

**IN THE HIGH COURT OF GUJARAT AT  
AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 5679 of 2017**

FOR APPROVAL AND SIGNATURE :  
HONOURABLE Mr. JUSTICE M.R. SHAH  
and  
HONOURABLE Mr. JUSTICE B.N. KARIA

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

JAGDISH GANDABHAI SHAH....Petitioner(s)

*Versus*

PRINCIPAL COMMISSIONER OF INCOME TAX, VALSAD &  
1....Respondent(s)

*Appearance :*

Mr B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

Mr SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 1 - 2

CORAM: HONOURABLE Mr. JUSTICE M.R. SHAH  
and  
HONOURABLE Mr. JUSTICE B.N. KARIA  
28<sup>th</sup> March 2017

**ORAL JUDGMENT** (PER : HONOURABLE Mr. JUSTICE M.R. SHAH)

1. Rule. Shri Sudhir M Mehta, learned advocate waives service of notice of rule on behalf of the respondents. In the facts and circumstances, the present writ petition is taken up for final hearing *today*.

2. By way of this petition under *Article* 226 of the Constitution of India, the petitioner has prayed for issuance of appropriate *writ*, order to *quash* and set-aside the *impugned* orders passed by the respective respondents at Annexure “**A**” [collectively] by which, on an application submitted by the petitioner to stay the demand, as per the assessment order till the disposal of first appeal is rejected.

3. The facts leading to the present petition in nutshell are as under:-

3.1 That, the order of assessment has been passed against the petitioner by the Assessing Officer under Section 143 [3] of the Income-tax Act, 1961 [hereinafter referred to as, “**the Act**”] determining the income at Rs. 1,97,76,530/= against the returned income at Rs. 4,64,554/=. That, pursuant to the

scrutiny assessment under Section 143 [3] of the Act, a demand notice of Rs. 91,38,400/= was issued to the petitioner.

3.2 Feeling aggrieved and dissatisfied with the order of assessment passed by the Assessing Officer, the petitioner-assessee filed an appeal before the learned CIT [A]. That, the petitioner also approached the respondent no. 2-Assessing Officer with an application under Section 220 [6] of the Act to keep the demand in abeyance till the disposal of the first appeal. That, by an order dated 7<sup>th</sup> February 2017, the respondent no. 2-Assessing Officer rejected the application of the petitioner mainly on the ground that at the time of submitting the stay application, the petitioner-assessee has not deposited 15% of the demand as pre-deposit and consequently, rejected the said application.

3.3 That, though not required, the petitioner approached the respondent no.1 and submitted the stay application on 10<sup>th</sup> February 2017 requesting for stay of the demand till disposal of the appeal by the CIT

[A]. That, by the *impugned* order dated 1<sup>st</sup> March 2017, the respondent no. 1 has rejected the said stay application and the petitioner-assessee is asked to pay entire outstanding demand on or before 16<sup>th</sup> March 2017, failing which the Assessing Officer shall be free to take suitable action as per the law.

3.4 Feeling aggrieved and dissatisfied with the *impugned* orders passed by the respondent no. 2 and respondent no.1, the petitioner-assessee has preferred the present Special Civil Application under *Article* 226 of the Constitution for the aforesaid reliefs.

4. Shri B.S Soparkar, learned advocate for the petitioner has vehemently submitted that the *impugned* orders passed by the respondents are contrary to the Office Memorandum F. No. 404/72/93-ITCC dated 29<sup>th</sup> February 2016 issued by the Central Board of Direct Taxes. It is submitted by Shri Soparkar, learned advocate for the petitioner that the respondent no. 2 has rejected the said application of the petitioner and has directed to pay the entire amount of demand

mainly on the ground that the petitioner-assessee has not deposited 15% of the disputed demand as pre-deposit, while submitting the said application. It is vehemently submitted that as such that is not the requirement either under the earlier instructions no. 1914 dated 21<sup>st</sup> March 1996 or the modified Instructions dated 29<sup>th</sup> February 2016.

4.1 It is submitted by Shri B.S Soparkar, learned advocate for the petitioner that as per modified instructions dated 29<sup>th</sup> February 2016, as and when assessee submits application for stay of the demand till disposal of the first appeal, which is preferred against the order passed by the Assessing Officer, in that case, the Assessing Officer has three options. It is submitted that considering Clause 4 [A] of the said Office Memorandum dated 29<sup>th</sup> February 2016, the Assessing Officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand. It is submitted that if the Assessing Officer is of the opinion that the case falls within Clause 4 [B] of the

amended Instructions, and he is of the opinion that the nature of addition resulting in the disputed demand is such that payment of a *lump sum* amount higher than 15% is warranted, in that case, he is required to refer the matter to the administrative Principal CIT/CIT and thereafter, the learned Principal CIT/CIT, after considering all the relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as *lump sum* payment for granting stay of the balance demand.

4.2 It is submitted that as per Clause 4 [B], even in a case where 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, as the case falls within Clause [B](b), in that case also, the Assessing Officer is required to refer the matter to the administrative Principal CIT/CIT and thereafter the learned Principal CIT/CIT, 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. It is submitted that therefore, the Assessing Officer if is of the opinion that the case would fall under Clause 4 [A], in that case, he is required to pass an order granting stay of demand till disposal of first appeal on payment of 15% of the disputed demand. It is submitted that therefore, none consideration of the stay application submitted by the petitioner on the ground that while submitting the stay application, the petitioner-assessee has not deposited 15% of the disputed demand as a pre-deposit is absolutely contrary to the amended/modified Instructions dated 29<sup>th</sup> February 2016. It is submitted that even the respondent no. 1 has passed an order considering the order passed by the Assessing Officer. Therefore, it is requested to allow the present petition and quash the *impugned* order remanding the matter to the Assessing Officer to consider stay application of the petitioner afresh in light of amended instructions dated 29<sup>th</sup> February 2016.

5. Shri Sudhir Mehta, learned advocate appearing on behalf of the Revenue has tried to oppose the present petition. Shri Mehta has submitted that considering para-4 of the amended instructions dated 29<sup>th</sup> February 2016, the quantum/*lump sum* payment is required to be made by the assessee as pre-deposit for stay of demand disputed before the learned CIT [A]. It is submitted that therefore, the assessee is required to deposit 15% of the disputed amount as a pre-deposit at the time of submitting the stay application and/or before his stay application is considered by the Assessing Officer on merits. It is submitted that therefore, in the present case, as the assessee did not make any deposit; more particularly, 15% of the disputed demand, the respondent no. 2 is justified in rejecting the stay application and consequently, directing the assessee to pay 100% of the demand.

5.1 It is further submitted by Shri Sudhir Mehta, learned advocate appearing on behalf of the Revenue that even otherwise, considering Clause 4[B], only in a

case where 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, in case the case of an assessee falls within the parameters of Clause 4 [B] (b), in that case only, the Assessing Officer is required to refer the matter to the administrative Principal CIT/CIT. According to Shri Sudhir Mehta, learned counsel for the Revenue, in case of Clause 4 [B](a) *ie.*, in case where 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, in case the case falls within the parameters of Clause 4 [B](a), in that case, the Assessing Officer is not required to refer the matter to the administrative Principal CIT/CIT.

5.2 It is submitted that therefore, when the petitioner- assessee did not deposit any amount; more particularly, 15% of the disputed demand at the time of submitting stay application on or before his stay

application is considered on merits and despite sufficient opportunity given to the assessee, the petitioner did not deposit 15% of the amount, the Assessing Officer is justified in passing the *impugned* order rejecting the application.

5.3 Making the above submissions, it is requested to dismiss the present petition.

6. Heard learned advocates appearing on behalf of respective parties at length.

7. At the outset, it is required to be noted that by the *impugned* order, the respondent no. 2 has rejected the stay application of the petitioner which was submitted to grant stay of demand till the disposal of first appeal. That, the stay application of the petitioner has been rejected by the Assessing Officer/respondent no. 2 herein solely on the ground that the assessee has not deposited 15% of the disputed demand either at the time of submitting the stay application or before his stay application is considered. Thus, according to the Assessing Officer-respondent no. 2 herein, before the

stay application is submitted and/or considered on merits, the assessee is required to make deposit of 15% of the disputed amount as a pre-deposit. The aforesaid interpretation is made absolutely on misconception and/or misreading of the modified instructions dated 29<sup>th</sup> February 2016.

8. Considering Clause 4 of the modified instructions dated 29<sup>th</sup> February 2016, as and when stay application is submitted by the assessee requesting to grant stay of demand till disposal of first appeal, it is for the Assessing Officer to pass appropriate order and grant stay of the 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] of Clause 4 of the modified instructions dated 29<sup>th</sup> February 2016. Considering the modified instructions dated 29<sup>th</sup> February 2016 as a whole, there is no such requirement of pre-deposit of 15% of the disputed demand either at the time of submitting stay application or before the stay application of the

assessee is considered on merits. Clause 4 of the modified Instructions dated 29<sup>th</sup> February 2016 reads as under :-

“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) hereinunder.

[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 [eg., 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**

(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 Principal 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.”

8.1 Therefore, the interpretation by the Assessing Officer that at the time of submitting stay application and/or before stay application is taken up for consideration on merits, the assessee is required to deposit 15% of the disputed demand as pre-deposit is absolutely based on misinterpretation and/or misreading of the modified Instructions dated 29<sup>th</sup>

February 2016. What Clause-4 provides is that the Assessing Officer may/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 mentioned in para 4 [B] of the modified instructions dated 29<sup>th</sup> February 2016. Under the circumstances, the *impugned* decision of the respondent no. 2 in rejecting the stay application and consequently directing the petitioner to deposit 100% of the disputed demand on the ground that the petitioner has not deposited 15% of the disputed demand as a pre-deposit before his application for stay is considered on merits cannot be sustained and the same deserves to be *quashed* and set-aside. The matter is required to be remanded to the Assessing Officer to consider the stay application in accordance with law and on merits, in light of the modified instructions dated 29<sup>th</sup> February 2016 and observations made by us in the present order.

8.2 In case, the Assessing Officer is of the view that any deviation from clause 4 [A] is warranted *ie.*, if the

Assessing Officer is of the opinion that case falls within parameters of Clause 4 [B](a) *ie.*, the Assessing Officer is of the opinion that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted, in that case, the Assessing Officer is required to refer the matter to the administrative Principal CIT/CIT, who shall, after considering the relevant facts, decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand. In case the Assessing Officer is of the opinion that the case falls within the parameters of Clause 4 [B](b) of the modified instruction dated 29<sup>th</sup> February 2016 *ie.*, if the Assessing Officer is of the view that the nature of addition resulting in the disputed demand is such that payment of lump sum amount lower than 15% is warranted, in that case also, the Assessing Officer is required to refer the matter to the administrative Principal CIT/ CIT, who after considering all the relevant facts, shall decide the

quantum/proportion of the demand to be paid by the assessee as *lump sum* payment for granting a stay of the balance demand. Therefore, the submissions made on behalf of the Revenue that only when the case falls under Clause 4 [B](b), in that case only, the Assessing Officer is required to refer the matter to the administrative Principal CIT/CIT and not in case when the case falls under Clause 4 [B](a), the aforesaid has no substance. Between clause 4 [B](a) and clause 4 [B](b), the word used is “**or**” and therefore, in both the eventualities *ie.*, in case of Clause 4 [B](a) and in case of Clause 4 [B](b) *ie.*, in case the Assessing Officer is of the opinion that the assessee is required to deposit either above 15% or less than 15% of the disputed demand, in that case, the Assessing Officer is required to refer the matter to the Principal CIT/CIT and thereafter, the Principal CIT/CIT is required to take appropriate decision, after considering all the relevant facts and determine the lump sum payment to be made by the assessee for granting stay of the balance

demand.

8.3 In a case where the Assessing Officer grants stay of demand on payment of 15% of the disputed demand and the assessee is still aggrieved, in that case, a further right is conferred upon the assessee to approach the *jurisdictional* administrative Principal CIT/CIT for review of the decision of the Assessing Officer.

8.4 Under the circumstances, for the reasons stated above, the *impugned* decision of the respondent no.2- Assessing Officer rejecting the stay application cannot be sustained and the same deserves to be *quashed* and set-aside. So far as the decision of the respondent no. 1 is concerned, it appears that after the decision rendered by the respondent no. 2, the assessee filed stay application before the respondent no. 1 and the respondent no. 1 has passed the *impugned* order mainly considering the order of the Assessing Officer. Therefore, first, the Assessing Officer is required to take appropriate decision on the stay application, as per the

modified instruction dated 29<sup>th</sup> February 2016 and unless the case falls within Clause 4 [B](a) & (b), he is required to pass appropriate order on the stay application, granting stay on payment of 15% of the disputed demand. In case, the Assessing Officer is of the opinion that the case falls within Clause 4 [B](a) or (b), in that case, he is required to follow the procedure as observed hereinabove; more particularly, Clause 4 [B] where the Assessing officer is required to refer the matter to the administrative Principal CIT/CIT and thereafter, the Principal CIT/CIT to take appropriate decision.

8.5 Under the circumstances, the *impugned* order passed by the respondent no. 1 also deserves to be *quashed* and set-aside and the matter is required to be remanded to the respondent no. 2-Assessing Officer to consider the stay application afresh in accordance with law and on merits, considering the modified Instructions dated 29<sup>th</sup> February 2016 as well as observation made by us hereinabove.

9. In view of the above and for the reasons aforestated, the present *writ* petition succeeds in part. The *impugned* orders at Annexure "A" collectively passed by the respondent no. 1 and respondent no. 2 herein are *quashed* and set-aside. The matter is remanded to the Assessing Officer to pass appropriate order on the stay application submitted by the petitioner-assessee afresh in accordance with law and on merits and considering the modified Instructions dated 29<sup>th</sup> February 2016 read with earlier Instruction No. 1914 dated 21<sup>st</sup> March 1996 and in light of the observations made hereinabove. The aforesaid exercise shall be completed within a period of six weeks from *today*.

Rule *nisi* made absolute to the aforestated extent.

No costs.

Sd/= [M.R Shah, J.]

Sd/= [B.N Karia, J.]

Prakash

