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

% *Date of Decision: 24.11.2023*

+ **W.P.(C) 8497/2019**

TIRUPATI BUILDINGS AND OFFICES PRIVATE LIMITED

..... Petitioner

Through: Mr Ramesh Singh, Sr. Advocate with
Mr Sumit K. Batra, Adv.

versus

**COMMISSIONER OF INCOME TAX
AND ANOTHER**

..... Respondents

Through: Mr Zoheb Hossain, Sr Standing
Counsel with Mr Sanjeev Menon,
Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

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

RAJIV SHAKDHER, J.: (ORAL)

1. On the previous date, i.e., 02.11.2023, after hearing counsel for the parties, we had broadly etched out the contours of the case.

1.1 For the sake of convenience, the relevant parts of the order dated 02.11.2023 are set forth hereafter:

“1. The petitioner/assessee, in effect, seeks a direction for the release of refund, amounting to Rs. 87,89,440/-, for the Assessment Year (AY) 2018-19, which has been adjusted against outstanding demand for AY 2011-12.

2. The brief background in which the aforementioned grievance arises is articulated as follows:



2.1 Admittedly, the total demand raised against the petitioner, for AY 2008-09, 2009-10, and 2011-12, is Rs. 14.90 crores. As per the Office Memorandum (OM) dated 31.07.2017, issued by the CBDT, where the outstanding demand is disputed before the Commissioner of Income Tax [CIT(A)], the petitioner is entitled to seek a stay of the demand on payment of 20% of the disputed demand. In the petitioner's/assessee's case, 20% of the disputed demand [20% of Rs. 14.90 crores] would be Rs. 2.98 crores.

3. On the other hand, it is not in dispute that the petitioner was entitled to a refund of Rs.2,42,07,990/-for AYs 2012-13, 2013-14, and 2017-18. This amount was utilized to make up the deposit of 20% of the disputed amount that the petitioner was required to make for obtaining a stay. However, due to a shortfall of Rs. 56 lakhs, the petitioner was required to deposit the amount to fulfil 20% of the disputed demand to trigger a stay of demand in its favour.

3.1 The record also shows that the petitioner was served with a communication dated 17.06.2019 which not only indicated that its application for stay was rejected but also informed that refunds of AY 2012-13, 2013-14, and 2017-18 had been adjusted against the required deposit of 20% of disputed demand. Pursuant to this rejection, the petitioner deposited, via demand draft, Rs.53.50 lakhs on 21.06.2019. This brought down the deficit from Rs.56 lakhs to Rs.2.50 lakhs.

4. We are informed by Mr Sanjeev Menon, learned standing counsel, who appears on behalf of the respondents/revenue, that, on 05.07.2019, refund amounting to Rs.87,89,440/-, which was payable to the petitioner for AY 2018-19, was adjusted towards outstanding demand for AY 2011-12.

4.1 Furthermore, Mr Menon informs us that it is only thereafter i.e., on 31.07.2019, that stay was granted. Mr Menon contends that despite a shortfall of Rs. 2.50 lakhs, the respondents/revenue, in their magnanimity, stayed the recovery.

5. Mr Ramesh Singh, learned senior counsel, who appears on behalf of the petitioner, seeks to correct Mr Menon and points out that a refund amounting to Rs.2.50 lakhs was available for AY 2010-11. Therefore, Mr Singh contends that when an adjustment was made qua refund due vis-à-vis AY 2018-19, on 05.07.2019, when [sic] there was no deficit.

6. We are also informed that against the assessment order dated 28.03.2013, an appeal was preferred by the petitioner with the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"], wherein, via order dated 25.11.2014, the CIT(A) deleted the entire addition.



6.1 Three appeals were filed by the respondents/revenue against the order of the CIT(A) dated 25.11.2014, pertaining to AYs 2008-09, 2009-10, and 2011-12, before the Tribunal. The Tribunal, via order dated 28.05.2018, on the issue of addition under Section 68 of the Act, remanded the issue concerning addition made under Section 68 of the Act to the AO while sustaining the order of the CIT(A) on the issue of deduction claimed under Section 40A of the Act.

6.2 Pursuant to this direction of the Tribunal in the first round, the AO, via orders dated 31.10.2018, added to the income of the petitioner/assessee, Rs.11,11,09,699/- for AY 2008-09, Rs.7,38,96,739/- for AY 2009-10, and Rs.1,29,50,000/- for AY 2011-12. On 02.12.2018, the petitioner lodged an appeal before the CIT(A) against the order of the AO.

7. It is in this context that the issue of the stay of outstanding demand arises.

8. Mr Menon contends that once recovery has already been made against the outstanding demand for any AY, refund, as sought by the petitioner, cannot be granted. It is against this backdrop the present writ action has been filed.

9. We may note that the petitioner/assessee has also sought a prayer to quash the communication dated 17.06.2019, which, as noticed hereinabove, rejected the petitioner's application for a stay of demand.

10. Prima facie, we are of the view that the stand taken by the respondents/revenue is unsustainable in law. The entire purpose of OM dated 31.07.2017 is to balance the interest of the revenue and the assessee.

11. The interest of the respondents/revenue is protected, pending the adjudication of the appeals, by allowing them to retain 20% of the outstanding demand concerning the AYs in issue, while qua the assessee its interests are secured by granting a stay against recovery of the entirety of the outstanding demand. However, in the instant matter, an amount above and beyond 20% of the disputed amount seems to have been retained on the premise that the respondents/revenue will succeed completely in the matter concerning AY 2011-12, and that the assessment order will be sustained.

12. If the prima facie view etched out above is not accepted, then it will result in a skewed approach where [sic...whereby] the assessee, perhaps, may not be able to carry on its affairs, pending adjudication of its appeals.



13. Since, Mr Menon seeks to place before the court certain precedents, list the matter on 24.11.2023.”

2. Today, we are informed by counsel for the parties that the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”] has passed orders concerning Assessment Years (AYs) 2008-09, 2009-10 and 2011-12.

2.1 Insofar as AY 2008-09 is concerned, the order passed by the CIT(A) is dated 17.03.2020, while AYs 2009-10 and 2011-12 are the subject matter of the orders dated 31.08.2022.

3. We are also informed by the counsel for the parties that insofar as AY 2008-09 is concerned, all additions have been deleted.

3.1 We are also told that insofar as AY 2011-12 is concerned, the CIT(A) has sustained the additions. However, insofar as AY 2009-10 is concerned, the appeal was partly allowed.

4. Therefore, in sum, the demand position for AYs 2008-09, 2009-10, and 2011-12, has improved, considerably, as far as the petitioner/assessee is concerned.

5. As noticed above by us, on 02.11.2023, admittedly, the respondents/revenue have secured 20% of the outstanding demand that had obtained at the relevant point in time. The respondents/revenue have, in their kitty, approximately Rs. 2.98 crores. The demand as alluded to above, at the present juncture, for the aforementioned AYs is, in fact, less than Rs. 14.90 crores, in view of the aforementioned orders dated 17.03.2020 and 31.08.2022.

6. Therefore, we are of the view that the relief sought by the petitioner/assessee should be allowed.



7. Accordingly, the respondents/revenue is directed to refund Rs. 87,89,440/- to the petitioner/assessee at the earliest, though not later than four (4) weeks from the receipt of a copy of the judgment.
8. The writ petition is disposed of in the aforesaid terms.
9. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 24, 2023/pmc