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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 7909/2019**

M/S DABUR INVEST CORP

..... Petitioner

Through: Mr.M.P.Rastogi with Mr.K.N.Ahuja,
Advocates.

versus

ADDL. COMMISSIONER OF INCOME TAX & ANR.

..... Respondents

Through: Mr.Raghvendra Singh, Sr. Standing
Counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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21.08.2019

CM APPL. 37329/2019 (for rectification of order)

For the reasons stated in the application, the application is allowed. The corrected order dated 31st July 2019 shall read as under:

“W.P.(C) 7909/2019 & CM Appl. No. 32777/2019 (interim relief)

M/S DABUR INVEST CORP

..... Petitioner

Through: Mr. M.P. Rastogi, Mr. Rohit Jain, Mr.
K.N.Ahuja, Mr. Aniket D. Agrawal,
Ms. Kannopriya Gupta & Mr. Manu K.
Giri, Advocates

versus

ADDL. COMMISSIONER OF INCOME TAX & ANR.

.... Respondents

Through: Mr. Raghvendra Singh, Sr. Standing
counsel & Mr. Vipul Agrawal, Junior
standing counsel

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
31.07.2019

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Dr. S. Muralidhar, J.:

1. This is a petition by M/s Dabur Invest Corp, questioning the order dated 15th January, 2019 passed by the Additional Commissioner of Income Tax – Special Range-16 (Respondent No.1) under Section 281-B of the Income Tax Act, 1961 (‘Act’) ordering the assets of the Petitioner mentioned in the order to be kept under provisional attachment for a period of six months. The challenge is also to an order dated 19th June, 2019 passed by Respondent No. 1 declining to stay the demand and release the bank accounts and other assets from attachment.

2. The Petitioner, a partnership firm, entered into a joint venture agreement on 7th August, 2001 with M/s Commercial Union International Holdings Ltd. (‘CUIH’), a company incorporated in England and Wales for co-promoting a joint venture company. The Petitioner was to subscribe 74% total paid up equity capital of the JV company and CUIH had to subscribe the balance 26%. The JV company was to be promoted as a private limited company for carrying on the business of insurance, subject to statutory and regulatory approvals.

3. In terms of the agreement a refundable option price was receivable by the Petitioner. This was permitted by the Reserve Bank of India. On this basis, a company known as Aviva Life Insurance Company India Limited (‘Aviva’) was promoted by the JV parties. In terms of Clause 16 of the agreement, on payment of the option price the Petitioner granted CUIH the rights during the ten-year period to acquire such number of shares held by the Petitioner to enable the shareholding of CUIH to be the maximum as permitted in law. The sale consideration received by the Petitioner, pursuant to such exercise of the CUIH option or the Petitioner’s option would also be at the market

value per share.

4. Under Clause 16.9, after a ten-year period if divestment of shares was to take place, CUIH would continue to pay the option price on the Petitioner's shares and the rights/option of the CUIH to require the Petitioner to sell shares to CUIH would remain in force. According to the Petitioner, in terms of the change in Government policy, the FIPB permitted CUIH by a letter dated 18th March, 2016 to increase the shareholding in Aviva from 26% to 49% by way of transfer of 23% shareholding then held by the Petitioner for a market value of Rs.940 crores subject to the condition that the investment would be made out of the remittance of foreign exchange received through normal banking channels. Apart from the FIPB approval for increase in shareholding of Aviva, the company also got approval from the IRDA. The Petitioner states that in the Assessment Year (AY) 2017-2018 it disclosed the long-term capital gain on sale of 23% stake in Aviva.

5. The Petitioner states that the returns filed for AYs 2005-06, 2006-07, 2008-09, 2011-2012, 2013-2014 and 2014-2015 were picked up for scrutiny and assessments were completed under Section 143 (3) of the Act. The Petitioner states that along with the returns, copies of Annual Accounts were filed. In the notes on accounts, the Petitioner had disclosed about the JV and had also disclosed that the interest paid on borrowed funds for acquisition of shares had been capitalized and included in the cost of investment. In the notes, disclosure was also made about the receipt of option money from the CUIH. It was stated that adjustments would be made at the time of reduction of the shareholding in Aviva.

6. The Petitioner states that during the course of assessment proceedings, the Assessing Officer (AO) raised a query about the JV. Copies of the JV agreements were made available to the AO from time to time. For the first time, while framing the assessment for AY 2015-2016, by order dated 31st December, 2017 the AO, who succeeded the earlier AO, was of the view that the Petitioner's business is of investment and that because the option price had been received by the Petitioner year after year annually, it was business income. As far as AYs 2013-2014 and 2014-2015 are concerned, the Principal Commissioner of Income Tax (PCIT) (Respondent No.2) invoked jurisdiction under Section 263 of the Act and directed the AO to tax the receipt of refundable option money in those years.

7. Based on the conclusion arrived at in AY 2015-2016 by the AO as well as observations/direction of the PCIT for AYs 2013-2014 & 2014-2015, Respondent No.1 commenced re-assessment proceedings under Section 147 of the Act for AYs 2011-2012, 2012 -2013 and 2016-2017 by issuing notice under Section 148 of the Act. Pursuant thereto, the AO completed the assessment on an income of Rs.250.07 crores, Rs.247 crores and Rs. 247.67 crores respectively against the returned income of Rs. Nil, Rs. 0.08 crore and Rs. 0.45 crores respectively. Extra demands of tax in interest of the sum of Rs.148.29 crores for 2011-2012, Rs.139.67 crores for 2012-2013 and Rs.103.22 crores for 2016-2017 were raised.

8. Against the orders of re-assessment for AYs 2011-2012, 2012-2013 and 2016-2017 the Petitioner preferred an appeal before the CIT (A).

9. It is pointed out that in AY 2017-2018 the AO treated the option money receipt (Rs.163 crores), as a business receipt. The AO also treated sum of Rs.940/- crores, being the market value of 23% stakes sold to CUIH disclosed by the Petitioner under the head 'Long Term Capital Gains', as a business receipt. Against the demand of Rs.381.96 crores as tax and Rs.87.95 crores as interest for the AY 2017-2018, the Petitioner preferred an appeal before the CIT (A).

10. During the pendency of the assessments for AYs 2011-2012, 2012-2013, 2016-2017 & 2017-2018 Respondent No.1 decided to invoke the powers under Section 281-B of the Act by the order dated 15th January, 2019 and attached all the assets of the Petitioner including the investments made in the form of shares of Aviva and all bank accounts. According to the Petitioner this left no business assets with the Petitioner and its business had come to a complete stand still on account of the said impugned order.

11. Representations against the above order were made by the Petitioner to Respondent No.1 in January, February and March, 2019. In the petition dated 5th March, 2019, the Petitioner offered encashment of FDR of Rs.163.5 crores with Standard Chartered Bank and also requested to adjust the sum of Rs.152.22 crores, being 20% of the demand in the above years. The Petitioner also sought refund of the balance of Rs.11.28 crores.

12. On 29th March, 2019 the Petitioner further made a representation to the

AO for vacation of the impugned order and for release of bank accounts, which had stood attached by the order dated 15th January, 2019. It was pointed out that the assessment had already been completed in February, 2019 and that a further order passed under Section 263 of the Act for AYs 2013-2014 and 2014-2015 had already been quashed by the ITAT by an order dated 11th March, 2019. The Petitioner in the same letter also objected to the action under Section 226 (3) of the Act by Respondent No.1 and withdrawal of Rs.164.87 crores from Standard Chartered Bank and Rs.20.16 lakh from HDFC Bank without intimation to the Petitioner.

13. On 29th March, 2019 the Petitioner filed stay application before Respondent No.1 under Section 220 (6) of the Act. This was rejected by Respondent No.1 by the second impugned order dated 19th June 2019. This led to the filing of the present petition.

14. In the meanwhile, the ITAT disposed of the appeals for AYs 2013-2014 and 2014-2015 by a common order dated 11th March, 2019 holding that the option money received in the terms of the JV Agreement was refundable money, linked with the capital contribution made by the Petitioner by investing in shares of Aviva for acquisition of controlling stakes in the company. According to the Petitioner, as a result of the above order of the ITAT for AYs 2013-2014 and 2014-2015 the tax paid by the Petitioner in the sum of Rs.79 crores (39 + 40 crores) became refundable.

15. As far as AY 2015-2016 is concerned, the Petitioner filed an appeal before the ITAT which stayed the demand for six months by an order dated 2nd January, 2019. It is pointed out by the Petitioner that the stay granted by ITAT was conditional upon parties not seeking any adjournment in the appeal. Further in W.P. (C) 4094 of 2019 filed by the Revenue in this Court challenging the aforementioned interim order of the ITAT, this Court while declining to interfere by its order dated 30th May 2019, desired that the appeal be disposed of expeditiously. It fixed 3rd June 2019 as the date on which the appeal would be listed before the ITAT. According to the Petitioner, despite the said order the Respondents sought adjournment before the ITAT.

16. The present petition was listed first on 23rd July, 2019 and the following order was passed:

“2. Notice. Notice is accepted by learned counsel for the Respondents.

3. The Petitioner has challenged the provisional attachment order dated 15th January 2019, which by a subsequent communication dated 8th July 2019 of the Respondents addressed to the Petitioner, has been continued notwithstanding the completion of the assessments for the Assessment Years (AYs) 2011-12, 2012-13, 2016-17 and 2017-18.

4. Counsel for the Petitioner points out that the impugned order has rejected the Petitioner's application for stay pending consideration of the Petitioner's appeals before the CIT(A) for the above AYs. He has placed before the Court a chart showing that the tax amounts already paid for the said AYs constitute 26%, 39%, 46% and 48% of the demand respectively.

5. Learned counsel for the Petitioner further points out that for two of the AYs i.e. 2013-14 and 2014-15, the Assessee has succeeded before the ITAT and the Revenue's appeals against the order dated 11th March 2019 of the ITAT are pending in this Court. He submits that for the said two AYs, a refund of Rs.79 crores de hors interest is due to the Assessee and he is willing for the adjustment of the entire refund amount +interest against the demand for the AYs in dispute. He points out that the Respondents have nevertheless proceeded to freeze all the accounts of the Petitioner making it impossible for it to function.

6. Learned counsel for the Respondents states that he will have to seek instructions. List on 30th July 2019.”

17. Mr. M.P. Rastogi, learned counsel for the Petitioner, points out that the attachment of all of the assets of the Petitioner during the pendency of the assessment proceedings and its continuation even after the completion of assessment, was totally illegal and contrary to Section 281-B of the Act. The power had been exercised unreasonably. It was submitted that once the final assessment was framed and actual tax demand crystallised, it would

serve no purpose in continuing with the provisional attachment under Section 281-B of the Act. This was only meant to protect the interest of the revenue during the pendency of the assessment proceedings and prior to the determination of the final tax demand. Reliance is also placed on the decision of the Punjab and Haryana High Court in *Motorola Solutions India Pvt. Ltd. v. CIT (2013) 212 Taxman 35 (P&H)*.

18. Mr. Rastogi placed before the Court a document showing the status of demands and recoveries made from the Petitioner for the AYs 2011-12, 2012-2013 and 2016-2017, 2017-2018. The said table reads as under:

Status of Demand & Collection				
Assessment Year	Demand raised in Assessment (Rs. in Cr.)	Demand Collected (Rs. in Cr.)	Percentage of demand collected	Demand collected in Excess of 20% (Rs. in Cr.)
2011-12	1,48,28,97,270	20,31,02,454	13.70%	(9,34,77,000)
2012-13	1,39,66,96,560	30,00,00,000	21.48%	2,06,60,688
2016-17#	115,54,57,517	35,00,00,000	30.29%	11,89,08,497
2017-18	469,90,79,420	99,87,90,999	21.26%	5,89,75,115
Total	873,41,30,767	185,18,93,453	21.20%	10,50,67,300

19. This Court was informed by Mr. Raghvendera Singh, learned counsel for the Revenue that when the petition was first heard on 30th July, 2019 two of the accounts of the Petitioner have been de-frozen. The matter was then kept today for the hearing.

20. Mr. Rastogi, learned counsel for the Petitioner, pointed out that while two accounts had been de-frozen, the remaining bank accounts of the Petitioner remained frozen. The Petitioner had been pushed to a financially precarious situation. His submission was that the Respondents having already collected over Rs.185 crores, there was no justification for them to continue to invoke the powers under Section 281-B of the Act.

21. The above submissions have been considered. Section 281-B (1) and (2) of the Act read as under:

“Provisional attachment to protect revenue in certain cases.

281B. (1) Where, during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the Assessing Officer is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, he may, with the previous approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director, by order in writing, attach provisionally any property belonging to the assessee in the manner provided in the Second Schedule.

2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under sub-section (1):

Provided that the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years or sixty days after the date of order of assessment or reassessment, whichever is later.

22. One of the essential conditions stipulated in Section 281-B (1) is that the Assessing officer should form the opinion that the provisional attachment is necessary to protect the interest of the Revenue. In terms of the Instruction No. F. No. 404/22/2004-ITCC, the circumstances in which the power under Section 281-B of the Act should be used were explained, as under:

“To safeguard against any indiscriminate use, the Board desires that the provisions of Section 281B should be resorted to only in cases where there is a reasonable likelihood of the recovery becoming difficult due to inadequacy of assets. Where there are sufficient assets to cover the demand, the provisions of Section

281B should not be resorted to, except under exceptional circumstances warranting the same, and after strictly complying with the conditions incorporated in section 281-B.”

23. A perusal of the impugned order does not indicate that the AO formed an opinion about the reasonable likelihood of the recovery becoming difficult due to inadequacy of the assets of the Petitioner. Even in terms of the CBDT Circular No.179 dated 30th September, 1975 setting out the purpose for insertion of Section 281-B of the Act, it was explained as under:-

“This provision has been made in order to protect the interests of the revenue in cases where the raising of demand is likely to take time because of investigations and there is apprehension that the assessee may thwart the ultimate collection of that demand.”

24. The impugned order does not talk of any time being taken for completion of investigation. On the other hand, as explained in ***Motorola Solutions India Pvt. Ltd. v. CIT (supra)***, once the assessment is complete there would be no justification for continuing with the order under Section 281-B of the Act. The following observations in the said decision explain the legal position:

“9. A plain reading of Section 281B of the Act clearly spells out that the Assessing Officer is empowered to pass order for provisional attachment to protect the interests of the revenue in certain cases during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment. However, the Assessing Officer is required to form an opinion that the same is necessary for the purposes of protecting the interests of the revenue. ...according to the aforesaid provision, during the pendency of any assessment proceeding or proceedings in pursuance to reassessment that in order to safeguard the interests of the revenue, after recording reasons for the same in writing and seeking the approval from the concerned authority, an order for provisional attachment can be passed.

...

11. The above circular clearly envisages that where during the pendency of any proceeding for assessment or reassessment of any income, the raising of demand is likely to take time due to

investigations and there is apprehension that the assessee may thwart the collection of that demand, provisional attachment can be made. This supports the interpretation that it is only till actual demand is created by passing an assessment order that the provisional attachment order will remain in operation. Another factor which deserves to be noticed relates to first Proviso to Sub-section (1) of Section 220 of the Act where the Assessing officer has been given an authority to reduce the full period of 30 days wherever he has reasons to believe that it would be detrimental to the revenue by allowing the full period of 30 days to deposit the demand in terms of Section 220(1) of the Act. The Assessing officer is required to have previous approval of the Joint Commissioner in this regard. Thus, there are sufficient provisions in the Act to safeguard the interest of the revenue in case the Assessing Officer has apprehension that the assessee by adopting extraneous method may thwart the recovery of the legitimate tax dues of the State.

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13. In view of the above, the interpretation put by learned counsel for the revenue that even after the passing of the assessment order, provisional attachment order shall still remain in force for six months, does not merit acceptance and is, thus, rejected.”

25. Learned counsel for the Respondent is unable to dispute that the Respondents have already collected over Rs.185 crores from the Petitioner, as against the total demand raised of around Rs.873.4 crores. The year-wise percentage of demand collected for the years 2012-13, 2016-17 and 2017-18 is over 21%.

26. In the circumstances the Court sees no reason why the attachment order under Section 281-B of the Act should be allowed to continue. Likewise, the attachment of the bank accounts of the Petitioner under Section 226 (3) of the Act also does not appear to be justified.

27. The Court accordingly sets aside the impugned order dated 15th January, 2019 passed by Respondent No. 1 under Section 281-B of the Act, thereby removing the attachment of the Petitioner’s assets mentioned therein and in

particular also removing the attachment of the bank accounts by Respondent No.1 in exercise of powers under Section 226 (3) of the Act.

28. It is pointed out by learned counsel for the Revenue that aggrieved by the order declining to stay the demand, the Petitioner has approached the Principal CIT by way of a petition, which is pending consideration. The said petition may now be disposed of expeditiously, in accordance with law.

29. For the aforementioned reasons, the writ petition is allowed in the above terms. No orders as to costs. The pending application is disposed of.

30. Order *dasti* under signature of the Court Master.”

S.MURALIDHAR, J

TALWANT SINGH, J

AUGUST 21, 2019 / tr