IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 08.03.2019

CORAM :

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.4310 of 2019
and
W.M.P.Nos.4847, 4849 to 4851 of 2019

Oasys Cybernetics Private Limited,
Represented by its authorised signatory,
Mr.E.Venkatakrishnaiah,
Having office at No.99, M.N. Complex,
II Floor, Greams Road, Chennai 600 006. ... Petitioner

Vs.

Assistant Commissioner of Income Tax,
Corporate Circle 5(1),
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034. ... Respondent

PRAYER:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the respondent contained in its order bearing reference No.ACIT/Corp.Cir 5-(1)/2018-19, dated 6.2.2019 with respect to PAN: AACCO2848M in respect of AY 2016-17 and quash the same as arbitrary, illegal and unjust and to consequently direct the respondents on any of their subordinates, agents, representatives or any other person claiming under/through the Respondents to refrain from in any manner seeking to enforce and/or initiate recovery proceedings pursuant to the Respondent's Notice of Demand bearing No.ITBA/AST/S/156/2018-19/1014633458(1) dated 28.12.2018 for PAN:AACCO2848M in respect of AY 2016-17.

For Petitioner : Mr.Suhrith Parthasarathy

For Respondent : Mr.Hema Muralikrishnan

ORDER

This Writ Petition falls within a short compass. The petitioner challenges an order dated 06.02.2019, seeking a Writ of Certiorarified Mandamus quashing the aforesaid order and a direction to the respondent to refrain from initiating recovery proceedings, pursuant to notice of demand dated 28.12.2018 for the assessment year 2016-17.

2.This Court had on 14.02.2019 noted prima facie that the impugned order was cryptic and non speaking order as follows:

> 'Ms.Hema Muralikrishnan, learned Senior Standing counsel takes notice for the respondent and seeks two (2) weeks time to file a counter with a specific reference to the Circulars issued by the Income Tax Department in relation to the stay of demand.
>
> 2.The petitioner has filed a detailed stay petition in terms of section 220 (6) of the Income Tax Act, 1961 (in short 'Act') dated 11.01.2019 before the assessing officer. In response, the impugned order dated 06.02.2019 states as follows:
>
> > 'Your application for stay of demand has been perused but it cannot be considered. You are directed to remit 20% of the disputed demand on or before 11/02/2019, failing which collection will be enforced as per the provisions on the Income Tax Act, 1961'
>
> 3.I am of the view that the manner of disposal of the Stay Petition leaves much to be desired insofar as the order is wholly non-speaking.
>
> 4.Accordingly, there shall be an order of interim stay as prayed for, for a period of two (2) weeks.
>
> 5.List on 04.03.2019.'

An interim stay for two weeks was granted and at request of the departmental counsel, the matter was adjourned to 04.03.2019 to file a counter.

3.When the matter is called for hearing today, the learned standing counsel for the revenue states, upon instruction that the matter may be remitted back to the Assessing officer for hearing de novo in the light of order dated 01.03.2019, passed by this Court in WP.No.5425 of 2019. The order is extracted as follows:

> '5. This Court had occasion to consider challenge to orders in stay applications that cryptic and non speaking relying wholly on the circular issued by Central Board of Direct Taxes (CBDT). I have, in the aforesaid order, concluded that circulars / instructions issued by the CBDT only set out a series of guidelines to the Assessing Officers in the matter of grant of stay, holding in the case of Mrs.Kannammal V. Income Tax Officer (W.P.No.3849 of 2019 dated 13.02.2019) as follows:
>
> '7. The parameters to be taken into account in considering the grant of stay of disputed demand are well settled - the existence of . 'Financial stringency' would include within its ambit the question of 'irreparable injury' and 'undue hardship' as well. It is only upon an application of the three factors as aforesaid that the assessing officer can exercise discretion for the grant or rejection, wholly or in part, of a request for stay of disputed demand.
>
> 8. In addition, periodic Instructions/Circulars in regard to the manner of adjudication of stay petitions are issued by the Central Board of Direct Taxes (CBDT) for the guidance of the Departmental authorities. The one oft-quoted by the assessee is Office Memorandum F.No.1/6/69/-ITCC, dated 21.08.1969 that states as follows:
>
> '1. One of the points that came up for consideration in the 8th Meeting of the Informal Consultative Committee was that income-tax assessments were often arbitrarily pitched at higher figures and that the collection of disputed demand as a result thereof was also not stayed in spite of the specific provision in the matter in s. 220(6) of the IT Act, 1961.
>
> 2. The then Deputy Prime Minister had observed as under :
>
> ".........Where the income determined on assessment was substantially higher than the

returned income, say twice the latter amount or more, the collection of the tax in dispute should be held in abeyance till the decision on the appeal provided there were no lapses on the part of the assessees."

3. The Board desire that the above observations may be brought to the notice of all the Income-tax Officers working under you and the powers of stay of recovery in such cases up to the stage of first appeal may be exercised by the Inspecting Assistant Commissioner/Commissioner of Income-tax.'

9. Thereafter, Instruction No.1914 was issued by the CBDT on 21.03.1996 and states as follows:

1. Recovery of outstanding tax demands
[Instruction No. 1914 F. No. 404/72/93 ITCC dated 2-12-1993 from CBDT]

The Board has felt the need for a comprehensive instruction on the subject of recovery of tax demand in order to streamline recovery procedures. This instruction is accordingly being issued in supersession of all earlier instructions on the subject and reiterates the existing Circulars on the subject.

2. The Board is of the view that, as a matter of principle, every demand should be recovered as soon as it becomes due. Demand may be kept in abeyance for valid reasons only in accordance with the guidelines given below :

A. Responsibility:

i. It shall be the responsibility of the Assessing Officer and the TRO to collect every demand that has been raised, except the following: (a) Demand which has not fallen due; (b) Demand which has been stayed by a Court or ITAT or Settlement Commission;(c) Demand for which a proper proposal for write-off has been submitted;(d) Demand stayed in accordance with paras B & C below.

ii. Where demand in respect of which a recovery certificate has been issued or a statement has been drawn, the primary responsibility for the collection of tax shall rest with the TRO.

iii. It would be the responsibility of the supervisory authorities to ensure that the Assessing Officers and the TROs take all such measures as are necessary to collect the demand. It must be understood that mere issue of a show cause notice with no follow-up is not to be regarded as adequate effort to recover taxes.

B. Stay Petitions:

i. Stay petitions filed with the Assessing Officers must be disposed of within two weeks of the filing of petition by the tax- payer. The assessee must be intimated of the decision without delay.

ii. Where stay petitions are made to the authorities higher than the Assessing Officer (DC/CIT/CC), it is the responsibility of the higher authorities to dispose of the petitions without any delay, and in any event within two weeks of the receipt of the petition. Such a decision should be communicated to the assessee and the Assessing Officer immediately.

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.

C. Guidelines for staying demand:

i. A demand will be stayed only if there are valid reasons for doing so. Mere filing an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. A few illustrative situations where stay could be granted are:

It is clarified that in these situations also, stay may be granted only in respect of the amount attributable to such disputed points.

Further where it is subsequently found that the assessee has not co-operated in the early disposal of appeal or where a subsequent pronouncement by a higher appellate authority or court alters the above situation, the stay order may be reviewed and modified. The above illustrations are, of course, not exhaustive.

ii. In granting stay, the Assessing Officer may impose such conditions as he may think fit. Thus he may — a. require the assessee to offer suitable security to safeguard the interest of revenue; b. require the assessee to pay towards the disputed taxes a reasonable amount in lump sum or in instalments; c. require an undertaking from the assessee that he will co-operate in the early disposal of appeal failing which the stay order will be cancelled. d. reserve the right to review the order passed after expiry of a reasonable period, say up to 6 months, or if the assessee has not co-operated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations; e. reserve a right to adjust refunds arising, if any, against the demand.

iii. Payment by instalments may be liberally allowed so as to collect the entire demand within a reasonable period not exceeding 18 months.

iv. Since the phrase "stay of demand" does not occur in section 220(6) of the Income-tax Act, the Assessing Officer should always use in any order passed under section 220(6) [or under section 220(3) or section 220(7)], the expression that occurs in the section viz., that he agrees to treat the assessee as not being default in respect of the amount specified, subject to such conditions as he deems fit to impose.

v. While considering an application under section 220(6), the Assessing Officer should consider all relevant factors having a bearing on the demand raised and communicate his decision in the form of a speaking order.

D. Miscellaneous:

i. Even where recovery of demand has been stayed, the Assessing Officer will continue to review the situation to ensure that the conditions imposed are fulfilled by the assessee failing which the stay order would need to be withdrawn.

ii. Where the assessee seeks stay of demand from the Tribunal, it should be strongly opposed. If the assessee presses his application, the CIT should direct the departmental representative to request that the appeal be posted within a month so that Tribunal's order on the appeal can be known within two months.

iii. Appeal effects will have to be given within 2 weeks from the receipt of the appellate order. Similarly, rectification application should be decided within 2 weeks of the receipt t hereof. Instances where there is undue delay in giving effect to appellate orders, or in deciding rectification applications, should be dealt with very strictly by the CCITs/CITs.

3. The Board desires that appropriate action is taken in the matter of recovery in accordance with the above procedure. The Assessing Officer or the TRO, as the case may be, and his immediate superior officer shall be held responsible for ensuring compliance with these instructions.

4. This procedure would apply mutatis mutandis to demands created under other Direct Taxes enactments also.'

10. Instruction 1914 was partially modified by Office Memorandum dated 29.02.2016 taking into account the fact that Assessing Officers insisted on payment of significant portions of the disputed demand prior to grant of stay resulting in extreme hardship for tax payers. Thus, in order to streamline the grant of stay and standardize the procedure, modified guidelines were issued which are as follows:

'.......

(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 pars (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.'

11. Instruction 1914 was further modified by Office Memorandum bearing number F.No.404/72/93 - ITCC dated 31.07 2017 as follows:

'OFFICE MEMORANDUM F. No. 404/72/93-ITCC dated 31.07.2017

Subject: Partial modification of Instruction No. 1914 dated 21.3.1996 to provide for guidelines for stay of demand at the first appeal stage.
Reference: Board's O.M. of even number dated 29.2.2016

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. N0.404/72/93-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 falls in the category discussed in para (B) thereunder. Similar references to the standard rate of 15% have also been made in succeeding paragraphs therein.

2. The matter has been reviewed by the Board in the light of feedback received from field authorities. In view of the Board's efforts 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.

These modifications may be immediately brought to the notice of all officers working in your jurisdiction for proper compliance.'

12. The Circulars and Instructions as extracted above are in the nature of guidelines issued to assist the assessing authorities in the matter of grant of stay and cannot substitute or override the basic tenets to be followed in the consideration and disposal of stay petitions. The existence of a prima facie case for which some illustrations have been provided in the Circulars themselves, the financial stringency faced by an assessee and the balance of

convenience in the matter constitute the 'trinity', so to say, and are indispensable in consideration of a stay petition by the authority. The Board has, while stating generally that the assessee shall be called upon to remit 20% of the disputed demand, granted ample discretion to the authority to either increase or decrease the quantum demanded based on the three vital factors to be taken into consideration.

13. In the present case, the assessing officer has merely rejected the petition by way of a non-speaking order reading as follows:

'Kindly refer to the above. This is to inform you that mere filing of appeal against the said order is not a ground for stay of the demand. Hence your request for stay of demand is rejected and you are requested to pay the demand immediately. Notice u/s.221(1) of the Income Tax Act, 1961 is enclosed herewith.'

14. The disposal of the request for stay by the petitioner leaves much to be desired. I am of the categoric view that the Assessing Officer ought to have taken note of the conditions precedent for the grant of stay as well as the Circulars issued by the CBDT and passed a speaking order. Of course the petition seeking stay filed by the petitioner is itself cryptic. However, as noted by the Supreme Court in the case of Commissioner of Income tax vs Mahindra Mills, ((2008) 296 ITR 85 (Mad)) in the context of grant of depreciation, the Circular of the Central Board of Revenue (No. 14 (SL- 35) of 1955 dated April 11, 1955) requires the officers of the department 'to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs. .... Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other......'. Thus, notwithstanding that the assessee may not have

specifically invoked the three parameters for the grant of stay, it is incumbent upon the assessing officer to examine the existence of a prima facie case as well as call upon the assessee to demonstrate financial stringency, if any and arrive at the balance of convenience in the matter. '

6. My observations and conclusions in the above order would apply equally to the facts and circumstances of the present case and may be read as part and parcel of this order.

7. In the light the above, I am inclined to set aside the impugned order dated 07.02.2019, as being mechanical and passed without application of mind.

8. In the light of the above, the Writ Petition is disposed in the following terms:

i) The petitioner will appear before the Principal Commissioner of Income Tax-1, the first respondent herein, on 08.03.2019 at 02:30 pm along with a stay petition covering the three (3) aspects as referred to aforesaid.

ii) After hearing the petitioner, the Principal Commissioner of Income Tax shall pass a reasoned and speaking order in accordance with law and in accordance with the circulars issued by Central Board of Direct Tax (CBDT) within a period of two (2) weeks from the date of conclusion of the personal hearing i.e. on or before 22.03.2019.

iii) Till the disposal of stay application, status quo, as of today, shall be maintained with regard to recovery.'

4. In the light of my observations in the matter as extracted above, that are equally applicable to the facts and circumstances of the present case, the petitioner is directed to appear before the Assessing authority on 15.03.2019 at 2.30 pm. Appropriate orders on the application for stay shall be passed by the assessing authority after hearing the petitioner and considering the materials placed by the petitioner in support of the

request for stay, within a period of two weeks thereafter (i.e.,) on or before 29.03.2019. There shall be an order of interim stay of recovery, till then.

5. The Writ Petition is disposed of in the above terms. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

sai

To

The Assistant Commissioner of Income Tax,
Corporate Circle 5(1),
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034.

+1cc to Mr.Arun Karthik Mohan , Advocate SR.No. 22267
+1cc to Mr.Hema Muralikrishnan , Advocate SR.No. 22736

W.P. No.4310 of 2019

A.SK(28/03/2019)