

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 10.12.2019****Judgment Delivered on : 19.12.2019****HIGH COURT OF CHHATTISGARH, BILASPUR****Writ Appeal No. 584 of 2019***(Arising out of interim order dated 05.09.2019 passed by the learned Single Judge in WPT No.118 of 2019)*

- Shri Amolak Singh Bhatia S/o Late Shri Harbans Singh Bhatia, aged about 68 Years, R/o C - 22, Minocha Colony, Bilaspur Chhattisgarh.

---- Appellant**Versus**

1. Principal Commissioner of Income Tax (Central) Ayakar Bhawan, Hoshangabad Road, Bhopal - 462011.
2. Commissioner Income Tax (Appeals) Ayakar Bhavan, Vyapar Vihar, Bilaspur, District : Bilaspur, Chhattisgarh
3. Assistant Commissioner of Income Tax, Circle 2(1), Ayakar Bhavan, Vyapar Vihar, Bilaspur, District : Bilaspur, Chhattisgarh

---- Respondents

For Appellant	:	Mr. Neelabh Dubey, Advocate
For Respondents	:	Ms. Naushina Afrin Ali, Standing Counsel

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****CAV JUDGMENT****Per P. R. Ramachandra Menon, Chief Justice**

1. Validity of the interim order dated 05.09.2019 passed by the learned Single Judge in WPT No.118 of 2019 is put to challenge in this appeal. By virtue of the said order, the I.A. No.1 of 2019 filed by the Appellant to grant interim stay of recovery of the tax assessed under the relevant provisions of the Income Tax Act, 1961 (for short, 'the IT Act') came to be rejected. It is contended that the said order is not in conformity with the mandate of the Circulars issued by the Central Board of Direct Taxes (CBDT) at different points of time, as to the course to be pursued in granting stay of recovery proceedings by the authorities of the Department.

2. Heard Mr. Neelabh Dubey, the learned counsel for the Appellant and Ms. Naushina Afrin Ali, the learned Standing Counsel for the Department.
3. When the matter was taken up for consideration, this Court expressed a doubt as to the very maintainability of the appeal, with reference to the proviso to Sub-section (1) of Section 2 of the Chhattisgarh High Court (Appeal to Division Bench) Act, 2006 (for short, 'the Act, 2006'). This was answered by the learned counsel for the Appellant, as maintainable, in view of the nature of challenge raised and the facts and figures involved. In the said circumstance, before considering the legal question, a brief reference to the factual matrix is felt necessary.
4. The Appellant is an Assessee on the files of the 3rd Respondent. There was a 'Search and Seizure' in the premises of the Appellant in terms of Section 132 of the IT Act, setting the proceedings in motion on 20.03.2007. The case was assessed by the Assistant Commissioner of Income Tax Circle (1)(1), Bilaspur, which subsequently came to be transferred to the Assistant Commissioner of Income Tax (Central), Bilaspur, as per order dated 30.03.2007 of the Principal Commissioner, Income Tax, Bilaspur, in terms of Section 127 of the IT Act. On issuance of notices under Sections 153A and 142(1) of the IT Act, the Appellant filed his return for the assessment years 2001-02 to 2007-08. However, challenging the proceedings under Section 127 involving transfer of the case, the Appellant had moved this Court by filing WPT No. 5414/2008, where an interim order was passed on 26.09.2008 with liberty to the assessment proceedings to go on, but prohibiting the passing of any final

order. Later, the writ petition was withdrawn on 04.12.2008 and the authorities initiated fresh proceedings by issuing notices under Sections 142(1) and 143(2) of the IT Act.

5. After completion of the procedural formalities, the assessment was finalized on 09.02.2019. The grievance of the Appellant is that the assessment is a 'high-pitched' one; insofar as it casts a huge tax liability upon the Appellant and the income assessed is several times higher than the returned income, which would lead to the closure of business of the Appellant. It is stated that the assessment is on the basis of presumptions and conjunctures; that the Assessing Authority has issued notice to various liquor retailer licensees at the addresses made available to the Department by the Excise Authority (some of whom had turned up by filing replies and some of whom had sought for adjournment) seeking for details regarding the 'source of cash' which they had utilized to pay for the license fee. Ultimately, it was treated as investment made by the Appellant and the liability was fixed accordingly. The explanation of the Appellant was that he was involved in business of retail sale of liquor for a long period and thus, when multiple entities started applying for retailer licenses, the Appellant had started a 'Consultancy Service' to the new vendors, who approached the Appellant as a 'one stop solution' to fill up the forms and complete all the formalities and that's all. The investment made by the multiple retail liquor licensees was wrongly held as 'unexplained investment of the Appellant', which led to the 'high-pitched assessment' and hence it has been sought to be challenged by way of appeal before the 2nd Respondent.

6. The case projected before this Court is that, various Circulars have been issued by the CBDT invoking the power under Section 119 of the IT Act and by virtue of Annexure-P/6 Circular of the year 1996, a policy decision was taken to grant absolute stay by the Assessing Officer, if it was a case of 'high-pitched assessment' i.e., if it was two or more times of the returned income, till the appeal was finalized.
7. The above Circular was modified as per the Circular No. 1914F dated 02.12.1993. Clause iii of heading '**B. Stay Petitions** :' reads as follows :

“iii. The decision in the matter of stay of demand should normally be taken by Assessing Officer/TRO and his immediate superior. A higher superior authority should interfere with the decision of the AO/TRO only in exceptional circumstances; e.g., where the assessment order appears to be unreasonably high-pitched or where genuine hardship is likely to be caused to the assessee. The higher authorities should discourage the assessee from filing review petitions before them as a matter of routine or in a frivolous manner to gain time for withholding payment of taxes.”

The said Circular envisages two circumstances for granting stay by the Assessing Authority; when the assessment is unreasonably high-pitched or where genuine hardship is likely to be caused to the assessee. In partial modification of the said Circular, another Circular bearing F.No.404/72/93-ITCC dated 29.02.2016 (Annexure-P/9) was issued, whereby power was conferred upon the Assessing Officer (such other higher officer as mentioned therein) to grant stay during pendency of the appeal, on payment of 15% of the disputed demand {under **Heading (A)**}. The course of action to be pursued, when payment of an amount higher than 15% was warranted or if lesser amount than 15% was

enough, was provided under sub-clauses (a) and (b) respectively of the **Heading (B)**. Under the **Heading (C)**, right was reserved to the Assessee to move the higher authorities, if he was aggrieved by the condition of satisfaction of 15% of the disputed amount for availing the benefit of stay. **Paragraphs 4 (A), (B) and (C)** of the said Circular are extracted below :

“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.

(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.”

8. Shortly thereafter, it was observed by the CBDT that the Circular issued to streamline the process and granting stay and standardization of the quantum of lump-sum payment required to be paid as a pre condition of stay, insisting satisfaction of 15% itself was not adequate in the normal circumstance and hence the stipulation was sought to be varied as per OM dated 31.07.2017, whereby instead of 15%, it was enhanced and modified to 20% of the disputed demand. The said Circular reads as follows :

“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.

Vide O.M. NO.404/72/93-ITCC dated 29.2.2016 revised guidelines were issued in partial modification of Instruction NO 1914, wherein. Inter alia, vide para 4 (A) it had been laid down that 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 fall in the category discussed in para (B) there under Similar reference to the standard rate of 15% have also been made in succeeding paragraphs therein.

The matter has been reviewed by the Board in the light of feedback received from field authorities. In view of the Board's effort to contain over pitched assessments through several measures resulting in fairer and more reasonable assessment orders, the standard rate of 15% of the disputed demand is found to be on the lower side. Accordingly it has been decided that the standard rate prescribed in O.M. dated 29.2.2016 be revised to 20% of the disputed demand,

where the demand is contested before CIT(A). Thus, all references to 15% of the disputed demand in the aforesaid O.M. dated 29.2.2016 hereby stand modified to 20% of the disputed demand other guidelines contained in the O.M. dated 29.2.2016 shall remain unchanged.”

9. The case of the Appellant is that, after passing the assessment order, the Appellant moved the 3rd Respondent / Assessing Authority on 08.03.2019 by filing a petition seeking for stay, where satisfaction of 20% of the disputed liability was insisted as per order dated 12.03.2019. Met with the situation, necessary proceedings were filed before the Principal Commissioner of Income Tax i.e., the 1st Respondent herein on 05.07.2019 seeking for stay, which was also turned down. The writ petition was filed challenging the above order and seeking for such other reliefs. The Appellant had also filed I.A. No. 01/ 2019, seeking for stay of the demand; which came up for consideration before the learned Single Judge. The prayer was opposed from the part of the Respondents. After hearing both the sides, Annexure-A/1 order was passed on 05.09.2019, rejecting the interim relief; correctness of which is under challenge in this appeal. The Appellant seeks to place reliance on the verdict passed by the Apex Court in ***Principal Commissioner of Income Tax 5 v. LG Electronics India Pvt. Ltd.***¹, a Division Bench judgment of the Delhi High Court in ***Taneja Developers & Infrastructure Ltd. v. Assistant Commissioner of Income Tax, Delhi & Ors.***² and a Single Bench judgment of the ***Karnataka High Court in Flipkart India Private Limited v. The Assistant Commissioner of Income Tax, Circle 3(1)***³.

¹ 2018 SCC OnLine SC 1214

² (2010) 324 ITR 247

³ [2017] 396 ITR 551 (KAR)]

10. The learned counsel for the Appellant submits that the 'high-pitched assessment', as in the instant case, stands different from the regular assessment and it is in this peculiar circumstance, that interim stay was to be granted as a matter of policy right from 1969, though with some modification as per the subsequent Circulars including Annexure-P/6 and P/9. In the case of the Appellant, the returned income was only Rs.1,12,31,353/-; whereas the assessment reckoned the income of Rs.87,36,07,803/-, which is higher by several folds and is undisputedly an instance of 'high-pitched assessment' governed by the above Circulars and hence the Appellant is entitled for stay.
11. The version of the Department, as submitted by the learned Standing Counsel, is that the Circulars sought to be relied by the Appellant himself clearly specify the circumstances under which stay is to be granted. The instances where deviation can be made and the power and authority to impose conditions referring to a situation where the assessment is pursuant to 'Search and Seizure' are also revealed therefrom. In the instant case, the proceedings were initiated, admittedly, pursuant to a 'Search and Seizure' and the Department had collected various documents / incriminating circumstances, which were analysed, leading to the assessment. The evasion of tax in an organized manner was brought to light in the said proceedings; that too over a period of years and the facts and figures have been clearly discussed by the Assessing Authority. This aspect has been specifically taken note of by the learned Single Judge while rejecting the interim relief as per the order under

challenge and hence no interference is warranted; submits the learned standing counsel.

12. The learned counsel for the Appellant submits that the power vested upon the Department / Assessing Authority has not been properly exercised and no reason has been given in the orders under challenge with regard to the benefit of interim stay claimed by the Appellant, when it was turned down. The Circulars issued by the CBDT are having binding effect upon the Departmental authorities and according to the Appellant, satisfaction of 20% itself is unconscionable in view of the huge extent of income assessed (which is a high-pitched assessment) by several times higher than the returned income, virtually causing undue hardship to the Assessee. Power is vested upon the Assessing Officer and the Principal Commissioner of Income Tax (Respondents No. 3 and 1 respectively) to have granted the relief as per the Circulars. This aspect has not been properly considered by the learned Single Judge and hence the grievance.
13. It is true that power is conferred upon the above Respondents to grant stay of the demand / recovery by virtue of the Circulars as mentioned above; which have been issued as standardization of the procedure, of-course as a matter of policy. But this power is specifically conferred upon the Assessing Officer, who passed the assessment order or the Higher Departmental Authorities as mentioned in the Circulars. This obviously is different from the power of the 'Appellate Authority' to grant stay in appropriate cases with or without any conditions. There is no case for the Appellant that he has filed any application for stay before the Appellate

Authority *i.e.* the 2nd Respondent or that it has been rejected. The Statutory Authority for considering and deciding the appeal (the 2nd Respondent) or the power of the Appellate Tribunal to consider the correctness of such orders passed by the Appellate Authority in terms of the provisions under the IT Act cannot be said as governed by the Circulars and it is always open for the Appellate Authority to grant even absolute stay in appropriate cases, if such circumstances are established by the Appellant. It is not a case where any 'pre-deposit' is insisted so as to entertain the appeal or the application for interim stay (filed before the Appellate Authority/2nd Respondent). No such obligatory provision is brought to the notice of this Court governing the right of appeal. As such, it may not be correct to say that the right of appeal or the right to file application for stay during pendency of the appeal is defeated because of the orders passed by the 1st and 3rd Respondents. This is more so, since the Circulars sought to be relied on by the Appellant virtually refer to the power of the Assessing Authority or such other higher authorities of the Department and not the power of the Appellate Authority/Quasi-Judicial Authority deciding the merit of the appeal/I.A. for stay. In other words, it is a self-imposed departmental restraint on the demand/recovery, to be raised/pursued, which cannot affect the statutory power conferred upon the Appellate Authority. This discussion is made only in view of the lengthy submissions made by the learned counsel for the Appellant with regard to the 'scheme of the taxation jurisprudence' and never to say, if the Appellant is actually entitled to get a stay as sought for or not.

14. Coming back to the challenge raised against the order passed by the learned Single Judge, the primary question to be considered is whether any 'interim relief' as sought for in the I.A. could have been granted to the Appellant / writ Petitioner. The prayer in the I.A. is as follows:

“That, this Hon'ble Court may kindly be pleased to direct the respondents not to initiate any recovery proceedings against the petitioner and also stay the effect and operation of the order dated 05.07.2019 being **Annexure P/8** and assessment order dated 09.02.2019 being **Annexure P/3** till the disposal of this petition.”

The writ petition has been filed with the following prayers:

- “10(i) That, this Hon'ble Court may kindly be pleased to call for the entire record concerning the case of the petitioner from the possession of the respondent authorities for its kind perusal.
- (ii) That, this Hon'ble Court may kindly be pleased to issue an appropriate writ setting aside the order dated 05.07.2019 made by the Principal Commissioner of Income Tax [Central] being **Annexure P/8**
- (iii) That, this Hon'ble Court may kindly be pleased to issue an appropriate writ directing the respondent authorities that the tax demand, interest and penalty arising out of the assessment order dated 09.02.2019 shall not be recovered till disposal of the appeal pending before the Commissioner (Appeals).
- (iv) That, this Hon'ble Court may kindly be pleased to stay the effect and operation of the order dated 05.07.2019 being **Annexure P/8** and assessment order dated 09.02.2019 being **Annexure P/3** till the disposal of this petition.
- (v) That, this Hon'ble Court may kindly be pleased to direct the respondent authorities that they expeditiously decide the appeal and the stay application of the petitioner.
- (vi) That, this Hon'ble Court may further be pleased to hold that the instant case involves high pitched

assessment and thus the amount shall not be recovered till the pendency of the appeal from the petitioner/assessee.

- (vii) Any other relief or relief(s) which this Hon'ble Court may deem fit or proper in the facts and circumstances of the case.”

From the above, it is clear that all the prayers in 'paragraph 10', except prayer in paragraph (v), seek for stay of operation of the orders under challenge / recovery pending appeal before the 2nd Respondent {prayers at sub-clauses (ii), (iii) (iv) and (vi)}. In other words, the 'interim relief' sought for in the I.A. is virtually the 'main relief' sought for in the writ petition. It has been held by the Apex Court in ***Bank of Maharashtra v. Race Shipping and Transport Co. Pvt. Ltd. and Another***⁴ that no final relief can be granted in the form of interim relief. The operative portion reads as follows:

“11. Time and again this Court has deprecated the practice of granting interim orders **which practically give the principal relief** sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations, [See : [Assistant Collector of Central Excise, West Bengal v. Dunlop India Ltd & Ors.](#), 1985 (1) SCC 260 at p. 265; [State of Rajasthan & Ors. v. M/s Swaika Properties & Anr.](#), 1985 (3) SCC 217 at p. 224].

13. In the instant case since there is serious dispute on facts it cannot even be said that a prima facie case had been made out for grant of an interim order in favour of the respondents which enables them to have the reimbursement of the sum of Rs. 95,000/- that was debited to their account in view of the encashment of the cheque in question. We are of the view that this was not a case in which the High Court while admitting the Writ Petition should have passed an interim order giving such a direction. In the circumstances we are unable to uphold the said interim order.”

⁴ (1995) 3 SCC 257

In the above circumstance, by virtue of the law declared by the Supreme Court, the prayer in the I.A. being the 'main relief' sought for in the writ petition, could not have been granted. Hence, we are not in a position to interdict the interim order under challenge.

15. Another relevant aspect in the context is as to the maintainability of the appeal. The appeal is preferred under 2(1) of the Act, 2006. The right of appeal being a statutory one, it can be preferred only in terms of the statute. Section 2(1) of the Act, 2006 reads as follows:

“2. Appeal to the Division Bench of the High Court from a Judgment or order of one judge of the High Court made in exercise of original jurisdiction. - (1)

An appeal shall lie from a judgment or order passed by one Judge of the High Court in exercise of original Jurisdiction under Article 226 of the Constitution of India, to a Division Bench comprising of two Judges of the same High Court :

Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.”

16. Proviso to Section 2(1) of the Act, 2006 clearly shows that no appeal is maintainable against an interim order passed by the learned Single Judge. Admittedly, the order dated 05.09.2019 is an interim order passed by the learned Single Judge in I.A. No. 1 of 2019. By virtue of the statutory bar, no appeal can be entertained against such an order.
17. The scope of the above provision had come up for consideration before this Court and a question was framed as follows:

“Whether the proviso to Section 2(1) of the Act, 2006 is an absolute bar to entertain an appeal

against an interlocutory order without considering the scope of the order and without considering whether the interlocutory order has decided the rights of the parties and has an element of finality attached to it ?”

The aforesaid question was referred to a Full Bench. After threadbare analysis of the relevant provision and the binding precedents, the Full Bench answered the question in the following terms:

“We therefore answer the question referred to us by holding that proviso to Section 2(1) of the Chhattisgarh High Court (Appeal to Division Bench) Act, 2006 bars appeals against those interim orders which are totally interlocutory in nature, do not decide matters of moment and do not have an element of finality attached to them. Conversely, if the order vitally affects rights of the parties having bearing on the final adjudication of the case, then even though the order is interim, it cannot be termed as interlocutory order and an appeal would lie. An appeal would also lie against those orders which cannot be undone at the time of final hearing and which have an element of finality attached to them. The orders, effect of which cannot be undone at the time of final hearing, cannot be termed to be interlocutory orders and in such eventuality, an appeal would lie against such orders.”

From the above, it is quite clear that unless the order finally adjudicates the *lis*, it cannot be treated as an order from which appeal lies.

18. It is relevant to note that the Appellant / writ Petitioner is free to substantiate the contentions in the writ petition with regard to the 'main reliefs' and also as to the necessity to have the appeal / stay petition stated as filed before the 2nd Respondent to be finalized within a specific time. Similarly, the observation made by the learned Single Judge in the 'last sentence' of the order under challenge, that it is open for the writ Petitioner to move the Assessing Officer / 3rd Respondent to have

relaxation in any manner and as to the alleged futility in this regard (having already moved the said authority and also the higher authority / 1st Respondent) could be highlighted in the course of final hearing.

19. In the said circumstance, the appeal is dismissed as not maintainable, without prejudice to the rights and liberties of the Appellant to substantiate the merit involved with reference to the main prayers sought for in the writ petition. We express our earnest hope and desire that the learned Single Judge would finalize the writ petition, as expeditiously as possible.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge