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

+ **W.P.(C) 14937/2021**

M/S ESSJAY ERICSSON PRIVATE LIMITED Petitioner

Through **Mr.Yuvraj Singh with Mr.Chetan Kumar Shukla, Advocates.**

versus

COMMISSIONER OF INCOME TAX, NEW DELHI & ORS.

..... Respondents

Through **Mr.Zoheb Hossain, standing counsel for the Revenue.**

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Date of Decision: 24th December, 2021

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVING CHAWLA

JUDGMENT

MANMOHAN, J (Oral):

C.M.No.47165/2021

Exemption allowed, subject to all just exceptions.

Accordingly, the application stands disposed of.

W.P.(C) 14937/2021 & C.M.No.47164/2021

1. Present writ petition has been filed seeking refund of Rs.6,05,46,907/- which was recovered in excess of 20% of the total disputed tax demand for the Assessment Year 2016-17 against the refunds due for the Assessments Years 2018-19 and 2020-2021 along with statutory interest. Petitioner also seeks directions to the Respondents to hear and dispose of the appeal filed against the order dated 07th December, 2019 under Section 143(3) of the

Income Tax Act, 1961 [for short 'the Act'] that is currently pending.

2. Learned counsel for the Petitioner states that under Section 220(6) of the Act, the Assessing Officer has been conferred with the power to grant stay on recovery of outstanding tax demand subject to fulfillment of appropriate conditions. He states that in order to provide guidance and lay down principles regarding stay of demand, the Central Board of Direct Taxes has issued various Circulars/ Notification from time to time including Office Memorandums dated 29th February, 2016 and 31st July, 2017, prescribing that in cases where an assessee challenges the additions/ disallowances made in the assessment order by way of an appeal before the first appellate authority, i.e., CIT(A), and during pendency thereof deposits 20% of the total disputed outstanding tax demand, the assessing officer is empowered to grant stay of recovery of the balance outstanding demand.

3. Learned counsel for the Petitioner submits that upon payment/recovery of the standard rate of 20% of the disputed outstanding tax demand, the assessing officer is mandated to grant stay on recovery of the balance disputed outstanding tax demand till disposal of first appeal of the assessee, unless the case of the assessee falls in the category mentioned in paragraph (B) of the Office Memorandums dated 29th February, 2016 and 31st July, 2017. He states that the Respondents in violation of the provisions of the Office Memorandums recovered the disputed outstanding tax demand in excess of 20% by way of adjustment of refunds due for the subsequent assessment years.

4. He states that while 20% of the disputed amount for the Assessment Year 2016-17 was Rs.2,00,93,653/- (20% of Rs. 10,04,68,268/-), the Respondents adjusted Rs.8,06,40,561/- being 80.26% of the demand and,

that too, without deciding Petitioner's application for stay.

5. Learned counsel for the Petitioner states that the Petitioner had preferred W.P(C) No.1449/2020 before this Court wherein the Petitioner had challenged the assessment proceedings, attachment of bank account and recovery of Rs.2,13,06,741/-, which was 21.21% of the disputed demand. He states that this Court vide order dated 07th February, 2020 had allowed the Petitioner to file a stay application before the CIT(A) and directions were given to the CIT(A) to decide the stay application by passing a speaking order within two weeks. However, he states that despite directions of this Court and several requests of the Petitioner, the stay application dated 18th February, 2020 of the Petitioner has not been decided till date.

6. Issue notice. Mr. Zoheb Hossain, learned standing counsel accepts notice on behalf of the Respondents. He states that in the present case, the Petitioner had not willfully deposited the 20% of the tax demand.

7. Having heard learned counsel for the parties, this Court finds that the Respondents had recovered 21.21% of the disputed demand before the order dated 07th February, 2020 was passed by the learned predecessor Division Bench, which had also directed the CIT(A) to decide the Petitioner's stay application. However, the said stay application has not been decided till date.

8. This Court is of the view that the issue raised in the present writ petition is no longer *res integra* as in ***Skyline Engineering Contracts (India) Pvt. Ltd. v. Deputy Commissioner of Income Tax Circle 22(2), W.P.(C) 6172/2021*** and other connected matters, this Court in similar facts has held as under:-

*“9. Having heard learned counsel for the parties, this Court is of the view that the Government is bound to follow the rules and standards they themselves had set on pain of their action being invalidated. [See: **Amarjit Singh Ahluwalia vs. State of Punjab & Ors. 1975 (3) SCR 82 and Ramana Dayaram Shetty vs. International Airport Authority of India & Ors. 1979 SCR (3) 1014**].*

10. This Court is also of the view that the office memorandum dated 29th February, 2016 read with office memorandum dated 25th August, 2017 stipulate that the Assessing Officer shall normally grant stay of demand till disposal of the first appeal on payment of 20% of the disputed demand. In the event, the Assessing Officer is of the view that the payment of a lump sum amount higher than 20% is warranted, then the Assessing Officer will have to give reasons to show that the case falls in para 4(B) of the office memorandum dated 29th February, 2016.

11. This Court finds that the order under Section 245 of the Act for adjustments of refunds as well as the order on stay of demand under Section 220(6) of the Act do not give any special/particular reason as to why any amount in excess of 20% of the outstanding demand should be recovered from the petitioner-assessee at this stage in accordance with paragraph 4(B) of the office memorandum dated 29th February, 2016. Consequently, this Court is of the view that the respondent is entitled to seek pre-deposit of only 20% of the disputed demand during the pendency of the appeal in accordance with paragraph 4(A) of the office memorandum dated 29th February, 2016, as amended by the office memorandum dated 25th August, 2017.

12. Consequently, this Court is of the view that the respondents are entitled to seek pre-deposit of only 20% of the disputed demand during the pendency of the appeals in accordance with paragraph 4(A) of the office memorandum dated 29th February, 2016, as amended by the office

memorandum dated 25th August, 2017.

13. Accordingly, the respondent no.1 is directed to refund the amount adjusted in excess of 20% of the disputed demand for the Assessment Year 2017-18, within four weeks.....”

9. Keeping in view the aforesaid mandate of law as well as non-compliance of order dated 07th February, 2020 and the fact that the refunds have been adjusted against the outstanding tax demand by the Authority without following the procedure prescribed under Section 245 of the Act, inasmuch as no notice or opportunity of pre-decisional hearing had been provided to the Petitioner prior to such adjustment of refund in excess of 20%, this Court is of the opinion that the Petitioner is entitled to refund of adjustments made in excess of 20% of the disputed tax demands. (See: *Glaxo Smith Kline Asia Pvt. Ltd. vs. The Commissioner of Income Tax & Ors., 2007 (94) DRJ 681(DB)* and *The Oriental Insurance Co. Ltd. vs. Deputy Commissioner of Income Tax & Anr., 2014 (10) TMI 746.*

10. Consequently, this Court directs the Respondents to verify the facts stated in the writ petition and if they find them to be true and correct then refund the amount adjusted in excess of 20% of the disputed tax demands for the Assessment Year 2016-17 to the Petitioner within six weeks. With the aforesaid directions, present writ petition and application stand disposed of.

MANMOHAN, J

DECEMBER 24, 2021/KA

NAVIN CHAWLA, J