

Prem Prakash Tripathi Vs Commissioner of Income Tax and Others

Court: Allahabad High Court

Date of Decision: March 21, 1994

Acts Referred: Income Tax (Appellate Tribunal) Rules, 1963 & Rule 35A
Income Tax Act, 1961 & Section 220(6)

Citation: (1994) 121 CTR 77 : (1994) 208 ITR 461 : (1994) 75 TAXMAN 107

Hon'ble Judges: Om Prakash, J; M.C. Agarwal, J

Bench: Division Bench

Advocate: Shakeel Ahmad, for the Appellant; Standing Counsel, for the Respondent

Final Decision: Dismissed

Judgement

Om Prakash, J.

This petition filed under Article 226 of the Constitution raises an important question whether the Commissioner of Income

Tax (Appeals) possesses power to grant stay against recovery of tax.

2. Whereas the petitioner's returned income was Rs. 12,840 and Rs. 16,430 for the assessment years 1989-90 and 1991-92, he was assessed in

the status of an individual at Rs. 12,97,130 and Rs. 26,18,190, respectively. Aggrieved, the petitioner filed appeals before the Commissioner of

Income Tax (Appeals), Kanpur, for both the years, which are said to be still pending.

3. The petitioner approached the assessing authority to get the stay order, then the assessing authority stayed the demand till November 30, 1993,

or till the disposal of appeals before the Commissioner of Income Tax (Appeals), whichever was earlier. The stay order stood terminated on

November 30, 1993, as the appeals could not be decided till then. Thereafter, the petitioner went up to the Commissioner of Income Tax,

Kanpur, seeking extension of the stay order till the decision of the appeals pending before the Commissioner of Income Tax (Appeals). The

Commissioner of Income Tax rejected the prayer of the petitioner and such rejection was communicated to the petitioner by order dated March 2,

1994 (annexure "6" to the writ petition). From such communication, it appears that the Commissioner of Income Tax rejected the prayer of the

petitioner "due to non-cooperative attitude" shown by the petitioner "before assessing authorities".

4. This is how the petitioner has come up to this court. It is submitted by learned counsel for the petitioner that no power is vested in the

Commissioner of Income Tax (Appeals) to grant stay order under the Income Tax Act, 1961 (briefly, "the Act"), and, therefore, the petitioner has

resorted to Article 226 of the Constitution. It is, no doubt, true that there is no specific provision in the Act or the Rules framed thereunder

conferring power to grant stay on the Commissioner of Income Tax (Appeals). Ordinarily, such power should be vested in an appellate authority.

The appeal is nothing but a continuation of assessment proceedings. If in the absence of power to grant stay the recovery is made during the

pendency of the appeal and if the appeal is allowed in course of time, then that would cause avoidable inconvenience to the assessee. For effective

adjudication of the matters and to obviate unnecessary inconvenience to the assessees, it is nothing but appropriate to confer power of granting

stay on the appellate authorities. Not only in the case of Commissioner of Income Tax (Appeals), power to grant stay was not conferred even on

the Appellate Tribunal prior to February 12, 1970. However, Sub-section (6) of Section 220 of the Act states that where an assessee has

presented an appeal u/s 246, the Assessing Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the

circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for

payment has expired as long as such appeal remains undisposed of. The rationale of this provision is that an assessee should not be unnecessarily

inconvenienced during the pendency of the appeal and, therefore, Sub-section (6) says that the assessee will not be treated as in default while the

appeal is pending against the assessment orders. Law does not require that once the assessment is made, recovery of tax should be made

immediately, notwithstanding the remedy of appeal having been provided in the Act. Rather, Sub-section (6) of Section 220 clearly provides that

the assessee against whom an assessment is made should not be treated as in default so long as his appeal remains undisposed of. If such is the

intention of law, then it can hardly be said that the Commissioner of Income Tax (Appeals) is not vested with the powers of granting stay order,

which is not only necessary but expedient for effective adjudication of appeals. If an assessee establishes his, prima facie, case in appeal, then the

appellate authority should be competent to grant stay order, otherwise the assessee would be put to a serious loss, which in certain cases may be

even irreparable. What is the use of remedy of appeal, if irreparable loss is caused? The remedy of appeal is always provided to alleviate the

sufferings and not to augment them and if the provisions of appeal are read in that spirit, then the only conclusion that can be reached is that the

appellate authority does possess power to grant stay order, even if it is not specifically conferred by any statutory provision. But the position will

be different if such power is specifically taken away from the appellate authority by any statutory provision. The right of appeal is not procedural,

but a substantive right and that right can be conferred by a given statute with or without imposing limitations. Unless there is an exclusionary

provision, power to grant stay will ordinarily be deemed to have been conferred on the appellate authorities.

5. Before Rule 35A was inserted in the Income Tax (Appellate Tribunal) Rules, 1963 (for short, "the Rules"), with effect from February 12, 1970,

conferring power on the Income Tax Appellate Tribunal to grant stay, a question came up before the Supreme Court in *Income Tax Officer Vs.*

M.K. Mohammed Kunhi, whether or not the Appellate Tribunal possessed power to grant stay. Interpreting Section 255 of the Act, the

Supreme Court observed (at page 822); "Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is

very doubtful if the power of stay can be spelt out from that provision". The Supreme Court then enunciated (at page 822): "But the Appellate

Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when Section

220(6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf

when an appeal is pending before the Appellate Tribunal.

6. It is amply clear that it is after this decision that power to grant stay was conferred on the Appellate Tribunal by inserting Rule 35A in the Rules

of 1963.

7. When the Appellate Tribunal was held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction, we see no reason

why the same legal position should not follow in the case of the Commissioner of Income Tax (Appeals), who is also an appellate authority like the

Appellate Tribunal. In this situation, what holds good in the case of the Appellate Tribunal equally applies to the Commissioner of Income Tax

(Appeals). Following this authority, we hold that the Commissioner of Income Tax (Appeals) must be held to have the power to grant stay, which

is incidental or ancillary to its appellate jurisdiction.

8. The petitioner may, therefore, make a stay application before the Commissioner of Income Tax (Appeals), before whom the appeals are

pending for both the assessment years.

9. In the result, the petition fails and is dismissed in limine with the observations that if the petitioner makes a stay application within ten days from

today, then the same will be decided by the Commissioner of Income Tax (Appeals), respondent No. 4, within two weeks from the date a

certified copy of this order is produced before him by the petitioner, who undertakes to produce the same within ten days from today. If such

application is made, as aforesaid, then until the decision of such application, no coercive measures will be taken for recovery of tax against the

petitioner.

10. If the petitioner fails to take steps, as aforesaid, then the stay order will stand vacated automatically.

11. A copy of this order be given to counsel for the parties, on payment of usual charges, within 24 hours.