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

+ W.P.(C) 4639/2022 & C.M.No.13945/2022

M/S TOSHIBA CORPORATION Petitioner

Through Mr.Deepak Chopra with Mr.Ankul
Goyal, Advocates.

versus

COMMISSIONER OF INCOME TAX (INTL. TAX) -3, NEW
DELHI AND ANR. Respondents

Through Mr.Ruchir Bhatia, Advocate.

% Date of Decision: 23rd March, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

MANMOHAN, J (Oral):

1. Present writ petition has been filed challenging the orders dated 14th March, 2022, 10th March, 2022, 11th February, 2022 and 28th January, 2022 directing the Petitioner to deposit twenty percent of outstanding demand. Petitioner also seeks stay of recovery proceedings arising out of the order dated 12th November, 2021 passed under Section 201(1)/201(1A) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') and notice of demand dated 12th November, 2021 issued under Section 156 of the Act.

2. Learned counsel for the petitioner states that in the Financial Year 2015-16, the Petitioner purchased 12,70,276 unlisted equity shares of UEM India Private Limited (Now known as Toshiba Water Solutions Private Limited) from non-residents (tax residents of USA) and deducted TDS @

10% as well as applicable surcharge and cess while remitting sale consideration of Rs.31,51,80,881/-. He states that proceedings were initiated under Section 201(1)/201(1A) of the Act against the Petitioner which culminated in passing the order dated 12th November, 2021 vide which the transaction of purchase of shares undertaken by the Petitioner was re-characterised as purchase of depreciable assets and short-term capital gain was computed, pursuant to which a demand of Rs.33,03,55,413/- was raised on the Petitioner.

3. Learned counsel for the Petitioner states that aggrieved by the order dated 12th November, 2021, the Petitioner filed an appeal before CIT(A) and also preferred an application before the Assessing Officer under Section 220(6) of the Act seeking a stay on recovery of demand raised pursuant to the impugned order. He states that the Assessing Officer vide the impugned order dated 28th January, 2022 directed the Petitioner to deposit twenty percent of the total tax demand in terms of CBDT Instruction No. 1914 as amended by Office Memorandum dated 29th February, 2016 and 31st July, 2017 without dealing with any of the submissions of the Petitioner.

4. He states that the Petitioner filed an application for review/stay before CIT in terms of the Office Memorandum dated 29th February, 2016 as modified by the Office Memorandum dated 31st July, 2017. However, the said application was rejected by Respondent no.1 vide order dated 11th February, 2022 stating that the “*application would not qualify for adjudication as a pre-payment of 20% of the disputed demand is necessary*”. He states that the petitioner on 21st February, 2022 made another request to respondent no.1 to decide the review application as per prescribed procedure. However, Respondent no.1 passed orders dated 10th March, 2022

and 14th March, 2022 directing the Petitioner to deposit twenty percent of the demand, without providing any reasons for the same.

5. Issue notice. Mr.Ruchir Bhatia, Advocate accepts notice on behalf of the Respondents. He states that the transaction, in question, is a colourable device to avoid payment of taxes. He further states that as far as direction to deposit twenty percent of the demand is concerned, the same is in accordance with the Office Memorandums dated 29th February, 2016 and 31st July, 2017.

6. Having heard learned counsel for the parties and having perused the two Office Memorandums, in question, this Court is of the view that the requirement of payment of twenty percent of disputed tax demand is not a pre-requisite for putting in abeyance recovery of demand pending first appeal in all cases. The said pre-condition of deposit of twenty percent of the demand can be relaxed in appropriate cases. Even the Office Memorandum dated 29th February, 2016 gives instances like where addition on the same issue has been deleted by the appellate authorities in earlier years or where the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee.

7. In fact the Supreme Court in the case of ***PCIT vs. M/s LG Electronics India Pvt. Ltd. 2018 SCC 447*** has held that tax authorities are eligible to grant stay on deposit of amounts lesser than twenty percent of the disputed demand in the facts and circumstances of a case. The relevant portion of the said judgment is reproduced hereunder:

‘Having heard Shri Vikramjit Banerjee, learned ASG appearing on behalf of the appellant and giving credence to the fact that he has argued before us that the administrative Circular will not operate as a fetter on the Commissioner since

it is a quasi-judicial authority, we only need to clarify that in all cases like the present, it will be open to the authorities, on the facts of individual case, to grant deposit orders of a lesser amount that 20%, pending appeal.'

8. In the present case, the impugned orders are non-reasoned orders. Neither the Assessing Officer nor the CIT have considered three basic principles i.e. the prima facie case, balance of convenience and irreparable injury while deciding the stay applications.

9. Consequently, the impugned orders and notices are set aside and the matter is remanded back to the Commissioner of Income Tax for fresh adjudication in the application for stay. However, before deciding the stay application, the Commissioner of Income Tax shall grant a personal hearing to the authorised representative of the Petitioner. For this purpose, list the matter before the Commissioner of Income Tax on 18th April, 2022. It is clarified that till the stay application filed by the petitioner is not decided, no coercive action shall be taken by the respondents against the Petitioner in pursuance to the demand arising out of the order dated 12th November, 2021.

10. With the aforesaid directions, the present writ petition stands disposed of.

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MANMOHAN, J

DINESH KUMAR SHARMA, J

MARCH 23, 2022
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