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

% *Judgment delivered on: 01 March 2024*

\+ W.P.(C) 9310/2022

NATIONAL ASSOCIATION OF SOFTWARE AND SERVICES COMPANIES (NASSCOM).....Petitioner

Through: Mr. Salil Kapoor, Mr. Sumit Lalchandani, Ms. Ananya Kapoor, Mr. Shivam Yadav and Mr. Vibhu Jain, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX (EXEMPTION) CIRCLE 2 (1), DELHI AND ORS .....Respondents

Through: Mr. Abhishek Maratha, Sr.SC with Mr. Parth Semwal and Ms. Nupur Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. The writ petitioner has approached this Court aggrieved by the adjustment of a disputed tax demand pertaining to **Assessment Year**[1] 2018-19 against refunds which were due to it for AYs' 2010-11, 2011-12 and 2020-21. The challenge is principally raised in the backdrop of the aforesaid adjustment having been made despite the petitioner having moved a rectification application pertaining to the final

[1] AY

assessment which was framed for AY 2018-19 and an admitted failure on the part of the respondents to consider and dispose of the stay application which was moved and was referable to Section 220(6) of the **Income Tax Act, 1961**[2]. It is in the aforesaid backdrop that the petitioner has prayed for the refund being processed after adjustment of 20% of the disputed demand for AY 2018-19. For the purposes of examining the reliefs which are claimed, we deem it apposite to notice the following facts.

2. The petitioner filed its **Return of Income**[3] for AY 2018-19 on 29 September 2018 claiming a refund of INR 6,45,65,160/- on account of excess **Taxes Deducted at Source**[4] which was deducted during the course of the said year. In the course of processing of that ROI, notices under Section 143(2) and 142(1) of the Act came to be issued on 22 September 2019 and 09 January 2020 respectively. On 16 November 2019, the petitioner received an intimation, referable to Section 143(1) of the Act, apprising it of an amount of INR 6,42,30,413/- being refundable along with interest. However, when the assessment was ultimately framed and a formal order was passed under Section 143(3) read with Section 144B of the Act, various additions came to be made to the income disclosed in the ROI and leading to the creation of a demand of INR 10,26,85,633/-.

3. Aggrieved by the aforesaid, the petitioner preferred an appeal before the **Commissioner of Income Tax(Appeals), National Faceless Appeal Centre**[5], which is stated to be pending.

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[2] Act
[3] ROI
[4] TDS
[5] CIT(A), NFAC

Simultaneously, it also moved an application purporting to be under Section 154 of the Act for correction of rectifiable mistakes which according to it were apparent on the face of the record. Along with the rectification application, the petitioner on 28 May 2021 also filed a stay application in respect of the demand so raised. The rectification application however came to be perfunctorily rejected in terms of an order dated 07 June 2021 which is reproduced hereinbelow:

> "Sub: Rectification in case of National Association of Software and Service Companies for A.Y. 2018-19 – Reg.
>
> 1. In this connection, it is stated while finalizing the assessment u/s 143(3), the FAO had denied exemption u/s 11 of the I.T. Act and has also made some other addition on the account of interest income, donation, TDS etc. and assessed at a taxable income of Rs. 24,65,40,625/-.
>
> 2. The order of the FAO is a speaking order on each additions made by him/her. This order u/s 143(3) cannot be rectified u/s 154 as the additions made are not mistakes apparent from the record."

4. It would appear that during the pendency of the appeal before CIT(A), NFAC, and without attending to the stay application which had been moved, the respondents proceeded to adjust the demand that stood created by virtue of the assessment order dated 29 April 2021 on 04 March 2022, 07 March 2022 and 30 March 2022 against various refunds which were payable to the petitioner for AYs' 2010-11, 2011-12 and 2020-21. According to the writ petitioner it was entitled to receive the following refunds for the aforenoted AYs:

AY 2010-11	INR 2,27,44,597/-
AY 2011-12	INR 30,39,000/-
AY 2020-21	INR 9,14,63,710/-

5. According to Mr. Kapoor, learned counsel who appeared in support of the writ petition, the action so initiated and the adjustments effected are wholly arbitrary and illegal in as much as there existed no justification for the adjustments being made without its application referable to Section 220(6) being either considered or examined. According to Mr. Kapoor, the very purpose of Section 220(6) has been nullified by the action of the respondents who have proceeded to make the impugned adjustments without even examining the application of the petitioner for not being treated as an "*assessee in default*".

6. Mr. Kapoor additionally submitted that as per the **Central Board of Direct Taxes Office Memorandum No. 404/72/93-ITCC**[6] dated 31 July 2017, the respondents could have at best required the petitioner to deposit 20% of the outstanding demand. According to learned counsel, despite the aforesaid binding prescription, the entire outstanding demand illegally created for AY 2018-19 had been adjusted against the refunds which were due and payable to the petitioner.

7. Appearing for the respondents, Mr. Maratha, learned counsel submitted that they were clearly justified in effecting the adjustments in the absence of a declaration having been rendered in favour of the petitioner that it was not an "*assessee in default*". Learned counsel submitted that although an application under Section 154 of the Act had been moved, the issues which were sought to be canvassed thereon clearly did not qualify as an error apparent and thus the same rightly came to be rejected.

8. It was the submission of Mr. Maratha that the application for stay which was moved by the writ petitioner was not accompanied by any

[6] OM

challan evidencing deposit of monies against the demand for AY 2018-19 which was outstanding. Thus, and according to learned counsel, since a pre-condition as specified in the OM was not adhered to, the application of the assessee was rightly not considered.

9. Having noticed the rival submissions, we at the outset deem it appropriate to extract the OM dated 31 July 2017 which reads as under:

> **"OFFICE MEMORANDUM [F.NO.404/72/93-ITCC] SECTION 220 OF THE INCOME-TAX ACT, 1961 - COLLECTION AND RECOVERY OF TAX - WHEN TAX PAYABLE AND WHEN ASSESSEE DEEMED IN DEFAULT - RECOVERY OF OUTSTANDING TAX DEMANDS - PARTIAL MODIFICATION OF INSTRUCTION N0.1914, DATED 21-3-1996 TO PROVIDE FOR GUIDELINES FOR STAY OF DEMAND AT FIRST APPEAL STAGE**
>
> **OFFICE MEMORANDUM [F.NO.404/72/93-ITCC], DATED 31-7-2017**
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> Instruction No. 1914 dated 21-3-1996 contains guidelines issued by the Board regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand.
>
> *Vide* O.M. NO.404/72/93-ITCC dated 29-2-2016. revised guidelines were issued in partial modification of Instruction No 1914, wherein, *inter alia*, *vide* para 4(A) it had been laid down that in a case where the outstanding demand is disputed before CIT(A), the Assessing Officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in para (B) there under Similar references to the standard rate of 15% have also been made in succeeding paragraphs therein.
>
> The matter has been reviewed by the Board in the light of feedback received from field authorities. In view of the Board's efforts to contain over pitched assessments through several measures resulting in fairer and more reasonable assessment orders, the standard rate of 15% of the disputed demand is found to be on the lower side. Accordingly, it has been decided that the standard rate prescribed in O.M. dated 29-2-2016 be revised to 20% of the disputed demand, where the demand is contested before CIT(A). Thus, all references to 15% of the disputed

demand in the aforesaid O.M dated 29-2-2016 hereby stand modified to 20% of the disputed demand. Other guidelines contained in the O.M. dated 29-2-2016 shall remain unchanged.

These modifications may be immediately brought to the notice of all officers working in your jurisdiction for proper compliance."

10. It would also be beneficial at this juncture to notice the earlier OM dated 29 February 2016 and the same is reproduced hereinbelow:-

"**OFFICE MEMORANDUM [F.NO.404/72/93-ITCC] SECTION 220 OF THE INCOME-TAX ACT, 1961 - COLLECTION AND RECOVERY OF TAX - WHEN TAX PAYABLE AND WHEN ASSESSEE DEEMED IN DEFAULT - AMENDMENT OF INSTRUCTION NO.1914, DATED 21-3-1996 TO PROVIDE FOR GUIDELINES FOR STAY OF DEMAND AT FIRST APPEAL STAGE**

OFFICE MEMORANDUM [F.NO.404/72/93-ITCC], DATED 29-2-2016

Instruction No. 1914 dated 21-3-1996 contains guidelines issued by the Board regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand.

2. In part 'C' of the Instruction, it has been prescribed that a demand will be stayed only if there are valid reasons for doing so and that mere filing of an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. It has been further prescribed that while granting stay, the field officers may require the assessee to offer a suitable security (bank guarantee, etc.) and/ or require the assessee to pay a reasonable amount in lump sum or in instalments.

3. It has been reported that the field authorities often insist on payment of a very high proportion of the disputed demand before granting stay of the balance demand. This often results in hardship for the taxpayers seeking stay of demand.

4. In order to streamline the process of grant of stay and standardize the quantum of lump sum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT (A), the following modified guidelines are being issued in partial modification of Instruction No. 1914:

(A) In a case where the outstanding demand is disputed before CIT (A), the assessing officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in para (B) hereunder.

(B) In a situation where,

(a) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted (e.g. in a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of Revenue or addition is based on credible evidence collected in a search or survey operation, etc.) or,

(b) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.), the assessing officer shall refer the matter to the administrative Pr. CIT/CIT, who after considering all relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand.

(C) In a case where stay of demand is granted by the assessing officer on payment of 15% of the disputed demand and the assessee is still aggrieved, he may approach the jurisdictional administrative Pr. CIT/CIT for a review of the decision of the assessing officer.

(D) The assessing officer shall dispose of a stay petition within 2 weeks of filing of the petition. If a reference has been made to Pr. CIT/CIT under para 4 (B) above or a review petition has been filed by the assessee under para 4 (C) above, the same shall also be disposed of by the Pr. CIT/CIT within 2 weeks of the assessing officer making such reference or the assessee filing such review, as the case may be.

> (E) In granting stay, the Assessing Officer may impose such conditions as he may think fit. He may, inter alia,-
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> (i) require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled;
>
> (ii) reserve the right to review the order passed after expiry of reasonable period (say 6 months) or if the assessee has not co-operated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations;
>
> (iii) reserve the right to adjust refunds arising, if any, against the demand, to the extent of the amount required for granting stay and subject to the provisions of section 245.
>
> **5.** These instructions/guidelines may be immediately brought to the notice of all officers working in your jurisdiction for proper compliance."

11. In our considered opinion, the respondents have proceeded on a wholly incorrect and untenable premise that the assessee was obliged to tender or place evidence of having deposited 20% of the disputed demand before its application for stay under Section 220(6) of the Act could have been considered. The interpretation which is sought to be accorded to the aforesaid OM is clearly misconceived for the following reasons.

12. It must at the outset be noted that the two OMs' noticed above neither prescribe nor mandate 15% or 20% of the outstanding demand as the case may be, being deposited as a pre-condition for grant of stay. The OM dated 29 February 2016 specifically spoke of a discretion vesting in the AO to grant stay subject to a deposit at a rate higher or lower than 15% dependent upon the facts of a particular case. The subsequent OM merely amended the rate to be 20%. In fact, while the

subsequent OM chose to describe the 20% deposit to be the "*standard rate*", the same would clearly not sustain in light of the discussion which ensues.

13. We note that while dealing with an identical question, we had in **Avantha Realty Ltd. vs The Principal Commissioner of Income Tax Central Delhi 2 & Anr.**[7] observed as under:

> "**2.** We note that the impugned orders are principally based on the instructions of the Central Board of Direct Tax ["**CBDT**"] as encapsulated in the Office Memorandum dated 31 July 2017 and which had while dealing with the manner in which the power under Section 220(6) of the Act is liable to be exercised had held that assessees' may be accorded interim protection subject to deposit of 20% of the total outstanding demand failing which they would be treated as an "*assessee in default*".
>
> **3.** Insofar as the aforesaid Office Memorandum is concerned, suffice it to note that while considering its ambit the Supreme Court in **Principal Commissioner of Income Tax and Others vs. LG Electronics India Private Limited** had held as follows:-
>
> > "1. Delay condoned. Leave Granted.
> >
> > 2. 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 cases, to grant deposit orders of a lesser amount than 20%, pending appeal.
> >
> > 3. The appeal is disposed of accordingly. Pending application, if any, shall stand disposed of."

14. As is manifest from the order passed by the Supreme Court in **Principal Commissioner of Income Tax & Ors. vs LG Electronics**

[7] WP(C) 2615/2024, Order dated 21 February 2024

India Pvt. Ltd.[8], it had been emphasized that the administrative circular would not operate as a fetter upon the power otherwise conferred on a quasi-judicial authority and that it would be wholly incorrect to view the OM as mandating the deposit of 20%, irrespective of the facts of an individual case. This would also flow from the clear and express language employed in sub-section (6) of Section 220 which speaks of the **Assessing Officer**[9] being empowered "*in his discretion and subject to such conditions as he may think fit to impose in the circumstances of the case*". The discretion thus vested in the hands of the AO is one which cannot possibly be viewed as being cabined by the terms of the OM.

15. The issue of a grant of stay pending appellate remedies being pursued arose for the consideration of a Division Bench of the Court in **Dabur India Limited vs Commissioner of Income Tax (TDS) & Anr.**[10], where it was pertinently observed as under:

> "**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 29 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.
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> xxxx xxxx xxxx

[8] (2018) 18 SCC 447
[9] AO
[10] 2022 SCC OnLine Del 3905

> **8.** In the present case, the impugned order is non-reasoned. The three basic principles i.e. the prima facie case, balance of convenience and irreparable injury have not been considered while deciding the stay application."

16. More recently in **Indian National Congress vs Deputy Commissioner of Income Tax Central – 19 & Ors.**[11] we had an occasion to examine the scope of the power conferred by Section 220(6) of the Act and which was explained in the following terms:

> "**22.** However, as we read the order impugned, the matter does not appear to have proceeded along those lines before the ITAT. The tone and tenor of submissions clearly appear to have been concentrated upon the merits of the assessment order. Although the issue of payment of 20% of the outstanding demand appears to have been raised, the same came to be summarily rejected by the ITAT in cryptic terms. Notwithstanding the above, it becomes pertinent to observe that the 20% deposit which is spoken of in the OM dated 31 July 2017 is not liable to be viewed as a condition etched in stone or one which is inviolable. The OM merely seeks to provide guidance to the authorities to bear in mind certain aspects while considering applications for stay of demand pending an appeals remedy being pursued. The OM is not liable to be read as conferring an indefeasible right upon the assessee to claim a stay of a tax liability by merely offering or consenting to deposit 20% of the outstanding liability. Ultimately, it is for the authorities to examine and consider what amount would be sufficient to securitise the interest of the Revenue and thus a just balance being struck. The quantum of the deposit that would be required to be made would ultimately depend upon the facts and circumstances of each case. This is evident from the order of the Supreme Court in **Principal Commissioner of Income Tax and others Vs. LG Electronics India Private Limited** and which is extracted hereunder: -
>
> > "1. Delay condoned. Leave granted.
> >
> > 2. 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

[11] Neutral Citation – 2024:DHC:2016-DB

> 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 cases, to grant deposit orders of a lesser amount than 20%, pending appeal.
>
> 3. The appeal is disposed of accordingly. Pending application, if any, shall stand disposed of."

> **23**. The position which thus emerges is that while 20% is not liable to be viewed as an entrenched or inflexible rule, there could be circumstances where the respondents may be justified in seeking a deposit in excess of the above dependent upon the facts and circumstances that may obtain. This would have to necessarily be left to the sound exercise of discretion by the respondents based upon a consideration of issues such as prima facie, financial hardship and the likelihood of success. This observation we render being conscious of the indisputable position that the OM applies only upto the stage of the appeal pending before the CIT(A) and being of little significance when it comes to the ITAT."

17. As explained in *Indian National Congress*, the 20% which is spoken of in the OM cannot possibly be viewed as being an inviolate or inflexible condition. The extent of the deposit which an assessee may be called upon to make would have to be examined and answered bearing in mind factors such as prima facie case, undue hardship and likelihood of success. We note that while dealing with the question of the claim of stay as made by an assessee and the competing obligation to protect the interest of the Revenue, the Supreme Court in **Benara Valves Ltd. & Ors. Vs Commissioner of Central Excise & Anr.**[12] had elucidated the legal position in the following words:

> "**6.** Principles relating to grant of stay pending disposal of the matters before the forums concerned have been considered in

[12] (2006) 13 SCC 347

several cases. It is to be noted that in such matters though discretion is available, the same has to be exercised judicially.

7. The applicable principles have been set out succinctly in *Silliguri Municipality v. Amalendu Das* and *Samarias Trading Co. (P) Ltd. v. S. Samuel* and *CCE v. Dunlop India Ltd.*

8. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand on, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in *Siliguri Municipality* and *Dunlop India* cases without analysing factual scenario involved in a particular case.

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11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of Revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interest of Revenue have to be kept in view.

12. As noted above there are two important expressions in Section 35-F. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in *S. Vasudeva v. State of Karnataka* that under Indian conditions expression "undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

> **13.** For a hardship to be 'undue' it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.
>
> **14.** The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.
>
> **15.** The other aspect relates to imposition of condition to safeguard the interest of Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the interest of the Revenue."

The aforesaid principles were reaffirmed by the Supreme Court in **Monotosh Saha vs Special Director, Enforcement Directorate & Anr.**[13]

18. We find a lucid explanation of the legal position with respect to pre-deposit and the grant of stay in a decision rendered by a Division Bench of the Allahabad High Court in **ITC Ltd v. Commissioner (Appeals), Customs & Central Excise**[14] where the Court had held as follows:

> "**18.** In *Income-tax Officer* v. *M.K. Mohammad Kunhi*, AIR 1969 SC 430, the Apex Court held that stay should be granted if a strong *prima facie case* has been made out and in the most deserving and appropriate cases where entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue, during the pendency of the appeal.
>
> 19. In *B.P.L. Sanyo Utilities and Appliances Ltd.* v. *Union of India*, 1999 (108) E.L.T. 621, the Karnataka High Court held that in the matter of grant of waiver of pre-deposit, each case has to be

[13] (2008) 12 SCC 359
[14] 2003 SCC Online All 2224

examined on its own merit and no hard and fast rule can be formulated.

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21. In *Mehsana District Cooperative Milk P.U. Ltd.* v. *Union of India*, 2003 (154) E.L.T. 347 (S.C.), the Hon'ble Supreme Court considered the case of dispensation of pre-deposit condition and held that the Appellate Authority must address to itself to the prima *facie* merits of the appellant's case and upon being satisfied of the same, determine the quantum of deposit taking into consideration the financial hardship and other such related factors.

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23. In *J.N. Chemicals Pvt. Ltd.* v. *CEGAT*, 1991 (53) E.L.T. 543, the Calcutta High Court while considering the provisions of pre-deposit of duty and penalty, observed that where the authority concerned comes to the conclusion that the appellant has a good *prima facie case* so as to justify the dispensation of requirement of pre-deposit of the disputed amount on duty and penalty, the authority must exercise its discretion to dispense with such requirement particularly in a case where the appellant satisfies the authority concerned that its case is squarely covered by the decision of a competent Court binding on it. In such an eventuality, asking the appellant to deposit the duty demanded and penalty levied would undoubtedly cause undue hardship to the appellant. While deciding the said case, Calcutta High Court placed reliance upon the judgment of the Hon'ble Apex Court in *L. Hirday Narain* v. *Income-Tax Officer, Bareilly*, (1970) 2 SCC 355 : AIR 1971 SC 33, wherein the Court observed as under:

> "If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moved in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute *prima facie* enabling, the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right-public or private-of a citizen."

24. Thus, even where enabling or discretionary power is conferred on a public authority, the words which are permissive in character, require to be constituted, involving a duty to exercise that power, if some legal right or entitlement is conferred or enjoyed, and for the effectuating the such right or entitlement, the exercise of such power is essential. The aforesaid view stands

fortified in view of that fact that every power is coupled with a duty to act reasonably and the Court/Tribunal/Authority has to proceed having strict adherence to the provisions of law. [Vide *Julius* v. *Lord Bishop of Oxford*, (1880) 5 Appeal Cases 214; *Commissioner of Police, Bombay* v. *Gordhandas Bhanji*, 1951 SCC 1088 : AIR 1952 SC 16; *K.S. Sriniva-san* v. *Union of India*, AIR 1958 SC 419; *Yogeshwar Jaiswal* v. *State Transport Appellate Tribunal*, (1985) 1 SCC 725 : AIR 1985 SC 516; *Ambica Quarry Works etc.* v. *State of Gujarat*, (1987) 1 SCC 213 : AIR 1987 SC 1073].

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26. In *Bongaigaon Refinery & Petrochem Ltd.* v. *Collector of Central Excise (A)*, 1994 (69) E.L.T. 193 (Cal.), the Calcutta High Court, while examining a similar issue and placed reliance upon a large number of judgments and held that the phrase "undue hardship" would cover a case where the appellant has a strong *prima facie case*. The phrase also covers a situation where there is an arguable case in the appeal. If the Appellate Authority forms the opinion that appellant has a strong *prima facie case*, it should dispense with the pre-deposit condition altogether. However, where it is of the opinion that the appellant has no arguable case, the Appellate Authority must safeguard the interest of the Revenue, as the same also cannot be jeopardised.

27. In *Sri Krishna* v. *Union of India*, 1998 (104) E.L.T. 305, Delhi High Court considered the issue of dispensation of pre-deposit condition and the concept of undue hardship while considering the provisions of Section 129E of the Customs Act, 1962 and Section 35 of the Act and held that the Court while considering the case of the appellant should examine as to whether the Appellate Authority or Tribunal have dealt with the plea raised by the appellant before it and have considered as to whether the appellant has a *prima facie case* on merit. In case the appellant has a strong *prima facie case*, as is most likely to exonerate him from liability and the Appellate Authority/Tribunal insists on the deposit of the amount, it would amount to undue hardship.

28. In *Hoogly Mills Co. Ltd.* v. *Union of India*, 1999 (108) E.L.T. 637, the Calcutta High Court again reiterated the view that if the appellant has a strong *prima facie case*, he is entitled of waiving the pre-deposit condition and in case the Appellate Authority insists to deposit the amount so assessed or penalty so levied, it will cause undue hardship to the assessee. While considering the said case, the Court placed reliance upon the large number of

judgments including *Tata Iron & Steel Co. Ltd.* v. *Commissioner (Appeals), Central Excise*, 1998 (98) E.L.T. 50; *Hari Fertilizer* v. *Union of India*, 1985 (22) E.L.T. 301 (All.); *Re. American Refrigeration Co. Ltd.*, 1986 (23) E.L.T. 74; and *V.I.T. Sea Foods* v. *Collector of Customs*, 1989 (42) E.L.T. 220 (Ker.), wherein the Courts had expressed the similar view.

29. In *I.T.C. Ltd.* v. *Commissioner of Central Excise and Customs (Appeals)*ILR 2000 KAR 25, while examining the issue of pre-deposit under Section 35 of the Act, after considering a large number of judgments of the Apex Court and various High Courts, it was held as under:

> "While considering the case of 'undue hardship', the authority is required to examine the *prima facie* on merits of the dispute as well. Pleading of financial disability would not be the only consideration. Where the case is fully covered in favour of the assessee by a biding precedent like that of the judgment of the Supreme Court, jurisdictional High Court or a Special Bench of the Tribunal, then to still insist upon the deposit of duty and penalty levied would certainly cause undue hardship to the assessee. Absence of the financial hardship in such a case would be no ground to decline the dispensation of pre-deposit under the proviso to Section 35F. The power to dispense with such deposit is conferred under the authorities has to be exercised precisely in cases like this type and if it is not exercised under such circumstances then this Court will require it to be exercised. Such like cases where two views are not possible then the condition of pre-deposit before the appeal is heard on merits, can be dispensed with. In case two views are possible on interpretation, based on conflicting judgments of the Tribunal or different High Courts in the absence of the judgment of the jurisdictional High Court then the authorities may pass the order under proviso to Section 35F of the Act keeping in view the facts of the case in hand."

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35. In view of the above, the aforesaid authorities make it clear that the Court should not grant interim relief/stay of the recovery merely by asking of a party. It has to maintain a balance between the rights of an individual and the State so far as the recovery of sovereign dues is concerned. While considering the application for stay/waiver of a pre-deposit, as required under the law, the Court must apply its mind as to whether the appellant has a

> strong *prima facie case* on merit. In case it is covered by the judgment of a Court/Tribunal binding upon the Appellate Authority, it should apply its mind as to whether in view of the said judgment, the appellant is likely to succeed on merit. If an appellant having strong *prima facie case*, is asked to deposit the amount of assessment so made or penalty so levied, it would cause undue hardship to him, though there may be no financial restrain on the appellant running in a good financial condition. The arguments that appellant is in a position to deposit or if he succeeds in appeal, he will be entitled to get the refund, are not the considerations for deciding the application. The order of the Appellate Authority itself must show that it had applied its mind to the issue raised by the appellant and it has been considered in accordance with the law. The expression "undue hardship" has a wider connotation as it takes within its ambit the case where the assessee is asked to deposit the amount even if he is likely to exonerate from the total liability on disposal of his appeal. Dispensation of deposit should also be allowed where two views are possible. While considering the application for interim relief, the Court must examine all pros and cons involved in the case and further examine that in case recovery is not stayed, the right of appeal conferred by the legislature and refusal to exercise the discretionary power by the authority to stay/waive the predeposit condition, would be reduced to nugatory/illusory. Undoubtedly, the interest of the Revenue cannot be jeopardized but that does not mean that in order to protect the interest of the Revenue, the Court or authority should exercise its duty under the law to take into consideration the rights and interest of an in dividual. It is also clear that before any goods could be subjected to duty, it has to be established that it has been manufactured and it is marketable and to prove that it is marketable, the burden is on the Revenue and not on the manufacturer."

19. Though some of the decisions noticed by us hereinabove pertained to pre-deposit prescriptions placed by a statute, the principles enunciated therein would clearly be of relevance while examining the extent of the power that stands placed in the hands of the AO in terms of Section 220(6) of the Act. In our considered opinion, the respondents have clearly erred in proceeding on the assumption that the application for consideration of outstanding demands being placed in abeyance could not have even been entertained without a 20% pre-deposit. The

aforesaid stand as taken is thoroughly misconceived and wholly untenable in law.

20. Undisputedly, and on the date when the impugned adjustments came to be made, the application moved by the petitioner referable to Section 220(6) of the Act had neither been considered nor disposed of. The respondents have thus in our considered opinion clearly acted arbitrarily in proceeding to adjust the demand for AY 2018-19 against available refunds without attending to that application. This action of the respondents is wholly arbitrary and unfair. The intimation of adjustments being proposed would hardly be of any relevance or consequence once it is found that the application for stay remained pending and the said fact is not an issue of contestation.

21. We consequently allow the instant writ petition and remit the matter to the respondents for considering the application of the petitioner under Section 220(6) in accordance with the observations made hereinabove. The issue of the amount of refund liable to be released shall abide by the decision which the respondents shall now take pursuant to the directions framed hereinabove.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 01, 2024/kk