

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

WRIT PETITION (L)NO. 2348 OF 2014

Mumbai Metropolitan Region
Development Authority

.. Petitioner.

V/s.

The Deputy Director of Income Tax
(Exemption -1(1)) & Others

.. Respondents.

Mr. S. E. Dastur, Sr. Advocate with Madhur Agrawal, Mr. P. C. Tripathi and
Mr. A. K. Jasani, for the Petitioner.
Mr. Suresh Kumar, for the Respondents.

**CORAM: M.S.SANKLECHA, &
M.S.SONAK, JJ.**

DATE : 29th OCTOBER, 2014.

JUDGMENT (Per M.S. SANKLECHA, J.):-

At the request of the counsel for the parties, Petition is being disposed of at the stage of admission.

2 This Petition challenges the orders dated 2nd June, 2014 passed by the Assessing Officer and 18th August, 2014 passed by the Director of Income Tax (Exemption)[Director] under Section 220(6) of the Income Tax Act, 1961 (the Act). By the impugned orders the Petitioner's application for unconditional stay of demand of Rs.961.92 Crores consequent to the Assessment Order dated 28th February 2014 for Assessment Year 2011-12, pending the disposal of its appeal by the Commissioner of Income Tax (Appeals) (CIT(A)), was rejected.

3 The Petitioner is a statutory authority, established under the

Mumbai Metropolitan Region Development Authority Act, 1974, (the MMRDA Act). The Petitioner has been set up inter alia for the purpose of planning, coordinating and supervising the development of the Mumbai Metropolitan Region. In terms of Section 40 of the Maharashtra Regional Town Planning Act, 1966 (MRTP Act) by a notification dated 7th March, 1977, the Petitioner was appointed as a Special Planning Authority in place of CIDCO for the notified areas including 'Bandra Kurla Complex'.

4 The Petitioner has been claiming since Assessment Year 2003-04, exemption under Section 11 of the Act, from payment of Income taxes. The Assessing Officer has been consistently denying the claim for exemption. However, in appeal, the CIT(A) has consistently allowed the appeals holding that the Petitioner is entitled to the benefit of Section 11 of the Act in respect of Assessment Years 2003-04 to 2009-10. The appeals filed by the Revenue from the orders of the CIT(A) except for Assessment Year 2006-07, are pending with the Income Tax Appellate Tribunal(Tribunal). The Appeal for Assessment Year 2006-07 has been rejected by the Tribunal. Thus, upholding the petitioner's claim for exemption under Section 11 of the Act.

5 By the Finance (No.2) Act, 2009, Section 2(15) of the Act was amended and a proviso was added thereto with effect from 1st April, 2009. Notwithstanding the above, the Petitioner was granted for Assessment Year 2009-10 the benefit of Section 11 of the Act by the CIT(A). However, for the Assessment Year 2010-11, the Assessing Officer disallowed the Petitioner's claim for exemption under Section 11 of the Act and pending the disposal of its appeal by the CIT(A), the Petitioner applied for stay of the demand. In its application for stay the

Petitioner raised an alternative plea of being an agent of the State in view of the MRTTP Act and therefore not liable to pay tax. The Petitioner claimed that the issue stands covered by the decision of the Tribunal in **CIDCO v/s. Assistant CIT 138 ITR 381**. The stay application was rejected and the Petitioner filed a Writ Petition being W. P. (L) No. 2158 of 2013, challenging the rejection of stay application pending disposal of the appeal by CIT(A). This Court by order dated 18th November 2013 in W. P. (L) No.2158 of 2013 was of the prima facie view that the Petitioner's case is covered by the Tribunal's decision in CIDCO (supra). However, as the issue was not raised during Assessment Proceedings, the Assessing Officer had no occasion to examine the claim of the Petitioner. In the above circumstances, it directed that a deposit 25% of the demand be made pending the disposal of appeal by CIT(A) for the purpose of stay.

6 On 28th February 2013 the Petitioner filed its return of income(revised) for the Assessment Year 2011-12 declaring its income as 'Nil'. During the assessment proceedings, benefit of exemption under Section 11 of the Act was claimed relying upon the orders of the CIT(A) for the earlier Assessment Years. Alternatively, the Petitioner also claimed that it is an agent of the State Government and not chargeable to tax. In support, reliance was placed upon the decision of Tribunal in CIDCO (supra) as it had stepped into the shoes of CIDCO. Nevertheless, the Assessing Officer did not accept the contention of the Petitioner and by order dated 28th February 2014 assessed the Petitioner to an income of Rs.2316 Crores for Assessment year 2011-12.

7 Being aggrieved by the Assessment Order dated 28 February 2014, the Petitioner filed an appeal to the CIT(A). Pending the disposal of

its appeal, the Petitioner moved an application before the Assessing Officer under Section 220(6) of the Act, seeking a stay of the demand of Rs.961.92 Crores for the Assessment Year 2011-12 pending the disposal of the appeal by the CIT(A). On 4th June, 2014, the Assessing Officer rejected the Petitioner's application for stay on the following grounds :-

- (i) that no financial hardship has been pleaded by the Petitioner;
- (ii) mere filing of an appeal to CIT(A) does not warrant a stay; and
- (iii) issues raised in the stay application are already considered while passing the assessment order dated 28th February, 2014.

8 Being aggrieved, the Petitioner filed a further application dated 19th June, 2014 before the Director in his administrative capacity for stay of demand till the disposal of the appeal by the CIT(A). The Petitioner placed reliance upon the decision of the Tribunal in CIDCO(supra). The Director by the impugned order dated 18th August 2014 rejected the Petitioner's application for stay inter alia on the ground that the decision of the Tribunal in CIDCO(supra) would not apply as in the above case CIDCO (supra) had not sought exemption under Section 11 of the Act as is being claimed by the Petitioner. Further that for the Assessment Year 2010-11, this Court had by order dated 18th November, 2013 directed the Petitioner to pay 25% of the total tax demanded for the Assessment Year 2010-11. Thus directed the petitioner to pay 25% of the tax demand and on making the above payment there would be a stay of recovery for the balance amounts.

9 Mr. S. E. Dastur, learned Senior Counsel in support of the Petition points out that in the present facts, an unconditional stay till the disposal of the appeal is warranted as the issue is concluded by the

decision of the Tribunal in the case of CIDCO(supra). It was further submitted that even in the order dated 13th November, 2013, this court in W. P.(L) No. 2158 of 2013 in the Petitioner's own case has held that prima facie the issue raised by the Petitioner is covered by order of the Tribunal in CIDCO(supra). In this case, this issue of being an agent of the State has been raised during the Assessment Proceedings and yet the decision of the Tribunal was not followed for any justifiable reason. Even otherwise, the order of CIT(A) for the earlier Assessment Year granting exemption under Section 11 of the Act should be applied and unconditional stay be granted.

10 Mr. Suresh Kumar, learned Counsel appearing for the Respondent-Revenue relies upon the impugned order. It is further submitted that in view of the amendment to Section 2(15) of the Act by addition of a proviso, no interference with the impugned order is called for.

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 on the facts of the case before him. Keeping in view of the above broad parameters we shall now examine whether the authorities have properly exercised their jurisdiction.

12 The order dated 2nd June 2014 of the Assessing Officer disposing of the application for stay has in fact been passed in total defiance of the law as laid down by this court as pointed above. The first ground in the order for refusing stay is that no financial hardship is pleaded This issue was a subject matter of consideration by the Court in **UTI Mutual Fund v/s. ITO** in W. P(L) No.523 of 2013 (supra) and it was held that where a strong prima facie case is made out, a direction to deposit would itself cause financial hardship. However before the financial situation of an applicant can be considered, the authority has to first consider the prima facie case pleaded by the applicant and if the same is covered against the revenue in view of a decision of a superior forum, then the question of considering the issue of financial hardship is irrelevant. The second ground for rejecting the stay application is that the issues raised in the appeal and the stay have already been dealt with in the Assessment Order. If this was so, pray what is the reason for the Act to provide for a stay of demand by an Assessing officer till the disposal of the appeal by the CIT(A). This is also contrary to the guidelines laid down

in UTI Mutual Funds (345 ITR 71) where the Court held that '*though the Assessing Officer had made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order....*' The impugned order proceeds on the basis that the petitioner is asking for stay merely because they have filed an appeal. This is belied if one merely looks at the application for stay dated 4 April 2014 which is a fourteen page application urging various grounds in support of their application for stay. Therefore, at one stage, we were considering to restore the issue for further consideration by the Assessing Officer. However, we find that the Director has in the impugned order dated 18 August, 2014 dealt with the issues and in any event the issue prima facie for the purposes of stay, appears to be covered in favour of the Petitioner by the order of the Tribunal in the case of CIDCO(supra).

13 We find that the Petitioner's submission before the authorities was that in view binding decision of the Tribunal in CIDCO (supra), a stay ought to be granted. This is so as the Petitioner would also be an agent of the State Government as it has been appointed as a Planning Authority by Notification dated 7th March, 1977 in place and in stead of CIDCO(supra), inter alia in respect of the Bandra Kurla Complex. The Director in the impugned Order dated 18 August 2014 holds that decision of the Tribunal in CIDCO(supra) is inapplicable on the ground that CIDCO(supra) unlike Petitioner had not sought exemption under Section 11 of the Act. The impugned order completely overlooked the fact that the exemption under Section 11 of the Act is in respect of the property held under a Trust, is a different and distinct ground, from that of being an agent of the State Government and therefore not taxable. The submission of being an agent

of the State is not based on any claim for exemption under any provision of the Act but under Article 289 of the Constitution of India. This mixing of chalk and cheese in the impugned order appears to have been done only so as to deprive Petitioner the benefit of binding decision in the case of CIDCO(supra).

14 Further, the impugned order dated 18 August 2014 of the Director states that in similar circumstances when the application of the Petitioner for stay was rejected for A.Y. 2010-11 this Court in W.P. (L) No.2158 of 2013 rendered on 18 November 2013 directed the Petitioner to pay 25% of the demand and relies upon para 5 thereof which reads as follows:-

“ Having heard the learned Counsel for the parties, we find that the demand has been raised upon the Petitioner consequent to the Assessment Order dated 11 March 2013. The issue of petitioner being an agent of the Government was not raised before the Assessing Officer and thus not examined in the Assessment order. The decision in the case of CIDCO(supra) of the Tribunal does prima facie appear to apply to this case, however, the same is subject to detailed examination of the activity of the petitioner in the context of being an Agent of the Government. This requires some factual examination and would be done by the Authorities. In view of the above, we were inclined to grant conditional stay of the demand upon deposit of 25% of the total tax demand. But we find that out of the total demand of Rs.850.69 Crores an amount of Rs.196.53 Crores has already been recovered by the department by way of adjusting the refund for other assessment years as indicated above. The Petitioner has thus already paid almost about 23% of the total tax demand. We are informed that the appeal of the petitioner for the A. Y. 2010-11 is already fixed for hearing before the CIT(Appeals) on 21 November 2013, when these issues would be considered in depth and decided. Therefore in the present facts, the

interest of justice would be served if the demand for the balance amount of Rs.656.14 Crores is stayed.”

It is axiomatic in law that a decision has to be read in the context of the facts which gave rise to it. A decision of a Court is not statute. The 25% of deposit out of the total tax demand was ordered by this Court in its order dated 18 November 2013 (W. P. (L) No.2158 of 2013) in the context of the fact that the Petitioner had not raised the issue of being an- agent of the Government before the Assessing Officer and thus, the Assessing Officer had no occasion to examine the same. In the present case, admittedly, the Petitioner has raised the issue of it being an agent of the Government of the Maharashtra and its income not being taxable in view of Article 289 of the Constitution before the Assessing Officer. In fact, the Assessment Order has considered the same and denied the benefit of the binding decision in CIDCO(supra) on the ground that in the above case CIDCO (supra) had not claimed exemption under Section 11 of the Act as is being claimed in this case. This reason is arbitrary and has no nexus with the plea raised viz. no tax payable as agent of the State. Therefore, on the aforesaid ground alone, the decision of the Tribunal in the case of CIDCO(supra) would prima facie apply to the facts of the Petitioner's case and an unconditional stay would be warranted, pending the disposal of the Appeal by the CIT(A).

15 One more fact which must be adverted to is the Petitioner's claim that addition of Rs.1311 Crores which are not to be treated as Income is not dealt with in the impugned order on the ground that the appropriate forum to deal with it is CIT(A). The Petitioner's contention that the substantial part of these additions have been deleted by the CIT(A) for earlier Assessment Years has not even been considered. In view

of the above reasons, we direct that pending the disposal of the Appeal by the CIT(A) for the Assessment Year 2011-12 from the order dated 28th February, 2014, the Petitioner will not be treated as an assessee in default. We further make it clear that in case the order of CIT(A) is adverse to the Petitioner then as held by this Court in *UTI Mutual Fund v/s. ITO 345 ITR 71*, the Revenue will not take any steps for recovery of tax dues till the expiry of the time limit for filing an Appeal and where a stay application is filed with the higher forum till the disposal of the stay application.

16 Before closing, we would like to clarify that observations in the present decision are confined only to the disposal of the application for stay and the recovery of the demand. The observations made in this order should in no manner prejudice the rights and contentions of the assessee and the Revenue in the pending appellate proceedings under the Act.

17 **Petition** is accordingly, **disposed of** in the above terms, with no order as to costs.

(M.S.SONAK,J.)

(M.S.SANKLECHA,J.)