

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.766 OF 2020

KEM Hospital and Seth G. S. Medical College Employees'
Co-operative Credit Society Ltd. ... Petitioner
Vs.
Income Tax Officer - 20(3)(4) and others ... Respondents

Mr. Kumar U. Kale a/w. Mr. D. H. Jain for Petitioner.

Mr. Sham Walve a/w. Mr. Prithvi Chatterji for Respondents.

**CORAM : UJJAL BHUYAN,
MILIND N. JADHAV, JJ.**

DATE : MARCH 13, 2020

P.C. :

Heard Mr. Kale, learned counsel for the petitioner and Mr. Walve, learned standing counsel Revenue for the respondents.

2. This petition has been filed under Article 226 of the Constitution of India assailing the legality and correctness of order dated 03.02.2020 passed by respondent No.1 rejecting the application of the petitioner for stay of demand as well as order dated 18.02.2020 passed by respondent No.2 similarly rejecting the prayer for stay of demand made by the petitioner. Further prayer made is to stay the demand till disposal of the appeal preferred by the petitioner before the Commissioner of Income Tax (Appeals) against the order of assessment.

3. Be it stated that petitioner i.e., KEM Hospital and Seth GSM College Employees Co-operative Credit Society Limited is an association of persons running a co-operative credit society and providing credit to its members. For the assessment year 2017-18, the assessing officer i.e., Income Tax Officer-20 (3)(4), Mumbai (respondent No.1) passed the assessment order dated 20.11.2019 holding that

petitioner is a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank. Treating the petitioner as a co-operative bank, deduction claimed by the petitioner under Section 80 P(2)(a)(i) of the Income Tax Act, 1961 (briefly 'the Act' hereinafter) was declined by the assessing officer and the amount covered by the said claim i.e., Rs.2,96,10,186.00 was added to the total income of the assessee.

4. Following passing of the assessment order, respondent No.1 issued notice of demand to the petitioner under Section 156 of the Act on the same day.

5. Aggrieved by the order of assessment, petitioner preferred appeal before the Commissioner of Income Tax (Appeals)-32, Mumbai, also referred to as the 'first appellate authority', on 14.12.2019 for which 272033491141219 was provided as the acknowledgment number.

6. While the appeal of the petitioner is pending, petitioner submitted an application before respondent No.1 on 24.01.2020 with the prayer that the entire demand be stayed / kept in abeyance till disposal of the appeal by the first appellate authority. Contention of the petitioner was that in earlier years, similar orders passed by the assessing officer were interfered with by the first appellate authority holding the petitioner to be a co-operative society and allowing deduction under Section 80-P as claimed by the petitioner. Such orders of the first appellate authority were affirmed by the Income Tax Appellate Tribunal. Therefore, it was contended that there was no reason for the assessing officer to take a different view in the assessment order under consideration ignoring the binding decision of the higher authorities for the earlier years. Accordingly, prayer for stay of the entire disputed demand was made.

7. Respondent No.1 by his order dated 03.02.2020 rejected the prayer of the petitioner by holding that mere filing of an appeal is not a

sufficient ground for stay of the entire demand. Referring to Circular of the Central Board of Direct Taxes (CBDT) dated 29.02.2016, petitioner was asked to pay 20% of the demand and on such payment, it was mentioned that the demand would be stayed.

8. Aggrieved by such rejection of the prayer for stay, petitioner submitted another application for stay of demand dated 07.02.2010 before the Principal Commissioner of Income Tax-20, Mumbai i.e., respondent No.2, highlighting the fact that in the case of the petitioner itself the higher authorities had held the petitioner to be a co-operative society for the purpose of Section 80P of the Act. Therefore, there was no reason for the assessing officer to take a different view in the present assessment year.

9. By a cryptic order dated 18.02.2020, respondent No.2 rejected the stay application of the petitioner while directing the petitioner to deposit 20% of the demand in which event the balance demand would be stayed till decision of appeal by the first appellate authority.

10. In the course of the hearing, learned counsel for the petitioner has placed before us a copy of CBDT Circular No.530 dated 06.03.1989 whereby it was clarified that when the demand in dispute relates to an issue that has been decided in favour of the assessee in an earlier year by the appellate authority or Court in assessee's own case, the assessee would not be treated as an assessee in default in respect of the amount attributable to such disputed point. This CBDT Circular was examined by this Court in *ICICI Prudential Life Insurance Co. Ltd. Vs. Commissioner of Income Tax*, **226 Taxman 74** wherein this Court referred to the decision of the Supreme Court in *Union of India Vs. Kamlakshi Finance Corporation Limited*, **55 Excise Law Times 483** wherein Supreme Court emphasized that in disposing of the quasi-judicial issues, revenue officers are bound by the decisions of the appellate authorities. Judicial discipline requires that the order 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', which itself is an objectionable phrase, can be no ground for not allowing the claim unless the decision of the appellate authority has been suspended by a competent Court. Supreme Court emphasized that if such healthy rule of judicial discipline is not followed, it would result in undue harassment to the assesseees and chaos in the administration of tax laws.

11. On the other hand Mr. Walve, learned standing counsel submits that respondent Nos.1 and 2 were justified in insisting upon payment of 20% of the tax demand which is the bare minimum for staying the entire demand. Since the appeal of the petitioner is pending before the first appellate authority, hearing of the same may be expedited.

12. Submissions made have been considered.

13. After hearing learned counsel for the parties and on due consideration, we feel that the approach taken by both respondent Nos.1 and 2 in not accepting the stay prayer of the petitioner and instead directing the petitioner to pay 20% of the demand is not justified. The two authorities did not address the issues raised by the petitioner, namely, that in his own case for earlier assessment years against orders passed by the assessing officer on the same issue, the first appellate authority had held it to be a co-operative society and entitled to deduction under Section 80P(2) of the Act which was confirmed by the Tribunal. It was not the case of the petitioner that only because it has filed an appeal before the first appellate authority, the entire demand should be stayed.

14. We have also perused the CBDT Circular No.530 dated 06.03.1989 and considered the decision of this Court in **ICICI Prudential Life Insurance Co. Ltd.** (*supra*).

15. On due consideration, we are of the view that the impugned demand notice dated 20.11.2019 issued by respondent No.1 for the assessment year 2017-18 is liable to be stayed till disposal of the appeal by the first appellate authority. We also direct that the first appellate authority may expedite hearing of the appeal filed by the petitioner on 14.12.2019.

16. Writ petition is accordingly allowed but there shall be no order as to costs.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

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