IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.09.2021

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

W.P.No.20267 of 2021
and
WMP.No.21524 of 2021

Cognizant Technology Solutions India Pvt., Ltd.,
No.165, Eternity Building,
6th Floor, St. Mary's Road
Chennai-600 018.

... Petitioner

-Vs.-

1. The Income Tax Appellate Tribunal -'B' Bench,
Represented by its Registrar,
'Rajaji Bhavan' - 2nd Floor,
Besant Nagar,
Chennai-600 090.

2. The Assistant Commissioner of Income Tax,
Central Circle 1(1)
3rd Floor, Investigation Building,
46, Mahatma Gandhi Road,
Nungambakkam, Chennai-34.

3. Commissioner of Income Tax,
Large Tax Payer Unit,
7th Floor, Wanaparthy Block,
Aayakar Bhavan, Nungambakkam,
Chennai-600 034.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, forbearing the 2nd respondent herein from proceeding further with the petitioner's assessment in relation to AY-2014-2015 undertaken pursuant to the 3rd Respondent's Order dated 01.08.2019 until such time as the 'B' Bench of the 1st Respondent passes orders in ITA No.2820/CHNY/2019.

For Petitioner : Mr.Arvind P.Datar
for Mr.Srinath Sridevan

For Respondents: Mr.A.P.Srinivas,
Senior Standing counsel for R1 to R3

O R D E R

Captioned writ petition and 'Writ Miscellaneous Petition' (WMP) thereat are in the admission Board before me.

2. Mr.Arvind P.Datar, learned Senior Advocate instructed by Mr.Srinath Sridevan, counsel on record for writ petitioner-company, who is before me in this web hearing on a video conferencing platform i.e., virtual Court submits that the writ petitioner is in a predicament qua an appeal, which 'Income Tax Appellate Tribunal' [hereinafter 'ITAT' for the sake of brevity] 'B' Bench, Chennai is in seizin. This appeal bears No.IT-2820/CHNY-2019 and it pertains to Assessment year 2014-2015.

3. Learned Senior Advocate submitted that an order dated 01.08.2019 made by third respondent in exercise of powers under Section 263 of 'Income-tax Act, 1961 (43 of 1961)' [hereinafter 'IT Act' for the sake of brevity] is under challenge before ITAT in aforementioned appeal. This order made by third respondent being an 'order dated 01.08.2019 under Section 263 of IT Act' shall hereinafter be referred to as 'Revisional Order' for the sake of convenience and clarity.

4. Owing to the limited scope of captioned writ petition, short facts shorn of elaboration will suffice. Short facts are that the writ petitioner-company filed its income tax returns for 'Assessment Year 2014-2015' [hereinafter 'said AY' for the sake of brevity]; that the writ petitioner's case was selected for regular assessment under Section 143(3) and notice under Section 143(2) was issued, but it is not necessary to advert to the dates of these notices as the same are not imperative for appreciating this order; that 'Assessing Officer' [hereinafter 'AO' for the sake of convenience and clarity] in the course of assessment requested for certain details pertaining to buy-back of shares undertaken by the writ petitioner-company inter alia under Section 77A of 'The Companies Act, 1956' [hereinafter 'Companies Act' for the sake of brevity] for the 'Financial Year' 2013-2014 [FY]; that AO came to the conclusion that tax liability of writ petitioner-company is Nil as far as dividend distribution taxes is concerned; that thereafter, third respondent issued a notice under Section 263 of IT Act as according to the third respondent, this order of AO is prejudicial to the interest of the Revenue. This notice was challenged by writ petitioner in this Court by way of WP.No.7542 of 2018 and the same was dismissed by a learned Single Judge vide order dated 25.06.2019, directing the writ petitioner to file response to the 263 pre-notice; that the writ petitioner carried it by way of intra-Court appeal i.e., WA.No.2081 of 2019 and a Hon'ble Division Bench on 05.07.2019 sustained the order

of Hon'ble Single Judge; that thereafter, writ petitioner filed its submissions and also appeared before third respondent; that this culminated in Revisional order; that the Revisional order made by third respondent is appealable under Section 253 of IT Act; that the appeal lies to ITAT; that the aforementioned appeal came to be filed on 03.10.2019 and the same is pending; that the appeal was last scheduled to be listed on 23.09.2021 before ITAT 'B' Bench, but all the matters scheduled to be listed that day before ITAT 'B' Bench stood reposted to 01.12.2021; that this Court is informed that the various Benches convene in different combinations owing to the limited number of members and that resulted in the matter not being taken up on 23.09.2021 though according to the appellant, appellant was ready to argue the matter; that in the interregnum, writ petitioner was visited with a notice from second respondent being notice dated 15.09.2021, which is pursuant to the Revisional Order of third respondent; that this notice dated 15.09.2021 draws up a timeline and if the same is not adhered to, writ petitioner is likely to have an order from second respondent in terms of Revisional order which specifically directs the AO to invoke the provisions of Sections 115(o) and 115(p) of IT Act and examine distribution of dividends qua 222 of IT Act and recover dividend distribution tax if that be so; that appeal before ITAT now stands listed on 01.12.2021, but if the AO passes order in the interregnum, the appeal will become infructuous and the writ petitioner has to reinvent the wheel; that on the teeth of such a scenario captioned writ petition has been filed.

5. Mr.A.P.Srinivas, learned Senior standing counsel (Revenue counsel) accepted notice on behalf of all the three respondents.

6. Owing to the short point that is being raised and owing to the limited prayer that is being made (the same shall be alluded to infra), with the consent of both sides, main writ petition is being taken up and the same is being disposed of vide this order.

7. Limited prayer which learned Senior counsel makes is, if the Revisional order is kept in abeyance for a period of twelve (12) weeks from today i.e., upto 15.12.2021, the appeal before ITAT can be heard out and that will give a quietus to the entire matter. This is the limited prayer that has been made before me today.

8. Learned Revenue counsel, in response to the above submission, responded by saying that the writ petitioner has not chosen to file a stay petition before ITAT and not having chosen to do so it cannot now seek this limited prayer.

9. The entire matter now turns on whether the writ petitioner should have moved a stay petition. In response to this, learned Revenue counsel drew the attention of this Court to Section 253(7) of IT Act as also proviso to 254(2A).

10. To be noted, learned Senior counsel initially drew the attention of this Court to Rule 35A of 'Income Tax Appellate Tribunal Rules, 1963' [hereinafter 'ITAT Rules' for the sake of convenience and clarity].

11. Learned Revenue counsel drew the attention of this Court to a judgment of Hon'ble Supreme Court rendered in 1969 and reported in AIR 1969 SC 430 being Income Tax Officer, Cannanore Vs.M.K.Mohamad Kunhi case for the proposition that ITAT has power to grant stay as the same is incidental or ancillary to its appellate jurisdiction.

12. I carefully considered the short point that falls for consideration as the ITAT is in seizin of the matter. Though submissions were made to say that buy-back of shares under Section 77A of Companies Act was in accordance with the value fixed by RBI guidelines and that the Revenue has already taxed the same in the hands of erstwhile shareholders of the Company and it cannot be taxed now, I do not want to express any opinion or go into those aspects as these are on merits which are pending adjudication in ITAT. It will suffice to say that prima facie case can be inferred from ITAT being in seizin, i.e., consideration of the correctness or otherwise of Revisional order made by third respondent. This takes us to the balance of convenience and irreparable/legal injury determinants. Balance of convenience obviously ennures to the benefit of the writ petitioner as if the second respondent pursuant to aforementioned notice dated 15.09.2021, which was issued pending appeal before ITAT, concludes the proceedings, the entire appeal would become infructuous. The other facet of the matter is, second respondent's such conclusion cannot also be found fault (if it happens) as, as of today the Revisional order is operating and it is live. Therefore, assuming that an order is passed between now and 01.12.2021 by second respondent, it cannot be said to be lack of jurisdiction and the second respondent cannot be found fault with for making such an order. Thereafter, it will be a situation or an attempt to put the clock back. Therefore, balance of convenience and possible legal injury and irreversible determinants also work in favour of limited stay for a limited period of twelve weeks.

13. Now what needs to be examined is the lone question as to whether the writ petitioner should have moved ITAT for stay (as alluded to supra). I am not inclined to look at Rule 35A of ITAT Rules as that is merely procedural and that deals with the procedure for filing and disposal of stay petitions. I would rather look at the substantive provision and substantive provision which vests ITAT with powers to grant stay is Section 253 (7) of IT Act, which reads as follows:

'253. Appeals to the Appellate Tribunal-

(1) ....

(a) .....

(b) .....

(ba)....

(c) .....

(d) .....

(e) .....

(f) .....

(2) ....

(3) ....

(4) ....

(5) ....

(6) ....

(a) .....

(b) .....

(c) .....

(d) .....

(7) An application for stay of demand shall be accompanied by a fee of five hundred rupees.'

14. A careful perusal of Section 253(7) makes it clear that power of ITAT to grant stay is qua a demand. In the instant case, there is no disputation or disagreement that there is no demand. Therefore, if 253(7) is invoked the question as to whether ITAT can stay the Revisional order becomes a matter of debate. In the instant case, I deem it appropriate to leave this debate open. The reason is M.K.Mohamad Kunhi's case rendered in 1969 (pressed into service by learned Revenue counsel and alluded to supra) does not come to the aid of the Revenue in the case on hand. In 1969, there was no specific provision for stay. Sub-Section 7 of Section 253 was brought into statue book or in other words, it kicked in only on and from 01.10.1998 vide Finance Act, 1998. Likewise, Section 254 (2A) and the proviso therein kicked in only in 2007. Therefore, M.K.Mohamad Kunhi's case was rendered by Hon'ble Supreme Court at a point of time when there was no specific provision for stay qua ITAT in a appeal. Now that there is a specific provision namely sub-section (7) of Section 253 read with proviso to Sub-Section 2A of Section 254, the scenario or the obtaining legal position is completely different. This Court is also informed that this proposition/principle i.e., proposition that 'absent

demand an appellant cannot move a stay petition under Section 253(7) before ITAT' is not blessed with authorities. As it involves a larger debate and in the light of the limited prayer that is sought for, I deem it appropriate to leave this question open and dispose of captioned writ petition and WMP therein by making the following order:

a) Revisional order being order dated 01.08.2019 made by third respondent will be kept in abeyance or in other words all further proceedings pursuant to this Revisional order will remain stayed for a period of twelve (12) weeks from today i.e., upto 15.12.2021;

b) It is open to the writ petitioner to move ITAT for expeditious disposal of appeal before ITAT filed being Appeal No. IT-2820/CHNY-2019 filed on 03.10.2019;

c) Though obvious, it is made clear that this Court has not expressed any view or opinion on the merits of the matter as the ITAT is in seizin of the matter and it is, at the moment, the domain of the Tribunal.

d) This Court has left open the question of incidental and ancillary powers of Tribunal to grant stay in the light of specific provisions namely Section 253(7) and 254(2A) proviso of IT Act.

15. Writ petition disposed of with the above directives. Consequently, connected WMP is also disposed of. There shall be no order as to costs.

s/d-
Assistant Registrar(CS-VI)

True Copy

Sub-Assistant Registrar

kmi

To

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PA(CO)
SP(26/10/2021)