

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision: 12.3.2013
CWP No.1816 of 2013 (O&M)

Punjab Urban Planning and Development
Authority (PDA), PatialaPetitioner

vs.

Chief Commissioner of Income Tax,
Chandigarh and orsRespondents

**CORAM: - HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MS. JUSTICE RITU BAHRI**

Present: - Mr. Akshay Bhan, Advocate for the petitioner.

Ms. Savita Saxena, Advocate for respondents.

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CM No. 4126 of 2013

Application is allowed. Annexures R-1 to R-4 are permitted to be taken on record.

CWP No. 1816 of 2013

Challenge in the present petition is to a communication dated 24.1.2013 (Annexure P-7) whereby the request of the petitioner for stay of demand till the expiry of the time limit for filing an appeal was declined.

The Assessing Officer framed the assessment in respect of the assessment year 2009-2010 on 30.12.2011. The appeal filed by the assessee was dismissed by the Commissioner of Income Tax (Appeals) on 16.1.2013. The order of the same was received by the assessee on 22.1.2013. On 24.1.2013, the petitioner made a request for stay of demand vide Annexure P-6 dated 24.1.2013. It is averred

that the assessee is in the process of filing of the appeal before the Income Tax Appellate Tribunal, Chandigarh and that the time limit for which expires on 23.1.2013, therefore, the impugned demand be stayed till the expiry of the time limit of the expiry of the appeal. Petitioner also referred to an order passed by the Bombay High Court reported as UTI Mutual Fund vs. Income Tax Officer, (2012) 5 ITR 71 (Bom), wherein the following guidelines were issued: -

1. No recovery of tax should made pending.
 - (a) Expiry of the time limit for filing an appeal;
 - (b) Disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated.
2. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and bearing in mind the guidelines in KEC International;
3. If the Assessing Officer has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay;
4. 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;
5. In exercising the powers of stay, the Income Tax Officer should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the assessing officer has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order; the matter must be considered from all its facts, balancing the interest of the assessee with the protection of the Revenue.

Earlier, the petitioner invoked the writ jurisdiction of this Court after the Assessing Officer framed the assessment and raised demand of recovery vide a notice dated 13.3.2012. This Court directed the revenue not to withdraw or encash the fixed deposits of the petitioner till the decision of appeal by respondent No.2. The operative part of the order reads as under: -

Mr. Alok Mittal, counsel for the petitioner-Authority points out that FDRs amount to over Rs. 90 crores whereas the demand raised against the petitioner is about Rs. 20 crores only. He further submits that some of the FDRs would be required to be encashed to discharge the due tax liability for the next assessment year and to perform other statutory responsibilities. Keeping the facts and circumstances in view and in order to protect the interest of the Revenue, we direct that the petitioner-Authority shall not withdraw or encash its fixed deposits to the tune of Rs. 20 crores till the decision of appeal by respondent No. 2, while it shall be at liberty to encash the rest of the FDRs.

In terms of the aforesaid order passed by the Division Bench of this Court, the fixed deposits to the tune of Rs. 20.00 crores were not encashed during the pendency of the appeal before the Commissioner of Income Tax (Appeals). After the appeal was decided, the embargo on the revenue to encash the fixed deposits came to an end and consequently the revenue was within its jurisdiction to encash the guarantee of Rs. 20.00 crores.

We do not find that the assessee is entitled to stay of recovery proceedings during the limitation period for the filing of the appeal. There is no deemed stay of liability after the enforceable order is passed by an authority under the statute. Reference may be made to *Collector of Customs, Bombay Vs. Krishna Sales (P) Ltd. AIR 1994 SC 1239*, wherein the court observed as:

6. According to the said para 4, the goods will not be released even where the party succeeds in cases where the Customs authorities decide to go in appeal before the Tribunal or the Supreme Court. They will consider the issuance of such certificate only after the decision of the Tribunal or the Supreme Court, as the case may be. The learned counsel for the respondent characterises the said direction as arbitrary and contrary to law. We see the force in his submission. If the authorities are of the opinion that the goods ought not to be released pending the appeal, the straightforward course for them is to obtain an order of stay or other appropriate direction from the Tribunal or the Supreme Court, as the case may be. Without obtaining such an order they cannot refuse to implement the order under appeal. As is well-known, mere filing of an appeal does not operate as a stay or suspension of the order appealed against. Moreover, such detention is likely to create several complications relating to the demurrage charges besides the possible deterioration of the machinery and goods. We hope and trust that the Collector of Customs, Bombay shall appropriately revise the said public notice in the light of the observations made herein. If he does not do so, there is a likelihood of the Customs authorities being themselves made liable for demurrage charges in appropriate cases.

In another judgment, the Court held that pending appeal, it is open to the Decree holder to execute decree subject to the right of restitution in *Inderchand Jain v. Motilal*, (2009) 14 SCC 663. The Court observed as under:

29. Order 41 Rule 1 of the Code stipulates that filing of an appeal would not amount to automatic stay of the execution of the decree. The law acknowledges that during pendency of the appeal it is possible for the decree-holder to get the decree executed. The execution of the decree during pendency of the appeal would, thus, be subject to the restitution of the property in the event the appeal is allowed and the decree is set aside. The court only at the time of passing a judgment and decree reversing that of the appellate court should take into consideration the subsequent events, but, by no stretch of imagination, can refuse to do so despite arriving at the findings that the plaintiff would not be entitled to grant of a decree.

In view of the above, mere fact that the petitioner had time limit to file an appeal does not bar the revenue to execute the order passed. We do not find any merit in the present petition.

Dismissed.

(HEMANT GUPTA)
JUDGE

(RITU BAHRI)
JUDGE

12.3.2013
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