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

% *Date of Decision: 24.11.2023*

+ **W.P.(C) 2162/2020**

M/S. FIS PAYMENT SOLUTIONS & SERVICES INDIA
PRIVATE LIMITED

..... Petitioner

Through: Mr Himanshu S Sinha, Adv.

versus

DEPUTY COMMISSIONER OF INCOME
TAX-9(1) & ANR.

..... Respondents

Through: Mr Ruchir Bhatia, Sr Standing
Counsel with Ms Deeksha Gupta,
Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

CM Appl. 55172/2023 [*Application moved on behalf of the petitioner for
early hearing*]

1. On the previous date, i.e., 20.10.2023, we had, broadly, heard arguments in the above-captioned application concerning the merits of the matter, as well as to ascertain whether the date of hearing in the matter should be advanced. After hearing the counsel for the parties, the following was noted, concerning the merits of the matter:

“1. This is an application moved on behalf of the petitioner/assessee seeking early hearing of the matter.

2. The principal grievance of the petitioner/assessee is that there is a failure on the part of the respondents/revenue to release refund amounting



to Rs.62,14,31,834/- under Section 143(1) of the Income-tax Act, 1961 [“Act”] along with applicable interest.

2.1 The prayer for refund is made for Assessment Year (AY) 2017-18.

3. Our attention has been drawn by Mr Himanshu Sinha, learned counsel who appears on behalf of the petitioner/assessee, to the order dated 03.03.2020 passed by a coordinate Bench comprising Hon’ble Justices Vipin Saghi [sic...Sanghi] and Sanjeev Narula.

3.1 Mr Sinha says that up until now, the respondents/revenue have not filed a counter-affidavit in the matter.

4. Mr Puneet Rai, learned senior standing counsel, who appears for Mr Ruchir Bhatia, learned senior standing counsel, says that he will have Mr Bhatia’s [sic...Bhatia] seek instructions as to what is the impediment qua the relief sought by the petitioner/assessee.

5. List the above-captioned application on 24.11.2023.”

2. Before we proceed further, with the consent of the counsel for the parties, early hearing is allowed, and the main matter is taken up for hearing.

3. The application is disposed of in the aforesaid terms.

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4. Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the respondents/revenue, says that he has returned with instructions.

4.1 Mr Bhatia says that the assessment order for the Assessment Year (AY) in issue i.e., AY 2017-18 was framed on 30.12.2019.

4.2 Mr Bhatia states that the demand raised *via* the said assessment order, amounting to Rs. 36,69,10,379/-, was fully adjusted against pre-paid taxes amounting to Rs. 67,76,90,204/- deposited by the petitioner/assessee.



4.3 Mr Bhatia says that although the amount left after adjustment would be Rs. 31,07,79,825/-, a larger amount was remitted as it included a component of interest.

4.4 Thus, the amount remitted to the petitioner/assessee was Rs. 34,80,73,401/-.

4.5 Mr Bhatia goes on to say that the said amount was remitted in and about March 03, 2020. This position is not disputed by Mr Himanshu Sinha, counsel who appears on behalf of the petitioner/assessee.

5. Mr Sinha, however, relies on Office Memorandums (OM) dated 29.02.2016 and 31.07.2017, issued by the Central Board of Direct Taxes (CBDT), in support of his contention that the respondents/revenue could not have adjusted the entire demand.

6. This argument is based on the directions contained in the aforesaid OMs.

6.1 Furthermore, Mr Sinha says that several additions made by the Assessing Officer (AO) could not have been made as per various judgments. In this regard, Mr Sinha has referred to the following additions made by the AO:

- (i) Disallowance in respect of ESOP expenses amounting to Rs. 4,50,93,651/-.
- (ii) Addition of Rs. 49,91,03,019/- made in respect of balance amount shown in sundry creditors account.
- (iii) Disallowance on employees' contribution made *qua* Provident Fund (PF) amounting to Rs. 30,31,354/-.



7. Insofar as the disallowances vis-à-vis ESOP expenses are concerned, Mr Sinha has placed reliance on the following judgment of this court: ***PCIT v. New Delhi Television Ltd.*** (2017) 398 ITR 57 (Delhi).

7.1 As regards the addition made *qua* balance amount in sundry creditors account is concerned, reliance is placed on the following judgments of this court:

(i) ***CIT vs. Hotline Electronics Ltd.*** (2012) 205 Taxman 245 (Delhi).

(ii) ***CIT vs. Jain Exports (P.) Ltd.*** (2013) 217 Taxman 54 (Delhi).

7.2 Likewise, insofar as the disallowance of employees' contribution vis à vis PF is concerned, reference is made to ***CIT vs. Vinay Cements Ltd*** (2007) 213 CTR 268 (SC) and ***CIT vs. AIMIL Ltd.*** (2010) 321 ITR 508.

8. In any case, we are of the view that the AO ought to have granted a stay in the matter, as the outstanding demand, as determined by the assessment order dated 30.12.2019, was disputed before the CIT(A) by taking recourse to appeal which was lodged on 27.01.2020. This, concededly, flows from a plain reading of the aforementioned OM dated 29.02.2016, read with OM dated 31.07.2017, issued by the CBDT. For convenience, the OMs are set forth hereafter:

“OFFICE MEMORANDUM [F.NO.404/72/93-ITCC], DATED 29-2-2016

Instruction No. 1914 dated 21-3-1996 contains guidelines issued by the Board regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand.

2. In part 'C' of the Instruction, it has been prescribed that a demand will be stayed only if there are valid reasons for doing so and that mere filing of an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. It has been further prescribed that while granting stay, the field officers may require the assessee to offer a suitable security (bank



guarantee, etc.) and/ or require the assessee to pay a reasonable amount in lump sum or in instalments.

3. It has been reported that the field authorities often insist on payment of a very high proportion of the disputed demand before granting stay of the balance demand. This often results in hardship for the taxpayers seeking stay of demand.

4. In order to streamline the process of grant of stay and standardize the quantum of lump sum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT (A), the following modified guidelines are being issued in partial modification of Instruction No. 1914:

(A) In a case where the outstanding demand is disputed before CIT (A), the assessing officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in para (B) hereunder.

(B) In a situation where,

(a) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted (e.g. in a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of Revenue or addition is based on credible evidence collected in a search or survey operation, etc.) or,

(b) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.), the assessing officer shall refer the matter to the administrative Pr. CIT/CIT, who after considering all relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand.

(C) In a case where stay of demand is granted by the assessing officer on payment of 15% of the disputed demand and the assessee is still aggrieved, he may approach the jurisdictional administrative Pr. CIT/CIT for a review of the decision of the assessing officer.

(D) The assessing officer shall dispose of a stay petition within 2 weeks of filing of the petition. If a reference has been made to Pr. CIT/CIT under para 4 (B) above or a review petition has been filed by the assessee under



para 4 (C) above, the same shall also be disposed of by the Pr. CIT/CIT within 2 weeks of the assessing officer making such reference or the assessee filing such review, as the case may be.

(E) In granting stay, the Assessing Officer may impose such conditions as he may think fit. He may, inter alia,-

(i) require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled;

(ii) reserve the right to review the order passed after expiry of reasonable period (say 6 months) or if the assessee has not cooperated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations;

(iii) reserve the right to adjust refunds arising, if any, against the demand, to the extent of the amount required for granting stay and subject to the provisions of section 245.

5. These instructions/guidelines may be immediately brought to the notice of all officers working in your jurisdiction for proper compliance.”

[Emphasis is ours]

“OFFICE MEMORANDUM [F.NO.404/72/93-ITCC], DATED 31-7-2017

Instruction No. 1914 dated 21-3-1996 contains guidelines issued by the Board regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand.

Vide O.M. NO.404/72/93-ITCC dated 29-2-2016. revised guidelines were issued in partial modification of Instruction No 1914, wherein, inter alia, vide para 4(A) it had been laid down that in a case where the outstanding demand is disputed before CIT(A). the Assessing Officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in para (B) there under Similar references to the standard rate of 15% have also been made in succeeding paragraphs therein.

The matter has been reviewed by the Board in the light of feedback received from field authorities. In view of the Board's efforts to contain over pitched assessments through several measures resulting in fairer and more reasonable assessment orders, the standard rate of 15% of the disputed demand is found to be on the lower side. Accordingly, it has been decided that the standard rate prescribed in O.M. dated 29-2-2016 be revised to 20% of the disputed demand, where the demand is contested before CIT(A). Thus, all references to 15% of



the disputed demand in the aforesaid O.M dated 29-2-2016 hereby stand modified to 20% of the disputed demand Other guidelines contained in the O.M. dated 29-2-2016 shall remain unchanged.

These modifications may be immediately brought to the notice of all officers working in your jurisdiction for proper compliance.”

[Emphasis is ours]

9. A plain reading of the two (2) OM's makes it clear that when the outstanding amount is disputed before the first appellate authority, i.e., the CIT(A), the AO **shall** grant a stay on demand till disposal of the first appeal on deposit of a certain percentage of the disputed demand with the respondents/revenue. The change that was brought about by the OM dated 31.07.2017 was that the percentage of the disputed demand required to be deposited for a grant of stay was increased from 15% to 20%.

10. In the instant case, the assessment order dated 30.12.2019 has created an outstanding demand amounting to Rs 36,69,10,379/-. This amount has been disputed before the CIT(A) *via* appeal dated 27.01.2020. The respondents/revenue already hold refunds due to the petitioner/assessee that exceed 20% of the disputed amount. Therefore, in our opinion, the AO is obligated to stay the demand created by the assessment order dated 30.12.2019.

10.1 Thus, the AO is directed to stay the demand captured in the order dated 30.12.2019, while retaining 20% of the disputed demand.

10.2 A necessary consequence of such direction would be that the petitioner/assessee would be entitled to a refund of the remaining amount.

11. Given the foregoing, the writ petition is disposed of with the following directions:

(i) The AO will stay the outstanding demand created by the



assessment order dated 30.12.2019.

ii) The AO will release the amount as alluded to hereinabove, which is in excess of 20% of the disputed demand.

12. The date already fixed in the matter i.e., 24.01.2024, shall stand cancelled.

13. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 24, 2023/pmc