

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.03.2019

CORAM

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

Writ Petition No.5923 of 2019
& WMP No.6752 of 2019

- 1 Uthangarai Sri Vidya Mandir
Educational and Social Welfare Trust,
Represented by V.Chandrasekaran,
The Correspondent / Managing Trustee
No.115 Ramamurthy Nagar,
Uthangarai Post and Taluk, Krishnagiri District
... Petitioner
- vs.
- 1 The Assistant Commissioner of Income-tax, Circle-1, Hosur
2 The Principal Commissioner of Income-Tax,
Salem
... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the first respondent dated 13.02.2019 in F.No.AADTS6092D/HSR/2018-19 for the assessment years 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18 and to quash the order of the 1st respondent under Section 220(6) of the Income Tax Act 1961, pending disposal of the writ petition.

For Petitioner : Mr. P.H.Aravind Pandian, Sr. Counsel,
for, Mr.T.Vasudevan

For Respondents : Mr. A.P.Srinivas,
Sr. Standing Counsel.

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O R D E R

The impugned order dated 13.02.2019 has been passed under Section 220 (6) of the Income Tax Act, 1961 (in short "the Act"), and calls upon the petitioner to remit 20% of the disputed demand of Income tax as a pre-condition for the grant of stay of recovery.

2. Heard Mr.P.H.Aravind Pandian, learned Senior Counsel, appearing for Mr.Vasudevan, learned counsel appearing for the petitioner and Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the respondents.

3. The petitioner is a Trust that manages a school, affiliated to the State Matriculation Board. Assessments under Section 153A of the Act were made on 26.12.2018, pursuant to search and seizure action under Section 132 of the Act conducted on 25.04.2016. Several assets were seized including cash and gold coins as well as rough note books. Appeals have been filed before the Commissioner of Income Tax (Appeals), challenging the aforesaid assessments, dated 26.12.2018, and the same are pending.

4. In the meanwhile, the petitioner also filed an application dated 24.01.2019 seeking a stay of recovery of the disputed demands in response to which the first respondent has passed an order dated 13.02.2019, now impugned before me.

5. Mr.Pandian submits that the petitioner has a prima facie case in the appeals and does not have the liquidity to make the payment of the amount demanded, being 20% of the total demand, amounting to a sum of Rs.11,68,24,189/-. He thus prays that the recovery be kept in abeyance, till the appeals are disposed of by the Commissioner of Income Tax (Appeals). He also points out that the petitioner has remitted a sum of Rs.1,00,00,000/- towards the disputed demand of a sum of Rs.58,41,20,946/-.

6. Mr.Srinivas, for his part, submits that the impugned order is a discretionary one that does not warrant any interference. He draws attention to the fact that the search had yielded the seizure of valuables, such as cash and gold coins and such assets have been brought to tax as unaccounted income in the hands of the petitioner. He urges that the writ petition is liable to be dismissed and the petitioner directed to remit 20% of the disputed demand as per the impugned order.

7. Since the matter before me turns upon a limited point, I take the writ petition up for disposal even at the stage of admission, by express consent of the learned counsel appearing for both sides.

8. Normally this Court would not interfere with the exercise of discretion by the assessing officer in the grant of stay of recovery, unless such exercise is shown to be perverse or excessive. The Assessing Officer, in exercise of jurisdiction under section 220(6) of the Act, has noted the following in the impugned order:-

'In the above case, warrant of authorization of search u/s 132 was obtained from Director of Income Tax (Inv.), Tamilnadu & Puducherry and the search was conducted on 25/04/2016. During the course of the search operations, cash of Rs.2,75 crores, gold coins, and books of account were found and seized. Consequently, assessments u/s.153A were concluded in the above case for A.Y.s 2011-12 to 2017-18 wherein additions were made under various heads raising a demand of Rs.58,41,20,946/-. The aforesaid assessee is a Trust not registered u/s. 12AA and running educational institution / hostel has filed application for stay of demand for A.Y.s 2011-12 to 2017-18 requesting to stay entire demand of Rs.58,41,20,946/- as appeal filed by the assessee is pending before the CIT (Appeals), Salem. The major issues on which such undisclosed income was arrived are discussed as under:-

i. Undisclosed Bank Deposits:- During the search proceedings, the assessee was asked to furnish receipts and payments accounts. It was noticed that the total credits by way of cash/transfer in various bank accounts maintained by the assessee was more than the total receipts as per receipts & payments account submitted. When the assessee was asked to explain sources for such bank deposits, no proper explanation was furnished during search proceedings and even during assessment proceedings, the assessee failed to furnish details of fixed deposits made by assessee in State Bank of India and also did not furnish details of F.D.s made with the return of income. In these circumstances, excess of credits in bank accounts as compared to receipts shown in income & expenditure account have been brought to tax.

ii. Excess Salary claimed in books:- During the course of search, details of salaries paid to teaching and non teaching staff written in books were seized but, as per the returns of income filed, the claim made was more than the expenses noted in seized records. Further, the average salary paid to non-teaching staff was almost equal to teaching staff and also assessee failed to furnish details of TDS made on salaries paid. In these circumstances, salary claimed in excess of material found in seized materials were disallowed.

iii. Expenses claimed in seized materials:- During the course of search, certain books maintained by correspondent of the Trust containing payments made to various persons were seized. When the assessee was asked to explain the entries made in those registers, proper explanation for sources of such payments made were not furnished during assessment proceedings, which resulted in disallowance u/s.69C of I.T.Act.

iv. Annual Day and Food Expenses:- In the Income & Expenditure Account, assessee had claimed huge expenses under this head and when the assessee was asked to furnish details in this regard, it was claimed that assessee had incurred major expenditure on account of giving gold medals to students and also food expenses to students and their parents, but assessee could not produce vouchers in support of the claims made, which resulted in addition under this head.

v. Depreciation claimed on fixed assets:- In the returns of income filed, assessee has claimed depreciation on fixed assets. As per Explanation-5 to Sec. 32 (1) introduced w.e.f. 1.4.2002, depreciation on fixed assets has to be allowed whether it is claimed or not. In the present case, the assessee had not claimed depreciation on fixed assets during earlier years and hence, the value of fixed assets right from A.Y.2012-13 was reduced by allowing deemed depreciation every year and opening WDV was reduced. Consequently, major amount of depreciation claimed was disallowed. Further, the assessee had claimed major additions to fixed assets but, did not produce invoices for purchase of assets in support of claim made in the return. Consequently, depreciation on such additions to fixed assets were also disallowed.

vi. Claim of Adjustment under Sections 10 & 11: In the computation of total income, assessee has claimed deduction on account of adjustment u/s.10 & 11. Since the assessee is not registered u/s.12AA of I.T.Act, such claim made was not admissible and hence same was disallowed.

vii. Seizure of cash during search:- During the course of search, cash of Rs.2.75 crores, gold coins of 245 gms were seized and the assessee had offered said cash partly in A.Y.2016-17 and 2017-18. But, as per Sec.69A of I.T.Act, unaccounted cash found has to be taxed in the previous year in which assessee was found to be owner of such cash and accordingly, entire cash seized was assessed to tax in A.Y.2017-

18. Further, tax on such undisclosed cash and gold coins were taxed at 75% u/s.115BBE since addition was made u/s.69A of I.T.Act.

2. In the stay petition filed by the assessee, it is contended that high pitched assessment is made in its case, but as could be seen from the above, the additions have been made under each head since proper evidences were not furnished during assessment proceedings in support of the claims made. The assessee is not eligible for exemption u/s.11 since, it is not registered u/s.12AA but, had not filed the returns of income after paying due taxes before due date. As could be seen from the above, all the additions in this case are made on account of provisions of I.T.Act and facts of the case as noticed during search proceedings and also as the assessee did not produce proper evidences during assessment proceedings.

3. Now, coming to the claim made by the assessee that it is not in position to pay the demand, as it will constrain the financial position of the trust, the assessee has not furnished details of fixed deposits / balances in bank accounts held by it in order to examine the claim made by it.'

9. So far so good. The officer is, while adjudicating upon a request for stay of recovery, required to test the existence of a prima facie case, financial stringency and the balance of convenience in the matter and the assessing officer has, in this matter, proceeded to do just so. The operative portion of the Officers' order is as extracted below:-

'The assessee's kind attention is also invited to CBDT Memorandum in F.No.404/72/93-ITCC dt.29.2.2016 modifying CBDT Instruction No.1914 dt.9.2.2016, all earlier Instructions in regard to stay of demand have been superseded. As per this Instruction, demand can be stayed only after coming to the conclusion that assessee has fair chances in appeal filed before CIT (A) and mere filing of appeal cannot be a ground for stay of demand. Further, as per O.M. dated 31.7.2017, the demand can be stayed by the A.O. only after payment of 20% of demand but, in the present case stay petition has been filed without payment of 20% of demand. In these circumstances, following order is passed on stay application filed by the assessee:

i. The assessee is directed to pay 20% of total demand raised for A.Y.s 2011-12 to 2017-18 i.e. Rs.11,68,24,189/- on or before 18.2.2019 and produce copy of the challan to this office by 18.2.2019, which is the pre-condition for applying stay of

demand as per CBDT instructions cited.

ii. On payment of said amount of Rs.11,68,24,189/- assessee will be treated as not in default in respect of balance demand of Rs.46,72,96,757/- till disposal of appeal or for a period of 6 months whichever expires earlier in accordance with provisions of Sec.220 (6) of I.T.Act. In case, the assessee fails to make the payment of Rs.11,68,24,189/- by 18.2.2019, assessee will be treated as in default for payment of entire demand raised in this case for A.Y.s 2011-12 to 2017-18 i.e., Rs.58,41,20,946/- and coercive steps will be pursued against the assessee.

iii. The assessee shall cooperate in early disposal of appeal failing which the stay order will be cancelled. The right to adjust refunds if any arising against the demands due vests with the Department to the extent of the amount required for granting stay subject to provisions of Sec.245 of i.T.Act."

10. The Officer, 1st respondent in the writ petition, proceeds on the basis that the payment of 20% of the tax, as per Office Instruction dated 31.07.2017, is a pre-condition for consideration of stay of demand and therein lies the flaw in the order. I have, in my order, in the case of Mrs.Kannammal V. Income Tax Officer (W.P.No.3849 of 2019 dated 13.02.2019) discussed various Circulars/Instructions issued by the Income Tax Department on the matter of grant of stay, concluding that the grant of stay is conditional upon the satisfaction of three primary aspects, i.e., the existence of a prima facie case, financial stringency demonstrated and established by the Assessee and the balance of convenience in the matter. Thus, the Office Instruction directing the Assessing Authority to call upon the assessee to remit 20% of the disputed tax, is, at best, only a thumb rule and not a mandatory pre-condition, cast in stone. I extract below, the operative portion of my order as aforesaid, for sake of clarity.

'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 assesseees."

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 thereof. 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. 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 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 categorical 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 assessee 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. '

11. In the present case, the officer proceeds to mechanically call upon the petitioner to remit 20% of the demand without examining the appropriateness of the direction to the facts and circumstances of the petitioners' case. For this sole reason, I am constrained to set-aside the impugned order.

12. The petitioner will appear before the first respondent on 13.03.2019 with all materials in support of its request for stay and the Assessing Officer shall consider the petitioners' request, afford an opportunity of personal hearing and pass a reasoned speaking order on the request for stay. Learned counsel for the petitioner states that the petitioner is in a position

to offer security to protect the interests of the Revenue, pending appeal. Let the same be placed before the officer for his consideration. I hasten to add that the Assessing Officer is at liberty to pass such orders as he may think fit in the facts and circumstances on the present case, in accordance with law and bearing in mind the prevailing Circulars/Instructions issued by the CBDT and nothing contained in this order shall stand in the way of such adjudication. Such order shall be passed by the Assessing Officer on or before 22.03.2019. There shall be an order of status-quo as regards recovery, till then.

13. With the above observations, the impugned order is set-aside. The petitioner is also given liberty to approach the Commissioner of Income Tax (Appeals), seeking expeditious disposal of the Appeals filed on 24.01.2019, in accordance with law.

14. The writ petition is disposed of in the above terms. Consequently, the connected WMP is closed. There shall be no order as to costs.

Sd/-
Assistant Registrar (CS-VIII)

//True copy//

Sub Assistant Registrar

srk

To

1 The Assistant Commissioner of Income-tax Circle-1, Hosur

2 The Principal Commissioner of Income-Tax, Salem

+1cc to Mr.AP.Srinivas, Advocate SR.No.21392

Writ Petition No.5923 of 2019
& WMP No.6752 of 2019

GMV (08/03/2019)

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