IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 315 OF 2023
ALONG WITH
WRIT PETITION NO. 316 OF 2023

BHIL Employees Welfare Fund No.4
(formerly known as Bajaj Auto
Employees Welfare Fund No.4) .. Petitioner
Vs.
Income Tax Officer,
Ward 9(1), Pune and Ors. .. Respondents

Mr. P. J. Pardiwalla, Senior Advocate a/w. Mr. Jeet Kamdar and Mr. Atul K. Jasani for the Petitioner.

Mr. Suresh Kumar for Respondents.

CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, JJ.
DATED : 7TH JANUARY, 2023.

P.C. : [PER KAMAL KHATA, J.]

1. The Writ Petition no.315 of 2023 is with regard to the assessment year 2014-15 and the Writ Petition no.316 of 2023 is with regard to the assessment year 2017-18. Since the facts of these petitions are common, we shall dispose of both the petitions by a common

order. For the sake brevity we advert to the facts stated in Writ Petition no.315 of 2023.

2. This petition no. 315 of 2023 challenges the impugned orders dated 5th May, 2022 and 13th July, 2022 passed by Respondent nos.1 & 2 whereby the application of the Petitioner for stay of recovery of the entire demand for AY-2014-15 was rejected. Further, the petition challenges the impugned letter dated 22nd July, 2022 whereby the Respondent no.1 sought payment of outstanding income tax dues of Rs.9.63 crores for A.Y. 2014-15; and also challenges the inaction of the CIT(A) in disposing of the Petitioner's application filed on 16th November 2022 against the recovery of demand by the Respondent.

3. It is the case of the Petitioner that the demand raised by Respondent no.3 in the sum of Rs.9,62,39,316/- on account of the addition made u/s 69 of the Act, ought not to have been made as the conditions laid down in Section 69 of the Act have not been fulfilled.

Brief facts :

4. On 9th March, 1981 the Petitioner trust was formed for the benefit of the employees of the erstwhile Bajaj Auto Ltd. The Petitioner

formerly known as "Bajaj Auto Employees Welfare Fund No.4" was allotted a permanent account number (PAN) AABFB9453F with a status of a firm.

5. As per the scheme of demerger of Bajaj Auto Limited approved by this Court, by its order dated 18th December 2007, the automobile business was transferred to Bajaj Auto Limited, and finance was transferred to Bajaj Finserv Limited with effect from 31st March 2007. Bajaj Auto Limited's name was changed to Bajaj Holdings and Investment Limited (for short "BHIL") on 5th March 2008.

6. Pursuant to the scheme of demerger, the name of Bajaj Auto Employees Welfare Fund No. 4 was changed to "BHIL Employees Welfare Fund No.4" as per trust deed dated 16th February 2015. The Petitioner on application, was allotted a new PAN bearing no.AACTB8382L with a status of a trust.

7. On 31st March 2021 the Respondent no.1 issued a notice under section (u/s) 148 of the Income Tax Act, 1961 (**the Act**) as they had reason to believe that the Petitioners income chargeable to tax for AY-2014-15 had escaped assessment within the meaning of Section 147 of the Act and called upon the Petitioner to file its

return of income within a period of 30 days from the date of service of the notice as per the necessary sanction issued by the PCIT, Pune-3 (Respondent no.2). On 31st March, 2021 the Respondent no.2 vide his letter granted approval u/s 151 of the Act for reopening for the following reasons:

> "*1. As per the PAN data the assessee is a firm and no e-filing record has been found for earlier years. Further, it is seen that, M/s Bajaj Auto Employees Welfare Fund No 4 has not filed his return of income for A.Y.2014-15, within the prescribed time limit as per the provisions of section 139 of the Income Tax Act, 1961.*
>
> *2. On going through the AIMS data available in the ITBA, it is seen that the assessee has made the following transactions:*
>
> *(i) Time Deposit of Rs. 1425000/- with a Banking Company.*
> *(ii) TDS Return – Other Interest (Section 194A) of Rs. 270868/-.*
> *(iii) TDS Return – Salary to employee (Section 192A) of Rs.270868/-*
> *(iv) Paid Rs. 5825000/- for Purchase of Units of Mutual Fund.*
> *(v) Paid Rs. 87800000/- for acquiring Bonds/ Debentures.*
> *(vi) Paid Rs. 2720949/- for acquiring Shares.*
>
> *3. In view of the above facts, the income raised out of the above transaction/receipts have not been brought to tax. Therefore, I have reason to believe that the income of the assessee more than Rs.1.00 lakh has escaped assessment as per explanation 2(a) of section 147 for the A.Y.2014-15.*
>
> *4. In this case, no return of income has been filed by the assessee for the year under consideration, no assessment was made and the only requirement to initiate proceedings u/s 147 is reason to believe which has been recorded above (refer paragraph 3).*"

8. On 20th July, 2021 the Respondent no.1 issued a notice u/s 142 (1) of the Act under the old name and PAN of the Petitioner, asking them to furnish details of various information stated therein by 4th August, 2021.

9. On 16th December, 2021 the Respondent no.3 issued a notice u/s 142(1) of the Act under the old name and PAN of the Petitioner, asking them to file a return of income in response to the notice u/s 148(1) of the Act and to furnish various details pertaining to the 10 items mentioned in the Annexure to the notice by 27th December, 2021.

10. On 21st December, 2021 the Petitioner addressed a letter to Respondent nos.1 and 3 and pointed out that the earlier notice was missed since most employees of the Petitioners were working from home during the second wave of covid pandemic and their tax personnel Mr. Eugene Waradkar had quit the organization in September 2021 and the new personnel joined only in November 2021 in addition to the technical difficulties faced by them on account of the change of name and status of the PAN from firm to trust. The letter also pointed out that the Income Tax Utility auto selected the status of the Petitioner as a firm in view of the old PAN

and directly computed tax at the rate of 30% plus surcharge and cess instead of applying slab rates and allowing the basic exemption limit for income upto Rs.2 lakhs. It was further pointed out that the income tax utility did not allow the Petitioner to select any other status other than the 'firm' on account of which they were unable to file the return of income. It was urged that even if the assessment was reopened, the reopening proceeding should be conducted on the new PAN and not the old one.

11. On 14th March, 2022 the Respondent no.3 issued a notice u/s 142(1) of the Act asking the Petitioner to furnish various details by 16th March, 2022. On 16th March, 2022 the Petitioner replied to the Respondent no.1 and pointed out that they were facing technical difficulty in submitting the return of income.

12. On 25th March 2022 Respondent no.1 issued a show cause notice wherein the extracted variations proposed in the draft assessment order by referring to reasons recorded for reopening the assessment and mentioned that the Petitioner was given ample opportunities to file its return of income and since the Petitioner had not filed he had no option but to complete the assessment proceedings *ex parte* u/s 144 of the Act. The Respondent no.3

made an addition and proposed the total income of the Petitioner at Rs.9,83,12,685/-. The Petitioner submitted a response on 26th March 2022 and raised its objections to the said notice. On 27th March 2022, Respondent no.3 addressed a letter intimating the schedule of personal hearing through Video conferencing and fixed the personal hearing for 29th March 2022. On 30th March 2022 the Respondent no.3 passed the final assessment order u/s 147 r.w.s. 144 and 144B of the Act. Thereafter, the Respondent no.3 passed a computation sheet referring to the order u/s 147 r.w.s. 144 of the Act and determined a demand of Rs.9,62,39,316/- from the Petitioner.

13. On 25th April 2022 the Petitioner filed an appeal before the CIT (A) (National Faceless Appeal Centre) challenging the order passed u/s 147 r.w.s. 144 and 144B of the Act. On 27th April 2022 the Petitioner also filed an application before Respondent no.1/Respondent no.3 for stay of the entire demand u/s 220 (6) of the Act to keep the demand in abeyance till the appeal is decided by the CIT(A).

14. On 5th May 2022, the Respondent no.1 granted the stay application of the Petitioner subject to fulfilment of certain

conditions viz. (a) the Petitioner pays 20% of the demand i.e. Rs.19247864/- within 15 days of receipt of the order (b) cooperate in early disposal of the appeal (c) Respondent no.1 reserves the right to review the order passed after expiry of a reasonable period and (d) Respondent no.1 reserves the right to adjust refund, if any, against the demand to the extent of the amount required from granting stay subject to the provisions of Section 245 of the Act. The Respondent no.1 also held that in the case the Petitioner fails to fulfil the conditions it will be treated as an assessee in default and recovery proceedings shall be initiated as per the Act.

15. The Petitioner filed an application for stay of demand on 18th May 2022 with Respondent no.2 and pointed out the factual position. The Petitioner contended that no addition could be made u/s 69 of the Act and that the assessment had been done on the basis that the Petitioner was a firm instead of an individual. The Petitioner also contended undue financial hardship if demand was recovered from Petitioner.

16. On 13th July 2022 the Respondent no.2 passed an order disposing of the stay application of the Petitioner for AY 2014-15 and AY

2017-18 by relying on the CBDT instruction no.1914 dated 2nd December 1993. Respondent No. 2 granted stay of demand for AY 2017-18 on the condition that the Petitioner paid 10% of the total disputed demand i.e. Rs. 21,05,721 on or before 31st August 2022.

17. On 22nd July 2022 the Respondent No. 1 addressed a letter to the Petitioner calling upon them to pay the outstanding income tax dues for AY 2012-13, AY 2014-15 and AY 2017-18 and furnish proof within 10 days of the receipt of the notice. The Petitioner was called upon to pay 20% of the outstanding demand if an appeal was filed before the CIT(A) and was informed that failure to do so within 10 days would result in penalty u/s 221 of the Act which may be 100% of the arrears. The letter reads as under:

> *"As per the records available in this office it is seen that the following demand(s) are still outstanding against you. If you have already paid the dues, you may please produce the proof for the same, including a copy of challan within Ten days of receipt of this notice. If you have not paid the same, you are called upon to pay the demand(s) outstanding and the interest u/s 220(2) of the Income Tax Act, 1961, immediately and produce copy of the challan, failing which the undersigned will be forced to take coercive actions, as may be found necessary, for recovery of the demand, as per the provisions of Income Tax Act, 1961.*

SN	*AY*	*Section*	*Date of Demand*	*Demand outstanding Rs.*
1	*2014-15*	*147*	*30.03.2022*	*9,62,39,320*
2	*2017-18*	*147*	*30.03.2022*	*2,10,57,210*
3	*2012-13*	*271(1)(b)*	*17.07.2019*	*10,000*

18. On 16th November 2022 the Petitioner filed an application for stay of the demand before the CIT(A) and requested to fix the date for hearing at an early date. Furthermore, the Respondent nos. 1 & 3 were requested not to initiate any action for recovery of the outstanding demand till the order is passed by the CIT(A).

19. The learned counsel for the Petitioner submitted that the Respondent nos. 1 & 2 have arbitrarily and capriciously rejected the Petitioner's stay application. The learned counsel further submits that the impugned letter was issued in gross contravention of the parameters laid down by this court in the case of ***KEC International v B R Balakrishnan (2001) 251 ITR 158***, which are required to be mandatorily followed by the appellate authorities whilst deciding the stay applications. The learned counsel failed to deal with the stay application and incorrectly passed an order granting a conditional stay requiring the Petitioner to pay 20 % of the demand within 15 days without appreciating the facts and circumstances of the case and without

considering the merits of the addition made in the assessment order.

20. The learned counsel further submitted that the Respondent no. 2 passed an order by simply relying on the CBDT Instruction no. 1914 dated 2nd December 1993 and wrongly held that demand will be stayed only if there are valid reasons and mere filing an appeal against the assessment order will not be a sufficient reason to stay recovery of the demand. He submitted that the Respondent no. 2 ought to have considered the stay application and thereby considered the factual position that the income tax return could not be filed since the old PAN no. was in the name of the firm and consequently the utility computes tax at the rate of 30% plus applicable surcharge and cess instead of giving the benefit of basic exemption limit and computing tax at slab rates applicable to individuals, AOPs and AJPs. He further submitted that the Respondent no. 2 ought to have considered the merits of the addition and followed the guidelines issued by the CBDT for recovery of taxes as per the office memorandum dated 29th February 2016. He submitted that the Respondent no. 2 ought to have passed a complete stay of the demand and not levied the condition of deposit of 10% of the total disputed demand.

21. The learned counsel further submitted that the impugned letter issued by the Respondent no. 1 ought to be quashed as it was issued without considering the impugned order passed by the Respondent no. 2 who is superior to Respondent no.1, and whereby the Petitioner was directed to pay 10% of the total disputed demand as against 20% directed to be paid by Respondent no.1.

22. The learned counsel further submitted that the Respondent no. 3 ought to have passed an assessment order u/s 143(3) and not u/s 144 of the Act as the Petitioner had filed detailed submissions dated 17th December 2021.

23. The learned counsel further pointed out various documents in support of his contention that the conditions of section 69 were not fulfilled as the Respondents have not disputed that the investments have not been made during the year and recorded in the balance sheet and the source of investments were also explained.

24. The learned counsel submitted that the income determined in the assessment was substantially higher than the returned income, net

profit and revenue of the Petitioner i.e. the income assessed was Rs 2,81,68,968/- whereas the total income was Rs 6,59,851/- i.e. 42 times the total income. It is submitted that the Respondent failed to consider the Instruction no. 96 dated 21st August 1969 issued by the CBDT which states that when income determined in assessment was substantially higher than the returned income, the recovery of the tax should be kept in abeyance till the decision in relation to the appeal filed is pronounced.

25. The learned counsel submitted that the Petitioner was created for benefitting the employees and calling upon them to pay tax on account of an incorrect assessment would cause financial hardship to them.

26. The learned counsel relied upon the following judgments in support of his contentions:

(i) ***Humuza Consultants versus Assistant Commissioner of Income Tax, passed in WP (L) 38423 of 2022 dated 16th December 2022;***

(ii) ***UTI Mutual Fund vs Income-tax Officer, 19(3)(2) reported in [2012] 345 ITR 71;***

(iii) ***UTI Mutual Fund vs Income-tax Officer, 19(3)(2), Mumbai reported in [2013] 31 taxmann.com 222 (Bombay).***

27. The learned counsel for the Respondent relied upon the assessment order and more particularly paragraph 5.2 at page 234 and page 268 and submitted that the AO has considered all the contentions of the Petitioner.

Conclusion:

28. We have heard the counsels.

29. We are unable to accept the contentions of the respondents that they have considered all the contentions of the petitioner inasmuch as the revert relied upon at page no.234 and page no.269 clearly evince that the respondents have not considered the various letters addressed by the petitioner from time to time and their request to change their status from a Firm to a Trust.

30. Apropos the judgement in the case of ***UPI Mutual Fund v/s. Income Tax Officer reported in [2012] 345 ITR 71 (Bombay)*** wherein it followed the judgement of the division bench of this court in ***KEC International Ltd. v/s. B. R. Balakrishnan [2011] 251 ITR 158 / 119 Taxman 974 (Bom)*** laying down the parameters for

disposing of the application for stay, more particularly, the parameter that:

> *"In exercising the powers of stay, the Income Tax Officer should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the assessing officer has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order : the matter must be considered from all its facets, balancing the interest of the assessee with the protection of the Revenue."*

We are of the opinion that these parameters have not been considered by the respondents in true letter and spirit as is evident from the orders passed that are based on the petitioner's status as a Firm instead of as a Trust.

31. Apropos the judgment in the case of ***UPT Mutual Fund v/s. Income Tax Officer reported in [2013] 31 taxmann.com 222 (Bombay)*** wherein this Court held that in considering whether a stay of demand granted, the Court is duty bound to consider not merely the issue of financial hardship if any, but also whether a strong *prima facie* case is made out and serious triable issues are raised that would warrant a dispensation of deposit. It was further held that calling upon petitioner to deposit, would itself occasion

undue hardship where a strong prima facie case has been made out. We are of the opinion that the respondents have failed to consider the ratio of the judgment in its true letter and spirit inasmuch as respondents called upon the petitioner to deposit 10% of the demand when the petitioner had a strong prima facie case. In our view, the deposit would itself occasion undue hardship to the petitioner who are Trust created for the purpose of benefiting the employees.

32. Apropos with regard to judgment ***Humuza Consultant v/s. Assistant Commissioner of Income Tax (supra)*** this Court has held that where a prima facie case in favour of the petitioner was found and it appeared that the assessment was high pitched, a stay was granted with regard to the impugned demand notices. In this case too it appears that the petitioner would have a strong *prima facie* case and they would not be liable to pay such a high demand if their assessment was considered in their capacity/status of a Trust as against the status of a Firm.

33. In view of the aforesaid, we are in agreement with the legal propositions enunciated in the aforesaid three judgments of this

Court and are bound by it and do not propose to take a different view. Accordingly, we are of the opinion that both the matters deserve to be remanded back with a direction that the Respondents to consider the Petitioner's application under their status as a Trust and try to dispose of the matter preferably within a period of 4 months from the date of this order. No coercive steps shall be taken against the assessee for the recovery of the demand in pursuance of the impugned notice dated 30th March 2022.

34. Petitions stand disposed of accordingly with no order as to costs.

(KAMAL KHATA, J.) **(DHIRAJ SINGH THAKUR, J.)**