HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Civil Writ Petition No. 11980/2021

Rajendra Kumar S/o Lt. Shri Manak Chand, R/o Plot No. 109, Ram Gali No. 6, Raja Park, Jaipur- 302004 Proprietor Of M/s Manak Chand Rajendra Kumar Having Its Office At 163-164, Chaura Rasta, Jaipur- 302003.

----Petitioner

Versus

1. The Assistant Commissioner Of Income Tax, Income Tax Department, Central Circle-I, Jaipur.
2. Commissioner Of Income Tax, New Central Revenue Building, Status Circle, Jaipur.

----Respondents

For Petitioner(s) : Mr. Ankit Totuka, Adv.
For Respondent(s) : Mr. Anuroop Singhi, Adv. with Mr. N.S. Bhati, Adv.

HON'BLE MR. JUSTICE PRAKASH GUPTA
HON'BLE MR. JUSTICE SAMEER JAIN

Judgment / Order

REPORTABLE

Reserved on: 13/05/2022
Pronounced on: 25/05/2022

Per: HON'BLE MR. JUSTICE SAMEER JAIN

1. Instant writ petition under Article 226 of the Constitution of India has been filed by the petitioner-assessee with the following prayers:-

a. to issue a writ of mandamus or any other appropriate writ, directing Respondent No. 1 to refund the amount adjusted in excess of 20% of the disputed demand for AY 2017-18;

b. to issue a writ of mandamus restraining the Respondent from initiating any further recovery of

outstanding demand for AY 2017-18 until the disposal of appeal challenging the assessment order is pending adjudication before the Commissioner of Income Tax (Appeals);

c. to impose the exemplary costs on Respondent No. 1 for carrying out a blatantly illegal recovery of tax against the accepted principles of reasonableness, judicial discipline and law.

d. by awarding the cost of writ petition in favour of the petitioner;

e. any other order, relief or direction, which this Hon'ble High Court may deem fit & proper be passed in favour of the Petitioner;

2. Facts of the case as borne out from record of the writ petition are that on 13/12/2019 one Assessment Order was passed by the respondent no.1-Assessment Officer (hereinafter referred to as 'AO') under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'IT Act') for the Assessment Year 2017-18 and a demand of Rs.2,09,44,100/- was raised under Section 156 of the IT Act as specified vide Annexure-2 & 3 against which the petitioner-assessee filed an appeal (Annexure-5) under Section 246 of the IT Act on 26/12/2019 in the prescribed form submitting that he has a prima-facie case and the demand raised is not maintainable.

2.1 On 13/01/2020, Income Tax Return for the Assessment Year 2018-2019 processed by the CPC Wing of the respondent-department and a refund of Rs.70,86,950/- due in favour of the petitioner-assessee was adjusted against the balance demand of Assessment Year 2017-18 created on 13/12/2019. The petitioner-assessee filed a Stay Application in response to intimation issued to him on 13/01/2020 under Section 245 of the IT Act in the form of a Note mentioned in the order dated 13/01/2020 (Annexure-6) which is reproduced as under:-

Note : As per the records of CPC, the following demands are outstanding. An Intimation under Section 245 of the Income Tax Act, 1961 has been issued separately proposing to adjust the outstanding demands against the refund determined as per this order. Since, the release of the refundable amount will be considered on the basis of your response/compliance to the intimation U/s 245. you are requested to submit your response expeditiously. For further clarification in this regard, please Refer CBDT Circular number 8/2015 DTD 14-05-2015.

3. Contention of the petitioner is that his letter dated 22/01/2020 (Annexure-7) in response to intimation under Section 245 of the IT Act dated 13/01/2020 pointed out that 20% of the demand amounting to Rs.41,88,620/- be adjusted from the said refund in terms of the departmental circulars. He further contended that he has preferred an appeal against the said order but in spite of the same, again on 25/02/2020, while processing Income Tax Return for the Assessment Year 2019-20, the CPC adjusted a refund of Rs.32,35,662/- against the balance demand of Assessment Year 2017-18 in spite of the appeal and the stay application filed in response to intimation under Section 245 of the IT Act. It is further contended that with the belief to be saved, the petitioner-assessee filed a stay application on 30/06/2020 (Annexure-9) which was disposed of on 22/01/2020 whereby stay on recovery of the balance demand was granted. The same was also passed vide order dated 23/03/2021.

4. In this background, the petitioner-assessee contended that in terms of the order under Section 245 of the IT Act, the appeal was preferred by him immediately and as per provisions of Section 220(6) of the IT Act, he cannot be termed as an assessee in default. As per petitioner, the recovery can only be initiated as per

the statutory mechanism that too by learned Tax Recovery Officer as mandatory under Section 223 of the IT Act. He further submitted that giving go-bye to the departmental circulars, settled position of law, principles of natural justice, statutory mandate and the provisions of Section 245 of the IT Act, set up of refund was made *suo-motu* and the act of the department was high handed and autocratic without authority of law and as such, he has filed the present writ petition for violation of his fundamental rights, principles of natural justice and recovery being violative of Article 265 of the Constitution of India.

5. Per-contra, Mr. Anuroop Singhi, learned Standing Counsel for the respondent-Revenue submitted that it is true that against the impugned order passed under Section 143(3) of the IT Act for the Assessment Year 2017-18, on 13/12/2019 a demand of Rs.2,09,44,100/- was raised under Section 156 of the IT Act against the addition of Rs.2,51,98,421/- on 13/12/2019. The petitioner-assessee filed an appeal on 26/12/2019 which is pending adjudication with the department. He further submitted that no application for waiver of recovery and stay of demand was filed alongwith appeal. He further submitted that it was only on 22/02/2021 that an application under Section 220(6) of the IT Act for stay of demand was filed by the petitioner-assessee and thereafter, the respondents have passed an order of stay on the balance amount till disposal of the appeal before the Commissioner of Income Tax (Appeals). Therefore, the recovery made is within the four-corners of law and till filing of the stay application on 22/02/2021, the assessee was deemed to be in default and hence the recovery was made.

6. After considering the records of the writ petition, hearing arguments advanced by learned counsel for both the sides and also considering the judgments cited at bar, we observe as under:-

(a) The Assessment Order under Section 143(3) of the IT Act was passed and the demand was raised under Section 156 of the IT Act simultaneously qua the Assessment Year 2017-18 for demand of tax to the tune of Rs.2,09,44,100/-. In the specified format of notice of demand under Section 156 of the IT Act, it was specifically submitted that recovery proceedings will be carried out in case of default and non-payment within thirty days under provisions of Section 222 to 227, 229 and 232 of the IT Act. It was also mentioned in the said notice under Section 156 of the IT Act that an appeal can be preferred within a period of thirty days. The same is reflected in the notice of demand dated 13/12/2019 (Annexure-3).

(b) It is also an admitted fact that an appeal under Section 246A of the IT Act read with Rule 45 of the IT Rules was filed in the prescribed form no.35 on 26/12/2019. As per provisions of Section 220(6) of the IT Act, which provide as under, the assessee cannot be termed as an assessee in default:-

> *"220 (6) Where an assessee has presented an appeal under section 246 2[or section 246A] the Assessing Officer may, in his discretion and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of."*

(c) The respondents have also issued an intimation deemed to be under Section 245 of the IT Act only on 13/01/2020. The provisions of Section 245 of the IT Act, which are reproduced below, categorically specify that as per the principles of natural justice, before adjusting the refund against the assessee in default, an intimation in writing to such person of the action proposed, is to be served:-

> ***245.*** *Where under any of the provisions of this Act, a refund is found to be due to any person, the Assessing Officer, Deputy Commissioner (Appeals), Commissioner (Appeals) or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section.*

(d) In response to the said intimation under Section 245 of the IT Act, the petitioner-assessee filed an application for stay of demand which is reflected in letter dt. 22/01/2020 (Annexure-7). It is also reflected that the petitioner-assessee, in terms of departmental circulars, has voluntarily requested the department for adjustment of 20% of the demand to the tune of Rs.41,88,620/- from the refund and the balance amount to be refunded but it is analyzed that *de-hors* the provisions of Sections 245, 220(6) of the IT Act the respondents have *suo-motu* adjusted the entire amount of refund to the tune of Rs.70,86,950/- qua the Assessment Year 2018-19 on 13/12/2020

making the provisions_of Sections 220(6) and 245 of the IT Act, referred to above, as an empty formality.

(e) Further, the prejudice against the petitioner has been taken in violation of the principles of natural justice. The high handed action of the respondents is also reflected in bye-passing the said application for the Assessment Year 2019-20 as refund of Rs.32,32,662/- was again *suo-motu* adjusted on 25/02/2020 bye-passing the fact of filing of appeal as well as the provisions of Section 245 of the IT Act. The petitioner, in support of his erstwhile application for stay dated 22/01/2020, again filed a stay application which also was not considered. Finally, the petitioner filed an application on 22/02/2021 being afraid of further recovery by specifically mentioning the provisions of Section 220 of the IT Act and on 23/03/2021, the respondents granted stay on recovery of balance demand till disposal of the appeal.

(f) The case in hand is a classic example of *'absolute power corrupts absolutely'*. The petitioner-assessee was quite prompt in filing appeal under Section 246-A of the IT Act against the order dated 13/12/2019 without waiting for thirty days of statutory time. He filed the appeal on merits in the prescribed format on 26/12/2019. It is a fact on record which is admitted by the respondents themselves that till date, the CIT(A), for the reasons best known to him, has not considered the said appeal which is beyond control of the petitioner. In spite of the specific statutory provisions under Section 220(6) of the IT Act that on filing appeal in the prescribed format, the petitioner-assessee will not be considered as an 'assessee in default', giving go-bye to the statutory provisions contained under Sections 220(6), 222, 223 and 245 of the IT Act, giving intimation under Section 245 of the

IT Act for staying of refund against the outstanding demand, the respondents have failed to consider the response rather have given a technical argument that the said application was not made as per specific provision of Section 220(6) of the IT Act. Nowhere in the provisions of Section 220(6) of the IT Act, it is specified that the stay application has to be filed. The mandate of Section 220(6) of the IT Act makes it very clear that once an appeal is filed within time in the prescribed format, the assessee will not be deemed as an 'assessee in default'. Further, the notice under Section 156 of the IT Act categorically specifies that the demand can only be initiated in the case of default under the provisions of Sections 222, 223 of the IT Act which in the given case is not made out.

(g) It is also analyzed by this Court that time and again in catena of judgments of Apex Court as well as various High Courts reported in ***Commissioner of Cus.& C. Ex. Ahmedabad Vs. Kumar Cotton Mills Pvt. Ltd.: 2005(180) E.L.T. 434 (SC); Larsen & Toubro Limited Vs. The Union of India & Ors.: 2013(288) E.L.T. 481 (Bom.); Manglam Cement Limited Vs. The Superintendent, Central Excise, Range-III, Kota & Ors. (DB Civil Writ Petition No.1891/2013) & connected matters decided by Rajasthan High Court at Jaipur Bench, Jaipur on 01/03/2013; Skyline Engineering Contracts (India) P. Ltd. Vs. Deputy Commissioner of Income-tax: (2021) 132 taxmann.com 158 (Delhi) and Jet Privilege (P.) Ltd. Vs. Deputy Commissioner of Income-tax: (2021) 131 taxmann.com 119 (Bombay),*** it is held that under Section 245 of the IT Act, the recovery can only be initiated after giving an intimation in writing to the assessee of the action that he proposes

to take under this Section. Not following the mandatory requirement of intimation under Section 245 of the IT Act and also not following the principles of natural justice, is illegal, without authority and unjustified.

(h) Further, the series of judgments, referred above, have categorically held that when an appeal of the assessee is pending and the same is not disposed of for the reasons beyond his control, on account of autocratic, lethargy and administrative constraints on the part of the respondents, the recovery of demand pending appeal will be an act *in terrorem*.

(i) Learned counsel for the respondent-Revenue was not able to reflect that why the appeal was not disposed of when the same was filed promptly nor was he able to refute the fact that under Section 220(6) of the IT Act, once on filing the appeal, the petitioner was not to be treated as an 'assessee in default' and that the recovery taken place is *de-hors* the provisions of Section 245 of the IT Act. Learned counsel for the respondent-Revenue only cited and contended that the application for stay under Section 220(6) of the IT Act was only made on 22/02/2021 and thereafter, the stay on demand was made. In this context, it is important to note that unlike the provisions of Section 129(e) of the Customs Act, 1962 and the provisions of Section 235(f) of the Central Excise Act, there is no mandatory requirement of pre-deposit for entertaining the appeal. It is only by administrative fiat under the Income-tax Act that a provision of stay is granted if a demand of 20% is pre-deposited, vide office memorandum dated 29/02/2016 meaning thereby that without a statutory fiat, power and authority of law, office memorandums are issued. The respondents have failed to consider the provisions of Section

220(6) of the IT Act whereby on filing of appeal, the assessee will not be deemed in default. The recovery action as per Sections 222, 223 of the IT Act can only be initiated by the Tax Recovery Officer, the adjustment from due refund can only be carried out after serving intimation and giving opportunity of hearing as per provisions of Section 245 of the IT Act as held in the catena of judgments (supra).

(j) The Revenue for its own default of not considering the appeal in time even after lapse of one and half year has initiated recovery from the assessee that too merely at the verge of expiry of 30 days *dehors* not only the statutory provisions and the judgments of the higher forums but even contrary to its own office memorandum which permits recovery only to the extent of 20%.

7. In ***Union of India (UOI) & Ors. Vs. Kamlakshi Finance Corporation Ltd.: AIR 1992 SC 711,*** the Apex Court held as under:-

> "8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assesses-public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and the utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them."

8. In these facts and circumstances, placing reliance upon the judgment rendered by the Apex Court in Kamlakshi Finance Corporation Ltd. (supra), the ratio of which is reproduced herein above, this Court deems it appropriate to allow the present writ petition on account of aforesaid discussion and findings and directs the respondent-Assessing Officer and other respondents to issue a refund to the petitioner-assessee alongwith interest as specified in law adjusted by them in excess of 20% of the disputed demand for Assessment Year 2017-18 within a period of thirty days from the date of passing of this order.

9. This Court also holds that the action of recovery on the part of the respondents was de-hors the statutory provisions specified under Section 220(6), 245 of the IT Act and was without jurisdiction in terms of Sections 222 and 223 of the IT Act. The respondents have also failed to honour the series of judgments, referred to above which for them are merely pieces of papers. They have completely given go-bye to the principles of judicial discipline, majesty of law and even their action is contrary to their own circulars. This high-handed action of the respondents is against Article 14, 19 and 265 of the Constitution of India. In spite of categorical directions of the Apex Court in ***Kamlakshi Finance Corporation Ltd. (supra)s***.

10. This Court considers that in the present case, the respondents have totally ignored the provisions of law, the judicial pronouncements of higher forum and the action of the respondents in not considering the appeal in time and even till date, is against the principles of natural justice, the requirement of law, fair play and therefore, the action of the respondents and

the Revenue Authorities is violative of Article 265 of the Constitution of India.

11. Accordingly, on perusal of the case in hand, apart from allowing the writ petition, this court further deems it appropriate to issue strictures to the effect that appropriate departmental action be initiated against the officers and authority concerned of the respodnent-Revenue who are involved in non-consideration of appeal of the petitioner in time as well as for not obeying and considering the judgments of the Apex Court, referred to above as well as the provisions of Section 220(6), 245 of the IT Act and the circulars of the department. The Chief Commissioner of Income Tax, Rajasthan, Jaipur, Udaipur, etc. is directed to apprise about pendency situation and statistics to the Rajasthan State Legal Services Authority, Jaipur so that in the interest of justice, the same can be considered and appropriate correspondences can be made with the higher/appropriate authorities in the larger public interest as illegal recoveries, levy of interest is imposed for the reasons beyond their control.

12. In the case in hand, this Court further deems it appropriate to impose a cost upon the respondents which is quantified to Rs.50,000/- which the respondent-department shall pay itself or if it so chooses, the same may be recovered equally from respondents No.1 & 2 and be deposited with the Rajasthan State Legal Services Authority, Jaipur and assessee in half and half within two months of passing of this order.

13. A copy of this order be sent by the Registry of this Court to the Chairman, Central Board of Direct Taxes (CBDT), Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi-110001 and Revenue Secretary, Ministry of

Finance, Government of India, North Block, New Delhi-110001 for appropriate compliance and to issue necessary instructions in the interests of citizens and the assessees.

14. The writ petition is accordingly allowed. All pending applications stand disposed of in above terms.

(SAMEER JAIN),J (PRAKASH GUPTA),J