

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

WRIT PETITION NO. 2542 OF 2014

Slum Rehabilitation Authority

.. Petitioner.

V/s.

The Deputy Director of Income Tax
Exemption 1(2) & Others

.. Respondents.

Mr. S. E. Dastoor, Sr. Advocate with Mr. Nishant Thakkar i/b. Mint and
Confreres, 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 taken
up for final disposal at the stage of admission.

2 The challenge in this Petition are to the orders dated 30th
May, 2014 passed by the Assessing Officer and 25th July, 2014 passed by
the Director of Income Tax -Exemption, under the Income Tax Act, 1961
(the Act). Both the impugned orders rejected Petitioner's application for
stay of demand of Rs.53.71Crores, arising from the order of assessment
dated 19th February, 2014 for the Assessment Year 2011-12, till the
disposal of the Petitioner's appeal from it by the Commissioner of Income
Tax (Appeal) [CIT(A)].

3 The Petitioner is a statutory authority established under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (Slum Act 1971). The Petitioner has been set up to formulate, implement and execute schemes to achieve the rehabilitation of slum areas and its inhabitants.

4 The Petitioner from the Assessment Year 2003-04 onwards has been claiming exemption from payment of Income Tax under Section 11 of the Act. For the Assessment Years 2003-04 to 2008-09 the Assessing Officer had denied the exemption to the Petitioner. On appeal, the CIT(A) upheld the Petitioner's claim for exemption under Section 11 of the Act for Assessment Years 2003-04 to 2008-09. The Respondent-Revenue being aggrieved by the orders of the CIT(A) appealed to the Income Tax Appellate Tribunal (Tribunal). By orders dated 30th September, 2011 and 18th July, 2012, the Tribunal dismissed the Revenue's appeal for Assessment Years 2005-06, 2007-08 and 2008-09 holding that the Petitioner is entitled to exemption under Section 11 of the Act, as its activity stands covered by the definition of 'charitable purpose' under Section 2(15) of the Act. Moreover, the Tribunal in its order dated 30th September, 2011 for the Assessment Year 2007-08, inter alia, also observes that the primary purpose and pre-dominant object of the Petitioner was to provide residence to slum dwellers without any profit motive.

5 By Finance (No.2.) Act, 2009 w.e.f. 1st April, 2009, a proviso was added to the definition of 'charitable purpose' in Section 2(15) of the Act. By the addition of the proviso, an advancement of any other object of general public utility would not be considered to be one for charitable

purpose, if it involved the carrying on of any activity in the nature of trade, commerce or business. However, for the Assessment Years 2009-10 and 2010-11, the Assessing Officer during the assessment proceeding did raise the issue of the Petitioner not being entitled to exemption in view of amendment of Section 2(15) of the Act but finally granted the benefit of Section 2(15) of the Act. However, the Assessment Orders for both the Assessment Years 2009-10 and 2011-11 have been reviewed by the Commissioner of Income Tax under Section 263 of the Act and the Petitioner's appeal to the Tribunal from the same are pending.

6 For the subject Assessment Year i.e. Assessment Year 2011-12, the Petitioner filed its Return of Income claiming benefit of exemption under Section 11 of the Act and offered 'nil income' to tax. On 19th February, 2014 the Assessing Officer passed an Assessment Order for Assessment Year 2011-12 denying the benefit of exemption under Section 11 of the Act on the ground that the Petitioner's activity of slum rehabilitation was hit by the newly added proviso to Section 2(15) of the Act.

7 Being aggrieved by the Assessment Order dated 19th February, 2014, Petitioner filed an appeal as on 19th March, 2014 to the CIT(A). Immediately thereafter on 25th March, 2014, the Petitioner filed with the Assessing Officer an application for stay of the recovery of the demand under Section 220(6) of the Act till the disposal of its appeal by the CIT(A).

8 The Assessing Officer by the impugned order dated 30th May, 2014, granted partial stay, directing the Petitioner to pay 50% of the entire payment of Rs.53.71 Crores on or before 16th June, 2014. The

impugned order partially rejected the stay application on the following grounds:-

- (i) Petitioner had not pleaded financial hardship;
- (ii) Mere filing of an Appeal to CIT(A) does not warrant a grant of stay;
- (iii) The issue raised in the stay application were already considered at the time of passing an Assessment Order dated 19th February, 2014; and
- (iv) The Petitioner's registration under Section 12A of the Act, enabling the availing of exemption under Section 11 of the Act was canceled by the Commissioner of Income Tax by order dated 27th March, 2014. (We are informed that appeal for the order dated 27th March 2014 is pending before the Tribunal).

9 Being aggrieved by the order dated 30th May, 2014, the Petitioner filed an application before the Director of Income Tax(Exemption). On 25th July, 2014, the Director of Income Tax(Exemption) rejected the Petitioner's application for stay on the ground that proviso to Section 2(15) of the Act which is newly added would take the Petitioner's activity outside the scope of charitable purpose. The Director of Income Tax(Exemption) varied the order of the Assessing Officer and directed the Petitioner to pay the entire amount demanded and at least Rs.25Crores within a period of 15 days from the receipt of the order dated 25th July, 2014.

10 Mr. Dastur, learned Senior Counsel appearing for the Petitioner submits that in the present facts, an unconditional stay of the demand raised consequent to the order dated 19th February 2014 of the Assessing Officer, ought to have been granted by the Assessing Officer and

Director of Income Tax(Exemption) till the disposal of the appeal by the CIT(A). This on the ground that the activities carried out by the Petitioner would be covered within the meaning of charitable purpose as it provide relief to the poor i.e rehabilitating the slums dwellers. This is evident from its obligation under the Slum Act, 1971. Therefore, the proviso to Section 2(15) of the Act would have no application to the present facts as it is applicable only with regard to the activities of advancement of any other object of general public utility. Without prejudice, it is submitted that even if the proviso to Section 2(15) of the Act is sought to be invoked it would not apply as the Petitioner's activity is absent of any profit motive. Therefore, its activities is not in the nature of trade, commerce and business. In fact, the Tribunal in its order dated 30th September 2011 for Assessment Year 2007-08 has held that the activities carried out by the Petitioner is charitable in nature and is absent of any profit motive. Thereafter, the order of the Tribunal for Assessment Years 2005-06, 2007-08 and 2008-09 has been upheld by this Court in Income Tax Appeal No. 655 of 2012 rendered on 8th March, 2013 when the Appeal of the Revenue was dismissed. Thus, prima facie, exemption is available under Section 11 of the Act and in view of the binding decision, a complete stay of the demand till the disposal of the appeal by the CIT(A) ought to have been granted. It is also submitted in Instruction No.1949 dated 2nd December 1993 issued by the CBDT also supports the petitioner.

11 As against the above, Mr. Suresh Kumar, learned Counsel appearing for the Respondent-Revenue states that the orders of the Tribunal for the Assessment Years 2005-06, 2007-08 and 2008-09 were all passed in the context of definition 'charitable purpose' under Section 2(15) of the Act as then existing i.e. without the proviso. Therefore, in

view of the change in law, the Petitioner will not be entitled to take the benefit of the aforesaid decision of the Tribunal and of this Court, disposing of the Revenue's appeal from the order of the Tribunal. It was submitted that Petitioner's registration under Section 12A of the Act has been canceled by an order dated 27th March 2014 with retrospective effect covering the subject Assessment Year 2011-12. Therefore, the Petitioner will not in any event be entitled to the benefit of Section 11 of the Act.

12 The parameters for disposing of an application for stay pending disposal of Appeal before the Appellate Authority under the Act are fairly settled. This Court in **KEC International Limited v/s. B. R. Balakrishnan 251 ITR 158** – laid down following parameters for disposing of the stay applications:-

“(a) While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.

(b) In cases where the assessed income under the impugned order far exceeds returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.

(c) In cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.

(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) We clarify that if the authority concerned complies with the above parameters while passing orders on the stay application, then the authorities on the administrative side of the Department like respondent No.2 herein need not once again give reasoned order.

The above parameters are not exhaustive. They are only recommendatory in nature.”

The aforesaid directions were reiterated by this Court in **UTI Mutual Funds v/s. ITO 345 ITR 71** while laying additional parameters in respect of disposal of stay applications, are as under:-

- “1.
2.
3. If the Assessing Officer has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay.
4.
5. In exercising the powers of stay, the Income Tax Officer should not act as a mere tax gatherer but as a quasi judicial authority 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 matter must be considered from all its facets, balancing the interest of the assessee with the protection of the Revenue.”

13 We have considered the submissions. At the very outset, it must be pointed out that the manner in which the Assessing Officer has disposed of the application for stay by impugned order dated 30th May, 2014 is in complete breach of the directions of this Court as set out herein above. Besides in any event the tests applied to dispose of the stay

application by the impugned order dated 30th May, 2014 are not at all germane to disposing of the stay application. The first test applied is absence of financial hardship being 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 rendered on 6th March 2013 (Dr. D. Y. Chandrachud & A. A. Sayed, JJ.) and it was held that it is not the law that in the absence of financial hardship, no stay of recovery can be granted. The Court held that where a strong prima facie case is made out, a direction to deposit would itself cause financial hardship. Therefore, in our view, the Assessing Officer must deal with the prima facie merits of the Petitioner's case in appeal 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 may not arise. Financial hardship is relevant only when the assessee is unable to make out a case on merits for an unconditional stay of the demand. In this case, the Assessing Officer has not dealt with the prima facie case. Moreover, in the impugned order dated 30th May, 2014, the Assessing Officer has not dealt with the issue as it has already been dealt with in the Assessment Order. If this justification is to be accepted there is no reason for the Act to provide for a stay of demand by the 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) 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.*' Therefore, at one stage, we were considering to restore the issue for fresh consideration by the Assessing Officer. However, we find that the Director of Income Tax(Exemption) has by the impugned order dated 25th July, 2014 disposed of the application for stay on

consideration of relevant grounds unlike the Assessing Officer. Therefore, we decided to examine the impugned orders and dispose of the petition on merits.

14 We find that the orders of the Tribunal for the Assessment Years 2005-06, 2007-08 and 2008-09 as well as the order of the this Court disposing of the Revenue's appeal from the above orders of the Tribunal on which much reliance was placed upon by the Petitioner were all rendered in the context of Section 2(15) of the Act as then existing i.e. prior to the introduction of the proviso. Thus, there is admittedly a change in the law and above decisions may not apply without considering the impact of the amendment i.e. the proviso. This aspect has also been provided in the guidelines laid down in UTI Mutual Fund (345 ITR 71) (supra). The introduction of the proviso would be a matter requiring a detailed examination with regard to its effect/ impact on the Petitioner's activity claimed to be carried out for a charitable purpose. The Assessing Officer has reached the conclusion in the Assessment Order dated 19th February 2014 that the activity of the Petitioner is in the nature of a commercial activity and, therefore, hit by the proviso to Section 2(15) of the Act.

15 However, this does not mean that the petitioner has not made out even a fairly arguable case that rehabilitation of the slum dwellers would be a charitable purpose. Besides, we were taken by the Petitioner's counsel through the provisions of the Slum Act 1971 which again indicated that the activity of the Petitioner in rehabilitating the slum dwellers would be an object of general public utility. However, all these would be a matter which would require consideration at the final hearing.

Therefore, though we find some substance in the Petitioner's claim of Charitable purposes, keeping in view the fact that the Petitioner's registration under Section 12A of the Act has been canceled even for subject Assessment Year by the order dated 27th March 2014 and though appeal from the same is pending before the Tribunal, no stay is obtained at least, as of today, the Petitioner is not entitled to the benefit of exemption under Section 11 of the Act for the subject Assessment Year 2011-12. Therefore, in the above facts, unconditional grant of stay of the demand till the disposal of the appeal by the CIT(A) would not be warranted.

16 However it was urged on behalf of the petitioner that a prima facie case by itself would warrant an unconditional stay till the disposal of the appeal by the first appellate authority. A prima facie case would mean an arguable case on first look/appearance. There are varying shades/degrees of a prima facie case. An issue which stands concluded by a decision of a higher forum in favour of the applicant, if not distinguishable on the face of it, would warrant an unconditional stay. Conversely, if the issue is covered against the applicant by a decision of an higher forum then complete deposit of amounts attributable to the issue would be justified. The fact that the issue is in further appeal would not by itself reduce the binding effect of the decision of the higher forum. Similarly another instance of strong prima facie case which would warrant an unconditional stay would be an instance where the order being appealed against is in breach of principles of natural justice. However where the issue is not concluded one way or the other by a decision of a higher forum, then the Authority considering the stay application would

have to prima facie consider on the face of the impugned order, the likelihood of the applicant succeeding in appeal. This need not be detailed examination but a first look examination and on that basis it is for the authority to exercise his discretion in law and grant such stay depending upon likelihood of success in appeal. At this stage various other factors such as financial hardship, balance of convenience etc would enter into consideration to decide the terms of the stay of demand, if any. These are general principles for guidance, illustrative in nature and the Authorities must exercise their discretion in law depending upon the facts before them.

17 Therefore on the application of the above tests bearing in mind that the Petitioner is working towards the rehabilitation of slum dwellers, it is very likely that the Appellate Authority may hold its activity to be for Charitable purposes. Therefore the interest of justice would be met if the Petitioner is directed to deposit 10% of the amount of Rs.53.71 Crores within six weeks from today and on the Petitioner making the deposit, there would be a complete stay of recovery of balance demand raised under Section 156 of the Act for the Assessment Year 2011-12, till the disposal of the Petitioner's appeal by the CIT(A). In case the order of CIT(A) is adverse to the Petitioner, then as laid down by this Court in UTI Mutual Fund -345 ITR 71 (supra) the stay would continue till the period of filing an appeal to a higher forum expires. Further if a stay application is filed before the higher forum in its pending appeal, then till the disposal of the stay application by the higher forum.

18 However, we must make it clear that the observations in the present judgment are confined only for the disposal of the application for

stay. The observations made in the present order would not prejudice the Petitioner and the Respondent-Revenue in any manner in the pending appeal.

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

(M.S.SONAK,J.)

(M.S.SANKLECHA,J.)