

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'B' BENCH
MUMBAI BENCHES, MUMBAI
BEFORE SHRI VIJAY PAL RAO, JM & SHRI N. K. BILLAIYA, AM**

**STAY APPLICATION No. 293/Mum/2013
(Arising out of ITA No.6678/M/2013 Asst Year 2010-11)**

M/s Maharashtra Housing & Area Development Authority, Office of the finance Controller Griha Nirman Bhavan, 4 th Floor, Bandra(E) Mumbai-400051	Vs	Addl. DIT(E) I (1), Piramal Chambers, Lalbaug, Parel Mumbai
(Applicant)		(Respondent)

PAN No.	AAAJM0344H
Assessee by	Shri S. E. Dastur & Shri Nishant Thakkar
Revenue by	Shri B. P. K. Panda
Date of hearing	22 nd November 2013
Date of pronouncement	25 th November 2013

ORDER

PER VIJAY PAL RAO, JM

By way of this Stay Application the assessee is seeking stay against the demand of ₹ 159,84,03,717 arising from the assessment u/s 143(3) of Income Tax Act for the assessment year 2010-11.

2 We have heard the Mr. S. E. Dastur, Ld. Senior Counsel for the assessment as well as Mr. B. P. K. Panda, Ld. D.R and carefully perused the relevant record. The Ld. Senior Counsel has submitted that the impugned order of the CIT(A) has been received by the assessee on 16.11.2013 and the assessee has filed the appeal before this Tribunal on 18.11.2013 which is the next working day. However, the A.O has recovered the entire outstanding tax from bank account of the assessee

by taking a coercive action u/s 226(3) of the Income Tax Act without waiting for the outcome of the Stay Application filed by the assessee before this Tribunal which was listed for today i.e. 22.11.2013. Thus, the A.O has taken the action which is in derogation and contravention of the various decisions of Hon'ble Jurisdiction High Court because the action of the A.O contradicts the basic principles laid down in the decisions viz. i) that the A.O has taken the coercive action before the expiry of time of filing the appeal against the order of the CIT(A) ii) the action was taken even prior to the disposal of the Stay Application of the assessee iii) no prior notice was given to the assessee before taking the recovery action u/s 226(3). The Ld. Senior Counsel has contended that the assessee is a authority setup under Maharashtra Housing and Area Development Act with view to solve the acute shortage of housing problem in the State. He has referred Section 1A of the Maharashtra Housing and Area Development Act, 1976 and submitted that the assessee has been setup for giving the effect to the policy of the State towards securing the principle specified under Article 39 of the Constitution of India and the execution of proposals, plans or projects and acquisition therefor of the lands and buildings and transferring the lands, buildings or tenements therein to the needy persons and the co-operative societies of occupiers of such lands or buildings. Thus, the Ld. Senior Counsel has submitted that the purpose and object of setting up of the assessee is implementing the policy as per the Constitution of India. He has relied upon the following decisions:

- Mahindra & Mahindra Ltd. Vs Union of India 59 ELT 505 (Bom)
- Mahindra & Mahindra Ltd. Vs Assessing Officer in Writ Petition No. 2164/2007
- UTI Mutual Fund Vs ITO 19 Taxman 250
- RPG Enterprises Ltd. Vs DCIT 251 ITR 20 (Trib) (Mum)
- Maharashtra State Electricity Board Vs JCIT 81 ITD 299 (Mum)
- Purnima Das Vs Union of India and Others 329 ITR 278 (Cal)
- CIT Vs Lucknow Development Authority, Gomit Nagar 38 Taxman 246 (Ald)

3. The Ld. Senior Counsel has submitted that in the case of Mahindra & Mahindra Ltd. Vs Union of India (supra) the Hon'ble High Court has held that it was highly improper on the part of the Collector and Assistant Collector to encash the bank guarantees before expiry of the statutory period of three months and in particular when the petitioners has specifically informed that the Stay Application is fixed for hearing. Accordingly, the Hon'ble High Court directed the respondents to pay entire amount recovered by encashing bank guarantees to the petitioner. The Ld. Senior Counsel then referred the decision in case of Mahindra & Mahindra Ltd. Vs Assessing Officer (supra) and submitted that the Income Tax Department should follow the parameters while passing the orders on Stay Application filed in pending appeals to the first appellate authority as laid down in the case of KEC International Ltd. Vs B. R. Balakrishnan and others 59 ELT 505. After considering the inappropriate action of the taxing authority the Hon'ble High Court has observed that the entire action of the respondent nos. 1 & 2 shocks our judicial conscience. Rule of law has

been given a total go-bye and wilfully ignored. The Income Tax Authorities has acted in a high handed manner and the action is prima facie ab-initio-void. After observing the serious lapse on the part of the taxing authority the Hon'ble High Court has directed the respondent to bring back the said amount and shall be deposited with the Registrar General of the High Court. The Ld. Senior Counsel has then referred the decision in case of UTI Mutual Fund Vs ITO (supra) and submitted that the Hon'ble High Court has again reiterated the guidelines which should be followed in the pending cases. He has then referred the decision of this Tribunal in case of RPG Enterprises Ltd. Vs DCIT (supra) and submitted that in the similar facts the Tribunal has directed the Revenue Authorities to refund the amount recovered by the A.O by misusing his powers without waiting the outcome of the Stay Application or the time period for filing the appeal against the order of the CIT(A). Similarly, in case of Maharashtra State Electricity Board Vs JCIT (supra) the Tribunal has again directed the Revenue Authorities to refund the amount which were collected without giving the sufficient opportunity and waiting till the hearing of the Stay Application filed by the assessee. On the proposition of service of notice prior to recovery u/s 226(3), the Ld. Senior Counsel has submitted that in case of Purnima Das Vs Union of India and Others (supra) the Hon'ble Calcutta High Court has held that the copy of notice shall be forwarded to the assessee at his last address known to the A.O and such notice has to be served before action is taken. In the case of the assessee the A.O has not complied the provision of Section 226(3)(iii) of the Income Tax Act

as the copy of the notice by which the recovery has been made from the bank account of the assessee was not served prior to such action. Thus, the Ld. Senior Counsel has submitted that the action of the A.O is in complete disregard to the orders of the Hon'ble High Court as well as this Tribunal and therefore the same is not sustainable. He has urged that the amount recovered unlawfully by the A.O should be refunded immediately and the recovery of the demand should be stayed. In support of his contention he has relied upon the order of this Tribunal on 16.3.2012 passed in the Stay Application No. 126/M/2012 for the assessment year 2009-10 and submitted that the Tribunal has found a prima facie strong case in favour of the assessee and thereby granted the stay against the demand for the assessment year 2009-10. He has relied upon the decision of Hon'ble Allahabad High Court in case of CIT Vs Lucknow Development Authority and submitted that in the identical fact the Hon'ble High Court has held that mere selling some product at a profit will not ipso facto hit the assessee by applying proviso to Section 2(15) and deny exemption available u/s 11 when there is no material on record which may suggest that the assessee was conducted its affairs on commercial lines with motive to earn profit and has deviated from its objects. He has also relied upon the decision of Hon'ble Delhi High Court in case of Bureau of Indian Standards Vs Director General of Income Tax (Exemptions) in Writ Petition No. W.P.(C) 1755/2012 as well as in case of M/s GSI India Vs Director General of Income Tax (Exemption) in Writ Petition No. 7797/2009 and submitted that in these case a similar issue was decided by the Hon'ble

High Court in favour of the assessee. Thus, the Ld. Senior Counsel has submitted that the assessee has very strong prima facie case in its favour and therefore the stay of recovery be granted.

4. On the other hand, the Ld. D.R has submitted that the recovery proceedings in this case were pending from the year 2010 as the Stay Application filed by the assessee was disposed off by the A.O with the direction to pay the tax in the instalment. The assessee has not complied with the directions passed by the DDIT (E) while deciding the Stay Application of the assessee. Further the assessee has filed a writ petition against the recovery of tax which is pending in the Hon'ble High Court. The Ld. D.R has further submitted that the A.O has complied with the provision and conditions prescribed u/s 226(3) of the Income Tax Act by serving the copy of the notice whereby the recovery has been affected. In rebuttal the Ld. Senior Counsel has submitted that though the assessee has filed a writ petition in the High Court but same has not come up for hearing therefore in view of the various decisions the action of the A.O is not sustainable. He has referred the letter dated 13.11.2013 whereby the assessee has informed the Assessing Officer that the assessee has not received the impugned order passed by the CIT(A) and subsequently the assessee would like to pursue the course of second appeal. The assessee has also brought to the notice to the A.O the directions of the Hon'ble High Court in case of UTI Mutual Fund Vs ITO 345 ITR 71. Despite the assessee's letter dated 13.11.2013 the

A.O has taken a coercive action by recovery the entire tax amount from the bank of the assessee.

5. Having considered the rival submissions and careful perusal of the relevant record we note that the A.O issued a letter dated 11.11.2013 regarding recovery of outstanding demand in view of the order passed by the CIT(A) on 29.10.2013. In response to the said letter the assessee vide letter dated 13.11.2013 stated that the assessee has not received the copy of the order of the CIT(A) and further the assessee would like to pursue the course of second appeal. The assessee has also requested the A.O not to take any recovery action before the time for filing the appeal in view of the directions of the Hon'ble High Court in case of UTI Mutual Fund Vs ITO (supra). The assessee was earlier asked to make the payment of outstanding amount in instalment of ₹ 17.76 crores per month starting from month of September 2013 but the assessee did not agree. The A.O then wrote a letter dated 14.11.2013 and reasserted the demand without further delay failing which action in terms of section 226(3) of the Income Tax Act shall be taken. The assessee received the impugned order of the CIT(A) ON 16.11.2013 and this fact has not been contraverted by the Revenue therefore the remedy with the assessee to file the appeal against the impugned order of the CIT(A) is available only after receipt of the impugned order but in the mean time the A.O has effected the recovery of outstanding sum of ₹ 159,84,03,720/- by taking action u/s 226(3) on 18.11.2013 itself. Thus, it is clear that the assessee was not afforded a minimum reasonable time to take remedial steps under the

law against the impugned order of the CIT(A). Even the assessee has filed the appeal against the impugned order without any wastage of time on the very next working day but the A.O without waiting the hearing and outcome of the Stay Application has taken the coercive action of recovery of the entire outstanding amount from the bank of the assessee as per Section 226(3) of the Income Tax Act. The Hon'ble High Court in case of Mahindra & Mahindra Ltd. Vs Union of India (supra) has opined in para 4 as under:

"4. In our opinion, it was highly improper on the part of the Collector and Assistant Collector to encash the bank guarantees before expiry of the statutory period of three months and in particular when petitioners had specifically informed that the stay application is fixed for hearing on 17th February 1992. Be that as it may, we accordingly direct Respondents Nos. 2 & 3 to pay entire amount recovered by encashing bank guarantees to the petitioners within 10 days from today. On receipt of the said amount by the petitioners, they shall execute bank guarantee in favour of the Collector of Central Excise within two weeks thereafter. It is also made clear that until disposal of the stay application bank guarantee will continue and in the event if the Tribunal rejects the application for stay, the said order shall not be executed for a period of two weeks from the date of its service on the petitioners."

6. It has been observed by the Hon'ble High court that the action of the Central Excise Authorities encashing the bank guarantees before expiry of the statutory period of filing the appeal was highly improper. Similarly, in the case of Mahindra & Mahindra Ltd. Vs Assessing Officer (supra) the Hon'ble High Court has taken a serious view of the action of the taxing authority by observing in para 9 as under:

"9. Entire action of the respondent Nos. 1 & 2 shocks our judicial conscience. Rule of law has been given a total go-bye and wilfully ignored. The Income Tax Authorities have acted in a high handed manner. The impugned action is prima facie ab-initio-void."

7. In the case in hand we are of the view that the A.O has taken a coercive action by ignoring the basic rule of law and the directions and guidelines issued by the Hon'ble Jurisdiction High Court in case of UTI Mutual Fund Vs ITO (supra) as under:

"In exercising his power, the Income-tax Officer should not act as a mere tax gatherer but as a quasi judicial authority vested with the power of mitigating hardships to the assessee."

These are, we may say so with respect, sage observations which must be borne in mind by the assessing authorities. Consistent with the parameters which were laid down by the Division Bench in KEC International Ltd. (supra) and the observations in the judgment in Coca Cola (P.) Ltd.(supra). We direct that the following guidelines should be borne in mind for effecting recovery:

- 1. No recovery of tax should be 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 application, if any, moned by the assessee should he disposed of after hearing the assessee and bearing in mind the guidelines in KEC international Ltd. (supra);*
- 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 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 facets, balancing the interest of the assessee with the protection of the Revenue."

8. Thus, it is clear that the Income Tax Officer being a quasi judicial authority should observed the parameters which are laid down by the Hon'ble High Court in various decisions and reasserted in the case of UTI Mutual Fund Vs ITO (supra). A similar view has been taken by this Tribunal in the case of RPG Enterprises Ltd. Vs DCIT as well as in case of Maharashtra State Electricity Board Vs JCIT. Thus, in view of the above judicial principles we hold that the A.O has misused his powers and the action of recovery from the bank amount of the assessee is a gross violation of the directions as well as the basic rule of law and principle of natural justice. Accordingly, we direct the Revenue to refund the entire amount of ₹ 159,84,03,720/- to the assessee within 10 days from the dated of receipt of this order.

9. As regards the stay of the recovery of the demand since the assessee has already filed a writ petition in the High Court and the matter of stay of demand is subjudice before the Hon'ble High Court therefore the judicial propriety and discipline demand that this Tribunal should not venture into the subject matter which is subjudice before the Hon'ble High Court. We are conscious about the various decisions of this Tribunal whereby the recovery of demand has been stayed after giving the directions of refund of the demand illegally recovered but in those cases no stay proceedings were pending before the Hon'ble High

Court. The appeal of the assessee is directed to the listed for out of turn hearing on 4.2.2014. The date of hearing of the appeal is pronounced in the open Court and in the presence of both the parties therefore no separate notice of hearing will be issued.

10. In the result, the Stay Application of the assessee is partly allowed.

Order pronounced on this 25th day of November 2013

Sd/-

Sd/-

(N. K. BILLAIYA) Accountant Member	(VIJAY PAL RAO) Judicial Member
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Place: Mumbai: Dated: 25th November 2013

SUBODH*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai