

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 7231 OF 2020

Vrinda Sharad Bal .Petitioner
A-7, 3rd Floor, Kamdar Building,
Gokhale Road South, Dadar,
Mumbai – 400 028.

Vs.

1. The Income Tax Officer, Ward 22(3)(5), .Respondents
Mumbai
Piramal Chambers, Dr. S. S. Rao Marg,
Parel, Mumbai – 400 012.
2. The Principal Commissioner of Income
Tax, Ward 22, Mumbai
Room No. 409, 4th floor, Piramal
Chambers,, Dr. S. S. Rao Marg,
Parel, Mumbai – 400 012.
3. The Union of India
Through the Principal Secretary, Department
of Revenue, Ministry of Finance,
Room No. 128-B, North
Block, New Delhi – 110 001.

Mr. Siddharth Bhole a/w Mr. Kalpesh Taralkar i/b. SSB Legal &
Advisory, Advocate, for the Petitioner
Mr. Sham Walve, Advocate, for the Respondents

CORAM : **SUNIL P. DESHMUKH &
ABHAY AHUJA, JJ.**

DATE : **25.03.2021**

JUDGMENT (Per Sunil P. Deshmukh, J.)

. Petitioner an individual and proprietor of M/s. Shree Bal Developers and M/s. Shree Bal Land Developers is before the court aggrieved by adjustment of refund amounts pertaining to Assessment Years (for short 'AY') 2012-13, 2017-18, 2018-19 and 2019-20 against the demand of income tax for the AY 2013-14. It is contended that non-payment of refund to petitioner and its adjustment in recovery of demand for AY 2013-14 is absolutely arbitrary and illegal.

2. Petitioner refers to that income tax return of the petitioner for AY 2013-14 was selected for scrutiny and notices under sections 142(1) and 143(2) of the Income Tax Act, 1961 (The Act / Income Tax Act) had been issued to petitioner. Order in respect of the same had been passed on 31.03.2016 assessing income at Rs. 21,48,06,900/-. Tax dues were claimed to be to the tune of Rs. 6,13,48,390/-. Demand notice was accordingly issued. Petitioner preferred an appeal against the assessment order dated 31.03.2016. During its pendency, amount to the tune of Rs. 1,38,34,925/- has been collected by respondents adjusting refunds pertaining to AYs 2014-15, 2015-16 and 2016-17. Petitioner had applied for stay to recovery of demanded tax for the

AY 2013-14. On 26.06.2018, the Assessing Officer had passed an order of stay to recovery of balance of tax due for the AY 2013-14, albeit, purporting to have reserved right to adjust refund arising against the demand.

3. Refund amounts Rs. 58,56,090/- and Rs. 71,92,970/- for assessment year 2018-19 and AY 2019-20 respectively as well are purportedly adjusted toward demand for AY 2013-14. Petitioner has made multiple representations to authorities for payment of refund amounts to petitioner. Petitioner has also raised grievance on online income tax portal. Respondent No. 1 has responded to with remark that under the stay order, right to adjust refunds towards recovery of demand for the AY 2013-14 has been reserved. The matter was even taken to the Principal Chief Commissioner of Income Tax, Mumbai. However, there has been no progress. Petitioner had once again made a specific request to grant a stay to recovery of demand for the AY 2013-

14 with a direction to issue refund orders and pay amount to the petitioner along with interest. Similar request has been made in November, 2020. Since petitioner was not getting any response, petitioner was constrained to be before this Court.

4. It is being referred to that due to COVID-19 pandemic and lock down, business has been badly affected leading to financial crunch

making it difficult for petitioner to arrange for day to day administrative and operative expenses.

5. It is requested that condition in the stay order dated 26.06.2018 be declared void, without jurisdiction and illegal and Petitioner seeks writ of Certiorari to quash the impugned refund orders to the extent that they seek adjustment against demand for AY 2013-14, and writ prohibiting and restraining recovery by adjustment of refunds against the demand for the AY 2013-14 is sought with a direction to refund of amounts referred to in prayer clauses (e) to (h).

6. Mr. Bhole, learned counsel for Petitioner submits that successive circulars have been issued by the CBDT giving guidelines for stay to recovery of demand at the first appellate stage and exercise of power under section 220(6) as such is regulated by the same. He purports to point out Instruction No. 1914 of 02.02.1993 prescribing the assessing officer to grant stay to demand reserving right to adjust refunds arising. He refers to Office Memorandum dated 29.02.2016, inter-alia, reserving right to adjust refunds arising against demand is restricted to the extent of the amount required for granting stay and subject to Section 245 of the Income Tax Act. He submits that office memorandum dated 31.07.2017 modifies amount upwardly from 15%

to 20% required for granting stay. He submits that having regard to the aforesaid, right to adjust refund is restricted to the extent of 20% of the demand amount. While in petitioner's case, amount adjusted from refunds being more than 20% of demand of tax for AY 2013-14 which is pending in appeal, action by the respondents to adjust demand from refund over and above 20% of demand for AY 2013-14 is absolutely arbitrary and against guidelines and memoranda issued from time to time. He submits that amount adjusted from refund of Rs. 1,38,34,925/- is 22.55% of total demand i. e. in excess of 20% of the demanded amount. He submits that refunds cannot be adjusted over and above 20% against balance outstanding demand subjected to appeal. He vehemently submits that petitioner is not a defaulter and refers to Section 220(6) of the Income Tax Act and contends that there is no dispute on that. Thus, petitioner would be entitled to the payment of amount as referred to in the prayer clauses.

7. He refers and relies on a decision of the Punjab and Haryana High Court in the case of *Jindal Steel And Power Ltd. Vs. Principal Commissioner of Income Tax And Another*, reported in [2017] 391 ITR 42 (P&H). It has been observed in the same, power to adjust refund against the demand is limited and assessing officer is not supposed to act contrary to the instructions by the CBDT.

He also refers and relies on decision of this court in the case of *M/s. Andrew Telecommunications India Pvt. Ltd. Vs. Principal Commissioner of Income Tax*, reported in 295 CTR 557 (Bom), wherein it appears to have been considered that refund could be adjusted only to the extent of 15% and order adjusting refund over and above said amount was liable to be quashed.

8. Learned counsel for petitioner cites and relies on the decision of the Supreme Court in the case of *Commissioner of Customs Vs. Indian Oil Corporation Ltd.*, reported in 267 ITR 272 to impress upon binding nature of the circulars issued by CBDT and that revenue is bound by the same and cannot be allowed to plead those being not valid or are contrary to the terms of the statute.

9. Mr. Bhole, learned counsel for petitioner submits that technical difficulty in processing refund is not a ground to deny refund to petitioner, when the petitioner is entitled in fact and in law to have refund.

10. The respondents have submitted reply to the petition. It is being referred to that provisions of the Income Tax Act empower the Assessing Officer to hold onto the money on account of the assessee,

and to adjust against the outstanding demands. It is contended that instructions have been properly followed by the assessing officer which are issued for internal circulation as guidelines to recover demands. As a matter of principle, every demand should be recovered as soon as it becomes due and the demand can be kept in abeyance for valid reasons only, in accordance with the guidelines. Instruction No. 1914 dated 21.03.1996 issued by the Board is regarding procedure for recovery of outstanding demand. The subsequent office memoranda are partial modifications.

11. To the Affidavit-in-reply, there is a re-joinder by petitioner re-asserting that there is an obligation cast upon assessing officer to grant stay having regard to the Office Memorandum dated 29.02.2016.

12. Mr. Walve, learned counsel for the respondents submits that the Central Government had introduced Centralised Processing of Return of Income Scheme, 2011 (the Scheme) under Notification dated 04.01.2012 in exercise of the powers under sub-section (1A) of section 143 of the Income Tax Act. He submits that the scheme has been introduced to streamline filing of return and the processing thereof in expeditious manner even allowing the assessee to receive their refunds in a shortest possible timeline. He submits that after introduction of aforesaid scheme, almost all the returns are processed

through the Centralised Processing Centers ('CPC' for short) save a few categories. He refers to clauses 7 & 10 of the Centralised Processing of Return of Income Scheme, 2011 which read thus :-

“ 7. Centralised Processing Centers. ('CPC' for short)

(1) The Board may set up as many Centralised Processing Centers as it may deem necessary and specify their respective jurisdictions.

(2) The processing of the returns shall be undertaken at the Centralised Processing Centre.

10. Adjustment against outstanding tax demand.

The set-off of refund, if any, arising from the processing of a return, against tax remaining payable will be done by using the details of outstanding tax demand lying against the person as uploaded onto the system of the Centre by the Assessing Officer. ”

He, therefore, submits that having regard to the provisions above, the action of the assessing officer in adjusting refunds would not be un-natural.

13. Section 143(1A) of the Income Tax Act, 1961 reads as under :-

“(1A) For the purposes of processing of returns under sub-section (1), the Board may make a scheme for centralised processing of returns with a view to expeditiously determining the tax payable by, or the refund due to, the assessee as required under the said sub-section.

14. Introduction of scheme pursuant to sub-section 143(1A) of the Act is with a view to process a return expeditiously. Clause 10 of the Scheme, refers to set off of refund arising from the processing of return against tax remaining payable will be done by using details of outstanding demand as uploaded on to the system by assessing officer.

15. Section 143 (1B) of the Act is as under :-

“(1B) Save as otherwise expressly provided, for the purpose of giving effect to the scheme made under sub-section (1A), the Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act relating to processing of returns shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in that notification; so, however, that no direction shall be issued after the 31st day of March, (2012).”

16. Sub-section 143(1B) reflects, for giving effect to the scheme pursuant to sub-section (1A), a notification with respect to application or non-application of any provisions relating to processing

of return may be issued and no such notification under Section 143(1B) has been referred to by parties. Having regard to the context of sections 143(1A), 143(1B), it does not appear Clause 10 under the scheme is intended to be read out of the context isolatedly.

17. It would, thus, emerge that the scheme pursuant to 143(1A) will have to be taken into account alongwith other provisions of Act and would take within its fold instructions issued by CBDT from time to time. It does not appear the clause is in derogation of and would efface prevailing and subsisting operation of provisions and instructions or would render the provisions and the instructions insignificant and redundant. Clause 10, as it would be seen will have to be read in the context of the provisions in the Act governing refund and also orders, circulars, instructions issued from time to time.

18. Set off of refund under the clause is to be done by using details of income tax demand lying against the person uploaded on to the system. The exercise of power to have set off / adjustment of refund is regulated by legislative provisions and instructions. The details referred to in the clause would have to correspond to the provisions and instructions operating. Function under the clause would be circumscribed by them and it would be incongruous to consider that

uploading referred to in Clause 10 would mean all refunds arising are liable to be adjusted against the tax demands irrespective of orders thereon by the authorities and / or subsisting instructions and provisions applicable.

19. The tax demand for AY 2013-14 is in dispute and is pending before appellate authority. Having regard to instructions, circulars and memoranda issued from time to time, as referred to on behalf of petitioner, which are not disputed by the respondents, it appears to be expedient that the assessing officer refrains from recovering tax dues demanded for AY 2013-14. In the circumstances, a restraint is called for from recovering amount over and above, as per instructions, circulars and guidelines issued by CBDT, from time to time. The amount recovered from petitioner if is over and above as per instructions, circulars, the excess collection over and above the amount required for stay may have to be returned to petitioner and the refunds would not be adjusted till disposal of the appeal.

20. The amount recovered from petitioner over and above the amount as per instructions, memoranda, circular towards demand of tax for the AY 2013-14 pending in appeal would be returned to the Petitioner with interest according to law and refunds of amounts over

and above the amount as per instructions / guidelines may not be adjusted towards tax demand for AY 2013-14 till disposal of appeal.

21. Rule is made absolute in above terms. Writ petition is disposed of accordingly.

(ABHAY AHUJA, J.)

(SUNIL P. DESHMUKH, J.)