

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 879 OF 2024

AVANA GLOBAL FZCO,
C/o D 301 to 305, Level 3, Tower II
Seawoods Grand Central, Avana Logistek
Limited, Seawoods Navi Mumbai, Navi
Mumbai 400 706

... PETITIONER

~ VERSUS ~

- 1. DEPUTY COMMISSIONER OF
INCOME TAX,**
International Tax, Circle 1(1)(2),
Room No 528, 5th Floor,
Air India Building, Nariman Point,
Mumbai 400 021.
- 2. ADDITIONAL COMMISSIONER
OF INCOME TAX,**
International Tax, Circle 1(1)(2),
Room No 528, 5th Floor,
Air India Building, Nariman Point,
Mumbai 400 021.
- 3. CENTRALIZED PROCESSING
CENTRE,**
Income Tax Department,
Bengaluru 560 500
- 4. THE UNION OF INDIA,**
Through Joint Secretary and Legal
Adviser, Branch Secretariat,
Department of Legal Affairs, Ministry

... RESPONDENTS

ARUN
RAMCHANDRA
SANKPAL

Digitally signed
by ARUN
RAMCHANDRA
SANKPAL
Date: 2024.03.08
10:03:39 +0530

of Law and Justice, 2nd Floor, Aayakar
Bhavan, MK Road, New Marine Lines,
Mumbai 400 020.

APPEARANCES

FOR THE PETITIONER **Mr Divesh Chawla, i/b Atul K
Jasani.**

FOR THE RESPONDENTS **Mr Suresh Kumar, with Mohini
Chougule & Jyoti Yadav, i/b
Suresh Kumar.**

**CORAM : G.S.Patel &
Kamal Khata, JJ.**

DATED : 5th March 2024

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** Rule returnable forthwith. There is an Affidavit in Reply.

2. The prayers in the Petition are as follows:

“(a) that 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 present case and after examining the legality and validity thereof quash and set aside:

(i) the action of Respondent No. 3 on 9th March 2023 of adjusting the refund of Rs.3,53,99,815/- for AY 2017-18, against demand for AY 2018-19,

wherein stay applications were pending and without issuing any intimation to the Petitioner under Section 245 of the Income Tax Act, 1961;

(ii) the action of Respondent No. 3 on 10th March 2023, of adjusting the refund of Rs.2,30,52,355/- and Rs.80,74,925/- for AY 2022-23, against stayed tax demand for AY 2018-19, wherein stay applications were pending and without issuing any intimation to the Petitioner under Section 245 of the Act; and

(iii) the inaction of the Respondent No. 1 in disposing off the stay application and rectification application for AY 2018-19 and rectification application for AY 2017-18 and AY 2022-2023 filed by the Petitioner.

(b) that 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, directing the Respondents to issue consequential refunds of Rs.3,53,99,815/- and Rs.2,30,52,355/- and Rs.80,74,925/- for AY 2017-18 and AY 2022-23 respectively aggregating to Rs.6,65,27,095/- to the Petitioners along with interest under Section 244A of the Act up to the date of payment within a fixed time frame;

(c) that 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, directing the Respondents to issue consequential refunds of on any further amounts determined by the rectification application.”

3. As the prayers indicate, the first challenge is to the purported adjustment by Respondents Nos 1 to 3 of a refund of Rs

3,53,99,815/- for the AY 2017–2018 against a demand for the subsequent AY 2018–2019. There were applications pending for the subsequent AY 2018–2019. However, the case of the Petitioner is that the Petitioner was given no intimation under Section 245 of the Income-Tax Act, 1961 (“**IT Act**”).

4. The prayer clause (a)(ii) is in similar terms but is in regard to two amounts of Rs 2,30,52,355/- and Rs 80,74,925/- and the adjustment on 10th March 2023 for the AY 2022–2023 against the demand for AY 2018–2019. Although this demand was stayed and the stay application was pending, here again there was no intimation under Section 245 of the IT Act.

5. The third substantive prayer is directed to the failure of the 1st Respondent, the Deputy Commissioner of the Income Tax Department to dispose of the stay application and the rectification application for the AY 2018–2019 and the rectification applications for the AYs 2017–2018 and 2022–2023.

6. Prayer clauses (b) and (c) are for corresponding writs of mandamus.

7. The prayers make it clear that the entirety of the case is centred around the interpretation of Section 245 of the IT Act. Specifically, the question is whether an intimation under this Section is or is not mandatory. In another manner of speaking, the question is whether the Revenue can set off or withhold a refund without an intimation under Section 245 of the IT Act.

8. Section 245 of the IT Act reads as follows:

“245. (1) Where under any of the provisions of this Act, a refund becomes due or is found to be due to any person, the Assessing Officer or Commissioner or Principal Commissioner or Chief Commissioner or Principal Chief Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this sub-section.

(2) Where a part of the refund is set off under the provisions of sub-section (1), or where no such amount is set off, and refund becomes due to a person, and the Assessing Officer, having regard to the fact that proceedings for assessment or reassessment are pending in the case of such person, is of the opinion that the grant of refund is likely to adversely affect the revenue, he may, for reasons to be recorded in writing and with the previous approval of the Principal Commissioner or the Commissioner, as the case may be, withhold the refund up to the date on which such assessment or reassessment is made.”

9. As Section 245(1) shows, it is permissible for the Revenue to set off a refund that is found due against a demand but only after an intimation is given in writing to the person of the action proposed, i.e., the proposed set off or adjustment. Sub-section (2) of Section 45 was introduced by an amendment. It speaks of a set off of part of a refund or an alternative scenario where there is no set off and a refund becomes due. In that situation, if the Assessing Officer having regard to the fact that the proceedings for assessment or reassessment are pending, forms an opinion that the grant of a

refund is likely to adversely affect the Revenue, he may, after recording reasons in writing and with the previous approvals of the Principal Commissioner, as the case may be, withhold the refund up to the date on which that assessment or reassessment is made.

10. There are also relevant circulars of 2013 in regard to compliance of Section 245 before making any adjustment of a refund.

11. The Affidavit in Reply on behalf of the Revenue is exceedingly peculiar. From paragraph 5.5 there are several sub-paragraphs that deal with the various assessment proceedings and the pendency of the stay proceedings. However, sub-paragraph (1) at internal page 6 clearly says that the adjustment by the CPC was effected without issuing a Notice under Section 245 of the IT Act. Sub-paragraphs (2) and (3) deal with a question of Tax Deducted at Source (“TDS”) credit but also mention an adjustment of the refund. It is therefore undisputed that no intimation under Section 245 of the IT Act was ever issued to the Petitioners.

12. The aggregate figures are like this. The refund for the AY 2017–2018 is Rs 3,53,99,815/–, for the AY 2022–2023 the refund is Rs 3,11,27,280/–. The total refund due is Rs.6,65,27,095/–.

13. If the rectification applications are taken into account, there are additional refunds that are due. For the AY 2017–2018, the additional refund would be Rs.5,89,648/–; for the AY 2018–2019, the additional refund due would be Rs.82,97,926/– and for the AY

2022–2023, the additional refund due, if rectification is permitted and is given effect to, would be Rs 3,56,75,300/-; coming to the additional total of Rs 4,45,62,874/-.

14. Paragraphs 3(a) and (b) of the Petition from pages 25 to 27 read thus:

“(a) On 9 March 2023, Respondent No 3 adjusted the refund of Rs.3,53,99,815/- for AY 2017–2018 against the disputed demand for AY 2018–19 without issuing any intimation to the Petitioner under Section 245 of the Income Tax Act, 1961 (hereinafter referred to as “Act”) and without disposing off the stay application dated 23 September 2021 and letter dated 9 November 2022 filed by the Petitioner for AY 2018–19, which is wholly erroneous, arbitrary and contrary to law and judicial precedents. Further, without considering that the issues are covered in favour of the Petitioner by the order passed by the Hon’ble Income Tax Appellate Tribunal (hereinafter referred to as “Tribunal”) for the AY 2016–17 and 2017–18, it shows non-application of mind, which is wholly erroneous, arbitrary and contrary to law. Hereto annexed and marked as Exhibit “A” and “B” is a screenshot of the TIN NSDL website and corresponding challan status as per OLTAS reflecting the status of the income tax refund for AY 2017–18 as adjusted against the demand for AY 2018–19;

(b) On 10 March 2023, Respondent No 3 adjusted the refunds of Rs.2,30,52,355/- and Rs.80,74,925/- for AY 2022–23 against the demands for AY 2018–19 without issuing any intimation to the Petitioner under section 245 of the Act and without disposing off the stay application dated 23 September 2021 and letter dated 9 November 2022 filed by the Petitioner for AY 2018–19 which is wholly erroneous, arbitrary and contrary to law and judicial precedents.

Further, without considering that the issues are covered in favour of the Petitioner by the order passed by the Hon'ble Tribunal for the AY 2016-17 and 2017-18, it shows non-application of mind, which is wholly erroneous, arbitrary and contrary to law. Hereto annexed and marked as Exhibit "C" and "D" is a screenshot of the TIN NSDL website and corresponding challan status as per OLTAS reflecting the status of the income tax refund for AY 2022-23 as adjusted against the demand for AY 2018-19."

15. There is then in paragraph 7, for the AY 2017-2018, there is a specific averment that the 3rd Respondent adjusted the refund against an outstanding demand for the AY 2018-2019 but failed to consider that the stay application filed by the Petitioner for that AY was pending. Further, the adjustment was made without any intimation under Section 245 of the IT Act.

16. For the AY 2018-2019 there was also a stay application. That was not disposed of. We are today not concerned with the merits of the stay application. But paragraph 14 mentions that even for this AY 2018-2019 the demand was adjusted against the refund determined for the AY 2017-2018 and the AY 2022-2023 despite the stay application being pending and also without an intimation under Section 245 of the IT Act.

17. For the AY 2022-2023, the Petitioner had filed a rectification application *inter alia* in regard to short TDS credit. The Petitioner raised a grievance that refunds had been adjusted without intimation under Section 245 of the IT Act and without an opportunity of

being heard. As noted, the Petitioner had filed a stay application for the entirety of the demand for the AY 2018–2019.

18. Paragraph 21 mentions that an online grievance has been filed but there has been no intimation. Paragraphs 22 and 23 of the Petition read as follows:

“22. Respondents No 3, on 9 March 2023, without issuing any intimation under Section 245 of the Act and contrary to the record and law, and without complying with the procedure under Section 245 of the Act, wrongfully adjusted the refunds for AY 2017–18 amounting to Rs.3,53,99,815/- (refund determined as per OGE of Rs.3,64,59,590/- less Taxes Deducted at Source of Rs.10,59,775/- on interest thereon) against the disputed demand for AY 2018–19 of Rs.5,84,53,170/- (wherein the issues are entirely covered in favour of the Petitioner by the order passed by the Hon’ble Tribunal in earlier AYs and the stay application were pending disposal.

23. Similarly, Respondent No 3, on 10 March 2023, without issuing any intimation under Section 245 of the Act and contrary to the record and law, and without complying with the procedure under Section 245 of the Act, wrongfully adjusted the refunds for AY 2022–23 amounting to Rs.3,11,27,280/- (refund determined in the intimation issued under section 143(1) of Rs.3,18,77,915/- less Taxes Deducted at Source of Rs.7,50,635/- on interest) entirely against the demand including interest under section 220 of the Act for AY 2018–19 (wherein the issues are entirely covered in favour of the Petitioner by the order passed by the Hon’ble Tribunal in earlier AYs and the stay application were pending disposal).”

19. Reliance is placed by the Petitioners on the following authorities: *Jet Privilege (P) Ltd v Deputy Commissioner of Income Tax- 5(2)(1), Mumbai*,¹ decided by a Division Bench of this Court and *Hindustan Unilever Ltd v Deputy Commissioner of Income Tax- 1(1)*,² also decided by a Division Bench of this Court.

20. In *Hindustan Unilever Ltd*, the Division Bench referenced Section 245 read with Section 220 of the IT Act. The relevant findings of the Division Bench in paragraphs 14, 15, 24 and 26 are reproduced hereunder. .

“14. Section 245 of the Act, empowers the revenue to adjust refunds due to an assessee against any tax payable(of the same character as the refund due) by him. The exercise of this power is discretionary as is evident from the use of the word “may” therein. Besides the requirement of giving notice/intimation of the proposed action of adjustment out of the refund due is also an indication of discretionary nature of power not mandatory. This notice/intimation is required to be given so as to enable a party to point out not only factual errors but also point out why such a power should not be exercised in the facts of the case, such as the demand sought to be adjusted is still a subject matter of appeal and the issue is covered by decisions of higher forums etc. On consideration of the same, it is open to the officer of the revenue concerned to exercise its discretion, to adjust or not. This giving of prior intimation has been held by this Court in *A.N. Shaikh, Sixteenth ITO v. Suresh B Jain* [1987] 165 ITR 86/[1986] 29 Taxman 191 to be mandatory before any adjustment

1 (2021) 131 taxmann.com 119; 2021 SCC OnLine Bom 1799.

2 (2015) 60 taxmann.com 326; 2015 SCC OnLine Bom 6006.

can be made. The exercise of powers under Section 245 of the Act being discretionary has also been so held by the Delhi High Court in *Glaxo Smith Kline Asia (P) Ltd. V. CIT* [2007] 290 ITR 35/160 Taxman 259. We respectfully concur with the above view of the Delhi high Court that the power under Section 245 of the Act is discretionary. Thus the exercise of a power of adjusting demands out of refunds due would depend upon the facts and circumstances of each case.

15. In view of the above, as held by this Court in *A.N.Shaikh, Sixteenth ITO's case (supra)* the giving of prior intimation under Section 245 of the Act is mandatory. The purpose being to enable the party to point out that there are factual errors or some further developments, if any, for example a stay of the demand, Supreme Court decision covering the demand which is still a subject matter of a pending appeal etc which would warrant not adjusting the refund against the pending demand. **Thus when a party does raise such issues in response to a prior intimation, the officer of the revenue exercising powers under Section 245 of the Act must apply his mind to it and must record reason why the objection is not sustainable and also communicate it to the party. This before or at the time of adjusting the refund. This alone would ensure that that the power of adjustment under Section 245 of the Act is not exercised arbitrarily. Such a procedure would cause no prejudice to the revenue as the occasion to grant the refund would not arise till the objection to the intimation is disposed of. Of course the objections should be disposed of expeditiously as undue delay in granting of refund would cause prejudice to the party entitled to the refund.**

24. The Delhi High Court in the case of *Maruti Suzuki India Ltd. (supra)* had an occasion to deal with a similar contention as is being raised by the Revenue in the present

case namely the recovery of tax cannot and would not include adjustment under Section 245 of the Act and the stay of recovery under Section 220(6) of the Act would not fetter the rights of the Revenue to adjust the demands out of refund due to the assessee. This submission was negated by the Delhi High Court holding that recovery could be made by various modes including adjustment under Section 245 of the Act. The Delhi High Court held that where an authority grants a stay of recovery under Section 220(6) of the Act, it could provide in that order granting stay of the recovery that the same would not be extended to adjustment of refund. In cases where the stay order is in absolute terms, it would be inappropriate on the part of the Revenue to adjust the demand by way of adjustment. The Delhi High Court observed as under:

“... However, when an order of stay of recovery in simplistic and absolute terms is passed, it would be improper and inappropriate on the part of the Revenue to recover the demand by way of adjustment. In case of doubt or ambiguity, an application for clarification or vacation/modification of stay to allow adjustment can be, and should be filed. But no attempt should be made and it should not appear that the Revenue has tried to overreach and circumvent the stay order. Obedience and compliance with the stay order in letter and spirit is mandatory. A stay order passed by an appellate/higher authority must be respected. No deviance or breach should be made.”

(Emphasis supplied)

We are in respectful agreement with this view.

26. The power under Section 245 is discretionary. The

orders of stay have to be honoured before adjustment of the demand out of refund is done by the Revenue. If the Assessing Officer did not accept the assessee's contention at the time of making the adjustment, the petitioner should have been informed as to why the objections of the assessee to the adjustment is not sustainable. Unless the Assessing Officer exercising power under Section 245 of the Act subjects himself to this discipline, he would be exercising his powers in an arbitrary manner."

(Emphasis added)

21. Rule was accordingly made absolute.

22. Similarly in *Jet Privilege*, the Division Bench had before it an almost identical question regarding Section 245. We reproduce paragraphs 4 to 10.

"4. Mr. Pardiwalla states that alongwith appeal challenging the demand for A.Y. 2015-16 and 2016-17, Stay Applications were also filed and orders have been stayed upon petitioner depositing 20% of the demand amounts. The fact of petitioner depositing 20% has not been disputed though Mr. Walve states that extension to deposit 20% for A.Y. 2016-17 was not granted but petitioner still went ahead and deposited it. In our view that should not really matter because 20% has been deposited and respondents have accepted the same. The stay for both A.Y. 2015-16 and 2016-17 have to be in force.

5. Mr. Pardiwalla submitted that before any adjustment is made, it is mandatory to give intimation under Section 245 of the Act to the person to whom the refund is due of the proposed action. In this case, admittedly, and we say admittedly because the affidavit in reply/additional affidavit filed by respondent confirms that the intimation under

Section 245 of the Act was given only on 13th May, 2020. At this point, if one refers to Form 26 AS which is the annual tax statement under Section 203 (AA) of the Act for the A.Y. 2015-16 and for A.Y. 2016-17, adjustment against the refund due has been made on 5th May, 2020, whereas the mandatory notice under Section 245 of the Act has been given only on 13th May, 2020. Mr. Pardiwalla submits that it is settled law that failure to comply with this mandatory requirement of prior intimation would make the entire adjustment as wholly illegal and therefore, respondent could not have made the adjustment as they wanted to.

Mr. Pardiwalla also submitted in any event, petitioner having deposited 20% amount and stay having been granted under Section 220 (6) of the Act, it would mean that the time to make payment stands extended and petitioner shall not be treated to be an assessee in default for the recovery provisions to be set in motion and therefore, the entire amount refundable after giving credit to the amount already refunded becomes payable together with accumulated interest.

6. Mr. Walve for respondent in fairness and in view of the affidavit in reply filed fairly accepted that intimation required under Section 245 of the Act was given only on 13th May, 2020. But his explanation is that the process for intimating petitioner under Section 245 of the Act about outstanding demand and interest payable was initiated on 17th March, 2020 but due to technical error, the intimation got stuck and could not be delivered to the assessee's registered E-mail id. Mr. Walve submitted that on 13th May, 2020 technical error got rectified in CPC portal and intimation under Section 245 of the Act was sent to the assessee.

7. For ease of reference, we shall quote Section 245 of the Act, which read as under;

245. Set off of refunds against tax remaining payable 2 Where under any of the provisions of this Act, a refund is found to be due to any person, the [Assessing] Officer, Deputy Commissioner (Appeals)], Commissioner (Appeals)] or Chief Commissioner or Commissioner], as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section.

8. Mere perusal of the section makes it clear that the officers mentioned in the section, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under the Act by the assessee to whom the refund is due. The officer may set off the amount to be refunded or any part of that amount only after giving an intimation in writing to the assessee of the action that he proposed to take under this section. Therefore, it clearly requires the intimation to be given prior to the officer sets off the amount payable against the amount to be refunded. It can be neither simultaneous nor subsequent.

We find support for this view in *Suresh B. Jain v. A.N. Shaikh, Sixteenth Income-tax Officer* [1986] 28 *Taxman* 321 [1987] 165 *ITR* 151 (Bom.), confirmed by the Division Bench of this court in *A.N. Shaikh, Sixteenth Income-tax Officer v. Suresh B. Jain* [1986] 29 *Taxman* 191 [1987] 165 *ITR* 86 (Bom.) and in *Hindustan Unilever Limited v. Deputy Commissioner of Income-tax-1* [2015] 60 *taxmann.com* 326/233 *Taxman* 353/377 *ITR* 281 (Bom.) relied upon by Mr. Pardiwalla.

9. The fact that respondent has not followed the mandatory prior requirement of intimation under Section 245 of the Act would make the adjustment wholly illegal and therefore, respondent was clearly in error in not refunding the amount.

10. As per the Office Memorandum [F. No. 404/72/93 – ITCC] issued dated 29th February, 2016, amended by another Office Memorandum dated 25th August, 2017 the assessing officer shall grant stay of demand where the outstanding demand is disputed on assessee paying 20% of the disputed demand. Admittedly, petitioner has filed an appeal disputing the outstanding demand for A.Y. 2015–16 and A.Y. 2016–17 and have deposited 20% of the amount demanded. Therefore, there is a stay of demand in force. The effect of this deposit would mean that the time to make the payment stands extended and petitioner is not deemed to be an assessee in default for the recovery provisions to be set in motion [*Hindustan Unilever Limited., case (supra)*].”

(Emphasis added)

23. Accordingly, even in that matter Rule was made absolute.

24. Before us therefore there are now two issues. The first is that these unilateral adjustments without prior intimation are contrary to the specific wording of the statute itself. They are contrary to settled decisions of this Court. The second aspect is the failure to dispose of the stay application and the rectification application. These cannot be kept pending indefinitely like this.

25. We have yet to find a reason in the Affidavit in Reply justifying the failure to take up and dispose of the stay application and the rectification application.

26. Having regard to these circumstances and the unambiguous state of the law in this regard, we make Rule absolute in terms of prayer clauses (a), a(i), a(ii), a(iii), (b) and (c) set out above.

27. The Petition is disposed of in these terms with no order as to costs.

28. All refunds are to be processed and paid out within a period of four weeks from today. We are told that the stay application has been decided after this Petition was filed and the Petitioner has no grievance in that regard.

29. The rectification applications are to be taken up and decided on a priority basis as early as possible and preferably within a period of eight weeks from today.

30. It is notable that there are no reasons recorded in compliance with the provisions of Section 245(2) of the IT Act either.

(Kamal Khata, J)

(G. S. Patel, J)