* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON: 28.08.2012

\+ **WP (C) No. 2773/2012**

LEASE PLAN INDIA & ANR. ..... Petitioner

Through: Mr. Ajay Vohra, Advocate.

versus

DEPUTY COMMISSONER OF INCOME TAX ..... Respondent

Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. In these writ proceedings, under Article 226 of the Constitution of India, the order of the respondent (hereafter called "the revenue") by which the refund amounts due to the assessee- Petitioner, for certain previous years were adjusted (by the revenue) is under challenge.

2. The brief facts are that on 30.10.2005, the Petitioner filed its income tax return declaring a loss of ₹.84,60,129/- for the year 2005-06. The assessment of the company under Section 143(3) was completed on 19.12.2008. On 24.02.2010, the revenue issued notice for reopening of

assessment of the petitioner's income. To the reasons cited for reopening the assessment on 17.08.2010, the petitioner filed its objections, which were dismissed by the respondent. In December 2010, the petitioner filed WP(C) 8130/2010 seeking quashing of the notice issued under Section 148. This court, by order dated 24.12.2010, disposed of the said petition, directing that

> "*...it is directed that the assessment proceedings initiated on the basis of Section 148 shall continue and be finalized, but shall not be given effect to without the leave of this Court."*

3. The reassessment order of the Assessing Officer resulted in a demand of ₹.43,16,97,327/-. The Petitioner was entitled to a refund of ₹.3,44,61,010/-, which was adjusted against the demand for AY 2005-06. Further refunds of ₹.11,26,38,990/- from other years were also adjusted against the demand created for AY 2005-06.

4. On 21.07.2011, the respondent issued a show cause notice against the Petitioner with regard to the default in payment of the demand of ₹.28,45,97,327/- and penalty for the same. On 9.8.2011, the Petitioner filed reply to notice under Section 221 stating that in view of the stay order passed by this Court in WP (C) 8130/2010, the demand could not have been made. Further, the action in adjusting the refund due by the respondent against the demand without notice of the same was in violation of the provisions of Section 245 (2) of the Income Tax Act. Since this reply was ignored, other letters raising these objections were filed on 17.11.2011 and

2.12.2011, with a reminder letter on 23.4.2012 requesting a release of the refunds.

5. The petitioner argues that in view of the law declared by the Supreme Court in the case of *GKN Driveshafts India Limited v ITO* [2003] 259 ITR 19 (SC), the reassessment proceedings filed by the respondent are without jurisdiction and are bad in law, as the reasons for initiation of the proceedings were factually incorrect and the they had been done on a mere change of opinion since no additional information had been used for the decision. It is argued, more importantly, that enforcement of the demand is in violation of the order passed by this Court on 24.12.2010, which stayed the enforcement of the demand from the re-assessment proceedings without leave from the court. The Petitioner relies on the decision reported as *Maruti Suzuki India Limited v Deputy Commissioner of Income Tax*, (2012) 246 CTR (Del)176, where it was held that the expression 'recovery' would include adjustments made. Thus an order directing maintenance of *status quo* operated as a bar to the revenue collecting amounts due by adjustment under Section 245.

6. It is also contended that the term 'to give effect to an assessment or reassessment order" means to take steps to recover the demand arising out of such order. Under Section 245, adjustment of refunds due for one year against the demand pertaining to any other year is permissible only when (i) the demand made is 'payable' and (ii) the assessing officer must give prior written intimation of the proposed adjustment to the assessee. Neither of

these conditions has been fulfilled in this case. The demand was not 'payable' being in violation of the stay order passed by the High Court in WP (C) 831/2010. Counsel argues that several High Courts have held that the requirement of written intimation to the assessee of the proposed action of adjustment of refund is mandatory.

7. The revenue, on the other hand, argues that since this Court had directed completion and finalization of the reassessment proceedings, the demand against the assessee was only raised after completing the reassessment proceedings. However, no coercive measures were taken against the Assessee to enforce the demand. Thus withholding of the refund due to the assessee is thus not in violation of the High Court's order as the demand has not been enforced.

8. It is also urged that it would be prejudicial to the interests of the Revenue to release amounts due as refund when such a large amount is already due to be payable by the assessee.

9. The above discussion shows that this court, in writ proceedings (WP 8130/2010) preferred by the petitioner, had directed an interim order, not to recover dues from the petitioner. The revenue, in respect of a later period, sought to adjust the amounts due to the writ petitioner, by way of refund. The revenue contends that the adjustment was only towards dues arising out of reassessment proceedings, which it is legitimately entitled to do. This contention is covered squarely by the case of *Maruti Suzuki India Limited v Deputy Commissioner of Income Tax*, (2012) 246 CTR (Del) 176. The

Division Bench of this High Court had held that the term 'recovery' would include any adjustments made, and is not merely limited to the adoption of coercive measures to realize the amounts due by the assessee. Thus an order directing maintenance of status quo would operate as a bar to the revenue collecting amounts due by adjustment under Section 245.

> "*15. It is not possible to agree with the contention of the Revenue that the word "recovery" cannot and would not include adjustment under Section 245. Recovery can be made by various modes including adjustments. Each Assessment Year is treated as separate and independent under the Act. Section 245 of the Act permits the Revenue to recover demand of one year which is pending by adjusting the refund due for another year. The term 'refund' has not been defined in the Act and, therefore, it has to be understood and interpreted in the manner in which it is understood in day to day life. The term 'recovery' in common parlance includes adjustments….*
> *17. 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 245 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 garnishee 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 ITAT (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 in 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."

The above extract would clarify that the revenue's contention is insubstantial. Therefore, the impugned adjustment sought to be made by it, was contrary to the Court's order.

10. The second issue concerns the applicability of Section 245 of the Income Tax which prescribes the procedure enabling the revenue to set off amounts due to an assessee from the demands pending against him. Section 245 reads as follows:

"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."

11. The above provision makes it adequately clear that before the Revenue can set off the payment of refund against the assessee, it is mandatory that notice in writing be given to the person against who such action is being taken. This point has been adjudicated upon by many High Court. In the case of *Glaxo Smith Kline Asia P. Ltd. vs. Commissioner of*

Income-Tax and Ors., [2007] 290 ITR 37, a Division Bench of this Court observed:

> *"26. 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.*

Further, it was held that:

> *"28. As already noticed, this discretionary power has to be exercised after giving an opportunity to the assessed of being heard preceded by an intimation to the assessed 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 assessed 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."*

In *J.K. Industries v Commissioner of Income Tax*, [1999] 238 ITR 820 (Cal) the Calcutta High Court held that

> *"... quite clearly the Revenue has no jurisdiction to make an adjustment of a refund without following Section 245 and without giving a prior intimation to the assessee as required by that section."*

The Bombay High Court reiterated the same opinion in *Suresh Jain v A.N. Shaikh* [1987] 165 ITR 151(Bom).

12. It is thus evident that in this case that the actions of the Revenue were violative of the stay order of this Court; they were also contrary to the provisions of Section 245 of the Income Tax Act. The term 'recovery' includes adjustment of the refund due to the assessee. Thus the High Court order which directed that the assessment proceedings *"would not be given effect to without the leave of the court"* translated to a bar on adjustments as well. Furthermore, Section 245 is clear in its mandate regarding the requirement of prior intimation in writing to the assessee whose refunds are being adjusted against amounts payable to the Revenue; the assessee has to be given notice, and heard. The revenue clearly did not follow the provision, and give any notice or hearing before making adjustments, impugned in this case.

13. The impugned adjustment made by the revenue/Respondent in this case, is therefore unsustainable. It is hereby set aside. This does not preclude the revenue from taking proper steps in accordance with law. The writ petition is allowed in these terms.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

28th August, 2012