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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 22 March 2024

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W.P.(C) 4413/2024 & CM APPL. 18051/2024 (interim relief)

SUSHEN MOHAN GUPTA

..... Petitioner

Through: Mr. Balbir Singh, Sr. Adv. with
Mr. Sachit Jolly, Ms. Soumya
Singh, Ms. Disha Jham & Mr.
Devansh Jain, Advs.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX

CENTRAL 2, DELHI & ANR.

..... Respondents

Through: Mr. Prashant Meharchandani,
SSC with Mr. Akshat Singh, Ms.
Ritika Vohra & Mr. Utkarsh
Kandpal, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR

KAURAV

J U D G M E N T

YASHWANT VARMA, J. (Oral)

CM APPL. 18052/2024 (Ex.)

1. Allowed, subject to all just exceptions.
2. Application is disposed of.

W.P.(C) 4413/2024 & CM APPL. 18051/2024 (interim relief)

3. The petitioner invokes our jurisdiction conferred by Article 226 of the Constitution and impugns the order dated 22 November 2021 passed by the second respondent as well as the order dated 27 February



2024 passed by the first respondent – **Principal Commissioner of Income Tax**¹ (Central), Delhi -2 , disposing of stay applications filed by the petitioner for outstanding demands pertaining to **Assessment Years**² 2010-11 to 2020-21 being kept in abeyance during the pendency of its statutory appeals before the **Commissioner of Income Tax (Appeals)**³.

4. The record would reflect that a search and seizure action under Section 132 of the **Income Tax Act, 1961**⁴ was conducted upon the petitioner on 02 January 2020. Thereafter, notices under Section 153A of the Act for AYs' 2010-11 to 2019-20 came to be issued and on culmination of proceedings so drawn, assessment orders came to be framed on 30 September 2021 raising a cumulative demand of INR 1,85,62,19,390/- vide demand notices issued under Section 156 of the Act for AYs' 2010-11 to 2020-21.

5. Aggrieved by the aforesaid assessment orders, the petitioner filed appeals before the CIT(A) on 30 October 2021 and which are stated to be pending. Seeking interim protection against the enforcement of the outstanding demand for AYs' 2010-11 to 2019-20, the petitioner moved the second respondent by way of a stay application referable to Section 220(6) of the Act on 15 November 2021. The said application, however, came to be disposed of on 22 November 2021, with the second respondent taking the position that since the petitioner had not deposited 20% of the outstanding demand, its application could not be entertained. The aforesaid position was taken on the basis of a

¹ PCIT

² AYs

³ CIT(A)

⁴ Act



purported understanding of the import of the **Central Board of Direct Taxes⁵ Office Memorandums⁶** dated 29 February 2016 and 31 July 2017.

6. The petitioner thereafter appears to have instituted proceedings for rectification which came to be ultimately disposed of by an order dated 04 January 2022. Vide the said order, the mistakes apparent on the face of the record were rectified for AYs' 2010-11 to 2017-18 and revised notices of demand were issued for the said AYs'. The revised demand against the petitioner for AYs' 2010-11 to 2020-21 consequently came to be pegged at INR 1,81,37,14,107.

7. The petitioner thereafter filed another stay application dated 24 February 2022 for AYs' 2010-11 to 2020-21 before the second respondent reiterating its request for the outstanding demand being placed in abeyance. During the pendency of that application, the petitioner was served with a letter dated 21 June 2022 seeking payment of the outstanding demand followed by a demand notice dated 16 September 2023 issued under Section 220(1) of the Act.

8. In response to the aforesaid, the petitioner furnished a detailed reply on 26 September 2023 asserting that the original assessment is wholly arbitrary and is rendered unsustainable in light of the judgment of the Supreme Court rendered in **Principal Commissioner of Income Tax, Central – 3 v. Abhisar Buildwell Private Limited⁷**. The petitioner also appears to have offered to pledge properties owned by M/s American Hotels and Restaurants Pvt. Ltd., an entity in which the

⁵ CBDT

⁶ OMs

⁷ (2024) 2 SCC 433



petitioner's family members are directors/shareholders, in order to securitize the outstanding demand to the extent of 20%, as was being consistently insisted upon by the respondents.

9. On 19 October 2023, the second respondent proceeded to reject that prayer observing as follows:-

“Subject: Outstanding demand of Rs.181,37,14,117/- in the case of Sh. Sushen Mohan Gupta (PAN:AFEPG7593R)-regarding

Ref: Your letter dated 26.09.2023 on the above subject

Kindly refer to the above.

In this matter, a notice u/s 220(1) of the Income-tax Act, 1961 was issued on 16.09.2023 requiring you to pay the outstanding demand and to produce the challan as proof of payment. Further, you were asked to provide stay of demand application filed before the PCIT (Central)-2, Delhi or Addi.CIT, Central Range-4, Delhi, if any. In response to the said notice, under referred letter has been filed by you.

On perusal of the said letter, it is noticed that you have not provided any details with regard to payment of the said outstanding demand. Further, you have not provided any details regarding your pending stay of demand applications.

Further, arguments have been made by you with regard to concluded assessment proceedings in your case. In this regard, it is to state that the assessment proceedings in your case were completed with due diligence and contention with the content of the assessment order or the observations made therein cannot be entertained at this juncture. As the matter is under appeal, as intimated by you, these grounds may be taken at the appellate forum by the assessee.

Hence, based on the above facts, no further action is pending with this office as stay application filed by you has already been disposed off by this office vide letter dated 22.11.2021.

MOHIT GARG
CENTRAL CIRCLE 15, DELHI”

10. Aggrieved by the aforesaid order, the petitioner approached the



first respondent on 27 October 2023 reiterating its prayer for grant of interim protection against the outstanding demands. The application has thereafter come to be disposed of by the impugned order of 27 February 2024 with the first respondent observing as under: -

“6. In the present case, during the course of search operations carried out on 28.10.2020, various incriminating documents were found and seized and credible evidences were collected. The additions in the assessment order were made on the basis of incriminating seized material pertaining to the assessee. Thus, the additions made in the assessment order are squarely covered by para "4B(a)" of OM No. F. No. 404/72/93-ITCC dated 29.02.2016 i.e., "the additions made are based on credible evidences collected in a search or survey operation".

7. Further, mere filing of an appeal before the CIT (A) is not a sufficient ground for being granting stay. The nature of evidences and sensitivity of evidences has also led to initiation of steps by other Law Enforcement Agencies. Therefore, in view of the above, the applications of assessee for stay of demand dated 25.10.2023 for AYs 2010-11 to 2020-21 are disposed off with the directions, that, the assessee shall deposit demand to the extent of Rs.72,54,85,642/- (i.e. 40% of total outstanding demand of Rs. 1,81,37, 14, 107/-) within 15 days of receipt of this order. The balance demand of Rs.1,08,82,28,464/- shall remain stayed, subject to payment of Rs. 72,54,85,642/- within the stipulated period, till the disposal of the first appeal or for a period of six months from the date of this order, whichever is earlier.”

11. Appearing in support of the writ petition, Mr. Balbir Singh, learned senior counsel, submitted that the respondents have woefully failed to examine the prima facie merits of the challenge which stood raised in respect of the assessment orders as framed and which was clearly incumbent in light of the various precedents rendered on the subject. Mr. Singh submitted that the judgments which had been cited for the consideration of the respondents had culled out the considerations that must weigh while examining a prayer for stay



referable to Section 220(6) of the Act. Insofar as prima facie merits are concerned, Mr. Singh drew our attention to the fact that an addition of approximately INR 284 crores has been made on the basis of documents and pen drives tendered by one Mr. Tanmaya Saxena to the **Enforcement Directorate**⁸ and on the basis of the statement of Mr. Rajiv Saxena, neither of which was material gathered in the course of search. It was in the aforesaid context that Mr. Singh sought to draw sustenance from the decision of the Supreme Court in *Abhisar Buildwell*.

12. Learned senior counsel also drew our attention to the judgment passed by our Court in the matter of **Sanjay Jain vs. Enforcement Directorate**⁹, where the Court had observed that the documents tendered by Mr. Rajeev Saxena were not even capable of being classified as evidence and therefore, the addition in the present case on the basis of his statement was untenable. Mr. Singh also referred to the fact that the assessment orders itself had created a demand nearly 98 times over the Returned Income. Despite all of the above, Mr. Singh submitted that the respondents have woefully failed to accord due consideration on the aforesaid aspects.

13. Appearing for the respondents, Mr. Meharchandani opposed the aforesaid contentions and submitted that the magnitude of the demand would clearly justify the conditions as imposed by the respondents. It was submitted that although the demands stand created in terms of an assessment order dated 30 September 2021, the petitioner has failed to make any significant deposits. It was contended on behalf of the

⁸ ED

⁹ 2024 SCC Online Del 1656



respondents that mere pendency of an appeal before the CIT(A) would not justify the demand being placed in abeyance and consequently there exists no justification for this Court to interfere with the orders impugned.

14. We recently had an occasion to exhaustively examine the contours of the power to stay demands by virtue of the authority conferred under Section 220(6) in **National Association of Software and Services Companies (NASSCOM) v. Deputy Commissioner of Income Tax (Exemption) Circle 2(1), New Delhi & Ors**¹⁰. On a consideration of the various precedents rendered on the subject, we had observed as under: -

“12. It must at the outset be noted that the two OM’s noticed above neither prescribe nor mandate 15% or 20% of the outstanding demand as the case may be, being deposited as a pre-condition for grant of stay. The OM dated 29 February 2016 specifically spoke of a discretion vesting in the AO to grant stay subject to a deposit at a rate higher or lower than 15% dependent upon the facts of a particular case. The subsequent OM merely amended the rate to be 20%. In fact, while the subsequent OM chose to describe the 20% deposit to be the “standard rate”, the same would clearly not sustain in light of the discussion which ensues.

13. We note that while dealing with an identical question, we had in *Avantha Realty Ltd. vs The Principal Commissioner of Income Tax Central Delhi & Anr.* observed as under:-

“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 assessee’s 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,

¹⁰ Neutral Citation- 2024:DHC:2078-DB



suffice it to note that while considering its ambit the Supreme Court in **Principal Commissioner of Income Tax and Others vs. LG Electronics India Private Limited** had held as follows:-

“1. Delay condoned. Leave Granted.

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.

3. The appeal is disposed of accordingly. Pending application, if any, shall stand disposed of.”

14. As is manifest from the order passed by the Supreme Court in **Principal Commissioner of Income Tax & Ors. vs LG Electronics India Pvt. Ltd.**, it had been emphasized that the administrative circular would not operate as a fetter upon the power otherwise conferred on a quasi-judicial authority and that it would be wholly incorrect to view the OM as mandating the deposit of 20%, irrespective of the facts of an individual case. This would also flow from the clear and express language employed in sub-section (6) of Section 220 which speaks of the Assessing Officer being empowered “in his discretion and subject to such conditions as he may think fit to impose in the circumstances of the case”. The discretion thus vested in the hands of the AO is one which cannot possibly be viewed as being cabined by the terms of the OM.

15. The issue of a grant of stay pending appellate remedies being pursued arose for the consideration of a Division Bench of the Court in **Dabur India Limited vs Commissioner of Income Tax (TDS) & Anr.** where it was pertinently observed as under:

“6. 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 percent of disputed tax demand is not a pre-requisite for putting in abeyance recovery of demand pending first appeal in all cases. The said pre- condition of deposit of twenty percent of the demand can be relaxed in appropriate cases. Even the Office Memorandum dated 29 February, 2016 gives instances like where addition on the same issue has been deleted by the



appellate authorities in earlier years or where the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee.

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8. In the present case, the impugned order is non- reasoned. The three basic principles i.e. the prima facie case, balance of convenience and irreparable injury have not been considered while deciding the stay application.”

16. More recently in Indian National Congress vs Deputy Commissioner of Income Tax Central – 19 & Ors. we had an occasion to examine the scope of the power conferred by Section 220(6) of the Act and which was explained in the following terms:

“22. However, as we read the order impugned, the matter does not appear to have proceeded along those lines before the ITAT. The tone and tenor of submissions clearly appear to have been concentrated upon the merits of the assessment order. Although the issue of payment of 20% of the outstanding demand appears to have been raised, the same came to be summarily rejected by the ITAT in cryptic terms. Notwithstanding the above, it becomes pertinent to observe that the 20% deposit which is spoken of in the OM dated 31 July 2017 is not liable to be viewed as a condition etched in stone or one which is inviolable. The OM merely seeks to provide guidance to the authorities to bear in mind certain aspects while considering applications for stay of demand pending an appeals remedy being pursued. The OM is not liable to be read as conferring an indefeasible right upon the assessee to claim a stay of a tax liability by merely offering or consenting to deposit 20% of the outstanding liability. Ultimately, it is for the authorities to examine and consider what amount would be sufficient to securitise the interest of the Revenue and thus a just balance being struck. The quantum of the deposit that would be required to be made would ultimately depend upon the facts and circumstances of each case.

23. The position which thus emerges is that while 20% is not liable to be viewed as an entrenched or inflexible rule, there could be circumstances where the respondents may be justified in seeking a deposit in excess of the above dependent upon the facts and circumstances that may obtain. This would have to necessarily be left to the sound exercise of discretion by the respondents based upon a consideration of issues such as prima



facie, financial hardship and the likelihood of success. This observation we render being conscious of the indisputable position that the OM applies only upto the stage of the appeal pending before the CIT(A) and being of little significance when it comes to the ITAT.”

17. As explained in *Indian National Congress*, the 20% which is spoken of in the OM cannot possibly be viewed as being an inviolate or inflexible condition. The extent of the deposit which an assessee may be called upon to make would have to be examined and answered bearing in mind factors such as prima facie case, undue hardship and likelihood of success. We note that while dealing with the question of the claim of stay as made by an assessee and the competing obligation to protect the interest of the Revenue, the Supreme Court in **Benara Valves Ltd. & Ors. Vs Commissioner of Central Excise & Anr.** had elucidated the legal position in the following words:

“6. Principles relating to grant of stay pending disposal of the matters before the forums concerned have been considered in several cases. It is to be noted that in such matters though discretion is available, the same has to be exercised judicially.

7. The applicable principles have been set out succinctly in *Silliguri Municipality v. Amalendu Das and Samarias Trading Co. (P) Ltd. v. S. Samuel and CCE v. Dunlop India Ltd.*

8. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand on, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in *Silliguri Municipality* and *Dunlop India* cases without analysing factual scenario



involved in a particular case.

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11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of Revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interest of Revenue have to be kept in view.

12. As noted above there are two important expressions in Section 35-F. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka that under Indian conditions expression "undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be 'undue' it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant

15. The other aspect relates to imposition of condition to safeguard the interest of Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the interest of the Revenue."

The aforesaid principles were reaffirmed by the Supreme Court in **Monotosh Saha vs Special Director, Enforcement Directorate & Anr.**

18. We find a lucid explanation of the legal position with respect to pre-deposit and the grant of stay in a decision rendered by a Division



Bench of the Allahabad High Court in **ITC Ltd v. Commissioner (Appeals), Customs & Central Excise** where the Court had held as follows:

“18. In *Income-tax Officer v. M.K. Mohammad Kunhi*, AIR 1969 SC 430, the Apex Court held that stay should be granted if a strong prima facie case has been made out and in the most deserving and appropriate cases where entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue, during the pendency of the appeal.

19. In *B.P.L. Sanyo Utilities and Appliances Ltd. v. Union of India*, 1999 (108) E.L.T. 621, the Karnataka High Court held that in the matter of grant of waiver of pre-deposit, each case has to be examined on its own merit and no hard and fast rule can be formulated.

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21. In *Mehsana District Cooperative Milk P.U. Ltd. v. Union of India*, 2003 (154) E.L.T. 347 (S.C.), the Hon'ble Supreme Court considered the case of dispensation of pre-deposit condition and held that the Appellate Authority must address to itself to the prima facie merits of the appellant's case and upon being satisfied of the same, determine the quantum of deposit taking into consideration the financial hardship and other such related factors.

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23. In *J.N. Chemicals Pvt. Ltd. v. CEGAT*, 1991 (53) E.L.T. 543, the Calcutta High Court while considering the provisions of pre-deposit of duty and penalty, observed that where the authority concerned comes to the conclusion that the appellant has a good prima facie case so as to justify the dispensation of requirement of pre-deposit of the disputed amount on duty and penalty, the authority must exercise its discretion to dispense with such requirement particularly in a case where the appellant satisfies the authority concerned that its case is squarely covered by the decision of a competent Court binding on it. In such an eventuality, asking the appellant to deposit the duty demanded and penalty levied would undoubtedly cause undue hardship to the appellant. While deciding the said case, Calcutta High Court placed reliance upon the judgment of the Hon'ble Apex Court in *L. Hirday Narain v. Income-Tax Officer, Bareilly*, (1970) 2 SCC 355 : AIR 1971 SC 33, wherein the Court observed as under:-



“If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moved in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute prima facie enabling, the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right-public or private-of a citizen.”

24. Thus, even where enabling or discretionary power is conferred on a public authority, the words which are permissive in character, require to be constituted, involving a duty to exercise that power, if some legal right or entitlement is conferred or enjoyed, and for the effectuating the such right or entitlement, the exercise of such power is essential. The aforesaid view stands fortified in view of that fact that every power is coupled with a duty to act reasonably and the Court/Tribunal/Authority has to proceed having strict adherence to the provisions of law. [Vide *Julius v. Lord Bishop of Oxford*, (1880) 5 Appeal Cases 214; *Commissioner of Police, Bombay v. Gordhandas Bhanji*, 1951 SCC 1088 : AIR 1952 SC 16; *K.S. Srinivasan v. Union of India*, AIR 1958 SC 419; *Yogeshwar Jaiswal v. State Transport Appellate Tribunal*, (1985) 1 SCC 725 : AIR 1985 SC 516; *Ambica Quarry Works etc. v. State of Gujarat*, (1987) 1 SCC 213 : AIR 1987 SC 1073].

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26. In *Bongaigaon Refinery & Petrochem Ltd. v. Collector of Central Excise (A)*, 1994 (69) E.L.T. 193 (Cal.), the Calcutta High Court, while examining a similar issue and placed reliance upon a large number of judgments and held that the phrase “undue hardship” would cover a case where the appellant has a strong *prima facie* case. The phrase also covers a situation where there is an arguable case in the appeal. If the Appellate Authority forms the opinion that appellant has a strong *prima facie* case, it should dispense with the pre-deposit condition altogether. However, where it is of the opinion that the appellant has no arguable case, the Appellate Authority must safeguard the interest of the Revenue, as the same also cannot be jeopardised.

27. In *Sri Krishna v. Union of India*, 1998 (104) E.L.T. 305, Delhi High Court considered the issue of dispensation of pre-deposit condition and the concept of undue hardship while considering the provisions of Section 129E of the Customs Act,



2024: DHC: 2504-03



1962 and Section 35 of the Act and held that the Court while considering the case of the appellant should examine as to whether the Appellate Authority or Tribunal have dealt with the plea raised by the appellant before it and have considered as to whether the appellant has a *prima facie case* on merit. In case the appellant has a strong *prima facie case*, as is most likely to exonerate him from liability and the Appellate Authority/Tribunal insists on the deposit of the amount, it would amount to undue hardship.

28. In *Hoogly Mills Co. Ltd. v. Union of India*, 1999 (108) E.L.T. 637, the Calcutta High Court again reiterated the view that if the appellant has a strong *prima facie case*, he is entitled of waiving the pre-deposit condition and in case the Appellate Authority insists to deposit the amount so assessed or penalty so levied, it will cause undue hardship to the assessee. While considering the said case, the Court placed reliance upon the large number of judgments including *Tata Iron & Steel Co. Ltd. v. Commissioner (Appeals), Central Excise*, 1998 (98) E.L.T. 50; *Hari Fertilizer v. Union of India*, 1985 (22) E.L.T. 301 (All.); *Re. American Refrigeration Co. Ltd.*, 1986 (23) E.L.T. 74; and *V.I.T. Sea Foods v. Collector of Customs*, 1989 (42) E.L.T. 220 (Ker.), wherein the Courts had expressed the similar view.

29. In *I.T.C. Ltd. v. Commissioner of Central Excise and Customs (Appeals)* IJR 2000 KAR 25, while examining the issue of pre-deposit under Section 35 of the Act, after considering a large number of judgments of the Apex Court and various High Courts, it was held as under:

“While considering the case of ‘undue hardship’, the authority is required to examine the *prima facie* on merits of the dispute as well. Pleading of financial disability would not be the only consideration. Where the case is fully covered in favour of the assessee by a binding precedent like that of the judgment of the Supreme Court, jurisdictional High Court or a Special Bench of the Tribunal, then to still insist upon the deposit of duty and penalty levied would certainly cause undue hardship to the assessee. Absence of the financial hardship in such a case would be no ground to decline the dispensation of pre-deposit under the proviso to Section 35F. The power to dispense with such deposit is conferred under the authorities has to be exercised precisely in cases like this type and if it is not exercised under such circumstances then this Court will require it to be exercised. Such like cases where two views are not possible then the condition of pre-deposit before the appeal is heard on merits, can be dispensed with. In case two views are possible on



interpretation, based on conflicting judgments of the Tribunal or different High Courts in the absence of the judgment of the jurisdictional High Court then the authorities may pass the order under proviso to Section 35F of the Act keeping in view the facts of the case in hand.”

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35. In view of the above, the aforesaid authorities make it clear that the Court should not grant interim relief/stay of the recovery merely by asking of a party. It has to maintain a balance between the rights of an individual and the State so far as the recovery of sovereign dues is concerned. While considering the application for stay/waiver of a pre-deposit, as required under the law, the Court must apply its mind as to whether the appellant has a strong prima facie case on merit. In case it is covered by the judgment of a Court/Tribunal binding upon the Appellate Authority, it should apply its mind as to whether in view of the said judgment, the appellant is likely to succeed on merit. If an appellant having strong prima facie case, is asked to deposit the amount of assessment so made or penalty so levied, it would cause undue hardship to him, though there may be no financial restraint on the appellant running in a good financial condition. The arguments that appellant is in a position to deposit or if he succeeds in appeal, he will be entitled to get the refund, are not the considerations for deciding the application. The order of the Appellate Authority itself must show that it had applied its mind to the issue raised by the appellant and it has been considered in accordance with the law. The expression “undue hardship” has a wider connotation as it takes within its ambit the case where the assessee is asked to deposit the amount even if he is likely to exonerate from the total liability on disposal of his appeal. Dispensation of deposit should also be allowed where two views are possible. While considering the application for interim relief, the Court must examine all pros and cons involved in the case and further examine that in case recovery is not stayed, the right of appeal conferred by the legislature and refusal to exercise the discretionary power by the authority to stay/waive the predeposit condition, would be reduced to nugatory/illusory. Undoubtedly, the interest of the Revenue cannot be jeopardized but that does not mean that in order to protect the interest of the Revenue, the Court or authority should exercise its duty under the law to take into consideration the rights and interest of an individual. It is also clear that before any goods could be subjected to duty, it has to be established that it has been manufactured and it is marketable and to prove that it is marketable, the burden is on the Revenue



and not on the manufacturer.”

19. Though some of the decisions noticed by us hereinabove pertained to pre-deposit prescriptions placed by a statute, the principles enunciated therein would clearly be of relevance while examining the extent of the power that stands placed in the hands of the AO in terms of Section 220(6) of the Act. In our considered opinion, the respondents have clearly erred in proceeding on the assumption that the application for consideration of outstanding demands being placed in abeyance could not have even been entertained without a 20% pre-deposit. The aforesaid stand as taken is thoroughly misconceived and wholly untenable in law.”

15. As would be evident from a reading of the impugned order dated 22 November 2021 passed by the second respondent, it has chosen to take the position that applications for stay can neither be countenanced nor entertained till the assessee deposits 20% of the pending demand. The aforesaid view as adopted is clearly untenable and erroneous bearing in mind the legal position as enunciated in *NASSCOM*. As we had held in *NASSCOM*, the CBDT's OMs' cannot possibly be read as mandating a pre-deposit of 20% of the outstanding demand, without reference to the prima facie merits of a challenge that may be raised by an assessee in respect of an assessment order.

16. It becomes pertinent to note that the first respondent has thereafter proceeded to cause even greater prejudice to the writ petitioner by requiring it to deposit 40% of the outstanding demand. The petitioner had moved the first respondent in terms of the provisions made in the OM dated 29 February 2016 and which reads thus: -

“OFFICE MEMORANDUM [F.NO.404/72/93-ITCC]

**SECTION 220 OF THE INCOME-TAX ACT, 1961 -
COLLECTION AND RECOVERY OF TAX - WHEN TAX
PAYABLE AND WHEN ASSESSEE DEEMED IN
DEFAULT - AMENDMENT OF INSTRUCTION NO.1914,**



2024: DHC: 2504-03



**DATED 21-3-1996 TO PROVIDE FOR GUIDELINES FOR
STAY OF DEMAND AT FIRST APPEAL STAGE**

**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,



2024: DHC: 2504-03



(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 co-operated 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.”



17. As would be evident from a reading of Para 4(C) of the aforesaid OM, the PCIT would be moved by an assessee in cases where it is aggrieved by the disposal of its stay application by the AO. The assessee in terms of the avenue of redress provided under Para 4(C) approaches the PCIT since it would conceivably be aggrieved by a direction of the AO to deposit 15% (now amended and to be read as 20% vide OM dated 31 July 2017). This is manifest from the words “...and the assessee is still aggrieved...” appearing therein. The PCIT cannot possibly, and consequently, be recognised to stand empowered to subject the assessee to more onerous conditions.

18. In the facts of the present case, the PCIT, rather than examining the challenge raised by the petitioner to the assessment orders and evaluating the prima facie merits of the challenge has in one sense placed it under a harsher burden of depositing 40% of the outstanding demand as opposed to the direction framed by the second respondent, which had merely insisted upon the petitioner depositing 20% as a pre-condition for the consideration of its application for stay. In any view of the matter, we find that both the authorities have failed to deal with the aspect of prima facie merits, likelihood of success and undue hardship. The impugned orders are consequently rendered wholly unsustainable on the aforesaid score alone.

19. We accordingly allow the instant writ petition and quash the impugned orders dated 22 November 2021 and 27 February 2024 passed by the second and first respondents respectively. The matter shall consequently stand remitted to the board of the AO which shall examine the applications for stay afresh and bearing in mind the legal



position as enunciated in *NASSCOM*. Though needless to state, we do observe that we have not examined the merits of the challenge as raised by the writ petitioner and consequently all rights and contentions of respective parties are kept open.

20. All pending applications shall stand disposed of.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 22, 2024/RW