



2014:KER:21781

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 13TH DAY OF JUNE 2014/23RD JYASHTA, 1936

WP(C).No. 8947 of 2014 (P)

PETITIONER :

SUNTEC BUSINESS SOLUTIONS PRIVATE LIMITED
321, NILA, TECHNOPARK CAMPUS,
TRIVANDRUM -695 581,
REPRESENTED BY ITS CHIEF FINANCIAL OFFICER,
MR. SURESH RAO V.R.

BY ADVS.SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.GOPINATH
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI.KURRYAN THOMAS

RESPONDENT(S):

1. THE UNION OF INDIA,
REPRESENTED BY THE SECRETARY,
MINISTRY OF FINANCE (DEPARTMENT OF REVENUE),
NORTH BLOCK, NEW DELHI-110 001.
2. THE COMMISSIONER OF INCOME TAX (APPEALS) -1,
AAYAKAR BHAVAN, KOWADIYAR, THIRUVANANTHAPURAM-695 003.
3. THE ASSISTANT COMMISSIONER OF INCOME TAX,
CIRCLE-1(1), AAYAKAR BHAVAN, KOWADIYAR,
THIRUVANANTHAPURAM-695 003.

***ADDL.R4 IMPEADED**

*Addl.4. THE MANAGER,
STATE BANK OF TRAVANCORE, KOWDIAR BRANCH
THIRUVANANTHAPURAM - 3.

*ADDL. R4 IS SUO MOTU IMPEADED AS PER ORDER DATED 21/05/2014.

R1 BY ASST.SOLICITOR GENERAL OF INDIA SRI.P.PARAMESWARAN NAIR
R2 & R3 BY SENIOR COUNSEL (TAXES) SRI.P.K.R.MENON
BY STANDING COUNSEL SRI.JOSE JOSEPH
ADDL.R4 BY STANDING COUNSEL SRI.R.S.KALKURA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 04-06-2014, THE COURT ON 13-06-2014 DELIVERED THE FOLLOWING:

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WP(C).No. 8947 of 2014 (P)

APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT P1. TRUE COPY OF THE ASSESSMENT ORDER DATED 1-3-2013 ALONG WITH THE NOTICE OF DEMAND.
- EXHIBIT P2. TRUE COPY OF THE APPEAL FILED UNDER SECTION 246(I) (B) OF THE INCOME TAX ACT, DATED 4-4-2013
- EXHIBIT P3. TRUE COPY OF THE APPLICATION FOR STAY DATED 5-7-2013.
- EXHIBIT P4. TRUE COPY OF THE JUDGMENT DATED 8-7-2-13 IN WPC NO. 17127/2013.
- EXHIBIT P5. TRUE COPY OF THE ORDER DATED 13-8-2013 ISSUED BY THE 2ND RESPONDENT.
- EXHIBIT P6. TRUE COPY OF THE INTERIM ORDER DATED 29-7-2013 IN W.A. NO. 1094/13.
- EXHIBIT P7. TRUE COPY OF THE CHALAN DATED 14-9-2013 AND 7-11-2013 EVIDENCING PAYMENT OF RS. 10 LAKHS AGAINST THE DEMAND FOR ASSESSMENT YEAR 2006-07.
- EXHIBIT P7(a). TRUE COPY OF THE CHALANS DATED 7-11-2013 EVIDENCING PAYMENT OF RS. 10 LAKHS AGAINST THE DEMAND FOR ASSESSMENT YEAR 2006-07.
- EXHIBIT P8. TRUE COPY OF THE LETTER DATED 18-9-2013 FROM THE PETITIONER TO THE 2ND RESPONDENT.
- EXHIBIT P9. TRUE COPY OF THE ORDER DATED 30-10-2013 (PERTAINING TO ASSESSMENT YEAR 2006-07) PASSED BY THE 2ND RESPONDENT.
- EXHIBIT P10. TRUE COPY OF THE NOTICE DATED 10-2-2014 REGARDING THE POSTING OF EXT.P2 APPEAL ON 20-2-2014.
- EXHIBIT P11. TRUE COPY OF THE NOTICE DATED 25-3-2014 ISSUED UNDER SECTION 226(3) OF THE INCOME TAX ACT BY THE 3RD RESPONDENT.
- EXHIBIT P12. TRUE COPY OF THE LETTER DATED 27/03/2014, ISSUED BY THE PETITIONER TO THE 3RD RESPONDENT.
- EXHIBIT P13. TRUE COPY OF THE LETTER DATED 26/03/2014 ISSUED BY THE 3RD RESPONDENT TO THE MANAGER, STATE BANK OF TRAVANCORE, KOWDIYAR BRANCH, THIRUVANANTHAPURAM.
- EXHIBIT P14. TRUE COPY OF THE DEMAND DRAFT DATED 26/03/2014 ISSUED BY THE STATE BANK OF TRAVANCORE, KOWDIYAR BRANCH, THIRUVANANTHAPURAM



WP(C).NO.8947/2014

EXHIBIT P15. TRUE COPY OF THE LETTER DATED 25/03/2014 ISSUED BY THE PETITIONER TO THE ADDITIONAL 4TH RESPONDENT

EXHIBIT P16. TRUE COPY OF THE LETTER DATED 26/03/2014, FILED BY THE PETITIONER BEFORE THE 3RD RESPONDENT

EXHIBIT P17. COPY OF THE LETTER DATED 26/03/2014, FILED BY THE PETITIONER BEFORE THE COMMISSIONER OF INCOME TAX

RESPONDENT(S)' EXHIBITS

EXHIBIT R3(A) COPY OF THE PROCEEDINGS OF THE COMMISSIONER OF INCOME TAX DATED 29/11/2013

EXHIBIT R3(B) COPY OF THE LETTER DATED 04/12/2013

EXHIBIT R4(a) TRUE COPY OF THE NOTICE BEARING NO.AA1CS8020KCIR.1(1): TVM/13-14 DATED 25/3/2014

EXHIBIT R4(b) COPY OF THE NOTICE BEARING NO.AA1/CS8020K/CIR.I(1)/TVM/13-14 DATED 25/3/2014 ISSUED BY THE INCOME-TAX DEPARTMENT TO THE ADDITIONAL 4TH RESPONDENT

EXHIBIT R4(c) COPY OF THE LETTER DATED 25/3/2014 ISSUED BY THE ADDITIONAL 4TH RESPONDENT ALONG WITH THE ACKNOWLEDGMENT OF RECEIPT OF THE SAME BY THE INCOME- TAX OFFICER.

EXHIBIT R4(d) COPY OF THE COMMUNICATION DATED 26/3/2014 ISSUED BY THE INCOME-TAX DEPARTMENT TO THE ADDITIONAL 4TH RESPONDENT

EXHIBIT R4(e) COPY OF THE SUMMONS ISSUED BY THE INCOME-TAX DEPARTMENT UNDER SECTION 13(1) OF THE INCOME-TAX ACT 1961 DATED 26/3/2014

EXHIBIT R4(f) COPY OF THE SHOW CAUSE NOTICE DATED 26/3/2014 ISSUED BY THE ASSISTANT COMMISSIONER OF INCOME-TAX CIRCLE TO THE ADDITIONAL 4TH RESPONDENT

EXHIBIT R4(g) COPY OF THE DEMAND DRAFT BEARING NO.323251 DATED 26/3/2014 TAKEN BY THE ADDITIONAL 4TH RESPONDENT IN THE NAME OF THE INCOME -TAX AUTHORITIES.

EXHIBIT R4(h) COPY OF THE LETTER DATED 26/3/2014 ISSUED BY THE ADDITIONAL 4TH RESPONDENT TO THE INCOME- TAX AUTHORITIES ACCOMPANYING THE DEMAND DRAFT ALONG WITH THE ENDORSEMENT MADE BY THE INCOME-TAX OFFICER DATED 26/3/2014

EXHIBIT R4(i) COPY OF THE EXPLANATION SUBMITTED BY THE ADDITIONAL 4TH RESPONDENT BEFORE THE ASSISTANT INCOME- TAX COMMISSIONER

/TRUE COPY/

P.S.TO.JUDGE

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2014:KER:21781

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K. Vinod Chandran, J.

W.P.(C).No.8947 of 2014-P

Dated this the 13th day of June, 2014

JUDGMENT

A mountain made out of a molehill, all for reason of the high-handed action of recovery attempted by the Income Tax Department. A writ petition filed seeking stay of recovery proceedings, pending appeal, has attained gigantic proportions and consumed considerable time of this Court for reason of the entire demand having been recovered from the assessee, without notice to the assessee and without exercising the in-built restrain any judicial or quasi-judicial authority is required to exercise.

2. The admitted facts are that the petitioner herein, an assessee, was served with Exhibit P1 assessment order for the year 2006-07 and consequently demand raised on that count. The petitioner filed an appeal before the first appellate authority and was before this Court in an earlier writ petition, the latter of which was disposed off by Exhibit P4. Exhibit P4 was concerned with the recovery proceedings for two assessment years, 2005-06 and 2006-07; when statutory appeals with stay petitions were pending. This Court directed



consideration of the stay applications within a period of one month and coercive steps were kept in abeyance till then.

3. With respect to both the assessment years, the first appellate authority passed Exhibit P5, wherein it was recorded that the assessee had agreed to pay an amount of Rs.50 lakhs for each of the assessment years for every month till the disposal of the appeal. The appeal was posted to 31.10.2013 and the Assessing Officer was directed to monitor the payment and submit a report before the said date. Subsequently, the demand made for the assessment year 2005-06 was stayed by a Division Bench of this Court in Exhibit P6. Admittedly the condition imposed by Exhibit P5 was not complied with for the assessment year 2006-07. Only an amount of Rs.10 lakhs was paid on 14.09.2013. Subsequently, on 30.10.2013, the appeal was again taken up for consideration and it was further directed to continue the payment of Rs.50 lakhs each month from the month of November, 2013. Obviously the officers of the Department did not bring to the notice of the first appellate authority that the earlier order was not complied with. Again the petitioner defaulted in complying with the order granted as revealed in Exhibit P9 and on 07.11.2013, paid an amount of Rs.10 lakhs.



4. The petitioner rested contend and it is stated that the appeal was heard finally on 20.02.2014. The present writ petition was filed, on 26.03.2014, obviously, on coming to know of a garnishee order issued by the 3rd respondent to the additional 4th respondent, in whose branch the petitioner maintains an account. The writ petition came up for admission on 27.03.2014 and an interim order was passed, keeping in abeyance further proceedings pursuant to Exhibit P11; being the garnishee proceedings initiated under Section 226(3) of the Income Tax Act, 1961. Exhibit P11 directed the additional 4th respondent to draw a Demand Draft for an amount of Rs.22,48,38,500/-, payable to the Income Tax Department, Government of India.

5. The interim order passed by this Court on 27.03.2014 was on condition that Exhibits P5 and P9 would be complied, and in addition directing similar payments for the months of February and March, 2014. Hence, the petitioner was obliged to make deposit of Rs.4 crores for the stay to be effective. However, when the matter was posted before Court on 21.05.2014, it was submitted by the learned counsel appearing for the petitioner that ignoring the interim order passed, the entire amounts were recovered from the account of the



petitioner. The Revenue contended that recovery was effected before the interim order was passed. It was in such circumstance that the additional 4th respondent was suo motu impleaded as per order dated 21.05.2014 and a direction was issued to both the additional 4th respondent as also the 3rd respondent to place separate affidavits detailing what transpired. The Despatch Register maintained in the office of the 3rd respondent was also directed to be produced.

6. The additional 4th respondent placed an affidavit, dated 24.05.2014, on record. On 27.05.2014 when the matter was taken up, it was noticed that the 3rd respondent had neither produced the Despatch Register; nor had filed any affidavit as directed in the order dated 21.05.2014. An Inspector attached to the office of the 3rd respondent was present before Court, and on a specific query made by the Court, through the learned Standing Counsel for Government of India (Taxes), it was admitted that the proceedings issued under Section 226(3) of the Income Tax Act were not entered in the Despatch Register. Hence, a detailed order was passed on 27.05.2014, again directing the 3rd respondent to file an affidavit in explanation and the matter was posted to 03.06.2014. The 3rd respondent was also directed to be present before Court on 03.06.2014.



7. The 3rd respondent was present on 03.06.2014 and had placed on record an affidavit dated 31.05.2014; but did not produce the Despatch Register. On a specific query being put to the 3rd respondent as to whether the petitioner was issued notice as provided in sub-clause (3) of Section 226 of the Income Tax Act, the 3rd respondent feigned ignorance and wanted time to verify the files. The matter was hence posted to 04.06.2014 for production of the Despatch Register and the personal appearance of the 3rd respondent was dispensed with. On 04.06.2014, the Despatch Register was produced and the learned Standing Counsel, on behalf of the 3rd respondent, submitted that neither was a notice to the petitioner entered in the Despatch Register; nor was it actually sent by post or any other mode of service.

8. It was in this context that this Court examined in detail the manner in which recovery was attempted. An encapsulated list of dates and events, as revealed from the affidavit, was also placed on record by the learned Standing Counsel. From the averments in the additional affidavit filed by the petitioner, the affidavit filed by the additional 4th respondent as also the 3rd respondent what comes to fore is this. Admittedly the petitioner did not comply with Exhibits P5



and P9 orders passed by the first appellate authority; nor were any proceedings taken to challenge the same. According to the 3rd respondent, in the month of November, 2013 the Assessing Officer submitted a status report regarding the dues from the petitioner and on 29.11.2013, the Assessing Officer was required to initiate recovery proceedings immediately, by the Commissioner of Income Tax (CIT). On 04.12.2013, the Assessing Officer issued Exhibit R3(B) notice to the petitioner, which was responded to, seeking deferment of the instalments, by a letter dated 17.12.2013. More than three months thereafter, on 25.03.2014 the Assessing Officer served Exhibits R4(a) and R4(b), both dated 25.03.2014, on the additional 4th respondent. Immediately on service, the additional 4th respondent informed the 3rd respondent that the accounts of the petitioner have been frozen and no operations would be permitted thereon. With respect to the further directions, the additional 4th respondent sought time to get clearance of their controlling office. Here, it is to be mentioned that the notices issued by the Assessing Officer, Exhibits R4(a) and R4(b), was for recovery of an amount of Rs.22,48,38,500/-.

9. The petitioner on coming to know of the orders issued by the 3rd respondent, immediately moved an application dated



26.03.2014 before the 3rd respondent, produced herein as Exhibit P16. The petitioner also moved the additional 4th respondent with Exhibit P15. Exhibit P16 is acknowledged by the 3rd respondent on 26.03.2014 and reveals that the officers of the petitioner personally met the CIT. The stay of demand for the year 2005-06, issued in the Writ Appeal was brought to the notice of the Department. The fact of a writ petition having been moved before the High Court, for the present demand also was brought to the notice of the 3rd respondent & the CIT. The affidavit of the 3rd respondent categorically admits that the officers of the petitioner met the Commissioner as also the 3rd respondent. Obviously on being made aware of the stay of recovery for 2005-06, the 3rd respondent issued Exhibit R4(d), wherein the demand for the year 2005-06 was deleted and the notice was rectified, in so far as demanding an amount of Rs.13,60,14,720/-. The additional 4th respondent-Bank has submitted, on affidavit, that they were coerced, with threats of penalty and prosecution; into taking the Demand Draft on 26.03.2014 itself and the same was handed over to the office of the 3rd respondent on 27.03.2014. The acknowledgment is produced by the additional 4th respondent as Exhibit R4(h), in which receipt endorsed by the Income Tax Inspector; is as on 26.03.2014.



10. The learned counsel for the petitioner places reliance on two decisions of the High Court of Bombay, reported in **UTI Mutual Fund v. ITO [(2012) 345 ITR 71 (Bom)]** and **DIT [Exemption] v. ITAT [(2014) 361 ITR 469 (Bom)]**, to urge refund of the amounts withdrawn under Section 226(3).

11. In **UTI Mutual Fund** (supra), notice of demand under the Act was issued against the petitioner therein, one of the beneficiaries of a Trust, deeming the Trust to be an association of persons (AoP); and finding the petitioner to be a member, who is jointly and severally liable. The assessment made as an AoP was appealed against by the Trust, and the demand was sought to be stayed by an application before the Assessing Officer; the latter of which was ordered, directing payment of 50%. The petitioner moved the Assessing Officer as also the Commissioner, for stay. The Assessing Officer rejected the stay application on 09.03.2012 and took proceedings under Section 226(3) on 12.03.2012 calling upon the petitioner's bankers to pay up Rs.26.70 crores. The Division Bench refused to go into the merits of the demand, but it was of the view that on facts the Revenue had made an unfortunate and hasty attempt to recover money, from the petitioner; due on the demand made



against the trust, without affording a reasonable opportunity. The Revenue was restrained from taking action pending appeal and for a period of six weeks of disposal of the appeal. The notice of attachment made under Section 226(3) was also set at naught.

12. **DIT [Exemption]** (supra) was a challenge by the Revenue against an order of the ITAT, directing refund of Rs.159 crores, recovered under Section 226(3). The assessee therein, confronted with a denial of exemption, filed an appeal from the assessment completed and also approached the Assessing Officer under Section 220(6). The Assessing Officer's order granting instalments was challenged before the Commissioner and the modified terms were again assailed under Article 226 of the Constitution. On dismissal of the appeal, the Assessing Officer, even before the certified copy was served on the assessee, demanded payment. The demand was replied to by the assessee, contending that they intend to file a further appeal, which was later done along with a stay application. Despite the notice of the appeal and stay petition being served on the Assessing Officer on 18.11.2013, on the very same day the Assessing Officer initiated steps under Section 226(3), attaching the bank account of the assessee and also withdrawing the amount of



Rs.159.84 crores. The Division Bench followed the judgment in **UTI Mutual Fund** (supra) and upheld the order of refund made by the Tribunal.

13. The learned Standing Counsel for Government of India (Taxes) would draw a distinction in so far as both the afore-cited cases are concerned. Therein appeals and stay applications were pending, whereas in the instant case the assessee had failed to comply with the conditional order of stay, thus making the recovery well within the bounds of the statute. The conduct of the petitioner herein is also not above board, is the argument. Two orders passed by the first appellate authority were not complied with and were not challenged. Exhibit P4 is a challenge made against the demand made, with respect to the years 2005-06 and 2006-07, on the ground that appeals and stay petitions were pending. Obviously, as indicated from Exhibit P6 order, the re-opening under Section 147, was agitated in an earlier writ petition, numbered as W.P.(C).7863 of 2013. That writ petition stood dismissed on 12.04.2013 and certified copy of the judgment was received on 22.05.2013. W.P.(C).No.17127 of 2013 was filed against the demand raised, on re-opening, for the assessment years 2005-06 and 2006-07. By Exhibit P4 this Court directed consideration of the



stay application within a period of one month of receipt of the judgment, and till such time ordered to keep in abeyance the coercive steps of recovery, if any, initiated. After having suffered that judgment which was also with respect to the year 2005-06, the petitioner again filed a Writ Appeal from the writ petition which was dismissed earlier, and got a stay of the demand for the year 2005-06. That, however, is a matter concerning the assessment year 2005-06 and would have to be raised appropriately in the relevant proceedings. Here we are concerned with the assessment year 2006-07 and the garnishee proceedings initiated thereon.

14. Allegations and counter allegations are made by the 3rd respondent and additional 4th respondent, into which this Court would not go into, at this stage. What is to be emphasized is, that a recovery, which had been lying dormant from June 2013, was revived just prior to the close of the financial year and recovery effected of the entire amounts demanded under the assessment order. A conditional order passed by the Appellate Commissioner in August, 2013 was not complied with and the same was not reported to the appellate authority when the same was reviewed in October, 2013 or action taken. The further conditional order was also not complied with and no



action thereon was taken for recovery. The Commissioner is said to have directed the Assessing Officer to expedite the recovery proceedings in November, 2013. The Assessing Officer issued a letter to the petitioner, which was replied seeking deference of instalments and nothing further was done.

15. On 25.03.2014, proceedings were initiated under Section 226(3) of the Income Tax Act. The same was rectified on the very next day, deleting substantial amounts, obviously on the assessee bringing to the notice of the Assessing Officer the stay for the assessment year 2005-06. The Assessing Officer and the Commissioner were also told of the writ petition, filed before this Court. The 3rd respondent, Assessing Officer, however, followed up the rectification [Exhibit R4(d)], with Exhibits R4(e) and R4(f). Exhibit R4 (e) summoned the Branch Manager of the additional 4th respondent on 31.03.2014 and threatened penalty. Exhibit R4(f) is a show cause notice, directing the petitioner to explain why proceedings under Sections 183 and 186 of the Indian Penal Code should not be initiated, as, according to the 3rd respondent, the additional 4th respondent had not complied with the order of the 3rd respondent, a quasi-judicial authority, and for having provided "unnecessary favours to the



assessee by delaying your actions” (sic). The “unnecessary favour” referred to by the 3rd respondent, as is discernible from the affidavit filed herein, is the alleged surreptitious manner in which the additional 4th respondent had informed the petitioner about the proceedings under Section 226(3) of the Income Tax Act; which definitely prompted the assessee to approach this Court with a writ petition.

16. The professed action of the quasi-judicial authority, however, is found to be not in compliance with Section 226 of the Income Tax Act. The recovery proceedings initiated by way of garnishee proceedings under Section 226 of the Income Tax Act has to be notified to the assessee also, as provided under Section 226(3) ((iii), which reads as under:-

“Sec.226(3)(iii) A copy of the notice shall be forwarded to the assessee at his last address known to the Assessing Officer or Tax Recovery Officer, and in the case of a joint account to all the joint holders at their last addresses known to the Assessing Officer or Tax Recovery Officer”.

17. Though the said provision does not postulate a hearing, definitely there is a mandate that a copy of the notice issued to the garnishee should be forwarded to the assessee. A learned



Single Judge of the Calcutta High Court in **Purnima Das v. Union of India [(2010) 329 ITR 278 (Cal)]** found that it was not proper on the part of the Assessing Officer to attach and debit a sum, under Section 226(3), without serving a copy of the notice of attachment on the assessee as mandated under Section 226(3)(iii). This Court is inclined to find that the provision definitely mandates that notice shall be forwarded to the assessee and though a hearing is not contemplated, the specific provision cannot be treated as a dead-letter. It is intended, at least, to alert the assessee so as to bring to the notice of the recovery officer any anomalies in making such demand and also to avail of the statutory remedies available to the assessee and for arranging its affairs to deal with the contingency of the bank accounts being frozen and debited off the amounts; against the demand. Herein there were two conditional orders of stay in the first appeal and the assessee would have been persuaded to comply with the condition, on notice under Section 226(3)(iii).

18. It is as against this mandate, that the 3rd respondent, in paragraph 11 of her affidavit, contends that the additional 4th respondent-Bank, on service of the garnishee order on 25.03.2014, made attempts to delay enforcement and communicated the



attachment to the petitioner herein, promoting the officers of the petitioner to meet the CIT with a request to withdraw the garnishee order. Hence, it is clear that the intention of the 3rd respondent was to attach the amounts remaining in the account maintained by the petitioner with the additional 4th respondent-Bank; without notice to the assessee. In fact, in the instant case the initial proceedings issued under Section 226(3) was for recovery of more than Rs.22 crores, being arrears for 2005-06 and 2006-07. The demand for 2005-06, as was noticed earlier, was stayed by a Division Bench of this Court. But for the assessee having brought to the notice of the Assessing Officer, the entire amounts would have been debited from the account of the assessee. The requirement of a notice, hence, cannot at all be discounted.

19. On point is a decision of this Court reported in **Rajan Nair v. I.T.O. [(1987) 165 ITR 650 (Ker)]**. Dilating upon the powers of the Assessing Officer, a learned Single Judge stated so:

“The power vested in the Income-tax Officer under section 220(6) of the Income-tax Act, 1961, which empowers him to treat an assessee as not being in default in respect of the amount in dispute in appeal as long as the appeal remains undisposed is a discretionary power. However, it is one coupled with a duty to be



exercised judiciously and reasonably based on relevant grounds. It should not be exercised arbitrarily or capriciously or based on matters extraneous or irrelevant. The Income-tax Officer should apply his mind to the facts and circumstances of the case relevant to the exercise of the discretion, in all its aspects. He is bound to apply his mind to relevant factors and circumstances like the assessment history of the assessee, his conduct and co-operation in relation to the Department, points raised in the appeal, chances of recovery in case the appeal is dismissed, the hardship to the assessee by inconsistency on immediate payment and the like. He has also to remember that he is not the final arbiter of the disputes involved but only the first amongst the statutory authorities. Questions of fact and of law are open for decision before the two appellate authorities both of whom possess plenary powers. In exercising his power, the Income-tax Officer should not act as a mere tax-gatherer but as a quasi-judicial authority vested with the power of mitigating hardship to the assessee”.

20. Immediately on coming to know of the recovery steps, the petitioner was before the 3rd respondent, with a request to stay recovery till the High Court is moved. The afore-cited decision of this Court was quoted with approval in **UTI Mutual Fund** (supra). Apposite are the guidelines laid down by the Division Bench of the Bombay High Court, which are as hereunder:

“1. No recovery of tax should be made pending



(a) expiry of the time limit for filing an appeal;

(b) disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated;

2. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and bearing in mind the guidelines in *KEC International* [(2001) 251 ITR 158 (Bom)];

3. If the Assessing Officer has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay;

4. When a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;

5. In exercising the powers of stay, the Income-tax Officer should not act as a mere tax gatherer but as a quasi-judicial authority vested with the public duty of protecting the interests of the Revenue while at the same time balancing the need to mitigate the hardship to the assessee. Though the Assessing Officer has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order; the matter must be considered from all its facets, balancing the



interest of the assessee with the protection of the Revenue”.

21. The 3rd respondent, in her affidavit, while deprecating the action of the additional 4th respondent in conveying the attachment to the assessee, has clearly admitted that the officers of the petitioner had met the Commissioner of Income Tax on 25.03.2014 as also on 26.03.2014. The 3rd respondent, by the said admission and the acknowledgement of Exhibit P16; was aware of the assessee's attempt to move this Court under Article 226 of the Constitution of India. Exhibit P16 is dated 26.03.2014 and the 3rd respondent admits that on 25th and the 26th the officers of the assessee met the CIT. Hence, before the Demand Draft was encashed, which admittedly was delivered only on 27.03.2014, the petitioner had apprised the 3rd respondent as also the CIT about the filing of a writ petition under Article 226 of the Constitution.

22. The encashment attempted to have been done immediately on production of the Demand Draft has to be viewed in that context. The power conferred under Section 226(3) is to be exercised with greatest caution and the provision is to be construed strictly. The power to attach and recover amounts from a third party is



to be invoked sparingly; in the event of the assessee having deliberately evaded recovery as also when the assessee is found to be indulging in activities which would eventually defeat the recovery. In the instant case, immediately on service of the order under Section 226(3), the Branch Manager informed the Assessing Officer that the operation in the account has been frozen. Definitely the Assessing Officer could have called for the details of the amounts remaining in the account of the assessee, from the banker. There being sufficient amounts, available in the account, to satisfy the recovery, the attachment could have been continued, without recovery. The withdrawal of the amounts demanded could have been kept in abeyance, especially when the assessee had informed both the 3rd respondent as also her superior officer that the assessee is intending to move this Court.

23. It would have been, in the fitness of things, for the 3rd respondent to have contacted the Standing Counsel for Government of India (Taxes), whose office is maintained in the High Court building; only for the purpose of conducting litigation, on behalf of the Department; before the High Court. Evidently the attempt was to pre-empt any orders issued in a writ petition. This Court is not



unaware of the acute, but unjustified, consternation harboured by, at least certain authorities, when superior Courts interdict their professedly legal methods of recovery. Such consternation is not justified in the context of the constitutional scheme under which the executive and the judiciary functions; which scheme reflects the anxiety of the framers to protect individual rights over arbitrary action of the State. The States power to make laws, implement them and interpret it have been with definite design conferred separately. The authorities would do well to imbibe the spirit of the observation in **DIT**

[Exemption] (supra), made in paragraph 12:

“The petitioner-Revenue and the Assessing Officer would do well to remember that we live in a State which is governed by rule of law. It is primary obligation of the officers of the State that it follows the law laid down by the courts in letter and spirit before taking any coercive action”.

24. This Court, hence, cannot but find that the surreptitiousness in action is on the part of the 3rd respondent and not the additional 4th respondent. The 3rd respondent, who has been conferred with statutory powers, had given a complete go-by to the specific provision for service of notice on the assessee, and had



surreptitiously sought recovery from the account maintained by the petitioner/assessee. The Branch Manager of the Bank, faced with a huge demand, as a garnishee, cannot be faulted for having informed his valued customer. The additional 4th respondent, also by way of abundant caution, sought permission from the controlling authority; but, however, complied with the proceedings under Section 226(3) of the Income Tax Act by interdicting operations in the account and also informing the 3rd respondent about the same. The amount thus remaining in the account then, which definitely was more than the demand made under Section 226(3) of the Act, was definitely secured by the operations in the account having been frozen. The 3rd respondent, however, thought it fit to follow up; with threat of penalty and prosecution, with discernible intent.

25. This Court finds that the 3rd respondent has overreached the statutory power and breached the limits of reasonableness and fairness that should always temper exercise of quasi-judicial power. Filling the coffers of the Revenue should not be the only aim of a recovery officer conferred with statutory powers; all with the avowed object of taking the nation forward, but not at the detriment of a citizen and without following the rule of law. An



exercise of statutory power though properly conferred by statute, on facts and on implementation can be found to be arbitrary for reason of the dictates of reasonableness and fairness having not been employed in its true measure and as contemplated by well established principles, strengthened further by judicial precedents.

26. Obviously the recovery which laid dormant despite a conditional order being passed by the appellate authority, acquired an unholy velocity on the 25th of March, 2014, apparently due to the close of the financial year. There is an appalling haste shown by the recovery officers of the Revenue Department, both of the Union and the State, to hastily attempt conclusion of recovery before the close of the year, not necessarily in the interest of the State; but more in the interest of achieving targets for personal aggrandizement. However, such goals of fulfilling targets shall not be the consideration of a quasi-judicial authority. The word "judicious" means in simple terms good judgment. Its synonyms are - reasonable, sober, sagacious, considered and so on and so forth. The antonym, as revealed from the dictionaries, are-imprudent, silly, unreasonable, etc. Any judicial or quasi-judicial action should be proceeded with or done with good judgment and good sense.



27. Taxation is the prerogative of the legislature and Courts fight shy of interfering with that immunity subject only to Article 265 of the Constitution of India. The legislature, in its innate wisdom, has provided for checks and balances in effectuating levy and collection of tax. This earmarks the concern of the legislature, Parliament herein, in providing sufficient safeguards from arbitrary exercise of power. A judicial or quasi-judicial authority outside the safe confines of office, can also, only resort to Courts, for redressal of their grievances against arbitrary action of State and its other instrumentalities.

28. In **Panhandle Oil Company v. State of Mississippi [1927 U.S. 278]**, Oliver Wendel Holmes, J., speaking for the dissenting minority, upholding a tax on gasoline even when sold to the Union; referred to the oft-quoted proposition of Chief Justice John Marshall that: "the power to tax is the power to destroy" [**M'Culloch v. The State of Maryland (1819 U.S.316)**]. That proposition made more than a century earlier was termed as not holding good as on today (sic) when it is (sic) recognized that the distinctions of law are distinctions of degree. It was held:

"If the states had any power it was assumed that they had all power, and that the necessary alternative was to deny it



altogether. But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. **The power to tax is not the power to destroy while this court sits**".

29. The Courts in India too have zealously guarded against any overreach by the legislature or abuse by the executive. Our own Supreme Court; a Constitution Bench, "numerically expanded, almost to a breaking point"(sic), dealing with forfeiture of amounts collected as tax had this to say:

"38. ... There is a tendency for valiant tax executives clothed with judicial powers to remember their former capacity at the expense of the latter. In a welfare State and in appreciation of the nature of the judicial process, such an attitude, motivated by various reasons cannot be commended. The penalty for deviance from these norms is the peril to the order passed. The effect of mala fides on exercise of administrative power is well established."

[(1977) 4 SCC 98 STO v. Ajit Mills Ltd.]

30. On such deliberate consideration, this Court is led to the irrefutable conclusion that the act of withdrawal of the amounts, after having validly attached the amounts, without any real or



presumable cause for suspecting delay or impediment in such recovery, was a clear abuse, especially since there was no notice to the assessee, which is the mandate of due process of law. The Department acted without deliberation or due cause and the unavoidable consequence is a direction for the refund of amounts withdrawn under Section 226(3), after deducting Rs.4 crores, as stipulated in the conditional order passed by this Court on 27.03.2014. The refund shall be made within a period of two weeks with interest from the date of withdrawal, to the date of repayment, at the rate applicable in the account of the petitioner; if the account is interest bearing. The refund shall be made without looking at the result of the appeal, which is said to have been heard on 20.03.2014, since the same is only a first appeal and substantial amounts are already recovered and allowed to be retained with the Revenue as per the interim order of this Court.

31. This Court does not intend to go into the conduct of the individual officer, since the learned Standing Counsel points out that she is new to office and had only acted in anxiety to protect revenue. This Court cannot also discount the pressure brought upon subordinate officers; when, as referred to in **UTI Mutual Fund**



(supra), the Chairman, Central Board of Direct Taxes, himself, has addressed the Chief Commissioner; Director Generals, etc., of the Income Tax Department, requiring speedy recovery and consequent weightage in the normal incidence of service. This Court has to necessarily practise the judicial restraint, it preached at the beginning. Suffice it to observe that the zeal to serve the nation shall not cross the bounds of law and result in over-zealous actions infringing upon the rights of citizens, for whom the State exists.

Writ petition disposed of with the above directions. There shall be no order as to costs.

Sd/-
K.Vinod Chandran
Judge.

vku/-

(true copy)