IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.635 OF 2016

Maharashtra Industrial Development Corporation .. Petitioner.
V/s.
Commissioner of Income Tax (Exemptions) & Others .. Respondents.

Mr. Mihir Naniwadekar, for the Petitioner.
Mr. N. C. Mohanty, for Respondent Nos.1 and 2.

**CORAM: M.S.SANKLECHA, &**
**A.K.MENON, JJ.**
**DATE : 16th MARCH, 2016.**

**P.C:-**

At the request of the Counsel, this Petition is being disposed of finally at the stage of admission.

2 This Petition under Article 226 of the Constitution of India assails the orders dated 13th October, 2015 passed by the Assessing Officer and the order dated 25th February, 2016 passed by the Commissioner of Income Tax (Exemptions). By the impugned orders, the Petitioner's application under Section 220(6) of the Income Tax Act, 1961 (the Act) for stay of recovery of taxes pending disposal of its appeals by the Commissioner of Income Tax (Appeals), have been rejected. The Appeals filed by the Petitioner from the orders of Assessment passed by the Assessing Officer for the Assessment Years 2007-08, 2008-09, 2009-10 and 2010-11 on re-assessment notice under Section 143(3) read with 147

of the Act and for Assessment Year 2012-13 in regular proceedings under Section 143(3) of the Act are pending disposal before the Commissioner of Income Tax (Appeals) [CIT(A)].

3 The Petitioner is a statutory Corporation established by the State Government under the Maharashtra Industrial Development Act, 1961 (MIDC Act). The Petitioner holds a valid registration as a Charitable Institution under Section 12A read with 12AA of the Act. The Petitioner is engaged in developing industrial infrastructure within the State and in that process, allots industrial plots on account of lease premium. This premium received is on behalf of the State Government and is directly taken as deposits to the Petitioner's balance sheet. Thus not subjected to tax. However, for the first time in Assessment Year 2011-12, the Assessing Officer subjected the deposits on account of lease premium to tax as Petitioner's income. However, the Income Tax Appellate Tribunal (Tribunal) by order dated 27th March, 2015 for Assessment Year 2011-12 set aside the order of the Authorities under the Act, bringing to tax the deposits on account of lease premium and restored the issue to the Assessing Officer for de-novo consideration.

4 In the meantime, the Assessing Officer re-opened the Assessment for Assessment Years 2007-08, 2008-90, 2009-10 and 2010-11 and the Assessing Officer by orders held that deposits on account of lease premium to be the Petitioner's income. Similarly, for the Assessment Year 2012-13 in regular Assessment proceedings the Assessing Officer held the deposits on account of lease premium taxable as Petitioner's income. Thus, the Assessing Officer held that these deposits are to be taxed as 'income'

and as a consequence thereof, raised the following demands:

| Sr. No. | Date of Order | Assessment Years | Amount (Rs.) |
|---|---|---|---|
| 1 | 23.3.2015 | 2007-08 | 700,15,53,215 |
| 2 | 18.3.2015 | 2008-09 | 851,80,18,070 |
| 3 | 18.3.2015 | 2009-10 | 914,13,23,700 |
| 4 | 18.3.2015 | 2010-11 | 887,83,84,890 |
| 5 | 09.03.2015 | 2012-13 | 715,90,43,80 |
| | | Total:- | 4069,83,23,745 |

Mr. Naniwadekar learned counsel for the Petitioner on instructions states that no amount of the above demand is attributable to the benefit of Section 11 of the Act claimed by the Petitioner.

5 Being aggrieved by the above orders of the Assessing Officer, the Petitioner filed appeals to the CIT(A). Consequent thereto, the Petitioner filed application for stay of recovery of demands for Assessment Years 2007-08 to 2010-11 and 2012-13. The stay was sought inter alia on the following grounds:-

(a) Order dated 27th March, 2015 of the Tribunal for Assessment Year 2010-11, setting aside the orders of the Authorities under the Act seeking to tax the deposits as income and restoring the issue for de-novo consideration to the Assessing Officer;

(b) The amounts have been received as a premium on lease since 1962 (since inception) and being treated as deposit carried directly to its balance-sheet. The accounts are audited by the Auditor General and no

fault with regard to the same has been found nor had the Revenue for all these Assessment Years till A. Y. 2010-11 not challenged the same. Thereafter re-opening notices for A. Y. 2007-08 to 2010-11 were issued seeking to tax these deposits as income of the Petitioner;

(c) Reliance was placed upon the decision of the Tribunal in the case of ***CIDCO v/s. Assistant CIT 138 ITR (AT) 381*** – wherein on principal, an identical issue as arising herein was considered by the Tribunal. On consideration, the Tribunal held that the deposit cannot be subjected to tax in the hands of CIDCO (supra); and

(d) Financial hardship.

6 By the five separate orders dated 13th October, 2015 (one for each Assessment Years), the Assessing Officer rejected the stay applications. However, the impugned orders dated 13th October, 2015 do not even advert to the Petitioner's submission that the issue arising for consideration before the CIT(A) is concluded in its favour by the decision of the Tribunal in CIDCO (supra) nor the reliance by the Petitioner upon the order dated 27th March, 2015 of the Tribunal for Assessment Year 2011-12. Moreover, it does not even refer to the past practice followed by the Revenue in not having treated deposits as income of the Petitioner since 1962, till the assessments were re-opened for the Assessment Years 2007-08, 2008-09, 2009-10 and 2010-11, consequent to the order passed in Assessment Year 2011-12. In fact, the order does not advert even remotely to the Petitioner's case on merits that amounts of lease premium which are deposits cannot be considered as income, subject to tax.

7 In view of the rejection of stay by orders dated 13th October, 2015 of the Assessing Officer, the Petitioner made further application to the Commissioner of Income Tax (Exemptions) for stay. In its application, the Petitioner reiterated submission made before the Assessing Officer. The Commissioner of Income Tax (Exemptions) by the impugned order dated 25th February, 2016 while rejecting the stay application directed deposits of 25% of the aggregable demand of Rs.4069.83 Crores in two equal installments. This was without considering the, prima facie, merits of the Petitioner's case. This also on the erroneous understanding that even prima facie merits cannot be considered by him while exercising his powers of stay under Section 220(6) of the Act as the order of the Assessing Officer is subject to consideration by the CIT(A) in the Petitioner's appeal.

8 We find that neither the Assessing Officer in the impugned orders dated 13th October, 2015 nor the Commissioner of Income Tax (Exemptions) in the order dated 25.2.2016 has dealt with the Petitioner's primary contentions that the amounts received as lease premium and shown as deposits, cannot be taxed as income. This Court has time again set out parameters to be kept in mind while considering the stay application under Section 220(6) of the Act. In fact, this Court in MMRDA v/s. The Deputy Director of Income Tax (Exemptions-1(1)) and Others ITO in Writ Petition (L) No.2348 of 2014 decided on 29th October, 2014 has set out the parameters to be kept in mind while disposing of the stay application as under:-

*"11 We have today, disposed of another Petition bearing No.2542*

*of 2014 filed by the Slum Rehabilitation Authority and set out the parameters in deciding stay application as laid down by this Court in KEC International Limited v/s. B. R. Balakrishnan 251 ITR 158; UTI Mutual Funds v/s. ITO 345 ITR 71 and UTI Mutual Fund v/s. ITO in W.P.(L) No.523 of 2013 rendered on 6th March 2013 which can for the purposes of disposing an application of stay can be summarized as under:*

> *(a) The order on stay application must briefly set out the issue and the submission of the assessee/ applicant in support of the stay;*
>
> *(b) In cases where the assessed income under the impugned order far exceeds returned income so as to make the demand arbitrary or the issue arising for consideration stands concluded by a decision of an higher forum or where the order appealed against is in breach of Natural Justice or the view taken in the order being appealed against is contrary to what has been held in the preceding previous years ( even if issue pending before higher forum ) without there being a material change in facts or law, stay should normally be granted;*
>
> *(c) If not, whether looking to the questions involved in appeal, keeping in view the likelihood of success in appeal what part of the demand the whole(in case issue covered against the applicant by a decision of higher forum) or part of it and must be justified by short reasons in the order disposing of the stay application;*
>
> *(c) Lack of financial hardship would not be a sole ground to direct deposit/payment of the demands if the assessee/applicant has a strong arguable case on merits;*
>
> *(d) In cases where the assessee/applicant relies upon financial difficulties, the authority concerned should briefly indicate whether the assessee is financially sound and viable to deposit the amount or the*

*apprehension of the revenue of non recovery later. Thus warranting deposit. This of course, if the case is not otherwise sustainable on merits;*
*(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) In exercising the powers of stay, the Authority should always bear in mind that as a quasi judicial authority it is 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 application for stay must be considered from all its facets and the order should be passed, balancing the interest of the assessee with the protection of the Revenue.*

*The above guidelines are only illustrative and the authority concerned would have to have exercise his discretion in matters of stay onthe facts of the case before him."*

9 It would thus be seen that the Commissioner of Income Tax (Exemptions) has completely misunderstood the scope of her powers and issues to be considered while disposing of the stay applications. In the above view, we set aside the orders dated 13th October, 2015 of the Assessing Officer and order dated 25th February, 2016. However, the Petitioner's stay application is restored to the file of the Commissioner of Income Tax (Exemptions) for fresh disposal in accordance with law and after considering, prima facie, merits of the Petitioner's case and in

accordance with law. This would include considering the Petitioner's stand that the issue is concluded by the decision of the Tribunal in CIDCO (supra) in its favour. It is made clear that the Revenue would not adopt any coercive proceedings to recover the aggregate demand of Rs.4069.83 Crores or any part thereof till disposal of the Petitioner's Application for stay by Commissioner of Income Tax (Exemptions) and for a period of two weeks from the date of communication of her order to the Petitioner.

10 The Petition stands disposed of in the above terms. No order as to costs.

**(A.K.MENON,J.)** **(M.S.SANKLECHA,J.)**