

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :16.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.7410 of 2018

and

W.P.M.P.No.9203 of 2018

Kalaigiar TV Private Limited
(Represented by its Director
Mr.P.Amirtham)
No.367/369, Anna Salai
Teynampet
Chennai - 600 018

....Petitioner

Vs.

1. The Assistant Commissioner of Income Tax
Non-Corporate Circle - 20(1)
M.G.Road, Nungambakkam
Chennai-34

2.The Commissioner of Income Tax-10
Aayakar Bhawan, Annexe VI Floor
No.121, M.G.Road, Nungambakkam
Chennai- 600 034

.... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus to call for the records of the respondent and quash the impugned order bearing C.No.10601(6)/2017-18/PCIT-10 dated 21.03.2018 issued by Respondent No.2 and direct the respondents to not to enforce the arrears of demand against the petitioner pending disposal of appeals before the Commissioner of Income Tax (Appeals).

For Petitioner : Mr.P.Wilson
Senior counsel
for Mr.Sandeep Bagmar

For Respondents : Mr.J.Narayanasamy
Standing Counsel

O R D E R

The petitioner/Assessee has filed this writ petition challenging an order passed by the second respondent dated 21.03.2018 on an application filed by the petitioner for stay of collection of taxes pursuant to the Assessment order for the Assessment years 2009-10 and 2010-11.

2. By the impugned order, the second respondent has directed the Assessee to pay 20% of the tax demanded on or before 26.03.2018 and if such condition is complied, the collection of remaining 80% of the tax will remain stayed, failing which the Assessing Officer may treat the assessee as an assessee-in-default and initiate recovery proceedings.

3. The learned senior counsel for the petitioner contended that the assessment order passed by the Assessing Officer dated 31.12.2017 for both the Assessment years, namely 2009-10 and 2010-11 are unduly high pitched and in such situation, the Central Board has clarified as early as in the year 1969 that the collection of disputed demands should be stayed till the appeals are heard and disposed of. In this regard, reliance was placed on Instruction No.96 dated 21.08.1969. It is further submitted that the show-cause notice dated 15.12.2017 as well as the Assessment Orders dated 31.12.2017 are mirror images of the Charge sheet laid by the Central Bureau of Investigation (CBI) before the Special Court and the persons cited as accused in the said case have been acquitted by the said Court, by judgment dated 21.12.2017. The Assessee had produced the copy of the judgment before Assessing Officer. Yet, the Assessing Officer has failed to take note of the same and has completed the assessment. As against the Assessment Orders, the petitioner has preferred appeals to the Commissioner of Income Tax (Appeals) on 23.02.2018 and the appeals are pending. A notice of demand dated 21.02.2018 was issued demanding a sum of Rs.12,66,66,300/- for the Assessment year 2009-10 and Rs.79,90,55,680/- for the Assessment year 2010-11. These amounts were directed to be paid on or before 07.02.2018, failing which coercive action will be taken against the Assessee for collection of the demands, as per the provisions of the Income Tax, 1961, without any further notice. On receipt of the demand, the petitioner filed stay petitions before the first respondent, their Assessing officer, vide petition dated 22.02.2018. The same was disposed of by the first respondent by order dated 23.02.2018 directing the petitioner to pay 20% of the disputed demand for both the Assessment years by referring to Board's Instruction No.1914 read with the Office Memorandum dated 29.02.2016 and 31.07.2017 of the CBDT. Immediately thereafter, the petitioner filed a stay petition before the second respondent on 27.02.2018, which has been disposed of by the impugned order.

4. The learned senior counsel was referring to the decisions of this Court in N.Jegatheesan Vs. Deputy Commissioner of Income-Tax reported in [2016] 388 ITR 410 and submitted that when assessments are unduly high pitched, stay has to be granted when appeals are filed before Commissioner of Income Tax (Appeals). Further it is submitted that the respondent, while disposing of the stay petition, did not take into consideration the effect of the decision of the Special Court and has mechanically gone by the instruction issued by the CBDT. Therefore, it is submitted that the appeal may be directed to be disposed of and in the meantime, the notice of demand may be directed to be kept in abeyance.

5. Mr.J.Narayanasamy, learned senior standing counsel for the revenue submitted that identical submissions, as made before this Court, were made by the petitioner before the Hon'ble First Bench in a writ petition, being W.P.No.13624 of 2018, in which the order passed by the Income Tax Appellate Tribunal (ITAT) dated 25.05.2018 was put to challenge. The Tribunal granted stay of recovery of tax payable subject to payment of installments of Rs.2.50 Crores per month, of which the first instalment was to be paid on or before 15.06.2018 and the subsequent installments on or before 15th of every subsequent month. It is submitted that the Hon'ble First Bench, by order dated 12.06.2018, declined to interfere with the order passed by ITAT and directed the Tribunal to dispose of the appeal within six months. Therefore, it is submitted that though the order pertains to the Assessment year 2011-12, the factual position, which was pleaded before this Court in this writ petition, is no different from W.P.No.13624 of 2018 and the Court may not interfere with the impugned order.

6. Further it is submitted the order passed by the second respondent is a reasoned order and the petitioner was directed to pay only 20% of the disputed tax and hence, the impugned order does not call for interference. Further it is submitted that Instruction No.96 dated 21.08.1969 has been superseded by Instruction No.1914 dated 22.12.1993 and therefore, 1969 instruction cannot be relied upon. Further by referring to the counter affidavit filed by the second respondent, it is submitted that the Assessing Officer, after examining various materials in his possession and after considering all the submissions of the assessee, came to the conclusion that a sum of Rs.25 Crores was unexplained for the assessment year 2009-10 and a sum of Rs.175 Crores was unexplained for the assessment year 2010-11. The Assessing officer was not satisfied with regard to the nature and source of Rs.200 Crores. It is further submitted that in any case, the matter is pending before CIT (A) and the CIT (A) will be passing orders on merits of the

additions made by the Assessing Officer and in these circumstances, the payment of 20% directed to be made is very reasonable. Further by referring to Counter affidavit, it is submitted that income tax proceedings are civil proceedings and the judgment of the CBI Special Court exonerating the accused will have no impact on the Income Tax proceedings and such decision cannot be applied to a tax assessment case. Further it is submitted that CBI Court adjudicated on the matter of illegal gratification under the laws relating to prevention of corruption, whereas the assessing officer made additions on the ground of whether the sums credited on the books of the assessee are genuine with regard to its nature and source thereof. Further by referring to the decision of the Hon'ble Supreme Court in the case of Assistant Collector of Central Excise Vs. Dunlop India Ltd., and others reported in 1985 AIR 330 (SC), it is submitted the Government cannot continue to run on mere Bank Guarantees and liquid cash is necessary for the running of a Government as indeed any other enterprises and therefore, the interest of Revenue will be protected only if the impugned order is upheld.

7. Heard Mr.P.Wilson, learned senior counsel appearing on behalf of Mr.Sandeep Bagwar, learned counsel on record for the petitioner and Mr.J.Narayanasamy, learned senior standing counsel for the respondents.

8. The second respondent, while passing the impugned order, held that the Assessment Orders cannot be stated to be high pitched. However, the second respondent has not given any finding or reasons to support such a stand as to why the assessment is not high pitched. With regard to the judgment of the Special Court, New Delhi, it is stated by the second respondent that the criminal proceedings are different from civil proceedings and Income Tax assessment proceedings are civil in nature and the rules of evidence are not strictly applicable to the proceedings as they apply in criminal proceedings. Further it is submitted that a criminal charge is required to be proved beyond reasonable doubt, whereas it is preponderance of probabilities in income tax proceedings. Further, merely because the charge sheet filed by the CBI or Enforcement Directorate in the trial Court did not result in the conviction of the accused, it cannot be argued that there is no case in the income-tax assessment proceedings. Further it is stated that the assessment is not merely based upon CBI charge sheet and it also takes into account such other materials as discussed in the assessment order.

9. As pointed out earlier, the second respondent has not given any reason as to why in his opinion the assessment is not high pitched. With regard to the other statement of law which

has been mentioned there, can be of no quarrel or no doubt that the said Income tax proceedings are civil in nature and strict rule of evidence are not applicable. However, the applicability of general preposition to the case on hand is required to be seen. The prima facie examination required is, as to whether there can be any impact on the income tax proceedings on account of the acquittal in the criminal proceedings.

10. This Court perused the show-cause notice dated 15.12.2017. In the show-cause notice, there is substantial reference to the averments set out in the charge sheet filed by the CBI. The petitioner had submitted their reply to the show-cause notice on 26.12.2017, after which the assessment has been completed under Section 143(3) r/w.254 of the Act. On a cursory perusal of the Assessment Order dated 31.12.2017, I find that substantial portion of the charge sheet filed by the CBI, which was relied on in the show-cause notice, has been referred to once again and a finding has been arrived at by the Assessing Officer. The correctness of the findings is to be tested by the CIT (Appeals) before whom the appeal petitions dated 07.02.2018 are pending. Therefore, the finding of the second respondent that the assessment is not solely based upon the CBI charge sheet appears to be prima facie incorrect because there is substantial reference to the proceedings which were initiated by the CBI. Undoubtedly, this issue has to be considered in the pending appeals before the CIT (A). Hence, it will be incorrect to render finding on that aspect and it is left to the decision of the CIT (A). However, when a stay petition is moved before the second respondent and the petitioner refers to the effect of the judgment of the Special Court, not only in the grounds of appeal as well as in the stay petition, the second respondent was required to examine the said contention to ascertain as to whether the petitioner has made out a prima facie case and whether the balance of convenience is in their favour and whether they will be put to irreparable hardship, if interim orders are not granted. The second respondent admits in the counter affidavit that the contentions raised by the assessee will be examined by CIT (A). However, in the interregnum, as there is a threat of recovery, the second respondent ought to have considered the prima facie effect of the judgment of the Special Court on the prayer for stay of the demand. This is more so because the Assessee's consistent case is that the income tax proceedings is a mirror image of the proceedings initiated by the CBI.

11. So far as the contention of the Revenue that Instruction No.96 dated 21.08.1969 has superseded Instruction No.1914 is concerned, the stand is incorrect in the light of the decision of this Court in the case of N.Jegatheesan Vs. Deputy Commissioner of Income-Tax, cited supra. Identical plea was

raised by the Revenue in the said case and the Court after taking into consideration several decisions, held that Instruction No.96 dated 21.08.1969 issued with the consent of the Informal Consultative Committee continues to hold the field. The relevant portion of the order reads as follows:

16.It is the contention of the learned counsel for the petitioner that pending the appeal, the petitioner is entitled for stay of recovery of the demand amount, as his case falls within the ambit of Sections 220(3) & 220(6) of the IT Act. In view of the pendency of the appeal, the respondent ought to have passed an order treating him as not being in default in respect of the amount in dispute in the appeal, by placing reliance on CBDT Instruction No.95 dated 21.08.1969. But, according to the respondent, the said CBDT Instruction No.95 was superseded and as such, the respondent has exercised his power under subsequent Instruction No.1914 dated 02.12.1993. But, the learned counsel for the petitioner, by relying upon number of judgments submitted that CBDT Instruction No.95 is still in force.

17.Therefore, it would be appropriate to refer some of the decisions in this regard. In the case of Taneja Developers & Infrastructure Ltd., Vs. Assistant Commissioner of Income Tax, Delhi & Ors in W.P.(C). No.6956 of 2009, dated 24.02.2009, the Division Bench of Delhi High Court has held as follows:-

'8.Relying upon the said Instruction No.1914 of 1993, Mr.Jolly submitted that all previous instructions stood superseded which included the supersession of said Instruction No.96. He further submitted that paragraph No.2(C), which deals with guidelines for staying demand, specifically requires that a demand be stayed only if there are valid reasons for doing so and that a mere filing of an appeal against the assessment order will not be a sufficient reason for staying recovery of a demand.

9.Having considered the arguments advanced by the learned counsel for the parties, we are of the view that although Instruction No.1914 of 1993 specifically states that it is in supersession of all earlier instructions, the position obtaining after the decision of this Court in Valvoline Cummins Ltd., (Supra) is not altered at all. This is so because paragraph No.2(A) which speaks of responsibility specifically indicates that it shall be the responsibility of the Assessing Officer and the TRO to collect every demand that has been raised except the following', which

includes ?(d) demand stayed in accordance with the paras B and C below?. Para B relates to stay petitions. As extracted above, Sub-clause (iii) of para B clearly indicates that a higher/superior authority could interfere with the decision of the Assessing Officer/TRO only in exceptional circumstances. The exceptional circumstances have been indicated as - ?where the assessment order appears to be unreasonably high pitched or where genuine hardship is likely to be caused to the assessee.?. The very question as to what would constitute the assessment order as being reasonably high pitched in consideration under the said Instruction No.96 and, there, it has been noted by way of illustration that assessment at twice the amount of the returned income would amount to being substantially higher or high pitched. In the case before this Court in Valvoline Cummins Ltd., (supra) that assessee's income was about eight (8) times the returned income. This Court was of the view that was high pitched. In the present case, the assessed income is approximately 74 times the returned income and obviously, this would fall within the expression ?unreasonably high pitched?. (Emphasis supplied).'

A reading of the above dictum would show that if assessment order is unreasonably high pitched or genuine hardship is likely to be caused to the assessee, then the assessee is entitled to be treated as not being in default in respect of the amount in dispute in the appeal.

In the case reported in (1997) 223 ITR 192 (Raj) [Maharana Shri Bhagwat Singhji of Mewar Vs. Income-Tax Appellate Tribunal, Jaipur Bench, and others), the Rajasthan High Court has held as follows:-

"accordingly, on the facts, that the factors which are relevant for deciding the stay applications primarily are a prima facie case, balance of convenience, financial status of the petitioner, hardship and also the interest Revenue. In the instant case there was an order of the court restraining the accountable person from alienating/disposing of the properties of the estate. The value of the estate which was determined by the authority was much more than twice the returned value. Hence, the Instruction No.96 of August 21, 1969, was

applicable. It was also established that the accountable person had no cash belonging to the estate. A perusal of the order of the Tribunal indicated that the contention raised by the petitioner before the Tribunal for staying the total recovery was not contraverted and no relevant and convincing material regarding the financial status of the petitioner was placed before the Tribunal to establish that the petitioner was in a position to deposit 25 percent of the disputed duty. The recovery of the entire duty had to be stayed till the disposed of the appeal.'

In the case in *Kec International Ltd Vs. B.R.Balakrishnan and ors*, reported in [2001] 251 ITR 158/119 Taxman 974, the Bombay High Court has held as follows:-

'...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.

(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.?

In the judgment reported in 346 ITR 375 (M/s.Maheswari Agro Industries Vs. Union of India and others), it has been held by the Rajasthan High Court as follows:-

"52..... The mandate of Parliament in sub-section (6) seems to be that the lower Assessing Officer should abide by and being bound by the decision of the appellate authority, should normally wait for the fate of such appeal filed by the assessee. Therefore, his discretion of not treating the assessee in default, conferred under sub-section (6) should ordinarily be exercised in favour of assessee, unless the overriding and overwhelming reasons are there to reject the application of the assessee under Section 220(6) of the Act. The application under Section 220(6) of the Act cannot normally be rejected merely describing it to be against the interest of Revenue if recovery is not made, if tax demanded is twice or more of the declared tax liability. The very purpose of filing of appeal, which provides an effective remedy to the assessee is likely to be frustrated, if such a discretion was always to be exercised in favour of revenue rather than assessee.

53.The tendency of making high pitched assessments by the Assessing Officers is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice & sometimes may even result into insolvency or closure of the business if such power was to be exercised only in a pro revenue manner. It may be like execution of death sentence, whereas the accused may get even acquittal from higher appellate forums or courts. Therefore, this Court is of the opinion that such powers under sub-section (6) of Section 220 of the Act also have to be exercised in accordance with the letter and spirit of Instruction No.95 dated 21.08.1969, which even now holds the field and its spirit survives in all subsequent CBDT Circulars quoted above, and undoubtedly the same is binding on all the assessing authorities created under the Act."

From the reading of the above cited judgments, it is clear that it is incorrect to state that DBDT Instruction No.1914, dated 02.12.1993 supersedes all previous instructions. Although instruction No.1914 specifically states that it is in supersession of earlier instructions, the position obtaining after the

decision of the case in Volvoline Cummins Limited Vs. DCIT (2008) 307 ITR 103 (Del) is not altered at all. This is so, the CBDT Instruction No.95, dated 21.08.1969 was issued with the consent of the informal consultative committee held on 13th May, 1969 formed under the business rules of the Parliament, which even now holds the field.

18. Hence, I am of the opinion that the tendency of making high pitched assessments by the Assessing Officer is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice & sometimes may even result into insolvency or closure of the business if such power was to be exercised only in a pro-revenue manner. Hence, I am of the opinion that the powers under Sections 220(3) & 220(6) of IT Act have to be exercised in accordance with the letter and spirit of CBDT Instruction No.95 dated 21.08.1969, which is binding on all the assessing authorities created under the Act.

19. Therefore, the impugned order passed by the respondent without considering CBDT Instruction No.95, dated 21.08.1969 is against the principles laid down in the judgments stated supra."

12. In the light of the above decision, which has been rendered following the decisions of the other High Courts, it has to be held that Instruction No.1914 does not specifically supersede Instruction No.96 and it binds the Assessing Officers.

13. So far as the decision of the Hon'ble Division Bench is concerned, firstly the same relates to the Assessment year 2011-12 and it is admitted by the Revenue that the issue arising for the Assessment years 2009-10 and 2010-11 is not the issue which has arisen for the Assessment year 2011-12. Apart from that the order impugned before the Hon'ble Division Bench was an order passed by the Tribunal on a stay application and the writ petition was disposed of with a direction to the Tribunal to expedite the disposal of the appeal. Therefore, in my considered view, the decision of the Hon'ble First bench does not render much support to the case of the Revenue.

14. In the light of the above discussion, this Court is of the view that the prima facie effect of the judgment of the Special Court was required to be considered by the second respondent while examining the prayer for stay. Further, the impugned order states that no such situation has been contemplated in the CBI Instruction No.1914. In my considered view the instruction issued by the Board are illustrative and not exhaustive. The instruction itself was issued to bring about

uniformity in the manner in which the stay petitions have to be dealt with by the Assessing Officers. Even in the said instruction, discretion has been given to the Assessing Officer to impose conditions which are just and proper. Therefore, to state that CBDT instruction does not cover facts and circumstances like the assessee's case is incorrect way of interpreting the issue which has arisen for consideration before the second respondent. In the light of the above discussion, this Court is of the view that the impugned order calls for interference. However, since the appeals are pending before CIT (A) and as admitted by the second respondent that the case as canvassed by the petitioner has to be dealt with by the CIT (A) on the merits of the additions made by the Assessing Officer, with a view to avoid double exercise, I propose to pass the following order, while setting aside the impugned order.

In the result, the writ petition is allowed and the impugned order is set aside with a direction to the petitioner to file a stay petition before Commissioner of Income Tax (Appeals) within a period of one week from the date of receipt of a copy of this order. On receipt of the stay petition, the Commissioner of Income Tax (Appeals) is directed to afford an opportunity of personal hearing to the authorized representative of the Assessee and pass orders on the stay petition on merits and in accordance with law. It is made clear that this Court has not rendered any finding on merits of the assessment. It is well open to the CIT (Appeals) to take note of all the aspects of the matter during the course of hearing.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

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- 2.The Commissioner of Income Tax-10
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+lcc to Mr.Sandeep Bagmar, Advocate, S.R.No.46424

W.P.No.7410 of 2018 and
W.M.P.No.9203 of 2018

VGII(CO)

GSP(30/07/2018)