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

\+ W.P.(C) 2615/2024

AVANTHA REALTY LIMITED ..... Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Neeraj Jain, Mr. Upvan Gupta, Mr. Aniket D. Agrawal and Mr. Saksham Singhal, Advs.

versus

THE PRINCIPAL COMMISSIONER OF INCOME TAX CENTRAL DELHI 2 & ANR. ..... Respondents

Through: Mr. Vipul Agrawal, Sr. Standing Counsel along with Mr. Gibran Naushad and Ms. Sakshi Shairwal, Jr. Standing Counsels.

**CORAM:**
**HON'BLE MR. JUSTICE YASHWANT VARMA**
**HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV**

**O R D E R**

% **21.02.2024**

**CM APPL. 10740/2024 (Exemption)**

Allowed, subject to all just exceptions.

Application stands disposed of.

**W.P.(C) 2615/2024**

1. The instant writ petition impugns the orders dated 26 May 2022 and 12 February 2024 passed by the Assistant and Principal Commissioners of Income Tax disposing of the application made under Section 220(6) of the **Income Tax Act, 1961**[1]. The application

[1] Act

itself came to be made pursuant to the stand of the respondents that a demand of Rs.132.58/- crores was outstanding. The aforesaid demand which stems from an order of assessment dated 08 April 2022 presently forms subject matter of challenge in an appeal which has been preferred before the Commissioner of Income Tax (Appeals) ["**CIT(A)**"].

2. We note that the impugned orders are principally based on the instructions of the Central Board of Direct Tax ["**CBDT**"] as encapsulated in the Office Memorandum dated 31 July 2017 and which had while dealing with the manner in which the power under Section 220(6) of the Act is liable to be exercised had held that assessees' may be accorded interim protection subject to deposit of 20% of the total outstanding demand failing which they would be treated as an "*assessee in default*".

3. Insofar as the aforesaid Office Memorandum is concerned, suffice it to note that while considering its ambit the Supreme Court in **Principal Commissioner of Income Tax 5 and Others vs. LG Electronics India Private Limited**[2] had held as follows:-

> "1. Delay condoned. Leave Granted.
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> 2. Having heard Shri Vikramjit Banerjee, learned ASG appearing on behalf of the appellant, and giving credence to the fact that he has argued before us that the administrative circular will not operate as a fetter on the Commissioner since it is a quasi-judicial authority, we only need to clarify that in all cases like the present, it will be open to the authorities, on the facts of individual cases, to grant deposit orders of a lesser amount than 20%, pending appeal.
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> 3. The appeal is disposed of accordingly. Pending application, if any, shall stand disposed of."

4. While this would have been sufficient to set aside the orders

[2] (2018) 18 SCC 447

impugned, Mr. Vohra, learned senior counsel has additionally contended that while considering the application under Section 220(6) of the Act, it was incumbent upon the Assistant and Principal Commissioners of Income Tax to deal with factors such as prima facie case, balance of convenience and irreparable loss that may be caused. According to learned senior counsel, the respondents have proceeded to pass the impugned orders proceeding on the assumption that the Office Memorandum dated 31 July 2017 commands them to inevitably require a deposit of 20%.

5. Taking us briefly through the facts itself and insofar as they relate to the question of Long Term Capital Gains, Mr. Vohra pointed out that the subject immovable property was purchased for a total sale consideration of Rs.378/- crores. The value of the aforesaid property as per the stamp duty authorities was Rs.390/- crores. It was pointed out that the **Assessing Officer**[3] referred the issue of determination of fair market value of the said property to a Valuation Officer who determined the same to be Rs.418/- crores. However, Mr. Vohra submits that the AO proceeding arbitrarily undertook a fresh assessment of fair market value and sought to peg the same at Rs.685/- crores taking into account the credit facility obtained upon mortgage of the subject property.

6. According to learned counsel, the manner in which the fair market value was assessed is violative of Section 50C of the Act. It was further contended that the respondents have incorrectly assumed that the provisions of Section 50D stood attracted even though the fair market value of the property already stood determined and ascertained.

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[3] AO

7. Mr. Vohra referred to the decision of the Division Bench of this Court in **Dr. B.L. Kapur Memorial Hospital vs. Commissioner of Income Tax and Others**[4] wherein the Court had observed as follows:

> "**7.** Learned Senior Counsel for the petitioner further states that respondents while disposing of the petitioner's applications have failed to appreciate that the condition under impugned office memorandum dated 31-7-2017, read with the office memorandum dated 29-2-2016, stating that, "the assessing officer shall grant stay of demand till disposal of the first appeal on payment of twenty per cent of the disputed demand", is merely directory in nature and not mandatory. In support of his submission, he relies on the decision of the Supreme Court in *CIT* v. *LG Electronics India (P) Ltd.* [*CIT* v. *LG Electronics India (P) Ltd.*(2018) 18 SCC 447] wherein it has been held that it is open to the tax authorities, on the facts of individual cases, to grant stay against recovery of demand on deposit of a lesser amount than 20 per cent of the disputed demand, pending disposal of appeal.
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> xxx xxx xxx
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> **9.** Having heard learned counsel for the parties and having perused the two office memorandums in question, this Court is of the view that the requirement of payment of twenty per cent of disputed tax demand is not a prerequisite for putting in abeyance recovery of demand pending first appeal in all cases. The said precondition of deposit of twenty per cent of the demand can be relaxed in appropriate cases. Even the office memorandum dated 29-2-2016, gives instances like where addition on the same issue has been deleted by the appellate authorities in the previous years or where the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee. In fact, as pointed out by the learned Senior Counsel for the petitioner, the Supreme Court in *CIT* v. *LG Electronics India (P) Ltd.* [*CIT* v. *LG Electronics India (P) Ltd.*(2018) 18 SCC 447] has held that tax authorities are eligible to grant stay on deposit of amounts lesser than twenty per cent of the disputed demand in the facts and circumstances of a case.
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> **10.** In the present cases, the impugned orders are non-reasoned orders. Neither the assessing officer nor the CIT have either dealt with the contentions and submissions advanced by the petitioner nor has considered the three basic principles i.e. the prima facie case, balance of convenience and irreparable injury while deciding the stay application.

[4] 2022 SCC OnLine Del 4120

> **11.** Consequently, the impugned orders and notices are set aside and the matters are remanded back to Respondent 1 CIT for fresh adjudication in the application for stay. However, before deciding the stay application, the CIT shall grant a personal hearing to the authorised representative of the petitioner. For this purpose, list the matter before Respondent 1 CIT on 12-12-2022.
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> **12.** It is clarified that till the stay applications filed by the petitioner are not decided, no coercive action shall be taken by the respondents against the petitioner in pursuance to the demands arising out of the impugned orders. With the aforesaid directions, the present writ petitions along with pending applications stand disposed of."

8. Opposing the grant of the reliefs as claimed, Mr. Agrawal submitted that while all the aforesaid aspects and which relate to *"prima facie case"* appear to have been alluded to in passing before the Assistant Commissioner, they were clearly not canvassed for the consideration of the Principal Commissioner. In view of the aforesaid, Mr. Agarwal contended that there would be no justification to interfere with or set aside the impugned orders based on a consideration of issues which had not even been pressed before the two authorities.

9. Mr. Vohra, however, refers to the ultimate application that was filed before the Principal Commissioner and which had in turn referred to the original stay application which had been moved before the Assistant Commissioner.

10. However, and in our considered opinion, there clearly appears to have been a laxity on the part of the petitioner to have directly raised the contentions noticed briefly by us hereinabove before the Principal Commissioner. That authority has thus been deprived of the opportunity to examine the issues of *prima facie case* or "*undue hardship*" in the context of the challenges which have been raised to the computation of fair market value by the AO.

11. In view of the aforesaid, we are of the opinion that the ends of justice would warrant the petitioner being accorded the liberty to move the Principal Commissioner afresh raising such contentions as may be chosen and advised. Any application in this respect that may be moved shall be decided by the Principal Commissioner without being influenced by the orders dated 26 May 2022 and 12 February 2024.

12. The writ petition stands disposed of in terms of the above. The orders impugned before us shall abide by the fresh decision which the Principal Commissioner shall now take in terms of our directions contained in para 11 of this order.

13. All rights and contentions of respective parties are kept open.

**YASHWANT VARMA, J.**

**PURUSHAINDRA KUMAR KAURAV, J.**

**FEBRUARY 21, 2024/**RW