

**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE P.KESHAHA RAO**

WRIT PETITION No.6588 of 2019

ORDER: (per Hon'ble Sri Justice V.Ramasubramanian)

Aggrieved by the rejection of an application for stay pending disposal of a first appeal before the Income Tax Appellate Tribunal, the assessee has come up with the above Writ Petition.

Heard Mr.S.Ravi, learned Senior Counsel appearing for the petitioner and Mr.T.Vinod Kumar, learned Senior Standing Counsel appearing for the Department.

The petitioner suffered an order of assessment under Section 143 (3) read with Section 144 C (13) of the Income Tax Act, 1961. The liability imposed upon the petitioner by the said order of assessment dated 29.10.2018 was Rs.39,92,21,960/-.

Aggrieved by the said order of assessment, the petitioner filed an appeal before the Income Tax Appellate Tribunal along with an application for stay. In the said application for stay, S.A.No.69/H/2019 in ITA No.2215/H/18, the Tribunal passed an order dated 15.03.2019, rejecting the prayer for stay on the ground that the assessee has no financial difficulty. Aggrieved by the said order, the petitioner is before us.

The main ground on which the petitioner challenges the impugned order of rejection of stay is that in respect of an order of assessment passed for the previous assessment year, the very same

Tribunal allowed an appeal, on the ground that both parties failed to submit the complete documents and remanding the matter back to the Assessing Officer. The issue involved was the application of comparables in transfer pricing. It appears that seven companies were taken as comparables and the rate charged by one entity was taken as the basis.

The second contention is that without looking into the balance sheet, but looking into the cash flow statement, the Tribunal came to the conclusion to reject the application for stay.

Opposing the plea for stay, it is contended by Mr.T.Vinod Kumar, learned Senior Counsel appearing for the department, that the order passed by the Tribunal in respect of the previous assessment year 2011-12 on 27.07.2016 itself made it clear that the same cannot be taken as a precedent. The learned Senior Counsel also contended that the financial hardship should be borne out by the fund flow statement and not by the balance sheet.

We are carefully considered the above contentions.

A look at the order passed by the Tribunal in two appeals, I.T.A.Nos.200/Hyd/16 and 435/Hyd/16 in respect of the assessment year 2011-12 dated 27.07.2016 would show that the comparable taken on the basis of the pricing adopted by the Infosys was not accepted by the Tribunal. But, the Assessing Officer in respect of the assessment year 2014-15 has made a comparison with certain companies, some of which stood excluded by the order of the Tribunal in respect of the assessment year 2011-12. The effect of the

same has not been taken into account by the Tribunal in the order impugned in this writ petition.

Out of seven companies which are taken as comparables, some of them stood excluded by the Tribunal in respect of the previous year and some of them were excluded by the DRP itself. This aspect has not been taken into account by the Tribunal.

Therefore, we are of the view that this case would not fall under the category of a case where the application for stay deserved to be rejected outright.

That takes us to the next question as to what we should do. Where we find that the outright rejection of the application for stay is not proper, we may in normal circumstances remand the matter back to the Tribunal for a fresh consideration of the application for stay. But, the same would motivate the Tribunal only to take up the application for stay first, leading to another round of litigation. Instead of having one more round of litigation at the stage of stay application, we think it better to put the petitioner on terms for the grant of stay.

The total liability fixed under the order of assessment i.e., pending appeal before the Tribunal is Rs.39,92,21,960/-. It is seen that there are also interest components under Section 234B and 234C.

Therefore, taking a cumulative account of all this, the Writ Petition is disposed of directing the petitioner to pay a sum of Rs.4,00,00,000/- (Rupees Four Crores) within a period of four weeks from the date of receipt of a copy of this order. Upon such payment

is made, there will be an interim stay of collection of the balance of tax. However, the Tribunal shall endeavour to expedite the hearing of the appeal.

Consequently, miscellaneous petitions, if any pending, in the Writ Petition shall stand closed. No order as to costs.

V.RAMASUBRAMANIAN, J

P.KESHAVA RAO, J

01.04.2019
Gsn.

