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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION LODGING NO.606 OF 2012

UTI Mutual Fund ...Petitioner

Versus

Income Tax Officer 19(3)(2) & ors. ...Respondents

Mr.S.E.Dastur, Senior Advocate with Mr.Madhur Agarwal and Mr.Atul K. Jasani for petitioner.

Mr.Suresh Kumar for respondents.

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

March 14, 2012.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD,J.)

1. Rule, by consent returnable forthwith. Counsel appearing for the respondents waives service. By consent the petition is taken up for final hearing.

2. The challenge in these proceedings under Article 226 of the Constitution is to a notice of demand dated 29 February 2012 issued by the Income Tax Officer 19(3)(2) calling upon the petitioner to pay an amount of Rs.9.63 crores under Section 177(3) of the Income Tax Act, 1961 and to a garnishee notice dated 12 March 2012 addressed by the Assessing Officer to Axis Bank calling for payment under Section 226(3) of all amounts due from the Bank on account of the assessee to the extent of an amount of Rs.26.70 Crores.

3. The dispute in the present case relates to Assessment Year 2009-2010. The petitioner is a Trust registered with the Securities and Exchange Board of India as a Mutual Fund. The income of the petitioner is exempt under the provisions of Section 10(23D) . On 20 May 2008 a Trust by the name of India Corporate Loan Securitisation Trust, 2008 Series 14 was constituted by IL & FS Trust Company Ltd. The petitioner is one of the beneficiaries of the Trust. The Trust was set up for securitising a loan of Rs.300 crores which was granted by Yes Bank Ltd. to Hindustan Petroleum Corporation Ltd. The loan was securitised by the Trust. The Trust issued Pass Through Certificates (PTCs) in various

series. The petitioner, amongst other funds, had subscribed to the PTCs, the beneficial interest of the petitioner being proportionate to the PTCs subscribed. The loan was assigned to the Trust on the same day as the constitution of the Trust. The Trust received interest of Rs.21.49 crores from HPCL on account of the loan which had been assigned to it. The Trust distributed the income to its beneficiaries including the petitioner in their respective shares.

4. The Trust filed its return of income for Assessment Year 2009-2010. An order of assessment was passed by the Assessing Officer in respect of the Trust. The Assessing Officer assessed the Trust as an Association of Persons (AOP). At this stage it would be necessary to note that the submission of the Trust before the Assessing Officer was that it had filed its return in a particular Form, ITR-5, showing its status as Category "5" based on a format for electronic filing of returns in which category "5" includes "AOP / BOI / Artificial Juridical Person". The Trust, however, contended that its status under the provisions of the Act was an individual and not as an AOP. This submission was not accepted by the Assessing Officer and as noted earlier, the Trust has been assessed as an AOP. On 12 January 2012 the Trust submitted an application for

stay of the demand to the Assessing Officer. Without the application being disposed of, the Assessing Officer by his order dated 23 January 2012 called upon the Trust to pay up at least 50 per cent of the demand and to seek stay / instalments in respect of the balance in the event an appeal had been filed before the CIT (Appeals).

5. The admitted position before the Court is that no assessment has been made against the petitioner by the Assessing Officer. However, a communication dated 29 February 2012 was received by the petitioner on 7 March 2012 by which the petitioner has been called upon to make payment of an amount of Rs.9.63 crores on the ground that the petitioner is a member of the AOP (Trust) and is jointly and severally liable in respect of the demand against the AOP. The Assessing Officer has invoked the provisions of Section 177(3) and has called upon the petitioner to pay the aforesaid amount as its share of the outstanding demand for investment made by the petitioner.

6. Immediately on receipt of the demand on 7 March 2012 the petitioner moved the Assessing Officer with an application for stay. On 9 March 2012 the petitioner moved the Commissioner of Income Tax-19

seeking his intervention, apprehending that the Assessing Officer may not entertain the application for stay. The application for stay was disposed of by the Assessing Officer on 9 March 2012. A copy of the letter of the Assessing Officer is stated to have been received by the petitioner on 13 March 2012. In the mean time on 12 March 2012 the Assessing Officer has taken action under Section 226(3) by calling upon the bankers of the petitioner to pay over to the Revenue an amount upto Rs.26.70 crores for and on account of the arrears claimed from the petitioner.

7. Counsel appearing on behalf of the petitioner submits that the entire action of the Revenue is arbitrary on the following grounds:

- (i) The action appears to have been in pursuance of a communication dated 7 February 2012 addressed by the Chairman of the Central Board of Direct Taxes to all the Chief Commissioners, Director Generals, Commissioners and Directors (International Taxation) requiring expeditious steps to be taken for recovery of arrears and informing the officers that in considering their postings for 2012, achievements in terms of revenue collection targets

would be given the highest weightage;

(ii) The income of the petitioner is exempt from the provisions of Income Tax Act, 1961 by virtue of the provisions of Section 10(23D);

(iii) The Trust cannot be considered as being an Association of Persons having regard to several judgments of Division Benches of this Court. In that case, the provisions of Section 177(3) cannot be invoked against the petitioner. Besides the petitioner is not a member of the Trust and cannot be regarded as a member of an Association of Persons;

(iv) Under Section 61 all income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income tax as the income of the transferor and shall be liable to be included in his total income. A transfer is deemed to be revocable under Section 63(a)(i) if it contains any provision for re-transfer of the whole or any

part of the income or assets to the transferor. In that event, an assessment could have been made only in the hands of the petitioner as a transferor and any income which would arise as a result of a revocable transfer would be exempt in the present case having regard to the fact that the petitioner is covered by the provisions of Section 10(23D); and

(v) The provisions of Section 161(1A) could not legitimately have been invoked.

8. On the other hand, counsel appearing for the Revenue urges that in the present case the Assessing Officer has correctly invoked the provisions of Section 161(1A). In the present case, the Trust, it has been submitted, is a representative assessee within the meaning of Section 160(1)(iv). Under sub-section (1A) of Section 161 which begins with a non obstante clause, where any income in respect of which the person mentioned in Section 160(1)(iv) is liable as representative assessee consists of, or includes, profits and gains of business, tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate. On this basis it was urged that Trust having

received interest from HPCL, even a single transaction can in certain situations qualify to be called a business. The Trust in turn issued PTCs to Mutual Funds including the petitioner. The Revenue, it has been urged, was justified in invoking the provisions of Section 177(3).

9. At the present stage, it would be necessary for the Court to clarify that the issue in these proceedings is confined to whether the Revenue should be permitted to enforce the demand of Rs.9.63 crores and to take coercive steps under Section 226(3) in the form of a garnishee notice which has been issued to the bankers of the petitioner. The Court is not called upon to adjudicate at this stage on the merits of the rival contentions. From the record before the Court however it now emerges as an admitted position that the demand against the Trust is sought to be enforced against the petitioner on the basis of the provisions of Section 177(3). The Petitioner has not been independently assessed and the issue which falls for determination is whether the petitioner has made out a substantial prima facie case to seek protection against coercive proceedings at this stage pending an appeal filed by the Trust against the assessment made in respect of the Trust. Sub-section (3) of Section 177 provides that where a business which has been carried on by an

association of persons has been discontinued, every person who was at the time of such discontinuance or dissolution a member of the association of persons, shall be jointly and severally liable for the amount of tax, penalty or other sum payable and all the provisions of the Act, so far as may be, shall apply to any such assessment or imposition of penalty, or other sum. Prima facie, the submission of the petitioner that the Trust itself cannot be regarded as being an association of persons finds support from a judgment of a Division Bench of this Court in **Commissioner of Income Tax Vs. Marsons Beneficiary Trust**.¹ The Division Bench of this Court in that case held that the beneficiaries of a trust cannot be construed as having set up the trust nor had they authorised the trustees to carry on business. The beneficiaries who are named in the trust as recipients of the income of the trust cannot be considered as an association of persons. Therefore, ruled the Division Bench, the trustees also cannot take on the character of an association of persons. The judgment of the Division Bench was followed subsequently by another Division Bench of this Court in **L.R. Patel Family Trust v. Income Tax Officer**.² We are indicating the nature of the controversy

1. (1991) 188 ITR 224

2. (2003) 262 ITR 520

making it expressly clear that we are not rendering any conclusive determination of the Court on the merits of the issue which will arise in the appeal which has been filed by the trust and which, the Court is informed, is pending before the Commissioner (Appeals). The second submission which has been urged on behalf of the petitioner, based on the provisions of Section 61, is equally a matter which would require careful consideration at the appellate stage. As we have noted earlier, the submission of the petitioner is that under Section 61, all income arising to a person by virtue of a revocable transfer of assets is chargeable to income tax as the income of the transferor. Under Section 63(a)(i) a transfer is deemed to be revocable if it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor. The submission of the petitioner is that if at all, an assessment could have only been made in the hands of the petitioner as the transferor of a revocable trust, in which event the income would be exempt under Section 10(23D). Whether the submission should be accepted is again a matter which would have to be determined in the course of the appellate proceedings arising from the order of assessment. The petitioner has intervened before the appellate authority. In our view, the Revenue has made an unfortunate and hasty attempt to make a

recovery of the demand which has been imposed on the trust pursuant to the order of assessment, against the petitioner without enabling the petitioner to take reasonable recourse to the remedies available in law. As we have noted earlier, the petitioner received the letter of demand dated 29 February 2012 on 7 March 2012. On the very same day, the petitioner moved an application for stay before the Assessing Officer. The next day, 8 March 2012, was a public holiday. The petitioner moved the CIT on 9 March 2012 with a request for intervention in the matter. The petitioner received a communication recording that the application had been disposed of, only on 13 March 2012. In the mean time a garnishee notice dated 12 March 2012 was addressed to the bankers of the petitioner calling upon them to deposit an amount of Rs.26.70 crores. Administrative directions for fulfilling recovery targets for the collection of revenue should not be at the expense of foreclosing remedies which are available to assessees for challenging the correctness of a demand. The sanctity of the rule of law must be preserved. The remedies which are legitimately open in law to an assessee to challenge a demand cannot be allowed to be foreclosed by a hasty recourse to coercive powers. Assessing Officers and appellate authorities perform quasi-judicial functions under the Act. Applications for stay require judicial

consideration. Rejecting such applications without hearing the assessee, considering submissions and indicating at least brief reasons is impermissible. The judgment of the Division Bench of this Court in **KEC International Ltd. Vs. B.R. Balakrishnan**³, lays down guidelines in regard to the manner in which applications for stay should be disposed of. The parameters which were laid down by the Division Bench presided over by Hon'ble Mr. Justice S.H.Kapadia (as the Learned Chief Justice of India then was) are as follows:

“(a) While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.

(b) In cases where the assessed income under the impugned order far exceeds returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.

(c) In cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate

3. (2001) 251 ITR 158

whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.

(d) The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order.

(e) We clarify that if the authority concerned complies with the above parameters while passing orders on the stay application, then the authorities on the administrative side of the Department like respondent No.2 herein need not once again give reasoned order.

The above parameters are not exhaustive. They are only recommendatory in nature.”

Unfortunately these guidelines are now being breached by the Revenue. In a subsequent decision in **Coca Cola India P. Ltd. Vs. Addl. CIT**⁴, another Division Bench of this Court, while deprecating the conduct of the Revenue in ignoring the parameters laid down in **KEC International**

4. (2006) 285 ITR 419

Ltd. in disposing of stay applications also noted that the practice of attaching bank accounts even before communicating the order passed on the stay application was high handed. The Court expressed the hope that the Revenue shall ensure that such instances do not occur in future. The caution which was addressed by the Division Bench in **Coca Cola India** has again not been followed. In **N. Rajan Nair v. ITO**⁵, the Kerala High Court observed thus:

“In exercising his power, the Income-tax Officer should not act as a mere tax gatherer but as a quasi judicial authority vested with the power of mitigating hardships to the assessee.”

These are, we may say so with respect, sage observations which must be borne in mind by the assessing authorities. Consistent with the parameters which were laid down by the Division Bench in **KEC International** and the observations in the judgment in **Coca Cola**, we direct that the following guidelines should be borne in mind for effecting recovery:

5. (1987) 165 ITR 650

1. No recovery of tax should be made pending
 - (a) Expiry of the time limit for filing an appeal;
 - (b) Disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated.
2. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and bearing in mind the guidelines in **KEC International**;
3. If the Assessing Officer has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay;
4. When a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;

5. In exercising the powers of stay, the Income Tax Officer should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the assessing officer has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order : the matter must be considered from all its facets, balancing the interest of the assessee with the protection of the Revenue.

10. In view of the aforesaid discussion, we are of the view that the assessee in the present case has a serious issue to urge as regards the legitimacy of the demand which has been raised by the impugned notice dated 29 February 2012, including in regard to the applicability of Section 177(3) of the Income Tax Act, 1961 on which the demand has been founded. The assessee has intervened in the appeal filed by the trust before the Commissioner (Appeals). We direct that pending the disposal of the appeal and for a period of six weeks thereafter, the Revenue shall not take any coercive steps against the petitioner for enforcing the

demand as contained in the communication dated 29 February 2012. The Revenue shall also refrain from taking any coercive steps or from enforcing the notice issued by the Assessing Officer on 12 March 2012 under Section 226(3). The Attachment, if any, that has been levied shall stand lifted.

11. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

(DR.D.Y. CHANDRACHUD,J.)

(M.S.SANKLECHA, J.)