

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.03.2019

Coram

The Honourable DR.JUSTICE ANITA SUMANTH

WP. No.9103 of 2019
& W.P.No.9623 of 2019

M/s. K3 Management & Edu Services P Ltd.
Old No.33, New No.61
Car Street, Anthiyur
Erode-638501
Pan:AAFCK 7114D

....Petitioner

/Vs/

1. The Principal Commissioner of Income Tax
Income Tax Department,
63, Race Course Road
Coimbatore
2. The Commissioner of Income Tax (Appeals)-3
Income Tax Department,
63, Race Course Road
Coimbatore
3. The Additional Commissioner of Income Tax
Income Tax Department,
No.15, Gandhiji Road
Erode
- 4 The Assistant Commissioner of Income Tax
Circle-2
Income Tax Department,
No.15, Gandhiji Road
Erode

...Respondents

P R A Y E R: WRIT PETITION under Article 226 of the Constitution in the nature of Certiorarified Mandamus calling for the records of the 4th respondent to quash the impugned order dated 12.03.2019 in PAN:AAFCK7114D relating to the assessment year 2016-17 and direct the 4th respondent not to proceed further in the matter of recovery of the disputed arrears pending disposal of the First Appeal before the 2nd respondent.

For Petitioner : Mr.A.S.Sriraman

For Respondents : Mr.A.N.R.Jayapratap

O R D E R

Heard Mr.Sriraman, learned counsel for the petitioner and Mr.A.N.R.Jayapratap, learned counsel for the respondents. By consent expressed by both learned counsel, the writ petition is taken up for disposal at admission stage itself.

2. The petitioner assails an order passed under Section 220 (6) of the Income Tax Act, 1961 (in short the 'Act') in respect of the assessment year 2016-17. The petitioner is an assessee on the file of the 4th respondent. An assessment was made on the petitioner, in respect of assessment year 2016-17, as per which a demand was made for a sum of Rs.2,09,00,205/-. The petitioner states that an appeal has been filed before the Commissioner of Income Tax (Appeals) III (CIT(A)) challenging the same.

3. An interim petition for stay was filed before the 4th respondent. The stay petition raises a prima facie case as well as illustrates the financial stringency faced by the petitioner and specifically prays for a personal hearing prior to adjudication of the same. Thereafter, the Assessing officer appears to have requested the petitioner to provide a copy of the grounds of appeal which were enclosed and forwarded to the Assessing Officer along with an email dated 11.03.2019. The contents of the E.Mail are extracted below:

Dear Sir,

In the case of M/s.K3 Management and Educational Services Private Limited (PAN No.AAFCK7114D), you have requested me to appear on 13.03.2019 (forenoon) for hearing for the stay petition filed U/s.220 (6) for the assessment year 2016-17 filed on 15.02.2019.

In this regard you have asked me over phone to provide you the grounds of appeal, which is enclosed for your kind reference.

The grounds of appeal is self-explanatory in nature, the assessment order consists of two major additions, the first addition is pertaining to interest paid for the loans borrowed, the same is again added back as unexplained expenditure. The complete bank statements, books and cash/fund flow statements have been furnished at the time of assessment, every credit and debit in the bank statements

have been explained and details have been furnished. The assessee is a company and the accounts are audited, to treat an expenditure as unexplained is out of context. Hence this position has to be reckoned while granting the stay.

If you find it inconvenient to take up the hearing for stay petition on 13.03.2019, I request you take it up on 18th March, 2019, as I am unavailable on 14th and 15th of March 2019.

Thanking You,
Regards
Venkatesh

4. While this is so, and the petitioner has specifically sought opportunity of personal hearing in the application of stay, as reiterated in the email, an order has been passed on the very next day upon receipt of the email and is extracted below:

The assessment was completed on 22/12/2018 creating a demand of Rs.2,09,00,205/- under section 143(3) of the Income Tax Act, 1961. Assessee has filed application dated 21.01.2019 seeking stay of recovery of demand on the ground that appeal is filed before the CIT(A)-3, Coimbatore against the assessment order.

The Case was posted for hearing on 15.02.2019. The assessee has filed written submission through e-mail on 11/03/2019. It is seen that the assessee has not paid any amount towards the demand raised in the assessment.

It is also seen that the assessee has not paid 20% of the demand in accordance with the guidelines issued by the CBDT under Office Memorandum dated 29/02/2016 read with letter dated 31/07/2017. Therefore, the stay petition filed by the assessee on 21/01/2019 is hereby rejected and the assessee is directed to pay the demand immediately.

5. The manner of adjudication upon the stay petition leaves much to be desired. The parameters for deciding application for stay are well settled, being, existence of a prima facie case financial stringency and balance of convenience as between the parties. The aforesaid factors have to be established by the assessee and adjudicated upon by the Officer concerned in an order upon an application for stay.

6. In the present case, the stay petition contains some details regarding the merits of the case. Moreover, the Assessing Officer has himself requested for a copy of the grounds of appeal ostensibly to verify the merits of the appeal for prima facie decision on merits. Having done so, there is absolutely nothing in the order to indicate application of mind to this aspect.

7. Moreover, the only ground on which the stay petition has been dismissed is that the assessee has not paid any amount towards the disputed taxes, in accordance with the guideline issued by the Central Board of Direct Taxes (CBDT). This Court has had occasion to deal with both the Office Memorandum and modification thereto 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 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 para (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. '

8. The aforesaid order would be applicable to the present facts and circumstances as well. In the light of the discussion as above I hold that the impugned order is not in accordance with law and does not follow the settled principles to be applied in adjudication of stay application. The same is quashed. The petitioner will appear before the Officer on 03.04.2019 and the Officer shall, after hearing the petitioner and considering all materials placed before him, pass suitable orders in the light of the directions contained in the orders within a period of one(1) week from the date of conclusion of the personal hearing of petition i.e. 09.04.2019. Till such time that is till 09.04.2019, stay of recovery shall be maintained. The writ petition is disposed of in the above terms. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar (Insp.Cell)

//True Copy//

ska

Sub Assistant Registrar

To

1. The Principal Commissioner of Income Tax
Income Tax Department,
63, Race Course Road, Coimbatore
2. The Commissioner of Income Tax (Appeals)-3
Income Tax Department,
63, Race Course Road, Coimbatore
3. The Additional Commissioner of Income Tax
Income Tax Department,
No.15, Gandhiji Road, Erode
- 4 The Assistant Commissioner of Income Tax
Circle-2
Income Tax Department,
No.15, Gandhiji Road, Erode

+1 cc to M/s.A.P.Srinivas, Advocate, S.R.No.29237

+1 cc to M/s.S.Sridhar, Advocate, S.R.No.28962

WP. No.9103 of 2019
& W.P.No.9623 of 2019

SAI (CO)
SSM(06/06/2019)
SSM(17/06/2019).