

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.554 OF 2019

Keva Fragrances Private Limited

.... Petitioner

versus

Assistant Commissioner of
Income-tax-4(2)(2) & Ors.

... Respondents

.....

- Mr.Percy Pardiwala, Senior Counsel, a/w Mr.Atul Jasani,
Advocate for Petitioner.
- Mr.Suresh Kumar, Advocate for Respondent.

**CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.
DATE : 15th MARCH, 2019.**

P.C. :

1. The Petitioner has challenged the orders passed by the Assessing Officer and the Commissioner of Income Tax requiring the Petitioner to deposit 20% of the tax demand arising out of the order of assessment pending Appeal. The Petitioner prays that a complete stay be granted against the recoveries till such Appeal is disposed of by the Appellate Commissioner.

2. Brief facts may be noted at the outset -:

Petitioner is a private limited company. Originally one K.V. Arochem Private Limited was the wholly owned subsidiary of one S.H. Kelkar and Company. This parent company had another subsidiary company Keva Fragrances Private Limited, under scheme of amalgamation envisaging dated 01/05/2015. Said Keva Fragrances Pvt. Ltd. was amalgamated with K.V. Arochem Private Limited. The scheme was sanctioned by the Bombay High Court by an order dated 22/09/2016. K.V. Arochem Pvt. Ltd. was renamed as Keva Fragrances Pvt. Ltd., the Petitioner herein. For the assessment year 2016-17 the Petitioner filed the return of income in November 2016 declaring loss of Rs.14.05 Crores (rounded off). In its return the Petitioner had claimed a refund of a sum of Rs.11,07,05,288/- which comprised of the advance tax of Rs.11 Crores and tax deducted at source of Rs.7,05,288/-.

3. The Assessing Officer took the return of the Petitioner in scrutiny and passed order of assessment under section 143(3)

of the Income Tax Act, 1961 (for short 'the Act') on 29/12/2018. In this order of assessment Assessing Officer had computed the assessee's total income at Rs.299.92 Crores (rounded of). This gave rise to a total demand of Rs.137,95,82,948 crores which includes tax of Rs.103.72 crores and interest of Rs.34.23 crores.

4. The Petitioner filed appeal against the said order of assessment on 09/01/2019. On the same day the Petitioner also filed an application before the Assessing Officer requesting that till such Appeal is disposed of, recovery of tax arising out of the order of assessment may be kept in abeyance. The Assessing Officer passed an order dated 23/01/2019 in which he provided that if the Petitioner deposited 20% of the outstanding demand, remaining recovery would be stayed pending Appeal. The Petitioner thereupon approached Principal Commissioner of Income Tax on 29/01/2019 and made the same request. This application was rejected by the Principal Commissioner by an order dated 15/02/2019, which is impugned in the present Petition.

5. Learned Senior Counsel Mr.Pardiwala, appearing for Petitioner, pointed out that the additions made by the Assessing Officer in the order of assessment relate to 3 separate heads as under;

(i) Addition of sum of Rs.251.18 Crores (rounded of) under section 56 (2)(viib) of the Act.

In this context, learned Counsel argued that the transaction in question would not be covered under the said provision. The Assessing Officer committed a serious error in making additions in terms of section 56(2)(viib) of the Act. Counsel submitted that the Petitioner had followed the share valuation method which was also approved by the High Court by confirming scheme for amalgamation. The Assessing Officer cannot insist that the said method was inappropriate.

(ii) Disallowance of claim of depreciation of goodwill of Rs.62.79 Crores (rounded of).

In this context, the Counsel contended that the depreciation on goodwill upon amalgamation is an accepted principle as held by the Supreme Court in case of *CIT Vs. Simfs Securities Ltd., reported in (2012) 348 ITR 302*. The Assessing Officer therefore committed a serious error in disallowing the claim of depreciation of goodwill.

(iii) Disallowance of set off of brought forward loss of Rs.12.61 Crores (rounded of) and unabsorbed depreciation of Rs.29.07 Crores (rounded of).

In this context learned Counsel for the Petitioner had argued that the Assessing Officer had incorrectly assumed that the amalgamation was done to set off the loss against the profits in order to evade the tax. Even if the amalgamation had taken place in a reverse sequence, there would be no difference in terms of the tax liability of the amalgamated company.

6. On the basis of such contentions, Counsel strenuously urged before us that the Petitioner has strong case in the Appeal

which is pending before the Commissioner. In the meantime, to insist that the Petitioner complies with the general formula of depositing 20% tax pending appeal as provided in the CBDT circulars would be wholly unjust. Learned Counsel pointed out that the Commissioner in his impugned order refused to take into account the question of prima facie case of the assessee, which would be one of the relevant considerations while deciding to impose condition for staying recovery pending Petition.

7. Counsel pointed out that the Petitioner had already paid advance tax of Rs.11 Crores and tax at source Rs.7,05,288/- which the Commissioner in impugned order has totally ignored. Counsel pointed out that the Petitioner has further deposited a sum of Rs.1 Crore with the Department.

8. On the other hand, learned Counsel Mr.Suresh Kumar appearing for the Respondent pointed out that the Assessing Officer has undertaken detailed exercise while passing the order

of assessment. He has given reasons for making disallowances and additions. He pointed out that the Assessing Officer has cited reasons to come to the conclusion that the method adopted by the assessee for valuation was designed to evade the tax and to avoid genuine evaluation of the goodwill. The Assessing Officer had held that the entire arrangement of amalgamation was a colourable devise. Learned Counsel relied on the CBDT circular dated 29/02/16 and 31/07/2017 which lay down general conditions for granting stay of recovery pending Appeals.

9. Having heard learned Counsel for the parties and having perused documents on record, what prima facie emerges from the record is that, the Petitioner undisputedly has an arguable case on the three additions which the Assessing Officer has made. Prima facie case is one of the considerations which will weigh while imposing condition of deposit of disputed tax pending Appeal as held and observed by this Court in case of UTI Mutual Fund Vs. Income Tax Officer in judgment dated

06/03/2013 in Writ Petition (LODG.) No.523 of 2013. We may notice that in the CBDT Circular dated 29/02/2016 while providing that the Assessing Officer shall stay pending Appeal on deposit of 15% of the disputed amount, (which was later on revised to 20% by virtue of the circular in 2017, other conditions remained constant.) The circular also envisaged cases where such requirement can either be increased or decreased depending on facts of the case. Thus requirement of 20% deposit of tax pending the Appeal is not a rigid one and cannot be implemented in all cases, irrespective of relevant facts.

10. Since the Appeal of the Petitioner is pending before the Appellate Commissioner, we would be well advised not to consider the Petitioner's argument on merit of disallowances threadbare. Suffice to reiterate that the Petitioner has a prima facie case on such disputed issues. With this background, we may recall, that the Petitioner had already deposited advance tax of Rs.11 Crores and TDS of Rs.7,05,288/- by the time of filing of the return. The Petitioner has deposited further sum of Rs.1

Crore with the tax department. Impugned order passed by the Commissioner does not take into account the sum of Rs.11,07,05,288/-, perhaps due to oversight since it appears that the Petitioner may not have brought such facts to his notice. Be that as it may, whatsoever direction we may issue for depositing the tax pending appeal, this amount must be taken into consideration.

11. Under the circumstances, the Petition is disposed of with following directions;

- (i) Petitioner shall deposit a further sum of Rs.3 Crores with the Department latest by 30/03/2019. This shall, along with the amounts already deposited by the Petitioner represent roughly 15% of the basic tax demand.
- (ii) Subject to the Petitioner depositing the same, there shall be no further recovery of the tax and interest pursuant to the order of assessment till the Petitioner's Appeal is disposed of by the Commissioner (A).

(iii) The Petitioner shall not cause any delay in disposal of the Appeal. If the department is of the opinion that the Petitioner is deliberately delaying the disposal, it would be open to the department to apply to the Court for vacating the stay.

(iv) Petition is disposed of accordingly.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)