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

Date of decision: 17.08.2012

\+ W.P. (C) 4983/2012

VIRGIN MOBILE INDIA PVT.LTD .... Petitioner
Through: Ms. Surekha Raman with
Mr. Anuj Sharma, Advocates.

versus

THE ASSISTANT COMMISSIONER OF
INCOME-TAX ..... Respondent
Through: Mr. Abhishek Maratha,
Sr. Standing Counsel.

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

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. Issue Notice. Mr. Abhishek Maratha, Sr. Standing Counsel accepts notice on behalf of respondent. With the consent of the counsel, the petition was taken up for disposal.

2. The petitioner prefers the present proceedings under Article-226, questioning the order dated 19.7.2012 issued by the Assessing Officer.

3. The brief facts are that the petitioner, an incorporated company engaged in the business of trading of telecom products and also providing consultancy services, had entered into the understanding with another service provider which had a valid telecom license. This was to provide services in designing,

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marketing and servicing of the brand “Virgin Mobile Products”. The petitioner claims that its relationship with its distributors is on principal to principal basis under which the property in goods are transferred by it to the distributors through valid invoices by charging applicable VAT. For the concerned assessment year, the AO after a survey conducted on 18.11.2011 in terms of Section-133A of the Income Tax Act collected material and sought a response from the writ petitioner by its show cause notice dated 12.01.2012 as to why it should not be treated as an assessee in default for non-compliance with Section-194H of the Income Tax Act. The petitioner responded to the notice on 23.1.2012. Ultimately, by the order dated 28.3.2012, the AO rejected the petitioner’s contentions and imposed a TDS liability for the sum of Rs.3,78,88,166/- under Section 194H and also demanded Rs.4,13,440/- on account of defaults; proceedings under Section-271C of the Act were also initiated.

4. The Writ Petitioner preferred an appeal under Section-246A before the CIT (A) and during the pendency of those proceedings, moved an application for stay before the AO under Section 220 (6), on 2.7.2012.

5. On 19.7.2012, the AO by an unreasoned order which was not preceded by any hearing, rejected the application under Section 220 (6) stating as follows: -

> “*Sir,*
>
> *Sub: Application for stay of demand for the FY 2009-10 reg.*

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Please refer to your application for stay of demand dated 2.7.2012 for F.Y. 2009-2010 on the ground that the deductor assessee is under appeal against the order passed for the said financial year.

2. In this regard, it is informed that simply filing an appeal before the appellate authority cannot be taken as a ground for granting stay of demand.

3. Your application for stay of demand is hereby rejected with the above remarks at this stage and you are directed to pay the demand immediately failing which coercive measures shall be taken to recover the demand.

Yours faithfully"

6. It is contended that the impugned order is in flagrant violation of the principles of natural justice besides not disclosing any application of mind. Learned counsel contended that Section 220 (6) of the Income Tax Act pre-supposed an application of mind by the concerned authority invested with the power, when it talked of use of discretion. Counsel also relied on a Division Bench ruling of this Court in *KLM Royal Dutch Airlines and Anr. v. Deputy Director of Income Tax*, (2011) 332 ITR 224 (Delhi) in support of the contention that the order should be a composite one and specifically deal with various elements such as existence of *prima facie* case etc.

7. Learned counsel for the Revenue contended that the proceedings under Section-220(6) provide for an efficacious alternative remedy especially with a higher authority i.e. the

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administrative Commissioner of Income Tax can be approached for suspension of the default demand. In this regard, counsel relied upon certain instructions and Circular, notably, the CBDT's letter dated 21.08.1969 F.No.1/6/69-ITCC- Instructions No.96). The said instructions read as follows: -

Board's letter F.No.1/6/69-ITCC (Instruction No.96)

Minutes of the 8th Meeting of the Informal Consultative Committee held on 13th May, 1969 – Implementation of assurance given regarding stay of recovery in certain cases – Sec. 220(6) of the IT Act, 1961

"RECOVERY
SECTIONS 220,
One of the points that came up for consideration in the 8th Meeting of the Informal Consultative Committee was that income-tax assessments were often arbitrary pitched at higher figures and that the collection of disputed demand as a result thereof was also not stayed inspite of the specific provision in the matter in s. 220(6) of the IT Act, 1961.

2. The then Deputy Prime Minister had observed as under:

"Where the income determined on assessment was substantially higher than the returned income, say twice the latter amount or more, the collection of the tax in dispute should be held in abeyance till the decision on the appeal provided there were no lapses on the part of the assessees."

3. The Board desire that the above observations

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may be brought to the notice of all the ITOs working under you and the powers of stay of recovery in such cases up to the stage of first appeal may be exercised by the IAC/CIT.

XXX XXX XXX"

8. Similarly, counsel relied upon the Circular No.530 dated 6.3.1989 which reads as follows: -

"***Circular No.530 dated 6th March 1989***

Exercise of discretion under S. 220(6) of the IT Act, 1961 to treat the assessee as not being in default in respect of the amounts disputed in first appeal pending before Dy. CIT (A)/CIT(A)

"1. *Under section 220(6) of the I.T. Act, 1961 where an assessee has presented an appeal u/s 246 of the Act before the Deputy Commissioner (Appeals) or the Commissioner (Appeals), the Assessing Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of.*

2. *Having regard to the proper and efficient management of the work of collection of revenue, the Board has considered it necessary and expedient to order that on an application being filed by the assessee in this behalf, the Assessing Officer will exercise his discretion u/s 220(6) of the Act (subject to such conditions as he may think fit to impose) so as to treat the assessee as not being in default in respect of the amount in dispute in the appeal in the following situations:*

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(i) the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which, there exist conflicting decisions of one or more High Courts or, the High Court of jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment, or

(ii) the demand in dispute relates to issue that have been decided in favour of the assessee in an earlier order by an appellate authority or Court in assessee's own case.

3. *It is clarified that in the situations mentioned in para 2 above, the assessee will be treated as not in default only in respect of the amount attributable to such disputed points. Further, where it is subsequently found that the assessee has not co-operated in the early disposal of appeal or where a subsequent pronouncement by a higher appellate authority or Court alters the situation referred to in para 2 above, the Assessing officer will no longer be bound by the instructions and will exercise his discretion independently."*

9. The last Circular which was relied upon is No.589 dated 16.1.1991. The relevant part of that Circular reads as follows: -

"*Circular No.589 dated 16th January, 1991*

Exercise of discretion under S. 220(6) of the IT Act, 1961 to treat the assessee as not being in default in respect of the amounts disputed in first appeal pending before Dy. CIT (A)/CIT(A)

"XXX XXX XXX

3. *Representations have been received by the Board that the exclusion of financial capacity of the assessee to pay the demand, from the factors relevant*

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for exercise of AO's discretion under S. 220(6) of the IT Act, is prejudicial to those assessees who are not financially sound.

4. The matter has been considered by the Board. It has been decided to substitute paragraph 4 of the Circular No.530 by the following paragraph.

In respect of other cases not covered by paragraph 2 above, the AO, while considering the situation for treating the assessees to be not in default, would consider all relevant factors having a bearing on the demand raised and communicate his decision to the assessee in the form of a speaking order."

10. Section-220 (6) of the Income Tax Act reads as follows: -

"(6) Where an assessee has presented an appeal under section 246, the [Assessing] Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of."

11. Facially, the use of the expressions "discretion" and "subject to such conditions as he may think fit to impose in the circumstances of the case" imply that AO is under a duty to apply his mind and after taking into account the necessary and appropriate circumstances, pass the most suitable order as may be warranted on the facts before him. The Instructions relied upon only reinforce the element of discretion; by no means can it be construed as limiting the choice of the AO who may have a greater

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latitude in taking into account other circumstances depending on the facts of the given case. It is a cardinal principle of construction that when a legislation confers power, its amplitude cannot be cut down by instructions or rules or regulations made by subordinate authorities. Instructions and Rules can only supplement but can never supplant or limit the width of the statutory powers. In this case, the AO – as is evident from a reading of the impugned order – has not applied his mind at all to the facts much less considered what are the circumstances which either justify the grant of relief or its refusal. Furthermore, even the petitioner does not appear to have been given any opportunity to make even a briefest submission in support of its case.

12. This Court is reinforced in the view that it has expressed with regard to the correct interpretation of Section-220 (6) by the previous ruling in *KLM Royal Dutch Airlines* case (supra) which pertinently had stated that: -

> *"……In the circumstances of the case, we are of the view that rather than to fall back on the reasoning in the assessment order, even keeping its close proximity so far as time is concerned, it would be better that the order refusing stay under Section 220(6) of the Income-Tax Act must be a composite order. That is, it must also specifically deal with the existence of prima facie case. On this technicality the impugned order is set aside……."*

13. For the above reasons, the impugned order dated 19.7.2012 of the Assistant Commissioner of Income Tax is hereby set aside. The writ petitioner is directed to appear before the concerned Assistant Commissioner on 27.08.2012 at 11:00 AM. The said

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officer shall thereafter decide the application after considering the submissions made on behalf of the petitioner.

14. The Writ Petition is allowed in the above terms.

15. Copy of this order be given ***dasti*** under the signatures of Courtmaster.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

AUGUST 17, 2012
/vks/