$~74

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

\+ W.P.(C) 6994/2024

SUSHEN MOHAN GUPTA ..... Petitioner

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

Versus

ASSISTANT COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE 15, DELHI & ANR. ..... Respondents

Through: Mr. Debesh Panda, Sr. SC with Ms. Zehra Khan, Mr. Vikramaditya Singh, JSCs, Mr. Ojaswa Pathak, Ms. Anauntta Sarkar & Mr. Vineet Gupta, Advs.

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

O R D E R

% **15.05.2024**

CM APPL 29101/2024 (Exemption)

1. Allowed, subject to all just exceptions.

2. The application stands disposed of.

W.P.(C) 6994/2024 & CM APPL 29100/2024 (interim relief)

3. The instant writ petition represents yet another foray by the writ petitioner before this Court impugning the order dated 06 May 2024 in terms of which its application for stay of demand for **Assessment**

Year[1] 2010-11 to 2020-21 has come to be disposed of with a direction calling upon it to deposit 20% of the outstanding demand within ten days and for the balance demand being duly securitized by submission of security in the form of immovable properties or bank guarantees.

4. On the last occasion and while dealing with W.P.(C) 4413/2024 we had an occasion to consider the challenge which was raised by the writ petitioner in some detail. In the aforenoted writ petition, the petitioner had assailed the validity of an order dated 22 November 2021, as well as an order dated 27 February 2024 passed by the **Pr. Commissioner of Income Tax**[2] disposing of its stay of demand applications. The authorities had on that occasion firstly passed an order requiring the petitioner to securitize the outstanding demand to the extent of 20%. Aggrieved by the aforesaid, the petitioner had approached the PCIT. While examining the aforesaid application the PCIT had in terms of the order dated 27 February 2024 required the petitioner to deposit 40% of the total outstanding demand.

5. While examining the validity of the orders impugned therein we had an occasion to test the same in light of the principles that had been enunciated by this Court in **National Association of Software and Services Companies (NASSCOM) v. Deputy Commissioner of Income Tax (Exemption) Circle 2(1), New Delhi & Ors**[3]**.** Ultimately, and upon due consideration of the challenge which stood raised, we found that the orders impugned were rendered unsustainable for reasons recorded in our judgment of 22 March 2024. While dealing with the validity of the order dated 22 November 2021,

---

[1] AY
[2] PCIT
[3] Neutral Citation- 2024:DHC:2078-DB

we had in para 15 of our judgment observed as follows:

> "**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."

6. Proceeding further to evaluate the validity of the order passed by the PCIT, we had held:

> "**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 PCTT 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 PCJT, 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 precondition 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."

7. In light of the aforesaid conclusions we had proceeded to allow the writ petition, quash the impugned orders and had remitted the

matter to the board of the **Assessing Officer**[4] for examination of the applications for stay of demand afresh. It is pursuant to the aforesaid direction that the impugned order has come to be passed.

8. Mr. Balbir Singh, learned senior counsel who appeared in support of the writ petition, assailed the validity of the impugned order contending that the AO has clearly erred while examining the prima facie merits of the challenge which stood raised and has again based its conclusions on evidence which could not have been taken into consideration. It was Mr. Singh's submission that not only had the AO yet again relied upon evidence obtained from Mr. Rajiv Saxena, it has additionally relied upon data gathered independently. According to Mr. Singh, the aforesaid evidence cannot constitute incriminating material and thus there is every likelihood of the appeal of the petitioner being allowed on this ground.

9. We, however, note that the AO has this time around undertaken a detailed examination of the prima facie case and has also evaluated the prayer for stay on the anvil of undue hardship and balance of convenience. Insofar as the admissibility of the material collected is concerned, it has in paragraph 10 & 11 observed as under:

> "**10.** Further, the assessee has made arguments before the Hon'ble Court that the documents tendered by Mr. Rajeev Saxena, as well as his statement, were not even capable of being classified as evidence. In this regard, it is to mention that in the Assessment Orders passed the AO had discussed in detail the availability as well as the admissibility of the material relied upon by him. The relevant observations of the AO are reproduced hereunder for ready reference:
>
> ***V. ADMISSIBILITY OF MATERIAL COLLECTED***
>
> *"1. It is apparent and clear from the earlier discussion that the transactions recorded in the pen-drive pertained to the*

---

[4] AO

assessee, his other family members and other business concerns controlled by the assessee and/or his other family members. Thus, prima facie the pen drive and its contents have a relationship with the assessee, the burden to disprove the same is on him. Assessee has raised various objections about the intentions and irregularities wrt the alleged pen drive as per the Cr. P. C., */PC, Indian Evidence Act and Cyber Laws, which in my view have no effect on the present proceedings which are merely quasi-judicial and not criminal in nature. Further, Income Tax proceedings are non-adversarial in nature and the entire exercise is directed to ensure* a *fair and proper assessment of income of the assessee. It is trite law that technical rules of Evidence Act and Cr. PC, etc are not applicable to these proceedings. Any evidence which indicates toward unaccounted/ undisclosed/ escaped income of an assessee is admissible in Income Tax proceedings. From the forthcoming discussion, it would be clear that that many of the entries mentioned in the pen-drive belonged to the assessee as well as to his other family members and business concerns controlled by Sh. Sushen Mohan Gupta and his other family members. Even though the assessee has vehemently denied having any cognizance or relationship with the contents of the pen-drive, the fact that the entries having direct corelation with the activities of the assessee as well as his other family members and business concerns controlled by Sh. Sushen Mohan Gupta and his other family members cannot be lost sight off. In view of this the contents of the pen drive become admissible evidence in Income Tax proceedings and form a basis for investigations and assessment. Consequently, it is held that contents of the pen-drive are admissible evidence in the present proceedings.*

2. Even presuming there is any purported infirmity under the Cr. P. C., *IPC, Indian Evidence Act and Cyber Laws, etc, it is* a *settled law that material seized even during an invalid/illegal search can be considered by the AO and that such material has got an evidentiary value.*

In the cases of Dr.Partap Singh vs. Director of Enforcement (1985) 46 CTR 319/155 /TR 0166 (SC) and Pooran Mal vs Director of *Inspection* ***(Inv.)*** *(1974) 93 !TR 505/(1973) 41 CCH 0511 (SC), the* **Hon'ble Supreme Court** *had held that illegality of search does not vitiate the evidence collected during such illegal search. The only requirement is that the Court or the authority before which such material or evidence brought is to be cautious and circumspect in dealing with such material or evidence.*

Further, based on the above judgments, the Hon 'ble Supreme Court in the case of CIT vs. Kamal & Co. *(313 /TR 0125*

(St.), held that any material co!lected during an illegal survey has got evidentiary value and can be used by the Assessing Officer against the assessee. It was held that if materials colfected during an illegal search could be used, on the same analogy, material collected/found during an illegal survey could be allowed to be used by the Assessing Officer because the procedure in regard to the use of material either collected in search or in survey is same.

Apropos the admissibility of pen drive as evidence it is re-iterated that there is a difference between criminal and income tax proceedings. In criminal proceedings there may be any issue contested by the assessee, but in income tax proceedings the pen drive was tendered by Sh. Rajiv Saxena to the Enforcement Directorate and, it becomes admissible evidence under the Income Tax Act. The fact that many entries recorded in the said pen-drive tally with the assessee, his family members, business concerns and business associate itself indicates that the pen-drive belonged to the assessee. There is no issue of presumption under Section 292C of the Act since Sh. Rajiv Saxena, being the person who had handed/tendered the pen-drive to the Enforcement Directorate on 04/03/2019, in his statement before the directorate of Enforcement has specifically stated in his statement dated 04/03/2019 that the said pen-drive pertains to Sh. Sushen Mohan Gupta.

11. Based on the above discussion, it is evident that there were substantive evidences to prove that the assessee has made out of books transactions during various years and the assessment proceedings were completed after taking into consideration all the evidences available on record and after consideration of the replies filed by the assessee. Thus, the assessment proceedings were concluded by the AO with due diligence and proper verification and analysis of the facts and information available. Further, the assessee is found to be involved in various incriminating activities as well where proceedings have been initiated by other Law Enforcement Agencies."

10. Proceeding further and while dealing with the prima facie merits and the aspect of likelihood of success, it has observed as under:

"**17.1** Based on the above discussion, it is evident that the AO has clearly made out a strong case on prima facie merits where information gathered during the search action on the assessee as well as information shared by the other LEAs have been extensively discussed in the assessment orders and the AO has conclusively proved that the assessee has made out of books transactions during various years in order to avoid tax liability. The assessee has failed to discharge his onus of explaining the recorded transactions and filed evasive replies/statements during search as well as assessment proceedings in order to escape from the tax implications. However, all the elusive strategies adopted by the assessee have been substantively negated by the AO by passing a speaking assessment order(s). As discussed in preceding paras, it stands proved by the forensic report that the pen drive rendered by Sh. Rajeev Saxena actually recorded the transactions related to the assessee and he was using it on his laptop. Similarly, the handwriting in the diaries and loose sheets were matched with the handwriting of Sushen Mohan Gupta and the forensic report has confirmed that the handwriting in the dairies and loose sheets is of Sushen Mohan Gupta. The relevant findings of ED as mentioned in the Prosecution Complaint (PC) filed by the it have specific mention of the data of the pen drive where it is proved that the pen drive was maintained by the assessee as accounts of transactions for himself, his family members, his transactions with friends and relatives and also contains data of funds received pursuant to various transactions/contracts entered into by him. Moreover, the Pen Drive which was seized by the department from the possession of Sushen Mohan Gupta during search action u/s 132 also contained the complete statement of Sushen Mohan Gupta recorded by the ED, the Prosecution complaint, various excel files related to the bank account statement of Interstellar and other incriminating files which were related to the investigation done by other LEA in relation to the case of the Sushen Mohan Gupta. Hence, the material which was taken as basis for completing the assessment proceedings in the case of Sushen Mohan Gupta was also recovered during the search action by the department and the evidences found against the assessee were not only found from the material/information received from the other LEA but also recovered during the search action u/s 132 of the Act by the income tax department.

17.2 Further, the statement recorded during the course of search as well as before the other LEA have been discussed in detail in the preceding paragraphs where assessee wilfully withheld information while recording statement before the income tax authority and gave vague and evasive replies. That itself becomes incriminating in nature as decided in various court rulings and there is high probability of assessee not getting any relief at the appellate stage. Further, the assessee has raised certain contentions before the CIT(A) during the appellate proceedings with regard to assessment orders passed in his case. These contentions were forwarded to this office for submitting the Remand Report. The said contentions have been logically comprehended and the undersigned has rejected the contentions so raised based on the information

> available in this office while submitting the Remand Report before the CIT(A). Thus, the assessment orders passed in the case of the assessee are based on strong prima facie merits and there is extreme likelihood of getting success by the department before the appellate authorities on the additions made by the AO."

11. Having conferred due consideration on the manner of exercise of power, we are of the considered opinion that the AO has duly applied its mind to the various contentions which were addressed before it. It becomes relevant to note that while considering an application for stay while the AO is obliged to evaluate aspects of prima facie case and likelihood of success, it is neither obliged nor placed under a duty to undertake a conclusive determination on the various challenges that an assessee may choose to raise. It has to essentially examine it from the anvil of a prima facie examination of the various contentions while forming its opinion on the nature of conditions which are liable to be imposed while granting stay of demand.

12. We note that the merits of an order of assessment that may be ultimately framed, is a subject which must necessarily be left for the consideration of the appellate authority in the first instance. It would, therefore, be wholly incorrect to undertake a judicial review of an order disposing of an application for stay of demand with the same level of intensive scrutiny as we would be obliged to bear while examining an order passed on an appeal and which would be concerned primarily with the merits of the challenge.

13. As we read the impugned order, we find ourselves unable to hold that the order is either patently perverse or manifestly unjust. The view as expressed therein is one which has come to be rendered based on a preliminary examination of the challenge raised by the petitioner

and cannot possibly be viewed as one which is wholly perverse or untenable. We, consequently, find no justification to interfere with the order impugned.

14. The writ petition fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 15, 2024/kk