

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (T) No.66 of 2018

Raipur Waste Management Pvt. Ltd. A Company Registered Under Companies Act, 1956 having its Registered Office At 60, Akshaya Complex, First Floor, Commercial Area, Nehru Nagar East, Bhilai-490020, Chhattisgarh, District Durg (CG)

---- Petitioner

Versus

1. Union of India, Ministry of Finance, Department of Revenue, New Delhi, Through its Secretary
2. Central Board of Direct Taxes, Ministry of Finance, Department of Revenue, New Delhi
3. Assistant Commissioner of Income Tax-1(1), Bhilai, 32/32, Bungalows, Admi Nagar, Hudco, Bhilai, Chhattisgarh
4. Commissioner of Income Tax-2, C R Building, Aaykar Bhawan, Raipur, Chhattisgarh
5. Principal Commissioner of Income Tax-2, C R Building, Aaykar Bhawan, Raipur, Chhattisgarh

---- Respondents

For Petitioner:	Mr. Ajay Kumar, Mr.Sanjeev Kumar Sahu and Mr.Prakash Sinha, Advocate
For Respondents:	Mrs. Naushina Afrin Ali, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

18/04/2018

1. This writ petition is directed against the order dated 6-6-2017 passed by the Assistant Commissioner of Income Tax rejecting the application for stay of disputed demand in an appeal preferred by the petitioner/assessee under Section 246 of the Income Tax Act, 1961.
2. Learned counsel for the petitioner would submit that stay application of the disputed demand has been rejected by the Assessing Officer on the ground that 15% of pre-deposit of the

disputed demand has not been made out, which runs contrary to the decision rendered by this Court in WPT No.59 of 2018 (M/s Aarti Sponge & Power Ltd. v. The Assistant Commissioner of Income Tax-2(1) and others), decided on 10-4-2018.

3. On the other hand, learned counsel for the respondents would submit that now demand has been enhanced to 20% vide office memorandum dated 31-7-2017 and even the petitioner has made the application before the Principal Commissioner of Income Tax, which has already been rejected on 2-3-2018.
4. In rejoinder submission, learned counsel for the petitioner would submit that in fact, revision/review was not maintainable before learned Principal Commissioner of Income Tax in view of the provisions contained in clause 4 (C) of the office memorandum dated 29-2-2016.
5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also gone through the records with utmost circumspection.
6. Clause 4(C) of the office memorandum dated 29-2-2016 provides for remedy of review as under: -

“4(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.”

7. The above-stated provision only provides the remedy of appeal against the order granting stay of demand subject to payment of 15% of the said demand, if the assessee is still aggrieved against that order. Present is a case in which application for stay of

disputed demand has been rejected. The memo dated 29-2-2006 for review would be applicable where the application for stay is granted and assess is still dissatisfied. Therefore, order dated 12-3-2018 passed by the Principal Commissioner of Income Tax would not come in the way of the petitioner to question the order dated 6-6-2017 by way of this writ petition.

8. The circular dated 29-2-2016 issued for considering the application for stay has been filed along with the writ petition and this circular has been modified by the circular dated 31-7-2017 and payment of 15% of the disputed demand has been enhanced to 20%. The office memorandum dated 29-2-2016 issued by the CBDT reads as follows: -

**“SECTION 220 OF THE INCOME-TAX ACT, 1961 –
COLLECTION AND RECOVERY OF TAX – WHEN
TAX PAYABLE AND WHEN ASSESSEE DEEMED IN
DEFAULT – AMENDMENT OF INSTRUCTION
NO.1914, DATED 21-3-1996 TO PROVIDE FOR
GUIDELINES FOR STAY OF DEMAND AT FIRST
APPEAL STAGE**

**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. XXX XXX XXX

3. XXX XXX XXX

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) 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.

xxx xxx xxx

xxx xxx xxx

xxx xxx xxx”

9. A careful perusal of the aforesaid office memorandum would show that guidelines have been issued to the assessing officers for considering the application for stay. Even the field officers may require the assessee to file a suitable security (bank guarantee, etc.) or pay a reasonable amount in lump sum or in installments and in para 4 for streamlining the process of grant of stay and to standardize the quantum of lump sum payment, and furthest

guidelines have been issued that in case where the outstanding demand is disputed before the Commissioner of Income Tax

(Appeals), the assessing officer shall grant stay of demand till the disposal of appeal on payment of 20% of the disputed demand, unless the case falls in the category discussed in para (B) of the said notification/office memorandum.

10. Thus, in the considered opinion of this Court, the assessing officer has to consider the case of the particular assessee on merits and if he comes to the conclusion that the assessee has a case for grant of stay, then subject to deposit of 20% of the disputed demand, the outstanding demand may be stayed and in certain cases where the assessee's case is covered by the decision of the Supreme Court and the deposit of 20% of the disputed demand may be reduced as per the discretion of the assessing officer, but the deposit of 20% of the disputed demand cannot be made condition precedent for hearing the application for stay. The condition of pre-deposit of 20% of the disputed demand is neither contemplated by the said memorandum nor there is legislative sanction mandating such deposit for hearing of an application for stay. Therefore, such a condition of pre-deposit cannot be imposed for hearing an application for stay of the disputed demand.

11. The High Court of Gujarat in the matter of **Jagdish Gandabhai Shah v. Principal Commissioner of Income Tax and others**¹ while dealing with the similar issue of pre-deposit of disputed

¹ [2017] 247 Taxman 414 (Guj)

demand qua the said memorandum while considering the application for stay by the said authority, held as under: -

“8.1 Therefore, the interpretation by the Assessing Officer that at the time of submitting stay application and/or before stay application is taken up for consideration on merits, the assessee is required to deposit 15% of the disputed demand as pre-deposit is absolutely based on misinterpretation and/or misreading of the modified Instructions dated 29th February 2016. What Clause-4 provides is that the Assessing Officer may/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 mentioned in para 4 [B] of the modified instructions dated 29th February 2016. Under the circumstances, the impugned decision of the respondent No. 2 in rejecting the stay application and consequently directing the petitioner to deposit 100% of the disputed demand on the ground that the petitioner has not deposited 15% of the disputed demand as a pre-deposit before his application for stay is considered on merits cannot be sustained and the same deserves to be quashed and set-aside. The matter is required to be remanded to the Assessing Officer to consider the stay application in accordance with law and on merits, in light of the modified instructions dated 29th February 2016 and observations made by us in the present order.

8.4 Under the circumstances, for the reasons stated above, the impugned decision of the respondent No.2-Assessing Officer rejecting the stay application cannot be sustained and the same deserves to be quashed and set-aside. So far as the decision of the respondent No. 1 is concerned, it appears that after the decision rendered by the respondent No. 2, the assessee filed stay application before the respondent No. 1 and the respondent No. 1 has passed the impugned order mainly considering the order of the Assessing Officer. Therefore, first, the Assessing Officer is required to take appropriate decision on the stay application, as per the modified instruction dated 29th February 2016 and unless the case falls within Clause 4 [B](a) & (b), he is required to pass appropriate order on the stay application, granting stay on payment of 15% of the disputed demand. In case, the Assessing Officer is of the opinion that the case falls within Clause 4 [B](a) or (b), in that case, he is required to follow the procedure as observed hereinabove; more particularly, Clause 4 [B] where the Assessing Officer is required to refer the matter to the administrative Principal CIT/CIT and thereafter, the Principal CIT/CIT to take appropriate decision.”

12. I am in respectful agreement with the view expressed by the Gujarat High Court in the above-stated judgment which squarely applies to the facts of the present case.

13. Now, the question is what should be the procedure followed by the assessing officer while deciding the application for stay.

14. In my opinion, the said question is no longer *res integra* and it has been well settled by a decision of the Bombay High Court in the matter of KEC International Ltd. v. B.R. Balakrishnan and others² in which S.H. Kapadia, J, as then His Lordship was speaking for the Bombay High Court, while considering the similar issue has laid down the following guidelines: -

“This is the consequence of an order being passed without giving any reasons. Hence, we intend to lay down certain parameters which are required to be followed by the authorities in cases where a stay application is made by an assessee pending appeal to the first appellate authority.

Parameters:

(a) While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.

(b) In cases where the assessed income under the impugned order far exceeds returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.

(c) In cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.

(d) The authority concerned will also examine whether

the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order.

(e) We clarify that if the authority concerned complies with the above parameters while passing orders on the stay application, then the authorities on the administrative side of the Department like respondent No.2 herein need not once again give reasoned order.”

15. The aforesaid guidelines have been followed later-on again by the Bombay High Court in the matter of UTI Mutual Fund v. Income Tax Officer 19(3)(2) and others³ in which Dr. D.Y. Chandrachud, J (as then His Lordship was) while following the decision rendered in KEC International Ltd. (supra) again held some more guidelines as under: -

“These are, we may say so with respect, sage observations which must be borne in mind by the assessing authorities. Consistent with the parameters which were laid down by the Division Bench in KEC International and the observations in the judgment in *Coca Cola*⁴, we direct that the following guidelines should be borne in mind for effecting recovery :

1. No recovery of tax should be made pending
 - (a) Expiry of the time limit for filing an appeal;
 - (b) Disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated.
2. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and bearing in mind the guidelines in KEC International;
3. If the Assessing Officer has taken a view contrary to

³ 2012 SCC OnLine Bom 390

⁴ Coca Cola India P. Ltd. v. Addl. CIT, (2006) 285 ITR 419

what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay;

4. When a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;

5. In exercising the powers of stay, the Income Tax Officer should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the AO has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order: the matter must be considered from all its facets, balancing the interest of the assessee with the protection of the Revenue.”

16. After having noticed the manner of disposing the appeal as highlighted by the Bombay High Court in the two judgments noticed herein-above and agreeing with the same, it would appear that the competent authority, in the instant case, while considering the application simply held that the appeal proceedings are separate and distinct from recovery proceedings and further proceeded to hold that 15% (now it is 20%) of the disputed demand has not been deposited in accordance with the guidelines dated 31-7-2017 and passed the order dated 6-6-2017. Thus, it is quite vivid that the application for stay of demand has not been considered in the manner it was required to be considered and dealt with. Deposit of 15% (now it is 20%) of the disputed demand has been made condition precedent for hearing the application for stay which is not contemplated either under the Act of 1961 or the CBDT guidelines dated 29-2-2016 modified by the office memorandum dated 31-7-

2017. It is only when the competent authority is of the opinion that the assessee has made out a case for grant of interim relief, stay can be granted subject to deposit of 20% of the disputed demand. Likewise, there is a further clause in the circular for reduction of 20% deposit if the petitioner makes out a case, it has also not been considered. In straightway, direction of deposit of 15% (now it is 20%) of the disputed demand has been made which is not the correct way of deciding the application for stay of the disputed demand.

17. As a fallout and consequence of the aforesaid discussion, the impugned order dated 6-6-2017 is set aside and the matter is remitted to the competent authority to consider afresh the matter in light of the guidelines as stated by the Bombay High Court and followed by this Court in the instant order and to pass a reasoned order within a period of two weeks from the date of receipt of a copy of this order after hearing the parties in light of the observations made for deciding the application for grant of stay of the disputed demand.

18. The writ petition is allowed to the extent sketched herein-above leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

B/-