

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

**WRIT PETITION NO.2157 OF 2018
AND
WRIT PETITION NO.2160 OF 2018**

Bhupendra Murji Shah

... Petitioner

Vs

Deputy Commissioner of Income Tax-15(1)(1)
and Ors.

... Respondents

Mr.Madhur Agarwal i/b Mr.Atul K. Jasani for the Petitioner.

Mr.Suresh Kumar for the Respondents.

**CORAM : S.C. DHARMADHIKARI &
B.P.COLABAWALLA, JJ.**

TUESDAY, 11TH SEPTEMBER, 2018

P.C. :

1 We have heard both sides.

2 It is undisputed that the petitioner has challenged the demand raised in the first petition No.2157 of 2018 in the sum of Rs.11,15,99,897/- for Assessment Year 2015-2016 by approaching the Commissioner of Income Tax (Appeals). Thus, an Appeal against the Assessment Order raising this demand is filed and is pending.

3 In the meanwhile, the petitioner approached the Assessing Officer/Deputy Commissioner of Income Tax, Circle 15(1)(1), Aayakar Bhavan, Mumbai. He may have made an application and termed it as a request for stay, but what essentially he was worried and concerned about was that since the Appeal is pending and yet to be decided, nor was there any consideration of application for stay by Appellate Authority, this Deputy Commissioner will treat the petitioner/assessee as 'assessee in default'. Thereupon, he will recover the amount by coercive means. It is in these circumstances, this letter was addressed and we have carefully perused that letter. That records that the subject matter of tax is in dispute. The Assessment Order is challenged. The Appeal under Section 246-A of the Income Tax Act 1961 challenging the Assessment Order dated 30th December 2017, received on 1st August 2018 is pending. The request of the petitioner/assessee is that the demand be kept in abeyance till the disposal of this Appeal.

4 With marginal difference in the figures, the issue raised in the second petition No.2160 of 2018 is also identical. Both petitions are taken up together. It is not disputed before us that in terms of Chapter XX styled as Appeals and Revision, the order of the Assessment

Officer is appealable under section 246 sub-section (1). Once it is an appealable order and the Appeal has been filed, it is pending, then, the petitioner/appellant should have been given either an opportunity to seek a stay during the pendency of the appeal, which power is also conferred admittedly in the Commissioner or this Deputy Commissioner should have held the demand in abeyance as prayed by the petitioner/assessee. He does neither, but proceeds to communicate to the petitioner/ assessee that his application for stay is dismissed. The petitioner/ assessee should pay 20% of the outstanding amount as prescribed in some Circulars of the Revenue and particularly, dated 29th February 2016 and produce the challan and seek stay of demand again, failing which collection and recovery will continue.

5 We are not concerned here with the Circular of the Central Board of Direct Taxes. We are not concerned here also with the power conferred in the Assessing Officer of collection and recovery by coercive means. All that we are worried about is the understanding of this Deputy Commissioner of a demand, which is pending or an amount, which is due and payable as tax. If that demand is under dispute and is subject to the appellate proceedings, then, the right of appeal vested in

the petitioner/assessee by virtue of the Statute should not be rendered illusory and nugatory. That right can very well be defeated by such communication from the Revenue/Department as is impugned before us. That would mean that if the amount as directed by the impugned communication being not brought in, the petitioner may not have an opportunity to even argue his Appeal on merits or that Appeal will become infructuous, if the demand is enforced and executed during its pendency. In that event, the right to seek protection against collection and recovery pending Appeal by making an application for stay would also be defeated and frustrated. Such can never be the mandate of law.

6 In the circumstances, we dispose both these petitions with directions that the Appellate Authority shall conclude the hearing of the Appeals as expeditiously as possible and during pendency of these Appeals, the petitioner/appellant shall not be called upon to make payment of any sum, much less to the extent of 20% under the Assessment Order/Confirmed Demand or claim to be outstanding by the Revenue.

7 We clarify that we have not expressed any opinion on the

merits. This order is passed in the peculiar facts and circumstances of the petitioner's case and only because Mr. Agarwal informs us that the Appellate Commissioner has scheduled the matter for hearing shortly. In fact, he has heard it in part. It is, therefore, clear that when the Appeal is being heard, the demand is raised on the petitioner/assessee by treating him as an assessee in default. We have passed this order so that the petitioner can avail of his right of appeal. In ordinary circumstances, we would have relegated the petitioner to the remedy of making an application for stay before the Commissioner (Appeals) and thereafter left it to the Commissioner (Appeals) to take an appropriate decision thereon. However, since the Appeals are being heard, we have passed this order. This order cannot be treated as a precedent for all cases of this nature.

8 We direct that during the pendency of the above Appeals, the attachment, if any, levied on the petitioner's bank account to stand raised forthwith. However, this is without prejudice to the power conferred in the Revenue/Department to collect and recover taxes, which are due and payable. We record the statement made by Mr. Agarwal on instructions as an undertaking to this Court and to this

effect that during the pendency of the Appeals before the Commissioner (Appeals), Income Tax, the petitioner shall not dispose of or create third party right in respect of his movable assets and properties. This, however, shall not prevent the petitioner/assessee from utilizing his assets and properties in the ordinary and normal course of business.

B.P. COLABAWALLA, J.

S.C. DHARMADHIKARI, J.