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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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W.P.(C) 7150/1999

M/S.SANGAM THEATRE P.LTD.

..... Petitioner

Through Mr K.R. Manjani, Advocate.

versus

CIT

..... Respondent

Through Mr Ashok K. Manchanda, Senior

Standing Counsel with Ms Vibhooti Malhotra,

Junior Standing Counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

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12.05.2016

Dr. S. Muralidhar, J.:

1. M/s. Sangam Theatre Private Limited has filed this writ petition aggrieved by the rejection by the Respondents of its application dated on 28th January, 1999 under the Kar Vivad Samadhan Scheme ('KVSS').

2. The brief facts are that for the two Assessment Years (AYs) in question, 1991-92 and 1995-96, the Assessing Officer ('AO') made additions to the disclosed income of the Assessee and raised demands of Rs.6,75,413 and Rs.66,804/- respectively. The demand notices were issued to the Petitioner on 10th February, 1998 and were challenged by the Assessee in appeal.

3. In the meanwhile, the KVSS was announced by the Government of India. Sections 84 to 98 of the Finance (No. 2) Act, 1998 set out, *inter alia*, the detailed procedure for making applications under the KVSS. The Petitioner

submitted an application on 28th January, 1999 seeking to settle the demands arising out of the assessment orders for the two AYs in question.

4. The Petitioner states that just before filing the above application, the Petitioner became aware that against the Petitioner's tax liability for the aforementioned two AYs, the refund due to the Petitioner for the subsequent AYs 1996-97 and 1997-98, had been adjusted by the AO. Accordingly, in a note appended the information provided in Column 5 of the application (where the Petitioner had to indicate the total tax outstanding as on 31st March, 1998), as Annexure -1, the Assessee stated as under:

“Note on Col 5 (e):

Reference to column 5 e, it is submitted that for the A.Y. 1995-96, the tax arrears according to law is Rs.66,804/-. The assessing officer made the adjustment of refund of other years which is against law as no prior intimation before any adjustment was given to the assessee”

5. Earlier to the submission of the above application, the Petitioner made an application to the AO on 18th March 1998 for stay of the tax for the AYs 1991-92 to 1995-1996. On 20th March, 1998, the AO wrote the letter to the Petitioner stating that the Petitioner had failed to attend his office on 19th March, 1998 with the plan for payment of the outstanding tax and therefore the Petitioner's application for stay of demand was "rejected".

6. In the above context, the counsel representing the Petitioner wrote to the AO on 23rd March 1998 referring to the hearing on 18th March, 1998 and stating that at that hearing the AO had directed the assessee to deposit Rs.20

lakhs against the disputed demand for the AYs 1991-92 to 1995-96. The Assessee contested the total tax demand computed by the AO at Rs.61,03,757 comprising tax (Rs.27,73,212) and interest (Rs.33,30,545). It was pointed out that the demand for AY 1993-94 did not take into account a payment of Rs. 4.10 lakhs already made by the Assessee. The interest liability would also correspondingly be reduced. It was further pointed out that if the TDS certificates furnished by the Petitioner for AY 1995-96 were accounted for, no demand would remain outstanding and instead a refund would be due. Therefore, according to the Petitioner, the outstanding demand of tax and interest worked out to Rs. 49,60,691/-. It was pointed out that for AYs 1996-97 a refund of Rs.14,76,388 (including interest) and for AY 1997-98 a refund of Rs.2,67,318/- was due. It is in this context that in para 6 of the said letter dated 23rd March 1998, the Petitioner's counsel stated as under:

"The assessee reiterates that the refund due for AYs, 1996-97 and 1997-98 along with interest due thereon may kindly be adjusted against the outstanding demand for the captioned assessment years and the balance, demand be stayed pending disposal of the assessee's appeals. It will kindly be appreciated that by adjustment of the outstanding refunds more than 73 per cent of the principal amount of the disputed demand would be covered."

7. However, in response to the said letter, the Petitioner received a letter dated 29th May, 1998 from the Commissioner of Income Tax Delhi-III (CIT) which reads as under:

"Sir,

SUB: APPLICATION FOR STAY OF DEMAND
IN THE MATTER OF SANGAM THEATRES

LTD. – ASSESSMENT YEAR 1991-92 to 1995-96

Please refer to your petition dated 30-3-1998 for stay of the outstanding demand amounting to Rs. 61,03,757/- for the years 1991-92 to 1995-96. You may in this regard contact the Assessing Officer Company Circle 3 (3), New Delhi to whom necessary instructions in the matter have been given."

8. What is significant is that at no stage was the Petitioner formally informed by the AO that in relation to the arrears of tax for AYs 1991-92 and 1995-96 an adjustment had already been made by the AO of the refund that was due to the Petitioner for the subsequent AYs.

9. In response to the notice issued in the present petition, a counter affidavit was filed on 7th February, 2000. First, a preliminary objection was raised stating that the Petitioner's application under the KVSS had already been rejected on 20th February, 1999 whereas the Petition was filed in October, 1999. As far as this objection is concerned, the Court notes that the present petition was filed on 15th October 1999 which is not too long after the date of rejection of the Petitioner's application under the KVSS. Consequently, this preliminary objection is rejected.

10. Secondly, it is stated in the counter affidavit that the Petitioner had not stated all the relevant facts. In para (c) (i) of the counter affidavit it is stated thus:

"(i) The income tax demand raised for the Assessment Years 1991-92 and 1995-96 were adjusted against the refunds due to the Assessee on 10.2.98 and 3.3.98. Although the Petitioner

was not informed about the adjustments but was very well aware and have full knowledge about the adjustments. The Petitioner has also impliedly given its consent and no objection to the adjustment."

11. In order to substantiate the above contention, the Respondent has enclosed a copy of the proceedings drawn up in hand by the AO which contains at the bottom the signature of the counsel/authorized representative (AR) of the Petitioner, Ms. Anshu Khanna bearing the date 18th March, 1998. Apart from the said signature of counsel, there is nothing to indicate that the Petitioner consented to the adjustment of the tax arrears the AYs 1991-92 and 1995-96 that had already been made by the AO on 10th February and 3rd March 1998 against the refund due to the Petitioner. In fact, the first line of the said proceedings records the presence of Ms. Anshu Khanna and states that it is "in reference to stay of demand for AY 1991-92, 1995-96."

12. The case of the Respondent is that the Petitioner had itself, through counsel, made a request for such refund by the letter dated 23rd March, 1998. In particular para 6 of the said letter, which has been extracted hereinabove, is referred to in this context.

13. As has already been noticed, the request in para 6 of the letter dated 23rd March, 1998 was in the context of the Petitioner's request for stay of the demand of tax for the years 1991-92 to 1995-96. The Petitioner's case was that the tax demand was actually much lower. The Petitioner at this stage had no formal intimation about the adjustment that had already been made.

Therefore, para 6 could by no means be construed as an ex post facto consent of the Petitioner to the adjustment.

14. Further, although the Petitioner did make the above request, it was not accepted by the Respondents. The CIT by the letter dated 29th May, 1998 reiterated the total tax arrears of Rs. Rs. 61,03,757 and asked the Petitioner to contact the AO "to whom necessary instructions in the matter have been given". Even at this stage there was no formal intimation to the Petitioner of adjustment having been made of the refund due to the Petitioner against the tax arrears.

15. During the hearing of the present petition two specific questions were asked to be addressed by the Respondent by an order dated 1st February, 2006. The said two questions read as under:-

"1. If an adjustment had already been made of the assessment years 1991-92 and 1995-96, why was the amount outstanding against the petitioner still shown as Rs.61,03,757/- in Revenue's letter dated 29.5.1998 (Annexure 'G' to the writ petition)?

2. Was there any formal adjustment order made by the competent officer and was any intimation regarding such adjustment required to be sent? If so, whether any such order was passed and an intimation sent to the assessee?"

16. As regards the first question, counsel for the Revenue is unable to dispute that the CIT's letter 29th May, 1998 continued to refer to the arrears of tax as of that date a Rs.61,03,757. Yet in para c (i) of the counter affidavit it is stated that adjustment was made of the arrears of tax against the refund

due, without any prior intimation to the Petitioner, on 10th February, 1998 and 3rd March, 1998.

17. The mandatory requirement of Section 245 of the Act that a prior intimation must be given to the Assessee if a refund is proposed to be adjusted against the arrears of tax has been explained by this Court in its decision in ***Glaxo Smith Kline Asia (P) Ltd. v. CIT (2007) 290 ITR 35 (Del)***. This was reiterated in a subsequent decision dated 16th October, 2015 in W.P. (C) 6172/2014 (***The Oriental Insurance Co. Ltd. v. DCIT***) and recently in an order dated 25th April, 2016 in W.P. (C) 683/2016 (***Vijay Singh Kadan v. Chief Commissioner of Income Tax***).

18. However, learned counsel for the Revenue seek to rely on the decisions in ***CIL Securities Ltd. v. Commissioner of Income-tax 242 ITR 472 (AP)***, ***Brij Bhushan Lal & Sons v. Designated Authority 246 ITR 353 (All)*** and ***M.V. Ganesh v. Commissioner of Income-tax, Cochin 310 ITR 183 (Ker)*** to urge that the requirement of a prior intimation under Section 245 was only directory and a failure to do so would be a mere irregularity without any attendant consequence of invalidity of the action of the Revenue. It is pointed that in all the said three cases, the High Courts were dealing with a situation where applications under the KVSS were rejected and adjustments had been made of refunds of subsequent AYs against the arrears of tax demand of earlier AYs, in respect of which the applications were made.

19. The facts of the present case are quite different from those in the cases cited. And that brings us to Question No. 2 posed by the Court to the

Revenue in its order dated 10th February, 2006. The fact of the matter is that no order was passed before the adjustment was made of the refund due to the Petitioner against the arrears of tax for AYs 1991-92 and 1995-96 on 10th February, 1998 and 3rd March, 1998. Therefore, question No. 2 posed by this Court has to be answered in the negative. The factual position is that contrary to the mandate of Section 245 of the Acct, without any prior order or prior intimation to the Petitioner, an adjustment of the refund against the arrears of tax was made. After making such adjustment, an attempt was made to justify the adjustment by seeking to infer an ex post facto consent of the Petitioner to such adjustment. Such course was legally impermissible for the Revenue to adopt.

20. The fact of the matter also is that there was express or implied consent by the Petitioner to such adjustments. As is evident from the note at Annexure-1 to the Petitioner's application under the KVSS, the Petitioner protested against such adjustment no sooner than it learnt of that fact. Therefore, unlike the facts of the decisions cited by the Revenue, where the Court was able to infer an implied consent of the Assessee to the adjustment made, in the present case the Court is unable to imply any such consent by the Petitioner to the adjustment already made by the AO without passing any order and without sending any prior intimation to the Petitioner. Interestingly, even on 29th May, 1998 there was no formal intimation to the Petitioner of such adjustment. The CIT mentioned the arrears of tax as Rs.61,03,757 which could not have been the case if in fact the adjustments had formally been made by passing an order.

21. The action of the Respondents appears to be contrary to the law explained by this Court in the decisions referred to hereinbefore. In this context the following passages from the decision in **Glaxo Smith Kline Asia (P) Ltd. v. CIT** (*supra*) are relevant:

"26. In our view, the power under Section 245 of the Act, is a discretionary power given to each of the tax officers in the higher echelons to 'set off the amount to be refunded or any part of that amount against the same, if any, remaining payable under this Act by the person to whom the refund is due.' That this power is discretionary and not mandatory is indicated by the word 'may.' Secondly, the set off is in lieu of payment of refund. Thirdly, before invoking the power, the officer is expected to give an intimation in writing to the Assessee to whom the refund is due informing him of the action proposed to be taken under this Section.

27. We reiterate that the restrictions on the power under Section 241, as explained judicially, would apply with equal, if not appear, force to Section 245. A mechanical invocation of the power under Section 245 irrespective of the fact situation, can lead to misuse of the power by the Revenue in order to delay the refund till such time a fresh demand for the subsequent assessment years is finalized. If reasonable time limits are not set for the processing of and disposal of an application for refund by the Revenue, it may result in the Assessee not being able to get the refund at all. Also, the statute by stipulating the payment of interest on refunds (Section 244A) and interest on delayed refunds (Section 243) has underscored the importance of timely processing of refund claims.

28. As already noticed, this discretionary power has to be exercised after giving an opportunity to the Assessee of being heard preceded by an intimation to the Assessee in writing of the action proposed to be taken under Section 245. A further implicit requirement is that the Revenue will have to be

satisfied that the Assessee will not be in a position to satisfy the demand of tax and that but for the set off, the outstanding tax amount cannot be recovered at all.

...

38..... Unless there are sound reasons justifying the formation of an opinion that the tax that has become payable cannot be recovered from the Assessee as and when the issues are ultimately decided, the power under Section 245 should not lightly be invoked."

22. Consequently, the Court sets aside the decision dated 20th February 1999 of the Respondents rejecting the Petitioner's application dated 28th January, 1999 under the KVSS Scheme. The adjustments made by the Revenue of the refunds to the Petitioner against the demand of tax for AYs 1991-92, 1995-96, on 10th February, 1998 and 3rd March, 1998 are declared to be invalid and are accordingly set aside.

23. The Revenue is directed to consider afresh the Petitioner's application under the KVSS without reference to the order dated 20th February 1999 and pass a reasoned order within six weeks from today after giving the Petitioner an effective opportunity of being heard. The orders of refund due to the Petitioner for the AYs subsequent to the AYs in question, together with the interest as admissible in law, will be issued to the Petitioner within the same period. The writ petition is disposed of in the above terms.

S.MURALIDHAR, J

VIBHU BAKHRU, J

MAY 12, 2016/pkv