



IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INCOME TAX MATTER

Reserved on : November 22, 2006

Date of Decision : January 12, 2007

Writ Petition (C) No. 2111 of 2006 & CM 6790/2006

GLAXO SMITH KLINE ASIA PVT. LTD. PETITIONER

Through Mr. Ajay Vohra with Mr. Vinay Vaish

and Ms. Kavita Jha, Advocates

versus

THE COMMISSIONER OF INCOME TAX

& ORS

...RESPONDENTS

Through Ms. Prem Lata Bansal, Advocate

CORAM :-

HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE DR. JUSTICE S. MURALIDHAR

Dr. S. Muralidhar, J.

1. This writ petition under Article 226 of the Constitution of India seeks a mandamus to the respondents “to give appeal effect to the order of the Tribunal and grant refund to the petitioner along with interest thereon till the date of grant of refund.”

Background Facts

2. The facts leading to the filing of this petition are that the petitioner is a company engaged in the business of manufacture and sale of fast moving consumer products. The petitioner itself did not have any employee other than a Company Secretary. The administrative services relating to marketing, finance, human resource, secretarial services etc. were provided by Glaxo Smith Kline Consumer Healthcare Limited ('GSKCH'), a widely held public limited company.



3. The agreement between the GSKCH and the petitioner was that the petitioner would reimburse the costs incurred by GSKCH for providing the various services to the petitioner plus 5% (referred to as 'cross charges'). Since in the said agreement, there was no basis laid down for allocation of costs incurred towards the various services provided to the petitioner, it was decided to engage the services of M/s. Price Waterhouse and Coopers ('PWC'), a leading firm of Chartered Accountants to carry out a study to determine the basis for allocation of costs reimbursable by the petitioner to GSKCH. A Report was submitted by PWC during the month of September 1997 and was made effective from 1.1.1997.

4. In the previous year pertaining relevant to the Assessment Year ('AY') 1998-99, the administrative expenses ('cross charges') were worked out on the basis of the report of PWC. However, the Assessing Officer ('AO') held that the increase in payment of cross charges by the petitioner to GSKCH was not fully and exclusively for the purpose of business of the petitioner and therefore could not be justified in terms of legitimate business requirements of the petitioner. The AO held that the payment of cross charges/administrative expenses to the extent of 7% of net sales alone was justified and disallowed the balance cross charges/administrative expenses. This order of the AO was confirmed by the Commissioner of Income Tax (Appeals) ['CIT (A)']. The same approach was adopted by the AO as well as the CIT (A) for the AY 1999-2000 as well.

5. The petitioner's appeal to the Income Tax Appellate Tribunal ('Tribunal') was allowed by an order dated 11.6.2004. It was found by the Tribunal that "there is no provision to disallow any expenditure on the ground that such expenditure is excessive or unreasonable unless the case of the assessee falls within the scope of Section 40A(2). It is not the case of the department that provisions of Section 40A(2) are attracted in the present case. There is no material on record to show that such provisions could be attracted." Accordingly, the Tribunal deleted the disallowance made in the AYs 1998-99 and 1999-2000. The consequential appeal filed by the Revenue to this Court was dismissed on 20.7.2005. It was held that in view of the clear findings of fact recorded by the Tribunal, there was no substantial question of law involved.

6. For the subsequent AY 2001-02, the AO continued to disallow the cross charges/administrative expenses claimed by the petitioner on the basis of the formula worked by the PWC. By an order dated 16.2.2005, the AO raised a demand of Rs.7,05,04,101. This amount was recovered by attaching the bank accounts of the petitioner on the very next day, i.e. 17.2.2005. Against this order dated 17.2.2005,



the petitioner filed an application before the Tribunal seeking refund of the amount recovered and for a stay of the demand of Rs.7.05 crores, pending disposal of appeal by the Tribunal. By an order dated 3.3.2005, the Tribunal directed the Revenue to refund the amount of Rs.7,05,04,101 to the petitioner within two weeks from the date of the receipt of the order.

7. The order dated 3.3.2005 of the Tribunal was challenged by the Revenue by Writ Petition (C) No. 7304 of 2005. By an order dated 27.4.2005 this Court granted a stay of the said order dated 3.3.2005. It may be mentioned here that ultimately the Revenue withdrew this petition since the assessee's appeals before the Tribunal for the AYs 2000-01 and 2001-02 were allowed by the Tribunal by its common order dated 19.8.2005. The Tribunal negatived the case of the Revenue that the fact situation in AYs 2000-01 and 2001-02 was different from the earlier AYs 1998-99 and 1999-2000 where the disallowance had been deleted by the Tribunal and confirmed by this Court. By the said order dated 19.8.2005, the Tribunal held that the finding that the assessee and GSKCH were not working at arms length was not sustainable and in any event not a relevant consideration to disallow the cross charges/ administrative expenses. The Tribunal concluded that:

"...none of the reasons assigned by the Commissioner of Income Tax (Appeals) to conclude that the decision of the ITAT for AY 98-99 and 99-00 is not applicable to the facts as it existed in Assessment Year 2001-02 can be sustained and therefore the said decision of the Tribunal will apply to this Assessment Year i.e. The Assessment Year 2001-02 also. Respectfully following the order of the Tribunal, we direct that the disallowance of expense made by the Assessing Officer and sustained by the Commissioner of Income Tax (Appeals) should be deleted and same is directed to be deleted."

The appeals filed by the Revenue against the said order of the Tribunal have been admitted and are pending consideration before this Court.

8. On 13.9.2005 the petitioner filed a copy of the order dated 19.8.2005 of the Tribunal with the Deputy Commissioner of Income Tax, Circle 12(1), New Delhi for giving effect to the order of the Tribunal and issuing a refund to the petitioner. The petitioner sent a reminder on 28.9.2005 enclosing a statement of computation of refund. Not receiving any response, the petitioner filed the present writ petition on 10.2.2006. According to the petitioner, the refund due to it for AYs 2000-01 and 2001-02 was Rs.19,53,13,686 along with interest thereon under Section 244 (A) of the Income Tax Act, 1961 ('Act').



9. On 15.2.2006, while directing the notice to issue to the respondents, this directed that till the next date of hearing, “the respondents shall not adjust the amount of refund, if any, due to the petitioner company without the leave of this Court.”

Pleadings

10. On 5.4.2006, the Revenue filed an application being CM No. 6790 of 2006 seeking permission of this Court “to set off the refund against the demand raised/to be raised against the assessee.” The Revenue placed reliance on Section 245 of the Act. It was stated in the application that “after giving appeal effect to the order passed by the ITAT for AYs 2000-01 and 2001-02, an amount of Rs.7.39 crores and Rs.4.44 crores respectively is due to the assessee. At the same time, an amount of Rs.3.55 crores is outstanding against the assessee for the AY 2002-03 and Rs.7.14 crores for AY 2003-04.”

11. On 7.7.2006, the petitioner filed a reply to the said application (CM No 6790/2006). It submitted that out of the aggregate outstanding demand of Rs.10,69,80,949 for AYs 2002-03 and 2003-04, only a sum of Rs.2.17 crores related to disallowance made on account of new issues raised in the AY 2003-04 and the balance demand related to disallowance of payment of cross-charges which was in any event covered in favour of the petitioner by the successive orders of the Tribunal for the AYs 1998-99, 1999-2000, 2000-01 and 2001-02. It was pointed out that Revenue's appeal for the AYs 1998-99 and 1999-2000 had already been dismissed by this Court. The petitioner relied upon the Circular No. 530 dated 6.3.1989 read with Circular No. 589 dated 16.1.1991 issued by the Central Board of Direct Taxes ('CBDT') and contended that it could not be treated to be an assessee in default in respect of a sum of Rs.8.53 crores out of total outstanding demand of Rs.10.70 crores relating to the issue covered in petitioner's favour by this Court as well as the Tribunal. It was, accordingly, submitted as under:

“It will be appreciated that no part of the aggregate sum of nearly Rs.20 crores, refundable to the petitioner, for assessment years 2000-01 and 2001-02, is required to be set off against the outstanding demand, except at the highest, to the extent of Rs.2.17 crores in respect of new issues.”

12. On 19.7.2006 the Revenue filed its reply to the present petition. It was submitted that the order dated 19.8.2005 passed by the Tribunal was received by the Respondent No.2 on 9.9.2005 and thereafter appeal effect was given for both the years, i.e., AYs 2000-01 and 2001-02 by an office order dated 28.12.2005. Since the refund was more than Rs.1 crore in both the years, the files were sent for internal audit to Deputy Commissioner of Income Tax, Circle 10(1) on 2.1.2006 and the files were received back on 16.3.2006. It is admitted that no intimation was given to the



petitioner in this regard till the date of filing the reply. Even thereafter, no intimation was given since the petitioner had filed the present writ petition. It was assured by the Revenue that any proposed adjustment would be made only upon directions that may be given by this Court. It was further averred as under:

“This deponent is advised to say that the limitation for framing an assessment for assessment year 2003-04 was going to be expired on 31.3.2006 and therefore, it was not a case that the respondents were making undue haste for passing an assessment order. Moreover, demand for assessment year 2002-03 was already outstanding against the assessee much before the order passed by the respondent giving appeal effect. Thus the apprehension made by the petitioner was unnecessary and was contrary to law.”

Finally it was urged:

“From the facts stated above, it is evident that it is not the intention of the Department to delay the process of refund so as to wait for the outcome of the assessment for assessment year 2003-04 as alleged by the petitioner. There is no question of depriving the petitioner of the refund due to it. The refunds had already been worked out and will be released to the petitioner as per the instructions by this Hon'ble Court.”

13. The petitioner in its rejoinder pointed out that only after perusing the reply filed by the Revenue, the petitioner came to know of the fact that appeal effect had been given by the order passed on 28.12.2005; that the order in any event gave only partial effect to the order of the Tribunal; that even though the internal audit took close to two and a half months to verify the refund amount claimed by the petitioner, the team overlooked the fact that a sum of Rs.7.05 crores had already been recovered by attaching the bank account of the petitioner. It is only when the petitioner brought this to the notice of the Revenue that an order dated 1.5.2006 was issued under Section 154 of the Act increasing the amount of refund for AY 2001-02 by Rs.7,35,90,159. The petitioner further pointed out that the appeal for the AY 2002-03 was pending before the CIT (A) since March 2005. The appeal had been heard on several occasions but no order had been passed. It was then averred as under:

“It may be pertinent to point out that when the refund became due on passing of the order by the Tribunal in August, 2005, there was no outstanding demand against the petitioner. The respondent deliberately delayed the issue of refund in order to adjust the same against the demand likely to be raised against the petitioner in the assessment for the succeeding year by repeating the disallowance(s) in earlier years, despite the fact the disallowance did not merit acceptance at the hand of the Tribunal and this Hon'ble Court.”



14. By order dated 25.7.2006, this Court directed the Revenue to file an add affidavit within two weeks indicating the break-up of the outstanding amount of Rs.3.5 crores for the AY 2002-03 and Rs.7.14 crores for the AY 2003-04 including the amount attributable to cross charges/administrative expenses. Pursuant to this order, on 8.8.2006, an additional affidavit was filed by the Revenue stating that for AY 2002-03, the demand pertaining to the issue of cross charges/administrative expenses was Rs.3.38 crores whereas demand pertaining to other issues was Rs.0.17 crores. After giving credit to the tax paid by the assessee for the AY 2003-04, the demand pertaining to cross charges/administrative expenses was Rs.4,96,91,139. As regards other issues, it was Rs.2,17,70,275. It was further pointed out that for the AY 2000-01, the refund voucher was issued on 26.7.2006. It was reiterated that this court should “allow the respondent to adjust the refund for AY 2001-02 against the outstanding demand for AY 2002-03 and 2003-04.”

15. In its order dated 17.8.2006 this Court noticed that for the AY 2001-02, the petitioner was entitled to a refund of Rs.11.79 crores whereas according to the Revenue, it is entitled to recover tax of Rs.10.69 crores for the subsequent AYs, i.e., 2002-03 and 2003-04. This meant that the Revenue was retaining an excess of Rs.1.10 crores with it without any justification. Accordingly, this Court directed the Revenue to refund/return to the petitioner a sum of Rs.1.10 crores along with interest accrued thereon, within ten days from the said order. This amount of Rs.1.10 crores, as noticed in the subsequent order dated 5.9.2006, has been paid by the Revenue to the petitioner by way of a cheque. Therefore, the only issue that remains to be decided is whether the petitioner is entitled to the refund of the sum of Rs.10.69 crores (Rs.1.10 crores having being paid to the petitioner pursuant to the order dated 17.8.2006), for the AY 2001-02.

Submissions of counsel

16. Mr. Ajay Vohra, the learned counsel appearing on behalf of the petitioner, submitted that as on the date of the passing of the order passed by the Tribunal on 17.8.2005, there was no demand outstanding against the petitioner for the AY 2003-04. He submitted a chart showing the break up of the proportionate amount of tax payable on the issue of cross charges and other issues for AYs 2002-03 and 2003-04 as on 8.8.2006 (This chart, copy of which has been handed over during the course of arguments, will form part of the record of this case). He further submitted that for the AY 2002-03, the total demand raised on account of cross charges was Rs.9.98 crores whereas the outstanding demand was only Rs.3.55 crores which proved that there was no outstanding demand on other issues. Even as regards the demand on account of cross charges, the petitioner had paid Rs.6.43 crores.



17. As regards the AY 2003-04, the demand raised on account of cross charge Rs.4.97 crores and on account of other issues it was Rs.2.17 crores. Therefore, collectively for both the years, i.e., 2002-03 and 2003-04, the total demand on account of cross-charge was Rs.14.95 crores whereas the total outstanding demand was only Rs.10.69 crores. According to Mr.Vohra, this proved that the petitioner had not only paid the entire demands raised on other issues but also had paid Rs.4.26 crores on account of cross charges as well. Therefore, on other issues also, the net effect was a refund and there could possibly be no outstanding demand at all. He placed reliance upon the Circular No. 530 dated 6.3.1989 and Circular No. 589 dated 16.1.1991 issued by the CBDT. He submits that there was no occasion to treat the petitioner as an assessee in default particularly when the petitioner was never in default in the payment of tax. There was no occasion to invoke Section 245 unmindful of the conduct of the assessee and where the assessee already had decisions on the various issues in its favour as evidenced by the previous orders. He placed reliance upon the judgment of this Court in *Vijay Kumar Bhati v. Commissioner of Income Tax* [1994] 205 ITR 110, *Sandvik Asia Limited v. CIT* [2006] 280 ITR 643 (SC), *Shreyans Industries Limited v. CIT* [2001] 252 ITR 544, *Naurata Ram v. CIT* [1998] 100 ITR 266, *Sabeta Detergents Limited v. CIT* [2001] 248 ITR 385.

18. On behalf of the Revenue, Ms. Prem Lata Bansal, the learned Senior Standing Counsel submitted that there is no averment in the writ petition pertaining to the demand for the AYs 2002-03 and 2003-04. The assessment order for the AY 2002-03 was passed on 22.5.2005. On the date of the order dated 17.8.2005 of the Tribunal, pursuant to which the refund for that AY became due to the petitioner, there was an outstanding demand "remaining payable" within the meaning of Section 245 of the Act. Therefore, according to her, the Revenue was justified in seeking to adjust this refund against the outstanding demand as on that date. As regards the AY 2003-04, the assessment order was framed on 10.3.2006 since the limitation was to expire on 31.3.2006. Since the demand for this AY was outstanding on the date of issuing the order of refund, the Revenue was within its rights to invoke the power under Section 245 to withhold the refund. She submitted that unless the action challenged was tainted by mala fides, this Hon'ble Court ought not to entertain the present writ petition under Article 226 of the Constitution of India.

19. Ms.Bansal points out that the two circulars, viz., Circular No. 530 dated 6.3.1989 and Circular No. 589 dated 16.1.1991 issued by the CBDT, on which the petitioner placed reliance, did not pertain to Section 245 of the Act but Section 220 of the Act. She states that since the refund voucher for the AY 2000-01 in the sum of Rs. 7,39,43,000 had already been issued to the petitioner on 26.7.2006, the only



surviving issue is the refund due to the petitioner for the AY 2001-02. outstanding demand for AYs 2002-03 and 2003-04, consequent upon the assessments framed for these years was Rs.10.69 crores. In these circumstances, the Revenue had filed the aforementioned application seeking permission of this Court to adjust the refund due to the petitioner against the outstanding demand.

Consideration of the issue

20. As noticed hereinabove, the issue arising for determination is whether the petitioner is entitled to refund for the AY 2001-02 of the amount already computed by the Revenue by its orders dated 28.12.2005 and 1.5.2006. The argument of the Revenue, to justify its request to this Court for permission to adjust the said refund against the outstanding demand of tax for the subsequent AYs 2002-2003 and 2003-04, is based on Section 245 of the Act which reads as under:

“245. Where under any of the provisions of this Act, a refund is found to be due to any person, the Assessing Officer, Deputy Commissioner (Appeals), Commissioner (Appeals) or Chief Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this Section.”

21. Prior to 1.6.2001, Section 241 of the Act gave the Revenue the power to withhold a refund and this power was not contingent upon any outstanding demand of tax against the assessee as on the date of the refund. Section 241, as it then stood, read as under:

“241. Power to withhold refund in certain cases – Where refund of any amount becomes due to the assessee as a result of an order under this Act or under the provisions of sub-section (1) of Section 143, after a return has been made under Section 139 or in response to a notice under sub-section (1) of Section 142 and the Assessing officer is of the opinion, having regard to the fact that –

(i) a notice has been issued, or is likely to be issued, under sub-section (2) of Section 143 in respect of the said return; or

(ii) the order is the subject matter of an appeal or further proceedings; or

(iii) any other proceeding under this Act is pending

(iv) that the grant of the refund is likely to adversely affect the revenue,



the Assessing Officer may, with the previous order of the Chief Commissioner, withhold the refund till such time as the Chief Commissioner or Commissioner may determine.”

22. The difference between the two provisions is that Section 241 gave a much wider power and did not require the assessee to whom the refund was due to be put on notice of the proposed withholding of the refund. Secondly, the discretion was to be exercised by the AO with the previous approval of the Chief Commissioner or Commissioner. Thirdly, the refund could be withheld for any indefinite time on the formation of an opinion that the grant of the refund was going to adversely affect the revenue. On a plain reading of the two provisions, it is clear that Section 241 gave the Revenue a much wider power than Section 245.

23. A Division Bench of the Punjab and Haryana High Court has in *Naurata Ram* (supra) held that the power under Section 241 cannot be used arbitrarily and refund cannot be denied merely because the Revenue had filed certain proceedings by way of appeal, and that such appeal was pending. It was explained:

“On a careful reading of the plain language used in the statute, it becomes clear that the power to withhold the refund cannot be exercised merely because some proceedings are pending before the authorities constituted under the Act or a court of law. In other words, mere pendency of the proceedings cannot by itself be a ground to deny the refund on the assumption that such refund would adversely affect the revenue. The competent authority has to form an opinion on the basis of relevant material for coming to the conclusion that the order of refund will necessarily cause prejudice to the revenue of the State. If the Legislature had intended to prohibit the refund of the amount due to the assessee only on the ground that the revenue has preferred an appeal/revision etc., then Section 240 would have been couched in a different phraseology. Absence of specific provision in the statute providing for withholding of refund only on the ground of pendency of the proceedings is clearly indicative of the intention of the Legislature that pendency of proceedings will not by itself be a ground for withholding the refund.”

24. Likewise the decision in *Shreyans Industries Limited* (supra), which is again the decision of the same High Court, reiterates that the pendency of the proceeding in a higher forum cannot justify invoking the power under Section 241 of the Act. Further, this Court has, in *Vijay Kumar Bhati* (supra) underscored the importance of the prior compliance with the procedural requirements under Section 245 before the power thereunder can be invoked.



25. In our view, the power under Section 245 of the Act, is a discretionary power given to each of the tax officers in the higher echelons to “set off the amount to be refunded or any part of that amount against the same, if any, remaining payable under this Act by the person to whom the refund is due.” That this power is discretionary and not mandatory is indicated by the word 'may'. Secondly, the set off is in lieu of payment of refund. Thirdly, before invoking the power, the Officer is expected to give an intimation in writing to the assessee to whom the refund is due informing him of the action proposed to be taken under this Section.

26. We reiterate that the restrictions on the power under Section 241, as explained judicially, would apply with equal, if not greater, force to Section 245. A mechanical invocation of the power under Section 245 irrespective of the fact situation, can lead to misuse of the power by the Revenue in order to delay the refund till such time a fresh demand for the subsequent assessment years is finalized. If reasonable time limits are not set for the processing of and disposal of an application for refund by the Revenue, it may result in the assessee not being able to get the refund at all. Also, the statute by stipulating the payment of interest on refunds (Section 244 A) and interest on delayed refunds (Section 243) has underscored the importance of timely processing of refund claims.

27. As already noticed, this discretionary power has to be exercised after giving an opportunity to the assessee of being heard preceded by an intimation to the assessee in writing of the action proposed to be taken under Section 245. A further implicit requirement is that the Revenue will have to be satisfied that the assessee will not be in a position to satisfy the demand of tax and that but for the set off, the outstanding tax amount cannot be recovered at all.

28. The High Courts have emphasized the importance of hedging the power of the revenue under Section 245 with certain safeguards in order to prevent its misuse. The decisions in *State Bank of Patiala v. Commissioner of Income Tax* [1999] 239 ITR 421 and *Sabeta Detergents Limited (supra)* are to the same effect. This apart, while proposing to invoke the power under Section 245, the Revenue should, as far as possible, adopt a consistent approach. Of course, if the fact situation in the particular assessment year is so different so as to justify the changed stance of the Revenue, the Revenue should, while filing an appeal to the higher forum, seek a stay from that forum itself of the refund due to the assessee before straightway invoking the power under Section 245. Such a procedure would while ensuring greater efficiency also ensure respect for the rule of consistency and deference to the orders of the higher judicial forum which are binding on the Revenue as much as they are on the assessee.



29. Although the Revenue may be right in contending that the words “against the sum, if any, remaining payable under this Act” should be given a literal interpretation, and that the minute demand is finalized at the very first level by the AO for the particular assessment year, the requirement of Section 245 stands satisfied, this argument, cannot in the context of Section 245 itself, be accepted without qualification. The decision in S.RM.AR.RM. Ramanathan Chettiar v. Additional Income Tax Officer, City Circle-II, Madras [1956] 29 ITR 683 (SC), upon which reliance was placed by the Revenue, was in a different context. The relevant provision considered in the said case was Section 49E, which read as under: “Section 49E: Where under any of the provisions of this Act, a refund is found to be due to any person, the Income-tax officer, may, in lieu of payment of the refund, set off the amount to be refunded, or any part of that amount, against the tax, if any, remaining payable by the person to whom the refund is due.”

It may be straightway noticed that Section 49 E of the Indian Income Tax, 1922 is not in pari materia with the power under Section 245. The latter power can be exercised only after prior intimation has been sent to the assessee of the action proposed to be taken by the Revenue. Therefore, the mere liability to pay tax, which was never in issue in the above case, is not sufficient to attract the provision of Section 245.

30. We may also notice another decision of the Hon'ble Supreme Court in Third Income Tax Officer, Mangalore v. M.Damodar Bhat [1969] 71 ITR 806. The question there was whether the AO had arbitrarily invoked the power under Section 220 to raise a demand on the assessee. On the facts of that case, it was held that since there was no specific averment by the writ petitioner and no particulars were given by the assessee in his writ petition to explain why the order passed under that Section was arbitrary, the High Court could not examine the question whether the AO had arbitrarily exercised his discretion. The facts of the present case are however different.

31. On the other hand, in N.C. Mukherjee & Co. v. Union of India [1968] 68 ITR 501 (SC) a Constitution Bench of the Hon'ble Supreme Court emphasized that even before a demand is raised against the assessee, the amounts refundable to it should be ascertained by the AO so that the demand may be executed only for the balance. The recent decision of the Hon'ble Supreme Court in Sandvik Asia also emphasises the importance of timely action by the Revenue and the need for compensatory costs in the event of an unjustified retention by the Revenue of amounts due to be refunded to an assessee. The Court said (ITR p. 671) : “the Act recognizes the principle that a



person should only be taxed in accordance with law and hence where excess amounts of tax are collected from an assessee or any amounts are wrongfully withheld from an assessee without authority of law the Revenue must compensate the assessee.” It appears from a news item appearing in the Economic Times, Delhi dated 16.8.2006, page 9 that concern has been expressed by the Public Accounts Committee of Parliament over the unusual delay in income tax refunds. The Committee noted that “the delay in refunds shot up to 27.36 months in 2003-04 compared to just 8 months in 1996-97. As a result, the projected reduction in interest burden on refunds worth about Rs. 350 crore was never met.”

32. Turning to the facts of the present case, we find that no notice under Section 245 was issued to the assessee proposing to set off the demand against the outstanding tax amount due from it. There is no explanation why such notice was not issued except saying that after the order of the Tribunal dated 17.8.2005, the Revenue was processing the refund application made by the writ petitioner. It could dispose of this application only on 27.12.2005. Even at this stage, there was no proposal to invoke Section 245 although on this date there was an outstanding demand for the AY 2000-01. The petitioner was, therefore, compelled to come to this Court assailing the delay in processing this application for refund. The application moved by the Revenue in this Court appears to be a device to pass the responsibility of taking a decision under Section 245 on to the Court only because the petitioner had come to this Court. To us, this does not appear to be a sufficient justification for by-passing the procedural requirement under Section 245.

33. If the Department has decided to issue a refund voucher for the AY 2000-01, by the same yardstick it should also be willing to make the refund for the subsequent AY 2001-02. The mere fact that appeals in respect of the two AYs are pending in this Court is not by itself a sufficient ground for denying the refund. The fact remains that the procedure contemplated under Section 245 of the Act has not been invoked. It is not without significance that the order dated 15.2.2006 by this Court only restrained the Revenue from making any adjustment of the amount of refund “without the leave of this Court.” This did not mean that the procedure under Section 245 was to be dispensed with. It is, therefore, strange that by the application filed, the Revenue was seeking permission from this Court to straightaway set off the refund against the outstanding demand without following the procedure under Section 245. The Revenue seeks to justify invoking the power under Section 245 only on the ground that its appeals for the two AYs are pending in this Court. However, having issued the refund voucher for the AY 2000-01 in respect of which also the appeal is pending in this Court, there appears to be no justifiable reason for withholding the refund due in respect of the other AY 2001-02.



34. The petitioner has referred to Circular No. 530 dated 6.3.1989 which suggests that while exercising discretion under Section 220 (6), the AO should treat the assessee as not being in default where “the demand and dispute relates to issues that have been decided in favour of the assessee in an earlier order by an appellate authority or court in the assessee’s own case.” While the Revenue may be justified in its submission that this circular does not strictly apply to an invocation of the power under Section 245 of the Act, the underlying principle recognized therein, should in our considered view apply even to Section 245. That principle requires the Revenue to respect the orders of the Tribunal and this Court for the previous AYs on the same issue, concerning the same assessee, which hold the field and are operative at the relevant time. We may point out, at the risk of repetition, that while filing an appeal under Section 260A of the Act, it may be open to the Revenue to seek a stay of the appeal effect arising out of the order. Needless to add that the Revenue will have to satisfy the requirements of the law generally while seeking such interim stay. That course has, however, not been adopted in the present case. The mere pendency of an appeal by the Revenue in this Court against an order of the Tribunal, without any order of stay, will be no ground to deny the appeal effect of that order to the assessee by invoking the power under Section 245.

35. We do not wish to comment on the merits of the orders passed by the Tribunal, for the AYs 2000-01 and 2001-02 since that is to be examined in the separate appeals filed by the Revenue in this Court. As and when those appeals are decided, the necessary consequential orders will be passed. However, the fact that neither of the orders of the Tribunal in those cases has been stayed by this Court while admitting the appeal is a relevant factor to be taken note of by the Revenue while deciding to invoke the power under Section 245.

36. Another important factor which cannot be lost sight of is that the major component of the outstanding dues for the AY 2001-02 pertains to administrative expenses/cross charges on which issue, the assessee has succeeded up to this Court for the earlier AYs 1998-99 and 1999-00. For AY 2001-02, the assessee has succeeded before the Tribunal. Therefore, to the extent of the demand on account of administrative expenses/cross charges, there is no justification for withholding the refund. In the event of the Revenue succeeding before this Court, the amounts would become payable by the assessee and there are sufficient provisions of the Act to take care of such a contingency. The Revenue, by delaying the refund, is actually incurring an additional expenditure since it has to pay interest on the amount of refund as well as delayed refund as contemplated under Sections 243 and 244A. This may not, in the larger context, be in the best of interests of the Revenue itself.



Unless there are sound reasons justifying in the formation of an opinion that t that has become payable cannot be recovered from the assessee as and when the issues are ultimately decided, the power under Section 245 should not lightly be invoked. All of the above factors weigh against the Revenue invoking the power under Section 245 in the present case.

37. On a conspectus of the facts and circumstances of the case, it appears to us that there is no justification for apprehending that the assessee is likely not to pay the demand pertaining to the administrative expenses/cross charges if and when it is ultimately held to be payable. From the submissions made on behalf of the assessee and the chart presented showing the status of demands as on 8.8.2006 (which has not been disputed by the learned counsel for the Revenue) it appears that the petitioner has not only paid the entire demands raised on all other issues but has also paid Rs.4.26 crores towards the demand on cross charges. In our considered view, there is no warrant for the Revenue to seek to set off the refund due to the petitioner on account of cross charges against the outstanding demand of tax on such account for the subsequent years. The delay in the processing of the refund claim and issuing the initial order dated 28.12.2005 and the subsequent order dated 1.5.2006 has not, in our view, been satisfactorily explained. The Revenue must, in our view, suffer the statutory consequence of payment of interest on the delayed refund.

38. We, accordingly, hold that the petitioner is entitled to refund for the AY 2001-02, as already computed by the Revenue while giving appeal effect vide orders dated 28.12.2005 and 1.5.2006 after adjusting the refund of Rs.1.10 crores already made pursuant to the order dated 17.8.2006 passed by this Court. Accordingly, a direction by way of a mandamus is issued to the respondents to refund to the petitioner the aforesaid amount due to it for the AY 2001-02 after making the adjustment as aforesaid. The petitioner would also be entitled to interest on such amount of refund as well as interest on delayed refund as per the provisions of the Act. The Respondents are directed to make the refund to the petitioner of the sum as aforesaid together with interest thereon and interest on delayed refund as per the provisions of the Act within a period of four weeks and in any event not later than February 15, 2007. The Respondents will also pay to the petitioner the costs of this petition which are quantified at Rs.20,000/-.

39. The writ petition and all pending applications stand disposed of accordingly.

Sd/-
(S. Muralidhar)
Judge



Sd/-
(Vikramajit Sen)
Judge