

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

WRIT PETITION NO.939 OF 2018

The Shri Saibaba Sansthan Trust (Shirdi) .. Petitioner.
v/s.
The Union of India & Others .. Respondents.

Mr. Ganesh, Sr. Advocate with Mr. Ramesh Soni, Mr. Mohan Jayakar, Mr. Sandip Junnarkar, Mr. Ashwin Sheth, Mr. Bharat Bagla i/b. Junnarkar & Associates, for the Petitioner.

Mr. N. C. Mohanty, for the Respondents

**CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE, JJ.**

DATE : 27th MARCH, 2018.

P.C:-

Not on board. Mentioned. Upon mentioning, taken up on board for consideration.

Mr. Ganesh, learned Sr. Counsel for the Petitioner seeks leave to amend the Petition by annexing the copy of the order dated 23rd March, 2018 passed by the Commissioner of Income Tax (Appeals)(CIT(A)) on the petitioner's stay application and also adding a prayer clause seeking the setting aside of the same. This amendment has become necessary as the impugned order was received on e-mail only after this petition was filed. Leave for amendment, granted. Amendment to be carried out forthwith. Re-verification dispensed with.

2 Mr. Mohanty, learned Counsel for the Revenue, on instruction, states that Petition itself could be disposed of finally today.

3 This Petition under Article 226 of the Constitution of India, challenges the method and the procedure adopted by the CIT(A)-Respondent No.3 in dealing with the Petitioner's appeal filed under Section 246A of the Income Tax Act 1961 (the Act). This appeal was filed from the order dated 31st December, 2017 of the Deputy Commissioner of Income Tax (Exemption) (DCIT(E)), in respect of Assessment Year 2015-16.

4 The primary grievance of the Petitioner is that the CIT(A) after having finally heard the petitioner on the merits of its appeal, instead of disposing of the appeal, seeks to set the clock back and pass an order on the petitioner's stay application. The aforesaid action on the part of the CIT(A) is without any basis in law, particularly, in the absence of any statutory requirement under the Act, of the tax demanded being paid/per-deposited before the appeal can be entertained/considered on merits.

5 Briefly, the relevant facts leading to this Petition, as urged by the Petitioner, are as under:-

- (a) On 31st December, 2017, the Respondent No.2 – DCIT(E) passed an order under Section 143(3) of the Income Tax Act, 1961 (the Act). The above order dated 31st December, 2017 determined an amount of Rs.122.04 Crores as tax payable by the Petitioner, for Assessment Year 2015-16;
- (b) Being aggrieved with the above order dated 31st December, 2017,

the Petitioner filed on 17 January 2018 an appeal under Section 246A of the Act to the CIT (A). The petitioner has after filing of the appeal to the CIT(A) had also made an application on 26th February, 2018 to the DCIT(E) –Respondent No.2 seeking a stay of the demand under Section 220(6) of the Act. The petitioner also sought to invoke the inherent powers of the appellate authority and by application dated 26 February 2018 to the CIT(A) sought a stay of the order dated 31st December 2017 till the disposal of the appeal. This for the reason that according to the petitioner the issue on merits was covered in its favour by the decisions of the Income Tax Appellate Tribunal(Tribunal). Therefore to the above extent the impugned order was without jurisdiction ;

- (c) On 14th March, 2018, the Petitioner received an undated notice from the office of the CIT(A), indicating that its appeal from the order dated 31st December, 2017 of Respondent No.2 has been fixed for hearing on 20th March, 2018 at 11.30 a.m;
- (d) On 20th March, 2018, the Petitioner attended the final hearing of its appeal before the CIT(A), as called for. The Petitioners were heard extensively on merits of its appeal from the order dated 31st December, 2017 of the Assessing Officer i.e Respondent No.2. At the conclusion of the hearing on 20th March, 2018, the Petitioner signed an order sheet, prepared by CIT(A), which records that Appeal has been finally heard. Thereafter, on 20th March, 2018, itself, the Petitioner filed a detailed letter with the CIT(A), highlighting the submissions made at the hearing of the appeal and prayed for disposal of the appeal;

- (e) Thereafter, on 20th March, 2018 itself, an Officer of the Petitioner received a telephone call from the Office of the CIT(A). The call directed the Petitioner to remain present in the office of the CIT(A) on 21st March 2018 at 10.30 a.m.. Accordingly, Petitioner along its Chartered Accountant (CA) attended the office of the CIT(A) at 10.30 a.m. on 21st March, 2018, expecting certain clarification with regard to the submissions made during the course of the hearing on 20th March, 2018;
- (f) However, at the meeting held on 21st March, 2018, the CIT (A) commenced / started the hearing of the stay application filed by the Petitioner along with its appeal. At which time, the Petitioner's CA informed the CIT(A) that the appeal itself has been heard and, therefore, the necessity of hearing the stay application was not understood. However, despite of the above protest, Petitioner was left with no option as the CIT(A) took up the stay application for consideration. Therefore, without prejudice to its above submission, Petitioner made submissions on its stay application. At the conclusion of the hearing on 21st March, 2018, in response to the Petitioner's above protest, the CIT(A) informed the Petitioner that that even if the order on the pending appeal is passed on 27th March, 2018, it would not be possible to issue the order before 31st March, 2018. Thus the requirement of hearing and disposing of the stay application;
- (g) The Petitioner also alleges that though stay application was heard on 21st March, 2018, the CIT(A) mentioned the date of the hearing as 20th March, 2018 on the order sheet. It is alleged in the petition

that when the incorrect date was pointed out, Petitioner was informed by the CIT(A) that it does not matter. It is alleged that the CIT(A) directed the Petitioner to sign the order sheet of the stay application as 20th March, 2018. Petitioner did as they were directed to do;

- (h) On 22nd March, 2018, Petitioner's CA received a call from the office of the Commissioner of Income Tax [Exemption](CIT[E]) i.e. Respondent No.4, directing the Petitioner to deposit at least Rs.20 Crores before 31st March, 2018. Further, the office of Respondent No.4 i.e. CIT[Exemption] informed the Petitioner that failing to deposit the amount of at-least Rs.20Crores would lead not only to the attachment of the Petitioner's bank accounts but also re-opening of the Assessment for the past two Assessment Years;
- (i) Thereafter, at 4.30 p.m. on 22nd March, 2018, Petitioner's CA received a call from the office of the CIT(A). The call directed the Petitioner to remain present before him on 23rd March, 2018 with reference to the stay application;
- (j) On 23rd March, 2018, the stay application was again heard by the CIT(A) in spite of the Petitioner's protest that no hearing on the said stay application is necessary and order on the main appeal should be passed. At the conclusion of the hearing, Petitioner was informed that they should attend his office on 24th March, 2018 although a Saturday (Holiday), to collect the order on the stay application. Petitioner was also informed that only on compliance with the order passed on stay application, would the appeal be disposed of;

- (k) On 24th March, 2018, the Petitioner's representative attended the office of the CIT(A) and sought to submit the letter dated 23rd March, 2018 which records the sequence of events which had taken place after the appeal was filed and take up for consideration by the CIT(A) till the evening of 23rd March, 2018. However, the CIT(A) refused to take the letter dated 23rd March, 2018 on record. This resulted in Petitioner's e-mailing the letter dated 23rd March, 2018 to the CIT(A); and
- (l) The above attitude on the part of the Respondent-Revenue resulted in the Petitioner's filing this Petition in Court on 26th March, 2018(Monday) i.e yesterday. It was only after the Petition was filed, that the Petitioner received through e-mail, a copy of the order dated 23rd March, 2018 passed by the CIT(A) on the Petitioner's stay application. By the order dated 23rd March, 2018, Petitioner was directed to determine the amount payable on the individual heads of demand at varying percentages of the constituents of demand, aggregating to Rs.122.04Crores. This, according to Mr. Mohanty, learned Counsel for the Revenue resulted in an aggregate amount of Rs.15.16Crores, being payable before the balance of the aggregate demand of Rs.122.04 Crores could be stayed.

6 The aforesaid facts have been taken from the Petition. These facts have not been disputed and/or denied by the CIT(A) and/or the CIT[E] by filing any affidavit. The allegations with regard to the CIT(A) mentioning of incorrect dates in the order sheet and the office of the CIT[E] threatening to attach the Petitioner's bank account and reopen

Assessments for the last two years in case it fails to deposit the amount of Rs.20 Crores before 31st March, 2018, is, indeed very serious. Particularly, when the Assessing officer or the CIT[E] could have dealt with the request of deposit by passing an order on the application under Section 220(6) of the Act filed by the petitioner. In the absence of denial on affidavit by the CIT(A) and CIT[E] the allegations in the petition cannot be discarded. Although in effect Mr. Mohanty the learned counsel for the Revenue has disputed the allegations by stating that if the date was wrongly mentioned there was no compulsion to sign the same. We could have asked for a response from the CIT(A) and CIT[E] to the allegations in the petition, considering the fact that the petition has just been filed yesterday. However it would be best if the Central Board of Direct Taxes (CBDT) carry out the necessary investigation on the above allegations and if there is truth in it, it would take corrective action on the same. This is particularly because this conduct alleged on the part of the CIT(A) and the office of the CIT[E] appears to us to be an aberration, as normally we have noted that the officers Revenue do administer the Act with fairness and with loyalty to the Act. Therefore if the allegation in the petition are correct, then such failures on the part of its Officers needs to be corrected by the CBDT before it becomes the norm. Failing corrective measures by the CBDT, would only result in our entertaining petitions from orders under the Act as the alternative remedy would cease to be an efficacious remedy, if such arm twisting measures de-hors application of the law, are adopted by the Revenue. We therefore direct the CBDT to carry out necessary investigation on the allegations made in the petition and if found correct, to take corrective measures to ensure that its Officers shall not be overzealous in seeking to recover

maximum revenue before 31st March of any financial year, in total disregard of the law.

7 We, therefore, now turn our attention to the immediate issue arising in the present facts viz. *whether the CIT(A) was correct in dealing with and disposing the stay application after having heard the appeal on merits*. Mr. Mohanty, learned Counsel for the Revenue submitted that mere commencement of final hearing of the appeal would not prevent/prohibit the CIT(A) from taking up the stay application and passing an order on the stay application. It is his submission that, on consideration of the appeal, the CIT(A) was of the view that the disposal of the appeal would take some time and, therefore, in the meantime, grant of unconditional stay would not be justified. It is submitted that the aforesaid view of the CIT(A), resulted in the order dated 23rd March, 2018, on the Petitioner's stay application, being passed.

8 We note that in terms of Section 246A of the Act, any person aggrieved by an order passed in regular assessment proceedings under Section 143(3) of the Act (such as the order dated 31 December 2017) is entitled to challenge it before the CIT(A). This challenge in appeal is not circumscribed by any requirement to pre-deposit and/or paying the amounts demanded, as a consequence of the order. Therefore the CIT(A) is obliged to entertain and dispose of the appeal before him on merits without any regard to the fact that the amounts demanded have been paid/deposited or not paid/deposited by the appellant before him.

9 We also note that there is no power bestowed upon the CIT(A) under the Act to stay the demand arising consequent to the order in appeal before him. In fact the power to stay such a demand has been

bestowed upon the Assessing officer under Section 220(6) of the Act by not treating the Assessee in default where an appeal is awaiting final disposal before the CIT(A) on such conditions as the facts and circumstances of the case may warrant. Nevertheless, the CIT(A) as an appellate authority, has inherent powers of an Appellate Authority to do all things necessary to make the appellate powers effective(see Apex Court observations in ITO v. M.K. Mohd. Kunihi 71 ITR 815). This would include a power to stay the effect of the order impugned before the appellate authority till the disposal of the appeal before it. This power is only in aid of the power to hear and dispose of the appeal by the Appellate Authority. This necessity of exercising inherent power of staying the order challenged before the appellate authority comes to an end, when the appellant has been heard finally on merits of its appeal, as now the appeal itself can be disposed of finally. The distinction between the powers to be exercised by the appellate authority and the Assessing officer under section 220(6) of the Act was adverted to by us while rejecting the petitioner's challenge in Writ Petition No. 903 of 2018 to the order dated 31 December, 2017 of the respondent no. 2 (now in challenge before the CIT(A)). The challenge in the above petition was that, the order dated 31st December, 2017 of Respondent No.2 herein, is without jurisdiction, as it is in defiance and contrary to the binding decision of the Income tax Appellate Tribunal, when we observed in paragraph No.7, as under:

“ Z:- The remedy they seek here can be effectively obtained from the Appellate Authority under the Act. Even if we accept the Petitioners contention is correct that the impugned order is contrary to the binding decisions of the Mumbai Bench of the Tribunal and the circular of the CBDT, then the CIT(A) would no examination of the case certainly set it aside. The Petitioner could also approach the

*CIT(A) for a stay of the impugned order if the same is contrary to binding decisions of the Tribunal. So far the apprehension of recovery proceedings being commenced, the Petitioner can under Section 220 (6) of the Act approach the Assessing Officer and thereafter the Commissioner of Income Tax as the administrative head to stay the recovery till the disposal of the appeal by the CIT(A). The application for stay has to be determined in terms of the parameter laid down by this Court in the **KEC International Ltd., v/s. B. R. Balakrishnan.**”*

Moreover, as held by this Court in **Qera Realty Estates v/s. CIT (A) & Others 368 ITR 366** in para 3 thereof, as under:-

“ The jurisdiction of the Commissioner of Income Tax (Appeals) to deal with application for stay of the order in appeal before it is inherent in it as an Appellate Authority. The exercise of this jurisdiction is to be exercised on examining the order in appeal before the Commissioner of Income Tax (Appeals)... As against the above, the jurisdiction of the Assessing Officer of staying the demand under Section 220(6) of the Income Tax Act, 1961 (the Act) and that of the Commissioner of Income Tax, is a different consideration i.e. including other factors over and above the order. The Assessing Officer and the Commissioner do not stay the order in appeal but only stay the demand, consequent to the order which is in appeal.”

10 In this case, admittedly no order under Section 220(6) of the Act has been passed by the Assessing officer or by the CIT[E].

11 In the present case the undisputed facts are that the petitioner had filed an appeal to the CIT(A) from the order dated 31st December, 2017 of Respondent no.2 – DCIT(E). Besides the petitioner had also filed an application for stay of the order dated 31st December, 2017 to the CIT(A) seeking the exercise of its inherent powers, as the order was contrary to the binding decisions of the Tribunal. On 14th March, 2018, Petitioner received a communication from the Office of CIT(A) that the hearing of the appeal is fixed on 20th March, 2018 at 11.30 a.m. Petitioner attended the hearing and made submission and at the

conclusion of hearing, an order sheet was also signed, indicating that the hearing of the appeal was completed. In spite of the aforesaid conclusion of the hearing of the appeal, the CIT(A) sought to hear the petitioner on its stay application leading to the order dated 23 March 2018 directing a conditional stay on certain amounts being paid to the Revenue.

12 In our view, once the hearing on the appeal is concluded then the stay application as filed becomes infructuous as the appeal itself would stand disposed of by an appropriate order of the CIT(A). The submission on behalf of the Revenue that mere commencement of final hearing of the appeal by the CIT(A) will not prevent him from taking up the stay application and passing an order thereon is in the present facts without merit. This is particularly so as on consideration of the appeal, the CIT(A) was of the view that the disposal of the appeal would take some time and, therefore, in the meantime, grant of unconditional stay would not be justified, then, it would find mention in the order dated 23rd March 2018 on the stay application. We find that the order dated 23rd March, 2018 does not indicate why the disposal of appeal would take time. We can understand if some factual data is called for from the Assessing Officer to dispose of the appeal and the furnishing of such factual data may take some time. In this case the order dated 23rd May, 2018 directs a conditional stay of the order dated 31st December 2017 only on the ground that, *prima faice*, the case laws relied upon do not support the petitioner's case completely. Thus in the present facts it is only the case of application of law and no factual investigation is felt necessary by the CIT(A) which would justify his taking up the stay application for hearing after having concluded the hearing on the merits of the appellant's appeal.

13 It appears that the entire exercise of taking up stay application, even after the appeal was heard, was only done so as to collect some revenue before 31st March, 2018. Therefore, this appears to be a blatant attempt to retrace his steps by the CIT(A) only to collect revenue before 31st March, 2018. In fact, even if an order is passed on the appeal by the CIT(A) finding the submission of the Petitioner not acceptable, either wholly or partly, it would result in the demand being sustained wholly or in part, which could then be collected in accordance with law. But the entire exercise, here, appears to be only to assist the Revenue to collect some amount of taxes prior to 31st. March 2018. This is certainly not expected of an Appellate Authority such as the CIT(A) who adjudicates disputes between the Revenue and the Assessee on a regular basis. The CIT(A) must not only be fair but appear to be so, in a country governed by Rule of law. In the absence of the above, the alternative remedy provided under the Act would be illusory leading to our entertaining writ petitions, even if an alternative remedy is provided under the Act.

14 In the above view, we set aside the order dated 23rd March, 2018 passed by the CIT(A) on the Petitioner's stay application. We direct the Respondent-Revenue not to initiate any recovery proceedings against the Petitioner till such time as the CIT(A) – Respondent No.3 disposes of the Petitioner's appeal from the order dated 31st December, 2017 of the Assessing Officer- Respondent No.2 and for a period of two weeks after the communication of the order of the CIT(A) to the Petitioner.

15 Accordingly, **Appeal dismissed.** No order as to costs.

16 Registry is directed to serve a copy of this order upon the CBDT, New Delhi. CBDT is directed to make an enquiry in terms of paragraph 6 of this order and if the allegations made by the Petitioner is correct, CBDT will take coercive measures to ensure that its Officers, deal with the Assessee's fairly and in accordance with the law.

(SANDEEP K. SHINDE,J.)

(M.S.SANKLECHA,J.)

