

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 73 OF 2019

Uber India Systems Pvt Ltd

.. Petitioner

Versus

Joint Commissioner of Income Tax, (TDS),
Range -2(3) & Ors.

.. Respondents

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- Mr. Jehangir Mistri, Sr. Counsel a/w Mr. Nishant Thakkar, Mr. Hiten Chande & Ms. Jasmine Amalsadvala i/by PDS Legal for the Petitioner
 - Mr. Suresh Kumar for the Respondents
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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : JANUARY 17, 2019.

P.C.:

1. Heard learned counsel for the parties for final disposal of the petition.

2. The petitioner has approached this Court at the stage where the respondent - Assessing Officer proposes to pass order under Section 271C of the Income Tax Act, 1961 ("the Act" for short). The facts may be recorded in brief:-

Petitioner is a company registered under the Companies Act and claims that it provides marketing and

support services to one Uber B.V., a Dutch Company. The dispute between the petitioner and the department relates to the question of deducting tax at source ("TDS" for short) by the petitioner while making payments to Uber BV taxi drivers of the fare after deducting commission. It is not necessary to go into the details of such controversy. For our purpose, it would be sufficient to record that in the earlier assessment years 2016-17 and 2017-18, the Assessing Officer had held that the petitioner was required to deduct TDS which the petitioner had failed to do. He, therefore, raised demand in terms of Section 201 of the Act. The petitioner having failed before the Commissioner (Appeals), has now filed appeal before the Income Tax Appellate Tribunal ("the Tribunal" for short). Pending this appeal, the petitioner had prayed for stay of the principal tax demands. The Tribunal passed interim order on 28.9.2018 requiring the petitioner to deposit certain amounts pending appeal subject to which the remaining tax would not be recovered. The Tribunal also noted that in the meantime, the Assessing Officer had instituted penalty proceedings under Section 271C of the Act. In this context, the Tribunal, in the said order, observed

as under:

"5. So far as the penalty proceedings are concerned, the assessee has made out a prima facie case in favour of the assessee proving that the outcome of the appeal before ITAT will directly impact the proceedings which are hurriedly being finalized by the authorities below, which may entail huge liability by way of penalty on the assessee. In our opinion, so long as the appeal is pending before the Tribunal, the Revenue authorities should be restrained from passing any order imposing penalty on the assessee u/s 271C and 206AA of the Act however the proceedings may continue. While deciding so, we are supported by the decision of the Jurisdictional High Court in the case of CIT vs Wander Pvt. Ltd., (2014) 44 Taxman.com 103 (Bombay) and ACIT vs GE India Technology Pvt. Ltd. (2014) 46 Taxmann.com 374 (Gujarat). We, therefore, respectfully following the decision of the Hon'ble Gujarat High Court, direct the Addl. CIT (TDS)/revenue authorities not to pass orders imposing penalty for a period of six months from the date of this order or disposal of appeal by the tribunal which ever is earlier, however, the proceedings may be continue during this period."

In the present case, we are concerned with the assessment for the assessment year 2018-19 in which similar issue is once again raised by the Assessing Officer. Order of assessment is passed on 9.8.2018. The petitioner has filed appeal against such order which is pending before the Commissioner (Appeals). Pending such appeal, the petitioner applied to the Assessing Officer for stay of the recoveries. The Assessing Officer passed an order on

6.9.2018 requiring the petitioner to deposit a sum of Rs. 30 crores and a further sum of Rs. 1.00 Crore every month for six months out of the total tax demand of 113.84 crores, subject to payment of which, remaining tax would not be recovered. It is undisputed that the petitioner has deposited the lump sum amount as required and is also depositing the monthly installment as and when it falls due.

3. In view of such background, when the Assessing Officer instituted penalty proceedings under Section 211C of the Act in relation to present assessment order, the petitioner requested for adjournment. By its letter dated 3.12.2018, besides raising other grounds, the petitioner urged that the Tribunal has already stayed the passing of final penalty order for earlier assessment years and that the appeals before the Tribunal are still pending and would come up for hearing on 11.12.2018. We are informed that the Assessing Officer had taken into account such facts and adjourned the penalty proceedings to 21.12.2018. We are further informed that the appeals came up before the Tribunal on 11.12.2018 on which date the department needed time. The appeals were

adjourned to 15.1.2019 and thereafter, to 28.1.2019.

4. In the background of such facts, learned counsel for the Petitioner submitted that the Assessing Officer may be prevented from proceeding further with the penalty proceedings to avoid multiplicity of legal proceedings. On the other hand, learned counsel for the department opposed the prayer contending that the Assessing Officer is well within his discretion to proceed further with the penalty proceedings.

5. In the facts of the present case, when the very question of levying tax from the petitioner is before the Tribunal, where the Tribunal has required that the Assessing Officer not to pass the order of penalty and that the appeals would be heard out of turn, in order to avoid multiplicity of legal proceedings, we would adopt a formula under which the interest of the petitioner as well as department are taken care of. As noted, the Tribunal has desired that the Assessing Officer may continue with the penalty proceedings but final order thereon may not be passed till disposal of the appeals.

In connection with the present assessment order, the Assessing Officer himself has imposed a condition of depositing a portion of tax demand subject to fulfillment of which the remaining recovery would be stayed. Considering such facts, we would require that the Assessing Officer in the present case also not to pass the final order of penalty till the petitioner's appeals before the Tribunal against assessment for assessment years 2016-17 and 2017-18 are disposed of. Under such circumstances, the petition is disposed of with following directions:-

- i. Respondent No.1 shall not pass final order under Section 271C of the Act till the petitioner's appeals before the Tribunal for assessment years 2016-17 and 2017-18 are decided. That would, however, not preclude him from proceeding further till the stage of passing the final order. The petitioner shall cooperate with such proceedings.
- ii. It goes without saying that by virtue of the stay granted by the Tribunal and the present further this order passed by this Court, the department would have no difficulty on the issue of limitation in passing the penalty order, If eventually, after the Tribunal disposes of the appeals, the question of passing the order on penalty arises in all or any of the assessment years.
- iii. The petitioner shall cooperate with the prompt disposal of the appeals before the Tribunal.

6. With these directions, the petition is disposed of.

7. Nothing stated in this order would hamper the department in pursuing the department's application filed before the Tribunal on 11.1.2019.

[M.S. SANKLECHA, J.]

[AKIL KURESHI, J]