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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **W.P.(C) 2112/2007 & CM No.3923/2007**

KLM ROYAL DUTCH AIRLINES & ANR Petitioner
Through: Mr. C.S. Aggarwal, Sr. Advocate,
with Mr. Prakash Kumar & Mr.
Anil Makhija, Advocates.

versus

DEPUTY DIRECTOR OF INCOME TAX Respondent
Through: Mr. Sanjeev Sabharwal, Advocate.

CORAM:**HON'BLE MR. JUSTICE VIKRAMAJIT SEN****HON'BLE MR. JUSTICE J.P. SINGH****ORDER****19.03.2007**

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Learned counsel for the Petitioner relies upon the decision of this court in *O.P. Khaitan v. Assistant Commissioner of Income Tax* (1999) 102 Taxman 605 (Delhi) in which it has been categorically stated "the guiding factors to be kept in view while considering a prayer for stay of the recovery of the revenue are well settled. The applicant must have a strong prima facie case. If the recovery is directed to be stayed, care should be taken to protect the interests of the revenue as well." The contention of Mr. Aggarwal, learned senior counsel appearing for the Petitioner, is that in the impugned order a reference has been made only to four factors spell out in its third paragraph. It is his



contention that Assessing Officer was duty bound to also consider the existence or absence of prima facie case. Mr. Sabharwal, learned counsel appearing for the Revenue, has drawn our attention to the fact that a detailed assessment Order has been passed few months ago prior to the order dated 15.3.2007. The perusal of the said assessment Order would indicate the reasons which have prevailed upon the Assessing Officer to arrive at the conclusion that a stay was not called for. In the circumstances of the case, we are of the view that rather than to fall back on the reasoning in the assessment Order, even keeping its closed proximity so far as time is concerned, it would be better that the order refusing stay under Section 220 (6) of Income Tax Act must be a composite Order. That is, it must also specifically deal with the existence of prima facie case. On this technicality the impugned Order is set aside. The Petitioner shall appear before the Assessing Officer on 28th March, 2007, at 11.00 A.M. The Assessing Officer shall thereafter decide the application under Section 220 (6) of the Income Tax Act. These Orders should not be construed as conveying our conclusion that the order was correct or incorrect.

Mr. Sabharwal contends that an efficacious alternative remedy is available to the Petitioner which has been availed of



inasmuch as appeal has been filed before the Commissioner (Appeals). It is, in this context, our attention has been invited by learned counsel for the Petitioner on the decision in *Income-Tax Officer, Cannonore v. M.K. Mohammed Kunhi*, reported in ITR Vol.71, 1969, P-815. The Hon'ble Court observed as follows:

"There can be no manner of doubt that by the provisions of the Act or the Income-tax Appellate Tribunal Rules, 1963, powers have not been expressly conferred upon the Appellate Tribunal to stay proceedings relating to the recovery of penalty or tax due from an assessee. At the same time it is significant that under Section 220(6) the power of stay by treating the assessee as not being in default during the pendency of an appeal has been given to the Income-tax Officer only when an appeal has been presented under section 246 which will be to the Appellate Assistant Commissioner and not to the Appellate Tribunal. There is no provision in section 220 under which the Income-tax Officer or any of his superior departmental officers can be moved for granting stay in the recovery of penalty or tax. It may be that under section 225, notwithstanding that a certificate has been issued to the Tax Recovery Officer for the recovery of any tax (the position will be the same with regard to penalty), the Income-tax Officer may grant time for the payment of the tax. In this manner he can probably keep on granting extensions until the disposal of the appeal by the Tribunal. It may also be that as a matter of practice prevailing in the department, the Commissioner or the Inspecting Assistant Commissioner, in exercise of administrative powers, can give the necessary relief of staying recovery to the assessee but that can hardly be put at par with a statutory power as is contained in section 220 (6) which is confined only to the



stage of pendency of an appeal before the Appellate Assistant Commissioner. The argument advanced on behalf of the appellant before us that in the absence of any express provisions in sections 254 and 255 of the Act relating to stay of recovery during the pendency of an appeal, it must be held that no such power can be exercised by the Tribunal, suffers from a fundamental infirmity inasmuch as it assumes and proceeds on the premise that the statute confers such a power on the Income-tax Officer who can give the necessary relief to an assessee."

Mr. Sabharwal contends that there are subsequent judgments to the effect that Commissioner (Appeals), before whom the appeal is pending, is competent to grant a stay. However, in the view we are adopting, we need not go into this controversy.

Mr. Sabharwal also fairly and correctly says that up to the date of passing of the fresh order, coercive steps for recovery shall not be pursued. The Writ Petition is disposed of.

VIKRAMAJIT SEN, J

J.P. SINGH, J

MARCH 19, 2007
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