NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPT NO.124 of 2018

Shree Parvati Scrap Processors Pvt. Ltd. Having its corporate office at 4/1 Priyadarshani Parisar (W), Bhilai, (CG)-490020 through its director Mr.Vijay Kumar Jaiswal aged about 61 years, S/o Late Charanjeet Jaiswal r/o 4/1 Priyadharshani Parisar (W), Bhilai (CG)-490020

----Petitioner

Versus

1. Income Tax Officer-1 (1), Bhilai, office of the Income Tax Officer-1 (1), Aayakar Bhawan, New Civil Centre, Bhilai 490006, Dist: Durg (CG)
2. Union of India through its Secretary Department of Revenue, Ministry of Finance, North Block New Delhi-110001

---- Respondents

For Petitioner : Mr.Siddharh Dubey, Advocate
For Respondents : Ms Naushina Afrin Ali, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

16/07/2018

1. Learned counsel for the petitioner would submit that the Assessing Officer has rejected the stay application filed by the petitioner pending appeal by order dated 3.4.2018 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 and others).

2. On the other hand, learned counsel for the respondents would support the impugned order.

3. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also gone through the records with utmost circumspection.

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

5. In the matter of **M/s Aarti Sponge & Power Ltd** (supra), this Court has held as under:-

> "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 others**[1] 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: -
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> > "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 assesee 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

[1] 2001 SCC Online Bom 1229

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 others**[2] 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[3], 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;

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[2] 2012 SCC Online Bom 390

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

> 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."

> 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."

6. Undisputedly, the direction issued by this Court while considering the stay application pending appeal has not been followed by

learned Assessing Officer, therefore, this Court has left with no other option to set aside the impugned order and direct the Assessing Officer to consider the application for stay afresh in accordance with the decision rendered by this Court in **M/s Aarti Sponge & Power Ltd.** (supra).

7. Accordingly, the impugned order dated 3.4.2018 (Annexure P/2) is set aside and the matter is remitted to the Assessing Officer to consider afresh in accordance with the decision rendered by this Court in **M/s Aarti Sponge & Power Ltd.** (supra) within a period of four seeks from the date of receipt of certified copy of this order and to pass a reasoned and speaking order after hearing the parties. A copy of this order be sent to the Chief Commissioner of Income Tax, Raipur for information and further needful action and to ensure that the order passed in **M/s Aarti Sponge & Power Ltd.** (supra) is to be complied with in its letter and spirit while considering the application for stay.

8. The writ petition is allowed to the extent indicated herein-above. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-