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

% Judgment delivered on: 21.03.2017

\+ **W.P.(C) 2602/2017**

ORIENTAL INSURANCE COMPANY LTD . ..... Petitioner
Through: Mr. M.S. Syali, Sr. Adv. with Mr. Mayank Nagi, Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Rahul Chaudhary and Ms. Lakshmi Gurung, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

S. RAVINDRA BHAT, J (Oral)

W.P.(C) 2602/2017 & CM No. 11239/2017

1. Issue notice.

2. Mr. Rahul Chaudhary accepts notice for the respondent. With consent, the petition was heard finally.

3. The petitioner is aggrieved by the impugned notice dated 15.03.2017, received by it the next day, purporting to curtail – by exercising discretion under proviso to Section 220 of the Income Tax Act, 1961 (in short the Act), the normal period for complying with demand for payment (income tax) from 30 days to 7 days. For AY 2011-12 the assessee was subject to a determined penalty under Section 271(1)(c) for the sum of ₹ 342.7 crores. The assessee/

petitioner contends that the impugned notice is in flagrant violation of proviso to Section 220(1) of the Act, in as much as, it does not furnish any reasons why the precipitate discretion to shorten the normal period of demand was made. The learned counsel relies upon the judgment of this Court in ***Sony India Ltd. Vs. CIT 276 ITR 278 (Del.).***

4. It is submitted that the assessee had to suffer penalty for AY 2011-12 on account of the Revenue's interpretation with respect to income derived from sale of securities. The learned counsel highlights that for previous years i.e. AY 1996-97, 2001-02, 2004-05, 2007-08 and a subsequent year i.e. 2013-14, such income has been treated as arisen from insurance business. It is further submitted that such investments were made on account of the mandate of the law as per Insurance Act, 1938. The learned counsel urges that the impugned order is not sustainable because the reasons to believe do not fulfil the two tests spelt out in ***Sony India Ltd.*** (supra) i.e. existence of reasons of valid income and that the belief should have direct nexus to the conclusion that granting the full period for payment will be detrimental to the Revenue.

5. The learned counsel for the Revenue, who appears on advance notice, had copies of the "reasons to believe", which were furnished to the Court in a sealed cover. It is submitted that the AO's reason to believe is valid, given the fact that for the AY in question i.e. 2011-12, a penalty of ₹ 342.7 crores has been levied, and that if such order is not made, the refunds to the credit of the petitioner would no longer

be available for adjustment. It is further submitted that the petitioner is in fact likely to incur losses and in these events, it would be difficult for the Revenue to realise the tax dues.

6. Section 220 of the Income Tax Act, in so far as it is relevant to the circumstances of the case, reads as follows:

> *"..220 (1) Any amount, otherwise than by way of advance tax, specified as payable in a notice of demand under section 156 shall be paid within thirty days of the service of the notice at the place and to the person mentioned in the notice:*
>
> ***Provided** that, where the Assessing Officer has any reason to believe that it will be detrimental to revenue if the full period of thirty days aforesaid is allowed, he may, with the previous approval of the Joint Commissioner direct that the sum specified in the notice of demand shall be paid within such period being a period less that the period of thirty days aforesaid, as may be specified by him in the notice of demand..."*

7. In ***Sony India Ltd.*** (supra), the Court apparently recorded as follows:

> *".....12. The proviso has the effect of divesting the assessee of a legitimate right therefore, recourse to such provision has to be for good reasons and with caution. Mere apprehension that dues of the Revenue may not be recoverable without any material or information on the record of the Assessing Officer to support such an apprehension, would in our view be not permissible under the legislative scheme of this provision. We have already noticed that the consequence of default under the provisions of Section 220 are of a severe nature including imposition of interest and penalty. In the normal*

circumstances, an assessee would have 30 days period to meet this demand and it is only after the expiry of such period that the assessee would entail the liabilities afore-referred. The assessee would still have the right to pray to the Assessing Officer not to treat the assessee as an 'assessee in default' in respect of the demand entries under Section 226 of the Act. Where the assessee would be deprived of seeking recourse to such remedy on the one hand, there on the other he would be exposed to liability of interest and penalty immediately on the expiry of the reduced period. Thus, an order of the Assessing Officer under proviso to Section 220 (1) vests the assessee with serious consequences. Once such are the serious consequences of the default in compliance to the direction for payment of tax in the reduced period, greater would be the obligation upon the Assessing Officer to act fairly and judiciously. There has to be definite cause or reason before the Assessing Officer capable of being understood by the person of common prudence that but for such an order there will be detriment to the Revenue. In other words, the recovery of the demand raised by the Revenue is likely to be defeated if the full prescribed period is granted to the Assessee. Invocation of such provisions in a routine or a mechanical manner would not be permissible. The language of the Section does not suggest that legislature intended to arm the Assessing Officer with powers carte blanche. Higher the power, greater is the obligation to act judiciously. Reason is the sole (sic) of any judicious order. The order supported by record should demonstrate existence of a proper cause as contemplated in the language of the law. Validly the reasons or cause should not be merely apprehensive or remote in their substance. To validly enforce its statutory discretion, the Assessing Officer must have (a) Relevant and valid reasons for forming a belief and (b) The belief must have a direct

nexus to the conclusion that grant of full period of 30 days to the assessee for payment of tax would be detrimental to the revenue. Both these ingredients are sine qua non for appropriate compliance to the relevant provisions and violation thereof would be cuasa sine qua non and would defeat the very basis of quasi-judicial exercise of power by the Assessing Officer. Despite the fact that inbuilt balances and checks have been provided in the Section itself, compliance to basic rule of law would be mandatory to counter-balance the extent of discretion vested in the Assessing Officer.

13.To discuss this aspect in some further elucidation, it may be appropriate to refer to certain illustrations whether mischief would be covered under proviso to Section 220 (1):- (i) If an assessee is intending to leave the territorial jurisdiction with intention to evade payment of demand. (ii) A case where an assessee is liquidating his assets, except in due course of its business; again with the intention of evading to pay tax and defeat the demand raised under Section 156 of the Act, (iii) an assessee is intending to leave the country; (iv) Is doing such act and deeds which would render it impossible for the Revenue to recover its dues on account of arrears or current demand, and (v) Closing of business by the assessee coupled with such other factors as may be deemed relevant by the Assessing Officer to reach to a conclusion that in the interest of the Revenue, period should be curtailed.

14.These are mere illustrations and are not intended to give any exhaustive dimensions to the limitations on the powers of Assessing Officer under these provisions. These reasons supported by record of the Assessing Officer could constitute a valid cause for invoking the provisions of Section 220 (1) of the Act. Analogous to these illustrative cases are the provisions of Order 48 of the Code of Civil Procedure. Under Order 38 Rule 1, at any stage of

the suit where the Court is satisfied that the defendants with an intention to delay or to avoid any process of Court or obstruct or delay the decree that may be passed against the defendant, the defendant has absconded or left the limitations of the jurisdiction of the court, is about to do so or has disposed of or removed his property or any part thereof under the jurisdiction of the Court, the court could issue a warrant of arrest with a direction that such defendant be brought before the Court and be directed to furnish security subject to such term and conditions as the court may deem fit and proper. Under different rules of this Order 38, vast powers have been vested in the Court in relation to the defendant as well as the property in suit, or both. Attachment before judgment is one of the known concepts. In civil law, this jurisdiction is quite familiar and the procedure is known as saisie conservatorie whereby the assets of a debtor may be impounded before a judgment, and orders commonly known as Mareva Injunction often practiced in British Australian and even in Indian law under the provisions of the said order. Even if a power to pass an order or grant an injunction is vested it would be granted only if it is right to do so. Legal and equitable consideration should weigh with the Assessing Officer for taking a final view as to whether in the facts and circumstances of a given case, the Assessing Officer ought or ought not to reduce the period granted to the assessee for meeting the demand under Section 220 (1) of the Act....."

8. Reverting to the facts of the case, this Court in ***Sony India Ltd.*** (supra) observed as follows:

"…..21. In terms of the directions issued by the Assessing Officer, the assessee had furnished a

complete details in regard to note of business activity, details of bank accounts, addition to fixed assets including the fact that in addition to providing clarification to all other question raised by the Assessing Officer. From the reading of the order sheet, it is clear that the Assessing Officer did not record his dis-satisfaction in regard to these matters which obviously has a connection to the reasons provided in the above noting leading to passing of the order under Section 220 (1) of the Act. The respondents have not placed on record any material to show that the manufacturing activity was reduced by the company with an intention to evade payment of tax due from the assessee. While one reason is factually incorrect, the other is without any foundation. The Assessing Officer could have easily called upon the assessee to show the proof if the assessee had paid the advance tax on 18th March, 2005 or even 21st March, 2005, when admittedly the representative of the assessee had appeared before the Assessing Officer. In the counter affidavit before us, it is admitted that installments of advance tax were paid by the assessee on 15th March, 2005. This fact, the Assessing Officer could even departmentally verify but no attempt was made by him in this direction. Therefore, this could not be treated as a valid ground for reduction of the period in terms of the proviso to Section 220 (1) of the Act. The reasons recorded by the Assessing Officer for forming an opinion that it would be detrimental to the revenue to grant full period were relevant material and had a direct bearing on the object of the Section.

22.The provisions of proviso to Section 220 (1) of the Act is an exception to the Rule entitling the assessee to pay the demand of tax within 30 days. The reasons to believe 'should be cogent and proper reasons' and should not be imaginary or without any record'. The reasons to believe of the Assessing Officer should be

relatable to the record on the file. It is not expected of the Assessing Officer to record detailed reasons in the order but the formation of belief should be record-based reason that grant of full period would be detrimental to the revenue.

23. In the present case the reasons were factually not correct and secondly there was no material before the Assessing Officer which can lead a person of common prudence to believe that the demand would become unrecoverable or that it would otherwise be detrimental to the revenue. The provisions of Section 220 have an inbuilt mechanism to prevent the assessee from evading the tax demand. To avoid interest and penalty, the assessee should pay the demand within the stipulated period.

24. This would further cast an obligation upon the Assessing Officer to form his belief on valid grounds. The belief of the Assessing Officer should not be based on untenable apprehensions or assumptions. Record-based reasons leading to such a belief would help in really protecting the interest of the revenue and that too without generating unnecessary litigation and burdening the assessee with avoidable pre-judicial consequences…."

9. In this case the "reasons to believe", which forms the substratum of the impugned demand notice dated 15.3.2017, reads as follows:

"... Subject: Request for granting approval u/s 220(1) for reducing the time limit in demand notice.

In this case a demand of Rs. 3,42,78,67,342/- is being raised by levy of penalty u/s 271(1)(c) of the Income Tax Act, 1961.

2. Further, it is noted that appeal effect is being given

in the case of the assessee for different years (A.Ys. 2004-05, 2013-14, 2001-02, 1996-97) which will result in refund of more than Rs. 200 crores which may be adjusted against the demand for A.Y. 2011-12 being raised through levy of penalty u/s 271(1)(c) of the Act.

3. Therefore, I have reasons to believe that it will be detrimental to revenue if the full period of 30 days is allowed and therefore, if approved, the demand period u/s 156 of the Act may be reduced from 30 days to 7 days.

4. In view of the above facts, it is kindly requested to grant approval for issuing demand notice u/s 156 to the assessee for payment of demand within 7 days of receiving of notice...."

10. It is evident *ex-facie* from the above that the Revenue was acutely conscious of the fact that for at least three previous assessment years and one subsequent assessment year (2013-14) refunds on account of additions were available to the assessee's account. Apparently for AY 2005-06 penalty was levied on the additions of income derived from sale of securities which was deleted by the CIT(A). The CIT(A), in fact, held as follows:

".... The return of income for assessment year involved, was filed on 31.03.2005, while even the order of AO for A.Y. 04-05 in reassessment proceedings is dated 25.01.2007, while in A.Y. 05-06 it is dated 03.12.2007. From a perusal of these facts, it is held that the issue involved, was a question of law which was of debatable nature and there has been no non-disclosure of material facts in the return of income filed. Consequently, the addition made, does not come within the definition of deemed

concealment under explanation 1 to section 271(1)(c). As a result, penalty corresponding to this addition is cancelled....."

11. The Revenue is conscious or at least expected to be conscious of these circumstances. In the present case it appears that the AO was authorized to file an appeal to the Income Tax Appellate Tribunal (ITAT) and did so against the findings of the CIT(A). Given the fact that the additions were made on account of a highly contentious and an entirely debatable issue, and the fact that the assessee had succeeded in past years – and at least in one year the penalty imposed was deleted, the exercise of discretion in this case under proviso to Section 220(1), in this Court's opinion was unwarranted. Furthermore, if one keeps the logic in ***Sony India Ltd.*** (supra) in mind, the reasons to believe in exercise of discretion should be actuated by some external fact such as the assessee's imminent threat of decamping from the jurisdiction or liquidating its assets. In fact the Division Bench in ***Sony India Ltd.*** (supra) even drew an analogy that the provisions of the Code of Civil Procedure, 1908 relating to attachment before judgment and like circumstances, impel a Court to exercise restraint before passing an attachment order. In the present case no such factor appears on the record. The Revenue seems to have been entirely motivated in ensuring that the refunds due to the petitioner / assessee are somehow not given effect to and that the demand is made so as to ensure that all other periods, available to the petitioner, are shortened. This is a plain case of abuse of power under Section 220(1) which no Court can countenance.

12 For these reasons, the impugned notice is hereby quashed. The writ petition is allowed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

MARCH 21, 2017/kk

HIGH COURT OF DELHI
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