

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.11.2018

CORAM

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.NOS.4155 AND 4156 OF 2004

M/s.TCV Engineering Ltd.,
25, Parameswari Nagar, 1st Street
Adyar, Chennai 600 020
Rep.by its Director,
Mr.C.Mohan

...Petitioner in both W.Ps.

Vs.

1. Assistant Commissioner of Income Tax,
Central Circle II (2),
108, Nungambakkam High Road,
Madras 600 034.
2. Deputy Commissioner of Income Tax,
Central Circle II (2),
108, Nungambakkam High Road,
Madras 600 034.
3. Commissioner of Income Tax
Central Chennai II,
108, Nungambakkam High Road,
Madras 600 034.

...Respondents in both W.Ps

Prayer:

Writ Petitions filed under Article 226 of Constitution of India, praying to call for the records in C.No.1747/6/2002-03/C.II dated 12.08.2003 for the Assessment Years 1996-97 & 1997-98 respectively on the file of the 3rd respondent and issue a Writ of Certiorari or other appropriate writ, direction or order quashing the same.

For Petitioner : Mr.M.P.Senthil Kumar

For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel

COMMON ORDER

These writ petitions have been filed seeking to issue a writ of certiorari to call for the records in C.No.1747/6/2002-03/C.II dated 12.08.2003 for the Assessment Years 1996-97 & 1997-98 respectively on the file of the 3rd respondent and quash the same.

2. The necessary facts which are required to be noticed for the disposal of these petitions are as follows:

The petitioner/assessee, in respect of the tax due for the Assessment Year 1996-97 and 1997-98, had applied for the waiver under Section 220(2A) of the Income Tax Act, 1961, [hereinafter referred to as 'Act']. For the Assessment Year 1996-97, the demand was Rs.10,34,719/- and for the Assessment Year 1997-98, the demand was Rs.3,79,120/- towards the interest payable under Sections 234-A, 234-B and 234-C.

2.2. The said common application made by the petitioner seeking such waiver had been considered and rejected by the respondent/Revenue, through the impugned order dated 12.08.2003. Challenging the said rejection order of the waiver application of the petitioner/assessee, these two writ petitions were filed for the aforesaid relief for the Assessment Years 1996-97 and 1997-98 respectively.

3. Heard Mr.M.P.Senthil Kumar, the learned counsel appearing for the assessee, who would submit that, the assessee had been regularly paying the taxes by way of advance tax and TDS and the demand made by the Revenue for the two Assessment Years is due under Sections 234-A, 234-B, 234-C and under Section 143(1)(a) adjustment only. The adjustment made under Section 143(1)(a) has already been subject to 20% additional tax. Therefore, the tax due portion was very low, hence, levying further interest under Section 220 was only an interest on interest and also as an additional due. Therefore, on these reasons and for further reasons of genuine hardship that the assessee faced in making the payment of the interest due as demanded by the Revenue, such waiver application was made by the assessee by invoking Section 226 (2A) of the Act.

4. In this context, the learned counsel appearing for the assessee would submit that, when the genuine hardship had been projected before the respondent/Revenue, through the said application made in this regard, the said hardship was not considered by the respondent/Revenue in proper perspective.

5. He would further submit that, the three conditions referred to under Section 220(2A) were satisfied by the assessee

and inspite of the fact that, all the three conditions had been satisfied, the respondent had rejected the waiver request without giving any acceptable reason for making such rejection.

6. The learned counsel appearing for the assessee would further submit that, since the order to be passed under 220 (2A) is a quasi judicial order, the respondent, while making the order rejecting the request of the assessee, should have applied his mind judicially and acceptable reasons should have been given as to how and why the assessee is not entitled to seek for the waiver.

7. The learned counsel for the assessee would further submit that, knowing well that the assessee did not have any source like liquid cash, deposits, shares or debentures, etc., and the business of the assess also had been completely shattered at the relevant point of time, the respondent/Revenue, had not considered those circumstances faced by the assessee as a genuine hardship.

8. The learned counsel would further add that, the respondent/Revenue, even though has found that the assessee was having only the building as well as the machineries, which, according to the balance sheet, was only worth about Rs.18 lakhs and Rs.45 lakhs respectively, and no other immovable assets were found for the purpose of exploiting the same to pay the dues as demanded by the Revenue, has not considered it as a genuine hardship faced by the assessee.

9.The learned counsel for the assessee would further submit that, though Section 220(2A) of the Act, does not expressly provide an opportunity of being heard be given to the assessee, before taking a decision on the application for waiver, in view of the development of law in this regard, by number of decisions made by the courts, such an opportunity ought to have been given to the assessee. However, in the case in hand, no such opportunity, of being heard was given to the assessee, therefore, on that reason also, the order impugned is vitiated.

10. By making these submissions and in support of his contentions, the learned counsel for the petitioner/assessee has relied upon the following decisions:

(i) B.M. Malani vs. Commissioner of Income tax and another, Supreme Court of India Civil Appeal No.5950 of 2008, equivalent (2008) 219 CTR 0313 and (2008) 306 ITR 0196.

(ii) Mani vs. Commissioner of Income tax in WP No. 6327 of 2006 of High Court of Madras Madurai Bench equivalent to (2010) 231 CTR 0453, (2010) 320 ITR 0472.

(iii) Poompuhar Shipping Corporation Ltd., represented by its Chief Managing Director vs. Assistant commissioner of Income Tax Madras and another in W.P.No.5068 to 5070 of 2004 dated 12.10.2017.

11. By relying upon these decisions, Mr.M.P.Senthil Kumar, learned counsel appearing for the assessee would contend that, the situation exactly faced by the assessee during the relevant point of time, while he was making the request for waiver under Section 220(2-A) of the Act was a genuine hardship faced by the assessee and therefore, if the principles enunciated in the aforementioned cases were applied on the facts of the petitioner/ assessee's case, certainly, the decision taken now by the Revenue as reflected in the impugned order, could not have been taken. Therefore, the learned counsel would submit that, the impugned order is liable to be interfered with for the above said reasons.

12. Per contra, Mr.A.P.Srinivas, the learned standing counsel appearing for the respondent/Revenue, would submit that, the assessee had not even paid section 140-A tax for both the assessment years, for which the waiver was sought for. Moreover, the demand made was the interest payable by the assessee under Section 234A, B and C and therefore, it cannot be construed as interest on interest, as the interest component under Section 234-A,B and C shall only be construed as tax component. Therefore, the said reasons cited in the application submitted by the assessee cannot be accepted.

13. Learned Standing counsel would further submit that, in the application dated 31.01.2003, the assessee has mentioned that the assessee company had been incurring loss for the past 4 years, therefore, they were undergoing financial crisis and the assessee could not get any funds due to lack of business even to meet the day to day expenses, hence the assessee was to be considered as if it was facing genuine hardship in making the payment of interest as demanded. Except this reasoning, nothing has been stated by the assessee in their application seeking waiver.

14. In this context, the learned standing counsel would further submit that, no doubt, the power to be exercised by the Revenue under Section 220(2A) of the Act is a discretionary power. While exercising such discretionary power, the Revenue

has to give reasons to meet the request made by the assessee for waiver and in doing that exercise, for disposal of the application under 220(2A), the officer concerned of the Revenue must act judicially, as an authority, to be considered in that context, as a quasi judicial authority. In the case in hand, the respondent has acted upon judiciously as a quasi judicial authority and the reasons have been given specifically as to why the request of the petitioner for waiver was rejected.

15. In this regard, the learned standing counsel would point out that, the respondent has stated the reason that the assessee failed to make out the case that, failing in payment of amount was due to the circumstances beyond the control of the assessee. This conclusion was arrived at by the respondent only after going through the records of the case, as the assessee had not established the said factual situation that, he had been genuinely facing the hardship and the reasons for non payment was beyond the control of the assessee, cogently and clearly with reference to their book of accounts and the cash availability, etc.

16. The respondent in the impugned order of rejection, has also taken into account the balance sheet of the assessee, which was already available with the Revenue, based on which, the respondent has come to a right conclusion that the assessee was having immovable property of building and machineries, which are several times worth than the actual due payable by the assessee.

17. He would further submit that, therefore only in that circumstances, the financial hardship projected by the assessee through its application, since was not substantiated by any other evidences to come to a conclusion that, really the assessee had been facing genuine hardship and the non payment of the due was because of the reason, which was beyond the control of the assessee, the Revenue has come to a right conclusion that the assessee was not entitled to seek the waiver within the meaning of Section 220(2A) of the Act.

18. In support of his contentions, the learned standing counsel has relied upon the following decisions.

1. 2006(204) E.L.T. 513 (S.C) (Benara Valves Ltd., Vs. Commissioner of Central Excise.
2. (2013) 30 taxman.com 376 (Kerala) (K.C.Mohanan Vs. Chief Commissioner of Income Tax).
3. (2016) 76 taxmann.com 333 (Karnataka) (Mookambika Associates Vs. Assistant Commissioner of Income

Tax, Central Circle 2 (1), Bengaluru.

4. Division Bench Judgment of this Court in W.A.Nos. 2020 to 2024 of 2010 (Chief Commissioner of Income Tax and another Vs. M/s. Rajanikant and Sons).

By relying upon the decisions referred to above, the learned standing counsel would contend that, the genuine hardship theory has already been considered in number of cases and also the demand of personal hearing before making a decision under Section 220(2A) of the Act had already been decided. If the principles enunciated in the aforesaid decisions are applied to the facts of the present case, certainly, the order, which is impugned herein, can be construed as an order of a quasi judicial authority passed after judicious consideration made in this regard based on the available materials. Therefore, such a discretionary order, without any plausible reason, cannot be interfered with, as no acceptable reasons have been projected by the assessee's side to assail the impugned order. Hence, the learned standing counsel would submit that, the impugned order rejecting the claim of the assessee for waiver is fully justifiable, hence it requires no interference.

19. I have considered the said submissions made by the learned counsel for both sides and also perused the materials placed before this court.

20. The issue raised herein is pertaining to the two Assessment Years i.e., 1996-97 and 1997-98. Insofar as the Assessment Year 1996-97, the interest under Section 220 of the Act to the extent of Rs.10,34,719/- and for the Assessment Year 1997-98, a sum of Rs.3,79,120/- had been levied and demanded. The said demand was made as there had been a non payment of interest under Section 234-A,B,C.

21. When such a demand was made, the assessee had invoked Section 220(2A) and made his application on 31.01.2003. Before advertng to the merits of the case as claimed by both the sides, for easy reference, the relevant provision of the Act i.e. Section 220(2A) is extracted hereunder:

"(2A) Notwithstanding anything contained in sub-section (2), The Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may reduce or waive the amount of interest paid or payable by an assessee under the said Sub-section if he is satisfied that-

- (i) payment of such amount has caused or would cause genuine hardship to the assessee;
- (ii) default in the payment of the amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and
- (iii) the assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

Provided that the order accepting or rejecting the application of the assessee, either in full or in part, shall be passed within a period of twelve months from the end of the month in which the application is received.

Provided further that no order rejecting the application, either in full or in part, shall be passed unless the assessee has been given an opportunity of being heard.

Provided also that where any application is pending as on the 1st day of June, 2016, the order shall be passed on or before the 31st day of May, 2017".

22. On going through the aforesaid provision i.e., sub section 2A of Section 220, it suggests that, the principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner is vested with the power to reduce or waive the amount of interest paid or payable by the assessee under Sub-section (2), provided, for seeking such waiver, the assessee must satisfy three conditions. In short, the first condition is that, the assessee must have genuine hardship, the second condition would be that the non payment was due to the circumstances beyond the control of the assessee and the third and final condition is that the Revenue must have the satisfaction that the assessee has cooperated in an enquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

23. Therefore, when the officer concerned, who has been vested with the power under Sub section 2A as referred to above, has to consider the waiver application by satisfying that the three conditions imposed in the sub section are satisfied by the assessee. Here, on a perusal of the impugned order, it is found

that, only for non satisfaction of condition No. 1 and 2, the waiver application has been rejected. The Revenue/respondent did not say anything about the alleged non satisfaction of the third condition, namely, the cooperation of the assessee with the Revenue. Therefore, we can take it that, the third condition has already been fulfilled by the assessee in this case.

24. In respect of the other conditions, i.e., conditions No.1 and 2, it mainly require that the difficulty faced by the assessee for non paying the demand of interest was due to genuine reason and also due to the reason which are beyond the control of the assessee. When this aspect has to be ascertained, the fact situation projected by the assessee, should have been carefully examined. Here, in the case in hand, as has been pointed out by the standing counsel for Revenue, the respondent has satisfied that the assessee has not produced or has not satisfied through records cogently and clearly with reference to the book of accounts and cash availability that the assessee has faced genuine hardship and the reason for non payment was beyond the control of the assessee.

25. In the impugned order, it has also been specifically mentioned as the reason for rejection of the waiver by the respondent that, based on the balance sheet of the assessee, which was available with the Revenue, it was found that, the assessee was having immovable property of building as well as machineries worth about Rs.18 lakhs and 45 lakhs respectively. These are all the main reasons given by the Revenue in the impugned order and by citing these reasons, the respondent has come to the conclusion that the condition Nos.1 and 2 had not been satisfied by the assessee and therefore he was not entitled to seek for waiver under Section 220(2A).

26. In this context, as projected by the learned counsel appearing for both sides, the decisions cited by them, regarding the aspect of genuine hardship and also regarding the aspect of the manner under which the Revenue has to consider the waiver application and the order to be passed in the waiver application to contain all the reasons, have to be ascertained. The learned counsel for the assessee as well as the Revenue relied upon B.M. Malani case cited supra, where, the Hon'ble Supreme Court has given a detailed findings about the three conditions imposed under 220(2A) and also the term "genuine hardship". The following findings given by their Lordships can be usefully referred to herein:

5. Section 220(2A) of the Act contains a non-obstante clause. It confers a jurisdiction upon the Chief Commissioner or Commissioner to

reduce or waive the amount of interest paid or payable by an assessee thereunder, if he is satisfied that:

(i) Payment of such amount has caused or would cause genuine hardship to the assessee;

(ii) Default in the payment of amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and

(iii) Assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

6. The submission of Mr. Verma is that non encashment of demand draft worth Rs. 10 lakhs as also non-selling of the shares and securities as prayed for by the appellant caused genuine hardship to the assessee, in support whereof reliance has been placed on the New Collins Concise English Dictionary, Words and Phrases Permanent Edition Vol. 18 and Black's Law Dictionary.

It was furthermore submitted that had the shares and securities been sold when the request therefor was made, which was worth Rs. 30 lakhs at the relevant time, the tax burden of the appellant would have been reduced; particularly when after adjusting the amount of Rs.117.04 lakhs deposited by the appellant, only a sum of Rs. 40.73 lakhs remained due.

7. Ms. Rajni Ohri Lal, learned counsel appearing on behalf of the respondents, however, drew our attention to the nature of the business, the appellant had been carrying on and the magnitude thereof to contend that the appellant did not suffer any genuine hardship.

8. The term 'genuine' as per the New Collins Concise English Dictionary is defined as under:

'Genuine' means not fake or counterfeit, real, not pretending (not bogus or merely a ruse)"

For interpretation of the aforementioned provision, the principle of purposive construction should be resorted to. Levy of interest although is statutory in nature, inter alia for re-compensating the Revenue from loss suffered by non-deposit of tax by the assessee within the time specified therefor. The said principle should also be applied for the purpose of determining as to whether any hardship had been caused or not. A genuine hardship would, inter alia, mean a genuine difficulty. That per se would not lead to a conclusion that a person having large assets would never be in difficulty as he can sell those assets and pay the amount of interest levied.

The ingredients of genuine hardship must be determined keeping in view the dictionary meaning thereof and the legal conspectus attending thereto. For the said purpose, another well-known principle, namely, a person cannot take advantage of his own wrong, may also have to be borne in mind. The said principle, it is conceded, has not been applied by the courts below in this case, but we may take note of a few precedents operating in the field to highlight the aforementioned proposition of law. [See Priyanka Overseas Pvt. Ltd. & Anr. v. Union of India & ors. 1991 Suppl. (1) SCC 102, para 39, Union of India & ors. v. Major General Madan Lal Yadav (Retd.) (1996) 4 SCC 127 at 142, paras 28 and 29, Ashok Kapil v. Sana Ullah (dead) & ors. (1996) 6 SCC 342 at 345, para 7, Sushil Kumar v. Rakesh Kumar (2003) 8 SCC 673 at 692, para 65, first sentence, Kusheshwar Prasad Singh v. State of Bihar & ors. (2007) 11 scc 447, paras 13, 14 and 16).

Thus, the said principle, in our opinion, should be applied even in a case of this nature. A statutory authority despite receipt of such a request could have kept mum. It should have taken some action. It should have responded to the prayer of the appellant.

However, another principle should also be borne in mind, namely, that a statutory authority must act within the four corners of the statute. Indisputably, the Commissioner has the discretion not to accede to the request of the

assessee, but that discretion must be judiciously exercised. He has to arrive at a satisfaction that the three conditions laid down therein have been fulfilled before passing an order waiving interest.

Compulsion to pay any unjust dues per se would cause hardship. But a question, however, would further arise as to whether the default in payment of the amount was due to circumstances beyond the control of the assessee."

27. The learned counsel appearing for the assessee heavily relied upon the judgment in *Mani vs. Commissioner of Income Tax* cited supra, where he relied upon the following paragraphs, which are extracted.

"22. This Court in *P.Ramasamy v. Commissioner of Income Tax* reported in 1999 (237) ITR held that pursuit of remedies available to the assessee under the Act cannot be construed as non co-operation with the department, unless the pursuit has been of a cantankerous nature, obstructive or evasive.

23. The Honorable Supreme Court in *Krishan Lal v. Union of India* reported in 1998 (230) ITR 85 held that when an application is filed under sub Section (2A) of 220 of the Act, the authority concerned is called upon to take a quasi-judicial decision and if it is satisfied that the reasons contained in the application would bring the case under Clauses (i), (ii) and (iii) of Section 220(2A), then it has power either to reduce or waive the amount of interest. It was further held that even though in the said sub-section it is not stated that reasons are to be recorded in the order deciding such an application, the same should be decided by a speaking order and the Principles of natural justice in this regard would be clearly applicable. It was further held that such decision which has been taken by the authority under Section 220(2A) can be subjected to judicial review by filing a petition under Article 226 of the Constitution of India.

24. A Division Bench of Kerala High Court in *G.T.N Textiles Limited v. Deputy Commissioner of Income Tax* reported in 1996 (217) ITR 653 held that it is a condition precedent that all

the three conditions laid down in Section 220 (2A) should be satisfied for getting a relief of waiver.

25. The Honourable Supreme Court in *Carborundum Universal Limited v. Central Board of Direct Taxes* reported in 1989 (V180) 171 while analysing the scope of Section 220 (2A) held that when a statutory provision does not exclude natural justice, the requirement of affording an opportunity of being heard can be assumed, particularly when the proceedings are quasi-judicial.

26. A Division Bench of this Court in *Auro Food Limited, Pondicherry v. The Commissioner of Income Tax, Tamil Nadu* reported in 2005 1 MLJ 79 was considering the aspect as regards the manner in which the power to be exercised under Section 220(2A) of the Act. By placing reliance of the decision of the Kerala High Court (referred supra), the Honourable Division Bench held that when ever an application is filed seeking waiver of interest, it is incumbent on the part of the quasi-judicial authority to record reasons in his order. While reiterating such principles, the Honourable Division Bench of this Court in the cases of *Kanchipuram Silk Handloom Weavers' Co-Operative Marketing Society Limited* and *M.Ganesan's case* (referred supra), had directed the matter to be considered afresh since reasons have not been recorded.

27. The legal position as regards the scope and power under Section 220(2A) having been analysed as above, if the impugned order is perused, it reveals that the respondent after narrating the facts of the matter, has stated that a perusal of the records and in particular the tax recovery officers report dated 27.07.2005 shows that the assessee has not honoured the installment payment provided by the Joint Commissioner of Income Tax, the assessee has not co-operated in the payment of installment granted and thus one of the conditions stipulated in clause (iii) of 220(2A) has not been fulfilled. Therefore, waiver application is rejected.

28.. to 33.....

34. Thus, in terms of the law laid down in the judgments referred supra, the respondent is bound to consider the petition, as to whether the petitioner fulfilled all the three conditions laid down under Section 220(2A) and record reasons as to how the petitioner is not entitled to the waiver of penal interest. The impugned order does not satisfy the tests laid down by the Hon'ble Supreme Court and this Court, as referred supra and therefore, the impugned order deserves interference. For the forgoing reasons, the impugned order is liable to be set aside and accordingly it is set aside. The respondent is directed to consider the claim of the assessee with regard to waiver of interest afresh and pass a considered order after giving sufficient opportunity to the petitioner in accordance with law, within a period of two months from the date of receipt of a copy of this order. It is needless to state that the petitioner shall co-operate in the hearing so afforded by the respondent."

He would also rely upon the decision in M/s.Poompuhar Shipping Corporation Ltd., cited supra, where, paragraph 10 of the judgment is very much relied upon by him, which reads thus:

"10. With regard to financial difficulty, the second respondent would state that the petitioner has a fixed deposit of a sum of Rs.4.4 Crores and they also earned interest income and the said fixed deposit is maintained specifically in connection with Kanniyakumari ferry service, which is a matter of national importance and the fixed deposit has to be maintained for the purpose of acquiring the ferry and cannot be diverted for any other purpose. Thus, the observation with regard to financial condition of the petitioner is also factually in-correct. Thus, for the above reasons, this Court has no hesitation to hold that the petitioner has fulfilled all the three conditions contained under Section 220(2A) of the Act and thus, entitled for waiver of interest."

28. At the same time, the learned standing counsel appearing for the respondent/Revenue, apart from citing the decision in B.M.Malani's case, had also cited three other decisions referred to above. The judgment in Benara Valves

Ltd., cited supra has been referred to by the learned standing counsel, where the following passages are relied upon:

"Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of Revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interest of Revenue have to be kept in view.

As noted above there are two important expressions in Section 35(F). One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka and Ors. (AIR 1994 SC 923) that under Indian conditions expression "Undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

For a hardship to be 'undue' it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant."

29. The next judgment relied upon by the learned standing counsel for Revenue is Mookambika Associates case cited supra, where the following passages are relied upon:

"6. The relevant material considered by the authority is that there is no proof produced to show that the payment of interest would cause genuine hardship to the assessee. The matter rests on the aspect of no proof. Even the assessee, in the application has not produced any documentary evidence to show the genuine hardship was to be caused. Even if it is

considered for the sake of examination that the Income-tax Department attached the property and froze the bank account and the attachment continued until the amount as per the assessment order was paid, then also the exercise of statutory power for enforcement of the recovery by attachment of property or by freezing of bank account cannot be said as a valid ground to treat it as genuine hardship. Such hardship as pleaded has to be due to circumstances other than enforcement of any law. If the enforcement of law is to be treated as hardship, the very purpose of rule of law would be frustrated. Therefore, we are inclined to observe that such hardship should be on the ground other than enforcement of law.

7. The only ground contended in the application was with regard to attachment of property by way of enforcement of law by the department. No other ground which may fall under the head of genuine hardship was contended.

8. Apart from the above, the schedule of the properties which were attached as per the documents produced by the petitioners themselves at Annexure-"G" shows that there are huge immovable properties totally 12 in number in the peripheral area of Bangalore City. Therefore, if a person is having large number of immovable properties and can pay the amount of interest by sale or realization of money from the property, it cannot be said to be a genuine hardship as sought to be canvassed. On the contrary, the quantum of amount of Rs.45,11,093/- is a tip in the iceberg in comparison to huge value of 12 properties belonging to the assessee. If the person has the capacity to pay, may be by out of his movable or immovable properties and in spite of that the ground is contended as of hardship, same cannot be termed as genuine hardship. If such hardship is treated as genuine hardship, it would defeat the purpose of consideration of the genuine hardship."

30. Yet another judgment of the Kerala High Court relied upon by the learned standing counsel is K.C.Mohan's case, where the following passages were relied upon:

"5. In so far as this case is concerned, reading of the impugned order shows that the first respondent has specifically found that this is not a case where the assessee had established that payment of interest would cause genuine hardship to him. This conclusion is on the basis that the assessee is a partner in two firms doing business in liquor and also in a firm running a theatre. It is also found that assessee has substantial agricultural income and that he owns 5.22 acres of coconut garden and 1.10 acres of cashew plantation. These facts found by the first respondent in Ext.P9 order are not even contended to be incorrect. If that be so, on the materials available before this court, I am unable to infer that the payment of interest by the assessee would cause any genuine hardship justifying invocation of power under Section 220 (2A) of the Act. Consequently, Ext.P9 order challenged in W.P.(C) No. 14634/08 has to be upheld.

6. This view taken by me is fortified by the fact that levy of interest under Section 220 (2) is for delay in payment of tax for the periods subsequent to completion of assessment. One of the contention raised by the assessee that non-payment was due to circumstances beyond his control is that the assessment was necessitated on account of addition of taxable income of the firm of which he is a partner. This reason may justify delay in filing the returns but not delay in the payment of tax for the post assessment period. If that be so, the second requirement of Section 220 (2A) of existence of circumstances beyond the control of the assessee is also established."

31. He also relied upon the decision of a Division Bench of this court, in Chief Commissioner of Income Tax and another vs. M/s. Rajanikant and Sons in W.A.Nos.2020 to 2024 of 2010, where, I am also one of the party. I have given my anxious consideration to the findings given in the decisions referred to above and also the law laid down therein.

32. In B.M.Malani's case, the word genuine has been exhaustively explained, especially in the context of section 220 (2A). The hardship faced by the assessee, need not be the mere hardship, but, it should be a genuine hardship. In this context, in Benara Valves Ltd., the Supreme Court has made it

clear that, in Indian context, the undue hardship is normally related to economic hardship and undue means something which is not merited by the conduct of the claimant or is very much disproportionate to it.

33. Here, in the case in hand, according to the assessee, the undue hardship faced by the assessee was that, there had been no business for four years consecutively, with the result, the assessee did not have any source to make the payment as demanded under Section 234A, 234B, 234C. When that situation was prevailing, the assessee made an application for waiver explaining the hardship faced by the assessee as a genuine hardship.

34. In the context, after having analysed the said plea made by the assessee, the respondent has found, based on the balance sheet of the assessee, that the assessee was having a building worth Rupees 18 lakhs and machineries worth Rupees 45 lakhs. From the said finding, it become clear that, apart from these immovable properties of building and machineries, which are the basic immovable/movable properties to run the industry or business of the assessee, no other source had been found out by the Revenue.

35. However, the said findings given by the Revenue was fully supported by Mr.A.P.Srinivas, learned standing counsel appearing for the Revenue by citing the decision of Mookambika Associates. In Mookambika's case, it was factually found that, the assessee was having huge immovable properties totally 12 in numbers in the peripheral area of Bangalore City and the total demand was only rupees Rs.45,11,093/- which, according to the learned Judges, was only a tip in a iceberg, in comparison to the huge value of assets belonging to the assessee.

36. Only in that context, the learned Judges had come to the conclusion that, the hardship projected by the assessee in that case, cannot be construed as a genuine hardship and therefore, the assessee did not fulfill the condition under Section 220(2A), therefore, the rejection of the waiver application was justified in that case.

37. However, here in the case in hand, it is the finding of the respondent that, except the land and machineries, no other immovable property had been shown in the account of the assessee. Therefore, the said decision referred to by the learned standing counsel on facts, cannot be made applicable to the present facts of the case.

38. The learned standing counsel would also heavily rely upon the decision made in, K.C.Mohanan Vs. Chief Commissioner of Income Tax, case. In that case also, it was a factual finding that, the assessee, apart from being the owner and partner of the business for which the assessment was made, has also been a partner in two firms, which were doing business in liquor and also was running a theatre. In view of the said alleged business undertaken by the assessee in that case, the ground of genuine hardship projected by the assessee was rejected and accordingly, the genuine hardship justifying the invocation of power under Section 220(2A) of the Act, in that case, was rejected and such rejection was upheld.

39. However, in the case in hand, there is no such finding given by the respondent in the impugned order that, the assessee, apart from the said business, is having any other business whatsoever, any other firm or company or doing any other business on his own, therefore, the said case also, cannot be factually made applicable to the present case.

40. At the same time, the learned counsel appearing for the assessee has very much relied upon Mani's case i.e. Mani v. Commissioner of Income tax, where, the learned Judge of this Court, after having analysed the case law, has come to the conclusion that, the rejection made by the Revenue in the waiver application under Section 220(2A) of the Act was not justifiable.

41. In the said decision, the learned Judge also had relied upon the decision of the Hon'ble Supreme Court in Corborundum Universal Ltd., Vs. CBDT (1989) 80 CTR SC 85, where the scope of Section 220(2A), after having been analysed, it was held that, when the statutory provision does not exclude the natural justice, the requirement of affording an opportunity of being heard, can be assured, particularly, when the proceedings are quasi judicial in nature.

42. Relying upon these decisions, the learned counsel appearing for the assessee, would vehemently contend that, even though the statute does not expressly provide for any opportunity of being heard to the assessee before passing the order in a waiver petition under Section 220(2A), impliedly, such a principle has to be adopted and such an opportunity of being heard should have been given to the assessee. Here, in the case in hand, since no such opportunity was given to the assessee, invoking the said principle underlined in Corborundum Universal Ltd., the impugned order can be interfered with.

43. However, Mr.A.P.Srinivas, the standing counsel appearing for the respondent, by relying upon the entire

judgment of the Corborundum Universal Ltd., case, would submit that, no doubt, even though the statute does not expressive in providing for an opportunity of being heard, if the proceeding is quasi judicial in nature, such an opportunity of being heard can be assumed as a settled proposition. However, in respect of the said settled general proposition, Section 220(2A) proceeding is an exception and this has also been considered by the Hon'ble Supreme Court in Corborundum Universal Ltd., case and accordingly based on the peculiar facts of that case in Corborundum Universal Ltd., it was decided in favour of the petitioner/assessee and therefore, the said principle made in Corborundum Universal Ltd., in fact, is against the assessee and in favour of the Revenue. Therefore, taking the clue from the Corborundum Universal Ltd., case, the assessee cannot make out a case stating that an opportunity of being heard should have been given to the assessee before taking the decision under 220 (2A).

44. Insofar as the said plea of opportunity of being heard is concerned, as has been rightly pointed out by the standing counsel for Revenue, the plea has never been raised by the assessee and in fact, there had been no written request in this respect made by the assessee seeking for such personal hearing. No doubt, before passing an order by quasi judicial authority, such an opportunity is must. Here, in the case in hand, since the assessee himself, has not taken into seriously, and no issue were raised by the assessee on the ground of non giving an opportunity of personal hearing, the said issue need not be decided in this case and therefore, the said plea made by the learned counsel appearing for the assessee is kept open for the decision to be taken later on in an appropriate case.

45. However, on the side of the merits of the case, the learned counsel appearing for the assessee, has very much relied upon the recent decision of this Court made in M/s.Poompuhar Shipping Corporation Ltd. In the said case, exactly the assessee was put in a similar situation, where the reasons sounded by the Revenue for rejecting the plea of waiver was that the assessee in that case was having fixed deposit of Rs.4.4 crores and when they have such a huge sum of liquid cash by way of fixed deposit, the reason projected by the assessee in that case that, it faced genuine hardship, cannot be accepted.

46. However, rejecting the said stand taken by the Revenue, the learned judge in Poompuhar Shipping Corporation Ltd., case, has taken a view that, the said amount of 4.4 crores kept in fixed deposit was to be maintained by the assessee to have Kanniyakumari Ferry Service, which was one of the prestigious service being undertaken by the assessee. Once the deposit is dismantled, the important service, which was

undertaken by the assessee, had to be abandoned and that will go to a very financial viability of the assessee and therefore the said deposit cannot be construed as a resource or source to be exploited for the purpose of making the demand. Therefore, on that reason, the rejection made by the Revenue was not justified and accordingly an interference was shown by the learned judge.

47. By citing the said decision, the learned counsel for the assessee, would vehemently contend that, here in the case in hand, it has been specifically found by the respondent that, except the land and machineries, no property is available with the assessee. No liquid cash or deposit or share capital or debenture are found in the name of the assessee, even according to the respondent, after having gone through the balance sheet. When that being so, by citing the reason, that the assessee is having land and machineries, his plea of genuine hardship can be rejected should not have been taken by the Revenue.

48. Applying the aforesaid principle mentioned in the said case, namely, Poompuhar Shipping Corporation Ltd., case, and also the principle in general that, the genuine hardship in Indian condition is nothing but the financial hardship as held by the Apex Court as cited above, the present reason cited by the Revenue in the impugned order, in the considered view of this court, cannot be considered to be a worthy reason for rejecting the plea made by the assessee for waiver.

49. Since the assessee already complied with the third condition and in respect of the 1 and 2 conditions, which are coupled with each other, regarding the genuine hardship, to some extent the assessee was able to demonstrate the reasoning, it should have been considered in proper perspective by the Revenue.

50. In this context, if at all, any further supporting document or materials required by the Revenue, that could have been called for from the assessee. No doubt, the issue with regard to the chance of personal hearing is not decided in this case for the reason set out above, atleast, the additional particulars could have been called for by the Revenue. No such exercise seems to have been taken by the Revenue and without making such exercise, this Court is at loss to understand, as to how the Revenue has come to the conclusion that the assessee was not able to establish the case of genuine hardship cogently and clearly with reference to their books of accounts and cash availability.

51. On analysing the facts of the case, especially in the context of reasons given by the respondent/Revenue, in the

impugned order, by applying the principle laid down by the Hon'ble Apex Court and various High Courts in the judgments, cited supra, this Court is of the considered view that, the respondent, being a quasi judicial authority, while exercising its power of discretion vest in them under Section 220(2A) of the Act, has not acted judiciously with cogent and plausible reasons with supporting materials. Therefore, this Court has no hesitation to hold that, the impugned order is not sustainable, accordingly, it is liable to be interfered with.

52. For all these reasons and discussions made in above, the impugned order is hereby quashed and consequently, the matter is remitted back to the respondent for re-consideration. While making such re-consideration, it is open to the respondent to seek for further materials/documents from the assessee and once such demand is made to the assessee for producing additional documents in support of his case to prove the genuine hardship as claimed by them, the assessee shall immediately produce those documents and cooperate with the Revenue for concluding the decision to be taken. The aforesaid exercise as directed above, shall be undertaken by the Revenue within a period of 3 months from the date of receipt of copy of this order.

53. It is made clear that even if the respondent/Revenue does not call for any additional document or materials from the assessee, in order to substantiate the case of the assessee, it is open to the assessee to provide those documents immediately not later than two weeks from the date of receipt of copy of this order. Thereafter, the final order shall be passed by the Revenue within a period of three months as indicated above.

With this direction, this Writ Petition is ordered accordingly. However, there shall be no order as to costs.

सत्यमेव जयते

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

smi/bga

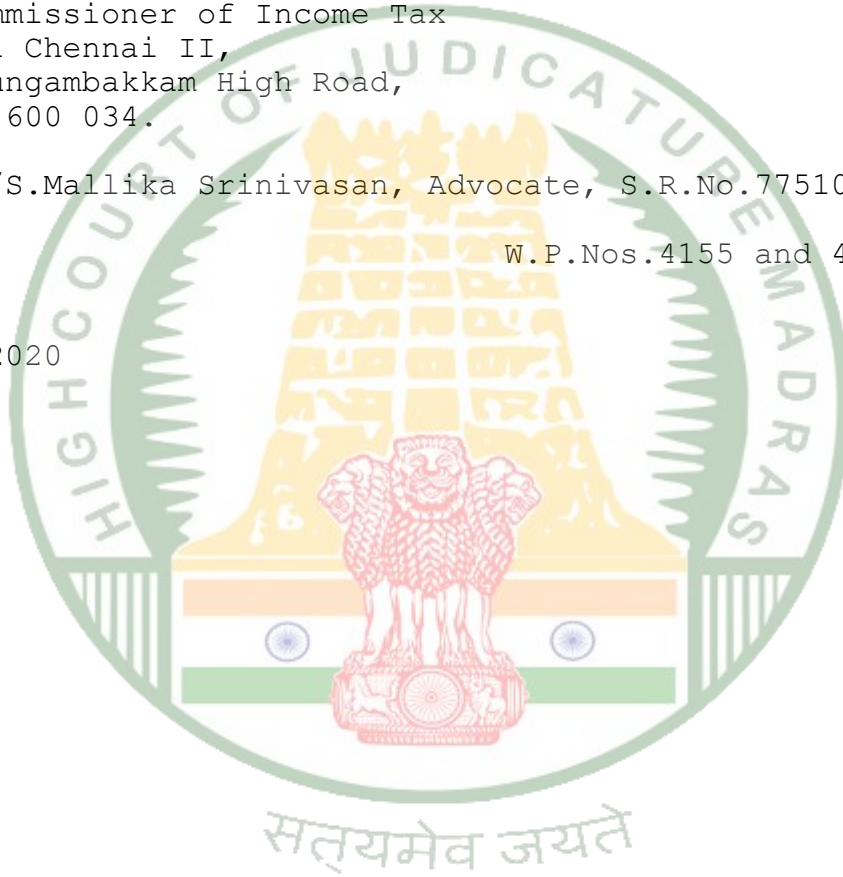
To

1. The Assistant Commissioner of Income Tax,
Central Circle II (2),
108, Nungambakkam High Road,
Madras 600 034.
2. The Deputy Commissioner of Income Tax,
Central Circle II (2),
108, Nungambakkam High Road,
Madras 600 034.
3. The Commissioner of Income Tax
Central Chennai II,
108, Nungambakkam High Road,
Madras 600 034.

+1cc to M/S.Mallika Srinivasan, Advocate, S.R.No.77510

W.P.Nos.4155 and 4156 of 2004

SSD(CO)
CS/29/01/2020



WEB COPY