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

\+ **W.P.(C) 3127/2017**

GECAS SERVICES INDIA PVT. LTD. ..... Petitioner
Through: Mr. Sachit Jolly, Advocate.

Versus

INCOME TAX OFFICER & ORS. ..... Respondents
Through: Mr. Rahul Chaudhary, Sr. Standing Counsel

CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 11.07.2017

Dr. S. Muralidhar, J.

Question involved

1. An interesting question of law that has been raised in this writ petition by GECAS Services India Pvt. Ltd. is whether it was mandatory for the Income Tax Department ('Department') to have issued a notice to the Petitioner under Section 226 (3) (iii) of the Income Tax Act, 1961 ('Act') prior to issuing a notice dated 27th February, 2017 to the garnishee, i.e., the Branch Manager, HSBC (with which the Petitioner has an account) under Section 226 (3) (i) of the Income Tax Act, 1961 (the Act)?

Background facts

2. The background facts are that the Petitioner (hereinafter 'Assessee') is a wholly-owned subsidiary of the GE Group. 99.5% of the shares in the

Petitioner are held by GECAS Services Ltd., Ireland and the remainder is held by GE Capital Aviation Funding, Ireland. The Petitioner is stated to be engaged in the business of providing marketing support, liaising and administrative services in connection with leasing of aircrafts in India to its parent company.

3. The Assessee filed its return of income for Assessment Year ('AY') 2014-15 declaring an income of Rs. 21,37,610. The return of income was picked up for scrutiny. By an order dated 19th December, 2016 the Income Tax Officer, Ward 11(3) [(hereinafter Assessing Officer ('AO')] framed the assessment under Section 143 (3) of the Act making an addition of Rs. 2,14,78,118.90 to the Assessee's income thereby raising a tax demand of Rs. 94,51,390.

4. The Assessee states that it received a copy of the aforementioned assessment order on 24th December, 2016. On 23rd January, 2017, the Assessee electronically filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. According to the Assessee, the AO was electronically intimated about the filing of the appeal before the CIT (A).

5. It is stated that on 25th March, 2017, the Assessee received a notice dated 27th February, 2017 issued under Section 226 (3) (i) of the Act addressed to the HSBC bank attaching the Assessee's bank account held there and any other amount held in recurring deposit/fixed account and current account held with the said bank towards the recovery of the entire tax demand of Rs. 94,51,390.

6. The Assessee states that it was shocked to learn that the AO had already recovered the entire demand of Rs. 94,51,390 on 9th March, 2017 much before the dispatch of notice dated 27th February, 2017 to the Assessee. A copy of the transaction statement of the debit entry in the Assessee's bank account has been enclosed with the petition.

The present petition

7. It is in the above circumstances that the present petition was filed praying that this Court should quash the said notice dated 27th February, 2017 issued by the AO to the HSBC Bank under Section 226 (3) (i) of the Act and further direct the Department to refund to the Assessee the amount recovered in excess of 15% of the entire demand for AY 2014-15.

8. When this petition came up for hearing on 12th April, 2017, the Court directed notice to issue to the Respondents. Pursuant thereto, a counter-affidavit has been filed on behalf of the Department in which it is *inter alia* stated that a demand notice in the sum of Rs. 94,51,390 under Section 156 of the Act was served upon the Assessee on 24th December, 2016. The period of 30 days for payment of the demanded sum expired on 24th January, 2017. Although the Assessee filed an appeal before the CIT(A), it, admittedly, did not file any application for stay of recovery of the demand. Since the Assessee had neither paid the demand nor filed the said stay application till 24th January, 2017, it was deemed that the Assessee was in default under Section 220 (4) of the Act.

9. It is claimed by the Department in para 2.6 of its counter-affidavit that on 1st February, 2017 a notice under Section 221 (1) of the Act was issued to

the Assessee asking it to furnish a reply by 9th February, 2017 as to why penalty should not be levied on it for being an Assessee in default. It is claimed that no reply was received to the said notice.

10. Thereafter, in para 2.7 of the counter-affidavit, it is stated as under:

> "2.7 In view of the above facts, notice under Section 226 (3) of the Act was issued by the Assessing Officer to the Petitioner's banker on 27.02.2017 to recover the outstanding demand of Rs.94,51,390/-. The banker issued a Cheque/Pay Order of the aforesaid amount which was received at the DAK Counter of the Ward on 15.03.2017, and was put up before the AO on 16.03.2017. 18.03.2017 (Saturday) and 19.03.2017 (Sunday) were holidays. On 21.03.2017 copy of the notice (dated 27.02.217), was sent to the Speed Post Department by the Assessing Officer and was, thereafter, finally booked/sent by the Speed Post Department on 22.02.2017 to the Petitioner/Assessee. The aforesaid copy of the notice sent by speed post was received by the Petitioner/Assessee on 25.03.2017."

Submissions on behalf of the Assessee

11. Mr. Sachit Jolly, the learned counsel appearing for the Assessee, submitted that it was incumbent upon the Department to have issued notice to the Assessee, if not prior to the sending a notice to the Bank, at least simultaneously and should have allowed the Assessee an opportunity of showing why it should not be treated as an Assessee in default. He relied on the CBDT Instruction No. 1914 dated 2nd December, 1993 partially modified by Office Memorandum ('OM') dated 29th February, 2016 which states that the Department should not recover more than 15% of the total outstanding tax demand which stands disputed before the CIT (A). He submitted that it

was evident from the counter affidavit filed by the Department that although the notice issued to the Assessee was dated 27th February 2017, it was withheld and dispatched only on 21st March, 2017. This itself demonstrated the illegality of the action of the Department.

12. Mr. Jolly placed reliance on the decisions of the Division Benches of the Allahabad and Bombay High Courts in ***Farrukhabad Gramin Bank v. Additional Commissioner of Income Tax (2005) 277 ITR 320 (All)*** and ***UTI Mutual Fund v. Income Tax Officer (2012) 345 ITR 71 (Bom.)*** and of the Single Judges of the Calcutta, Punjab and Haryana and Kerala High Courts in ***Purnima Das v. Union of India (2010) 329 ITR 278 (Cal), Mohan Singh v. Commissioner of Income Tax 1993 (204) ITR 571 (P&H)*** and ***Suntec Business Solutions Private Ltd. v. Union of India 2014 (3) KLJ 226***.

13. Mr. Jolly submitted that an amount in excess of 15% of the total tax demand could not possibly have been sought to be recovered at this stage from the Assessee when its appeal before the CIT(A) was pending. He also disputed the assertion of the Department that the Assessee had been served a notice dated 1st February, 2017 under Section 221(1) of the Act. He pointed out that no proof of service of such notice was enclosed with the counter affidavit.

Submissions on behalf of the Revenue

14. Countering the above submission, Mr. Rahul Chaudhary, the learned Senior Standing Counsel for the Department maintained that the Assessee had in fact been issued a notice under Section 221 (1) of the Act on 1st

February, 2017. He stated that the proof thereof would be available in the records of the Department. He pointed out that the CBDT Circular No. 1914 applied only if a stay application had been preferred by the Assessee along with its appeal before the CIT(A). Likewise, the decisions of the Division Bench of the Allahabad High Court in ***Farrukhabad Gramin Bank v. Additional Commissioner of Income Tax*** (*supra*) and of the Bombay High Court in ***UTI Mutual Fund v. Income Tax Officer*** (*supra*) would apply only in the circumstances where an application for stay had been filed by the Assessee along with its appeal. In the present case, admittedly, no such application for stay has been filed till date.

15. Mr. Chaudhary pointed out that in ***Purnima Das v. Union of India*** (*supra*), the learned Single Judge of the Calcutta High Court had failed to notice an earlier judgment of the another Single Judge of the same High Court in ***Golam Momen v. Asstt. Commissioner of Income Tax (2003) 263 ITR 69 (Cal)*** which held to the contrary. This anomaly was noticed in a subsequent judgment of another learned Single Judge of the Calcutta High Court in ***Anil Kumar Banerjee v. Union of India (2014) 44 taxmann.com 465 (Cal)***. Therefore, as far as the Calcutta High Court is concerned, the two judgments of the learned Single Judge held that it was not mandatory under Section 226 (3) (iii) of the Act for a notice to be issued to the Assessee prior to attachment of its bank account towards recovery of the tax demand.

16. Mr. Chaudhary submitted that Section 226 (3) (iii) of the Act only required a copy of the notice to be "forwarded to the assessee" and not served upon the Assessee prior to or simultaneously with the issuance of

notice to the bank under Section 226 (3) (i) of the Act. In support of this proposition, he placed reliance on the decision in ***P.P. Kanniah Chetty v. Income Tax Officer & Anr. (1976) 105 ITR 622 (Mad.)*** and ***Third ITO v. Damodar Bhat, (1969) 71 ITR 806 (SC)***. He pointed out that even according to the Assessee, it was under liquidation and there is no prospect of the tax demand being recovered from it in the event of its appeal being dismissed.

Analysis and reasons

17. The above submissions have been considered. Under Section 156 of the Act, it is incumbent on the AO to serve upon the Assessee a notice of demand of tax, interest, penalty, fine or any other sum specifying the same to be payable. In the present case, it is not in dispute that such a notice was in fact issued to the Assessee by the AO on 19th December, 2016 and was served on the Assessee on 24th December, 2016.

18. Under Section 221 (1) read with Section 220 (4) of the Act, the Assessee is deemed to be an Assessee in default if it fails to make the payment of the demand within 30 days of the service of notice under Section 156 of the Act. In the present case, the Assessee acknowledges that it was served with a notice of demand under Section 156 of the Act on 24th December, 2016. Therefore, the Assessee was aware that under Section 221 (1) read with Section 220 (4) of the Act, it would be deemed to be an Assessee in default upon its failure to pay tax within 30 days. The Assessee is unable to explain why it did not file an application for stay of recovery of demand along with its appeal filed on 23rd January, 2017 before the CIT(A). In fact, it has not

filed any such stay application till date.

19. With the Assessee not having paid the amount within 30 days of the service of notice under Section 156 of the Act, the Department was justified in proceeding to treat it as an Assessee in default and in proceeding to take the necessary action to recover the demanded amount.

20. At this juncture, it requires to be noticed that Para 2B of Instruction No. 1914 of the CBDT dated 2nd December, 1993 on the subject of recovery of demands is titled 'Stay Petitions'. Para 2C gives 'Guidelines for Staying Demand' wherein the AO "may impose such conditions as he may think fit." The above Instruction No. 1914 was further modified by the OM dated 29th February, 2016. In para 4 of the OM, it is stated that the guidelines were being modified in order to streamline the process of grant of stay. Paras (A) and (B) therein, which are relevant for the present purpose, read thus:

> "(A) In a case where the outstanding demand is disputed before CIT(A), the assessing officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case fails in the category discussed in para (B) hereunder.
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> (B) In a situation where,
>
> (a) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of lump sum amount higher than 15% is warranted (e.g. in a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of Revenue or addition is based on credible evidence collected in a search or survey operation, etc.) or,

> (b) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.), the assessing officer shall refer the matter to the administrative Pr.CIT/CIT, who after considering all relevant facts shall decide the quantum/ proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand."

21. Instruction No. 1914 dated 2nd December, 1993 and the OM dated 29th February, 2016 are in the context of the AO considering a stay application filed by the Assessee. The Instruction or the OM will have no application where there is no application for stay filed by the Assessee. The decisions of the Division Bench of the Allahabad High Court in ***Farrukhabad Gramin Bank v. Additional Commissioner of Income Tax*** (*supra*) and of the Bombay High Court in ***UTI Mutual Fund v. Income Tax Officer*** (*supra*) have to be understood in this context.

22. In ***Farrukhabad Gramin Bank Bank v. Additional Commissioner of Income Tax*** (*supra*), the AO had attached two bank accounts maintained by the Assessee by giving a period of only 1 day's time in the notice of demand under Section 156 of the Act and without serving a notice under Section 226 (3) of the Act. What appears to have weighed with the High Court is that instead of granting 30 days' time under Section 221 of the Act, the AO had reduced the time for making payment of the demand to just one day.

23. The further observations of the Allahabad High Court that the action of the Department in proceeding to recover the demanded amount from the accounts of the Assessee without serving a notice under Section 226 (3) of the Act rendered the action arbitrary and illegal appears to run contrary to the decision of the Supreme Court in ***Third ITO v. Damodar Bhat*** (*supra*) where the contention of the Assessee that it should have been issued a notice under Section 226 (3) prior to the AO issuing the garnishee order to the third part was negatived by the Supreme Court. Following the said decision of the Supreme Court, the Madras High Court in ***P.P. Kanniah Chetty v. Income Tax Officer*** (*supra*) held: "in order to issue a garnishee order, it is not necessary that the person from whom the tax is due in respect of which the garnishee order is issued be a defaulter within the meaning of Section 46 of the Indian Income Tax Act 1922 or the corresponding provision of the Income Tax Act 1961."

24. Consequently, this Court is unable to accept the contention of the Assessee that the decision of the Allahabad High Court in ***Farrukhabad Gramin Bank v. Additional Commissioner of Income Tax*** (*supra*) on the question of the mandatory nature of the requirement of prior service of notice upon the Assessee under Section 226 (3) (iii) of the Act reflects the correct position in law.

25. Turning to the decision of in ***UTI Mutual Fund v. Income Tax Officer*** (*supra*), it is plain from the facts of the case that there was an application for stay moved by the Petitioner before the AO immediately on the receipt of the demand. Thereafter, the Petitioner moved the CIT seeking his

intervention apprehending that the AO may not entertain the application for stay. The application for stay was disposed of by the AO thereafter. Within 3 days of the disposal of the stay application, the AO took action under Section 226 (3) of the Act calling upon the bankers of the Petitioner to pay to the Revenue the demanded amount. It was in the above context that the Division Bench of the Bombay High Court held that "when a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law." All of the guidelines issued by the Division Bench of the Bombay High Court in ***UTI Mutual Fund v. Income Tax Officer*** (*supra*) were in the context of the Assessee having filed an application for stay. However, in the context of the present case where the Assessee has not filed any such application for stay, the question of application of those guidelines does not arise.

26. Likewise, the Court is not persuaded to hold that the decisions of the learned Single Judges of the Punjab & Haryana High Court in ***Mohan Singh v. Commissioner of Income Tax*** (supra) or of the Kerala High Court in ***Suntec Business Solutions Private Ltd. v. Union of India*** (*supra*) correctly expostulate the legal position under Section 226 (3) (iii) of the Act. As far as the Calcutta High Court is concerned, the two decisions of the learned Single Judges of that Court in ***Golam Momen v. Asstt. Commissioner of Income Tax*** (*supra*) and ***Anil Kumar Banerjee v. Union of India*** (*supra*) correctly explain the legal position. The Court considers the contrary view of another learned Single Judge in ***Purnima Das v. Union of India*** (*supra*) as not laying down the correct legal position.

27. In other words, the Court respectfully follows the view expressed by the Supreme Court in ***Third ITO v. Damodar Bhat*** (*supra*) and concurs the view of the Madras High Court in ***P.P. Kanniah Chetty v. Income Tax Officer*** (*supra*).

28. In the present case there was no illegality committed by the Department in not issuing to the Assessee a notice under Section 226 (3) (iii) of the Act simultaneously with or prior to the notice issued to its bank under Section 226 (3) (i) of the Act for recovery of the tax demand from its account. The Court accepts the submission of the Revenue that requirement under Section 226 (3) (iii) is only that a copy of the notice should be "forwarded to the assessee" and not that a copy should be served on the Assessee in advance or simultaneously.

Conclusion

29. For all the aforementioned reasons, the Court finds no merits in this writ petition which is dismissed but in the circumstances, with no other as to costs.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

JULY 11, 2017
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