

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 16.10.2014

W.P.(C) 6172/2014 & CM 14938/2014

THE ORIENTAL INSURANCE CO. LTD.

..... Petitioner

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr M.S.Syali, Sr. Advocate with Mr Tarandeep Singh and Mr Mayank
Nagi.

For the Respondents : Ms Suruchi Aggarwal.

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. In this writ petition the following prayers have been made:-

- “a) A Writ of Certiorari or Writ, order or direction in the nature of Certiorari, or any other appropriate Writ, order of direction under Article 226/227 of the Constitution of India quashing adjustment of refund of Rs 89,16,28,190/- pertaining to AY 2013-14 against outstanding penalty demand of AY 2005-06 and directing the Respondents to grant the said refund to Petitioner.

- b) A Writ of Mandamus or Writ, order or direction in the nature of Mandamus, or any other appropriate Writ, order of direction under Article 226/227 of the Constitution of India directing the Respondents to dispose off the petition u/s 220(6) filed by the Petitioner on 28.04.2014 by passing a speaking order either accepting / rejecting the prayers made therein after granting a proper opportunity of being heard to the Petitioner.”

2. Insofar as prayer (b) is concerned the petition under Section 220(6) of the Income Tax Act, 1961 has already been decided by a speaking order dated 23.09.2014. Mr Syali, the learned senior counsel appearing for the petitioner, states that in view of this development, prayer (b) does not survive. He will take his independent remedy under Section 264 of the said Act. With regard to prayer (a), he submits that the adjustment was made without giving an opportunity to the assessee as is the requirement under Section 245 of the said Act as interpreted by this court in **Glaxo Smith Kline Asia (P.) Ltd v. CIT: 290 ITR 35 (Del)**. The same sentiment is reiterated in **Genpact India v. ACIT: 205 Taxman 51 (Del)** and **Court on its Own Motion v. CIT: 352 ITR 273 (Del)**.

3. In ***Glaxo Smith Kline Asia (P.) Ltd (supra)*** a Division Bench of this court held as under:-

“25. In our view, the power under section 245 of the Act, is a discretionary power given to each of the tax officers in

the higher echelons to “set off the amount to be refunded or any part of that amount against the same, if any, remaining payable under this Act by the person to whom the refund is due.” That this power is discretionary and not mandatory is indicated by the word ‘may’. Secondly, the set off is in lieu of payment of refund. Thirdly, before invoking the power, the officer is expected to give an intimation in writing to the assessee to whom the refund is due informing him of the action proposed to be taken under this section.

26. xxxx xxxx xxxx xxxx

27. As already noticed, this discretionary power has to be exercised after giving an opportunity to the assessee of being heard preceded by an intimation to the assessee in writing of the action proposed to be taken under section 245. A further implicit requirement is that the revenue will have to be satisfied that the assessee will not be in a position to satisfy the demand of tax and that but for the set off, the outstanding tax amount cannot be recovered at all.”

4. In ***Genpact India (supra)*** this court held as under:-

“3. It is not in dispute that no such notice under Section 245 of the Act was issued. It was also conceded by learned counsel for the respondent at the time of hearing that the procedure prescribed under Section 245 of the Act, namely, advance intimation and opportunity of hearing, is mandatory. It, therefore, clearly follows that the impugned adjustment was made in violation of the provisions of Section 245 of the Act and this adjustment is liable to be quashed on this ground itself.”

5. In ***Court on its Own Motion (supra)*** this court held asunder:-

“20.....In one of the paragraphs of the counter affidavit, the respondents have stated as under:

“Accordingly, it was again reiterated that the provisions of section 245 of the I.T. Act, 1961 must be followed and written intimation must be sent to the assessee before adjusting refund of the outstanding demand and any lapse

in this regard shall be viewed seriously. The CCsIT/DGsIT/CsIT were direct to ensure compliance of the aforesaid direction. Thus, enough safeguards have been provided not only in the I.T. Act, 1961 but also in the Instructions issued by the CBDT” (emphasis supplied)

21. The aforesaid statement reflects the correct position in law as Section 245 mandates and envisages prior intimation to the assessee so that he/she can respond before any adjustment of refund is made towards the demand relating to any other assessment year. Thus, an opportunity of response/reply should be given and after considering the stand and plea of the assessee, justified and valid order or direction for adjustment of refund can be made. The Section postulates two stage action; prior intimation and then subsequent action when warranted and necessary for adjustments of the refund towards arrears.”

6. It is evident from the record of the case that on the same date on which the intimation was issued the adjustment was made simultaneously. This is contrary to the spirit of the provisions of Section 245 as interpreted by this court in the above decisions inasmuch as no opportunity of hearing was given to the assessee before the adjustment was made. Therefore, on this ground alone the adjustment order would have to be quashed. It is so directed. The writ petition is allowed to the aforesaid extent.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

OCTOBER 16, 2014*/mk

* Corrected vide order dated 07.11.2014 passed in WP(C) 6172/2014.