

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.**

WRIT PETITION NO.653 OF 2012

Nishith Madanlal Desai. ...Petitioner.
Vs.
Commissioner of Income Tax-11 & Ors. ...Respondents.

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Mr.Firoz Andhyarujina, Senior Advocate with Mr.Sameer G.Dalal
and Mr.Karthik Ranganathan for the Petitioner.

Mr.Suresh Kumar with Ms.Suchitra Kamble for the Respondents.

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**CORAM : DR.D.Y.CHANDRACHUD AND
M.S.SANKLECHA, JJ.**

March 15, 2012.

P.C. :

Rule, by consent returnable forthwith. With the consent of Counsel and at their request, the Petition is taken up for hearing and final disposal.

2. The Petitioner filed his return of income for Assessment Year 2009-10 declaring a total income of Rs.19.41 crores. In the order of assessment, the Additional Commissioner of Income Tax assessed the total income of the Petitioner at Rs.22.43 crores, resulting in a demand of Rs.2,00,48,630/-. The Petitioner filed a

rectification application under Section 154 on 5 January 2012. Upon rectification, the demand has been scaled down from Rs.2 crores to Rs.1.30 crores. Thereafter, upon a second rectification application dated 30 January 2012, the demand has been further scaled down to Rs.1.18 crores. A refund was due to the Petitioner for Assessment Year 2010-11 approximately in the amount of Rs.78 lakhs. The Petitioner has filed an appeal before the Commissioner of Income Tax (Appeals) against the order of assessment. An application for stay was moved before the Commissioner of Income Tax (Appeals). By his impugned order dated 27 February 2012, the Commissioner of Income Tax-11 has directed that the refund of Rs.78 lakhs which has been determined to be payable for Assessment Year 2010-11 shall be adjusted against the outstanding demand of Rs.1.18 crores for Assessment Year 2009-10. The Petitioner has been called upon to pay the balance of Rs.41 lakhs on or before 10 March 2012. The Commissioner of Income Tax-11 has noted that considering “the financial status and affairs” of the Petitioner the payment of such an amount is not likely to cause any financial hardship. Simultaneously, on 27 February 2012 an order has been passed by the Assessing Officer, adjusting the refund of

Rs.78 lakhs against the demand of Rs.1.18 crores. Consequently, the Petitioner has been called upon to pay an amount of Rs.40.54 lakhs by 10 March 2012.

-3. Counsel appearing on behalf of the Petitioner submits that the CIT (Appeals) has failed to take due note of the submission which has been made regarding the additions made. It has been stated that primarily the additions have been made by the Assessing Officer on three counts: (i) Interest paid to HDFC Bank; (ii) The annual letting value of house property; and (iii) Sales promotion expenses. As regards (i), it has been stated that interest was allowed by the Assessing Officer for seven previous years upon a scrutiny assessment. As regards (ii), the Municipal certificate of valuation produced by the assessee was accepted by the Assessing Officer for previous years. However, for the year in question, the addition which has been made would result in an increase by 3700% in the annual letting value. As regards (iii), it has been stated that the expenses which were incurred in the amount of Rs.1.20 crores were towards legitimate professional expenditure, including towards international conferences, institution of a chair

in conjunction with the International Fiscal Association (IFA) and to the Government Law College at Mumbai. In these circumstances, it was submitted that the action of the Revenue is completely arbitrary. On the other hand, Counsel appearing on behalf of the Revenue submitted that the refund of Assessment Year 2010-11 was adjusted against the tax demand for Assessment Year 2009-10 after due intimation under Section 245.

-4 The power which is vested in the Assessing Officer under Section 220(6) and for that matter that which is conferred upon the CIT (Appeals) to grant a stay of demand is a judicial power. It is necessary for both the Assessing Officer as well as the Appellate Authorities constituted under the Income Tax Act, 1961, to have due regard to the fact that their function is not merely to act as tax gatherers, but equally as quasi judicial authorities, they owe a duty of fairness to the assessee. This seems to be lost sight of in the manner in which the authority has acted in the present case. The parameters for the exercise of the jurisdiction to grant a stay of demand has been set out in several judgments of this Court,

including in **KEC International vs. B.R.Balakrishnan**.¹ In the present case, the assessee returned an income of approximately Rs.19 crores. In the original order of assessment, there was a demand of Rs.2 crores, which was scaled down upon rectification to Rs.1.30 crores initially and thereafter, to Rs.1.18 crores. The assessee in the present case is a professional. The submissions which have been made on behalf of the assessee in regard to the three issues noted above, require to be considered in appeal. Having regard to this position, the Commissioner of Income Tax, in our view, ought to have devoted a more careful consideration to the issue as to whether a stay of demand was warranted. Of the total demand of Rs.1.18 crores, an amount of Rs.78 lakhs has been adjusted against the refund which became due and payable against the demand for Assessment Year 2010-11. Since the refund has already been adjusted, and the balance of the demand was Rs.40.54 lakhs, we are of the view that the ends of justice would require that there should be a stay on the recovery of balance until the disposal of the appeal before the CIT (Appeals). At this stage, since the amount of Rs.78 lakhs has already

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been adjusted, we are not issuing any direction in respect of that amount, but we direct that the CIT (Appeals) shall expedite the disposal of the appeal and endeavour to do so within a period of three months from today. In these circumstances, we make the rule absolute by modifying the order passed by the Commissioner of Income Tax-11 on 27 February 2012 by staying the recovery of the balance amount of Rs.40.54 lakhs pending disposal of the appeal. There shall be no order as to costs.

(Dr.D.Y.Chandrachud, J.)

(M.S.Sanklecha, J.)