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

\+ **Writ Petition (Civil) No. 2252/2011**

Reserved on: 21st October, 2011
% Date of Decision:25th November, 2011

Maruti Suzuki India Limited ....Petitioner
Through Mr. S. Ganesh, Sr. Advocate with
Mr. S. Sukumaran, Mr. Anand Sukumar
and Mr. Bhupesh Kumar Pathak, Advs.

Versus

Deputy Commissioner of Income Tax …Respondent
Through Mr.Kamal Sawhney, Sr.Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R. V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

SANJIV KHANNA, J.

The present writ petition by Maruti Suzuki (India) Limited, a public limited company, is for direction against the Deputy Commissioner of Income Tax, Circle VI(1) and Additional Commissioner, Range VI. The said respondents, it is prayed, should be restrained from recovering any part of the demand raised for the assessment year 2006-07 pending final hearing and disposal of the petitioner's appeal before Income Tax Appellate Tribunal (ITAT, for short). The petitioner has also prayed for direction that the respondents should be directed to refund Rs.122.57 crores and Rs.107.42 crores relating to the assessment years

2003-04 and 2005-06 respectively, which as per the petitioner have been wrongly and illegally adjusted/appropriated by invoking Section 245 of the Income Tax Act, 1961 (Act, for short), vide order dated 2nd February, 2011 towards the demand for the Assessment Year 2006-2007.

2. Factually, it is not in dispute that the petitioner was entitled to refund of Rs.122.57 crores and Rs.107.42 crores for the assessment years 2003-04 and 2005-06 respectively. In normal course, the said refunds should have to be paid by the respondents to the petitioner but for the adjustment against the demand for the Assessment Year 2006-07.

3. For the assessment year 2006-07, an assessment order under Section 143(3) read with Section 144C was passed on 20th October, 2010. This created an additional demand of Rs.266.61 crores, the breakup being; income tax of Rs.169 crores and interest under Sections 234 B and 234C of Rs.95,49,06,432/- and Rs.1,91,31,933/- respectively. Against the said assessment order, the petitioner on 19th November, 2010 filed an appeal before the ITAT. Subsequently, on 30th November, 2010, an application for stay of demand was filed. This stay application came up for hearing before the ITAT on 9th December, 2010 and an interim order was passed directing status quo in respect of recovery till

14th December, 2010. The Departmental Representative (DR, for short) undertook to convey these directions to the concerned authorities. The petitioner also filed a letter before the respondent No. 1 informing the said respondent about the status quo order with copy to the Commissioner of Income Tax. On 13th December, 2010, one day before the date of hearing, respondent No. 1 informed the petitioner that refund of Rs.122.57 crores for assessment year 2003-04, stands adjusted against the demand for assessment year 2006-07 vide order dated 7th December, 2010. It is not disputed that this communication was made on 13th December, 2010, after the status quo order was passed on 9th December, 2010. Similarly, the Revenue vide order dated 22nd November, 2010, had made adjustments under Section 245 of the Act for refund of Rs.69.94 crores for assessment year 2005-06 and Rs.37.47 crores for the assessment year 2003-04. Adjustment of Rs.37.47 crores for the assessment year 2003-04 was subsequently reversed vide order dated 3rd December, 2010, in view of the stay order passed by the High Court in a separate proceeding.

4. The two orders under Section 245 of the Act making adjustment of refunds of Rs.69.94 crores for the assessment year 2005-06, dated 22nd November, 2010 and Rs.122.57 crores for assessment year 2003-04 vide order dated 7th December, 2010 but communicated on 13th

December, 2010, were made without prior intimation as mandated and required by law.

5. Dispute/question arose before the ITAT, whether the additions and disallowances made in the assessment year 2006-07, resulting in additional demand of income tax of Rs.169 crores plus interest, was in respect of issues and contentions that have already been decided by the ITAT or the Commissioner of Income Tax (Appeals) (CIT(Appeals), for short) in favour of the petitioner in earlier years. The contention of the petitioner was that the additions or disallowances made in the assessment order dated 20th October, 2010, for assessment year 2006-07, were partly covered by decisions of the ITAT and the CIT (Appeals) in favour of the petitioner and thus demands should not be recovered and there should be an absolute or blanket stay from recovery of the demand in respect of at least the issues which have been decided by the appellate authorities in favour of the petitioner. The ITAT instead of examining the said questions while considering the stay application on 20th January, 2011, recorded the statement made by the DR that he had received a letter dated 19th January, 2010 accepting that the earlier action under Section 245 of the Act was bad and proper proceedings under Section 245 would be initiated. Accordingly, the matter was adjourned to 4th February, 2011 "on the request of both the parties".

6. The petitioner appeared before the respondent No. 1 and filed written submissions dated 27th January, 2011, along with the chart indicating how and in what manner, as per the assessee, several issues which had resulted in the additional demand for the assessment year 2006-07, were covered in their favour by the orders of the appellate authorities in earlier years.

7. It may be also noted here that the petitioner had filed an application under Section 220(6) of the Act before the Assessing Officer on 8th November, 2010, that the petitioner should not be treated as an assessee in default and the demand should be kept in abeyance till disposal of the appeal before the ITAT. It is also apparent that the ITAT while dealing with the applications was of the opinion that the respondent No. 1 should first dispose of the application under Section 220(6) of the Act.

8. Respondent No. 1, vide order dated 2nd February, 2011, disposed of the 'stay application' and substantially dismissed the same stating inter alia, that refund of Rs.107.41 crores for the assessment year 2005-06 and Rs.122.57 crores for the assessment year 2003-04 stand adjusted and that there would be a stay of the balance amount of Rs.36.61 crores pending decision of the appeal before the ITAT, for the assessment year 2006-07. Another order dated 2nd February, 2011 was

passed by the respondent No. 1 under Section 245 of the Act. The factum that adjustment under Section 245 of the Act was made by the order dated 2nd February, 2011, has been mentioned in the writ petition but this order under section 245 of the Act dated 2nd February, 2011, has not been filed with the writ petition and has been filed by the respondents along with the counter affidavit. The relevant portion of the said order under section 245 of the Act reads as under:-

> "3. You have relied on instruction No.1914 of Hon'ble CBDT and submitted that the demand of Rs.47.20 crores and interest u/s. 234B of 27.17 crores is relating to the covered issues, in which the order has been passed by Appellate Authorities in earlier years in favour of the assessee. The submission has also been made that in some issues, disallowances have been made, though in the earlier relating to the same were rejected and hence in this year i.e. A Y 2006-07, the claims were made us. 43B of IT Act. It has also been submitted that some issues are covered by the decisions of jurisdictional Delhi High Court and CBDT Circular. The submission made by you has been considered but the same has not been found correct. IN the body of assessment order, detailed observations have been made by the Assessing Officer in all the issues and the relied judgments have been distinguished by the Assessing Officer. In the earlier years, the issues have not reached to the finality and the appeals of department are pending before Hon'ble High Court against the order of Hon'ble ITAT and before Hon'ble ITAT against the order of Ld. CIT(A). IN AY 2006-07, Ld. DRP-II, New Delhi has confirmed additions by examining all the issues therefore the additions have withstood the test of first appellate authority, therefore, the relied instruction, i.e.. Instruction No.1914 is not applicable. In the matter of issues covered by decisions of Hon'ble High Court in other cases, the Assessing Officer has distinguished the facts of the case of the assessee from the relied cases in the body of assessment order itself. Therefore, in the matter of disallowance of 'Royalty on sales' amounting to Rs.95.98 crores and 'Sales tax subsidy' amounting to Rs. 32.26 crores, the submission made by you is not acceptable.

> 4. The department is not making recovery of the outstanding demand but simply adjusting the refund arising out in the earlier years wherein the effect has been given to the order of Ld. CIT(A). The issues on which, Ld. CIT(A) has given relief have not become final so far and the department is contesting the same before Hon'ble ITAT in A Y 2003-04. It might be the case that the additions are confirmed by Hon'ble ITAT, then the assessee may be required to make the payment .
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> 5. The submission of the assessee that some of the issues are covered by the decisions of Hon'ble ITAT in earlier years, may be given importance, if forceful recovery is made. But in case of adjustment of refund of the amount which was already lying with the department cannot be refunded back to the assessee since the issues have not attained finality so far in A Y 2006-07.
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> 6. Huge demand is relating to the fresh issues like capital subsidy (disallowance of Rs.32.26 crores), royalty payment (disallowance of Rs.105.55 crores), disallowance on identical issues have been made in AY 2007-08, wherein the assessee has again filed appeal before Hon'ble DRP, i.e. the first appellate authority, which has confirmed the issues in AY 2006-07. Therefore, it is most likely that the assessee may be required to make payments in subsequent years on these issues. Therefore, refunding the amount is not a very viable proposition."

9. The stay application filed by the petitioner thereafter came up for hearing before the ITAT on 11th February, 2011 and the same was disposed of after recording the factual position noticed above with the following observation and reasoning:-

> "7.1 We find merit in the argument of learned DR that this section occurs under the chapter of 'refunds' and not 'recovery'. Section mandates that if some refund is found to be due to any person, the AO shall set off such amount before refund against any sum remaining payable by the person under this Act. No conditions are prescribed except that assessee should be given an intimation of the proposed action. We find that the earlier action u/s 245 dated 7-12-2010 in short intimation has been corrected by the department vide fresh order u/s 245 dated 2-2-2011. Looking at the language of section 245, it cannot be held that department has acted in a mala fide manner. We find no infirmity in action u/s 245 dated 2-2-2011, the issue

> which thus remains for our consideration is the balance outstanding demand against assessee which both parties contend be around Rs. 22 crores.
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> 7.2 In our view, assessee has made out a prima facie case inasmuch as various issues have been proposed to be covered in favour of the assessee by earlier orders of appellate authorities which shall be taken at the time of hearing of appeal on merits. The balance of convenience qua this outstanding demand lies in favour of the asseessee. After considering all the facts and circumstances we stay the balance outstanding demand against assessee subject to usual condition of not seeking undue adjournments by the assessee."

10. On the basis of submissions made by the parties, we have thought it appropriate to discuss aspects raised and our decision under separate headings:

A. **Whether writ petition should be dismissed as the petitioner has not filed order dated 2nd February, 2011, under Section 245 of the Act and, therefore, is guilty of concealment and which disentitles them to obtain discretionary relief?**

11. This contention has been examined first as the learned counsel for the Revenue has raised this issue vehemently. This contention of the Revenue is without merit and has to be rejected. In the writ petition itself, it is mentioned that vide order dated 2nd February, 2011, there was adjustment of refund of Rs.122.57 crores and Rs.107.42 crores for the assessment year 2003-04 and 2005-06 respectively. This factum is also mentioned in the order under Section 220(6) of the Act which has been enclosed with the writ petition. The assessee has nothing to gain and has not tried to seek any advantage/benefit by not

filing the order dated 2nd February, 2011, under Section 245 of the Act. It is obvious that the writ petition of this nature could not have been decided without notice to the respondents who would have referred to this order. We are not satisfied that there is concealment, misstatement or suppression of a material fact or the petitioner had any motive or cause not to file the order dated 2nd February, 2011 with their writ petition. The relevant and material facts have been stated in the writ petition. We may reproduce the following observations of the Supreme Court in ***S.J.S. Business Enterprises (P) Ltd. v. State of Bihar,*** (2004) 7 SCC 166 :

> **"13.** As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken."

B. Whether the stay application under Section 220(6) was maintainable?

12. It may be noted here that the petitioner and Revenue have proceeded on the assumption that the said Section was applicable to the present case though the petitioner had filed an appeal before the ITAT and no appeal was filed before the CIT (Appeals) under Section 246A. The learned counsel for the Revenue has submitted and in our

opinion rightly that Section 220(6) is not applicable when an appeal is preferred before the ITAT, as it applies only when an assessee has filed an appeal under Section 246 or Section 246A of the Act. Section 220(6) of the Act reads as under:-

> "(6) Where an assessee has presented an appeal under Section 246[or Section 246-A] 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."

13. An assessee is required to file an appeal before the ITAT against an assessment order under Section 143 (3) read with Section 144C. Appeal under Section 246 or 246A is not maintainable. As per Section 253(1d), against an order under sub-section 3 of Section 143 in pursuance to the direction of the Dispute Resolution Panel an appeal is maintainable before the ITAT. It may be noted that the ITAT has power to grant stay as an inherent power vested in the appellate authority as well as under Section 254 and the Rules.

C. Whether adjustment under Section 245 can be regarded as recovery and the orders passed by the authorities/tribunal?

14. ITAT by its order dated 11th February, 2011, has held that recovery cannot be equated with adjustment or refund under Section 245. ITAT in this regard has stated that Section 245 does not occur

under the Chapter "refund" and, therefore, cannot be equated with recovery. It also appears that the Revenue was of the view that the status quo order passed on 9th December, 2010 or filing of the applications for stay did not prevent them or bar them from making adjustment of refund under Section 245 of the Act.

15. It is not possible to agree with the contention of the Revenue that the word "recovery" cannot and would not include adjustment under Section 245. Recovery can be made by various modes including adjustments. Each Assessment Year is treated as separate and independent under the Act. Section 245 of the Act permits the Revenue to recover demand of one year which is pending by adjusting the refund due for another year. The term 'refund' has not been defined in the Act and, therefore, it has to be understood and interpreted in the manner in which it is understood in day to day life. The term 'recovery' in common parlance includes adjustments. The word 'Recovery' has been defined as

> Black's Law Dictionary:
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> In its most extensive sense, the restoration or vindication of a right existing in a person, by the formal judgment or decree of a competent court, at his instance and suit, or the obtaining, by such judgment, of some right or property which has been taken or withhold from him. St. Paul Fire & Marine Ins. Co. v. Wood, 242 Ark.879, 416 S.W.2d 322, 327. This is also called a "true" recovery, to distinguish it from a "feigned" or "common" recovery.

> The obtaining of thing by the judgment of a court, as the result of an action brought for that purpose. The amount finally collected, or the amount of judgment. In re Lahm, 1979 App.Div. 757 167 N.Y.S. 217, 219. To be successful in a suit to obtain a judgment. Garza v. Chicago Health Clubs, Inc.,D.C.Ill., 347 F.Supp. 955, 962.
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> P. Ramanatha Aiyar Law Lexicon:
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> The actual possession of anything, or its value, by judgment of a legal tribunal ; the obtaining of anything by judgment or trial at law; the obtaining of a thing as the result of an action brought for the purpose; the obtaining of right to something by a verdict and the judgment of a Court from an opposing party in suit."

16. Marginal note or chapter heading can be used as interpretative aids but with care and caution as they are necessarily brief and therefore there is a possibility that they may be of inaccurate nature. It is proper to consider them when ambiguity exits to gather guidance but weight to be attached has to be judged. (see ***Tata Power Company Ltd. Vs. Reliance Energy Limited***, (2009) 16 SCC 659, ***Chandroji Rao Vs. CIT,*** (1970) 2 SCC 23 and ***Pioneer Silk Mills Pvt. Ltd. Vs. Union of India***, ILR (1972) 1 Del. 433.). Chapter XVII of the Act deals with "collection and recovery of tax". The said chapter is divided in various parts including deduction of tax at source, payment of advance tax and Part-D is also given the same heading as Chapter XVII "collection and recovery". Chapter XIX deals with refund and Section 245 deals with adjustment/set off of refund of the tax remaining payable in other years. Placement of Section 245 in Chapter XIX relating to refund is a

matter of convenience. The provisions relating to 'collection and recovery" have been put in an earlier Chapter i.e. Chapter XVII, whereas "refunds" have been placed in a subsequent Chapter XIX. While dealing with the question of refund, the Legislature has provided that the refund can be adjusted or set off against a pending demand. We do not think that set off or adjustment cannot be regarded as a mode of recovery or is not a recovery mechanism. The term "recovery" is comprehensive and includes adjustment thereby reducing the demand.

17. At the same time, different parameters and requisites may apply when the appellate authority considers the request for stay against coercive measures to recover the demand and when stay of adjustment under Section 245 of the Act is prayed for. In the first case, coercive steps are taken with the idea to compel the assessee to pay up or by issue of garnishee notice to recover the amount. In the second case, money is with the Revenue and is refundable but adjusted towards the demand. Thus, while granting stay, the appellate authority or the ITAT (for that matter, even under Section 220(6)), the authority can direct stay of recovery by coercive methods but may not grant stay of adjustment of refund. However, when an order of stay of recovery in simplistic and absolute terms is passed, it would be improper and

inappropriate on the part of the Revenue to recover the demand by way of adjustment. In case of doubt or ambiguity, an application for clarification or vacation/modification of stay to allow adjustment can be, and should be filed. But no attempt should be made and it should not appear that the Revenue has tried to over-reach and circumvent the stay order. Obedience and compliance with the stay order in letter and spirit is mandatory. A stay order passed by an appellate/higher authority must be respected. No deviancy or breach should be made.

18. We do not, in the present case, intend to lay down propositions or broad principles when and in what case there should be total stay of demand, or stay of recovery through coercive steps but no stay of adjustment under Section 245 of the Act. We would like to restrict ourselves to the facts of the present case and the contentions raised by the petitioner that when an issue or contention has been decided in favour of the assessee in earlier years whether adjustment under Section 245 of the Act is permissible in respect of arrears pertaining to the same issue or subject matter.

19. The Act provides for a right to appeal after the assessing officer has passed an assessment order and has made additions or disallowances. An order of the appellate authority is binding on the assessing officer. Once the appellate authority has passed an order in

favour of the assessee, the appeal effect must be given by the assessing officer. Section 241 of the Act is an express provision when the assessing officer may not refund an amount which is due. However, the section postulates pre-conditions before the said power is exercised. Justifiability and validity when power under section 241 is exercised with reference to the pre-conditions can be made subject matter of judicial review in writ proceedings.

20. It will be odd for the Revenue to contend that if an issue or contention is decided in favour of the assessee then for the said year refund has to be paid but the refund can be adjusted under Section 245 of the Act, on account of the demand on the same issue in a subsequent year. The broad contention is specious and illogical to be accepted. Similar or same additions can be made in a subsequent year for justifiable cause including contention of the Revenue that they have not accepted the earlier decision but it cannot be accepted as a principle that the Revenue can in ordinary course make adjustments towards a demand on an issue or contention which is already decided in favour of the assessee, though it may be a subject matter of appeal or challenge by the Revenue. Normally in such circumstances, the appellate forum should not permit the Revenue to adjust the demand, for it will be unjust, unequitable and unfair. However, while examining

the issue of grant of stay including adjustment, the appellate authority for good grounds and justification made by the Revenue can refuse to grant stay of the adjustment of the refund. In such cases, adjustment can be permitted in exceptional situations pointed out by the Revenue but not as a matter of routine. It may not be possible or proper to postulate and elucidate all such situations but grounds mentioned under Section 241 of the Act are indicative. In this connection, we may reproduce the observations of a Division Bench of this Court in ***Glaxo Smith Kline Asia P. Ltd. vs. Commissioner of Income-Tax and Ors.,*** [2007] 290 ITR 37. In the said case, the Division Bench noticed the difference between Sections 241 and 245 in respect of procedure as well as the width and scope of the power but has observed as under:-

> "26. In our view, the power under section 245 of the Act, is a discretionary power given to each of the tax officers in the higher echelons to "set off the amount to be refunded or any part of that amount against the same, if any, remaining payable under this Act by the person to whom the refund is due." That this power is discretionary and not mandatory is indicated by the word "may". Secondly, the set off is in lieu of payment of refund. Thirdly, before invoking the power, the officer is expected to give an intimation in writing to the assessee to whom the refund is due informing him of the action proposed to be taken under this section.
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> 27. We reiterate that the restrictions on the power under section 241, as explained judicially, would apply with equal, if not greater, force to section 245. A mechanical invocation of the power under section 245 irrespective of the fact situation, can lead to misuse of the power by the Revenue in order to delay the refund till

such time a fresh demand for the subsequent assessment years is finalized. If reasonable time limits are not set for the processing of and disposal of an application for refund by the Revenue, it may result in the assessee not being able to get the refund at all. Also, the statute by stipulating the payment of interest on refunds (section 244A) and interest on delayed refunds (section 243) has underscored the importance of timely processing of refund claims."

21. In subsequent portion, while dealing with the power under Section 245 of the Act, it was held as under:

> "35. If the Department has decided to issue a refund voucher for the assessment year 2000-01, by the same yardstick it should also be willing to make the refund for the subsequent the assessment year 2001-02. The mere fact that appeals in respect of the two assessment years are pending in this court is not by itself a sufficient ground for denying the refund. The fact remains that the procedure contemplated under section 245 of the Act has not been invoked. It is not without significance that the order dated February 15, 2006, by this court only restrained the Revenue from making any adjustment of the amount of refund "without the leave of this court." This did not mean that the procedure under section 245 was to be dispensed with. It is, therefore, strange that by the application filed, the Revenue was seeking permission from this court to straightaway set off the refund against the outstanding demand without following the procedure under section 245. The Revenue seeks to justify invoking the power under section 245 only on the ground that its appeals for the two assessment years are pending in this court. However, having issued the refund voucher for the assessment year 2000-01 in respect of which also the appeal is pending in this court, there appears to be no justifiable reason for withholding the refund due in respect of the other assessment year 2001-02."

Thus pendency of appellate proceedings by itself alone cannot be a ground to not to refund the amount due and payable and is not sufficient to pass an order of the adjustment for demand on issues which have been decided against the Revenue.

22. Learned counsel for the Revenue had submitted that in the said case, reference was made to Circular No. 530 dated 6th March, 1989, but the said circular has been superseded by Circular No. 1914 dated 2nd December, 1993, reported in [2010] 236 CTR 137 (St.). This to our mind does not affect the observations made in the above paragraphs in Glaxo Smith Kline (supra) and the principles enunciated.

23. Learned counsel for the Revenue had drawn our attention to the Circular dated 2nd December, 1993, heading (C) - "guidelines for stay of demand" which under sub-clause (e) states that the Assessing Officer may "reserve a right to adjust refund arising, if any, against the demand" and clause (iv) stating inter-alia that the expression 'stay of demand' does not occur in Section 220(6) and the expression used is that the assessing officer would not to treat the assessee as in default. The second contention drawing distinction between stay of demand and the language in Section 220(6) which uses the expression 'assessee being in default' does not help the Revenue. Circular No. 1914 dated 2nd December, 1993 has been issued by Central Board of Direct Taxes with reference to Section 220(6) of the Act. These are guidelines, when and in what circumstances the demand should not be recovered. This is a reason why in clause (iv), it is mentioned that the words 'stay of demand' does not occur under Section 220(6) and the Assessing Officer should always use the expression 'assessee in default' in consonance with the language of section 220(6).

Clause (e) occurs and is a sub-clause of clause (ii) of the circular dated 2nd December, 1993. Sub-clause (e) read with (ii) will read as - "In granting stay, the Assessing Officer may impose such condition as he may think fit" and "he may reserve a right to adjust refund arising, if any, against the demand." The use of word 'may' and the expression 'reserve a right' clearly shows that the Board itself did not postulate and regard 'recovery' as excluding and not covering 'adjustment' under Section 245 of the Act. As per the said circular, the Assessing Officer may reserve a right to adjust, if the circumstances so warrant. In a given case, the assessing officer may not reserve right to refund. Further, reserving a right is different from exercise of right or justification for exercise of a discretionary right/power. Moreover, the circular is not binding on the ITAT.

24. Contention of the Revenue in the counter affidavit that adjustment of refund for assessment year 2005-06 was made with approval of the Commissioner of Income Tax-II on 26th October, 2010, i.e. before the stay order was passed by the ITAT on 9th December, 2010, is specious and incorrect. In fact during the course of hearing this point was not pressed. The respondents have placed on record letter dated 26/27th October, 2010, written by Income Tax Officer, Headquarter-II, to the Additional Commissioner of Income Tax, the respondent No. 2 herein, that the administrative approval had been granted by the Commissioner for issue of refund for assessment year

2003-04, but was subject to the condition that demand of Rs.266 crores for assessment year 2006-07 and other demand, if any, should be first adjusted. The date on which this letter was received in the office of the respondents 1 and 2 is not stated. Senior standing counsel for the respondent was specifically asked to state the said date but information has not been furnished. The said letter cannot be construed and is not an order under Section 245 of the Act. Commissioner has referred to the power to make adjustment but adjustment must be as per and in accordance with law. It was the duty of the respondents 1 and 2 to bring to the notice of the Commissioner, if required, the stay order passed by the ITAT on 9th December, 2010. Order/direction of the ITAT must be obeyed and not violated.

25. In the light of the aforesaid discussions, the following conclusions emerge:-

(i) Order dated 2nd February, 2011 under Section 220(6) of the Act is null and void as the said provision is not applicable as the petitioner has filed an appeal before the ITAT and no appeal has been preferred under Section 246 or 246A of the Act.

(ii) ITAT should have decided and disposed of the stay application filed by the petitioner and should not have

called upon the Assessing Officer to dispose of the application under Section 220(6) of the Act or left it to the Assessing Officer to decide whether or not to make recovery.

(iii) Word 'Recovery' is comprehensive and includes both coercive steps to recover the demand and adjustment of refund to recover the demand. Adjustment under Section 245 of the Act is a form/method of recovery.

(iv) ITAT is competent to stay recovery of the impugned demand and if an order for "stay of recovery" is passed, the Assessing Officer would be well advised and should not pass an order of adjustment under Section 245 to recover the demand. In such cases, it is open to the Assessing Officer to ask for modification or clarification of the stay order to enable him to pass an order of adjustment under Section 245 of the Act.

(v) Different parameters and considerations can be applied when a stay order is passed, against use of coercive methods for recovery of demand and when adjustment is stayed. Therefore, ITAT can stay adoption of coercive steps for recovery of demand but may permit adjustment under Section 245.

(vi) When and in what cases, adjustment under Section 245 of the Act should be stayed would depend upon facts and circumstances of each case. The discretion is to be exercised judiciously. Nature of addition resulting in the demand is a relevant consideration. Normally, if the same addition/disallowance/issue has already been decided in favour of the assessee by the appellate authority, the Revenue should not be permitted to adjust and recover the demand on the same ground. In exceptional cases, which include the parameters stated in Section 241 of the Act, adjustment can be permitted/allowed by the ITAT.

Additions/Amount covered by earlier orders

26. The petitioner has filed calculations and has drawn our attention to a chart summarizing the issues on which additions/ disallowances have been made by the Assessing Officer and has high-lighted that several additions or disallowances have already been decided or adjudicated in favour of the petitioner by the CIT (Appeals) or by the ITAT. As noticed above, this is a relevant factor, while deciding the stay application. We do not agree with the stand of the Revenue that in the present year, assessment order has been passed under Section 144C, i.e. after reference to the Dispute Resolution Panel, therefore the

orders passed by the CIT(Appeals) and ITAT in favour of the petitioner have lost significance and do not justify stay of demand in matters covered in favour of the assessee. Decisions of the CIT (Appeals) or the ITAT in favour of the assessee should not be ignored and have not become inconsequential. This is not a valid or good ground to ignore the decisions of the appellate authorities and is also not a good ground to not to stay demand or to allow adjustment under Section 245 of the Act. Revenue has not made out a good cause or reason why adjustment should allowed to recover demand on issues that have been decided in favour of the petitioner in other years.

27. Revenue in the affidavit filed on 19th October, 2011, has admitted that additions/disallowances to the tune of Rs.96 crores are already covered against them by orders of the ITAT or CIT (Appeals). The petitioner has submitted that the aforesaid affidavit in fact conceals and does not specifically deal with some of additions like sales tax subsidy, disallowance of claim for withdrawl of amount added back etc. The petitioner has submitted that attempt of the Revenue is to deliberately make additions so that refunds due in the earlier year do not become payable but can be adjusted. The allegation is that attempt by the respondents is that statistics and collection figures can be maintained. We are not examining the said aspects but in a case and if

it is found that the contention of the assessee is correct then appropriate orders can certainly be passed. However, no assumptions should be drawn. The respondents are officers of the State and the Law requires that they perform their duties with utmost objectivity and fairness, while keeping in mind the sanctity of the role and function assigned to them which at times requires tough steps.

Final Directions

28. In view of the findings recorded above, we have no hesitation in holding that conduct and action of the respondent-Revenue in recovering the disputed tax in respect of additions to the extent of Rs.96 crores on issues which are already covered against them by the earlier orders of the ITAT or CIT (Appeals) is unjustified and contrary to law. Accordingly, directions are issued to the respondents to refund Rs.30 crores, which will be approximately the tax due on Rs.96 crores. The said refund shall be made within one month from the date when a copy of this order is made available to the respondents.

29. With regard to the interest under Section 234B and 234C recovered on the said Rs.30 crores, we are not issuing direction for refund as the respondents have not recovered the full demand. The allegation of the petitioner that several other disputed additions are

also covered by the earlier orders of the ITAT/CIT (Appeals) prima facie has merit but it is not possible to quantify and calculate the exact amount. We have already recorded above that the order passed by the ITAT substantially dismissing the stay application is not correct. One option available is that the ITAT should be asked to examine the said questions and decide the stay application afresh. However, we prefer the second option i.e. to direct the ITAT to hear the appeal filed by the petitioner expeditiously and preferably within a period of four months from the date copy of this order is served in their registry.

30. The writ petition is accordingly disposed of, without any orders as to costs.

(SANJIV KHANNA)
JUDGE

(R. V. EASWAR)
JUDGE

November 25th, 2011
kkb