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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.59 of 2018

(Order dated 7-3-2018 passed by the Assistant Commissioner of Income Tax, Circle 2(1), Raipur)

M/s Aarti Sponge & Power Ltd., Aarti House, Ashoka Ratna, Shanker Nagar, Raipur (C.G.) Through its Director Manish Kumar Mandal, S/o Shri Jagdish Prasad Mandal, Aged 45 years, R/o Golcha Residency, C/203, Shankar Nagar, Raipur (C.G.)

---- Petitioner

Versus

1. The Assistant Commissioner of Income Tax-2(1), Aaykar Bhawan, Raipur (C.G.)
2. The Commissioner of Income Tax (Appeals)-1, Aaykar Bhawan, Raipur (C.G.)
3. The Principal Commissioner of Income Tax-1, Aaykar Bhawan, Raipur (C.G.)

---- Respondents

AND

Writ Petition (T) No.60 of 2018

(Order dated 7-3-2018 passed by the Assistant Commissioner of Income Tax, Circle 2(1), Raipur)

M/s Aarti Sponge & Power Ltd., Aarti House, Ashoka Ratna, Shanker Nagar, Raipur (C.G.) Through its Director Manish Kumar Mandal, S/o Shri Jagdish Prasad Mandal, Aged 45 years, R/o Golcha Residency, C/203, Shankar Nagar, Raipur (C.G.)

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3. The Principal Commissioner of Income Tax-1, Aaykar Bhawan, Distt. Raipur (C.G.)

---- Respondents

For Petitioner:	Mr. Sumit Nema, Senior Advocate with Mr. Anand Dadariya, Advocate.
For Respondents:	Mrs. Naushina Afrin Ali, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

10/04/2018

1. Since common question of law and fact is involved in both the writ petitions, they are heard together and are being disposed of by this common order.
2. The petitioner was subjected to order of assessment by the assessing officer by order dated 30-12-2017. Feeling aggrieved and dissatisfied with the order of assessment, the petitioner preferred an appeal under Section 246A of the Income Tax Act, 1961 (for short, 'the Act of 1961') before the Commissioner of Income Tax (Appeals), Raipur. During the pendency of appeal, the petitioner also filed an application for stay of demand under Section 220(6) of the Act of 1961 followed by another application dated 28-2-2018 for staying the demand of ₹ 8,86,98,510/-. The applications filed by the petitioner were rejected by the learned assessing officer on 7-3-2018 stating that in accordance with the memorandum dated 31-7-2017 issued by the Central Board of Direct Taxes, deposit of 20% of the demand due is imperative. Questioning legality, validity and correctness of the orders dated 7-3-2018, these writ petitions have been preferred.
3. Mr. Sumit Nema, learned Senior Counsel appearing for the petitioner, would submit that the circular issued by the Central

Board of Direct Taxes (CBDT) under Section 119(1)(a) of the Act of 1961 has the force of law, but the assessing officer was required to consider the application for stay on merits and if he comes to the conclusion that the petitioner has prima facie case for grant of stay, then the question of deposit could have been considered, but the pre-deposit of 20% cannot be made condition precedent to consider the application for grant of interim relief. He would further submit that the application for stay of demand has not been considered on merits and the application has been disposed of stating that the 20% of the demand due be paid and proof of the same be produced within seven days from the date of receipt of notice, as such, the orders impugned are illegal and bad in law, therefore, same be set aside and the matters be remanded to the appellate authority to consider afresh and pass speaking order in accordance with law.

4. Mrs. Naushina Afrin Ali, learned counsel appearing for the respondents, would submit that the order passed by the assessing officer is challengeable before the Principal jurisdictional administrative member i.e. the Principal Commissioner of Income Tax for review of the decision of the assessing officer, therefore, the petitioner has alternative efficacious remedy against that rejection, as the review application has to be decided by the Principal Commissioner of Income Tax within a period of two weeks. Therefore, the writ petitions as framed and filed are not maintainable. In accordance with the circulars, the petitioner has to deposit 20% of the demand due as per the CBDT circular dated 29-2-2016 modified by another circular dated 31-7-2017, as such, the

impugned orders are supportable in law and the writ petitions deserve to be dismissed.

5. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also went through the record with utmost circumspection.
6. Section 119 of the Act of 1961 provides for instructions to subordinate authorities. Sub-section (1) of Section 119 of the Act of 1961 provides as under: -

“119. (1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board :

Provided that no such orders, instructions or directions shall be issued—

(a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner (Appeals) in the exercise of his appellate functions.”

7. The power of the CBDT to issue instructions came up for consideration before the Supreme Court in the matter of UCO Bank, Calcutta v. Commissioner of Income Tax, W.B.¹ in which the Supreme Court considering the object and nature of the CBDT circulars held that CBDT can issue circulars, inter alia, to tone down the rigour of law and ensure a fair enforcement of its provisions and such circulars are binding on the Income Tax Authorities and Revenue also and observed as under: -

1 (1999) 4 SCC 599

“9. ... Under sub-section (2) of [Section 119](#), without prejudice to the generality of the Board's power set out in sub-section (1), a specific power is given to the Board for the purpose of proper and efficient management of the work of assessment and collection of revenue to issue from time to time general or special orders in respect of any class of incomes or class of cases setting forth directions or instructions, not being prejudicial to assessees, as the guidelines, principles or procedures to be followed in the work relating to assessment. Such instructions may be by way of relaxation of any of the provisions of the sections specified there or otherwise. The Board thus has power, inter alia, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circulars in exercise of its statutory powers under [Section 119](#) of the Income Tax Act which are binding on the authorities in the administration of the Act. Under [Section 119\(2\)\(a\)](#), however, the circulars as contemplated therein cannot be adverse to the assessee. Thus, the authority which wields the power for its own advantage under the Act is given the right to forego the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manner as laid down in [Section 119](#). The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorised as belonging to a class, can thus be given the benefit of relaxation of law by issuing circulars binding on the taxing authorities.”

8. The principle of law laid down in UCO Bank (supra) has been followed with approval by the Supreme Court in the matter of Catholic Syrian Bank Limited v. Commissioner of Income Tax, Thrissur² and while dealing with the effect of circulars, the Supreme Court held as under: -

“23. Now, we shall proceed to examine the effect of the circulars which are in force and are issued by the Central Board of Direct Taxes (for short “the Board”) in exercise of the power vested in it under [Section 119](#) of the Act. Circulars can be issued by the Board to explain or tone down the rigours of law and to ensure fair enforcement of its provisions. These circulars have the force of law and

2 (2012) 3 SCC 784

are binding on the Income Tax Authorities, though they cannot be enforced adversely against the assessee. Normally, these circulars cannot be ignored.

24. A circular may not override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances. So long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act. (Refer to *UCO Bank v. CIT*, (1999) 4 SCC 599.)”

9. Thus, it is very well settled that the circulars issued by the CBDT have the force of law and are binding on the income tax authorities, but they cannot be enforced adversely against the assessee and normally, these circulars have not to be ignored.

10. 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.”

11. 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 where no order of stay has been granted in favour of the petitioner and there is no remedy of review against the order refusing stay of disputed demand. Therefore, the plea of the Revenue that alternative remedy is available sans merit and is accordingly overruled.

12. 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”

13. 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.
14. 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.

15. The High Court of Gujarat in the matter of **Jagdish Gandabhai Shah v. Principal Commissioner of Income Tax and others**³ while dealing with the similar issue of pre-deposit of disputed 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

3 [2017] 247 Taxman 414 (Guj)

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.”

16. 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.

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

18. 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 others⁴ in which S.H. Kapadia, J, as then His Lordship was speaking for the Bombay High Court, while considering the similar

4 2001 SCC OnLine Bom 1229

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.”

19. 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 others⁵ 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*⁶, 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 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.”

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

20. 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 20% of the disputed demand has not been deposited in accordance with the guidelines dated 31-7-2017 and passed the order dated 7-3-2018. 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 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 20% of the disputed demand has been made which is not the correct way of deciding the application for stay of the disputed demand.

21. As a fallout and consequence of the aforesaid discussion, the impugned orders dated 7-3-2018 in both the cases, are 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.

22. The writ petitions are allowed to the extent sketched herein-above leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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HIGH COURT OF CHHATTISGARH, BILASPUR

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M/s Aarti Sponge & Power Ltd.

Versus

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AND

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Head Note

The office memorandum issued by the Central Board of Direct Taxes dated 29-2-2016 as modified on 31-7-2017 has a force of law.

केन्द्रीय प्रत्यक्ष कर बोर्ड द्वारा जारी 29-2-2016 दिनांकित कार्यालय ज्ञापन 31-7-2017 को उपान्तरित होने पर विधि का बल रखता है।