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

+ W.P.(C) 5819/2021

EKO INDIA FINANCIAL SERVICES PRIVATE LIMITED

..... Petitioner

Through Mr.Bhuwan Dhoopar, Advocate.

versus

**ASSISTANT COMMISSIONER OF INCOME
TAX CIRCLE 7(1) & ANR.**

..... Respondents

Through Mr.Zoheb Hossain, standing counsel for
the Department/Revenue.

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Date of Decision: 03rd August, 2021

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

MANMOHAN, J: (Oral)

1. The petition has been heard by way of video conferencing.
2. Present writ petition has been filed with the following prayers:-
 - a) *issuance of a writ of certiorari quashing the Impugned Order No.1 dated June 11, 2020 issued by CPC adjusting the entire refund for AY 2019-20 against the disputed demand for AY 2017-18;and*
 - b) *issuance of a writ of mandamus directing the Respondent No. 1 to refund the amount adjusted in excess of 20% of the disputed demand for AY 2017-18; and*
 - c) *issuance a writ of mandamus restraining the Respondents No. 1 and 2 from further recovery of outstanding tax demand for AY 2017-18 until the disposal of appeal filed by the Petitioner before the Commissioner*

(Appeals) which is pending adjudication under the Faceless Appeal Scheme, 2020; and

d) issuance of a writ of certiorari quashing the Impugned Order No.2 dated December 21, 2020; and

e) imposition of exemplary costs on Respondent No.1 for carrying out a blatantly illegal recovery of tax against the accepted principles of reasonableness, judicial discipline and law

f) For ad-interim reliefs as the Court may deem fit; and

g) For the costs of this Petition;

h) Pass any other further order (s) / direction (s) as this Hon'ble Court may deem fit and proper in the fact and circumstances of the case.

3. On 03rd June, 2021, the learned predecessor Division Bench had passed the following order:-

“CM APPL. 18229/2021

1. Allowed, subject to just exceptions.

CM APPL. 18230/2021

2. The prayer made in the captioned application is to grant extension for filing the court-fee and notarised affidavits along with the present petition. The captioned application is disposed of with a direction to the petitioner to place on record the duly notarised affidavits and deposit the requisite court fee, within three days from the resumption of the normal and usual work pattern by this court.

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3. The petitioner is aggrieved as, the refund available to it in respect of the assessment year („AY') 2019 -2020, was adjusted against the disputed demand qua AY 2017-2018.

3.1. Mr. Himanshu Sinha, who appears on behalf of the petitioner, says that the adjustment is in excess of 20%, which is contrary to the guidelines contained in the Office Memorandum, dated 29.02.2016, issued by the Central Board of Direct Taxes.

4. The record shows that the petitioner had made several requests for course correction, vide letters dated 14.01.2021, 26.02.2021 and

10.03.2021. These communications are addressed to the Principal Commissioner of Income Tax, Delhi-I (in short 'PCIT') and are appended on pages 74, 77 and 84 of the paper book.

5. Issue notice.

5.1. Mr. Zoheb Hossain accepts service on behalf of the respondents/revenue. Counter-affidavit will be filed within the next four weeks. Rejoinder thereto, if any, will be filed before the next date of hearing.

6. In the meanwhile, the PCIT will deliberate and deal with the petitioner's communications, dated 14.01.2021, 26.02.2021 and 10.03.2021. The PCIT will pass a speaking order, after according a hearing to the authorised representative of the petitioner.

7. List the matter on 03.08.2021.

8. In the meanwhile, the respondents/revenue will maintain status quo with regard to the future adjustments qua refunds, if any, available to the petitioner, till the next date of hearing. It is made clear that, notwithstanding this direction, the plea made in the aforementioned communications addressed to the PCIT, concerning adjustment of future refunds, if any, being made available to the petitioner, will be dealt with by the PCIT."

4. Today learned counsel for the respondent has screen shared the order dated 02nd July, 2021 passed by the Principal Commissioner, Income Tax, Delhi-1 disposing of the petitioner's representations dated 14th January, 2021, 26th February, 2021 and 10th March, 2021. The relevant portion of the said order reads as under:-

"9. Considering the directions of Hon'ble Delhi High Court, letter was sent to the assessee on 24.06.2021 and the case is fixed for hearing on 29.06.2021. Shri Gautam Seth (CFO) of the assessee attended the office of the undersigned on 01.07.2021. The case is discussed with him. The CFO and the authorized representative principally agreed that the remaining demand of the assessee may kindly be stayed and the refund due in future may not be adjusted.

10. The demand of the assessee for A.Y. 2017-18 is already collected 40.21%. The assessee would not be treated as assessee in default for the remaining

demand of A.Y. 2017-18 till the disposal of the first appeal of the assessee or 31.03.2022, whichever is earlier. It is further clarified that till then no further refund, if determined or due to the assessee would be adjusted against the demand.”

5. Mr.Zoheb Hossain, learned counsel for the respondent states that in view of the aforesaid order dated 02nd July, 2021, the grievance raised in the present writ petition stands addressed and it should be disposed of as infructuous.

6. However, learned counsel for the petitioner submits that as per the binding directions issued by the CBDT, the respondent was obliged to grant a stay on recovery of outstanding demand for the Assessment Year 2017-18 to the petitioner upon recovery of 20%, as an appeal challenging the assessment order is pending adjudication before the Commissioner of Income Tax (Appeals). The relevant portion of the office memorandum dated 29th February, 2016, as amended by office memorandum dated 25th August, 2017 and relied upon by learned counsel for the petitioner is reproduced hereinbelow:-

Office memorandum dated 29th February, 2016

“ 4. In order to streamline the process of grant of stay and standardize the quantum of lump sum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT (A), the following modified guidelines are being issued in partial modification of Instruction No. 1914:

(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 falls in the category discussed in para (B) hereunder.

Office memorandum dated 25th August, 2017

“Vide Board's O.M. of even number dated 31.7.2017, modifications were made to O.M. NO.404/72/93-ITCC dated 29-2-2016, to the effect that the standard rate prescribed in O.M. dated 29-2-2016 stood

revised to 20% of the disputed demand, where the demand was contested before CIT(A).”

7. Per contra, Mr.Zoheb Hossain, learned standing counsel for the Revenue states that he has only instructions to place on record the order dated 02nd July, 2021, reproduced hereinabove. However, a perusal of the order dated 03rd June, 2021 passed by the learned predecessor Division Bench shows that notice had been accepted by the respondent on the said date of hearing and time to file a counter-affidavit had been given. Since no counter-affidavit has been filed, the request for adjournment is declined.

8. In any event, this Court is of the view that the respondent cannot improve upon or supplement the reasons which have already been given in the adjustment of refund order dated 17th March, 2020 under Section 245 of the Income Tax Act, 1961 (hereinafter referred to as ‘Act’) and order dated 21st December, 2020, by way of a counter-affidavit. Accordingly, the matter is taken up for hearing.

9. At this stage, Mr.Hossain refers to paragraph 4(B) of the office memorandum dated 29th February, 2016 which states that pre-deposit of 20% is not a rule of the thumb and the respondent has the discretion to direct a set off of a higher sum under Section 245 of the Act. Paragraph 4(B) of the office memorandum dated 29th February, 2016 as well as the relevant portion of the adjustment of refund order dated 17th March, 2020 under Section 245 of the Act and order dated 21st December, 2020 granting conditional stay of demand are reproduced hereinbelow:-

(A) Office memorandum dated 29th February, 2016

4(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 a 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.

(B) Relevant portion of the order dated June 11, 2020 passed under Section 245 of the Act adjusting the entire refund due for Ay 2019-20 against the disputed demand for assessment year 2017-18

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PAN	AY	Refund Sequence NO.:	Document Identification No. CPC/1920/G23/1967229611	
AABCE8314 M	2019-20			
Return Filed under section : 139			Reference to 245 Notice: CPC/1920/G8/1967229611	
Date of Communication : 11-06-2020				
E-filing Acknowledgment No:	Date of Filing Return:	Date of Order:	ITR Type:	
214987561231019	23-10-2019	17-03-2020	ITR-6 ORIGINAL	

Dear Sir/Madam,

Subject: Adjustment of refund against outstanding demand payable

Please refer to the Intimation u/s 245 vide CPC/1920/G8/19672229611 dated 13-MAY-20 sent earlier.

On careful consideration of your response if any, and material available on record, the refund of Rs. 37951268 determined for the AY 2019-20 as per Intimation dated 21-MAR-20, has been adjusted against outstanding demands in the following manner.

Note: Refunds will be issued through ECS mode subject to Bank account validation

SL No. (1).	AY(2)	Demand Amount (3)	DIN (4)	Order dated (5)	Section (6)	Taxpayer's Response (7)	Amount of adjustment (8)	Remarks (9)
1	2017-18	96876430	2019201737081640974	19-12-2019	143(3)	No response for the demand	37951270	
Net Amount Refundable							0	

N SAIRAJ
Asst. Director of Income Tax, CPC”

(C) Relevant portion of the order dated December, 21, 2020 granting conditional stay of demand for assessment year 2017-18

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PAN: AABCE8314M	Assessment Year: 2017-18	Dated: 21/12/2020	DIN & Letter No : ITBA/COM/F/17/2020- 21/1029105839(1)
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Sir/ Madam/ M/s,

Subject: Online service of Orders - Letter

Order on stay of demand application of the assessee

1. Application for stay of demand of Rs. 9,68,76,426/- for A.Y. 2017-18 was filed by the CA/AR of the assessee vide letter dated 13.11.2020.

2. The petition filed by the CA/AR of the assessee has been considered in light of the reason cited by the assessee, Instruction no. 1914 of CBDT as modified by CBDT O. M. F. No. 404/72/93-ITCDD dated 31.07.2017.

3. On perusal of the records, it is found that the assessee has filed an appeal before Ld CIT (Appeal), Delhi-19 which is pending for decision. The assessee

has also paid Rs. 10,00,000/- and an amount of Rs. 3,79,51,268/- had been adjusted against refund of A.Y. 2019-20. More than 20% of the demand has already been recovered.

4. As per section 220(6), the assessing officer in his discretion and subject to such conditions as he may think fit to the circumstances of the case, treat the assessee is not being in default in respect of the amount in dispute in the appeal. Further as per section 220(3), an application made by the assessee before the expiry of due date under sub section (1), the assessing officer may extend the time of payment or allow payment in installments, subject to such conditions as he may think fit to impose in the circumstances of the case.

5. Thus, after considering of the facts of the case, as the assessee has deposited 10 lac and adjustment of refund of Rs. 3,79,51,268/- against the demand has been made which is more than 20% of the demand, thus it is a fit case for stay of demand till the disposal of appeal.

6. The stay granted on the following terms and condition:-

- i. That is would not affect the chargeability of interest u/s 220(2) as per law.
- ii. That the assessee would cooperates with appellate authorities for proceedings, and would not seek adjournment.
- iii. That if any refunds are determined in any assessment year till the disposal of the first appeal, the same will be adjusted against the outstanding demand
- iv. That the undersigned reserves the right to review this order from time to time.”

10. Having heard learned counsel for the parties, this Court is of the view that the Government is bound to follow the rules and standards they themselves had set on pain of their action being invalidated. [See: **Amrit Singh Ahluwalia vs. State of Punjab & Ors. 1975 (3) SCR 82 and Ramana Dayaram Shetty vs. International Airport Authority of India & Ors. 1979 SCR (3) 1014**].

11. This Court is also of the view that the office memorandum dated 29th February, 2016 read with office memorandum dated 25th August, 2017 stipulate that the Assessing Officer shall normally grant stay of demand till disposal of the first appeal on payment of 20% of the disputed demand. In the event, the Assessing Officer is of the view that the payment of a lump sum amount higher than 20% is warranted, then the Assessing Officer will have to give reasons to show that the case falls in para 4(B) of the office memorandum dated 29th February, 2016.

12. This Court finds that the order under Section 245 of the Act for adjustments of refunds as well as the order on stay of demand under Section 220(6) of the Act do not give any special/particular reason as to why any amount in excess of 20% of the outstanding demand should be recovered from the petitioner-assessee at this stage in accordance with paragraph 4(B) of the office memorandum dated 29th February, 2016. Consequently, this Court is of the view that the respondent is entitled to seek pre-deposit of only 20% of the disputed demand during the pendency of the appeal in accordance with paragraph 4(A) of the office memorandum dated 29th February, 2016, as amended by the office memorandum dated 25th August, 2017.

13. Accordingly, the respondent no.1 is directed to refund the amount adjusted in excess of 20% of the disputed demand for the Assessment Year 2017-18, within four weeks. This Court clarifies that it is not granting any relief with regard to prayer (c), as the Principal Commissioner, Income Tax vide order dated 02nd July, 2021, as reproduced hereinabove, has already granted the said prayer.

14. With the aforesaid directions, the present writ petition stands disposed of.

15. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

MANMOHAN, J

NAVIN CHAWLA, J

**AUGUST 03, 2021
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