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

WRIT PETITION NO.543 OF 2019

Milestone Real Estate Fund]
through its trustee Ms. Rubi Arya,]
402-A, Hallmark Business Plaza,]
Sant Dnyaneshwar Marg,]
Bandra (E), Mumbai 400 051.] .. Petitioner.

v/s.

1 The Assistant Commission of Income]
Tax, Circle 25(3), Pratyaksakhar]
Bhavan, C-10, Bandra-Kurla Complex]
Bandra (East), Mumbai 400 051]

2 Principal Commissioner of Income]
Tax-25, Pratyaksakhar Bhavan,]
C-10, Bandra Kurla Complex,]
Bandra (E), Mumbai 400 051.]

3 Commissioner of Income Tax]
(Appeals) 37, Pratyakshakar Bhavan]
C-13, Bandra Kurla Complex,]
Bandra (E), Mumbai 400 051.]

4 Union of India]
through the Secretary, Department]
of Finance, Ministry of Revenue]
Government of India, North Block]
New Delhi 110 001.] .. Respondents.

Mr. J. D. Mistri, Sr. Advocate with Mr. Madhur Agrawal i/b. Mr. A. K. Jasani, for the Petitioner.
Mr. Sham Walve, for the Respondents.

CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.
RESERVED ON : 8th MARCH, 2019.
PRONOUNCED ON : 26th MARCH, 2019.

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

RULE. By consent, rule made returnable forthwith. Counsel for the Respondent waive service. Petition taken up for final disposal.

2 This Petition under Article 226 of the Constitution of India, relates proceedings under the Income Tax Act, 1961 (the Act) for Assessment Year 2016-17. The Petitioner seeks the following reliefs:-

(a) the order dated 18th December, 2018 passed by the Assessing Officer of provisional attachment under Section 281B of the Act, be set aside;

(b) notices dated 19th December, 2018 issued to the Assessing Officer under Section 226(3) of the Act, attaching Petitioner's bank accounts be set aside;s

(c) the orders dated 29th January, 2019 passed by Respondent No.1-Assessing Officer and 14th February, 2019 passed by Respondent No.2 - Pr. Commissioner of Income Tax [Pr. CIT] rejecting the Petitioner's applications for complete stay on recoveries under Section 220(6) of the Act of outstanding demand, arising out of assessment order dated 20th December, 2018, relating to Assessment Year 2016-17, pending disposal of its appeal by the Commissioner of Income Tax (Appeals) [CIT(A)], be set aside;

(d) notice of demand dated 15th February, 2019 passed by the Assessing Officer, adjusting refund of Rs.60.46 lakhs and Rs.12.42 Crores refundable for the Assessment Years 2012-13 and 2014-15 respectively against outstanding demand of Rs.51.32 Crores payable for the Assessment Year 2016-17 under Section 245 of the Act, be set aside; and

(e) as a consequence of the above, the Assessing Officer be directed:-

(i) to deposit forthwith the amount of Rs.14.62 Crores adjusted for Assessment Year 2016-17 out of aggregate amount of Rs.29.25 Crores withdrawn from the Petitioner's bank account;

(ii) to hand over the refund of Rs.60.46 lakh and Rs.12.42 Cores relating to Assessment Years 2012-13 and 2014-15 respectively; and

(iii) to restrain the Respondents from adopting any proceedings for recovery of any outstanding demand for the Assessment Year 2016-17 till the disposal of its pending appeal by the CIT(A) and for a period of eight weeks thereafter.

3 The facts leading to this Petition are as under:-

(a) The Petitioner is a trust established under the Indian Trusts Act, 1882. The Petitioner has been granted a certificate of registration by the Securities and Exchange Board of India (SEBI) as Venture Capital Fund. This makes the Petitioner eligible for exemption under Section 10 (23FB) of the Act while computing its taxable income;

(b) For the subject Assessment Year 2016-17, the Petitioner filed its return of income on 24th October, 2016. In its return, it declared a total income of Rs.19.23 Crores after claiming exemption under Section 10 (23FB)) of the Act and also exemption of dividend income earned from mutual funds under Section 10(35) of the Act;

(c) However, during the course of the scrutiny assessment proceedings, the Assessing Officer issued an order dated 18th December, 2018 for provisional attachment under Section 281-B of the Act, attaching the Petitioner's Bank Account. This to protect the interest of the Revenue for the likely demand to be raised for the Assessment Year 2016- 17. This attachment order was served on the Petitioner only on 2nd January, 2019, although in the meantime, the attachment order had already been served on the Petitioner's bankers, attaching Petitioner's bank account;

(d) Further, during the pendency of the scrutiny assessment proceedings i.e. on 19th December, 2018, the Assessing Officer issued notices under Section 226(3) of the Act to the Petitioner's Bankers. The above notices stated that an amount of Rs.46.47 Crores is due from the Petitioner for Assessment Year 2016-17 along with interest thereon under Section 220 of the Act. The above notices also requested the Petitioner's Bankers to make payment of the amounts available with it to the Income Tax Department to meet the Petitioner's dues;

(e) No sooner the Petitioner's Bankers informed it of the impugned notices dated 19th December, 2018 issued under Section 226(3) of the Act (not served upon the Petitioner), the Petitioner addressed a communication dated 21st December, 2018 to the Assessing Officer, pointing out that the impugned notice were contrary to the provisions of the Act. This was so as no amount was due from the Petitioner to the Revenue on 19th December, 2018 when the notice was issued. It was pointed out that no assessment order for

Assessment Year 2016-17 (in respect of which notice is issued) has been passed till 19th December, 2018. Thus, the notices are bad in law. It was also pointed out, that the impugned notices under Section 226(3) of the Act make reference to an attachment under Section 281B of the Act by an order dated 18th December, 2018, but the same had not been received by it. Thus, requesting the Assessing Officer to withdraw the attachment order under Section 281B of the Act and notices under Section 226(3) of the Act;

(f) On receipt of the Petitioner's above letter dated 21st December, 2018, the Assessing Officer in stead of acting upon the same and withdrawing the order under Section 281B and notices under Section 226(3) of the Act, issued a corrigendum dated 26th December, 2018, to the notices dated 19th December, 2018 issued under Section 226(3) of the Act. By the above corrigendum dated 26th December, 2018, the Assessing Officer substituted the words *'demand has fallen due'* with the words *' demand is to be fallen due';*

(g) In the meantime, on 20th December, 2018, the Assessing Officer passed an order under Section 143(3) of the Act for Assessment Year 2016-17. By the above order dated 20th December, 2018, the Petitioner claims for exemption to the extent of Rs.133.09 Crores under Section 10(23FB) of the Act as Venture Capital fund and exemption to the extent of Rs.3.62 Crores under Section 10(35) of the Act on dividend from Mutual funds was rejected. Thus, determining the Petitioner's income at Rs.147.08 Crores for Assessment Year 2016-17 as against a declared income of Rs.10.85 Crores. This resulted in a demand of Rs.65.94 Crores;

(h) Being aggrieved by the order dated 20th December, 2018 of the Assessing Officer, the appellant on 10th January, 2019 preferred an appeal to the CIT(A). Immediately thereafter on 14th January, 2019, the Petitioner applied to Assessing Officer under Section 220(6) of the Act, seeking a stay of the demand for Assessment Year 2016-17 till the disposal of its appeal by the CIT(A). In support, the Petitioner relied upon the fact that its eligibility for the benefit of Section 10(23FB) of the Act had been decided in its favour by Appellate Authority for Assessment Year 2014-15 by CIT(A) and for Assessment Year 2013-14 by Income Tax Appellate Tribunal as is evident from the Assessment Order. Besides, it was pointed out that the Revenue is secured, as huge refunds are payable by the Revenue to the Petitioner;

(i) On 14th January, 2019, the Assessing Officer lifted the attachment of some of the Petitioner's bank accounts. However, the attachment of the other bank accounts continued undisturbed;

(j) By order dated 29th January, 2019, the Assessing Officer rejected the Petitioner's application for stay pending disposal of its appeal for Assessment Year 2016-17 by the CIT(A). The above order does not deal with the Petitioner's submission and holds that mere filing of an appeal to the CIT(A) is not sufficient to grant a stay. Besides, relying upon the CBDT instructions which states that stay can be granted only on deposit of 20% of the disputed/ outstanding demand. The above order also directs the Petitioner to pay the amounts on or before 1st February, 2019, failing which coercive proceedings were threatened;

(k) The hard copy of the order dated 29th January, 2019 of the Assessing Officer was received by the Petitioner on 4th February, 2019. Immediately on 5th February, 2019, the Petitioner made a representation to the Respondent No.2 Pr. CIT, seeking a complete stay of the outstanding demand for A. Y. 2016-17 till the disposal of its appeal by the CIT(A);

(l) During the course of common hearing before the Pr. CIT, on 13th February, 2013 in respect of stay of demands consequent to Assessment Orders for Assessment Year 2015-16 and 2016-17, the Petitioner was informed that the Assessing Officer had on 4th February, 2019, withdrawn an amount of Rs.29.25 Crores from the Petitioner's bank account. At the hearing, the Petitioner was informed about the proposed adjustment of the refunds for Assessment Years 2012-13 and 2014-15 with the demand for Assessment Year 2016-17. This without the Petitioner being given any notice and/or intimation of the withdrawal of the amount from the Petitioner's bank account and/or adjustment for refund. The Petitioner made its submissions for complete stay as the issue of exemption under Section 10(23FB) of the Act, was concluded on merits in its favour by orders of the Appellate Authorities for earlier Assessment Years;

(m) It was only at 6.00 p.m. on 13th February, 2019 (after the completion of the hearing before the Pr. CIT) that a communication dated 11th February, 2019 was received from the Assessing Officer seeking to adjust the refund for Assessment Years 2012-13 and 2014-15 with the demand for Assessment Year 2016-17. This after

recording the fact that an amount of Rs.14.62 Crores (out of Rs.29.25 Crores withdrawn from the bank) had been reduced from demand for Rs.65.94 Crores to Rs.51.32 Crores for Assessment Year 2016-17;

(n) On 14th February, 2019, the Petitioner responded to the above notice dated 11th February, 2019 of the Assessing Officer and objected to the proposed adjustment. No order on the Petitioner's objection was passed by the Assessing Officer. Nevertheless, on 14th February, 2019, itself the Respondent No.2 - Pr. CIT passed a common order in respect of stay for Assessment Year 2015-16 and 2016-17. In the common impugned order, it records the fact that in the aggregate demand payable is Rs.1.33 Crores for Assessment Year 2015-16 and 2016-17 and that 20% of it would be Rs.29.25 Crores. It is further recorded that after adjustment of the refund in the aggregate of Rs.34.46 Crores for the Assessment Years 2012-13, 2013-14 and 2014-15 with the aggregate demand of Rs.1.33 Crores, the aggregate balance demand of Rs.69.66 Crores would be stayed till the disposal of the appeal by the CIT(A); and

(p) It was only later that the Petitioner received an order/notice dated 15th February, 2019 from the Assessing Officer seeking to adjust the refund of Rs.60.46 lakhs and Rs.12.42 Crores for the Assessment Years 2012-13 and 2014-15 against the demand of Rs.51.32 Crores for the Assessment Year 2016-17.

4 It is on the above facts, that the Petitioner has filed this Petition for the relief detailed herein above. The Assessing Officer has

filed an affidavit in reply dated March, 2019. On facts, the affidavit of the Assessing Officer adverts to two issues as under:-

(a) The approval of the Pr. CIT was obtained prior to issuing a notice under Section 281B of the Act for provisional attachment; and

(b) The CIT(A) has in the case of HDFC Property Fund on the issue of eligibility to exemption under Section 10(23FB) of the Act has taken a view in favour of the Revenue. Thus the view taken in the Petitioner's case for the earlier Assessment Year by the CIT(A) has been differed from, leaving the issue open.

5 Mr. Mistri, learned Senior Counsel appearing in support of the petition submits that action of the respondents particularly, the Assessing Officer has been arbitrary and contrary to not only binding decisions of this Court but also to the statutory provisions. In support of the above primary submissions, the following actions of the respondents have been pointed out :-

(a) The order of provisional attachment under Section 281B of the Act was issued on 18th December, 2018 by the Assessing Officer when the assessment order was imminent as it was passed on 20th December, 2018. Moreover, the above order was issued without the sanction of the Pr. CIT. The impugned order under Section 281B of the Act does not indicate any basis for the apprehension of the Revenue that the tax dues of the petitioner when liable would be in jeopardy, requiring extra-ordinary action of provisional attachment of the petitioner's assets;

(b) A notice under Section 226(3) of the Act was issued on 19th December, 2018 when admittedly no amount was due from the

petitioner to the respondents for Assessment Year 2015-16 or for that matter for any other assessment year on that date. This notice is in defiance of Section 226(3) of the Act which can only be issued when any amount is due by an assessee to the Revenue. Admittedly, no amount was due on 19th December, 2018 when notices were issued to the petitioner's bankers seeking to recover the amounts lying with the petitioner's bank account on the ground that the petitioner has failed to pay the amount of taxes which are due.

(c) The orders dated 29th January, 2019 passed by the Assessing Officer rejecting a stay is *ex facie* arbitrary and in defiance of numerous orders of this Court setting out the manner in which an application for stay under Section 220(6) of the Act has to be disposed of by the Officers of the Revenue. The only reason given in the order for refusing to stay the demand was that mere filing of an appeal would not warrant a stay of the demand without dealing with the issue in dispute and the petitioner's submission in support of its application for stay under Section 220(6) of the Act.

(d) The action of the Assessing Officer in giving only two days time to pay the amounts after rejection of the stay application on 29th January, 2019 for petitioner to pay the amounts is unfair and contrary to the decision of this Court. Thereafter, the Assessing Officer posthaste recovered the amounts aggregating to Rs.29.25 Crores from the petitioner's bank accounts even though

undisputedly there was no fear of any amounts being withdrawn by the petitioner as the bank account stood attached in favour of the Revenue. Moreover, this action of withdrawing the amounts from the attached bank accounts on the part of the respondents was in defiance of the decision of this Court in ***UTI Mutual Funds Vs. ITO & Ors. 344 ITR 71.*** In the above case, the Court has while dealing with powers of the Assessing Officer to recover the dues pending disposal of appeals has specifically held that before withdrawing the amounts from a bank account which has been attached, a reasonable prior notice should be furnished to the assessee to enable it to seek appropriate remedy, if any, available in law.

(e) The action of the respondent no.1 Assessing Officer in adjusting the refund which was due for the Assessment Years 2012-13 and 2014-15 against the demand for Assessment Year 2016-17 was again in defiance of the law laid down by this Court in ***Hindustan Unilever Ltd. Vs. DCIT, 377 ITR 281***. Moreover, the action on the part of the respondent of serving the so called intimation notice of adjustment of the refund due against the demand payable was only after the Petitioner had been orally informed at the hearing by the Respondent no.2 Pr. CIT that the refund amounts has been adjusted against the due for the subject assessment year; and

(f) The order order dated 14th February, 2019 of the respondent no.2 Pr. CIT rejecting the petitioner's stay application without adhering to the directions in numerous decisions of this Court of the manner in which the applications for stay under Section 220(6) of the Act

has to be disposed of by the Authorities under the Act. Thus, he submits a miscarriage of justice.

It is submitted that not only the relief prayed for by the petitioners be granted but heavy costs be imposed upon the respondents. This to ensure that the Officers of the Revenue do not resort to such high handed action in the face of the statutory provisions and binding decisions of this Court.

6 On the other hand, Mr. Walve, learned Counsel appearing for the Revenue supports the impugned order and submits as under :-

(a) The order under Section 281B of the Act has been issued on 18th December, 2018 after obtaining the necessary approval from the Pr. CIT.

(b) The contention of the petitioner that a complete stay should be granted to it on merits as the issue is concluded in its favour by orders of the Appellate Authorities for earlier assessment years is not correct. This as the CIT(A) in the case of HDFC Property Funds has departed from the view taken in the case of petitioner, even though the facts and law are identical. Thus, the requirement to deposit the amounts for grant of stay by the Assessing Officer and the Pr. CIT need not be interfered with; and

(c) The requirement of depositing 20% of the disputed balance amount pending the appeal is merely an administrative circular and will not fetter the Commissioner from directing deposit of amount higher than 20%, depending upon the facts and circumstances of the case. This is so as held by the Supreme Court in ***CIT Vs. LG Electronic India Pvt. Ltd.*** (Civil Appeal No.6850 of 2018) dated 20th July, 2018.

In view of the above, it is submitted that this Court should not exercise its extra ordinary writ jurisdiction. It is submitted that the petitioner's contention on merits would be dealt with by the CIT(A) in accordance with law.

7 We have considered the rival submissions. The manner in which the Revenue has dealt the petitioner in respect of subject Assessment Year 2016-17 leaves much to be desired. We shall first address ourselves to the petitioner's grievance that in the facts and circumstances of the present case, an unconditional stay of the entire demand ought to have been granted as the issue of petitioner's claim for eligibility under Section 10(23FB) of the Act was already upheld by the CIT(A) for the Assessment Year 2014-15 and by the Tribunal for Assessment Year 2013-14. It is the submission on behalf of the petitioner that if the parameters laid down by this Court in numerous decisions beginning with ***KEC International Ltd. Vs. B.R. Balkrishnan, 251 ITR 158*** were followed by the Assessing Officer and the Pr. CIT while disposing of the petitioner's application for stay, the miscarriage of justice would have been averted.

8 This Court in ***MMRDA Vs. Deputy DIT (Exemption) (2015) 230 Taxman 178*** had on consideration of the earlier decisions of this Court, set out the parameters to be kept in mind while disposing the stay application filed under Section 220(6) of the Act, which read 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 Ltd. Vs. B.R. Balkrishnan 251 ITR 158; UTI Mutual Funds Vs. ITO 345 ITR 71 and UTI Mutual Fund Vs. 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 sole ground to direct deposit / payment of the demands if the assessee/ applicant has a strong arguable cause 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.*
>
> *(emphasis supplied)*

9 In the present case, we note that both the impugned order dated 29th January, 2019 passed by the respondent no.1 Assessing Officer and order dated 14th February, 2019 passed by the respondent no.2 Pr. CIT have completely ignored the binding directions of this Court of the manner in which the stay applications are to be disposed of and the test to be applied while considering grant of a stay of demand under Section 220(6) of the Act pending disposal of appeal by CIT(A). In fact, none of the two orders set out even briefly the issue involved and the submissions of the parties in support of its application for stay and yet both the orders dispose of the stay application, adverse to the petitioner. On the above ground itself, the impugned order dated 29th January, 2019 of the Assessing Officer and 14th February, 2019 of the Pr. CIT are unsustainable.

10 Moreover, in the stay proceedings, it was the petitioner's contention that the issue of eligibility for claim under Section 10(23FB) of the Act stood concluded in its favour by orders of the CIT(A) for the Assessment Year 2014-15 and by the Tribunal for the Assessment Year 2013-14 and there are no material changes in facts and law which would warrant a different view for the Assessment Year 2016-17. This fact viz. the issue being concluded by the orders of the Appellate Authorities is also noticed by the Assessing Officer in his assessment order dated 20th December, 2018. In fact, the assessment order dated 20th December,

2018 after accepting the above facts refused to follow the same on the ground that the orders of both the Appellate Authorities i.e. CIT(A) and Tribunal on this issue are subject matters of further appeal before a higher forum by the respondents. The justification for this action in defiance of orders of Appellate Authorities is to keep the claim of the Revenue alive for the reason that no appeal by the Revenue from the order of the Assessing Officer is available under the Act unlike the Central Excise Act, 1944 or in the Customs Act, 1962. However, even if one were to accept this position, the orders of higher forums, unless stayed are binding on the lower authorities in the herarchical system of jurisprudence adopted by us. Thus, it is not open to the lower authorities to seek to enforce decisions contrary to and in defiance of the orders of the higher forums in the absence of any change in the facts and/or in law. Thus, while dealing with an application for stay of demand pending the disposal of an appeal before the CIT(A), the demand relatable to the assessment order being contrary to the orders of appellate authorities ought to be stayed for the mere asking. Notwithstanding the above settled position in law, both the Assessing Officer in his order dated 29th January, 2019 and the Pr. CIT in his order dated 14th February, 2019 while rejecting the stay, choose not to deal/consider the submission on the above account made by the petitioner. However, Mr. Walve, learned Counsel appearing for the Revenue relies upon stand taken in the affidavit-in-reply filed by the Assessing Officer in the month of March, 2019 that the CIT(A) in the case of HDFC Property Fund has departed from the view taken by him in the petitioner's case on similar facts to hold that HDFC Property Fund is not entitled to the benefit of Section 10(23FB) of the Act. Thus, the issue is now open and not concluded in petitioner's favour. Therefore, the need

to protect the Revenue. However, the above submissions ignores the fact that on 20th February, 2019 the Tribunal has reversed the decision of the CIT(A) in HDFC Property Fund while allowing the appeal of the party in line with the decisions in the case of the petitioner. In any event, one must not loose sight of the fact that it is the petitioner's own case which stands covered by the orders of the appellate authorities and the same must take precedence over other decisions as the facts and circumstances in the other cases may be different from that of the assessee. On the aforesaid grounds also the impugned orders dated 29th January, 2019 and 14th February, 2019 are unsustainable.

11 Normally, on setting aside the orders under Section 220(6) of the Act, we restore the application to the Authorities for fresh consideration in accordance with law. However, looking at the conduct of the Assessing Officer and Pr. CIT in this particular case, restoring the stay application to them for fresh disposal would not serve any purpose. This for the reason that the conduct of the respondent nos. 1 and 2 in this case has been high handed and manifestly unfair towards the petitioner being in defiance of settled law. We have come to this view not only for the manner in which the stay application is disposed of by the respondent nos. 1 and 2 but from the manner in which the notices for attachment, notice / demands for recoveries made, refunds adjusted beginning with order under Section 281B of the Act and ending with notice dated 15th February, 2019 adjusting the refund with the pending demands.

12 The order under Section 281B of the Act was issued just two days before the assessment order was passed and neither does the order mention any basis for apprehension of the Revenue nor does the affidavit

state any reasons in support of the action nor any submission made in support of its order dated 18th December, 2018 under Section 281B of the Act. Moreover, the notices under Section 226(3) of the Act were issued on 19th December, 2018 to the petitioner's bankers. This without any amount being due from the petitioner to the Revenue on that date and calling upon the petitioner's bankers to pay over the amounts of the petitioner lying with them to the Income Tax Department. As if this was not enough, the stay application was disposed of by the Assessing Officer on 29th January, 2019 and he withdrew an amount of Rs. 29.25 crores from the petitioner's bank account on 1st February, 2019 even before the hard copy of the order was served upon the petitioner. The stand of the Revenue for having withdrawn the amounts is that the order was communicated on e-mail to the petitioner. However, there is no response when confronted by the order of this Court in UTI Mutual Fund (supra) where the Officers of the Revenue have been directed that where the bank accounts have been attached, the recovery / withdrawal of the amounts from the such bank account should be done only after giving a reasonable notice to the party of the proposed withdrawal of the amounts from the attached bank accounts. Following the above course would cause no prejudice to the Revenue as the amounts continue to be attached and the assessee will not be able to withdraw the same. However, at the same time it gives an opportunity to the party to seek redressal, if any, available in law. In this case, the petitioner could have moved the Respondent No.2- Pr. CIT or the CIT for appropriate relief. Thereafter, during the hearing on 13th February, 2019 before the Pr. CIT, the petitioner is informed that the Assessing Officer has already issued a letter dated 12th February, 2019 to the petitioner intimating adjustment of the refund available for the

Assessment Year 2012-13, 2013-14 and 2014-15 against the demands payable by the petitioner for the two Assessment Year 2015-16 and 2016-17. In fact, from the record as shown to us, it appears that letter / intimation given by the Assessing Officer is dated 11th February, 2019 and was received by the petitioner only on 13th February, 2019 at 6.00 p.m. i.e. after the hearing was concluded before the Pr. CIT. This conduct is not expected of the Officers of the State. It is unbecoming of the State. It appears the manner in which the Assessing Officer is communicating with the assessee, it is planned attempt to make it impossible for the petitioner to challenge the communication as by the time the petitioner comes to know of the proposed action on receipt of the communication, the action has already taken place making it a fait accompli. In any case, this adjustment of refund due for the other years with the demand for the subject Assessment Year under Section 245 of the Act by notice dated 15th February, 2019 is contrary to the law laid down by this Court in Hindustan Unilever Ltd. (supra). In the above case, this Court has held that in terms of Section 245 of the Act, which empowers the Revenue to set off or adjust the amounts to be refunded against any amounts remaining payable by the person concerned under the Act is a discretionary remedy. However, before the adjustment is done, intimation would under Section 245 of the Act to the party is mandatory. This intimation enable a party to point out any factual errors or any other development which would warrant non-adjustment of the refund against the demand payable for the consideration of the Assessing Officer. The Assessing Officer while exercising his powers under Section 245 of the Act must apply his mind to the objections raised by the assessee and record his reasons why the objection is not sustainable or otherwise and

communicate it to the party before making the adjustment. This aforesaid procedure has been completely ignored by the Assessing Officer and also by the Pr. CIT. It is in the above view, we are also not directing a deposit/ payment of Rs.3.62 Crores (claimed in the alternative as exemption under Section 10(35) of the Act). Besides, Section 10(23FB) of the Act exempts any income earned by a Venture Capital Fund and whether the dividend Income would be a part thereof, is an issue not dealt with the impugned orders dated 29th January, 2019 and 14th February, 2019 of the Assessing Officer and Pr. CIT respectively.

13 Therefore, in the above circumstances we pass the following order :-

ORDER

(a) We set aside the order dated 29th January, 2019 of the Assessing Officer and order dated 14th February, 2019 of the Principal Commissioner of Income Tax. As the issue stands concluded in favour of the petitioner by the orders of the appellate authorities as existing today in the petitioner's own case, we grant an unconditional stay of the demand for Assessment Year 2015-16 under Section 220(6) of the Act till the petitioner's appeal against the order dated 20th December, 2018 before the CIT(A) is disposed of and for a period of two weeks from the communication of the order to the petitioner;

(b) We set aside the notice dated 19th December, 2018 issued under Section 226(3) of the Act by the Assessing Officer to the petitioner's bankers and direct the Revenue to deposit the amount of Rs.14.62 croers (in respect of Assessment year 2016-17) withdrawn from the

petitioner's bank account along with appropriate interest at the bank lending rate from the date of the withdrawal to the date of redeposit into the petitioner's bank account. We direct that the redeposit shall be done expeditiously and not later than 3 weeks from today along with interest;

(c) We also set aside the notices dated 15th February, 2019 by which the refund of Rs.60.46 Crores and Rs.12.42 Crores available to the petitioner for the Assessment Years 2012-13 and 2013-14 respectively is adjusted against the outstanding demand of Rs.51.32 Crores for subject assessment year and direct the refund of Rs.60.46 lakhs and Rs.12.42 Crores to the petitioner in accordance with law; and

(d) We set aside the order dated 18th December, 2018 passed under Section 281B of the Act. This as the Revenue has not been able to justify the basis of their apprehension that if the petitioner's assets are not attached, the interest of the Revenue in recovering its dues would be prejudiced.

14 Before parting, we have to express our dismay at the conduct of the Officers of the Revenue in this matter. We pride ourselves as a State which believes in rule of law. Therefore, the least that is expected of the Officers of the State is to apply the law equally to all and not be over zealous in seeking to collect the revenue ignoring the statutory provisions as well as the binding decisions of this Court. The action of respondent nos.1 and 2 as adverted to in para 14 herein above clearly indicates that a separate set of rules was being applied by them in the case of the petitioner. Equal protection of law which means equal application of law has been scarified in this case by the Revenue. It appears that the

petitioner is being singled out for this unfair treatment. The desire to collect more revenue cannot be at the expense of Rule of law. In the above view, we direct the Respondent-Revenue to pay cost of Rs.50,000/- (Rupees Fifty thousand only) to the Petitioner for the unnecessary harassment, it had to undergo at the hands of the Revenue. This amount is to be paid by the Respondent- Revenue to the Petitioner within four weeks from today.

15 The **Petition** is **allowed** in the above terms.

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**