Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.471 OF 2022
WITH
WRIT PETITION NO.472 OF 2022
WITH
WRIT PETITION NO.473 OF 2022

WRIT PETITION NO.471 OF 2022

Tungabhadra Minerals Private Limited thr. Jayant Gaunker ...**Petitioner**

Versus

Deputy Commissioner of Income Tax And 3 Ors. ...**Respondents**

WITH
WRIT PETITION NO.472 OF 2022

Salgaocar Mining Industries Private Limited thr. Jayant Gaunker ...**Petitioner**

Versus

Deputy Commissioner of Income Tax And 3 Ors. ...**Respondents**

WITH
WRIT PETITION NO.473 OF 2022

Salitho Ores Private Private Limited thr. Jayant Gaunker ...**Petitioner**

Versus

Deputy Commissioner of Income Tax And 3 Ors. ...**Respondents**

Mr. Percy Pardiwala, Senior Advocate *with* **Mr. Sukh Sagar Syal, Mr. Ashwin D. Bhobe** *and* **Ms. Shaizeen Shaikh, Advocates** *for the Petitioners.*

Ms. Amira Razaq, Standing Counsel *for the Respondent No.1.*
Mr. Raviraj Chodankar, Deputy Solicitor General of India *for Respondent No.4.*

CORAM: G. S. KULKARNI &
BHARAT P. DESHPANDE, JJ.

Date: 30th September 2022

P.C.

We have heard Mr. Pardiwala, learned Senior Counsel for the petitioner and Ms. Razaq, learned Standing Counsel for the Revenue on these petitions.

2. The challenge as raised in these petitions, as also agreed at the bar, is analogous. Accordingly, the petitions are being disposed of by this common order. For convenience we refer to the facts relevant to the first petition.

3. The petitioners being aggrieved inter alia by the orders dated 20.06.2021 passed by the Assessing Officer for the Assessment Year 2008-2009 and the consequent demand notices dated 5 August 2021, 23 August 2021, 9 May 2022 , 8 June 2022, 2 August 2022 and 29 August 2022 issued by the respondents have filed these petitions. Mr. Pardiwala would submit that essentially

the concern of the petitioners in the present proceedings is in regard to the refusal of stay to the demand notices. We note the prayers as made in the petition:

> *(a) this Hon'ble Court may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof quash and set aside the Order dated 20th June, 2021 for the A.Y. 2008-09 and the Notices dated 5th August, 2021, 23rd August, 2021, 9th May, 2022, 8th June, 2022, 2nd August, 2022 and 29th August, 2022 and Orders dated 11th August, 2021, 17th November, 2021, 29th December, 2021 for the recovery of a part of the demand arising from the Order dated 20th June, 2021 for the A.Y. 2008-09.*
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> *(b) this Hon'ble Court may be pleased to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing Respondent No.1 to forthwith withdraw and cancel the Order dated 20th June, 2021 for the A.Y. 2008-09 and the Notices dated 5th August, 2021, 23rd August 2021, 9th May, 2022, 8th June, 2022, 2nd August, 2022 and 29th August, 2022 and Orders dated 11th August, 2021, 17th November, 2021, 29th December, 2021 for the recovery of a part of the demand arising from the Order dated 20th June, 2021 for the A.Y. 2008-09.*
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> *(c) this Hon'ble Court may be pleased to issue a Writ of Prohibition or a writ in the nature of Prohibition or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondents to permanently refrain from giving effect to and/or proceeding further with the recovery of any tax demand for the A.Y. 2008-09.*
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> *(d) Pending and hearing and final disposal of this Petition, this Hon'ble Court may be pleased to restrain the Respondents from acting upon the Order dated 20th June, 2021 for the A.Y. 2008-09 and the Notices dated 5th August,*

2021, 23rd August 2021, 9th May, 2022, 8th June, 2022, 2nd August, 2022 and 29th August, 2022 and Orders dated 11th August, 2021, 17th November, 2021, 29th December, 2021 for the recovery of a part of the demand arising from the Order dated 20th June, 2021 for the A.Y. 2008-09.

(e) Ad interim relief in terms of prayer clause (d) be granted;

(f) the Respondents be directed to pay the costs of this Petition.

(g) this Hon'ble Court may be pleased to grant such other and further reliefs and orders as this Hon'ble Court may deem fit and proper.

(Note: Prayers are similar in the other petitions.)

4. Mr. Pardiwala has drawn our attention to the impugned Assessment Order dated 20 June 2021 passed in the petitioner's case which is for the Assessment Year 2008-09 issued under the provisions of Section 143(3) read with Section 153A of the Income Tax Act 1961 (for short 'the IT Act'). The assessment in question is issued on the basis of a search and seizure action taken against the petitioner under the provisions of Section 132 of the Income Tax Act, 1961. By the Assessment Order in question there is an addition of income in the petitioner's hands in the tune of ₹264.59 crores for the Assessment Year 2008-09. Consequent to the Assessment Order a tax demand is raised against the petitioner which is for an amount of ₹239.54 crores. Similar is the position in the companion matters, however, the amounts are different.

5. The petitioner has already assailed the assessment orders by filing an appeal before the Commissioner of Income Tax (Appeals) which are stated to be pending adjudication. In the meantime, the petitioner approached the Assessing Officer by an application dated 30.07.2021 praying for stay of the tax demand inter alia also contending that such demand is not justified on the ground of the assessment order being bad and illegal when considered on its merits. The petitioner also raised an issue on financial stringency contending that it would not make it possible for the petitioner to deposit the tax as demanded. The petitioner contended that the balance of convenience was in favour of the petitioner and a prima facie case made out by the petitioner for stay of the tax demand. The Assessing Officer by an order dated 11.08.2021 without assigning any reasons rejected the petitioner's stay application. Being aggrieved by such decision of the Assessing Officer the petitioner approached the Principal Commissioner of Income Tax, by an application dated 13.08.2021, inter alia, praying for stay of the demand in view of the pendency of the appeal and on the extensive grounds as made out by the petitioner in the stay application as filed before the Assessing Officer. The petitioners contend that in their application before the Assessing Officer dated 30.07.2021 a substantive case on the aspect of “financial

stringency" was made out by the petitioner, which was not considered by the Assessing Officer and without assigning any reasons their prayer for stay was rejected by an order dated 11.08.2021.

6. The Principal Commissioner heard the petitioner on such application and by order dated 17.11.2021 did not accept the petitioner's'' case on stay of the demand notice, inter alia observing that the additions made are based on evidences found during search proceedings and the issues are not exactly same as already decided by the appellate authorities in earlier assessment years. It was observed that in the facts and circumstances of the case and Instruction No. 1914 and OM dated 29.02.2016, the petitioner be directed to remit 10% of the taxes due as per the demand notices served for the relevant assessment years before 15 December 2021.

7. Mr. Pardiwala has made submissions that the petitioners' case although was considered on other aspects, however, the Principal Commissioner had not considered the specific case of the petitioner on financial distress in deciding petitioner's prayer for stay of the demand. It is stated that on such backdrop the petitioner re-approached the Principal Commissioner by another

application dated 06.12.2021, categorically pointing out the issues of financial stringency as already detailed in the applications filed in relation to the stay of the demand, thereby praying before the Principal Commissioner to consider such contentions, and the material placed on record, to stay the demand.

8. Such application of the petitioner came to be decided by the Principal Commissioner by an order dated 29.12.2021, whereby in rejecting the petitioner's application in paragraph 7 of his order the Principal Commissioner observed thus:

> '7. Regarding financial stringency claimed by the assessee, the AO in his report submitted that the overseas BVI companies controlled by Late Anil V Salgaocar realised net trading profit of USD $ 690,650,641 which includes profit illegally shifts outside India belonging to Salgaocar Group of companies, which has been utilised for purchase of various overseas assets which include apartments, office units, residences, oil tanker, cruise liner, barges, towing tugs, cranes, aircraft etc. Further it is also revealed from Suit 821 documents that the trading profits earned from the under invoicing of iron order exports by Salgaocar Group of Companies in India have also been utilised to invest in India as well as various foreign entities like Subarnarekha Port India, Ideal Port India, Vertex Newton Mumbai, Salgaocar Asia Pte Ltd, African Pte Ltd, Venus Shining Bulk Carrier, Salgaocar Swaziland, GIP general Trading LLC, Navy Impex LLC etc. In view of the above facts of the case, it can be said

> that the assessee is not able to prove any financial distress to the company to pay the demand.'

On such reasoning the Principal Commissioner concluded that 10% of the tax is required to be remitted by the petitioner within 10 days of the receipt of the said demand in question. Accordingly, a fresh demand has been raised by the respondents by notice dated 29.08.2022 which was received by the petitioner on 03.09.2022. It is on such conspectus assailing the said orders the petitioner has approached this Court in the present proceedings.

9. Mr. Pardiwala has made extensive submissions including on merits of the case of the petitioner, which no doubt, is the petitioner's case in the pending appeal, to contend that a prima facie case was made out by the petitioner for a stay on the tax as demanded, during the pendency of the appeal. However, Mr. Pardiwala would fairly submit that the immediate concern of the petitioner is in regard to the demand of 10% of the tax as assessed, as raised against the petitioner by the notices in question. Mr. Pardiwala would submit that in the said three successive orders as passed refusing stay on the tax demand notices, none of the orders have considered the petitioner's categorical case, as pleaded, on the aspect of financial distress. It

is hence his submission that the demand notices are required to be stayed.

10. In support of his submissions that it would be imperative for the respondents to consider the issue of financial hardship in deciding the stay application, reliance is placed on the decision of the co-ordinate Bench of this Court in the case of ***Mumbai Metropolitan Region Development Authority v/s. Deputy Director of Income -tax (Exemption-1)***[1]. Referring to paragraph 11 of the said decision Mr. Pardiwala submits that this Court referring to the settled position in law on the issue of a stay of demand on such ground as laid down in ***KEC International Ltd. V/s. B. R. Balakrishnan***[2]***, UTI Mutual Funds v/s. ITO***[3] and ***UTI Mutual Fund v/s. ITO*** has held that in cases where the assessee/applicant relies upon financial difficulties, the authority concerned should briefly indicate whether the asssessee is in a "financially sound and viable position" to deposit the amounts or the apprehension of the revenue of non-recovery later on, is correct warranting deposit.

11. Mr. Pardiwala would thus submit that apart from the

1 (2015) 273 CTR 317 (Bombay)

2 (2001) 251 ITR 158

3 (2012) 345 ITR 71 (Bom)

petitioner making out a case on merits certainly a case of financial hardship was made out by the petitioners which was required to be considered by the Assessing Officer as also the Principal Commissioner in deciding the stay application. Mr. Pardiwala would submit that the Principal Commissioner has in fact not assigned any reason and has merely quoted observations as made by the Assessing Officer in his report, which according to the petitioners, was an issue of an assail on the merits of the petitioners case in the pending appeal. According to Mr. Pardiwala what was necessary to be seen is the financial stringency as categorically pleaded by the petitioner in the stay applications.

12. On the other hand, Ms. Razaq, learned Standing Counsel for the Revenue at the outset has objected to the maintainability of the petitions. She would support the impugned orders. Ms. Razaq would contend that this is a clear case where the demands would be justified even when the Court considers the merits of the case. She would submit that the Court, thus ought not to interfere and more particularly when the appeal itself is pending the petitioner ought not to urge such issues and needs to comply with the demand of deposit of the 10% of the total amount of tax payable as assessed.

13. We have heard learned counsel for the parties and with their assistance we have perused the record. On perusal of the orders by which the stay of the demand has been rejected by the Assessing Officer as also by the Principal Commissioner of Income tax, we may observe that in the petitioner's application dated 30.07.2021 the petitioner had averred a categorical case of financial hardship. However, the Assessing Officer rejected the petitioner's application of a stay on the demand, without assigning any reasons. The petitioner accordingly approached the Principal Commissioner praying for stay of the demand, reiterating the specific grounds in that regard contending that the Assessing Officer has not applied his mind to the aspect of financial stringency and therefore the demand needs to be stayed. However, the fate of the petitioner before the Principal Commissioner was not different. Although other issues on merits are considered by the Principal Commissioner, we find that there are no reasons in the context of financial hardship, in both the orders passed by the Principal Commissioner being orders dated 11.08.2021 and order dated 29.12.2021. Thus, the case of the petitioner on financial stringency is not at at all considered in the perspective it ought to have been considered by the Principal Commissioner, after applying his mind to the specific plea as taken by the petitioners in that regard. Such plea was required to

be decided by considering the facts and figures from the materials as placed on record, so as to determine by giving reasons as to whether the plea was at all genuine and acceptable.

14. It is clearly seen from the decision cited by Mr. Pardiwala in the case of ***Mumbai Metropolitan Region Development Authority v/s. Deputy Director of Income -tax (Exemption-1)***(supra) that this Court considering the earlier decisions on such issue as noted by us, has held that the aspect of financial hardship is one of the grounds which is required to be considered by the authority concerned and the authority concerned should briefly indicate whether the assessee is financially sound and viable to deposit the amount or the apprehension of the revenue of non-recovery later is correct warranting deposit. We find that at this stage such test is not applied in passing of the impugned orders by the Principal Commissioner who has simplicitor referred to the Assessing Officer's report in rejecting stay on deposit of the tax.

15. We are conscious that the proceedings are pending before the Commissioner of Income Tax (Appeals) and hence, we need not delve on any issues on the merits as any observations on merits of the petitioner's contentions would not be in the interest of the parties in the adjudication of the appeals. This would also

not be fair to such proceedings. However, considering this limited issue with regard to the stay of demand, we are of the opinion that the Principal Commissioner needs to reconsider such issue and pass an appropriate order considering the issue of financial stringency as canvassed by the petitioner by furnishing reasons. In the light of the above discussion, we dispose of these petitions by the following order:-

ORDER

a) The Principal Commissioner of Income Tax is directed to hear the petitioner(s) on the stay application on the specific plea of the petitioner in regard to financial stringency and after granting an opportunity of a hearing to the petitioner(s), pass an appropriate order on such issue. Let such exercise be undertaken as expeditiously as possible and in any case within 2 months from today.

b) In the meantime, till a fresh decision on such issue is taken, the impugned demands in question, relevant to these petitions shall not be acted upon by the respondents.

16. We clarify that considering the view taken by us, we have not considered the issue of maintainability of the petitions.

17. We further clarify that this order is in no manner any expression on the contentions of both the parties in the pending proceedings.

18. All contentions of the parties on merits are expressly kept open.

19. The petitions are disposed of. No costs.

BHARAT P. DESHPANDE, J **G. S. KULKARNI, J**

MARIA SUZANA REBELLO Digitally signed by MARIA SUZANA REBELLO Date: 2022.10.03 19:30:30 +05'30'