Co-operative Bank Ltd.,
No.233, NSC Bose Road,
Chennai 600 001.

..R2 in W.P.7990/17

Prayer in W.P.7937/17:-Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of certiorarified mandamus to call for the records pertaining to the impugned notices under section 226(3) of the Income Tax Act, 1961 dated 31.03.2017 in Attachment/NCC-11/AAAAC0982C/2016-17 and quash the same and direct the first respondent to refund the amount of Rs.34,63,21,380/- withdrawn from the petitioner's Bank Account No.201305380 PAN:AAAAC0982C maintained with the second respondent.

Prayer in W.P.7990/17:-Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of certiorarified mandamus to call for the records pertaining to the impugned notice under section 226(3) of the Income Tax Act, 1961 dated 31.03.2017 in Attachment/NCC-11/AAABL0162C/2016-17 issued by the first respondent and quash the same as arbitrary and illegal and direct the first respondent to refund the amount of Rs.2.07,89,510/- withdrawn from the petitioner's bank account maintained with the second respondent.

For Petitioner : Mr.S.Prabakaran
in W.P.No.7937/17 Senior Counsel
for Mr.A.Ramesh Babu
For Petitioner : Mr.K.Ravi
in W.P.No.7990/17

For Respondent : Mr.M.Swaminathan for R1

in both W.Ps. Mr.L.P.Shanmugasundaran for R2
Special Government Pleader (Co.op)

COMMON ORDER

W.P.No.7937 of 2017 is filed challenging the proceedings of the first respondent dated 31.03.2017, issued under Section 226 (3) of the Income Tax Act, 1961 and for consequential direction to the first respondent to refund a sum of Rs.34,63,21,380/- withdrawn from the petitioner's Bank Account No.201305380 PAN:AAAAC0982C maintained with the second respondent bank.

2.W.P.No.7990 of 2017 is filed challenging the proceedings of the first respondent dated 31.03.2017, issued under Section 226(3) of the Income Tax Act and for consequential direction to the first respondent to refund a sum of Rs.2,07,89,510/- withdrawn from the petitioner's Bank account maintained with the second respondent.

3.Through the said impugned proceedings, the first respondent called upon the respective second respondent bank to make payment out of the money which is due from the second respondent bank to the respective petitioner. The claim of the first respondent as against the

petitioner in W.P.No.7937 of 2017 is Rs.34,63,21,380/- and Rs.4,68,76,060/- against the petitioner in W.P.No.7990 of 2017.

4.The case of the petitioner in W.P.No.7937 of 2017 is as follows:

The petitioner is a registered Cooperative Society and carrying on business of banking under the license granted by the Reserve Bank of India. In respect of the Assessment Years 2009-10, 2010-11 and 2013-14, the petitioner filed return of income. In respect of those Assessment Years, orders of assessment under Section 143 (3) read with Section 147 of the Income Tax Act, 1961, were made on 26.03.2016, raising a demand of Rs.6,19,08,220/-; Rs.7,88,09,230/- and Rs.20,56,03,930/- respectively, thus totaling a sum of Rs.34,63,21,380/-. Challenging such orders of assessment, the petitioner preferred appeals before the First Appellate Authority and paid 15% of demand each in respect of the Assessment Years 2009-2010 and 2010-11. In respect of the Assessment Years 2013-14, the petitioner paid 25% of the demand, while preferring the appeal before the First Appellate Authority. Thus, the total sum paid by the petitioner at the time of filing the first appeal in respect of all the three assessment years comes to Rs.7,25,08,598/-, as against the total

demand of Rs.34,63,21,380/-. The First Appellate Authority by an order dated 24.03.2017, which was served on the petitioner on 30.03.2017, dismissed all the appeals. The petitioner filed a rectification application under section 154 before the Appellate Authority on 31.03.2017 and such application is still pending. However, the first respondent issued the impugned proceedings on the very same date i.e., 31.03.2017 and recovered a sum of Rs.34,63,21,380/- from the second respondent Bank on the very same day. The action of the first respondent in recovering such sum without even allowing the petitioner to file statutory appeal before the appellate Tribunal and seeking interim relief therein, is highly arbitrary and unreasonable. When the total demand itself is Rs.34,63,21,380/- and admittedly, the petitioner had paid Rs.7,25,08,598/- during the pendency of the first appeal, the action of the first respondent in recovering the amount as shown in the demand is illegal.

5.The case of the petitioner in W.P.No.7990 of 2017 is as follows:

The petitioner is a cooperative society carrying on the business of bank under the license granted by the Reserve Bank of India. In respect of the Assessment Years 2009-10, 2010-11, 2013-14 and 2014-

15, orders of assessment were passed on 26.12.2016, 26.12.2016, 23.3.2016 and 27.12.2016 respectively under Section 143(3) read with Section 147 of the Income Tax Act. The demand raised in respect of the Assessment Year 2009-10 is Rs.35,69,360/-; for the Assessment Year 2010-11 is Rs.67,66,510/-; for the Assessment Year 2013-14 is Rs.2,26,79,210/- and for the Assessment Year 2014-15 is Rs.1,38,60,980/-. Thus, the total demand made for the above said four assessment years, is Rs.4,68,76,060/-. The petitioner challenged the above said orders of assessment before the First Appellate Authority, who in turn, dismissed the appeals by order dated 27.03.2017, which was communicated to the petitioner on 31.03.2017. When the petitioner was preparing to file further appeal and seek stay before the Income Tax Appellate Tribunal, as provided under Section 253(3) of the Income Tax Act, 1961, the first respondent issued the impugned proceedings and recovered a sum of Rs.2,07,89,510/- from the account maintained by the petitioner with the second respondent bank. The issuance of impugned notice and the recovery were made on one and the same day. Therefore, the petitioner is totally denied the right of filing an appeal and getting interim relief before the Tribunal.

6.The first respondent filed a counter in W.P.No.7937 of 2017,

wherein it is stated as follows:

Though the petitioner has paid 15% of the tax demand for the Assessment Years 2009-10, 2010-11, 2013-14, has however not paid even such 15% of the tax in respect of the Assessment Year 2014-15, when they filed the appeal before the First Appellate Authority in respect of such assessment year. As per the manual of office procedure, the Assessing Officer is responsible for the collection of tax. The Assessing Officer was indeed directed by the higher authorities to collect the demand immediately. An e-mail was sent to the petitioner/assessee on 30.03.2017, requesting them to pay the balance demand. If the Assessee fails to pay the demand, they shall be deemed in default. In case of default to pay tax, the Assessing Officer is mandated to recover the tax by one or more of the method provided under Section 226 of the Income Tax Act. Accordingly, the impugned attachment proceedings were issued and a sum of Rs.34,63,21,380/- was received by way of demand draft from the second respondent, which was duly acknowledged by the first respondent. The tax under demand got crystallized with the serving of the original notice under section 156 of the Income Tax Act along with the assessment order. Therefore, its liability/obligation arose and continued to exist from that

day onwards. The petitioner is definitely entitled to seek remedy by way of filing appeal before the Income Tax Appellate Tribunal. However, only the quantified demand crystallized by way of confirmation of order by the Appellate Authority has been recovered. Any excess recovery, as a result of decision to be given by the Tribunal, will carry interest under the provisions of the Income Tax Act.

7.The first respondent filed counter in W.P.No.7990 of 2017, wherein it is stated as follows:

In respect of the Assessment Years 2009-10, 2010-11, 2013-14 and 2014-15, demands were raised by issuing notice under Section 156. The appeals preferred by the Assessee were dismissed on 27.03.2017. The assessee, while preferring the appeal has not paid 15% of the demand as per the CBDT's instruction. As per the manual of Office Procedure, the Assessing Officer is responsible for the collection of tax. The Assessing Officer was indeed directed by the higher authorities to collect the demand immediately. Thus, after issuing the impugned notice on 31.03.2017 for attaching the bank account, an amount of Rs.2,07,89,510/- was withdrawn. The time limit

available for the petitioner to file appeal before the Tribunal will not take away right of the revenue to recover the demand confirmed by the Appellate Authority. There is no necessity to issue fresh notice of demand.

8.The second respondent, who is one and the same in both the writ petitions has filed a common counter affidavit, wherein it is stated as follows:

On 31.03.2017, by 12.30 p.m., the officials of the first respondent entered the second respondent bank and issued the impugned attachment orders and insisted for immediate payment of the balance available in the accounts maintained by the respective petitioner. By 05.30 p.m., another batch of officials including the Enforcement Officer himself from the Department of the first respondent entered the second respondent bank and threatened and intimidated the officials with dire consequences to make the payment immediately. The second respondent bank is not an individual but they are a cooperative institution. Because of the short fall, the maintenance of CRR and SLR by the petitioners' bank will attract penalty provisions by the RBI, which will be reflected as black mole in

their balance sheets. Due to pressure given by the first respondent, the second respondent bank was constrained to debit the account and paid the amounts.

9.Mr.S.Prabakaran, learned Senior Counsel appearing for the petitioner in W.P.No.7937 of 2017 submitted as follows:

The petitioner has already paid 15% of the demand in respect of the Assessment Years 2009-10 and 2010-11, while preferring the appeal before the First Appellate Authority. Likewise, the petitioner paid 25% of the demand in respect of the Assessment Year 2013-14, while preferring the appeal before the First Appellate Authority. Therefore, the amount alleged to be due, as referred to in the impugned notice itself, is factually erroneous, since the petitioner has admittedly paid Rs.7,25,08,598/- out of the total demand of Rs.34,63,21,380/-. Consequently, recovering the entire sum of Rs.34,63,21,380/- in pursuant to the issuance of the impugned notice, is also an arbitrary exercise of power. The petitioner has filed the appeals before the Income Tax Appellate Tribunal on 31.03.2017 itself. However, the first respondent, without even waiting for the Tribunal to consider the request of the petitioner for stay and to pass an order

therein, has taken the entire amount due on 31.03.2017 itself. Therefore, the first respondent has to return the money pending final order to be passed in the appeal before the Tribunal. The petitioner is willing to give bank guarantee for entire sum of Rs.34,63,21,380/-.

10.Mr.M.Swaminathan, learned Standing counsel appearing for the first respondent in W.P.No.7937 of 2017 submitted as follows:

It is true that the petitioner paid 15% of the tax demand in respect of the Assessment Years 2009-10 and 2010-11 and 25% of the tax demand in respect of the Assessment Year 2013-14, while preferring the appeals before the First Appellate Authority. However, the First Appellate Authority dismissed the appeals on 24.03.2017. Apart from these three disputed Assessment Years, the petitioner has filed another appeal before the First Appellate Authority in respect of the Assessment Year 2014-15, wherein the petitioner has not paid the 15% of the tax demand. Therefore, the total due referred to in the impugned notice, is to be construed also in respect of the Assessment Year 2014-15 as well. In other words, when the impugned order does not refer to the demand for the particular Assessment Year, the petitioner is not justified in seeking credit for the part payment made

during the pendency of the first appeal. When there are dues payable to the Government, the authorities are competent and empowered to recover the same in the absence of any legal impediment to do so. The power under Section 226(3) and 220 (1A) of the Income Tax Act is wider, as such power is conferred for recovery of any amount due and liable to be paid by the assessee. After recovering the money from the amount maintained with the second respondent bank, the impugned orders of attachment were lifted on 31.03.2017 itself. Therefore, the petitioner cannot have any grievance.

11.Mr.K.Ravi, learned counsel appearing for the petitioner in W.P.No.7990 of 2017 submitted as follows:

As against the order of assessment, the petitioner preferred appeals before the First Appellate Authority. Those appeals were dismissed on 27.03.2017 and such dismissal was communicated to the petitioner only on 31.03.2017. On the very same day, the impugned order of attachment was passed followed by withdrawal of the sum of Rs.2,07,89,510/- on that day itself. The petitioner is having a statutory appellate remedy to challenge the order of the Commissioner appeals before the Income Tax Appellate Tribunal. The Appellate Tribunal is

empowered to deal with and decide the stay petitions filed pending disposal of appeals. When statute provides 60 days time limit for filing such appeal before the Tribunal, the first respondent, without even waiting for one day, passed the impugned order and recovered the money. It is nothing but an arbitrary and unreasonable action. In this connection, the following decisions are relied on:

- a) Unreported decision in W.P.No.15373 of 2014 dated 13.06.2014;
- b)2007(295) ITR 42 (Bombay), Mahindra & Mahindra Ltd vs. Assessing Officer;
- c)(2014) 43 Taxmann.com 146(Bombay), Director of Income Tax (Exemptions) vs ITAT;

The petitioner has already filed appeals before the Appellate Tribunal.

12.Mr.M.Swaminathan, learned counsel appearing for the first respondent in W.P.No.7990 of 2017 submitted as follows:

The petitioner, while filing the first appeal before the Commissioners appeal, has not paid even 15% of the tax demand. They have also not filed any stay petition before the First Appellate Authority. The appeals were dismissed. Therefore, the amount of tax assessed by the Assessing Officer has become due and liable to be paid by the petitioner from the day one of the assessment. There is no legal impediment for the first respondent to recover such amount due,

since Section 220(1A) and 226(3) of the Income Tax Act empower the first respondent to recover the amount due from the petitioner. In this case, the first respondent has recovered only fifty percent of the demand in pursuant to the impugned order.

13. Heard the learned counsels appearing on either side and perused the materials placed before this court.

14. The point for consideration in these writ petitions is as to whether the first respondent has validly issued the impugned proceedings under Section 226(3) of the said Act and recovered the money and whether the petitioners are entitled for refund of such money so recovered?

15. Before answering the said question, it is better to understand certain facts, which are relevant and essential for deciding the issue.

16. There is no dispute to the fact that both the petitioners were assessed in respect of the relevant Assessment Years and consequently, demand was made for payment of the tax so assessed in respect of each Assessment years. It is also not in dispute that both the

petitioners have challenged the orders of assessment in respect of each Assessment Years before the First Appellate Authority viz., the Commissioner of Income Tax (Appeals). It is an admitted fact that the petitioner in W.P.No.7937 of 2017 has paid a sum of Rs.7,25,08,598/- in total, while preferring the first appeal, out of the total demand of Rs.34,63,21,380/-. However, even such part payment was not made by the other petitioner, while preferring the first appeal. It is also not in dispute that in both the cases, the First Appellate Authority rejected the appeals and confirmed the orders of assessment and consequential demand. In the case of the petitioner in W.P.No.7937 of 2017, the First Appellate Authority dismissed the appeal on 24.03.2017 and such dismissal was communicated to the petitioner on 30.03.2017, by the first respondent herein. Likewise, in the case of the petitioner in W.P.No.7990 of 2017, the First Appellate Authority passed the order in the appeal on 27.03.2017 and it is claimed that the said order was received by the petitioner only on 31.03.2017, around 12.30 p.m.

17.It is not in dispute that in both the cases, the respective petitioners are entitled to file further appeal before the Income Tax Appellate Tribunal, as provided under Section 253 of the Income Tax

Act, within a period of 60 days from the date of communication of the order sought to be appealed against. There is no dispute to the fact that proviso to sub clause 2(A) of Section 254 of the said Act, empowers the Appellate Tribunal to consider the application for stay. There is no dispute to the fact that in both these cases, the appeal time has not expired on the date of issuance of the impugned proceedings. However, the fact remains that both the petitioners have filed their respective appeals immediately before the Income Tax Appellate Tribunal.

18. Under the above stated facts and circumstances, now, this Court has to consider as to whether the impugned proceedings followed by recovery of the money are made in accordance with law and whether such action requires any interference by this court by invoking its extraordinary and discretionary jurisdiction under Article 226 of the Constitution of India.

19. In order to answer such question, the scope and ambit of the relevant provisions under the Income Tax Act are required to be noted

first, as hereunder.

Chapter XVII of the Income Tax Act, 1961, deals with the common heading of "Collection and Recovery of Tax", out of which, sub heading 'D' deals with "Collection and Recovery". Under the above sub heading, Section 220, which contemplates as to when the tax become payable and when the assessee is deemed to be in default, reads as follows:

"When tax payable and when assessee deemed in default.

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 :*

(1A) Where any notice of demand has been served upon an assessee and any appeal or other proceeding, as the case may be, is filed or initiated in respect of the amount specified in the said notice of demand, then, such demand shall be deemed to be valid till the disposal of the appeal by the last appellate authority or disposal of the proceedings, as the case may be, and any such notice of demand shall have the effect as specified in section 3 of the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964 (11 of 1964).

(2) If the amount specified in any notice of demand under [section 156](#) is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at one per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid :

..(3) Without prejudice to the provisions contained in sub-section (2), on an application made by the assessee before the expiry of the due date under sub-section (1), the Assessing Officer may extend the time for payment or allow payment by instalments, subject to such conditions as he may think fit to impose in the circumstances of the case.

(4) If the amount is not paid within the time limited under sub-section (1) or extended under sub-section (3), as the case may be, at the place and to the person mentioned in the said notice the assessee shall be deemed to be in default.

(5) If, in a case where payment by installments is allowed under sub-section (3), the assessee commits defaults in paying any one of the installments within the time fixed under that sub-section, the assessee shall be deemed to be in default as to the whole of the amount then outstanding, and the other installment or installments shall be deemed to have been due on the

same date as the installment actually in default.”

20. Perusal of the above provision of law would show that any amount, otherwise than by way of advance tax, specified in a notice of demand issued under section 156, becomes payable and shall have to be paid within 30 days of the service of such notice.

21. Section 156 of the Income Tax Act, 1961, which deals with notice of demand, reads as follows:

“Notice of demand:

156. *When any tax, interest, penalty, fine or any 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 .”*

22. Thus, the combined reading of Section 220 (1) and Section 156 of the said Act would show that the liability to pay the demand arises on issuance of such notice and the same has to be paid within 30 days from the date of service of such notice. Perusal of Section 220 (1A) would show that such demand made through such notice shall be deemed to be valid till the disposal of the appeal by the last appellate

authority or disposal of the proceedings as the case may be. Sub Clause (1A) further contemplates that any such notice of demand shall have the effect of Section 3 of the Taxation Laws (Continuation & Validation of Recovery Proceedings) Act, 1964. For better appreciation, Section 3 of the Taxation Laws (Continuation & Validation of Recovery Proceedings) Act, 1964 is extracted hereunder:

"3.Continuation and validation of certain proceedings:-

(1) Where any notice of demand in respect of any Government dues is served upon an assessee by a Taxing Authority under any scheduled Act, and any appeal or other proceedings is filed or taken in respect of such Government dues, then-

a) Where such Government dues are enhanced in such appeal or proceeding, the Taxing Authority shall serve upon the assessee another notice of demand only in respect of the amount by which such Government dues are enhanced and any proceedings in relation to such Government dues as are covered by the notice or notices of demand served upon him before the disposal of such appeal or proceeding may, without the service of any fresh notice of demand, be continued from the stage at which such proceedings stood immediately before such disposal;

b) Where such Government dues are reduced in

such appeal or proceeding:-

i) it shall not be necessary for the Taxing Authority to serve upon the assessee a fresh notice of demand;

ii) the Taxing Authority shall give intimation of the fact of such reduction to the assessee, and where a certificate has been issued to the Tax Recovery Officer for the recovery of such amount, also to that officer;

...(2)For the removal of doubts it is hereby declared that no fresh notice of demand shall be necessary in any case where the amount of Government dues is not varied as a result of any order passed in any appeal or other proceedings under any scheduled Act."

23.Sub section (2) of Section 3 of the Taxation Laws (Continuation & Validation of Recovery Proceedings) Act, 1964, contemplates that no fresh notice of demand shall be necessary in any case where the amount of Government dues is not varied as a result of any order passed in any appeal or other proceeding under any scheduled Act. However, it is made clear in the above said provision that if such Government dues are enhanced in such appeal, another notice of demand only in respect of the amount so enhanced shall have to be issued. On the other hand, if the Government dues are reduced

in such appeal or proceedings, it shall not be necessary for the Taxing Authority to serve upon the assessee a fresh notice of demand.

24. What would be the effect on the assessee if the amount demanded under Section 156 is not paid? Such question is answered under Sub Clause (2) of Section 220, which contemplates payment of simple interest for every month of non payment commencing from the day immediately following the end of 30 days and ending with the day on which the amount is paid. However, sub section (3) of Section 220 empowers the Assessing Officer to extend the time for payment or allow the payment by installments subject to such conditions, as he may think fit, based on an application made by the assessee before the expiry of due date. If the amount is not paid within the time limit, as provided under Sub Section (1) or within the extended time as provided under Sub Section (3), then the assessee shall be deemed to be in default, as contemplated under Section 220 sub Clauses (4) and (5).

25. What is the effect of an assessee, who is in default or is deemed to be in default in making the payment of tax? The said question is answered under section 221 of the Income Tax Act, 1961,

which reads as follows:

“Penalty payable when tax in default.

221. (1) *When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of [section 220](#) , be liable, by way of penalty, to pay such amount as the Assessing Officer may direct, and in the case of a continuing default, such further amount or amounts as the Assessing Officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears : Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard :*

Provided further that where the assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.”

Thus, from the perusal of the Section 221, it is clear that an assessee, who commits default in making the payment of tax, apart from paying the interest, is also liable for penalty.

26. Then, the next question that would arise is as to how such

arrears of tax, interest and penalty are to be recovered.

27. Section 222 of the Income Tax Act, 1961, deals with a procedure by way of drawing up a certificate by the Tax Recovery officer and thereafter to recover the dues from the assessee by one or more of the methods mentioned under the above said provision, viz., attachment sale of assessee's movable property; attachment and sale of the assessee's immovable property; arrest of the assessee and his detention in prison and appointment of a receiver for the management of the assessee's movable and immovable properties. Apart from the above said procedures contemplated under Sections 222 to 225, other modes of recovery are dealt with under section 226, out of which, relevant sub sections are extracted hereunder:

“Other modes of recovery:

226. (1) *Where no certificate has been drawn up under [section 222](#), the Assessing Officer may recover the tax by any one or more of the modes provided in this section.*

(1A)...

(2)....

(3) (i) The Assessing Officer or Tax Recovery Officer may, at any time or from time to time, by notice

in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Assessing Officer or Tax Recovery Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.

...(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary.

..(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Assessing Officer or Tax Recovery Officer, he shall be deemed to be an assessee in default in respect of the amount specified in the notice and further proceedings may be taken against him for the

realisation of the amount as if it were an arrear of tax due from him, in the manner provided in [sections 222 to 225](#) and the notice shall have the same effect as an attachment of a debt by the Tax Recovery Officer in exercise of his powers under [section 222](#). "

28. Perusal of the above said provision of law would show that the Assessing Officer, by exercising his power under sub section (3), may by notice in writing require any person, from whom money is due or become due to the assessee, to pay the Assessing Officer either forthwith upon the money becoming due or within the time specified in the notice. Section 226(3)(iv) contemplates that every person, to whom a notice under sub section (3) is issued, is bound to comply with such notice. Sub section (x) of sub section (3) of section 226 further contemplates that if the person, to whom the notice under section 226(3) is sent, fails to make payment, he shall be deemed to be an assessee in default in respect of the amount specified in the said notice and further proceedings may be taken against him for realisation of the said amount, as if it were an arrears of tax due from him in the manner provided in Sections 222 to 225. Thus, it is clear that if a person on receipt of notice under Section 226(3) fails to make payment, proceedings are to be initiated for recovery of such amount from such

person only by resorting to the procedures contemplated under Sections 222 to 225 and not otherwise.

29. Keeping the above statutory position in mind, let me consider the facts and circumstances of the present case. In both the cases, the respective assessees were assessed in respect of the relevant Assessment Years and consequently, the orders of assessment were passed for each year fixing the tax liability payable by the respective assessee, followed by issuance of notice under Section 156. Therefore, the liability to pay the amount so determined by the Assessing Authority starts from the date of the assessment, followed by issuance of notice of demand under section 156 of the said Act. No doubt, these assessees have filed their appeals before the First Appellate Authority challenging the orders of assessment. However, those appeals are dismissed by confirming the order of the Assessing Authority. After the dismissal of the appeals, there is no necessity for issuing a fresh notice of demand under Section 156 in view of Section 220(1A) of the said Act, which contemplates that a notice of demand originally served on the Assessee shall be deemed to be valid till the disposal of the appeal by the last appellate authority or disposal of the

proceedings and any such notice of demand shall have the effect as specified in Section 3 of the Taxation Laws (Continuation & Validation of Recovery Proceedings) Act, 1964.

30. Thus, it is clear that it is not necessary for issuing a fresh notice of demand every time after the disposal of the appeal or other proceedings and the original notice of demand issued under section 156 shall be deemed to be valid all through out the proceedings. Moreover, Section 3 of the Taxation Laws (Continuation & Validation of Recovery Proceedings) Act, 1964, makes it abundantly clear that no such notice is to be served on the assessee, if the quantum of Government dues is not varied as a result of any order passed in any appeal or other proceedings. As already stated above, in this case, the Appellate Authority has only confirmed the order of the Assessing Authority and therefore, after such dismissal of the appeal, these assesseees are not entitled to seek for issuance of fresh notice under Section 156. Therefore, it is evident that on the date of issuance of the impugned proceedings, there is no legal impediment or bar for the first respondent to take steps to recover the money due from the respective assesseees in accordance with law. In other words, there is no legal necessity that the impugned proceedings must be preceded by a

notice under Section 156.

31. I have already discussed the modes of recovery of such tax due. Admittedly, the first respondent has not resorted to the proceedings contemplated under Sections 222 to 225 for recovery of such dues from these assesseees through their garnishees. On the other hand, the first respondent has chosen to proceed under Section 226(3) for recovery of the dues from these assesseees. I have already discussed supra the procedure to be followed while exercising the power under Section 226(3). In these cases, the first respondent issued the notice under section 226(3) to the second respondent and called upon them to pay the amount forthwith. It is an admitted fact that in both these cases the second respondent has transferred the disputed amount from the account maintained by the respective petitioners to the credit of the first respondent on the same day.

32. No doubt, it is alleged by the second respondent that such transfer was made under the threat and pressure exerted by the officials of the Income Tax Department. At this juncture, it is to be noted that the second respondent has not questioned the impugned

proceedings by contending that there is no due from them payable to the respective petitioner. Therefore, this court has to see as to whether such recovery is liable to be interfered with. I have already pointed out that on the date of issuance of the notice under Section 226(3), there is no legal impediment or bar for the first respondent to recover such dues. Section 226(3) of the Act also enables and empowers the Assessing Officer or the Tax Recovery Officer to seek such payment from the person to whom such notice was issued either forthwith or within the time specified in the notice. In other words, it is the discretion of such authority to specify the time for such payment in the said notice. In this case, the first respondent directed the second respondent to make the payment forthwith. Therefore, legally, the first respondent is not barred from seeking such payment forthwith.

33. It is contended by the first respondent that in compliance with the issuance of such notice, the second respondent has paid the disputed amount on the same day. However, in the counter affidavit filed by the second respondent, certain allegations are made against the officials of the first respondent regarding threat and pressure exerted on the second respondent by personally making their presence

at the place of business of the second respondent. Such contentions, not rebutted by filing any reply by the first respondent, would only indicate that the first respondent, after issuing the notice under Section 226(3), has not even waited for a reasonable time for the second respondent to react to the notice and on the other hand, the amount was hurriedly recovered on the same day of issuance of such notice. However, it is to be noted that the second respondent is not raising any claim that the amount recovered are not the amount due to the assessee from the second respondent. In other words, the amount recovered is only from the account maintained by the assessees with the second respondent. But at the same time, the hurried manner, in which recovery was made on the same day of issuance of notice under Section 226(3) cannot be appreciated as a proper course of action. Propriety demands that the first respondent should have shown some amount of restraint after issuance of the impugned notice and should have given atleast a reasonable breathing time for the assessee or the garnishee to act or react on such notice. In fact, after issuance of such notice, if the person to whom such notice was served, fails to make payment, the said person shall be deemed to be an assessee in default and further proceedings to recover the amount from him, that too only

in the manner provided under Sections 222 to 225, as if it were an arrear of tax due from him, have to be resorted to. This is what contemplated under Section 226(3)(x).

34. In this case, the first respondent has not given any breathing time for the petitioner or the second respondent to act or react on the issuance of such notice. Undoubtedly such course of action adopted by the first respondent has to be viewed as a bureaucratic overreach and thus, an improper action, though not an illegal one. Therefore, the next question that would arise is as to whether judicial interference is called for against such action of the first respondent. I have already pointed out that the impugned action is only an improper action and not an illegal action in toto. An illegal action can never be condoned, whereas, an improper action, though not appreciable, still can be condoned, depending upon the facts and circumstances of each case. It is not that all improper actions would automatically become illegal or unlawful or void. Certainly such test has to be made only based and on appreciation of all the facts and circumstances of a particular case. Therefore, considering the above stated facts and circumstances, I find that the impugned action of the first respondent cannot be termed as

illegal, merely because the recovery was made on the same day of issuance of notice, especially when the liability of the petitioners exists. On the other hand, it only exhibits the over enthusiastic act of the first respondent to see that a target goal is achieved on that day, being the end of the financial year. Apart from the above, it is an admitted fact that the impugned proceedings are already lifted on the same day after recovery and as such those proceedings are not in force as on today.

35. In this case, apart from challenging the impugned proceedings, the petitioners also seek the consequential relief for refund of the amount so collected.

36. Chapter XIX of the Income Tax Act, 1961, deals with refunds wherein Section 237 contemplates as to who is the person entitled to a refund. Section 237 of the Income Tax Act, 1961, reads as follows:

Refunds:-

237. If any person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess."

Perusal of the above said provision would show that only a

person, who satisfies that the amount of tax paid by him for any Assessment Year exceeds the amount chargeable is entitled to a refund.

37. Section 240 of the Income Tax Act, 1961, deals with refund as a result of an order passed in appeal. Section 240 of the Act reads as follows:

Refund on appeal, etc.,

240. Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf."

Perusal of the above said provision makes it clear that the Assessing Officer shall refund the amount to the assessee without a claim made by the assessee, only when such amount becomes due as a result of an order passed in appeal or other proceedings.

38. Keeping the above legal position in mind, if the facts and circumstances of the present case are taken into consideration, I am of the view that the petitioners are not entitled to seek for refund of the

amount recovered at this stage, as a matter of right, since neither Section 237 nor Section 240 of the Act would come to their rescue as on date. Admittedly the amount recovered is the amount due as per the assessment order confirmed in appeal. On the date of recovery or even thereafter till this date, there is no legal impediment for the first respondent to collect such due. When that being the factual position, I do not understand as to how the petitioners are justified in seeking for refund unless they satisfy that their claim would come under the purview of either section 237 or section 240. I have already pointed out that both the provisions, in this case, would not come into operation as of now, as such situation has not arisen so far. Therefore, the refund claim made by the petitioners cannot be sustained. Of course, in the case of the petitioner in W.P.No.7937 of 2017, it is contended that the amount paid before the First Appellate Authority has not been given credit to. But at the same time, it is seen that in respect of the subsequent Assessment Year viz., 2014-15, the said assessee has not even paid the 15% of the tax demand before the First Appellate Authority, while preferring such appeal. The said claim of the revenue is not disputed by the petitioner. However, their contention is that the first respondent is not entitled to club that amount as well to

justify the recovery.

39.True, the amount referred to in 226(3) notice, in the case of the petitioner in W.P.No.7937 of 2017 matches with the total demand in respect of the Assessment Years 2009-10, 2010-11, 2013-14. It is also true that the said assessee has made some part payment, while preferring the appeal before the First Appellate Authority. But the undisputed fact is that the said assessee has not paid any amount, while preferring the other appeal in respect of the Assessment Year 2014-15. As per the claim of the first respondent, as set out in the counter affidavit, the demand in respect of the Assessment Year 2014-15 is Rs.21,73,55,160/- and such demand is challenged before the Appellate Authority, without even making any part payment of tax. Therefore, I do not find any justification on the part of the petitioner in W.P.No.7937 of 2017, in contending that the amount recovered is over and above the amount liable to be paid, more particularly, the impugned proceedings does not specifically refer to any Assessment Years.

40.Learned counsel for the petitioner in W.P.No.7990 of 2017

relied on unreported decision of this court made in W.P.No.15373 of 2014 dated 13.06.2014. Perusal of the said decision would show that a notice of demand issued even before the expiry of statutory period for preferring revision, was set aside. But in this case, the recovery is already made. I have also pointed out that there is no statutory bar for the first respondent to effect such recovery immediately after the dismissal of the appeal. Therefore, I do not think that the above decision, that too made in respect of the notice issued under TN VAT Act, 2006, is helping the petitioners in any manner.

41.The next decision relied on by the learned counsel for the petitioners is the Division Bench decision of the Bombay High Court reported in **2007(295) ITR 42, Mahindra & Mahindra Ltd. Vs Assessing Officer**. It is true that in the said case, the Division Bench of the Bombay High Court pointed out that the action of the Assessing Officer in sending the garnishee notice and recovering the money from the garnishee bank shocked the Court's judicial conscience. A careful perusal of the facts and circumstances of the said case would show that such observation was made by the Court, since the Income Tax

Official

has proceeded to issue the garnishee notice and recovered the money from the garnishee, without even waiting for the assessee to reply to the show cause notice issued to them. Therefore, the Division Bench pointed out that the action of the department is *ab initio void*. But the facts and circumstances of the present case are totally different. Here, the assessment is already over. Notice of demand was also given already. Appeal filed by the petitioners also got dismissed. Therefore, I find the above decision of the Bombay High Court is not applicable to the present facts and circumstances of the case.

42.The next case relied on is reported in **(2014) 43 Taxmann.com 146(Bombay), Director of Income Tax (Exemption), Mumbai vs. Income Tax Appellate Tribunal**. In that case, the Bombay High Court has pointed out that the Tribunal is empowered to grant stay against any demand in terms of the proviso to Section 254(2A) and consequently the order passed by the Tribunal restoring the status quo ante by ordering the refund of the amount recovered need not be interfered with under Article 226 of the Constitution of India.

43. Certainly, therefore, the petitioners are not remediless. They have already filed the appeal before the Income Tax Appellate Tribunal. They are also entitled to seek for interim protection as proviso to Section 254(2A) of the said Act deals with such relief. Certainly, the Appellate Tribunal will have to consider the merits of the application and pass orders on the same. If the Appellate Tribunal comes to the conclusion, while considering the interim petitions, that the petitioners are entitled to some interim relief, it is open to the Appellate Tribunal to pass such interim orders on such applications, based upon the consideration of the facts and circumstances of the case and the merits of the order of assessment, of course, with a prima facie view. Therefore, these recoveries made by the first respondent is always subject to the result of the order to be passed by the Appellate Tribunal in such applications or the final order to be passed in the main appeal. Needless to say that depending upon the orders to be passed so, the petitioners are entitled to work out their remedies.

K.RAVICHANDRABAABU,J.
VRI

44. Considering all these facts and circumstances, both the writ

petitions are dismissed, without expressing any view on the merits of the assessment and the order passed by the Appellate Authority, however, by granting liberty to the petitioners to work out their remedy

before the Income Tax Appellate Tribunal, as discussed supra. No costs. The connected miscellaneous petitions are closed.

26.04.2017

Speaking/Non Speaking

Index:Yes/No

vri

To

- 1.The Assistant Commissioner of Income Tax,
Non Corporate Circle 11,
Chennai 600 006.
- 2.The Manager,
The Tamilnadu State Apex Cooperative Bank Ltd.,
233 N.S.C.Bose Road,
Chennai 600 001.

PRE DELIVERY COMMON ORDER IN
W.P.Nos.7937 AND 7990 OF 2017

PRE DELIVERY COMMON ORDER IN
W.P.NOS7937 AND 7990 OF 2017

TO
THE HON'BLE MR.JUSTICE K.RAVICHANDRABAABU

Most respectfully submitted
by

(V.RAJESWARI)
P.S. TO HON'BLE JUDGES