

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 732 OF 2021

Tata Communications Ltd.,)
having its address Videsh) .PETITIONER
Sanchar Bhavan, Mahatma)
Gandhi Road, Fort,)
Mumbai – 400 001.)

V/s.

1. Union of India)
Through the Secretary,) .RESPONDENTS
Ministry of Finance, Government)
of India, North Block,)
New Delhi – 110 001.)
)
2. Deputy Commissioner of)
Income Tax – 1(3)1, Aayakar Bhavan)
M. K. Road,)
Mumbai – 400 020.)
)
3. Additional Commissioner of)
Income Tax – 1(3), Aayakar Bhavan,)
M. K. Road,)
Mumbai – 400 020.)
)
4. Principal Commissioner of)
Income Tax – 1, Aayakar Bhavan,)
M. K. Road,)
Mumbai – 400 020.)
)
5. Commissioner of Income Tax)
(Centralized Processing Centre)
Income Tax Department,)
Bengaluru – 560 500.)
)
6. Assistant Director of Income-tax)
(Centralized Processing Centre)
Income Tax Department,)
Bengaluru – 560 500.)

Mr. J. D. Mistri, Senior Advocate a/w Mr. Atul Jasani i/b Mr. Harsh Kapadia, Advocates for the petitioner

Mr. Suresh Kumar, Advocate for the respondents

**CORAM : SUNIL P. DESHMUKH, AND
ABHAY AHUJA, JJ.**

DATE : 06.04.2021

ORAL JUDGMENT (PER : SUNIL P. DESHMUKH, J.)

1. Rule. Rule made returnable forthwith and heard learned advocates for the parties, finally, by consent.

2. The petitioner is a telecommunications company engaged in offering services as referred to in the writ petition. Petitioner had filed its return of income for the Assessment Year (AY) 2019-20 of total income of Rs.638,05,85,060/- and Rs.220,62,55,842/- as total tax on said income. Petitioner had claimed a credit of Rs.425,84,02,174/- as tax paid in the form of Tax Deducted at Source (TDS) of Rs.425,83,76,387/- and Tax Collected at Source (TCS) of Rs.25,787/- and had claimed refund of Rs.205,21,46,330/-. Processing of said return had been getting obfuscated and prolonged at the end of the respondents and the petitioner had been before this court in writ petition bearing (Lodging) No. 6965 of 2020. Said writ petition had been disposed of

by this court on 11th January, 2021 directing to release due refund amount with interest within a period of two weeks from the date of receipt of the order.

3. Petitioner had forwarded a copy of aforesaid order dated 11th January, 2021 to the respondents on 14th January, 2021 with a request to comply with the same and to release the refund with interest.

4. Respondent No. 6 issued an intimation under section 143 (1) of the Income Tax Act, 1961 (Herein after “the Act”), on 17th January, 2021 and had determined income tax refund with interest payable to the petitioner to the tune of Rs.227.27 crore, referring, *inter alia*, to that certain demands were outstanding, including those for the AYs 2007-08 (Rs.153.91 crore) and 2008-09 (Rs.138.26 crore), further referring to that intimation pursuant to section 245 of the Act has been issued separately proposing to adjust outstanding demands against aforesaid determined refund, asking the petitioner to submit its response as release of refund would be considered with reference to the same.

5. Petitioner, had, in response, referred to that the petitioner had not received any notice under section 245 of the Act,

despite a statement in the intimation under section 143 (1) of the Act. It was pointed out that the outstanding demands stated were stayed by orders of the high court and the Income Tax Appellate Tribunal (ITAT), giving details thereof. It had been specifically pointed out that stay had been granted on 19th June, 2020 which was to remain effective up to 15th July, 2020 by the ITAT to the demands of AYs 2007-08 and 2008-09 and while final hearing had been scheduled on 15th July, 2020 that could not take place. Thereafter, there had been series of orders by the high court whereunder *status quo* was maintained for all interim orders within the State till 31st January, 2021, as the high court had intervened in view of nationwide lock-down due to pandemic. It was referred to that petitioner had also met respondents No. 2 and 3 and explained aforesaid position and had requested to release refund which had been due. Petitioner had also furnished substantiating material on, on-line portal of the Income Tax Department on 22nd January, 2021. The petitioner had again requested respondents No. 2 and 3 explaining status of the outstanding demands, highlighting that the demands stated in intimation dated 17th January, 2021 had been stayed or injunction has been clamped.

6. As nothing was heard from the respondents, the

petitioner on 30th January, 2021 had requested the respondents to release refund as the period granted by the high court had come to an end. In the meanwhile, the petitioner had informed the respondents that it had requested to fix stay applications for AYs 2007-08 and 2008-09.

7. On 1st February, 2021, the petitioner found that demands pertaining to AY 2007-08 had been stopped appearing as outstanding and demand pertaining to AY 2008-09 had been reduced as on 31st January, 2021 on the income tax e-filing portal and “*date of last refresh*” mentioned therein was 31st January, 2021.

8. Since the petitioner had neither received any communication from the respondents nor the amount of refund, it had written on 2nd February, 2021 to respondents that there has been no communication with regard to refund and that it was surprised to see on 1st February, 2021 that online income tax e-filing portal suggested that demand for AY 2007-08 is no longer outstanding and for the next AY 2008-09, it had been reduced and clarification was sought in this respect as to whether refund of AY 2019-20 was adjusted against these demands, reiterating that demands for said AYs were stayed and could not be recovered.

9. Petitioner noticed, when status of income tax refund for AY 2019-20 on “Tax Information Network” of the Income Tax Department available on the website of National Securities Depository Limited (NSDL) was checked, that refund of AY 2019-20 was adjusted against the outstanding demands. Thus, the petitioner is before this court seeking writ of certiorari or writ of its nature to quash and set aside the adjustment of demands of AYs 2007-08 and 2008-09 against the determined refund due for the AY 2019-20. Petitioner also seeks writ of mandamus directing respondent No. 3 to release refund of AY 2019-20 along with interest as determined under the intimation dated 17th January, 2021 and to forthwith withdraw impugned adjustment purportedly done.

10. In the affidavit in reply to the writ petition, respondents refer to that return for the AY 2019-20 had been processed under section 143 (1) of the Act and total refund of Rs.204,74,43,697/- plus interest under section 244A of the Act of Rs.22,52,18,796/- has been given under intimation dated 17th January, 2021 and there is a difference of Rs.47,02,633/- on account of lower TDS credits appearing in Form 26AS of the assessee. It has been referred to that the petitioner had been communicated details of outstanding tax

demands, arrears from time to time and even the assessee has forwarded its reply through e-filing portal. It is referred to that an opportunity of being heard was granted to the petitioner and accordingly on 21st January, 2021, authorized representative of the petitioner had been heard and e-mail was sent by the petitioner to the respondents on 22nd January, 2021 and thus, the petitioner had been granted opportunity to present its stand on outstanding demands and accordingly adjustment under section 245 of the Act has been carried out by CPC, which is in accordance with law.

11. It is being submitted that order dated 11th January, 2021 of this court has been complied with. The return of income for AY 2019-20 was processed under section 143 (1) of the Act and intimation dated 17th January, 2021 was generated and served on the petitioner. The petitioner has furnished reply on 21st January, 2021 to notice under section 245 of the Act. The direction was to release “*due refund amount*” which is after giving effect to all provisions of law, including section 245 of the Act. It is submitted that the petitioner had been confronted with outstanding demands and after considering response, the respondents had communicated to CPC regarding demands which are currently not recoverable (on account of stay by ITAT), including that stay in respect of demands for AYs

2007-08 and 2008-09 was not in operation. In short, it is submitted that it is not the case that the petitioner had no communication/intimation with regard to proposed adjustment.

12. It is referred to that stay to demands for AYs 2007-08 and 2008-09 expired on 15th July, 2020 and 7th April, 2020 and during hearing it was enquired with the petitioner as to whether there had been further stay granted and the assessee had not produced any stay order. It is contended that the *suo motu* writ petition, referred to by the petitioner was in context of restraint on eviction by public authority and Union of India had not been a party and no directions were issued with regard to the Act. It is under these circumstances, while two weeks' period was to expire, demands were adjusted.

13. It is submitted that procedure, as per provisions of the Act had been followed before adjusting the demands under section 245 of the Act and there is an acknowledgment with respect to the same vide petitioner's e-mail dated 22nd January, 2021. It is being referred to that while the stay had been operating, as contended on behalf of the petitioner and had been extended till 31st January, 2021, then no plausible explanation is coming forth from the petitioner as to why the petitioner had got stay orders extended in

respect of other AYs until September, 2020 and why argument had not been advanced that the stay orders were automatically extended.

14. It is referred to in the reply that the period granted by this court was to expire on 28th January, 2021 and, as such, approval to adjustment was given on 27th January, 2021.

15. It is, thus, submitted that proper procedure as per law had been followed while adjusting the refund and that the petitioner has an alternate remedy and, as such, the request of the petitioner may not be accepted and the writ petition be dismissed.

16. While resistance of the respondents is as aforesaid, learned senior advocate Mr. Jahangir Mistri appearing on behalf of the petitioner, submits that there has been no intimation as required under section 245 of the Act, before making adjustment of refund towards outstanding demands. He contends that contention on behalf of the respondents that the petitioner has been heard over adjustment under section 245 of the Act, is not proper and is fallacious. There has been no intimation whatsoever issued to the petitioner in respect of adjustment as required under section 245 of the Act. As a matter of fact, the intimation dated 17th January, 2021 under section 143 (1) of the Act under note specifically refers to *that*

“An intimation under section 245 of the Income Tax Act, 1961 has been issued separately proposing to adjust the outstanding demands against the refund determined as per this order. Since, the release of the refundable amount will be considered on the basis of your response/compliance to the Intimation U/s 245, you are requested to submit your response expeditiously.” He submits that pursuant to the same the petitioner has not received, any intimation under section 245 of the Act, at all.

17. Apart from aforesaid, he submits that it had been explained to the authorities that demand of taxes for AYs 2007-08 and 2008-09 are pending adjudication and that stay had been operating under orders passed from time to time by tribunal as well as this court. However, all aforesaid contentions have fallen on deaf ears and the respondents, with a view to not to pay refund to petitioner, have rushed to adjust due refund amount to petitioner for AY 2019-20, which is absolutely without authority of law and without jurisdiction and an act which is patently capricious.

18. In support of his submissions, Mr. Mistri purports to refer to and rely on a decision of division bench in the case of *“A. N. Shaikh and Others V/s Suresh B. Jain”*, *Income Tax Reports Vol.165, page 86*, wherein it has been found that – *“Intimation given in the*

assessment order for 1983-84 that the tax liability of the respondent (original petitioner) came to Rs.7,47,732/- and that the amount of refund for the previous assessment year 1982-83 is adjusted against the said liability does not amount to intimation in writing as contemplated by section 245. Section 245 clearly requires a previous intimation of the proposed action for adjustment and not simultaneous intimation.”

19. Yet another division bench judgment of this court in the case of *“Hindustan Unilever Ltd., V/s Deputy Commissioner of Income Tax and Others”, [2015] 377 ITR 281 (Bom)* has been referred to. It has been observed in said judgment that *“Giving of prior intimation under section 245 of the Act is mandatory, the purpose being to enable the party to point out that there are factual errors or some further developments, if any the officer of the Revenue exercising power under section 245 of the Act must apply his mind to it and must record reasons why the objection is not sustainable and also communicate these to the party before or at the time of adjusting the refund. This alone would ensure that the power of adjustment under section 245 of the Act is not exercised arbitrarily.”*

20. Learned senior advocate also refers to a decision of

division bench of this court in the case of “*Milestone Real Estate Fund V/s Assistant Commissioner of Income Tax and Others*” [2019] 415 ITR 467 (Bom), wherein as well it has been observed that the assessing officer while exercising powers under section 245 of the Act, must apply his mind to the objections raised by the assessee and record his reasons why the objection is not sustainable or otherwise and communicate it to the party before making the adjustment. It has further been observed that when the issue stands concluded in favour of the assessee by orders of the appellate authority in assessee’s own case, it would be proper to grant stay to demand for the assessment year under section 220 (6) of the Act till the appeal of the assessee against the order is disposed of. Thus, this court had set aside adjustment of refund. It is submitted that it is well settled that the reasons in affidavit would not substitute and replace a reasoned quasi judicial order and its communication.

21. Learned senior advocate submits that the petitioner had placed on record order of the high court dated 26th March, 2020 in the *suo motu* writ petition (2 of 2020). He submits, title of the order clearly suggests that it is with reference to extension of interim orders (page 97 of this writ petition). From time to time thereafter, orders were passed extending operation of interim orders till 31st

January, 2021. Said orders as well have been supplied to the respondents and it is not in dispute. He submits that perusal of the orders would show that those are not confined only to eviction / dispossession of persons and it embraces all the cases of interim orders passed by courts, authorities and tribunals, etc. He, therefore, submits that there is not only contumacy in refund adjustment violating stipulation under section 245 of the Act and letter and spirit of order dated 11th January, 2021, but also the reply filed by the respondents is even more contumacious wherein it is purportedly contended that orders of this court in *suo motu* writ petition would hardly put on hold adjustment of refund.

22. He submits that in the present matter, neither any notice had been issued to the petitioner under section 245 of the Act nor any order has been passed on the submission and/or the objections inasmuch as there is no communication of orders to the petitioner. He, thus, urges to allow the writ petition.

23. Mr. Suresh Kumar, learned advocate appearing for the Revenue, however, submits that the record sufficiently reveals that it is not the case that the petitioner had no idea that the department is purporting to have adjustment of refund towards outstanding demands. An intimation about adjustment would be considered, had

been given under the intimation pursuant to section 143 (1) of the Act.

24. He submits that petitioner had been given opportunity and had been before the authorities on 21st January, 2021 over the issue of adjustment of refund in respect of AYs 2007-08, 2008-09. Assuming that the orders cover only eviction / dispossession of persons, he purports to submit that order of high court in *suo motu* petition would not be legitimately said to cover matters before ITAT. He submits that the order dated 11th January, 2021, having regard to facts and circumstances, has been complied with. Order for adjustment of refund has been made before expiry of period of fourteen days from the date of orders of the court dated 11th January, 2021. He submits that the provisions of the Act under section 245 of the Act have been duly followed before adjusting outstanding demands. He, therefore, submits that the petition would not be said to carry any weight in it and the same be not entertained and be rejected.

25. This court, under its order dated 11th January, 2021 in writ petition (Lodging) No. 6965 of 2020 had observed as under:

“10. From the above, it is seen that the grievance of the petitioner is now within a narrow compass. Matter is with respondent No. 5 which will intimate the

petitioner regarding processing and release of refund since processing of the income tax return for the assessment year 2019-20 has been completed. It is also seen that the said respondents have admitted that certain amount of refund is due to the petitioner processing of which at the level of respondent No. 2 is complete after resolution of all technical issues.

11. *Having heard learned counsel for the parties and having considered the provisions of section 143 (1) of the Act, we direct respondent No. 5 to complete the processing of the refund claim of the petitioner and thereafter, release the due refund amount to the petitioner along with applicable interest in accordance with law within a period of two weeks from the date of receipt of a copy of this order.”*

26. Paragraphs of the order, reproduced above, show that respondents had admitted that certain amount of refund is due to the petitioner for AY 2019-20 and in the next paragraph, it has been directed to release the due refund within a period of two weeks. The observations about admission of refund amount due and its release are in tandem.

27. Although it is referred to that on 21st January, 2021, petitioner was communicated about adjustment and was acknowledged under e-mail dated 22nd January, 2021, perusal of the e-mail annexed to the reply refers to “*status of outstanding demands and intimation under section 143 (1) of the Income Tax Act (‘Act’)*” and not to under section 245 of the Act. It also emerges that there is

no record made available by the respondents about any separate intimation being issued to the petitioner under section 245 of the Act for adjustment of demands from the refund from AY 2019-20 as referred to under note in intimation pursuant to section 143 (1) of the Act. The affidavit in reply is silent over the same.

28. It is not the case of the respondents that revenue officer had passed an order, *inter alia*, with regard to contention that there is no receipt of intimation under section 245 of the Act at the end of the petitioner and reasons were recorded as to why those are not sustainable and that it was communicated to the petitioner before adjusting the refund.

29. Although the respondents purport to contend that proper procedure had been followed, record does not bear that there had been any communication made to the petitioner as to its submissions being not acceptable before or at the time of making the adjustment.

30. Decisions in the cases of “A. N. Shaikh”, “Hindustan Unilever Ltd.,” and “Milestone Real Estate Fund” (*supra*) relied on, on behalf of the petitioner have not been met with by the respondents nor it is the case of the respondents that any other course could be adopted for adjustment of refund. There is stark

absence of material showing compliance of requirements viz: application of mind to contentions on behalf of the petitioner, reasoned order and its communication to the assessee. The facts and circumstances lend lot of substance to submissions advanced on behalf of the petitioner that there is absence of compliance of requirements under section 245 of the Act, coupled with observations of high court in the decisions relied upon on behalf of the petitioners.

31. Perusal of order dated 26th March, 2020 by this court (copy of entire order is appended to the writ petition), which is with reference to extension of interim orders it does not appear that the canvas of order is limited to eviction by public authorities from building / structures. Copy of the order is at page 97 as Annexure-1. Relevant portion thereof reads, thus,

*“In this situation, we find it appropriate to continue **all interim orders which are operating till today and are not already continued by some other courts / authority including this court and the same shall remain in force till 30/04/2020**, subject to liberty to parties to move for vacation of interim orders passed by this High Court at Mumbai, Aurangabad, Nagpur and Panaji **as also all courts / Tribunal and authorities subordinate over which it has power of superintendence expiring before 30/04/2020, shall continue to operate till then**. It is clarified that such interim orders which are not granted for limited duration and therefore, are to operate till further orders, shall remain unaffected by this order.”*

32. Said order was continued from time to till 31st January, 2021. The order specifically refers to that same is applicable to interim orders of courts, tribunals and authorities over which the court has power of superintendence. All the subsequent orders are also made available whereunder there does not appear that their operation is limited to the extent of eviction / dispossession of persons / tenants.

33. Having regard to aforesaid extract of the order of this court and the order passed from time to time, as have been annexed by the petitioner to the writ petition, it would be discernible that interim orders passed by the tribunal were to be operative till 31st January, 2021. In the scenario, it is difficult to go by the explanation and submission that there had hardly been any interim relief granted by the tribunal operating in respect of demands for AYs 2007-8 and 2008-09. It is difficult to appreciate the stand of the respondents that the order passed by the high court would not cover/operate over the matters and orders passed by the ITAT, Union of India being not a party to the matter. Such a justification from and the approach of, the respondent authorities is difficult to be approved of which is not in fitness of stature, especially of the state department, which is supposed to act like a model litigant.

34. We, therefore, consider in the circumstances of the case and emerging position, it would not be said that the action of the respondents of adjusting the amount is sustainable.

35. As such, writ petition is allowed in terms of prayer clause b (i). The respondents would refund the amount to the petitioner for AY 2019-20 as determined under intimation under section 143 (1) of the Act dated 17th January, 2021 with interest thereon, as per law, within a period of four weeks from the date of receipt of this order.

(ABHAY AHUJA, J.)

(SUNIL P. DESHMUKH, J.)