

Reserved on 12.10.2022
Delivered on 20.10.2022

Court No. - 10

Case :- WRIT TAX No. - 1307 of 2022

Petitioner :- ALM Industries Ltd.

Respondent :- Deputy Commissioner of Income Tax & 3 Others

Counsel for Petitioner :- Suyash Agarwal, Sr. Advocate

Counsel for Respondent :- Gaurav Mahajan, A.S.G.I., Anant Kumar Tiwari

Hon'ble Rohit Ranjan Agarwal, J.

1. Heard Sri Rakesh Ranjan Agarwal, learned Senior Advocate, assisted by Sri Suyash Agarwal, learned counsel for the petitioner and Sri Manu Ghildyal, learned counsel for the Income Tax Department.

2. This writ petition under Article 226 of the Constitution of India has been filed by the petitioner–Assessee challenging the order dated 14.09.2022 passed by Principal Commissioner of Income Tax, Dehradun requiring pre-deposit of 20% of outstanding tax payment of Rs.197,41,95,820/- for the assessment year 2016-17 and order dated 30.8.2022 passed by Deputy Commissioner of Income Tax, Circle-3(1)(1), Muzaffarnagar on the stay application of the Assessee–Petitioner filed against the demand dated 28.04.2022.

3. The facts, in nutshell, are that the petitioner–Assessee is a Company being engaged in the business of processing and export of frozen boneless buffalo meat to various countries. The dispute relates to assessment year 2016-17. A return of income tax was filed on 14.10.2016 declaring total income of Rs.6,53,84,790/-. The said return was processed and accepted under Section 143(1) of the Income Tax Act, 1961 (*hereinafter called as “Act of 1961”*). On 30.03.2021 a notice under Section 148 of Act of 1961 for reassessment was issued to which reply was filed by the petitioner. During pendency of the proceedings, the assessment proceedings were transferred to the National Faceless Assessment Centre (*hereinafter called as “NFAC”*). On 08.02.2022, a notice under Section 142(1) of the Act of 1961 was issued by NFAC and details of

purchases and records, maintained by the petitioner as per Rule 6DD of the Income Tax Rules, 1962 (*hereinafter called as “Rules of 1962”*), were sought to which reply was furnished on 09.03.2022 by the petitioner. Another notice was issued on 26.03.2022 asking for several details relating to cash purchases and disallowance under Section 40A(3) of the Act of 1961 read with Rule 6DD of Rules of 1962. The same was replied and a draft assessment was made proposing disallowance of Rs.331,27,16,435/- under Section 40A(3) of the Act of 1961 and a notice was issued on 27.03.2022 which was to be replied by 28.03.2022.

4. On 29.03.2022, assessment order was passed under Section 147 read with Section 144B of the Act of 1961 assessing total income of Assessee at Rs.337,81,01,225/- after repeating addition/disallowance. A demand of Rs.197,41,95,820/- was raised against the petitioner as the total income tax. A statutory appeal under Section 246A of the Act of 1961 read with Rule 45 of the Rules of 1962 was filed on 25.04.2022. On 28.04.2022, the petitioner filed a stay application before the Deputy Commissioner of Income Tax, Circle-3(1)(1), Muzaffarnagar. The said application for stay of demand was rejected on the ground that the Assessee Company has not made payment of 20% of the disputed demand as per the CBDT instruction No.1914 of 1996, which was amended vide office memorandum dated 29.02.2016 and further partial modification vide office instruction dated 31.07.2017.

5. Thereafter, the petitioner filed application before respondent No.2 i.e. Principal Commissioner of Income Tax, Dehradun on 05.09.2022 and the same was rejected on 14.09.2022 on the ground that liquidity position of the Assessee was strong enough to make payment of impugned tax demand at the rate of 20% of the outstanding demand. Hence the present writ petition.

6. Sri Rakesh Ranjan Agarwal, Senior Advocate, appearing for the petitioner submitted that the Assessee had filed appeal before

Commissioner of Income Tax (Appeals) on 25.04.2022 i.e. within a period of 30 days from the date of assessment. An application as per provision of Section 220(6) of the Act of 1961 was also filed within time, as such the Assessee cannot be treated to be “Assessee-in-default”. According to him, under the Act of 1961, there is no requirement for filing stay application. He next contended that cardinal principles for consideration of stay of demand is that before warranting for enforcement of payment/recovery of such high pitched demand, the authorities should see that, whether there is strong *prima facie* case of the Assessee; that the balance of convenience lies in favour of the Assessee; and, financial position of the Assessee.

7. According to senior advocate, the Deputy Commissioner of Income Tax while considering the stay application had only relied upon the instructions of CBDT of 2016, which was partially amended in 2017 and without recording any finding, had directed for deposit of 20% of the disputed demand. Similarly, the Principal Commissioner of Income Tax had only seen one side of the case and relying upon the total Receivables Trade receipt bills and cash in hand, found that the financial position of the petitioner was strong enough to make payment of 20% of the impugned tax demand. According to him, the Principal Commissioner of Income Tax had not seen the liabilities of the Company, which is quite huge to the tune of Rs.117 crores and the Principal Commissioner of Income Tax while deciding the stay application should have also considered the liability portion in its order. Reliance has been placed upon Rule 6DD(e) of the Rules of 1962, which provides that where the payment is made for the purchase of the produce of animal husbandry (including livestock, meat, hides and skins) or dairy or poultry farming, payment exceeding ten thousand rupees may be made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft or use of electronic clearing

system through a bank account, no disallowance under Section 40A(3) of the Act of 1961 shall be made.

8. He has relied upon decision of Apex Court in **Principal Commissioner of Income-Tax vs. GEE Square Exports (2019) 260 Taxman 175 (SC)** as well as decisions of different High Courts in **Writ Tax No. 294 of 2010 (M/s Jeet Construction Company vs. Assistant Commissioner of Income Tax and others)** decided on 24.02.2020, **KEC International Ltd. vs. B.R.Balakrishnan (2001) 119 Taxman 974 (Bombay)**; **Flipkart India (P.) Ltd. vs. Assistant Commissioner of Income-tax, Circle 3(1)(1), Bengaluru (2017) 248 Taxman 555 (Karnataka)**; **Tata Teleservices Limited vs. Commissioner of Income Tax, International Taxation-3 & Another in Writ Petition (C) No.4660 of 2022** decided on 23.03.2022 by the Delhi High Court and decision of High Court of Bombay at Goa in **Tungabhadra Minerals Private Limited through Jayant Gaunker vs. Deputy Commissioner of Income Tax and 3 others** decided on 30th September, 2022.

9. Sri Manu Ghildyal, learned counsel appearing for Income-Tax Department submitted that Section 220 (6) of the Act of 1961 provides that it is the discretion of the Assessing Officer that a condition be imposed in a particular set of case treating the Assessee as 'not being in default' in respect of amount not disputed in appeal. According to him, mere filing of statutory appeal within time would not mean that Assessee is 'not in default', but only upon the conditions imposed by the Assessing Officer having been complied by the Assessee, it is only then that the Assessee is treated as to be "*Assessee not in default*".

10. According to him, initially the return declaring an income of Rs.6,53,84,790/- was filed by the petitioner. Subsequently, the deductions were disallowed under Section 40A(3) of the Act of 1961 on the ground that the Assessee failed to furnish the required

information and an assessment was made and tax demand of Rs.197,41,95,820/- was raised against the petitioner. The Principal Commissioner of Income Tax had considered the balance sheet of the petitioner and after going through the audit report and the balance sheet of the latest assessment year 2022-23, the application for stay of recovery was rejected on the ground that liquidity position of the petitioner was strong enough to pay the impugned tax demand i.e. 20% of the outstanding demand.

11. According to the Department counsel, nowhere in the stay application it has been pressed by the Assessee that its financial position was critical and was not in the position to deposit 20% of the outstanding demand, as directed by the authority.

12. I have heard the respective counsel and perused the material on record.

13. It is a case where the appeal filed by the Assessee–petitioner is under consideration before Deputy Commissioner of Income Tax (Appeals). The dispute is as to the deposit of 20% of the disputed demand raised subsequent to the reassessment made by the Income-Tax Authorities.

14. Section 220(6) of the Act of 1961 reads as under :

“(6) Where an assessee has presented an appeal under section 246 or section 246A the Assessing Officer may, in his discretion and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of.”

15. From the reading of the aforesaid provision it is clear that once an appeal has been filed under Section 246 or 246A of Act of 1961, it is the discretion of the ‘Assessing Officer’ and subject to the condition as he may think fit to impose in the circumstances of the case, treat the Assessee as not being in default in respect of the amount in dispute in the appeal.

16. The argument of the petitioner's counsel to the extent that the presentation of the appeal within statutory period should be treated as "Assessee as not being in default" cannot be accepted because it is clarified to the extent that discretion has been given to the Assessing Officer who has to impose a condition in each of such cases treating the Assessee as not being in default in respect of the amount in dispute in the appeal.

17. Thus, it is clear that mere pendency of an appeal will not give any benefit to an Assessee, but only upon the satisfaction having been recorded by the Assessing Officer and the condition being imposed by him in each of such cases that an Assessee shall be treated to be not in default in respect of the outstanding demand of tax, which is matter of dispute in appeal.

18. However, the word 'discretion', which occurs in the aforesaid provision of law, does not give a blanket power to the Assessing Officer. He has to exercise his discretion within the four corners of law and while passing an order imposing a condition, he has to justify his action.

19. In the instant case, the Deputy Commissioner of Income Tax while passing the order dated 30.08.2022 had solely relied upon the circular of 2016, which was partially modified in the year 2017 and directed for deposit of 20% of the disputed amount of tax and rejected the stay application while the Principal Commissioner of Income Tax proceeded to consider the audit report and balance sheet partially and considering the assets while ignoring the liability part had rejected the stay application holding the financial position of the petitioner to be strong enough and directed for depositing 20% of the disputed amount of tax.

20. This Court finds that while considering the stay application, neither the Deputy Commissioner of Income Tax nor Principal Commissioner of Income Tax had considered three basic principles

i.e. *prima facie* case, balance of convenience and irreparable loss, as held by Delhi High Court in **Tata Teleservices Limited (supra)**.

21. In the result, the writ petition is **partly allowed**. The orders impugned dated 30.08.2022 and 14.09.2022 are hereby set aside and the matter is remitted back to the Deputy Commissioner of Income Tax, Circle 3(1)(1), Muzaffarnagar for consideration of stay application of the petitioner afresh.

22. It is made clear that respondent No.1 i.e. Deputy Commissioner of Income Tax, Circle 3(1)(1), Muzaffarnagar shall pass appropriate order on the stay application within two weeks from today after affording personal opportunity of hearing to the petitioner.

Order Date :- 20.10.2022
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