Court No. - 4

Case :- MISC. BENCH No. - 2238 of 2016

Petitioner :- Uttar Pradesh Bhumi Sudhar Nigam Lko.Thru Authorised Signato
Respondent :- Principal Commissioner Of Incoem Tax-Ii Ashok Marg Lko.& Ors
Counsel for Petitioner :- Pradeep Agrawal
Counsel for Respondent :- Manish Misra

Hon'ble Amreshwar Pratap Sahi,J.
Hon'ble Attau Rahman Masoodi,J.

(Delivered by Hon'ble A. R. Masoodi, J.)

Heard Sri Pradeep Agarwal, learned counsel for the petitioner and Sri Manish Misra, learned counsel who has accepted notice on behalf of the respondents.

By means of this writ petition, the petitioner has assailed the recovery notice issued by the assessing officer on 3.11.2015 in respect of the amount due for the assessment year 2012-13.

The contention of the learned counsel for the petitioner is that the petitioner has already filed an appeal against the assessment order passed by the assessing authority in relation to the assessment year 2012-13 and has also filed an application for the grant of interim stay against the assessment order. The appeal as well as interim stay application are pending before the C.I.T. (Appeals) i.e. respondent no. 2.

Referring to Section 220 (6) of the Income Tax Act, 1961, it is argued that since the assessee has preferred an appeal against the assessment order, it is not open to the authorities to proceed with the recovery pursuant to the assessment order once the appeal is pending. This argument has been raised on the strength of Section 220 (6) of the Income Tax Act and the same is extracted below:

> *"220 (6) Where an assessee has presented an appeal under section 246, 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."*

The aforesaid provision clearly refers to the appeal filed under Section 246 or 246-A of the Act and to this extent there is no dispute with regard to the pendency of appeal being filed by the petitioner alongwith an application for interim stay. However, the difficulty has arisen due to the fact that the appellate authority not being empowered with the jurisdiction of granting interim stay under the appellate jurisdiction, can it be said that such a jurisdiction is either ancillary or incidental to the appellate power under Section 246 or 246-A particularly when Section 220(6) of the Act regulates the situation in a different manner.

The assessing officer, it is provided under the Statute, while the appeal remains undisposed of, may impose the conditions as he thinks fit in the circumstances of the case so as to treat the assessee as not being in default in respect of the amount in dispute. The plain reading of Section 220(6) of the Act rather imposes a restriction on the appellate authority not to entertain any interim stay application leaving the matter open to be dealt with by the assessing authority during the course of pendency of appeal, *inter alia*, by establishing his due co-operation in the pending appeal or pointing out the failure on the part of the appellate authority to decide the appeal despite his cooperation.

The intention of the statute is very clear to the extent that an assessee during pendency of an appeal has primarily to satisfy the assessing officer under Section 220(6) at the first instance for seeking deferment as regards the execution of an assessment order. In the present case, the petitioner admittedly has filed an appeal alongwith an application for interim stay but the fact remains that the petitioner has not approached the assessing officer under Section 220 (6) for the exercise of his discretion to defer the recovery proceedings.

Learned counsel for the petitioner while arguing the matter, has referred to the judgements rendered in the case of ***Prem Prakash***

Tripathi v. Commissioner of Income-tax and others, [1994] 208 ITR 461 (All) and the judgement reported in ***(2010) 321 ITR 491 (All.): Smita Agarwal (Individual) v. Commissioner of Income Tax and others***, and it is urged, that in terms of the law settled by this Court, the proposition that during pendency of an appeal, recovery proceedings have to be stayed during pendency of appeal or at least till the disposal of interim stay application, is inevitable.

From a perusal of the aforesaid decisions, it is seen that the High Court has read the authority of dealing with the interim stay applications by the first appellate authority under Section 246 or 246-A, keeping in view the law laid down by the apex court in the case of ***ITO V. M. K. Mohammed Kunhi (1969) 71 ITR 815***, wherein the following observation has been made:

> *"But the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction."*

The apex court in the decision mentioned supra while dealing with the provision of Section 255 (5) of the Act, opined that once the tribunal had an authority to regulate its procedure to deal with the appeals, in that situation the power to grant stay can be read as incidental or ancillary to its appellate jurisdiction. The situation in the present case is different inasmuch as during pendency of an appeal under Section 246 or 246-A, the power of interim stay instead of being conferred upon the appellate authority is rather, vested with the assessing officer by virtue of Section 220 (6). The power conferred on the assessing officer in view of the aforesaid provision by its very nature, is discretionary but at the same time it is to be read so long as an appeal remains pending or undisposed of by the appellate authority under Section 246 or 246-A of the Act. The assessee, in such a situation, is left with no other remedy except to approach the assessing officer for the exercise of his discretioni conferred under Section 220 (6). The intention of restricting the power of appellate authority to grant interim stay may have a purpose of dealing with such appeals by the appellate authority

expeditiously which in the event of grant of interim stay would prolong the proceedings due to non-cooperation of the assessee like in the present case where appeal is pending since last about a year.

It is not the case of the petitioner that he has filed any application under Section 220 (6) of the Act for seeking an order of interim stay within the scope of said provision but what is argued is that the assessee once having exercised the right of appeal, is entitled to a protection of not being treated to be an assessee in default as a natural consequence of the mere filing of an appeal. In our considered opinion, this proposition in the context of the case laws referred to above is not the correct proposition of law and is contrary to the legislative intention. The scheme of the Act provides a specific remedy under Section 220 (6) and the same having not been invoked by the petitioner in the present case, does not entitle him to the protection as has been prayed for on the ground of mere pendency of the appeal or till the disposal of interim stay application. From the perusal of impugned notice dated 3.11.2015, we do find that the assessing authority has not considered the aspect of the pendency of appeal nor the grievance raised by the petitioner to this effect has been considered in accordance with law but at the same time it is found that the petitioner has not brought any material whatsoever to the knowledge of the assessing authority. Although the petitioner has also made a reference to some circulars issued by CBDT but the same are not filed before the Court nor before the assessing authority, therefore, the Court has no choice except to interpret the intention of legislation from its plain reading. In civil disputes Order XLI Rule 5 and 6 Code of Civil Procedure, 1908 specifically confer jurisdiction on the appellate court or the court passing the decree for stay of orders/decree appealed against or for imposing conditions to secure the ends of justice. The benefit of Section 144 CP.C. is also available to a litigant in all judicial proceedings, therefore, the exclusion of power of interim stay at the first appellate stage under Income Tax Act, 1961 has to be read in the manner provided for in

Section 220 (6) of the Act but not otherwise. The provisions of Section 144 C.P.C. may not be applicable to the proceedings under the Income Tax Act, 1961 but the principles do apply. It is true that an appeal is the continuity of proceedings but the legislative intention of securing the interest of revenue by imposing just conditions at the first appellate stage, can also not be held to be arbitrary and reading a principle contrary to the intention of Section 220 (6) amounts to adding something in the appellate jurisdiction which the law neither expressly nor by implication does provide. The apex court judgement placed reliance upon in the Division Bench judgements cited before us, does appear to have led to the incorporation of Rule 35-A in the Rules of 1963 but no such amendment was made in pursuance of the apex court judgement incorporating any such provision which may authorise the appellate authority at the stage of proceedings under Section 246 or 246-A to pass an interim stay order. The position of law becomes further doubtful when it is noticed that the writ petition in the case of ***Prem Prakash Tripathi*** (supra) was dismissed, as such a direction issued therein becomes binding merely between the parties and is not a judgement in rem. On the other hand, looking to the scheme of the Act and law laid down by the apex court in the case of ***Assistant Collector of Central Excise v. Dunlop India Ltd. (1985) 154 ITR 172*** and the judgements reported in ***AIR 1956 All. 130***: ***Goverdhan Lal Jagdish Kumar v. Commissioner of Income Tax and others; AIR 1957 Andhra Pradesh 114:Vetcha Sreeamamurthy v. Income Tax Officer and another*** and ***AIR 1957 Andhra Pradesh 671: Shrimathi Mokhamatla Mondamma and another v. Shrimathi Mokhamatla Venkatalakshmidevi,*** we are not in agreement with the proposition of law as has been canvassed by the learned counsel for the petitioner in the writ petition. It is, however, open to the CBDT to issue guidance to the assessing authority to deal with the matters, during pendency of the appeals filed under Section 246 and 246-A so that the recovery of revenue of direct taxes may not suffer a set back

and the assessee is equally relieved of unnecessary torture.

In the circumstances of the case, we leave it open to the petitioner to approach the assessing officer under Section 220 (6) of the Act within a period of two weeks from today and in case any application is filed by the petitioner before the assessing officer, he shall pass necessary order after affording an opportunity to the petitioner within three months from the date of filing of any such application. Until decision on the application, filed if any, or until decision of the appeal itself within a period of three month, the recovery proceedings in relation to the assessment year 2012-2013 for the disputed amount shall remain in abeyance and the same shall abide by to the outcome of the appeal.

With the aforesaid observations, the writ petition is disposed of.

Order Date :- 3.2.2016
MFA/-

Court No. - 4

Case :- MISC. BENCH No. - 2238 of 2016

Hon'ble Amreshwar Pratap Sahi,J.
Hon'ble Attau Rahman Masoodi,J.

The writ petition is disposed of vide our orders of date, on separate sheets.

Order Date :- 3.2.2016
MFA/-