(2017) 03 MP CK 0045

MADHYA PRADESH HIGH COURT

Case No: 3164 of 2017

Northern Coal Fields Limited		APPELLANT
	Vs	
Assistant Commissioner of Income Tax & Ors.		RESPONDENT

Date of Decision: March 23, 2017

Acts Referred:

- Income Tax Act, 1961, Section 156, Section 156, Section 156, Section 156, Section 245, Section 245,

Hon'ble Judges: Hemant Gupta,, S.K. Gangele

Bench: Division Bench

Advocate: C.S. Agrawal, Abhijeet Shrivastava, Sanjay Lal

Judgement

1. The challenge in the present writ petition is to an action of the Revenue in adjusting the amount refundable for the Assessment Year 2012-13 against the tax demands raised for the Assessment Years 2013-14 and 2014-15.

2. Some facts are required to be mentioned. The Income Tax Appellate Tribunal, Jabalpur Bench, Jabalpur (for short "Tribunal") vide order dated 03.06.2016 allowed the appeal of the assessee, the present petitioner for the Assessment Year 2012-13. As a consequence of said order, an amount of Rs.899,83,91,210/- became refundable to the petitioner. It was on 05.01.2007, the Assessing Officer (The Assistant Commissioner of Income Tax-2 Jabalpur) served a notice on the assessee in terms of Section 245 of the Income Tax Act (for short "the Act") proposing to set off the amount of refund against the tax demand of Rs.729.33 Crores due for the Assessment Year 2013-14 and Rs.791.25 Crores due to the Assessment Year 2014-15.

3. It may be stated that the assessment for the Assessment Year 2013-14 was finalized by the Assessing Officer on 18.03.2016 and that of the Assessment Year 2014- 15 was finalized on 28.12.2016. It is thereafter, a notice for adjustment was

issued on 05.01.2017, which was received by the assessee on 12.01.2017 and response was submitted by the petitioner on 12.01.2017 (Annexure-P/17). After considering the reply filed, an order of adjustment was passed on 16.01.2017 adjusting Rs.729,33,48,880/- as a demand raised for the Assessment Year 2013-14 and Rs.170,50,42,330/- from the demand of tax for the Assessment Year 2014-15. The amount of refund was thus adjusted against the tax payable amounting to Rs.899,33,91,210/-.

4. Learned counsel for the petitioner has vehemently argued that in respect of the Assessment Year 2013-14, the Assessing Officer has passed an order of stay of the demand for a period of six months whereas the order of refund has been passed within the period of stay, therefore, the refund amount could not be adjusted against demand for the Assessment Year 2013-14 as such demand was stayed. The order of stay of the Assessing Officer reads as under:

GOVERNMENT OF INDIA

MINISTRY OF FINANCE

(DEPARTMENT OF REVENUE)

OFFICE OF ASSISTANT COMMISSIONER OF INCOME TAX-2(1)

ANNEXE BUILDING, NAPIER TOWN, JABALPUR

F.No.ACTT/C-2(1)/JBP/Stay of Demand /2016-17 / Dated 12.09.2016

To,

The Northern Coalfields Ltd.,

Panjresh Bhawan,

Singrauli Colliery,

District Sidhi.

Sir,

Sub: Application for stay of demand of A.Y. 2013-14 regarding.

Ref: Please refer to your letter regarding stay of demand for A.Y. 2013-14, dated 22.03.2016-reg.

Kindly refer to the subject cited above.

In this connection, it is to state that the stay petition filed by you vide your letter dated 22.03.2016 is re-considered. It has been verified that the first appeal in this case is pending before Hon''ble CTT-(A-II), Jabalpur. Demand raised u/s 143(3) for the year under consideration is Rs.873,41,98,340/- and out of this demand refund of A.Y. For Rs.144,08,49,460/- has been adjusted by the CPC. Your stay application is considered in light of CBDT memorandum dated-29.02.2016 and balance demand is stayed for a period of 6 months or upto the decision of 1st appeal whichever is earlier.

Yours faithfully

(-sd-)

Assistant Commissioner of Income-tax,

Circle-2(1), Jabalpur

5. Learned counsel for the petitioner relies upon an order passed by the Delhi High Court reported as (2012) 347 ITR 43 (Delhi) in Maruti Suzuki India Ltd. Vs. Deputy Commissioner of Income-Tax and that of the Bombay High Court reported as (2013) 354 ITR 77 (Bom) in HDFC Bank Ltd. Vs. Assistant Commissioner of Income-Tax and Others. It is further argued that no notice of demand was served upon the assessee in respect of Assessment Year 2014-15, therefore, there could not be any order of adjustment. The order of assessment is said to have been passed on 28.12.2016

(Page 184 of the paper book) whereas the notice of adjustment has been issued on 05.01.2017 itself. It is contended that the demand becomes due after the expiry of 30 days and since the assessee has not been given 30 days for depositing the due amount, therefore, demand was not due and payable which could be adjusted against the refund due to the assessee for the Assessment Year 2012-13. It is also argued that the demand raised in the Assessment Years 2013-14 and 2014-15 is an identical grounds which have been set aside by the Tribunal for the Assessment Year 2012-13. Infact, the Tribunal has consistently set aside the demand raised against the petitioner from the Assessment Year 1998-99.

6. On behalf of the Revenue, it is pointed out that the orders passed by the Tribunal for the earlier Assessment Years have not attained finality and are pending consideration in appeals before this Court. The following are the appeals pending in respect of earlier Assessment Years including the appeal arising out of order of the Tribunal pertaining to Assessment Year 2012-13:

> "MAIT 79/2004, MAIT 80/2004, ITA 71/2014, ITA 72/2014, ITA 70/2015, ITA 74/2015, ITA 75/2015, ITA 76/2015, ITA 77/2015, ITA 78/2015 and ITA 79/2015"

7. In view of the said fact, it cannot be said that the legality and validity of the assessment proceedings is final.

8. We have heard learned counsel for the parties and find no merit in the present petition. In respect of an argument that demand for the Assessment Year 2013-14 was stayed by the Assessing Officer in exercise of powers conferred under Section 220(6) of the Act, we do not find any merit. A perusal of the order of stay passed by the Assessing Officer on 12.09.2016 in terms of Section 220(6) of the Act shows that even in the said order, an amount of Rs.144,08,49,460/- has been adjusted. After adjustment, the balance amount was stayed for a period of 6 months or upto the decision of the first appeal, whichever is earlier. After passing of such order, the assessment for the Assessment Year 2014-15 was finalized on 28.12.2016. The order under Section 220(6) of the Act as well as the intimation under Section 245 of the Act was issued by the same Assessing Officer. Therefore, the argument of the learned counsel for the petitioner that the Assessing Officer should have modified its order of 12.09.2016 before the order of adjustment is not tenable as the order of stay was not passed by any other superior authority but by the Assessing Officer himself. The Hon''ble Supreme Court in M/s. Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association, Madras AIR 1992 SC 1439 has examined the effect of an interim order of stay. The Supreme Court held that distinction has to be made between quashing of an order and stay of an order. Quashing of the order results in restoration of the position as stood on the date of passing of the order which has been quashed but the stay of operation of the order does not however lead to such

a result. In view thereof, the order of Assessing Officer not to recover the demand for the Assessment Year does not lead to setting aside of the demand itself. The said demand could very well be adjusted against the refund due for the previous year 2012-13.

9. Similarly, the assessment was completed for the Assessment Year 2014-15 on 28.12.2016. The demand for recovery of the tax due was issued on 13.01.2017 giving time to the assessee to deposit the tax due within 30 days. Such demand notice is for the recovery of the amount which is payable within 30 days and after 30 days, the consequences as contemplated under Section 156 of the Act follows but assessment having been finalized on 28.12.2016, the Assessing Officer could adjust the amount against the refund payable as it was amount due and payable by the assessee though it had 30 days time to deposit the same.

10. The order of the Delhi High Court referred to by the learned counsel for the petitioner infact draws a distinction between stay of coercive measures to recover the demand and stay of adjustment under Section 245 of the Act. The Court has held to the following effect:

> "……We do not think that set off or adjustment cannot be regarding as a mode of recovery or is not a recovery mechanism. The term "recovery" is comprehensive and includes adjustment thereby reducing the demand.
>
> At the same time, different parameters and requisites may apply when the appellate authority considers the request for stay against coercive measures to recover the demand and when stay of adjustment under Section 145 of the Act is prayed for. In the first case, coercive steps are taken with the idea to compel the assessee to pay up or by issue of gamishee notice to recover the amount. In the second case, money is with the Revenue and is refundable but adjusted towards the demand. Thus, while granting stay, the appellate authority or the Income-tax Appellate Tribunal (for that matter, even under section 220(6)), the authority can direct stay of recovery by coercive methods but may not grant stay of adjustment of refund. However, when an order of stay of recovery is simplistic and absolute terms is passed, it would be improper and inappropriate on the part of the Revenue to recover the demand by way of adjustment. In case of doubt or ambiguity, an application for clarification or vacation/modification of stay to allow adjustment can be, and should be filed. But no attempt should be made and it should not appear that the Revenue has tried to over- reach and circumvent the stay order . Obedience and compliance with the stay order in letter and spirit is mandatory. A stay order passed by an appellate/higher authority must be respected. No deviancy or breach should be made.

> We do not, in the present case, intend to lay down propositions or broad principles when and in what case there should be total stay of demand, or stay of recovery through coercive steps but no stay of adjustment under section 245 of the Act. We would like to restrict ourselves to the facts of the present case and the contentions raised by the petitioner that when an issue or contention has been decided in favour of the assessee in earlier years whether adjustment under section 245 of the Act is permissible in respect of arrears pertaining to the same issue or subject-matter."

11. The Delhi Court has categorically held that it did not intend to lay down propositions or broad principles when and in what case there should be total stay of demand or stay of recovery but no stay under Section 245 of the Act can be made. Section 245 of the Act infact permits the Revenue to set off any demand from the amount to be refunded but the only condition is of intimation in writing to such person against whom action is proposed to be taken. We find that demand having been raised against the petitioner for the Assessment Years 2013-14 and 2014-15 and intimation having been sent to the petitioner on 05.01.2017, the mandate of Section 245 of the Act was satisfied by the Revenue before making adjustment from the refund due to the assessee from the tax due to the assessee for the subsequent years.

12. In view thereof, we do not find any merit in the writ petition, the same is dismissed.

13. At this stage learned counsel for the petitioner has sought intervention of this Court for directing the Commissioner of Income Tax (Appeal) to decide the appeals preferred by the petitioner for the Assessment Years 2013-14 and 2014-15 expeditiously as having received the tax amount, the petitioner has the apprehension that the appeals will not be decided.

14. In view of the argument raised, we deem it appropriate to direct the jurisdictional Commissioner of Income Tax (Appeal) to decide the appeals of the petitioner expeditiously preferably within a period of six months from the date of receipt of this order.