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

WRIT PETITION NO. 2271 OF 2019

General Insurance Corporation of India … Petitioner

V/s.

The Assistant Commissioner of Income Tax
Circle 3(1)(2) and Ors. ... Respondents.

Mr. F.V. Irani i/b. Atul Jasani for the Petitioner.

Mr. Sham Walve a/w. Pritish Chatterjee for the Respondents.

CORAM : M.S. SANKLECHA &
NITIN JAMDAR, JJ.

DATE : 14 OCTOBER 2019.

<u>P.C.</u> :-

This Petition by a Government of India undertaking under Article 226 of the Constitution of India challenges the order dated 12 June 2019 passed by the Respondent No.1 – Assessing Officer and the order dated 13 August 2019 passed by the Respondent No. 2 - Principal Commissioner of Income Tax

(Appeals). Both the impugned orders have been passed on the Petitioner's application for not being treated as an assessee in default under Section 220(6) of the Income Tax Act 1961 (the Act), consequent to the Assessment order dated 30 May 2019 relating to the Assessment Year 2017-18 raising a demand of Rs.3601 crores. The above applications were made by the Petitioner in respect of an appeal from the order dated 30 May 2019 which is pending disposal before the Commissioner of Income Tax (Appeals).

2. By the impugned order dated 12 June 2019, the Respondent No.1 – Assessing Officer allowed the Petitioner's application for not being treated as an assessee in default (stay) on condition of the Petitioner depositing 20% of the disputed demand of Rs.3601 crores i.e. Rs.720 crores immediately. Being aggrieved the Petitioner filed the further representation on 14 June 2019 before the Respondent No.2 – Commissioner of Income Tax under Section 220(6) of the Act. This application for stay was disposed of by the impugned order dated 13 August 2019 of the Respondent No.2 – Commissioner of Income Tax who considered each head comprising of the disputed demand of Rs.3601 crores and allowed the representation on deposit of Rs.439 crores.

3. The impugned order dated 12 June 2019 of the Respondent No.1-Assessing Officer now stands modified by the

impugned order date 13 August 2019 by Respondent No.2 – Commissioner of Income Tax. Thus, the impugned order dated 13 August 2019 being the final order would only be subject of examination in this Petition.

4. At the very outset the Petitioner informed us that the hearing of the Petitioner's appeal for the assessment order dated 13 May 2019 is fixed for hearing on 21 October 2019 before the Commissioner of Income Tax (Appeals). We were therefore inclined to adjourn the hearing of this Petition to 22 October 2019 as the Appeal itself may be disposed of in the near future. This particularly bearing in mind that post 30 May 2019, the Petitioner has been enjoying an effective stay of the demand. However, on instructions this course of action was strongly opposed by Mr. Walve, the learned Counsel for the Respondents. It was in the above view that we took up the Petition for consideration.

5. The impugned order dated 13 August 2019 of the Respondent No.2 – Commissioner of Income Tax dealt with each head of the disputed demand arising from the order dated 30 May 2019 and determined the quantum of deposit to be made in respect of each of them. The same has been tabulated issue-wise (each head of disputed demand) as under :-

Sr. No.	A	B	C	D	E
	Nature of additions/ disallowance	**Amount of addition/ disallowance**	**Issue wise total demand payable**	**% of demand payable as per Pr.CIT order**	**Demand to be paid as per Pr.CIT order**
1.	Deduction for Claims Incurred but Not Reported (IBNR)	6693,30,07,781	27,85,63,49,209	10%	2,78,56,34,921
2.	Exemption u/s 10(38) to profit on sale of Investments	1592,75,81.738	6,62,87,81,429	20%	1,32,57,56,286
3.	Disallowance u/s 36(1)(vii) of provisions for doubtful debts and provision for doubtful loans and Investments.	259,56,44,771	108,02,62,035	20%	21,60,52,407
4.	Disallowance of write-off of diminution in value of investments.	55,64,38,885	23,15,80,149	20%	4,36,16,030
5.	Amortization of Premium on securities	18,51,51,780	7,70,56,938	20%	1,54,11,388
6.	Disallowance u/s 14A r.w. Rule 8D	30,93,37,339	12,87,40,800	0%	
7.	TP Adjustment of Corporate Guarantee Commission	1,99,50,135	83,02,898	20%	16,60,580
	Total Demand to be paid	**8652,71,12,429**	**3601,10,73,457**		**439,08,31,611**

The Petitioner had returned an income of Rs.1495 crores and the Assessing Officer by his order dated 30 May 2019 assessed the Petitioner to a total income of Rs.10148 crores. Thus, an high pitched assessment.

6. It is the case of the Petitioners that so far as Serial Nos. 1 (deduction for claim incurred but not reported), 2 (Exemption under Section 10(38) of the Act) and 5 (Amortization of premium) hereinabove are concerned, the same stands concluded in favour of the Petitioner either by virtue of decision of the Income Tax Appellate Tribunal (Tribunal) or the decision of this Court. Notwithstanding the above, the impugned order dated 13 August 2019 of Respondent No.2 - the Commissioner of Income Tax has directed them to deposit 20% of the disputed amounts under Item Nos.2 and 5 above and 10% of the disputed amount under Item No.1 above. It is further submitted that in the ordinary course by virtue of the Board Circulars/Instructions, a deposit of 20% of the disputed demand by an assessee who has filed the first appeal would be entitled to a stay of the balance demand till the disposal of the Appeal by the First Appellate Authority. In support reliance is placed by the Petitioner upon Instruction No.1914 dated 2 February 1993 as modified by the office memorandums dated 29 February 2016 and dated 31 July 2017 issued by the Central Board for Direct Taxes (CBDT).

7. So far as Item Nos. 3,4 and 7 of the above chart are concerned, the Petitioner only for the purposes of the stay does not dispute the direction to deposit 20% of disputed demand in impugned order dated 13 August 2019 of Respondent No.2 - Commissioner of Income Tax. This of course is what prejudice to its

contention that no amount is payable under the above heads, which is being impugned in the appeal. It is thus submitted that complete stay of demand attributable to Item No.1,2 and 5 be granted and that time be given to pay the amount of 20% payable in respect of Item Nos.3,4 and 7 above.

8. On the other hand, Mr. Walve, learned Counsel appearing for the Respondents supports the impugned order and states that it is very fair and called for no interference. This fairness he submits is evident from the fact so far as Item No.6 of the above chart i.e. disallowance of Section 14A of the Act is concerned, the Commissioner of Income Tax has directed a complete stay in view of the fact the issue stood covered in favour of the Petitioner by virtue of Tribunal decisions in the Petitioner's own case for the earlier Assessment Years 2006-07 to 2011-12. So far as other claims are concerned, Mr. Walve invited our attention to the impugned order so far as Item Nos.1,2 and 5 are concerned. On the reading of the same, it is submitted that direction of deposit of 10% and 20% is reasonable as there are decisions contrary to this Court and the Tribunal (Mumbai Bench) being relied upon by the Petitioner for grant of stay. In the above circumstances, he submits that there is no warrant to interfere with the impugned order dated 13 August 2019 of Respondent No.2 – Commissioner of Income Tax. Thus he submits that the Petition be dismissed.

9. Before dealing with the rival submissions it would be useful to set out the parameters to be borne in mind while disposing of stay application as laid down by this Court. We refer to the following extract of the decision of this Court in Mumbai Metropolitan Region Development Authority v/s. Deputy Director of Income Tax (WP(L) No. 2348 of 2014) rendered on 29 October 2014 as under :-

> *"11. We have today, disposed of another Petition bearing No. 2542 of 2014 filed by the Slum Rehabilitation Authority and set out the parameters in deciding stay application as laid down by this Court in KEC International Limited v/s. B. R. Balakrishnan 251 ITR 158; UTI Mutual Funds v/s. ITO 345 ITR 71 and UTI Mutual Fund v/s. ITO in W.P.(L) No.523 of 2013 rendered on 6 th March 2013 which can for the purposes of disposing an application of stay can be summarized as under:*
>
> *(a) The order on stay application must briefly set out the issue and the submission of the assessee/ applicant in support of the stay;*
>
> *(b) In cases where the assessed income under the impugned order far exceeds returned income so as to make the demand arbitrary or the issue arising for consideration stands concluded by a decision of an higher forum or where the order appealed against is in breach of Natural Justice or the view taken in the order being appealed against is contrary to what has been held in the preceding previous years (even if issue pending before higher forum) without there being a material change in facts or law, stay should normally be granted;*

(c) If not, whether looking to the questions involved in appeal, keeping in view the likelihood of success in appeal what part of the demand the whole(in case issue covered against the applicant by a decision of higher forum) or part of it and must be justified by short reasons in the order disposing of the stay application;

(c) Lack of financial hardship would not be a sole ground to direct deposit/payment of the demands if the assessee/applicant has a strong arguable case on merits;

(d) In cases where the assessee/applicant relies upon financial difficulties, the authority concerned should briefly indicate whether the assessee is financially sound and viable to deposit the amount or the apprehension of the revenue of non recovery later. Thus warranting deposit. This of course, if the case is not otherwise sustainable on merits;

(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) In exercising the powers of stay, the Authority should always bear in mind that as a quasi judicial authority it is vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the assessing officer has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order; the

> *application for stay must be considered from all its facets and the order should be passed, balancing the interest of the assessee with the protection of the Revenue.*
>
> *The above guidelines are only illustrative and the authority concerned would have to have exercise his discretion in matters of stay on the facts of the case before him. Keeping in view of the above broad parameters we shall now examine whether the authorities have properly exercised their jurisdiction."*

Besides the above, we shall also keep in mind the Circulars/Instructions issued by the CBDT from time to time, directing the Officers of Revenue to the manner in which stay applications are to be disposed of. These circulars/instructions are binding upon the Officers of the Revenue. Reference will be made to the appropriate Circulars/Instructions while considering the submissions.

10. We shall now examine the impugned order dated 13 August 2019 of the Respondent No.2 – Commissioner of Income Tax bearing in mind the yardstick laid down in the above decisions and the Circulars/Instructions of CBDT in the context of the submissions made by the parties. We are also taking into account the fact that the appeal before the Commissioner of Income Tax (Appeals) is ripe for hearing and is in fact fixed on 21 October 2019. Thus the appeal itself is in all likelihood will be decided in the near future.

11. So far as Issue No.1 above is concerned, the Petitioner submits that same stands concluded in its favour by virtue of the decision dated 11 October 2017of the Mumbai Bench of the Tribunal in *DCIT Circle 3(1)(2) vs. ECGC IT No. 7657/Mum/2014* and the Kolkata Bench of the Tribunal in the case of *DCIT v/s. Mutual Insurance Co. Ltd. 2016 (72) Taxmann.Com 116* in favour of the Petitioner. However, the impugned order still directed a deposit of 10% of disputed demand on this Court in view of the decision of Chennai Bench of the Tribunal in the case of *United India Insurance v/s. JCIT (2018) 97 Taxmann.com 466*. We note that the Chennai Bench decision of the Tribunal has ignored the co-ordinate bench decision of Mumbai and Kolkata benches of the Tribunal. Therefore, prima facie per incurium. In any case the CBDT Circular No. 530 dated 6 March 1989 states that stay of demand be granted where there are conflicting decisions of the High Court. This principle can be extended to the conflicting decisions of the different benches of the Tribunal. Thus, in the above facts the complete stay of the demand on the above head i.e. Item No.1 of the above chart was warranted in the Petitioner's favour.

12. So far as Issue No.2 of the above table is concerned, it is the case of the Petitioner that the issue is covered by the decision of this Court in *PCIT v/s. New India Assurance Co. Ltd. 91 Taxmann.Com 433.* The Revenue contended that the

Commissioner of Income Tax (Appeals) for the earlier Assessment Years i.e. A.Y. 2006-07 to 2011-12 had taken a view adverse to the Petitioner and thus follows it. However, we are informed that on further Appeal to the Tribunal, the demand attributable on the aforesaid head had been stayed on partial deposit and the Appeal is now fixed for hearing on 11 December 2019. However, we note the fact that while the impugned order of Commissioner of Income Tax directed the Petitioner to pay 20% on this issue, it has not indicated the reason it has chosen to follow the decision of the Commissioner of Income Tax (Appeals) for the earlier Assessment Year in preference to the decision of this Court in *New India Assurance* (Supra). This when it is the Petitioner's contention that the amendment made in Rule 5 of the 1st Schedule to the Act will not affect the claim for deduction under Section 10(38) of the Act. No prima facie view on this is taken by the impugned order. Besides the decision of jurisdictional High Court is binding upon the Authority. Therefore, in the above view, no deposit should have been directed on this head of disputed tax. An unconditional stay of this demand at Item No.2 of the chart in the present fact was warranted.

13. So far as Issue No.5 in the above chart is concerned, we find that the impugned order dated 13 August 2019, does record the Petitioner's submission that this issue stands concluded in its favour by the decision of the Mumbai Bench of the Tribunal in the case of

Tata AIG General Insurance Co. Ltd. v/s. ITA (ITA No. 2543 of 2009). Nevertheless the aforesaid binding decision is ignored on the ground that the Chennai Bench of the Tribunal in *Chennai United India Insurance v/s. JCIT* has taken a different view. There is no discussion as to why the Chennai Bench decision of the Tribunal is to be preferred in the Mumbai Bench decision of the Tribunal. In this case also CBDT Circular No. 530 dated 6 March 1989 while stating that a stay of demand be granted if there are conflicting views of the High Court. This in our view could be extended to conflicting view of different benches of the Tribunal. In the above view, the impugned order directing the deposit of 20% on this head was also not justified. An unconditional stay of this demand at Item No.5 of the chart, in the present facts is warranted.

14. In the above view, we modify the impugned order dated 13 August 2019 of Respondent No.2 – Commissioner of Income Tax to the extent that there shall be a complete stay of the demands made on Item at Serial Nos. 1,2 and 5 of the chart hereinabove. The Petitioner will deposit the balance amount as directed by the Commissioner of Income Tax (Appeals) of Rs.26.40 crores with the Respondents within a period of four weeks from today.

15. It is made clear that one of the factors which weighed with us in passing this order was the hearing of the appeal is now

fixed before the Commissioner of Income Tax (Appeals) on 21 October 2019 and the Petitioner's undertaking to us that it will co-operate with the Commissioner of Income Tax (Appeals) in early disposal of the appeal.

16. It is made clear that observations made herein are only in the context of the order of stay passed under Section 220(6) of the Act. Our observations are only prima facie view for the limited purpose of disposal of the stay application. It would not have impact/influence on the Commissioner of Income Tax (Appeals) while considering the Petitioner's appeal on merits for the order dated 30 May 2019 of the Assessing Officer. The Commissioner of Income Tax (Appeals) will dispose of the appeal on its own merits without in any manner being influenced by any observation in this order.

17. The Petition is disposed of in the above terms.

NITIN JAMDAR, J. **M.S. SANKLECHA, J.**