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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **W.P.(C) 683/2016**

VIJAY SINGH KADAN ..... Petitioner
Through: Mr. Piyush Kaushik, Advocate.

versus

CHIEF COMMISSIONER OF INCOME TAX & ANR ..... Respondents
Through: Mr. Ashok Manchanda, Senior standing counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R
% 25.04.2016

Dr. S. Muralidhar, J.:

1. Mr. Vijay Singh Kadan, the legal heir of late Mr. Randhir Singh Kadan, (hereinafter referred to as 'the deceased Assessee') has been constrained to approach the Court for a second time with this writ petition, aggrieved by the non-compliance by the Revenue of the directions issued by this Court on 15th December 2015 in Writ Petition (Civil) No. 10895 of 2015 in a matter of grant of refund due to the deceased Assessee for the Assessment Year ('AY') 2006-07.

2. The deceased Assessee has filed his return for the AY 2006-07 on 31st July 2006 declaring taxable income of Rs. 25,64,290 which comprised income from salaries and income from other sources. The Assessee claimed tax exemption on long term capital gains with respect to sale of agricultural land.

3. The return was picked up for scrutiny and assessment order was passed by the Assessing Officer ('AO') on 30th December 2008 under Section 143 (3) of the Income Tax Act, 1961 ('Act') for AY 2006-07 assessing the total income of Rs. 8,28,42,803. The AO denied the exemption from capital gains as claimed by the Assessee in its return of income. The appeal filed by the Assessee against the said order was partly allowed by the Commissioner of Income Tax (Appeals) ['CIT (A)'] by an order dated 5th August 2011. Against the said order, both the Assessee and the Revenue filed their respective appeals before the Income Tax Appellate Tribunal ('ITAT').

4. During the pendency of the aforesaid proceedings, the Revenue is stated to have recovered a sum of Rs. 1,40,17,266 from the Assessee during the period from 31st March 2009 till 24th March 2014. The Assessee also deposited certain amount on account of tax for AY 2006-07. It is stated that the total entitlement of tax credit of the Assessee for AY 2006-07 (excluding interest) was Rs. 1,45,28,863.

5. By an order dated 12th December 2014 the ITAT allowed the Assessee's appeal and dismissed the Revenue's appeal. As a result, the Assessee was entitled to refund of the aforesaid tax payment/collection together with the statutory interest thereon.

6. During the pendency of the above proceedings, the Assessee expired and the matter was pursued by his legal heir, Mr. Vijay Singh Kadan, (the Petitioner herein).

7. Soon after the order of the ITAT, the Petitioner submitted an application on 17th December 2014 requesting the Revenue to grant

appeal effect to the order of the ITAT and issue the refund along with t statutory interest.

8. The Petitioner sent reminders on 6th April 2015 and 17th August 2015. Meanwhile on 14th September 2015 this Court dismissed the Revenue's appeal against an order of the ITAT. Thereafter on 28th September 2015 the Petitioner sent a third reminder. It was explained that the Assessee had expired as a result of cancer and the Petitioner, his legal heir, was in urgent need of the refund along with statutory interest.

9. When no response forthcoming even thereafter, the Petitioner filed Writ Petition (Civil) No. 10985 of 2015 in this Court which came to be disposed by the following order on 15th December 2015:

> "The learned counsel for the Respondent informs us that the refund, consequent upon the appeal effect along with interest, in accordance with law, has been processed and the same shall be paid to the Petitioner within two weeks.
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> In view of the statement made by the learned counsel for the Respondent, this writ petition stands disposed of. However, we are granting liberty to the Petitioner to approach this Court in case the refund is not so granted."

10. It appears that in the meanwhile on 7th December 2015 a computer generated letter was addressed to the Petitioner by the Transaction Banking Unit of the State Bank of India enclosing a demand draft in the sum of Rs. 1,29,01,503 stating it to be on account of 'income tax refund' for AY 2006-07. The Petitioner states that his refund entitlement was Rs. 1.65 crore (approx) inclusive of interest and therefore, was surprised that a sum of Rs. 36.30 lakh (approximately) had been withheld while granting refund. It is further stated that while following up the matter with the Revenue authorities the Petitioner was informed that the aforementioned sum which was adjusted pertained to demand for AY

2008-09.

11. The Petitioner was furnished with a defaced refund adjustment voucher. A copy of the said refund voucher had been annexed to the Petition as Annexure P-3. *Inter alia* it reveals that the net refund amount payable is shown as Rs. 1,65,35,770. In another portion thereunder titled 'adjustments – regular refunds payable to income tax', under a column titled 'amount to be adjusted' a demand of Rs. 20,68,392 (under Section 144A of the Act), penalty of Rs. 15,200 (Under Section 271(1)(b) of the Act) and Rs. 15,48,222 (under Section 271 (1) (c) of the Act') have been shown. The aggregate amount 'to be adjusted' worked out to Rs. 36,34,267 which, according to the Petitioner, was in fact adjusted against the total refund amount resulting in the Petitioner being issued a demand draft only for a sum of Rs. 1,29,01,503. The Petitioner's contention is that such adjustment of demand pertaining to AY 2008-09, without prior intimation to the Petitioner or affording him an opportunity of being heard was in gross violation of Section 245 of the Act. Further, the Petitioner states that against the demand raised for AY 2008-09 by the AO, the Petitioner had already filed an appeal before the CIT (A) together with an application for stay which is still pending disposal by the CIT (A).

12. Mr. Piyush Kaushik, learned counsel for the Petitioner referred to the decision of this Court in ***Glaxo Smith Kline Asia (P) Ltd. v. CIT (2007) 290 ITR 35 (Del)*** where the Court explained the mandatory nature of Section 245 of the Act and held that prior to invoking the discretionary power to set off or adjust an amount against the amount to be refunded, the Assessee had to be given an intimation in writing of the action proposed to be taken. It was further held that the Revenue had to be

satisfied that the Assessee would not be in a position to satisfy t demand of tax and that, but for the set off, the outstanding tax amount cannot be recovered at all. Reliance was also placed on the decision in ***Genpact India v. ACIT (2012) 205 Taxman 51 (Del)*** and an order dated 16th October 2014 in Writ Petition (Civil) No. 6172 of 2014 (***The Oriental Insurance Co. Ltd. v. DCIT***). Mr. Kaushik also drew the attention of the Court to Instruction No. 1952/1998 dated 14th August 1998 issued by the Central Board of Direct Tax ('CBDT') regarding 'prompt issue of refund' which was reiterated by the subsequent Instruction No. 12 of 2013 dated 9th September 2013.

13. Mr. Ashok Manchanda, learned Senior standing counsel for the Revenue, referred to the counter-affidavit filed in the present case wherein in para 5 of the preliminary objections, it was stated that the balance amount of Rs. 36,34,257 was not released pending verification of unpaid outstanding demand for AYs 2008-09 and 2010-11. According to Mr. Manchanda, the question of issuing of notice under Section 245 of the Act did not arise since the Revenue had not 'adjusted' any sum but merely withheld it pending verification. Mr. Manchanda stated that after notice was issued in the present petition on 27th January 2016, a notice under Section 245 of the Act was issued to the Petitioner on 21st March 2016 requiring the Petitioner to file a response within 15 days. He further submitted that after the Assessee submits his response thereto an order will be passed in a time-bound manner.

14. The above submissions have been considered. The mandate of Section 245 of the Act is clear. It states that where a refund is found to be due to any person, then in lieu of payment of the refund, it would be in the discretion of the AO, the Deputy Commissioner (Appeals),

Commissioner (Appeals) or the Chief Commissioner or t Commissioner to set off the amount to be refunded, against the sum amount found payable "after giving an intimation in writing to such person of the action proposed to be taken under this Section." In ***Glaxo Smith Kline Asia P. Ltd. v. Commissioner of Income Tax*** (*supra*) this Court analyzed Section 245 of the Act in some detail and observed as under:

> "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.
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> 27. We reiterate that the restrictions on the power under Section 241, as explained judicially, would apply with equal, if not appear, 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 244A) and interest on delayed refunds (Section 243) has underscored the importance of timely processing of refund claims.
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> 28. 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."

15. Further, it was reiterated in para 38 of the decision in ***Glaxo Smith Kline Asia P. Ltd. v. Commissioner of Income Tax*** (*supra*):

> "38……. Unless there are sound reasons justifying the formation of an opinion that the tax 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."

16. The above decision was followed by this Court in ***The Oriental Insurance Company Limited v. DCIT*** (supra). There the Court too reiterated that the adjustment which was sought to be made contrary to Section 245 of the Act, without affording an opportunity of hearing to the Petitioner "before the adjustment was made" would vitiate the action of adjusting the demand against such refund.

17. In the present case although the refund voucher uses the word 'adjustment to be made' as far as the Petitioner is concerned, the refund issued was after the adjustment was made. The explanation offered by the Revenue that it was merely 'withholding' Rs. 36,34,267 pending verification and not 'adjusting' it is not acceptable. The Revenue is fully aware that the demand raised for AY 2008-09 had been challenged by the Petitioner before the CIT (A) and an application for stay of recovery of the demand had also been filed. The Revenue in fact does not dispute that both the appeal and the application are pending for disposal before the CIT (A). Therefore, it cannot be said that the withholding of the above amount was pending 'verification' of the demand for AY 2008-09 or AY 2010-11.

18. Incidentally the show cause now issued to the Assessee under Section

245 of the Act is dated 21st March 2016, i.e., two months after notice h been issued by this Court in the present petition. Whatever the demand may be for the AYs 2008-09 and 2010-11, the fact remains that prior making the adjustment of such demand against the refund due to the Petitioner, no notice was issued to the Petitioner as mandatorily required under Section 245 of the Act. By issuing a notice on 21st March 2016 under Section 245 of the Act, two months after the notice was issued in the present petition, the Revenue cannot seek to correct the fatal error arising from the clear violation of the mandatory requirement under Section 245 of the Act.

19. Consequently, the Court issued the following directions:

(i) The Revenue will forthwith issue to the Petitioner the balance refund of Rs. 36,34,267 together with statutory interest up to the date of the payment. The sum will be issued/credited to the Petitioner in the same manner in which the first instalment of Rs. 1,29,01,503 was paid, without any further delay and in any event not later than 9th May 2016.

(ii) The CIT (A) will pass an order on the stay application filed by the Petitioner against the assessment order for AY 2008-09 within a period of four weeks from today and in any event not later than 23rd May 2016.

(iii) Till such time the CIT (A) does not pass an order in the stay application filed by the Petitioner along with the appeal for AY 2008-09, no coercive steps should be taken by the Revenue to enforce the demand for AY 2008-09.

(iv) In case of any disobedience of the aforesaid directions issued by the Court, it will be open to the Petitioner to apply to the Court.

20. The writ petition is disposed of in the above terms, with no order as costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

APRIL 25, 2016
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HIGH COURT OF DELHI
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