HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE K.LAKSHMAN

WRIT PETITION NO.11353 OF 2019

O R D E R
(*Per Sri Justice M.S.Ramachandra Rao)*

1. In this writ petition, the petitioner assails the order passed by the Deputy Commissioner of Income Tax (2nd respondent) in Proceedings No.DCIT, C10(1)/Stay/2019-20 dt.08.05.2019 for the assessment year 2016-17 rejecting the stay application filed by the petitioner in the Appeal filed before the CIT (Appeals) challenging the order dt. 31.12.2018 of the Assessing Officer rejecting the claim of the petitioner for exemption.

2. In the impugned order dt.08.05.2019, the 2nd respondent stated as under:

> *"As per the CBDT OM in F. No. 404/72/ 93, ITCC (FTS:284146) dt: 31.07.2017, the outstanding demand is stayed till the disposal of the first appeal filed before CIT(A) upon payment of 20% of the disputed tax into the Govt Treasury. As verified from OLTAS/ this office records, the assessee has paid only Rs.1,00,00,000/- which is equivalent to 3.41% of the disputed tax of Rs. 29,24,15,774/-. Mere filing of an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand.*
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> *In view of the above, considering the facts and circumstances of the case, stay application filed by you is hereby rejected. You are therefore directed to pay the disputed demand immediately failing which action as per the Income Tax Act will be taken without any further notice."*

3. Counsel for the petitioner contends that the Office Memorandum dt.31.07.2017 referred to in the above order merely modified the earlier Office Memorandum No.404/72/93-ITCC dt.29.02.2016 by substituting the figure 20% in the place of the figure 15% used therein; that the 2nd respondent proceeded on the footing that he had no choice but to insist

upon the petitioner depositing 20% of the disputed tax as a condition precedent for granting stay of the outstanding demand pending disposal of the Appeal before the CIT (Appeals); and in fact there was discretion vested in the 2nd respondent in the Office Memorandum dt.29.02.2016 to even consider seeking deposit of an amount less than the figure of 20%; and no reason is assigned as to why the 2nd respondent did not take that into account and rejected the stay application on the ground that the petitioner did not deposit 20% of the disputed tax.

4. In the counter filed by the 2nd respondent, he did not dispute the contents of the Office Memoranda dt.29.02.2016 and 31.07.2017 but supported the order passed by him stating that unless 20% of the disputed demand is deposited by the petitioner, stay of the balance 80% of the demand cannot be granted.

5. A further plea is also raised that as per the instructions of the Principal Chief Commissioner of Income Tax in Proceedings dt.24.08.2016, the power to grant stay of demands more than Rs.25.00 lakh vests with the concerned Principal Commissioner of Income Tax, which in the petitioner's case would be Principal CIT-6, Hyderabad and the 2nd respondent was not competent to grant stay of collection. This latter reason is not found in the impugned order.

6. The Office Memorandum dt.29.02.2016 in Clause (B) deals with grant of stay of a demand of tax and gives discretion to the Assessing Officer to insist on an amount higher than 15% and also an amount lower than 15% of the disputed demand; and only the figure of 15% was replaced by the figure of 20% in the later Office Memorandum dt.31.07.2017. Therefore, the view of the 2nd respondent that he had no

choice but to insist on deposit of 20% of the disputed demand as a precondition to grant stay to the petitioner cannot be sustained.

7. In any event, when according to the counter filed by the 2nd respondent, he had no jurisdiction to consider the stay application in view of the Proceedings dt.24.08.2016 of the Principal Chief Commissioner of Income Tax and it is only the Principal Commissioner of Income Tax-6, Hyderabad who had such jurisdiction, it was the duty of the 2nd respondent to return the stay application presented by the petitioner for presentation before the jurisdictional Commissioner and he ought not to have decided it in the first place.

8. Therefore, for all these reasons, we are of the opinion that the impugned order cannot be sustained. Accordingly, it is set aside.

9. The Writ Petition is allowed directing that there shall be stay of collection of the outstanding demand from the petitioner pending disposal of the Appeal by the CIT (Appeals) against the order dt.31.12.2018 of the Assessing Officer; and the CIT (Appeals) is directed to decide the said Appeal presented by the petitioner within four weeks after complying with the principles of natural justice.

10. Pending miscellaneous petitions, if any, shall stand closed. No order as to costs.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

12th November, 2019

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