IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 40 OF 2021

Jet Privilege Private Limited
Unit No.2, 2nd Floor, A Wing,
Tines Square, Andheri Kurla Road,
Opp. Mittal Estate,
Mumbai – 400 059. ….Petitioner

V/s.

1. Deputy Commissioner of Income
Tax - 5 (2) (1)
Room No.571, 5th Floor, Aaykar Bhavan,
New Marine Lines, Mumbai – 400 026.

2. Commissioner of Income Tax (CPC)
Centralised Processing Cell
CPC – Bangalore, Prestige Alpha,
Post Box No.2, Electronic City Post,
Bengaluru – 560 500.

3. Union of India,
Through the Secretary,
Department of Revenue,
Ministry of Finance, Govt. of India,
North Block, New Delhi – 110 001. …Respondents

Mr. Percy Pardiwalla, Senior Advocate i/b Mint and Cofereres for Petitioner.
Mr. Sham V. Walve for Respondent.

CORAM : K.R. SHRIRAM &
ABHAY AHUJA, JJ.
DATED : 9th AUGUST 2021

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. Rule. Rule made returnable forthwith.

Respondents waive service.

Taken up for final disposal.

2. Petitioner is seeking issuance of writ of certiorari or a writ in the nature of certiorari or any other appropriate writ or order or direction under Article 226 and 227 of the Constitution of India, calling for records of petitioner's case so far as related to the adjustment of refund against outstanding demand for A.Y. 2019-20. Petitioner says respondent is yet to refund a sum of Rs.37,63,57,620/- for A.Y. 2019-20 alongwith applicable statutory interest under Section 244 (A) of the Income Tax Act, 1961 (the Act).

3. According to petitioner, for the assessment year 2019-20, respondent had to refund a sum of Rs.44,24,54,040/- as per the intimation dated 17th March, 2020 under Section 143 (1) of the Act. Thereafter, petitioner received a communication dated 13th May, 2020 being intimation under Section 245 of the Act from the Centralized Processing Center, Income Tax Department, whereby petitioner was informed that their return for the assessment year 2019-20 has been processed at CPC and the refund will be adjusted against the outstanding demand as shown in "Outstanding Demand table" annexed to the said communication. The Outstanding Demand table reads as under :

SL No.	PAN	The Outstanding demand pertains to the AY	Demand Raised under section	DIN	Demand Raised Date	Demand Amount	Demand Uploaded By	Rectification rights with
1	AACCJ9147J	2015	154	2018201510000470981C	11-07-2018	14802770	Jurisdictional AO	AO
2	AACCJ9147J	2016	143 (3)	2018201637047134700C	30-12-2018	313182800	CPC	AO
3	AACCJ9147J	2018	1431a	2019201837051947354C	16-10-2019	6437110	CPC	AO

Petitioner had 30 days to respond or take action.

Petitioner, by its letter dated 21st May, 2020 responded to this communication and informed respondent that no amount was adjustable and no recovery should be made with respect to outstanding demands reflected in the table, as demands have been stayed for recovery in appeals which were pending or erroneous (pending rectification).

Mr. Pardiwalla states that the amount of outstanding demand of Rs.64,37,110/- for A.Y. 2018-19 has already been rectified and the dispute is now restricted to amount of outstanding demand of Rs.1,48,02,770/- for A.Y. 2015-16 and Rs.31,31,82,800/- for A.Y. 2016-17.

4. Mr. Pardiwalla states that alongwith appeal challenging the demand for A.Y. 2015-16 and 2016-17, Stay Applications were also filed and orders have been stayed upon petitioner depositing 20% of the demand amounts. The fact of petitioner depositing 20% has not been disputed though Mr. Walve states that extension to deposit 20% for A.Y. 2016-17 was not granted but petitioner still went ahead and deposited it. In our view that should not really matter because 20% has been deposited and respondents have accepted the same. The stay for both A.Y. 2015-16 and 2016-17 have to be in force.

5. Mr. Pardiwalla submitted that before any adjustment is made, it is mandatory to give intimation under Section 245 of the Act to the person

to whom the refund is due of the proposed action. In this case, admittedly, and we say admittedly because the affidavit in reply/additional affidavit filed by respondent confirms that the intimation under Section 245 of the Act was given only on 13th May, 2020. At this point, if one refers to Form 26 AS which is the annaul tax statement under Section 203 (AA) of the Act for the A.Y. 2015-16 and for A.Y. 2016-17, adjustment against the refund due has been made on 5th May, 2020, whereas the mandatory notice under Section 245 of the Act has been given only on 13th May, 2020. Mr.Pardiwalla submits that it is settled law that failure to comply with this mandatory requirement of prior intimation would make the entire adjustment as wholly illegal and therefore, respondent could not have made the adjustment as they wanted to.

Mr. Pardiwalla also submitted in any event, petitioner having deposited 20% amount and stay having been granted under Section 220 (6) of the Act, it would mean that the time to make payment stands extended and petitioner shall not be treated to be an assessee in default for the recovery provisions to be set in motion and therefore, the entire amount refundable after giving credit to the amount already refunded becomes payable together with accumulated interest.

6. Mr. Walve for respondent in fairness and in view of the affidavit in reply filed fairly accepted that intimation required under Section 245 of the Act was given only on 13th May, 2020. But his explanation is that the

process for intimating petitioner under Section 245 of the Act about outstanding demand and interest payable was initiated on 17th March, 2020 but due to technical error, the intimation got stuck and could not be delivered to the assessee's registered E-mail id. Mr. Walve submitted that on 13th May, 2020 technical error got rectified in CPC portal and intimation under Section 245 of the Act was sent to the assessee.

7. For ease of reference, we shall quote Section 245 of the Act, which read as under ;

> *245. Set off of refunds against tax remaining payable 2 Where under any of the provisions of this Act, a refund is found to be due to any person, the [Assessing] Officer, Deputy Commissioner (Appeals)], Commissioner (Appeals)] or Chief Commissioner or Commissioner], as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section.*

8. Mere perusal of the section makes it clear that the officers mentioned in the section, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under the Act by the assessee to whom the refund is due. The officer may set off the amount to be refunded or any part of that amount only after giving an intimation in writing to the assessee of the action that he proposed to take under this section. Therefore, it clearly requires the intimation to be given prior to the officer

sets off the amount payable against the amount to be refunded. It can be neither simultaneous nor subsequent.

We find support for this view in ***Suresh B. Jain Vs. A.N. Shaikh, Sixteenth Income-tax Officer*** [1], confirmed by the Division Bench of this court in ***A.N. Shaikh, Sixteenth Income-tax Officer Vs. Suresh B. Jain***[2] and in ***Hindustan Unilever Limited Vs. Deputy Commissioner of Income-tax-1 (1)***[3] relied upon by Mr. Pardiwalla.

9. The fact that respondent has not followed the mandatory prior requirement of intimation under Section 245 of the Act would make the adjustment wholly illegal and therefore, respondent was clearly in error in not refunding the amount.

10. As per the Office Memorandum [F. No. 404/72/93 – ITCC] issued dated 29th February, 2016, amended by another Office Memorandum dated 25th August, 2017 the assessing officer shall grant stay of demand where the outstanding demand is disputed on assessee paying 20% of the disputed demand. Admittedly, petitioner has filed an appeal disputing the outstanding demand for A.Y. 2015-16 and A.Y. 2016-17 and have deposited 20% of the amount demanded. Therefore, there is a stay of demand in force. The effect of this deposit would mean that the time to make the payment stands extended and petitioner is not deemed to be an assessee in

1 [1987] 165 ITR 151 (Bom.)
2 [1987] 165 ITR 86 (Bom.)
3 [2015] 377 ITR 281 (Bom.)

default for the recovery provisions to be set in motion [(*Hindustan Unilever (supra)*].

11. Respondent to refund the amounts to petitioner as determined for A.Y. 2019-20 under intimation issued under Section 143 (1) of the Act with interest thereon as per law within a period of four weeks from the date of receipt of this order.

12. Petition accordingly stands disposed.

13. Appeals filed by petitioner be disposed expeditiously.

14. All to act on authenticated copy of this order.

(ABHAY AHUJA, J.) **(K.R. SHRIRAM, J.)**