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IN THE HIGH COURT OF DELHI

+ CWP No.3560/02 & CMs 6151, 6523, 9412/02

% Date of Decision: 10th October 2002

M/s.JCT Limited............................Petitioner

! through: Mr.C.S.Aggarwal with Mr.Prakash Kumar, Advocates

Versus

$ Income-tax Appellate Tribunal. Delhi Bench & Ors......................Respondents

^ through Mr.R.C.Pandey, Sr.Standing Counsel with Mr.Ajay Jha, Advocates.

* CORAM:

THE HON'BLE MR.JUSTICE D.K.JAIN
THE HON'BLE MS.JUSTICE SHARDA AGGARWAL

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

Yes

: D.K.JAIN,J.

. Rule D.B.

2. Since a very short point is involved and the matter brooks no delay, with the consent of counsel for the parties, we proceed to dispose of the matter at this stage itself.

3. Challenge in this petition under Article 226/227 of the Constitution of India is to the order, dated 23 May 2002, passed by the Income-tax Appellate Tribunal New Delhi (for short the Tribunal) directing the petitioner to pay a sum of Rs.1.15 Crores in three instalments of Rs.40 Lacs each, as a condition for stay of realisation of demand created against the petitioner and for disposal of its appeal on out of turn basis. The Tribunal has also directed the petitioner not to alienate or dispose of any of its immovable properties till the final disposal of the appeal.

4. The background facts, giving rise to the present petition are as follows:

. The petitioner, a public limited company, is primarily engaged in the manufacturing and selling of textiles, cotton, nylon, synthetic filament yarn etc. On 11 January 2000, a survey operation under Section 133-A of the Income-tax Act, 1961 (for short the Act) was conducted at the business premises of the petitioner at New Delhi. During the course of survey, it was noticed that to raise funds the petitioner had come out with Global Depository Receipts (GDR for short) issue during the financial year 1994-95, through offer circular dated 29 July 1994. GDR was listed for trading in Luxembourg stock exchange and the lead managers for the issue were M/s Merrill Lynch

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International Banking Group (Merrill Lynch for short). As per the approval of the Ministry of Finance, the petitioner was allowed to pay selling commission, underwriting commission and management fees to Merrill Lynch to the extent of 3% of the gross issue proceeds Apart from this, the petitioner was also allowed to reimburse the expenses less than 0.75% of the gross issue proceeds.

5. Upon a perusal of the agreement entered into by the petitioner with Merrill Lynch, it was felt by the Assistant Commissioner of Income-tax, respondent No.2 herein, that Merrill Lynch had played a significant role in the GDR issue by way of preparation of the prospectus, organising road shows for publicity, providing necessary guidance about the pricing, size and timing of the issue. The total expense incurred on the GDR issue was Rs 5,38,79,122. The Assistant Commissioner was of the view that the services rendered by Merrill Lynch to the petitioner were in the nature of "fees for technical services" within the meaning of Section 9(1)(vii) read with Explanation 2 of the Act and, therefore, the consideration received by Merrill Lynch for the service rendered was taxable in India, on which tax at source @ 30% should have been deducted by the petitioner under Section 195 of the Act. He, accordingly, issued notice to the petitioner to show

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cause as to why an order under Section 201 of the Act for short deduction of tax at source and under Section 201(1A) for levy of interest for this default, be not passed by treating it as the company in default.

6. Rejecting the stand of the petitioner that it was not under any obligation to deduct tax at source on the amount retained by Merrill Lynch, the Assistant Commissioner held that the petitioner was in default in respect of non-deduction of tax to the extent of Rs.1,61,63,736/- under Section 201(1) of the Act. He also levied interest of Rs.1,85,47,887/- under Section 201(1A) of the Act. The petitioner was required to pay the said two amounts within fifteen days of the receipt of the order.

7. Having failed to get any relief from the Commissioner of Income-tax (Appeals) against the said order, the petitioner preferred second appeal to the Tribunal. Along with the appeal, the petitioner also filed an application for stay of realisation of the said demand till the disposal of its appeal by the Tribunal. The Tribunal, while directing the petitioner to pay the aforenoted amounts, passed the following order:

> "After considering the entire conspectus of the case we find that it is premature to discuss the merits of the case in as much as it may have impact on the hearing of the

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appeal on merits. Latest balance sheet available on record is that of 31 3 2001 A perusal of it reveals that despite the fact that the assessee has regularly suffered losses, it still has comfortable liquid position As shown on page 16 of the Annual Report 2001, the assessee is having net current assets after deduction of current liabilities and provisions from current assets, loans and advances to the tune of Rs 207.33 Crores It is not the case that the payment of disputed tax liability would paralyse its functioning Keeping into consideration the entirety of the case, we grant the stay of demand till the disposal of the appeal or for a period of 180 days from the date of this order, whichever is earlier, subject to the further payment of Rs.1 15 Crores in three instalments as under-

Rs.40 lakhs - on or before 15.6 2002

Rs.40 lakhs - on or before 15.7.2002

Rs.40 lakhs - on or before 15.7.2002."

8. Hence the present petition.

9. Since the petitioner had not complied with order dated 23 May 2002, vide its order dated 28 August 2002, the Tribunal has vacated the stay granted earlier and has directed the Registry to list the appeal in routine.

10. We have heard Mr C.S.Aggarwal, learned counsel for the petitioner and Mr.R C Pandey, learned senior standing counsel for the Revenue.

11. It is vehemently submitted by Mr Aggarwal that the Tribunal has failed to apply the basic principles governing the grant of stay of realisation of the

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disputed demand. Learned counsel would urge that there is not even a whisper in the impugned order, much less an observation, on the merits of the various contentions urged before the Tribunal to show that the petitioner had a very strong prima facie case in its favour. It is contended that since the amounts incurred by the petitioner did not represent fees for technical services within the meaning of Section 9(1)(vii) of the Act, these were not sums chargeable to tax and, therefore, the petitioner was under no obligation to deduct tax at source; even if it was to be assumed that expenses incurred by the petitioner were in the nature of fees for technical services, the amount in question was not taxable in India in view of the Double Taxation Avoidance Agreement between India and the USA, there was no actual payment by the petitioner and the amount in question, for the service rendered, was deducted by Merrill Lynch outside India from the gross proceeds collected there and as such no part of income in the hands of Merrill Lynch was chargeable to tax in India; neither any assessment in respect of the said amount has been made on Merrill Lynch nor the petitioner has been treated as their agent under Section 162 of the Act and, therefore, it cannot be made liable for deduction of tax at source on the expenses incurred; and that the order passed by the Assistant Commissioner was otherwise

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barred by limitation. In essence, the submission is that the Tribunal having ignored these vital aspects of the matter and failed to record its finding as to whether petitioner has made out a prima facie case for grant of stay or not, the discretionary power to grant stay has not been judiciously exercised. Inviting our attention to the balance sheet of the petitioner for the period ending 31 March 2001; the details of losses incurred by it for the last five years and the details of the heavy amounts due from the petitioner to various banks, learned counsel has contended that the Tribunal has also failed to consider the financial position of the petitioner in its correct perspective.

12. Mr.R.C.Pandey, learned senior standing counsel for the Revenue, on the other hand, while supporting the order passed by the Tribunal as just and fair, has urged that as per the balance sheet of the petitioner company, as on 31 March 2001, more than Rs.14 Crores was available to the petitioner as cash and bank balance and, therefore, the directions to pay the aforenoted amounts cannot be said to be onerous. He submits that even in the absence of any statutory provision, laying down any guidelines for grant of stay, the order passed by the Tribunal is very reasonable and, therefore, it is not a fit case for interference by this Court in the exercise of writ jurisdiction.

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13. In rejoinder, learned counsel for the petitioner has submitted that although as on 31 March 2001, the balance sheet does reflect cash and bank balance at more than Rs.14 Crores, but if the cheques issued by the petitioner to various parties towards its liabilities for the year were taken into account, hardly any bank balance would be left. To buttress the stand, learned counsel has referred to the list of 35 bank accounts held by the petitioner company showing that except for ten accounts, having nominal credit balances, rest of the accounts have heavy debit balances.

14. There are many fiscal statutes like Central Excise Act, Customs Act, Sales Tax Act of various states and many other similar statutes, which mandate deposit of even disputed demand as a condition precedent for entertaining an appeal. At the same time, these statutes also confer discretion on the prescribed authority to dispense with pre-deposit conditionally or in full or in part. The effect of such an order is that upon passing and compliance of the order of pre-deposit, realisation of the disputed demand remains stayed till the disposal of appeal. However, the Act does not contain any such provision Still the need for stay of realisation of the disputed demand during the pendency of appeal becomes necessary to prevent unnecessary hardship to an assessee, which in some cases may

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ultimately turn out to be beyond repair, even when ultimately the assessee is successful in appeal.

15. As noted above, there is no specific provision in the Act dealing with the powers of the Tribunal to grant or not to grant stay of realisation of disputed amount pending appeal. But this power flows from Section 254 of the Act, which confers on the Tribunal powers of the widest amplitude in dealing with an appeal before it, which, by implication, includes power of doing all such acts and things or employing such means, as are essentially necessary for its 'execution'. In Income Tax Officer, Cannanore v. M.K.Mohammed Kunhi (1969) 71 ITR 815 (SC), a locus classicus on the subject, while dealing with the issue of power of the Tribunal to grant stay, their Lordships of the Supreme Court said that "the statutory power under this Section carries with it the duty in proper cases to make such orders for staying recovery proceedings pending an appeal before the Tribunal, as will prevent the appeal if successful, from being rendered nugatory. It is firmly established principle that an express grant of statutory power carries with it, by necessary implication, the authority to use all reasonable means to make such grant effective." It is pertinent to note that the power of the Tribunal to grant stay of recovery has now been recognised by the Legislature also by the

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insertion of sub-Section 7 in Section 253 of the Act by Finance (No.2) Act, 1998, w.e.f. 1 October 1998 and the two provisos to sub-Section (2A) of Section 254 of the Act, by the Finance Act, 2001 w.e.f 1 June 2001, respectively providing for levy of fees on the application for stay of demand and fixing the time limit for disposal of an appeal where an order of stay is made as also the consequence of its non-disposal within the said time.

16. The principles by which an application for waiver of condition of pre-deposit for entertainment of an appeal under the aforenoted statutes are well settled by a catena of decisions of the Supreme Court and High Courts. These are : (a) whether there is a prima facie case in favour of the assessee; (b) the balance of convenience qua deposit or otherwise; (c) irreparable loss, if any, to be caused in case stay is not granted and (d) safeguarding of public interest.

17. In Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Limited AIR 1985 SC 330, the Apex Court held that normally four factors for grant of stay order should be kept in view, i.e. prima facie case, which by itself is not enough; balance of convenience; possibility of irreparable injury and safeguarding the public interest.

18. In our view, same principles need to be kept in

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view while dealing with an application for stay of realisation of disputed demand under the Act. At this stage, it may also be useful to notice the following observations of the Supreme Court in Mohammed Kunhi's case (supra) :

> " the power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws It will only be when a strong prima facie case is made out that the Tribunal will consider whether to stay the recovery proceedings and on what conditions, and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the 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. It is trite that while dealing with an application for stay, it is neither desirable nor proper for the Tribunal or any other authority to embark upon a detailed enquiry to find out whether the stand of the assessee is on terra firma, because expression of final opinion on merits at that juncture, without full-fledged hearing and consideration of entire material, is likely to cause prejudice to either side. But, at the same time, the authority concerned is required to consider whether, with reference to the material placed before it, a prima facie case for grant of stay is made out or not Similarly, the Tribunal has to consider whether with reference to the pleadings and the material placed

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before it to substantiate it, undue hardship is likely to be caused to the assessee in case the stay is not granted or when a conditional stay is granted, the conditions imposed are so onerous that the assessee is incapable of complying with the same and, thus, rendering the right of appeal illusory Of course, the authority is required to keep in mind the interest of the Revenue while making such an order. If any one of these vital aspects are ignored by the Tribunal, it may warrant interference by this Court even under a limited scope of judicial review because such an order would have the attributes of arbitrariness and irrationality.

20. In the present petition we are not concerned with the merits of the controversy as to whether the petitioner was required to deduct tax at source under Section 195 of the Act. The only question requiring consideration is whether the Tribunal has exercised discretion in directing the petitioner to make the aforenoted deposit on sound legal principles, noticed above, by considering all the relevant facts. On a consideration of the matter in the light of the material placed on record by the petitioner, we are of the view that the impugned order lacks proper application of mind by the Tribunal on the facts of the case. The afore-extracted order shows that the Tribunal has not expressed prima facie view on the merits of the

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petitioner's case, evidently under the belief that it is premature to do so and it may have impact on the hearing of the appeal. In the light of what we have said above, we feel that it is not a correct approach. Apart from other legal issues of some substance, one of the factual aspects, peculiar to the petitioner's case, highlighted by the petitioner, was that the petitioner had not remitted any amount to Merrill Lynch and whatever amount was payable to them by way of commission or management fee was deducted by Merrill Lynch from the gross proceeds collected by them and, therefore, there was no occasion for them to either pay or credit such amount to the account of Merrill Lynch, within the meaning of Section 195 of the Act. The question is not the effect of the aforenoted facts and other above-mentioned contentions urged on behalf of the petitioner on the appeal of the petitioner when it is decided on merits but is about the effect of non-consideration of these facts by the Tribunal while deciding the stay application of the petitioner. In our considered view, non-consideration of the aforenoted vital facts has resulted in vitiating the impugned order of the Tribunal. We also feel that the Tribunal has not considered the financial condition of the petitioner in its correct perspective. For all these reasons the impugned order cannot be sustained.

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21. Having held that the impugned order is not sustainable and is to be set aside, two options are available with us at this stage, namely (i) the matter of stay be remitted back to the Tribunal for reconsideration in the light of the afore-mentioned principles of law and (ii) to direct the Tribunal to hear the appeal of the petitioner on merits expeditiously without insisting upon any further deposit. In the facts and circumstances of the case and bearing in mind the fact that the petitioner has already deposited a sum of Rs 40 lacs in pursuance of our order dated 3 September 2002 and the statutory mandate is that where an order of stay is made, the Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order, (first proviso to sub-section 2A of Section 254), we are of the view that it would be just and proper to exercise the latter option. The first option, we feel, would only prolong the life of litigation.

22. Accordingly, we allow the writ petition; set aside the impugned order and make the Rule absolute with a direction that the appeal of the petitioner shall be heard by the Tribunal without insisting upon any further deposit as a condition precedent for early hearing of the appeal. At the same time, we request the Tribunal to hear the appeal of the petitioner on merits as

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expeditiously as practicable, but not later than 31 January 2003 We would further direct that the amount of Rs.40 lacs deposited by the petitioner in this Court will be remitted to respondent No 2 herein, through counsel, forthwith. However, it is made clear that in the event of the petitioner succeeding in its appeal before the Tribunal, the said amount shall be refunded to it within a week of its moving an application for refund, before the Commissioner concerned, supported by a copy of the Tribunal's order Till the Tribunal decides the appeal, the respondents shall not take any coercive steps to realise the demand in question.

23. The petition and all the applications, seeking interim relief, stand disposed of in the above terms, leaving the parties to bear their own costs.

D.K.JAIN,J.

SHARDA AGGARWAL,J.

10th October, 2002
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