

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Writ Petition Nos.6040 to 6052 of 2018
and W.M.P.Nos.7441, 7443, 7445, 7447, 7449,
7451, 7452, 7454, 7456 & 7458 of 2018

Orders reserved on 23.04.2018	Orders pronounced on 28.04.2018
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M/s.Vasan Health Care Pvt., Ltd.,
Rep., by its Managing Director,
Dr.A.M.Arun,
S/o. Thiru.A.R.Murugaiah,
No.70, Lancor West Minister,
4th Floor, Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

.. Petitioner in WP.No.6040 to 6045 of 2018

Vs.

1. Assistant Commissioner of Income Tax
Central Circle-2(1)
Investigation Wing, Room No.122,
1st Floor, New No.46, M.G.Road,
Chennai - 600 034.
2. Principal Commissioner of Income Tax
Central Range-2,
III Floor, No.46 (Old No.108),
Mahatma Gandhi Road, Chennai - 600 034.
3. Commissioner of Income Tax (Appeals)-18
Aayakar Bavan,
No.46, Mahatma Gandhi Road, Chennai - 600 034.
4. The Manager, Axis Bank,
No.82, Dr.Radhakrishnan Salai,
Chennai -18.

.. Respondents in WP.No.6040 to 6045 of 2018

R4-impleaded as per order dated 10.04.2018 in CMP.No.9429/18 in
W.P.No.6040 of 2018

Dr.A.M.Arun
S/o.Mr.A.R.Murugaiah,
199, St.Marys Road,
Alwarpet, Chennai-600 018.

.. Petitioner in WP.6046
to 6052 of 2018

vs

1.Assistant Commissioner of Income Tax,
Central Circle-2(1)
Investigation Wing, Room No.122,
1st Floor, New No.46, M.G.Road,
Chennai-34.

2.Principal Commissioner of Income Tax,
Central Range-2,
III Floor, No.46 (Old No.108)
Mahatma Gandhi Road,
Chennai-600 034.

3.Commissioner of Income Tax(Appeals)-18,
Aayakar Bavan,
No.46, Mahatma Gandhi Road,
Chennai-600 034.

.. Respondents in
WP.No.6046 to 6052 to 2018

Prayer in W.P.No.6040 to 6052 of 2018:-

Petition filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, to call for the records in C.No.2802/C-2/2017-18, dated 06.03.2018, for Assessment Year 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, 2016-17 on the file of the second respondent and quash the same and direct the second respondent to grant stay of collection of outstanding tax demand pending disposal of the appeal before the third respondent.

For Petitioner :Mr.P.H.Arvinth Pandian Sr., Counsel for
Mr.G.Baskar in W.P.Nos.6040 to 6045 of 2018

Mr.G.Baskar in W.P.Nos.6046 to 6052 of 2018

For Respondents: Mr.G.Rajagopalan ASGI assisted by
Mr.A.P.Srinivas & Mr.A.N.R.Jayapradhap
for RR1 to 3 in All W.Ps.

Mr.O.R.Santhana Krishnan &
Mr.O.R.Karthikeyan for R4
in W.P.Nos.6040 to 6045 of 2018

C O M M O N O R D E R

As the issues involved in both the Writ Petitions a more or less identical in the sense, the petitioners/assesseees have challenged the orders passed by the Principal Commissioner of Income Tax in stay petitions filed by them, and the petitioners being the Company and its Managing Director, they were heard together and are disposed of by this common order.

2. The petitioner in W.P.Nos.6040 to 6045 of 2018 is a private limited company, which has established Eye Care Hospitals in different cities and States. The petitioner in W.P.Nos.6046 to 6052 of 2018, is the Managing Director of private limited company.

3. The assessment, in respect of the private limited company was completed under Section 143(3) read with Section 153(C) read with Section 153A of the Income Tax Act (hereinafter referred to as "Act") by order dated 29.12.2017, for the assessment years 2011-12 to 2016-17. On the same date, an order of provisional attachment of the immovable properties held in the name of the company was passed. On receipt of the order of assessment, the petitioner sent a communication dated 22.01.2018, requesting for rectification of mistakes, alleging to be apparent from the record, by filing petition under Section 154 of the Act. At the time when the Writ Petitions were filed, these rectification petitions were pending, however when they were heard, the learned Additional Solicitor General of India submitted that those petitions have been rejected by order dated 13.04.2018.

4. The company, while in process of filing appeal against the assessment orders, filed petition before the Assessing Officer, namely, Assistant Commissioner of Income Tax, Central Circle-2(1), praying for stay of the collection of the tax for each assessment year by petitions dated 23.01.2018. The Assessing Officer, by order dated 30.01.2018, referring to the revised instruction of CBDT in No.1914, directed the petitioner to pay 20% of the disputed demand, within three days, failing which the stay petition will be treated as rejected and recovery proceedings will be initiated. The petitioner filed appeals before the third respondent against the assessment orders on 01.02.2018, and on 02.02.2018, submitted a petition before the second respondent praying for stay of collection of the taxes for the relevant assessment years. In the said petition, it was stated that the company was incorporated several years ago and has been regular in filing the returns of income and payment of substantial taxes; it has got around 120 branches all over India and 5000 employees including Doctors and support staff; every month assessee has to pay salary to the employees and rent at

various locations to continue their business and other statutory liabilities such as electricity charges & water bills and maintenance of equipment are essential to carry on the services. It was further stated that in the assessment orders, high pitched additions have been made, which could not be anticipated and the assessee is confident of substantial relief in the appeal. The assessee thus, prayed for grant of stay, stating that if stay is not granted, they will be put to extreme hardship and they would find it difficult to run the day-to-day affairs of the company. The petitioner also stated that they are filing a separate waiver petition for waiver of interest, charge under Section 234A, B & C.

5. While so, the Tax Recovery Officer, Central-2, Chennai issued prohibitory orders against the Directors of the company, one of whom, the Managing Director, is the petitioner in W.P.Nos.6046 to 6052 of 2018. Roughly about the same time, the petitioner approached this Court and filed W.P.Nos.4778 to 4783 and 4784 to 4790 of 2018, challenging the orders passed by the Assessing Officer, first respondent, directing the petitioner to pay 20% of the tax demanded. The Writ Petitions were disposed of by common order dated 05.03.2018, without expressing any view on the merits of the claim made by the petitioner and only directing the second respondent to consider the applications filed by the petitioner, dated 02.02.2018, praying for stay of the demand within a time frame. The second respondent by orders dated 06.03.2018, directed the petitioner to pay 30% of the disputed demand and if such payment is made, the balance shall remain stayed till the disposal of the appeal, with the further condition that the assessee has to cooperate in the appeal proceedings and stay would be reviewed after six months. This order dated 06.03.2018, is impugned in these Writ Petitions.

6. The Writ Petitions were presented on 14.03.2018 and one day before the date of presentation, on 13.03.2018 the petitioners filed stay petition before the third respondent, requesting for stay of the entire disputed amount for each of the assessment years. While those petitions were pending, the petitioner has moved these Writ Petitions for admission on 19.03.2018.

7. Before the Writ Petitions were heard for admission, on 16.03.2018 the third respondent has disposed of the stay petitions by order dated 13.03.2018, directing the petitioners to pay 20% of the total demand. Thus, the petitioner has approached all the three respondents, praying for stay and has also approached this Court earlier, challenging the order passed by the first respondent, dated 30.01.2018. The first and the third respondent directed payment of 20% of the disputed tax, whereas the second respondent directed payment of 30% of the

disputed tax. The petitioner is before this Court contending that the assessments are unduly high pitched and therefore, this Court should grant stay of the demands and direct the appeal to be taken up for disposal.

8. So far as the Writ Petitions filed by the Director, namely, W.P.Nos.6046 to 6052 of 2018, the facts are more or less identical. The assessment orders were passed under Section 153A of the Act for the assessment years 2010-11 to 2016-17, by orders dated 29.12.2017. Even during the assessment proceedings, the immovable properties of the Directors were attached by separate orders, dated 29.07.2016 and after the assessment was completed on 29.12.2017 and 04.01.2018, order under Section 281B of the Act was passed, provisionally attaching the immovable properties of the company as well as the Directors. As in the case of company, the Managing Director also filed the petitions for rectification of the assessments, dated 22.01.2018 and moved stay petition before the first respondent on 23.01.2018. The petitions for rectification filed by the Managing Director were dismissed by the first respondent, by order dated 30.01.2018. The petitioner approached the first respondent by a separate petition dated 23.01.2018, requesting for stay of the demand, as they are in the process of filing appeal against the assessment orders. The first respondent, by order dated 30.01.2018, directed the petitioner to pay 20% of the tax demand for each of the assessment years. Immediately thereafter, on 01.02.2018, the petitioner filed appeals as against the orders of assessment before the third respondent, and parallelly moved the second respondent for grant of stay. Immediately thereafter, the petitioner along with the company filed Writ Petitions challenging the order passed by the first respondent, which were disposed of without expressing anything on merits, but directing the second respondent to consider the petition filed by the petitioner for grant of stay. The second respondent, by order dated 06.03.2018, has directed the petitioner to pay 30% of the tax demanded for each of the assessment years, which order is impugned in these Writ Petitions. Prior to the filing of these Writ Petitions, which were presented on 14.03.2018, on 13.03.2018, the petitioner filed stay petition before the third respondent and moved the Writ Petitions, when the prayer for stay, was pending before the third respondent. It is not clear as to whether separate orders have been passed by the third respondent on the stay petitions, as passed in the case of the company by order dated 16.03.2018.

9. Mr.P.H.Arvinth Pandian, learned Senior counsel appearing for the petitioner elaborately set out the factual matrix and referred to a tabulated statement given in the affidavit filed in support of the Writ Petitions to demonstrate that the assessments are extremely high pitched assessments as for

certain years, the number of times, the assessment has been increased, is more than 130 times. It is submitted that the second respondent ought to have appreciated that instruction No.96, dated 21.08.1969, read with sub-clause 2(B)(iii) of the instruction No.1914, dated 02.12.1993, issued by the CBDT vested power to grant stay of collection of demand of tax, where the assessment order is high pitched or where genuine hardship is likely to be caused to the petitioner. It is further submitted that the second respondent grossly erred in referring to clause 4(A)(a) of the modified instruction of the CBDT, dated 29.02.2016, to enhance the payment to 30% of the disputed demand. The learned Senior counsel referred to the decision of the Division Bench of the Allahabad High Court in the case of Sultan Leather Finishers Pvt., Ltd., vs. Assistant Commissioner of Income Tax, [(1991) 191-ITR-179], wherein the Court observed that when an application for rectification filed under Section 154 of the Act is pending, the Tax Recovery Officer should not proceed with the recovery proceedings. The learned Senior counsel further submitted that the assessee company is entitled for a refund for the assessment year 2017-18 to the tune of Rs.7,42,16,770/-.

10. Mr.G.Rajagopalan, learned Additional Solicitor General of India, assisted by Mr.A.P.Srinivas and Mr.A.N.R.Jayapradhap, learned Standing counsels appearing for the respondent department, submitted that the rectification petitions filed by the petitioner having been rejected by order dated 13.04.2018, the prayer sought for in the Writ Petition has become infructuous, because, the third respondent, the Commissioner of Appeals has passed an order dated 16.03.2018, on the petitioner's stay petition, directing the petitioner to pay 20% of the tax demanded and that order has not been challenged and the Writ Petitions are liable to be dismissed.

11. Without prejudice to the above submission, it is submitted that the stay petitions were considered by the second respondent in a proper manner by taking note of the latest instruction issued by the CBDT in instruction No.1914, which alone will be operative as all other earlier instructions have been superseded by the latest instruction No.1914. It is further submitted that the CBDT instruction provides for and grants power to the authority to enhance payment of the demand after considering the facts of the case and the second respondent has assigned reasons as to why, he is of the opinion that the petitioner should pay 30% of the tax demanded. It is further submitted that the contention that the petitioner is under financial constraints and the assessments are high pitched are totally hypothetical and without any supporting evidence as the petitioner failed to put forth any evidence to show or prove financial constraints. The learned Additional Solicitor General

submitted that the contention of the petitioner that they are entitled for a refund of more than seven crores is incorrect, since it is a claim made by them while filing the return for the assessment year 2017-18 and the return is yet to be processed and such a contention raised by the petitioner is not sustainable. Therefore, it is submitted that the Writ Petitions are liable to be dismissed.

12. Mr.O.R.Santhanakrishnan, learned counsel appearing for the fourth respondent Bank placed before this Court in the form of a typed set of papers, the notice received from the first respondent, calling upon them to pay the money to the department and it is submitted that the respondent bank has permitted only inward remittances and all outward payments have been frozen.

13. Heard the learned counsels appearing for the parties and carefully perused the materials placed on record.

14. The factual details set out above, will clearly show that the petitioners, company as well as the Managing Director, have exhausted all avenues available to them before the respondents. In fact, on certain occasions, there has been parallel remedies invoked. One such attempt made by the petitioner has ended against the petitioner with a direction to pay a higher percentage of tax demanded, which is the order dated 16.03.2018, impugned in the Writ Petition.

15. The petitioner initially approached the Assessing Officer and sought for a stay of the demand of tax. The Assessing Officer took note of CBDT instruction No.1914, directed the payment of 20% of the demanded tax. The petitioners did not comply with the order nor made any attempt to effect partial compliance, but they moved the second respondent for an identical relief. Complaining that the second respondent did not take action on the petition, they approached this Court and filed the Writ Petitions in W.P.Nos.4784 to 4794 of 2018, challenging the order passed by the Assessing Officer dated 30.01.2018. Unfortunately, the petitioner was not successful before this Court in getting the order set aside and the Court refused to go into the merits of the matter and only directed the second respondent to consider the petition dated 02.02.2018. The second respondent considered the matter and has passed the impugned order increasing the amount to be paid to 30% of the tax demanded. Challenging the same, the Writ Petitions have been filed and roughly about the same time, the petitioner moved the third respondent by way of stay petitions. The third respondent has passed an order on 16.03.2018, directing the petitioner to pay 20% of the tax demanded. Thus, the Court would be justified in coming to a prima facie conclusion that the intention of the petitioner is to drag on

the matter and not to comply with the orders passed by the authorities. It is for the first time before this Court, the petitioner seriously canvass the issue of financial constraints and has enclosed the copy of the balance sheet, tentative profit and loss account etc.

16. On a perusal of the orders passed by the three authorities, it is seen that the only plea raised before the authorities was that they are in severe financial crunch due to non-support of the investors, banks, financial institutions and the proceedings initiated by the Enforcement Directive. The assessee company would state that they have branches all over country and have employed around 5000 people, including Doctors and staff. In my considered view the said averments made by the petitioner in their stay petitions, are absolutely vague and devoid of any substance and materials.

17. The assessees failed to bear in mind that when they make a prayer for grant of stay, three principles have to be satisfied. The assessees were bound to show that they have a prima facie case; secondly they have to show that the balance of convenience is in their favour and thirdly they will have to prove that if the stay is not granted, they would be put to irreparable hardship.

18. Unfortunately, the assessees, when they drafted the stay petitions, did not bear in mind these basic legal principles and vague averments have been set out, which appears to be not supported by any material. Thus, the assessees themselves have to be blamed for creating the present situation and there is no justification on their part to find fault with the orders passed by the authorities. On a reading of the stay petition filed before the first respondent and second respondent, one gets an impression that the matter was not pursued seriously. Had it been done, then obviously more care would have been taken to present the petition in a proper format. Therefore, the second respondent was fully justified in making an observation that mere filing an appeal against the assessment, will not be a sufficient reason to stay the recovery of demand.

19. The sheet anchor of the arguments of the learned Senior counsel for the petitioner is that the assessments are high pitched. The respondents 1 to 3 were guided and bound by the circular instruction issued by the CBDT. The guidelines have been revised from time to time and therefore, whatever the guidelines, which are in force on the date when the petitions are considered, would alone be binding upon the Assessing Officer or the Appellate Authority. The latest of such being the Office Memorandum, dated 31.07.2017, which speaks about over pitched assessments and taking note of the feed back received

from the Field Authorities, the CBDT revised the standard rate prescribed in office memorandum, dated 29.02.2016, from 15% to 20% of the disputed demand, where the demand is contested before the Commissioner of Income Tax (Appeals). With regard to the other directions in the office memorandum, dated 29.02.2016, the same were left in-tact. The guidelines issued by the Board, was regarding the procedure to be followed for recovery of outstanding demand, including the procedure for grant of stay of demand. Firstly the instruction states that a demand will be stayed only if there are valid reasons for doing so and mere filing an appeal against the assessment order will not be sufficient to stay of the recovery demand.

20. The Board took note of the fact that the Field Authorities often insisted on payment of very high proportion of the disputed demand before granting stay of the balance demand, often resulting in hardship to the taxpayers and in order to streamline the process of grant of stay and standardise the quantum of lumpsum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT (A), the modified guidelines were issued. Paragraph 4(A) of the instruction, dated 29.02.2016, stipulates payment of 15% of the disputed demand, in cases which do not fall in category discussed in para(B). Para (B) of clause 4 of the instruction, has two parts, namely, sub-clause (a), which deals with cases, where lump sum amount higher than 15% is warranted; sub-clause (b) deals with cases where payment of lump sum amount of lower than 15% is warranted. To bring the petitioner's case under sub-clause (b) of Clause 4(B) of the circular instruction dated 29.02.2018, they should be able to show that in their case, where addition on the same issue has been deleted by the Appellate Authority office memorandum the earlier year or decision of a Supreme Court or jurisdictional High Court is in the favour of the assessee.

21. Admittedly, there is no such plea raised by the assessees. In any event, the underlying principles which govern the matter of grant of interim orders have to be borne in mind as guiding principles for the authorities to consider the relief for grant of stay. The circular instruction binds the Assessing Officer, but not the Court. The Court can take into consideration the facts and circumstances to exercise discretion as to what would be the order, which will protect the interest of the revenue, and at the same time grant a reasonable relief to the assessee till the appeal is heard and disposed of. The object of grant of interim order is to preserve status-quo and not to make the appellate remedy infructuous or illusory. However, this principle cannot be straight away applied to Revenue matters, where a slight departure is required to be adopted. As pointed out earlier, the petitioner miserably

failed to substantiate their contention that they are unable to mobilise funds to comply with the conditions nor they had brought out before the authorities as to how they have made out a prima facie case for grant of an unconditional stay or for that matter how the direction of the Assessing Officer to pay 20% of the disputed demand, is an onerous condition. Mere pendency of an appeal before the third respondent is no ground to state that there should be stay of the recovery of the tax demanded.

22. So far as the plea regarding high pitched assessment, it is undoubtedly true that in some of the years, the assessments of the assessee company are high pitched. Nevertheless this Court cannot make a roving enquiry into the same and examine whether the additions made by the Assessing Officer were justified as those are issues to be adjudicated before the CIT (A). However, taking note of the fact that the assessee company has established Eye Hospitals in various parts of the State and elsewhere in the country and it is stated that there are several persons employed with them and the hospitals are functioning and there are several senior citizens, who require care and attention, this Court is inclined to grant one more opportunity to the assessee company to show their bonafide and if they do so, this court is inclined to direct the assessee company to once again approach the third respondent for appropriate relief. Since the third respondent, CIT(A), is seized of with the appeal petition, the order passed by the second respondent, being earlier than the order dated 16.03.2018, passed by the third respondent, in my considered view, the order dated 16.03.2018, shall govern the proceedings and not the impugned order dated 06.03.2018.

23. For such reason, it is unnecessary to interfere with the said order dated 06.03.2018 as already the third respondent, before whom the appeal is pending against the assessment, has already passed an order, dated 16.03.2018. This order is in tune with the order passed by the Assessing Officer and the petitioners have not questioned the order till date. With a view to avoid the multiplicity of proceedings and to ensure that the interest of revenue is also protected at the same time, the operation of the company does not come to a stand still, this Court is inclined to dispose of the Writ Petition by passing the appropriate orders. The reasons assigned by this Court with regard to orders passed in respect of the assessee company can not be extended to the Managing Director, petitioner in W.P.Nos.6046 to 6052 of 2018.

24. In the result,

(i) W.P.Nos.6040 to 6045 of 2018, are disposed of by directing the petitioner/assessee company to pay 5% of the tax

demanded for each of the assessment years. The petitioner is granted three weeks time from the date of receipt of a copy of this order to effect such payment. On complying with the said condition, the assessee company is entitled to file a fresh stay petition before the third respondent clearly explaining as to how they are justified in seeking for an interim order along with supportive documents and on presentation of the petition, it is open to the third respondent to pass appropriate orders on merits and in accordance with the law.

(ii) W.P.Nos.6046 to 6052 of 2018, being devoid of merits, are dismissed. This is so because, the reasons assigned by the company cannot be made applicable to its Managing Director, an individual. The petitioner/assessee is directed to pay 20% of the tax demanded for each of the assessment years and such payment shall be made within a period of three weeks from the date of receipt of a copy of this order, for being entitled to stay of the balance outstanding tax. If the petitioner fails to comply with the said condition within the time permitted, the benefit of this order will not enure to the petitioner/assessee and the respondents Department is at liberty to initiate action for recovery.

(iii) Consequently, connected Miscellaneous Petitions are closed. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

pbn

To

1. Assistant Commissioner of Income Tax
Central Circle-2(1)

Investigation Wing, Room No.122,
1st Floor, New No.46, M.G.Road,
Chennai - 600 034.

2. Principal Commissioner of Income Tax
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4. The Manager, Axis Bank,
No.82, Dr.Radhakrishnan Salai,
Chennai -18.

+2ccs to Mr.A.P.Srinivas, Advocate, S.R.No.32671
+13ccs to Mr.G.Baskar, Advocate, S.R.No.32135 & 32136
+1cc to Mr.O.R.Santhana Krishnan, Advocate, S.R.No.32590

Writ Petition Nos.6040 to 6052 of 2018

GMR(CO)
CS/10/05/18



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