

**IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL**

**Special Appeal No. 525 of 2015**

Commissioner of Income Tax (TDS)  
& others. .... Appellants

Versus

State Bank of India & another. .... Respondents

Mr. Hari Mohan Bhatia, Advocate for the appellants.

Mr. Bishwajit Bhattacharya, Senior Advocate, assisted by Mr. D.S. Patni, Advocate  
for respondent No. 1.

Mr. Udyog Shukla, Advocate for respondent No. 2.

**JUDGMENT**

**Coram: Hon'ble K.M. Joseph, C.J.  
Hon'ble V.K. Bist, J.**

**Dated: 12<sup>th</sup> October, 2015**

**K.M. JOSEPH, C.J.**

Appellants are respondent Nos. 1 to 3 in the writ petition.

Respondent No. 1 Bank filed a writ petition seeking the following reliefs:

- a. Issue a writ, order or direction in the nature of mandamus directing the respondent No. 2 and 3 to refund to the petitioner the entire amount which it has coercively recovered on 29-03-2014 along with 15% interest per annum, as per sections 240 and 244(1) of ITA, and,
- b. Issue any other writ, order or direction in the nature of certiorari quashing letter dated 04-12-2014 (Annexure No. 5) issued by the Respondent No. 3 granting an illusory refund, and instead direct respondent No. 2 and 4 to make actual refund under section 240 and 244(1) along with interest @ 15%.”

2. Very briefly put, the case of respondent No. 1 / writ petitioner was as follows:

On 18.07.2014, the Income Tax Appellate Tribunal, Delhi Bench, in three appeals, passed a judgment and allowed the appeals filed by the

writ petitioner and dismissed the appeals filed by the Income Tax Department (hereinafter referred to as the “Department”) holding that the provision of Section 194A(1) of the Income Tax Act (hereinafter referred to as the “Act”) is not applicable to the SRF deposit made. On 30.07.2014, on the basis of the said judgment, writ petitioner applied for refund of ₹ 44,36,57,686/- with interest, which the Department had coercively recovered from the writ petitioner. It is necessary to notice that recovery was effected by proceedings dated 29.03.2014, by which the Department attached the account of the writ petitioner with RBI in a sum of ₹ 44 and odd crores, which amount related to 2013-2014. Writ petitioner further sent communication dated 08.09.2014 (Annexure No. 4) seeking refund. It is, thereafter, that the impugned letter dated 04.12.2014 (Annexure No. 5) was issued, which reads as follows:

“F.No. DCIT(TDS)DDN/SBI/AY2013-14/2014-15/26

Office of the  
Dy. Commissioner of Income Tax (TDS)  
Dehradun  
Dated: 04/12/2014

To,

The Branch Manager  
State Bank of India  
Tel Bhawan, Dehradun.

Sir,

**Subject: Adjustment of Refund of Rs. 46,14,03,993/- for the AY 2013-14 against the demand of Rs. 97,85,38,937/- outstanding for the AY 2014-15 U/s 245 – Regarding.**

Kindly refer to the above mentioned subject.

In this connection, the demand of Rs. 88,73,15,372/- for the AY 2013-14 was created on 12/12/2013. The said demand become nil after giving appeal effect U/s 251 dated 01/12/2014 and a refund of Rs. 46,14,03,993/- is payable to you for the AY 2013-14.

The demand of Rs. 97,85,38,937/- for the AY 2014-15 is still pending. The refund of Rs. 46,14,03,993/- is therefore being adjusted U/s 245 against the demand due of Rs. 97,85,38,937/- for the AY 2014-15.

Yours faithfully  
Sd./-  
(A.K. Sonkar)  
Dy. Commissioner of Income Tax (TDS)  
Dehradun”

3. It is, on these facts, that the writ petition was filed.

4. The learned Single Judge allowed the writ petition. From the judgment of the learned Single Judge, we find that he notes the argument of the writ petitioner that the Commissioner of Income Tax (Appeals) has directed to delete the assessment in a sum of ₹ 97,85,38,937/-, which, apparently, was the basis for Annexure No. 5, and, as of today, no amount was outstanding against the writ petitioner Bank and there is no question of adjustment or set off. We, further, note that the learned counsel for the appellants contended that he was not aware of the judgment dated 03.03.2015 and that, if the amount has been directed to be deleted, the assessee would be entitled to refund of the amount with interest under Section 240, read with Section 244 of the Act. The learned Single Judge held as follows:

“I am of the opinion that once I.T.A.T. has opined that Section 194A of the Income Tax Act is not applicable against the Bank on SRF deposit, then the same legal position would be applicable in the subsequent assessment years as well, unless of course, Section 194A is amended or is substituted by any new law. Therefore, submission of Mr. Bishwajit Bhattacharya, learned Senior Counsel appearing for the petitioner Bank that amount of Rs. 97,85,38,937/- has been deleted against the assessee/Bank seems to be correct.

Since, it is not within the knowledge of Mr. Hari Mohan Bhatia, learned counsel for the Revenue, as to whether order dated 03.03.2015 has been passed by the Commissioner of Income Tax (Appeals), therefore, in the peculiar facts and circumstances of the case, I direct that on the applications of the petitioner seeking refund, an appropriate decision shall be taken within two weeks positively and if it is found that vide order dated 03.03.2015 amount of Rs. 97,85,37,937/- has been deleted against the assessee, amount of Rs. 44,36,57,686/- shall be refunded to the petitioner Bank along with interest as provided under Section 240 read with Section 244 of the Income Tax Act.

It is, however, clarified that unless and until order passed by the Income Tax Appellate Tribunal has been stayed or set aside by the higher Forum, refund shall not be denied to the petitioner.

Petition stands disposed of accordingly.”

5. It is feeling aggrieved by the same that the appeal has been filed.

6. We heard Mr. Hari Mohan Bhatia, learned counsel appearing for the appellants and Mr. Bishwajit Bhattacharya, learned Senior Counsel appearing on behalf of respondent No. 1 / writ petitioner.

7. Mr. Hari Mohan Bhatia would submit that it is true that the assessment for ₹ 97,85,38,937/- for the Assessment Year 2014-2015 has been set aside by the Commissioner of Income Tax (Appeals), as was contended by the writ petitioner; but, he would take exception to the direction of the learned Single Judge that, if the said assessment was indeed cancelled, as was the case of the writ petitioner, then, the amount should be refunded. Equally, he would take objection to the statement that, as long as the order passed by the Income Tax Appellate Tribunal has not been stayed or set aside by the higher forum, refund should not be denied to the writ petitioner. He would submit that, in fact, assessment has been completed for the year 2015-2016 and it is pointed out that the same was done by order dated 12.05.2015 and a total demand of ₹ 105,68,13,294/- has been raised. No doubt, he does not dispute that the writ petitioner has preferred an appeal before the Commissioner of Income Tax (Appeals), Dehradun, and it is pending. It is, in fact, pointed out by Mr. Hari Mohan Bhatia that this fact, which was well-known to the writ petitioner, was not brought to the notice of the learned Single Judge. The counsel was also not aware of the said assessment and the judgment was rendered on 31.08.2015 after the assessment for the year 2015-2016 dated 12.05.2015. Therefore, he would contend that, while the appellants had no objection in considering the application for refund filed by the writ petitioner, the judgment must be modified so that the direction must be to direct the officer to take a decision in accordance with law and this would take in Section 245 of the Act. It is pointed out that Section 245 of the Act enables the authority to adjust any amount due to the Department against the refund. He would also submit that the observation in the judgment of the learned Single Judge that, unless and until the Tribunal's order is set aside or stayed, refund cannot be refused, cannot be sustained.

8. Per contra, Mr. Bishwajit Bhattacharya would submit that this is a case, where the appeal is filed without any basis. He would contend that this is an affront to the rule of law, which, he would point out, has been held by the 13 Judges Bench of the Hon'ble Apex Court in **Kesavananda Bharati Sripadagalvaru & others vs. State of Kerala & another**, reported in (1973) 4 SCC 225, as also by the Constitution Bench in **Indira Nehru Gandhi vs. Shri Raj Narain & another**, reported in AIR 1975 SC 2299, to be a basic feature of the Constitution. He would complain of arbitrariness on the part of the Department in refusing to grant refund of the amount, which was illegally attached. He would point out that, actually, there is only a single deposit made by ONGC with the Bank and, in regard to the said deposit, Section 194A of the Act is not applicable. He points out that, for Assessment Year 2013-2014, an amount of ₹ 44 and odd crores came to be recovered by the Department by attaching the account of the Bank. While so, the Income Tax Appellate Tribunal, vide judgment dated 18.07.2014 (Annexure No. 2 to the writ petition), allowed the appeals filed by the writ petitioner for the Assessment Years 2010-2011, 2011-2012 & 2012-2013. Thereafter, for Assessment Year 2014-2015, even though the matter stood concluded by the judgment of the Tribunal, the Assessing Officer, by order dated 15.09.2014, assessed the writ petitioner again in respect of the very same deposit made by ONGC on the basis of the non deduction under Section 194A of the Act, an issue which stood concluded by the order of the Income Tax Appellate Tribunal. It was this order, which was set aside in appeal by order dated 03.03.2015. He would submit that it is absolutely necessary for the upkeep of the rule of law that the decisions taken by the superior forums in a hierarchy of authorities must be followed by the authority at the bottom of the pyramid. It is contrary to the same that, however, the Assessing Officer, on an issue which stood concluded, again sought to assess the writ petitioner by assessing him for the Assessment Year 2014-2015 and this has finally resulted in the impugned order being passed, by which, even without complying with the mandatory requirement of prior intimation under Section 245 of the Act, the amount, which became payable by way of refund, came to be adjusted against the

illegal demand raised for the Assessment Year 2014-2015. The learned Senior Counsel would submit the following case law in support of his contentions:

- i. Union of India & others vs. Ramlakshi Finance Corporation Ltd., reported in 1992 Supp (1) SCC 443;
- ii. Glaxo Smith Kline Asia P. Ltd. vs. Commissioner of Income Tax & others, reported in (2007) 290 ITR 35 (Delhi);
- iii. Maruti Suzuki India Ltd. vs. Deputy Commissioner of Income Tax, reported in (2012) 347 ITR 43 (Delhi);
- iv. Suri Sons vs. Commissioner of Income Tax & another, reported in (1988) 169 ITR 320;
- v. Shreyans Industries Ltd. vs. Commissioner of Income Tax & another, reported in (2001) 252 ITR 544;
- vi. Vijay Kumar Bhati vs. Commissioner of Income Tax & another, reported in (1994) 205 ITR 110;
- vii. Commissioner of Income Tax vs. J.K. Industries Ltd., reported in (2000) 245 ITR 457;
- viii. A.N. Shaikh & others vs. Suresh B. Jain, reported in (1987) 165 ITR 86; and
- ix. State Bank of Patiala vs. Commissioner of Income Tax & another, reported in (1999) 239 ITR 421.

9. The learned Senior Counsel would stress that the principle that Section 194A of the Act is not applicable to the deposit made by ONGC stands concluded, as things stand, by the order passed by the Income Tax Appellate Tribunal and there is no rhyme or reason for the lower authorities to take a different view for the subsequent assessments and to generate illegal demands as it were and, thereafter, the authority resorting to Section 245 of the Act for making adjustment. This is apart from his contention that, as far as the impugned order is concerned, there is no prior intimation as required under Section 245 of the Act.

10. In order to appreciate the contentions of the parties, we deem it necessary to refer to the scheme of the Act in regard to refunds. Refunds figure under Chapter XIX of the Act. Section 237 provides, *inter alia*, that, if a person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under the Act for that year, he shall be entitled to a refund of the excess. We need not be detained with Section 238. Section 239 provides for the form of the claim for refund and limitation. Section 240 being relevant, we extract the same as under:

**“240. Refund on appeal, etc.** – Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf:

Provided that where, by the order aforesaid,-

- (a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment;
- (b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee.”

11. Section 241, though it figures in a number of cases relied on by the writ petitioner, has been repealed by the Finance Act of 2001 with effect from 01.06.2001; but, we will advert to the same when we advert to the case law based on the Section as it stood prior to the repeal.

12. Section 242 of the Act provides as follows:

**“242. Correctness of assessment not to be questioned.** – In a claim under this Chapter, it shall not be open to the assessee to question the correctness of any assessment or other matter decided which has become final and conclusive or ask for a review of the same, and the assessee shall not be entitled to any relief on such claim except refund of tax wrongly paid or paid in excess.”

13. Section 243 provides for interest on delayed refunds. Section 244 deals with interest on refund where no claim is needed. Section 244A declares that the assessee entitled to refund will be entitled to receive, in addition, simple interest calculated in the manner provided therein. Finally, we come to Section 245 of the Act, which is at the center of the controversy. It provides as follows:

**“245. Set off of refunds against tax remaining payable. –** 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 Chief 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.”

14. Having set out the statutory framework, we pass on to the consideration of the case law, which is cited by the learned Senior Counsel for the writ petitioner.

15. In **Union of India & others vs. Ramlakshi Finance Corporation Ltd.**, reported in **1992 Supp (1) SCC 443**, the Hon’ble Apex Court, *inter alia*, held as follows:

“6. Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching in their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities; The order of the Appellate

Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assesseees and chaos in administration of tax laws."

It is, at once, necessary to notice the facts involved in the said case. The Assistant Collector of Central Excise took the view that the product of the respondent, who manufactured electrical insulation tapes, fell under Heading 39.19 of the Schedule to the Central Excise Tariff Act, 1985. The assessee joined issue with the officer on the ground that it fell under Heading 85.47. An order in respect of another plant was distinguished by the Assistant Collector. In appeal, the Collector (Appeals) observed that the reason given for not following the order of the Collector (Appeals) was totally untenable and directed the Assistant Collector to pass a speaking order. When the matter went back, the Assistant Collector reiterated the conclusion reached by his predecessor. No reason was given why the appellate authority's order in respect of the other plant was not followed. Despite a decision of the Appellate Tribunal being placed favourable to the assessee, the same was distinguished on the ground that the Department had appealed the decision. The Hon'ble Apex Court notes that the second order was practically a repetition of the earlier order. The High Court quashed the said order and directed the Department to allocate the matter to a competent officer to pass a proper order. It was this order, which was challenged by the Government of India.

16. Next, the learned Senior Counsel for the writ petitioner referred us to the judgment of the Bench of the Delhi High Court in **Glaxo Smith Kline Asia P. Ltd. vs. Commissioner of Income Tax & others**, reported in (2007) 290 ITR 35 (Delhi). The judgment was rendered in a writ

petition under Article 226 filed seeking a mandamus to the respondents to give effect to the order of the Tribunal and grant refund with interest. The petitioner therein entered into an agreement with a Company for providing various services. The petitioner was to reimburse the cost incurred by the Company for providing the services plus 5 per cent, which was referred to as "cross charges". There was no basis laid down for allocation of costs and the parties agreed to engage a firm of Chartered Accountants to determine the basis. For the Assessment Year 1998-1999, the cross charges were worked out. However, the Assessing Officer took the view that the increase in cross charges was not fully and exclusively for the purpose of the business of the petitioner and justifiable only to the extent of 7 per cent of the net sales. The order was confirmed by the appellate authority. Similar approach was taken in Assessment Year 1999-2000 also by the Assessing Officer and the appellate authority. The petitioner therein successfully appealed before the Tribunal and the Tribunal deleted the disallowance for Assessment Years 1998-1999 and 1999-2000. The said order of the Tribunal attained finality, apparently, as the appeal filed by the Revenue before the High Court was dismissed on 20.07.2005, wherein the court took the view that there was no substantial question of law. For the Assessment Year 2001-2002, the Assessing Officer continued to disallow the cross charges / administrative expenses. A demand was raised on 16.02.2005 and the amount was recovered by attaching the bank accounts on the very next day. The petitioner therein filed an application before the Tribunal seeking refund of the amount recovered pending disposal of the appeal by the Tribunal. By order dated 03.03.2005, the Tribunal directed the Revenue to refund the amount within two weeks from the date of receipt of the order. The said order was challenged by the Revenue in a writ petition. The said order was stayed by the High Court by order dated 27.04.2005. Ultimately, the Revenue withdrew the said petition, as the assessee's appeals for Assessment Years 2000-2001 and 2001-2002 were allowed by the Tribunal by a common order dated 19.08.2005. The Tribunal took the view that there is no difference in the facts from the earlier assessment years. It is noted that the appeals against the said order of the Tribunal

had been admitted and pending consideration before the High Court. Thereafter, the petitioner, on 13.09.2005, sought refund based on the order of the Tribunal and, thereafter, filed the writ petition on 10.02.2006 giving rise to the judgment. On 15.02.2006, the court directed that, till the next date of hearing, the respondents should not adjust the amount of refund, if any, due to the petitioner Company without the leave of the court. On 05.04.2006, the Revenue filed an application seeking permission to set off the refund against the demand raised / to be raised against the assessee relying on Section 245 of the Act, noting in their application that after giving effect to the order of the Tribunal for the Assessment Years 2000-2001 and 2001-2002, amounts of ₹ 7.39 crores and ₹ 4.44 crores were due to the assessee, and, at the same time, an amount of ₹ 3.55 crores was outstanding against the assessee for the Assessment Year 2002-2003 and ₹ 7.14 crores for the Assessment Year 2003-2004. The petitioner joined issue. By order dated 17.08.2006, the court had noticed that, for the Assessment Year 2001-2002, petitioner was entitled to refund of ₹ 11.79 crores; whereas, according to the Revenue, it was entitled to recover ₹ 10.69 crores for the Assessment Years 2002-2003 and 2003-2004. An excess amount of ₹ 1.10 crores was withheld without any justification. The said amount was directed to be refunded along with interest and the same was paid. Thereafter, the question related to the refund of ₹ 10.69 crores. The issue which finally fell for decision was, whether the petitioner was entitled to refund for the Assessment Year 2001-2002 of the amount already computed by the Revenue by its orders dated 28.12.2005 and 01.05.2006. The Revenue sought to adjust it against the subsequent Assessment Years 2002-2003 and 2003-2004. The court referred to Section 241, as it stood prior to 01.06.2001. The said provision was as follows:

“241. *Power to withhold refund in certain cases.*- Where refund of any amount becomes due to the assessed as a result of an order under this Act or under the provisions of Sub-section (1) of Section 143, after a return has been made under Section 139 or in response to a notice under Sub-section (1) of Section 142 and the Assessing Officer is of the opinion, having regard to the fact that-

(i) a notice has been issued, or is likely to be issued, under Sub-section (2) of Section 143 in respect of the said return; or

(ii) the order is the subject matter of an appeal or further proceedings; or

(iii) any other proceeding under this Act is pending; and

(iv) that the grant of the refund is likely to adversely affect the revenue,

the Assessing Officer may, with the previous order of the Chief Commissioner or Commissioner, withhold the refund till such time as the Chief Commissioner or Commissioner may determine.”

Thereafter, the court proceeded to note the distinction between the provisions as follows:

“23. The difference between the two provisions is that Section 241 gave a much wider power and did not require the assessed to whom the refund was due to be put on notice of the proposed withholding of the refund. Secondly, the discretion was to be exercised by the Assessing Officer with the previous approval of the Chief Commissioner or Commissioner. Thirdly, the refund could be withheld for any indefinite time on the formation of an opinion that the grant of the refund was going to adversely affect the Revenue. On a plain reading of the two provisions, it is clear that Section 241 gave the Revenue a much wider power than Section 245.

24. A Division Bench of the Punjab and Haryana High Court has in *Naurata Ram* [1998] 100 Taxman 266 held that the power under Section 241 cannot be used arbitrarily and refund cannot be denied merely because the Revenue had filed certain proceedings by way of appeal, and that such appeal was pending. It was explained (page 269):

“On a careful reading of the plain language used in the statute, it becomes clear that the power to withhold the refund cannot be exercised merely because some proceedings are pending before the authorities constituted under the Act or a court of law. In other words, mere pendency of the proceedings cannot by itself be a ground to deny the refund on the assumption that such refund would adversely affect the revenue. The competent authority has to form an opinion on the basis of relevant material for coming to the conclusion that the order of refund will necessarily cause prejudice to

the revenue of the State. If the Legislature had intended to prohibit the refund of the amount due to the assessed only on the ground that the Revenue has preferred an appeal/revision, etc., then Section 240 would have been couched in a different phraseology. Absence of specific provision in the statute providing for withholding of refund only on the ground of pendency of the proceedings is clearly indicative of the intention of the Legislature that pendency of proceedings will not by itself be a ground for withholding the refund.”

.....

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 assessed 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 greater, 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 assessed of being heard preceded by an intimation to the assessed 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 assessed 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.

29. The High Courts have emphasized the importance of hedging the power of the Revenue under Section 245 with certain safeguards in order to prevent its misuse. The decisions in *State Bank of Patiala v. CIT* and *Sabeta Detergents Ltd. v. CIT* are to the same effect. This apart, while proposing to invoke the power under Section 245, the Revenue should, as far as possible, adopt a

consistent approach. Of course, if the fact situation in the particular assessment year is so different so as to justify the changed stance of the Revenue, the Revenue should, while filing an appeal to the higher forum, seek a stay from that forum itself of the refund due to the assessed before straightaway invoking the power under Section 245. Such a procedure would while ensuring greater efficiency also ensure respect for the rule of consistency and deference to the orders of the higher judicial forum which are binding on the Revenue as much as they are on the assessed.

30. Although the Revenue may be right in contending that the words "against the sum, if any, remaining payable under this Act" should be given a literal interpretation, and that the minute the demand is finalised at the very first level by the Assessing Officer for the particular assessment year, the requirement of Section 245 stands satisfied, this argument, cannot in the context of Section 245 itself, be accepted without qualification. The decision in S. RM. AR. RM. Ramanathan Chettiar v. AMI ITO [1956] 29 ITR 683 (Mad), upon which reliance was placed by the Revenue, was in a different context. The relevant provision considered in the said case was Section 49E, which read as under:

“Section 49E : Where under any of the provisions of this Act, a refund is found to be due to any person, the Income-tax officer,... may, in lieu of payment of the refund, set off the amount to be refunded, or any part of that amount against the tax, interest or penalty, if any, remaining payable by the person to whom the refund is due.”

31. It may be straightaway noticed that Section 49E of the Indian Income-tax, 1922 is not in pari materia with the power under Section 245. The latter power can be exercised only after prior intimation has been sent to the assessed of the action proposed to be taken by the Revenue. Therefore, the mere liability to pay tax, which was never in issue in the above case, is not sufficient to attract the provision of Section 245.”

It is, however, also important to notice the following observations in paragraphs 34 & 35:

“34. Turning to the facts of the present case, we find that no notice under Section 245 was issued to the assessed proposing to set off the demand against the outstanding tax amount due from it. There is no explanation why such notice was not issued except saying that after the order of the Tribunal dated August 17, 2005, the Revenue was processing the refund application made by the writ petitioner. It could dispose of this application only on December 27, 2005. Even at this stage, there was no proposal to invoke Section 245 although on this date there was an outstanding

demand for the assessment year 2000-01. The petitioner was, therefore, compelled to come to this court assailing the delay in processing this application for refund. The application moved by the Revenue in this court appears to be a device to pass the responsibility of taking a decision under Section 245 on to the court only because the petitioner had come to this court. To us, this does not appear to be a sufficient justification for by-passing the procedural requirement under Section 245.

35. If the Department has decided to issue a refund voucher for the assessment year 2000-01, by the same yardstick it should also be willing to make the refund for the subsequent the assessment year 2001-02. The mere fact that appeals in respect of the two assessment years are pending in this court is not by itself a sufficient ground for denying the refund. The fact remains that the procedure contemplated under Section 245 of the Act has not been invoked. It is not without significance that the order dated February 15, 2006, by this court only restrained the Revenue from making any adjustment of the amount of refund "without the leave of this court." This did not mean that the procedure under Section 245 was to be dispensed with. It is, therefore, strange that by the application filed, the Revenue was seeking permission from this court to straightaway set off the refund against the outstanding demand without following the procedure under Section 245. The Revenue seeks to justify invoking the power under Section 245 only on the ground that its appeals for the two assessment years are pending in this court. However, having issued the refund voucher for the assessment year 2000-01 in respect of which also the appeal is pending in this court, there appears to be no justifiable reason for withholding the refund due in respect of the other assessment year 2001-02."

17. The said judgment, apparently, was followed in **Maruti Suzuki India Ltd. vs. Deputy Commissioner of Income Tax**, reported in (2012) 347 ITR 43 (Delhi). Following the aforesaid judgment, it was, *inter alia*, held that the pendency of appeal proceedings by itself cannot be a ground to not refunding the amount due and payable and it is not sufficient to pass an order of adjustment for demand on issues, which have been decided against the Revenue. Therein, the court was dealing with the question, whether Section 220(6) of the Act was applicable when appeal is preferred before the Tribunal. It was held that the Tribunal had power to stay recovery. It was, further, noted that Section 245 permits recovery of the demand of one year, which is pending, by adjusting the refund due for another year. It was a case, where the petitioner was entitled to refund

of ₹ 122.57 crores and ₹ 107.41 crores for the Assessment Years 2003-2004 and 2005-2006 respectively. However, the Department adjusted the refund against the demand for the year 2006-2007. An application for stay before the Tribunal was dismissed. The writ petition filed was allowed on the principle that recovery was made in respect of additions on issues, which were covered against them by the earlier orders of the Tribunal or the Commissioner (Appeals).

18. In **Suri Sons vs. Commissioner of Income Tax & another**, reported in (1988) 169 ITR 320, a Bench of the Punjab & Haryana High Court was dealing with the case, where the assessment for the year 1979-1980 was annulled by the Appellate Tribunal and the same was questioned under Section 256(1) of the Act. On the basis of the annulment, refund became due. The court repelled the contention based on Section 241 of the Act, as it stood then, for the reason that the proceedings questioning the validity of the order were pending before the High Court. The court, further, held as follows:

“As held by us in our judgment in Civil Writ Petition No. 4378 of 1986 [*Leader Valves Private Ltd. vs. CIT* (1987) 167 ITR 542], the assessing authority is not justified in withholding the refund which has become due to the assessee merely for the reason that the proceedings initiated by the Revenue questioning the validity of the order under which the refund has become due are pending before the appropriate authority. Accordingly, for the reasons given by us in our judgment in Writ Petition No. 4378 of 1986 [*Leader Valves Private Ltd. vs. CIT* (1987) 167 ITR 542], the petition succeeds and is allowed. The respondents are directed not to withhold the refund which has become due to the petitioner as a result of the annulment of its assessment for the year 1979-80 on the ground that the proceedings questioning the validity of the order annulling the assessment are pending before the High Court.”

19. In **Shreyans Industries Ltd. vs. Commissioner of Income Tax & another**, reported in (2001) 252 ITR 544, again, a Bench of Punjab & Haryana High Court was dealing with the scope of Section 241 of the Act. The court took the view as follows:

“Section 241 of the Income-tax Act, 1961, does authorise the Assessing Officer to withhold the refund with the previous approval of the Commissioner of Income-tax for such time as may be determined by the Commissioner of Income-tax, but some facts are required to be brought on record to justify the withholding of refund. The mere fact and the only fact that the order is under challenge either before the High Court or before the Tribunal is no ground to withhold the refund or to reach a conclusion that the refund would adversely affect the Revenue.

Held, that, in the present case, nothing had been brought out in the letter of the Assessing Officer justifying the withholding of the refund. The Commissioner of Income-tax (Appeals) deleted the total additions on the merits by holding that the assessee was carrying out the scientific research at his premises and that the reasons for reopening the assessment were not sufficient. The Assessing Officer in his letter only recommended the filing of the appeal against the order of the Commissioner of Income-tax (Appeals) and at the same time sought permission to withhold the refund as refunding the amount at this stage would adversely affect the interest of the Revenue. A huge amount had been withheld only on the ground that the appeal against the order of the Commissioner of Income-tax (Appeals) was pending before the Tribunal. No material was forthcoming on the record in this case which could justify the withholding of the refund. The petitioner who was an assessee was not shown to be in default in the payment of income-tax dues or even in the matter of filing of returns. Hence, the order of the Assessing Officer recommending the withholding of refund and the order of the Commissioner of Income-tax granting the approval for withholding of the refund could not be justified under the provisions of section 241.”

The court noted that a huge amount has been withheld only on the ground that the appeal against the order of the Commissioner of Income Tax (Appeals) was pending before the Tribunal and there is no material forthcoming, which would justify the withholding of the refund. It was found that the petitioner, who was an assessee, was not shown to be in default in the payment of income tax dues or even in the matter of filing of returns.

20. In **Vijay Kumar Bhati vs. Commissioner of Income Tax & another**, reported in (1994) 205 ITR 110, a Division Bench of the Delhi High Court was, again, dealing with the case under Section 241 of the Act. The petitioner was a non-resident Indian and he sought a mandamus

for refund along with interest. The writ petition was filed in August, 1987. The factum of entitlement to refund was not disputed by the Revenue; but, it took the stand that a petition under Section 256(1) was pending before the Appellate Tribunal for referring certain questions of law. An order under Section 241 was also passed to withhold the refund until 30.04.1988. Besides, there is reference to criminal proceedings also. The petition under Section 256(1) was dismissed by the Tribunal. A petition under Section 256(2) before the High Court was also dismissed. So was the fate of the complaint filed under Sections 276C and 277 of the Act. With six months' intervals, orders were being passed under Section 241. There were penalty proceedings for the Assessment Year 1988-1989. The officer found that certain amount is due to the petitioner as interest on the refund. The writ petition was amended seeking further relief. The court proceeded to deal with Section 241 after its substitution w.e.f. 01.04.1989. The court took note of the order passed under Section 241 permitting withholding of the refund upto 31.10.1991 or till the disposal of the Special Leave Petition before the Apex Court, whichever was earlier. However, the petitioner disputed filing of any Special Leave Petition. The court, further, took note of the proceedings before the Supreme Court. The Special Leave Petition could not be listed earlier for some reasons. No certificate was granted by the court under Section 261 making it a case fit for appeal to the Supreme Court. Therefore, the matter under Section 256(2) had come to an end and, thereafter, the court proceeded to find that, if the Revenue wanted to withhold the refund after the filing of the petition under Section 136, it has to obtain a stay from the Supreme Court and cannot rely on Section 241. There was nothing to show the pendency of the Special Leave Petition itself and thwarting the right of the petitioner to refund by merely filing a Special Leave Petition in the Registry after limitation had expired, was noted as grossly illegal. In regard to Section 245, the Bench took the following view:

“There is nothing on the record or even in the letter to suggest that before passing the order, the provisions of section 245 were complied with. For the purpose of any set of an intimation has to be given in writing to the assessed of the action proposed to be

taken under this section. Earlier to this order it has never been the case of the Revenue to claim any set off. This order purporting to be under section 245 of the Act is neither fair, nor just, nor reasonable and has to be ignored. This order also shows scant respect by the authorities for the pendency of these proceedings in this court and this does not commend itself to us, to say the least.

We have not been told by the Revenue any reason as to why assessments for years subsequent to the assessment year 1988-89 were not taken though interest was accruing all this period on the refund due to the petitioner. We are of the view that the assessment order for the assessment year 1988-89 and penalties imposed on the petitioner have no meaning particularly when we are of the view that withholding of the refund by the respondents was illegal and all orders passed under section 241 of the Act, after dismissal of the application under section 256 of the Act by this court, were without jurisdiction and illegal. Rather it has been contended by the petitioner that the interest accrued on non-resident account maintained in foreign exchange is not liable to tax. There had been no answer to this by the Revenue.”

The writ petition was allowed.

21. In **Commissioner of Income Tax vs. J.K. Industries Ltd.**, reported in (2000) 245 ITR 457, a Bench of the Calcutta High Court declared that intimation should be given in writing before set off is made under Section 245. The court, in this regard, also relied on the judgment of the **Bombay High Court in A.N. Shaikh & others vs. Suresh B. Jain**, reported in (1987) 165 ITR 86. The court held that Section 245 clearly requires previous intimation of the proposed action for adjustment and not a simultaneous intimation. It was a case, where the intimation was that the amount of refund for the previous assessment is adjusted against the liability and it was the said intimation, which was found to be not amounting to intimation in writing, as contemplated under Section 245. The Calcutta High Court also took the same view.

22. In **State Bank of Patiala vs. Commissioner of Income Tax & another**, reported in (1999) 239 ITR 421, a Bench of the Punjab & Haryana High Court was dealing with a petition seeking refund. The intimation, which was given, read as follows:

“Sub.:Adjustment of refund – Assessment year 1996-97 – Intimation under section 245 of the Income Tax Act – Regarding.

Return of income for the assessment year 1996-97 was processed under section 143(1)(a) on March 19, 1997, and a refund of Rs. 16,27,64,936 has been determined to be refundable to you. The said refund is adjusted against the following demand:”

Thereafter, the demand and the assessment years were set out.

Thereafter, the Bench held as follows:

“On a plain reading of section 245 of the Act, it would appear that this provision enables the Assessing Officer or other tax or appellate authorities to set off, after intimation to the claimant, the amount to be refunded or any part thereof, against any sum remaining payable under the Act by the person to whom the refund is due. In the Indian Income-tax Act, 1922 (for short “the 1922 Act”), similar provision regarding set-off existed in section 49E. Requirement regarding intimation to the assessee did not, however, find place in section 49E of the 1922 Act. Section 245 reproduces section 49E of the 1922 Act with the addition of the requirement that the Assessing Officer shall give intimation to the assessee before making the adjustment under this section. Thus, an additional requirement regarding intimation was engrafted in section 245 which corresponds to section 49E of the 1922 Act.

The following conditions must exist or be fulfilled in order to set off a refund under section 245 of the Act:

- (i) A refund is found due to a person under any provision of the Income-tax Act;
- (ii) The amount of refund is set off against another sum which is payable by that person under Income-tax Act; and
- (iii) The refundable amount is set off after intimation, in writing, of such proposed action to that person.

In the present case, the first two conditions stand fulfilled, but the third condition is missing. No intimation, in writing, was given by the assessing Officer prior to the proposed action of set-off. When the third condition in terms requires that intimation in writing has to be given about the proposed action that must be strictly followed. This course was not adopted by the Assessing Officer. A perusal of the intimation dated March 26, 1997, (reproduced earlier), would show that the Assessing Officer sent the intimation to the assessee after making adjustment or it was a simultaneous action. Thus, adjustment was made in violation of the third condition contained in section 245 of the Act. As has been noticed earlier, there was no provision regarding intimation to the assessee in section 49E of the 1922 Act. It would, thus, mean that there was a purpose in adding a specific condition regarding intimation in section 245 of the Act. Obviously, the object was to inform the assessee about the proposed action of set-off so as to

enable him to put forward his objection, if he so desired. There cannot be any other object behind a prior intimation regarding the proposed action. If the legislative intent was simply to give an intimation about the set-off to the assessee, there would not be a requirement of giving intimation before making the adjustment. It would defeat the purpose of the provision if it is said that an intimation simpliciter, while making adjustment of the refundable amount towards the tax demand of other years, was sufficient.”

23. Section 245 of the Act corresponds to Section 49E of the Income Tax Act, 1922. It is, at once, relevant to extract Section 49E. It provides as follows:

*“49E. Power to set off amount of refunds against tax remaining payable. – Where under any of the provisions of this Act, a refund is found to be due to any person, the Income-tax Officer, Appellate Assistant 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 tax, interest or penalty, if any, remaining payable by the person to whom the refund is due.”*

24. We may, at once, notice the fact that, while there are a number of similarities in the provisions, it does contain differences. Apart from the fact that the persons, who may make use of the power, being different, which may not be relevant for our purpose; in the new incarnation, the law provides that the set off may be as against the sum, if any, remaining payable under the Act. Earlier in Section 49E, the amounts were specified expressly as the tax, interest or penalty, if any, remaining payable under the Act by the person to whom such a refund is due. The third difference is, undoubtedly, the requirement in Section 245 of giving intimation in writing to the person of the action proposed to be taken under this Section. The words used therein are “after giving an intimation in writing”. Such a requirement was not there in Section 49E.

25. We have already adverted to Section 241 of the Act. The same stands deleted w.e.f. 01.06.2001. In the decision of the Delhi High Court rendered in **Glaxo Smith Kline Asia P. Ltd. vs. Commissioner of Income Tax & others** (supra), the Bench, after adverting to the same, has

taken the view that the restriction on the power under Section 241 would apply with equal, if not greater, force to Section 245. It is, further, held that, if reasonable time limits are not set for processing of or disposal of the application for refund by the Revenue, it may result in the assessee not being able to get the refund at all. It was also a case, where there was no notice at all under Section 245 processing to set off the demand against the outstanding tax amount due from it. This was also a case, where the issue involved had attained finality in regard to the Assessment Years 1998-1999 and 1999-2000 by the dismissal of the appeals in the High Court by order dated 20.07.2005.

26. Time is, now, ripe to consider the purport of Section 245 of the Act. Section 237, which is the first Section in Chapter XIX relating to Refunds, provides that when a person satisfies the Assessing Officer that he has paid an amount in excess of the amount with which he is properly chargeable, he will be entitled to a refund of the excess. Section 239 provides for the form of the claim for refund and also the period of limitation. Therefore, a refund is to be made on the basis of an application made within the period provided, ordinarily. An exception to this is found in Section 240, for the said provision declares that if, as a result of any order passed in an appeal or other proceeding under the Act, refund becomes due, the amount found due by way of refund is to be refunded without the assessee having to make any claim. We are not to be detained by the provisions contained in the proviso. In a claim for refund, the assessee is not entitled to question the correctness of any assessment or other matter decided finally or to seek a review of the same. He is entitled only to the relief of refund. This is the purport of Section 242. When an order is passed within the meaning of Section 240, the Assessing Officer is obliged to refund the amount within three months from the end of the month, in which the order is passed. Failure to do so casts a liability on the Central Government to pay the assessee simple interest at the rate of 15 per cent per annum on the amount of refund due from the date immediately following the expiry of three months to the date on which refund is granted. Coming back to Section 240, it

significantly provides that, if the said Section is attracted, the amount is to be refunded even without any claim, except where it is otherwise provided under the Act. It is by way of bringing up the rear that Section 245 figures as the last provision in Chapter XIX. It is all embracing, as it takes in all cases, where refund is found due. It enables the setting off of any amount remaining payable under the Act by a person to whom the refund is due as against the refund, no doubt, after prior intimation in writing. We have already set out the provisions of Section 241, as it stood prior to its deletion. We are of the view that Sections 241 and 245 operate in different fields. The objects of the provisions are different. As far as Section 241 is concerned, it empowered the withholding of the refund in the circumstances mentioned therein. Undoubtedly, the power was to be exercised by the Assessing Officer; but only with a previous order of the Chief Commissioner or Commissioner. It related to situations, which included cases, where the order was the subject matter of an appeal or further proceeding. That is to say, the order under which refund became due was subjected to an appeal or further proceeding. No doubt, withholding of the refund could be for a long period of time.

27. But, we should notice, however, that withholding of refund was, nonetheless, essentially ancillary or incidental in the sense that it was to be interlocutory in nature. It was substantially an interim arrangement. It was to be done during the pendency of the various contingencies, which were provided for. Furthermore, the exercise of power under Section 241 was subjected to the condition that, besides the contingencies provided therein being present, the officer had to form the opinion that the grant of refund is likely to adversely affect the Revenue. On the other hand, Section 245 of the Act, though it figures in the Chapter dealing with refunds, is essentially and substantially a provision, which facilitates recovery of tax. Under the Act, collection and recovery of tax is contemplated in Chapter XVII. Tax can be collected by deduction at source. It also provides for advance payment of tax. Besides the same, there is collection at source. Under Chapter XVII-D, a bunch of Sections starting with Section 220, provides for the other modes of recovery of tax.

Section 222 provides for certificate being issued to the Tax Recovery Officer for recovery as provided thereunder. Section 226 contemplates other modes of recovery. Section 226 includes recovery by garnishee proceedings, *inter alia*.

28. On the other hand, Section 245 of the Act does not contain the restrictions, which are embedded in Section 241. The object of Section 245 is to empower the authorities specified therein to adjust the refund in lieu of actual payment against any sum remaining payable under the Act. In other words, the ordinary rule is that, when a refund becomes due, the authorities are obliged to pay the same in the circumstances either, where there is an application required, on such application being made or, where cases fall under Section 240, even without an application to the party entitled. In case of non-payment, the law visits the Revenue / Government with the liability to pay interest as provided. It is as an exception to this law to make the payment and, by way of effecting recovery of any amount remaining payable under the Act from the very same person, that Section 245 vests authority to adjust the refund against any sum remaining payable. Therefore, Section 245 is, essentially, intended for the purpose of enabling extinguishment of the right to the refund on the basis of adjusting the refund against the sum remaining payable from the same person. Quite clearly, the purport of Section 245 is different from Section 241, which, as we have explained, is intended to put things in a state of suspension in the contingencies provided therein, subject to the further superadded condition that the authority must take the view that, if the refund is not withheld, it will adversely affect the interest of Revenue. We do not see any scope for reading into Section 245 the conditions, which would have been germane under Section 241.

29. We must, further, examine what is the meaning of the words “in lieu of” found in Section 49E of the earlier enactment and also in Section 245 of the Act. Does Section 245 provide for a two-way traffic? In other words, does it enable the assessee to demand a set off of the refund due

against any amount payable by him? This question is no longer *res integra* and it is profitable that we advert to some of the case law in this regard. We may, however, begin by noting the following commentary in the work *The Law and Practice of Income Tax* by Kanga, Palkhivala and Vyas, wherein we notice the following commentary:

“The provisions of this section are not merely for the benefit of the department but for the convenience of both department and the taxpayer. It would be the duty of the AO to allow a set-off under this section if the assessee claims it and proves that he is entitled to a refund.”

When an application is made to the AO under this section, he can decide whether a refund is due to the assessee, without there being a prior adjudication of the claim to refund. However, a set-off under this section cannot be demanded, if the claim to refund is itself barred.”

30. The question arose in **Hindustan Construction Co. Ltd. vs. V.S. Gaitonde, Income Tax Officer, Companies Circle I(3), Bombay & another**, reported in (1965) 56 ITR 241 (Supreme Court). Therein, an application for refund was made by the assessee, but beyond the time. Thereafter, the assessee was served with demand notices for certain assessment years. The assessee sought the benefit of set off under Section 49E of the refund, which was due according to it; but, which, according to the Department, had been rejected as being time-barred. The assessee took the contention that, though the words in Section 49E provide, *inter alia*, that “refund is found to be due to any person”, it does not require any prior adjudication to enable a person to claim a set off. It is, thereafter, that the court proceeded to discuss the effect of the words in the statute and it concluded as follows:

“The question then arises as to whether there should be a prior adjudication existing before a set-off can be allowed under section 49E, and whether there is any other condition which is necessary to be fulfilled before the section becomes applicable. We are of the opinion that it is not necessary that there should be a prior adjudication before a claim can be allowed under section 49E. There is nothing to debar the Income-tax Officer from determining the question whether a refund is due or not when an application is made to him under section 49E. The words "is found" do not

necessarily lead to the conclusion that there must be a prior adjudication. But this is not enough to sustain the claim of the appellant. It must still show that a refund is due to it. The words "found to be due" in section 49E may possibly cover a case where the claim to refund has been held barred under rule 5 of the Indian States Rules but that this is not the correct meaning is made clear by the expression "in lieu of payment". This expression, according to us, connotes that payment is outstanding, i.e., that there is subsisting obligation on the Income-tax Officer to pay. If a claim to refund is barred by a final order, it cannot be said that there is a subsisting obligation to make a payment. The expression "in lieu of" was construed in Stubbs v. Director of Public Prosecutions, (1890) 24 QBD 577. It was held there that where a liability has to be discharged by A in lieu of B, there must be a binding obligation on B to do it before A can be charged with it. In our opinion, there must be a subsisting obligation to make the payment of refund before a person is entitled to claim a set off under S. 49E. In this case, in view of the orders of the Commissioner and the Central Board of Revenue mentioned above there was no subsisting obligation to pay, and, therefore, the claim of the appellant must fail."

The position at law under Section 245 of the Act cannot be different, as, when the Legislature repeats the same words, which have been interpreted by the court, the Legislature must be deemed to have accepted the interpretation placed by the court.

31. **N.C. Mukherjee & Co. vs. Union of India & another**, reported in (1968) 68 ITR 500 (SC) was a case, where the court directed to set off the amounts due from the assessee as against the refund due, which had not been determined for a long period of time. Let us take certain concrete examples. Assuming for a moment, there is a refund falling due by virtue of an order within the meaning of Section 240 of the Act and, subsequently, an assessment is completed against the very same assessee. Let us further proceed on the basis that the assessee accepts the assessment and does not appeal the same. He, instead, requests that the refund due to him may be adjusted against the amount payable by him. Will it be open to the officer to deny the benefit of Section 245? Will it remain a matter of discretion? We would think that, in such circumstances, it would not only be a power, but would be a power

coupled with a duty, as Section 245 is intended to benefit both, the Revenue and the assessee.

32. Likewise, let us take a situation, where, again, a refund is due for a certain year. An assessment order is passed. The matter, in the meantime, received the attention of the jurisdictional court. The assessee still prefers an appeal. In the meantime, he does not obtain an order of stay. The officer, who resorts to Section 245, forms a belief honestly, which means after considering all relevant aspects, that the appeal of the assessee before the appellate commissioner is entirely merit-less. Should the Revenue be saddled with the liability of paying the amount by way of refund and put off the recovery of the amount in regard to which there is no stay obtained or can the Revenue not adjust the refund against the amount becoming payable under the order of assessment?

33. There is one more aspect, which is relevant. Governments cannot run except with funds. Achievement of various targets, ambitiously proclaimed, flounders in the face of paucity of funds. Collection of revenue due to the Government becomes its imperative duty, inasmuch as, it sub serves the larger public good of arming the Government with the requisite funds to carry out various welfare schemes, apart from meeting its ever growing expenditure. Therefore, in situations where the matter is without much dispute, there cannot be anything wrong in resort being made to Section 245. By doing so, the Government would be freed from the situation of depriving itself of the funds, which it has in its hands, on the basis of the payment towards the refund, where the assessee, himself, owes money to the Government.

34. There may, however, be situations also, where the matter is seriously contested by the assessee. The assessee pursues the matter before the higher forum and, undoubtedly, he may obtain an order of stay, in which case, of course, there cannot be any scope for invoking the power to adjust the refund. We must keep in our minds that the effect of an adjustment under Section 245 is the extinguishment of the

duty to refund the amount and the loss of the right of the assessee to refund. Therefore, when the assessment order, itself, is stayed, it could not then be said truly that the amount remains payable within the meaning of Section 245.

**Effect of the words “after giving prior intimation in writing of the proposal to adjust the refund”:-**

35. Mr. H.M. Bhatia, learned counsel for the appellants would submit that, in the letter (Annexure No. 5), actually, there was compliance of Section 245. Mr. H.M. Bhatia would, in fact, submit that the statement in the letter (Annexure No. 5) was in compliance with Section 245 and a response from the assessee was awaited; but, instead, the assessee rushed to the court. What is stated in Annexure No. 5 is that the refund is being adjusted. No doubt, in the cases, which we have adverted to at the instance of the assessee, the words, which have been used, would suggest that adjustment is made and the intimation adverts only to the fait accompli of the adjustment having been made and, therefore, it was held that it would amount to a simultaneous intimation and not prior intimation, as was required by law.

36. This brings up the question as to what really is the purpose of incorporating the words in Section 245, which words were not there in Section 49E, the previous version of the provision. Does it entail the obligation to comply with the principles of natural justice?

37. A learned Judge of the Madras High Court in **Sabeta Detergents Ltd. vs. Commissioner of Income Tax**, reported in (2001) 248 ITR 385, after adverting to the decision of the Delhi High Court in Vijay Kumar Bhati vs. Commissioner of Income Tax & another, reported in (1994) 205 ITR 110, which we have already adverted to; the decision of the Bombay High Court in Suresh B. Jain vs. A.N. Shaikh, reported in (1987) 165 ITR 151; and the decision of the Calcutta High Court in Bank of Tokyo

Mitsubishi Ltd. vs. Commissioner of Income Tax, reported in (1999) 240 ITR 331, held, *inter alia*, as follows:

“There is nothing in section 245 of the Income-tax Act, 1961, to warrant the conclusion that the task of adjusting the refund towards the arrears of tax payable by the assessee is a quasi-judicial proceeding. Section 245 of the Act in terms does not require any show-cause notice being given, calling upon the assessee to explain as to why the adjustment should not be made nor does it contemplate any hearing. All that section 245 of the Act requires the authorities to do is to make a readjustment “after giving an intimation in writing to such person of the action proposed to be taken” under that section. The authorities are not required to go beyond what the section itself requires them to do.”

38. We may also notice the recent judgment of the Bombay High Court in **Hindustan Unilever Limited vs. Deputy Commissioner of Income Tax-1(1) & others**, reported in (2015) 279 CTR (Bom) 71. It was held in paragraph 15 as follows:

“15. In view of the above, as held by this Court in A.H. Shaikh (supra) the giving of prior intimation under Section 245 of the Act is mandatory. The purpose being to enable the party to point out that there are factual errors or some further developments, if any, for example a stay of the demand, Supreme Court decision covering the demand which is still a subject matter of a pending appeal etc which would warrant not adjusting the refund against the pending demand. Thus when a party does raise such issues in response to a prior intimation, the officer of the revenue exercising powers under Section 245 of the Act must apply his mind to it and must record reason why the objection is not sustainable and also communicate it to the party. This before or at the time of adjusting the refund. This alone would ensure that that the power of adjustment under Section 245 of the Act is not exercised arbitrarily. Such a procedure would cause no prejudice to the revenue as the occasion to grant the refund would not arise till the objection to the intimation is disposed of. Of course the objections should be disposed of expeditiously as undue delay in granting of refund would cause prejudice to the party entitled to the refund.”

In fact, Mr. H.M. Bhatia, learned counsel for the appellants, would take the stand that the adjustment had not taken place by virtue of the notice (Annexure No. 5); but, in fact, the Revenue was awaiting a response and he asked us to take notice of the words “is being adjusted”.

As far as this case is concerned, we are overtaken by the subsequent development in the form of order dated 03.03.2015 passed by the appellate authority canceling the assessment itself. The question, therefore, may be academic; but, in view of the course we intend to adopt in this case, it is necessary to lay down the true purport of the words in question. A quasi-judicial authority is obliged to comply with the principles of natural justice. Rights cannot be adjudicated without opportunity of either making a representation or, if the situation so warrants, an opportunity of personal hearing. Even if the order is an administrative order, as long as the administrative order has the effect of affecting legal rights of parties, the authority is not immune from the operation of the principles of natural justice. These principles are elementary by now and we do not wish to burden the judgment with case law in support of this proposition. When the competent authority, mentioned in Section 245, decides not to pay the amount due by way of refund and seeks to invoke Section 245 and set off the amount against any amount remaining payable, it cannot be said that it does not affect the right of the party. In the first place, when the power is invoked, the right of the concerned party to get the amount by way of refund will stand extinguished. The very words in Section 245 indicate that an amount must be due by way of refund. Therefore, there is a right with the party to claim the amount as such. Secondly, as noted in the decision of the Bombay High Court in *Hindustan Unilever Limited vs. Deputy Commissioner of Income Tax-1(1) & others (supra)*, there could be areas of genuine dispute such as factual disputes, which may strike at the very root of the action proposed under Section 245. Thirdly, it may be open to the assessee to point out that the assessee has pursued the matter in appeal and, in fact, obtained interim order of stay, which may not be even known to the competent authority acting under Section 245. The assessee may even bring to the notice of the authority any recent pronouncement of a binding superior court, which will have the effect of rendering the assessment completely vulnerable in law and in a matter where he is pursuing the statutory remedies within the time. He may point out that, though an

order of stay was not granted by the appellate authority, it is not so granted on the basis that the appeal, itself, will be heard on a very near date. When there is no interim order obtained, then, certainly, in terms of the assessment order passed, the amount, as per law, when it falls due, will become payable and, therefore, legally, there cannot be any illegality as such in the amount being adjusted. But, even there, the authority would stay its hands on various relevant considerations. It may include the consideration that an identical issue, as raised in the appeal, has already been answered by the higher forum provided under the Act. The order, under which the amount has become payable and remains payable, may be shown to be palpably unsustainable as, for instance, where the assessment was done in naked violation of the principles of natural justice. Benefits do flow from compliance with the principles of natural justice, as they tend to advance the cause of justice. They would make the proceedings of the authority fair. Therefore, we would think that, in keeping with the object of the provision and the change in the law brought about by the Parliament, the intention was clearly not to reduce it to an empty formality; but, it was intended that a bare opportunity of hearing against the proposed refund being set off must be given to the party. It is, certainly, not sufficient to merely send a communication simultaneously. This flows from the words, which are specifically used, namely, proposal to set off. No doubt, vexed question relating to the legality of the assessment, under which the amount has fallen due, cannot be raked -up before the authority. Such, in our view, would be the purport of the words used.

39. However, the fact remains that, as far as Annexure No. 5 notice is concerned, the adjustment of the refund was sought to be done with reference to the assessment made for the year 2014-2015 and that was the subject matter of the writ petition. But, there is no dispute that, much prior to the judgment delivered before the learned Single Judge, assessment was completed against respondent No. 1 / writ petitioner in a sum of over ₹ 105 crores. This fact was, admittedly, not brought to the notice of the learned Single Judge either by the writ petitioner or by the

Revenue. The learned counsel for the Revenue would allege concealment of material fact. This is disputed by the learned Senior Counsel for the writ petitioner. He would contend that, in fact, it is not even a material fact. What is material is the principle involved and the act of the Revenue in passing assessment orders, which are in the teeth of the order of the Income Tax Appellate Tribunal, wherein similar issues arose, clearly betrays non-adherence to the principle of discipline by the Assessing Officer, in the sense, the principle was settled by the Tribunal and there being no difference in the facts, as the issue related to non-applicability of Section 194A to the deposit and, every year, the issue will remain the same and, therefore, there cannot be a resort to Section 245.

40. We must remind ourselves that there is an assessment order passed for the Assessment Year 2015-2016. That assessment order is not challenged before us. It is not even before us. In fact, it is not the subject matter of the writ petition itself. The learned Single Judge was also not made aware of the said assessment. The learned Single Judge, in fact, proceeded mainly on the basis that, in regard to the impugned order, where the refund was sought to be adjusted against the amount assessed for the year 2014-2015, as the assessment itself was cancelled by the appellate authority, nothing further remained in the way of the grant of refund. No doubt, the learned counsel for the Revenue did make a statement that, if it is found that the assessment for 2014-2015 had been cancelled, the amount would be paid. In that sense, under normal circumstances, in the light of the fact that it is admitted that the assessment for 2014-2015 was, indeed, cancelled by proceeding dated 03.03.2015, as contended by the learned Senior Counsel for the writ petitioner and in view of the statement made by the learned counsel for the Revenue / appellants, we would have had no occasion to entertain the appeal.

41. But, in this case, we are faced with facts, which are not in dispute, which took place, in fact, prior to the pronouncement of the judgment. The judgment was pronounced in August, 2015; whereas, the assessment

order for the year 2015-2016 was passed on 12.05.2015. In the light of the said assessment order, though we did toy with the idea of relegating the appellants to the remedy of a review, as the learned Single Judge did not have occasion to consider the effect of this development; we felt that it will be in the interest of parties that we took note of the development and dealt with the arguments of the parties in the appeal.

42. Even according to respondent No. 1 / writ petitioner, Section 245 vests a discretion. Section 245 uses the word “may”. This is a case, which attracts Section 240 of the Act, as the refund became due by virtue of the order passed in assessee’s appeal for three years dated 18.07.2014. Writ petitioner has also moved an application for refund, as already noted. For the years 2010-2011, 2011-2012 & 2012-2013, as against the order of the Income Tax Appellate Tribunal dated 18.07.2014, it is pointed out by the appellants that appeals are pending before this Court and, for the year 2011-2012, it is pointed out that 50 per cent of the demand has already been realised by attachment under Section 226(3) of the Act by order dated 23.01.2014. The order of the Income Tax Appellate Tribunal has not attained finality at the hands of the jurisdictional High Court even for a single year, unlike the facts in *Glaxo Smith Kline Asia P. Ltd. (supra)*. But, at the same time, the order of the Income Tax Appellate Tribunal is rendered in favour of the assessee, in the sense that it was held that Section 194A does not apply to the deposit in question. No stay is obtained by the appellants. As regards 2013-2014, in respect of which an amount of nearly ₹ 44 crores is attached and which is the subject matter of the refund claimed, a second appeal is pending before the Tribunal.

43. Section 245 of the Act, undoubtedly, vests a discretion with the authorities concerned, except in those circumstances, where the discretion would be one, where there is a power coupled with a duty. We have pointed out the circumstances, in which, the assessee could, in fact, demand, as a matter of right, to adjust the refund against any assessment, which he accepts; and, if the refund is not barred, as was held by the Hon’ble Apex Court in **Hindustan Construction Co. Ltd. vs. V.S.**

**Gaitonde, Income Tax Officer, Companies Circle I(3), Bombay & another**, reported in (1965) 56 ITR 241, the Department may not be justified in refusing to accede to the request. We cannot possibly pronounce on the legality of the assessment for the year 2015-2016. We cannot even, in any manner, pronounce on the question whether the assessment is to be sustained or not. In fact, an appeal is pending consideration before the appellate Assistant Commissioner. There is no order of stay obtained by the writ petitioner. But, at the same time, there is a clear case that the issue at hand is one squarely covered, as things stand, at the hands of the appellate Tribunal in favour of the assessee and there is absolutely no difference in facts. As already noted, the effect of set off of refund under Section 245 against the sum remaining payable would be the extinguishment of the right to refund. It is also clear that an order under Section 245 would operate as a method of recovery of the tax or other amount due and remaining payable under the Act. The request of the appellants is that the officer concerned will decide the application for demand of refund bearing in mind Section 245 and also taking into consideration the amount assessed for the year 2015-2016 by order dated 12.05.2015.

44. In the circumstances of the case, we are inclined to accept the request, namely, that a decision will be taken by the authority regarding the refund in accordance with law, which would include the right to consider whether, under Section 245 of the Act, a case is made out for adjustment of the refund against the demand for the year 2015-2016. We have adverted to the various principles and situations, in which Section 245 can operate. It may not be exhaustive. The officer is duty bound not to invoke Section 245 without application of mind. Every repository of discretionary power would be obliged to act, in the first place, being guided by relevant considerations and ignoring irrelevant considerations. The relevant considerations, in this case, would be the fact that there is no stay obtained by the assessee in the appeal against the assessment for the year 2015-2016; but, equally, the authority would be bound to consider the fact that, for the Assessment Years 2010-2011, 2011-2012 and 2012-

2013, the Tribunal has ruled in favour of the assessee in regard to the applicability of the issue. If it is found that the issue considered by the Tribunal for the years 2010-2011, 2011-2012 and 2012-2013 is absolutely the same, which fell for consideration by the Assessing Officer for the year 2015-2016, particularly when it is not stayed by the High Court in the appeal pending against the same, it may amount to abuse of the discretionary power to satisfy the demand under the assessment order, which, though not stayed, has not been accepted by the assessee, but, instead, challenged before the competent forum. It is, undoubtedly, true that the amount due for the Assessment Year 2015-2016 is one, which is remaining payable as it still remains unsatisfied. As far as the right to refund is concerned, it is also not questioned by the appellants. The only question is, whether, in the circumstances obtaining as a whole, set off should be ordered. We have given sufficient indications, which should guide the authority. It is for the authority concerned to look into all these aspects and, firstly, decide whether it should invoke the power under Section 245 of the Act. If it is of the view that the power should be invoked; then alone, in view of the requirement of giving prior intimation, which we have held entails compliance with natural justice, appellants must issue a notice indicating the proposal to invoke Section 245. A decision should be taken within a period of 10 days from today and, if the competent authority, actually, decides to invoke Section 245, then, notice should be issued to the writ petitioner and, after giving an opportunity of being heard to the assessee, a decision shall be taken in accordance with law. If the authority finds, in the facts of this case, that no case is made out for invoking Section 245 on the basis of the assessment completed in 2015-2016 within a period of 10 days from today, then, the amount due by way of refund, along with due interest, shall be paid to the writ petitioner at the earliest. If, on the other hand, it decides to invoke Section 245, then the proceedings must be completed within a period of two weeks from the date of affording an opportunity to the writ petitioner.

45. The judgment of the learned Single Judge will stand modified as above and action will be taken as per our judgment. The appeal is allowed as above.

**(V.K. Bist, J.)**

**(K.M. Joseph, C. J.)**

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