

(2016) 05 GUJ CK 0022

In the Gujarat High Court

Case No : Special Civil Application No. 1192 of 2016

M.D. Infra Developers (S)

APPELLANT

Vs

Deputy Commissioner of Income Tax

RESPONDENT

Date of Decision : 05-05-2016

Acts Referred:

Income Tax Act, 1961 — Section 220

Citation : (2016) 287 CurTR 431 : (2016) 385 ITR 82

Hon'ble Judges : Harsha Devani and G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : J.P. Shah with Manish J. Shah, Advocates, for the Appellant; Sudhir M. Mehta, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Harsha Devani, J.(Oral) - Rule. Mr. Sudhir Mehta, learned Senior Standing Counsel waives service of notice of rule on behalf of the respondents.

2. Having regard to the controversy involved in the present petition which lies in a very narrow compass, the matter was taken up for final hearing.

3. This petition under Article 226 of the Constitution of India has been filed seeking the following substantive reliefs:

"7. In the premises aforesaid, the petitioner prays that :-

[A] this Hon'ble Court be pleased to call for and look into the records of the proceedings taken by the Tax Recovery Officer as also the Principal Commissioner of Income Tax, and be pleased to issue a writ of certiorari or any other appropriate writ, order or direction quashing the proceedings taken by them, as also the notices of Tax Recovery Officer at Annexures-G, I and J and the other of the Principal Commissioner of Income Tax, at Annexure-L.

[B] this Hon'ble Court be pleased to grant the stay of demand of Rs.22,94,74,880/- till the disposal of the appeal by the Commissioner of Income

Tax (Appeals).

[C] this Hon?ble Court be pleased to ask the Tax Recovery officer to lift all attachments done on (i) all properties belonging to the petitioner, particularly on 114 flats and the land belonging to the petitioner and (ii) Bank Account No.05332560003644 of the petitioner with HDFC Bank Ltd., Varachha, Surat."

4. The petitioner, a partnership firm, started construction of Om Township Project in the assessment year 2011-12. It is the case of the petitioner that no sales were effected in assessment years 2011-12 and 2012-13, and sales of Rs. 30,97,77,000/- were made in assessment year 2013-14. The petitioner came to be searched under section 132 of the Income Tax Act, 1961 (hereinafter referred to as the "Act") on 17.07.2012. By order dated 31.03.2015 passed under section 153A of the Act, the petitioner came to be assessed for assessment years 2011-12 to 2013-14. Against the assessment orders, the petitioner preferred appeals before the Commissioner of Income Tax (Appeals) ? 4, Surat. It is the case of the petitioner that high-pitched assessments have been made on the petitioner which are highly contentious and hence, the petitioner has a good case to succeed in all the appeals. As a result of the above assessments, the Assessing Officer raised total demand of Rs. 22,94,74,880/-. The notices of demand under section 156 of the Act came to be issued and served upon the petitioner. The petitioner, through its Chartered Accountants, made three stay applications dated 04.05.2015 (one for each assessment year) to the first respondent Assessing Officer stating, inter alia, that it hopes to succeed fully; that the financial position of the petitioner is too poor to meet such huge demand even in part and that the petitioner expects the Assessing Officer to follow the CBDT Circular No.530 dated 06.03.1989, Circular No.589 dated 16.01.1991, Instruction No.1914/2004 dated 02.12.1993 and also the judgment of this court in the case of Vikrambhai Punjabhai Palkhiwala v. S. M. Ajbanj, (1990) 182 ITR 413, and requested to keep the demand in abeyance and not to treat the petitioner as an assessee in default as visualised under section 220(6) of the Act. However, despite the pendency of the above application before the Assessing Officer, the second respondent Tax Recovery Officer issued a notice of demand dated 21.05.2015 under rule 2 of the Second Schedule of the Act, calling upon the petitioner to pay the demand of Rs.22,94,74,880/- within a period of fifteen days, failing which coercive action would be taken against the petitioner and stating that the petitioner would be liable for interest under section 220(2) of the Act from the date of issue of notice and other incidental charges. The Tax Recovery officer also issued a notice dated 28.07.2015 under section 226(3) of the Act to the Branch Manager, HDFC Bank Ltd., Varachha, Surat, where the petitioner has a bank account No.05332560003644 to pay whatever was the balance and recovered Rs.17,050=87 (being total credit balance). The said account was also attached under section 222 of the Act. The petitioner received a copy of such notice on 11.08.2015. The second respondent also issued a notice dated 11.08.2015 to the petitioner prohibiting and restraining the petitioner from transferring 114 flats belonging to it.

4.1 The petitioner, therefore, addressed an application dated 14.09.2015 to the Principal Commissioner of Income Tax, Surat, the third respondent herein, praying that the Tax Recovery Officer be asked to lift the attachment on the bank account, as also the residential flats and not to treat the petitioners in default. By an order dated 06.11.2015, the Principal Commissioner of Income Tax, Surat called upon the petitioners to pay 50% of the demand before 31st March, 2016 in equal monthly instalments starting from November, 2015, that is, Rs.2,29,00,000/- every month for five months, totalling to Rs.11,45,00,000/-, and stating that the attachment on the bank accounts and the residential flats shall be considered on furnishing bank guarantee of the total demand of Rs.22,94,74,880/- and that in case the petitioner fails to make such payment, he may be treated as an assessee in default. Being aggrieved, the petitioner has filed the present petition.

5. Mr. J. P. Shah, learned advocate for the petitioner, submitted that the petitioner had made an application under section 220(6) of the Act to the Assessing Officer. During the pendency of such application, the petitioner could not have been declared a defaulter and therefore, drawing up of a certificate in Form-57 by the Tax Recovery Officer treating the petitioner as an assessee in default is bad in law. It was submitted that all actions taken against the petitioner despite the pendency of the stay application before the Assessing Officer, are bad. It was submitted that the Tax Recovery Officer was not justified in withdrawing the monies from the bank account of the petitioner without giving reasonable notice of his intention to do so and in fact, while the notice was given to the petitioner on 11.08.2015, the account was attached on 06.08.2015. It was submitted that in view of the attachment of the petitioner's bank account as well as 114 flats, the petitioner is experiencing acute scarcity of working capital and is not in a position to carry out its day-to-day activities. Referring to the order dated 06.11.2015 passed by the Principal Commissioner of Income Tax, it was submitted that the order has been passed mechanically, without application of mind to the facts and is totally arbitrary. It was submitted that the Principal Commissioner of Income Tax has failed to appreciate that the Tax Recovery Officer, by attaching all saleable flats had totally plugged the source of generation and inflow of funds to finish the incomplete construction and also pay some part of the tax demand. Reference was made to Instruction No.1914F dated 02.12.2013 issued by the Central Board of Direct Taxes, to point out that the same instructs the departmental authority to grant stay where the assessment is unreasonably high-pitched. Referring to the assessment orders it was pointed out that very high pitched assessments had been made in the case of the petitioner, which would squarely fall within the ambit of above instruction whereby the departmental authority is required to grant stay. It was, accordingly, urged that the petition deserves consideration and that the reliefs, as prayed for, deserve to be granted.

6. Opposing the petition, Mr. Sudhir Mehta, learned Senior Standing Counsel for the respondents placed reliance upon the averments made in the affidavit-in-

reply filed on behalf of the respondents. It was submitted that the total demand raised against the petitioner on the basis of the material seized during search proceedings is Rs.22,71,92,750/-. All the orders were passed on 31.03.2015 and dispatched through the Notice Server. The Notice Server has submitted his report dated 31.03.2015 to the ACIT, Central Circle-2, Surat, wherein, he has reported that Shri Bhagirath Baldha, partner of the petitioner firm had refused to receive the assessment orders and asked him to deliver the orders on the next day. It was submitted that under the provisions of the Act, refusal to receive notice/ letters on the part of the assessee is considered as a deemed service and therefore, the assessment orders are deemed to have been served on the petitioner firm on 31.03.2015 itself. It was pointed out that as mentioned in the demand notice under section 156 of the Act, the petitioner was required to pay the amount within thirty days of receipt of the notice or alternatively, the assessee could have requested the Assessing Officer to keep the demand in abeyance till the disposal of appeal, if filed by the assessee before the expiry of thirty days from the date of receipt of the notice of demand. It was submitted that in this case, the application for keeping the demand in abeyance was received by the office of the Deputy Commissioner of Income Tax, Central Circle-2, Surat, on 05.05.2015, that is, after the expiry of the period mentioned in the notice of demand. It was submitted that as per the office procedure, the applications for stay of demand or grant of instalments, received after the expiry of the due date, cannot be entertained under section 220(3) of the Act in the absence of an application for extension of time, which is not the case here. Therefore, the then Assessing Officer has not entertained the application dated 04.05.2015 of the petitioner and has issued recovery certificate under sections 222/223 of the Act on 20.05.2015 for recovery of demand including interest of Rs.22,72,130/- under section 220(2) of the Act, till the date of issuance of the recovery certificate. It was submitted that since there was no compliance with the demand notice, a letter dated 13.07.2015 was written to the petitioner seeking reasons for non-compliance. However, the petitioner did not respond to such notices, thereby, compelling the Tax Recovery Officer to attach its bank account by issuing the notice under section 226(3) of the Act. It was submitted that since despite the attachment of the bank accounts, the petitioner failed to attend the office of the Tax Recovery Officer, to safeguard the interest of revenue, the Tax Recovery Officer was forced to attach the immovable properties of the petitioner on 11.08.2015 as the provisional attachment was going to expire on 19.09.2015. It was submitted that in the aforesaid circumstances, the action for recovery of the outstanding demand has been taken as per law. Referring to the order dated 06.11.2015 passed by the Principal Commissioner of Income Tax, it was pointed out that the Commissioner has followed Instruction No.1914 while deciding the stay application filed by the petitioner. It was submitted that the impugned order being in consonance with the guidelines issued by the Board, there is no warrant for interference by this court.

7. The facts as emerging from the record reveals that the assessment orders

came to be passed in the case of the petitioner for assessment years 2011-12, 2012-13 and 2013-14 under section 153A of the Act on 31.03.2015. According to the respondents, such orders came to be served upon the petitioner on the same day. The notice of demand under section 156 of the Act came to be issued to the petitioner raising a demand of Rs.22,94,74,880/-. The petitioner on the other hand moved three stay applications dated 04.05.2015 in relation to each assessment year before the first respondent ? Assessing Officer. From the averments made in the affidavit-in reply, it is evident that the Assessing Officer did not entertain the applications made by the petitioner under section 220(6) of the Act on the ground that the same had been filed after the expiry of the period mentioned in the notice of demand. The notice of demand is dated 31.03.2015 and in terms of the said notice, the amount was required to be paid within a period of thirty days from the date of receipt of such notice. Thus, the period of thirty days from the date of the notice would expire on 02.05.2015. The petitioner filed stay applications under section 220(6) of the Act on 04.05.2015. The Assessing Officer, however, refused to entertain such applications and on the other hand, took steps to make coercive recovery under section 226(3) of the Act. The petitioner, thereafter, moved the Principal Commissioner of Income Tax seeking a direction to the Assessing Officer to first decide the stay applications made by the petitioner. The Principal Commissioner of Income Tax, however, instead of referring the matter to the Assessing Officer for a decision on the applications made by the petitioner, took a decision on the objection against the action of the Tax Recovery Officer and passed an order, the operative part whereof reads as under:

"[5] This Instruction No.1914 F.No.404/72/93 ITCC dated 2-12-1993 has been issued by the CBDT in supersession of all its earlier circulars in this regard. Considering the facts and circumstances of the case and evidences gathered, the income determined by the Assessing Officer appears to be quite reasonable and justifiable. Further, from Instruction No.1914, it is very clear that mere filing an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. On going through the grounds raised by you for keeping demand in abeyance, it appears that no such valid grounds have been put forth to consider your stay application favourably.

[6] Considering the facts of the case and your request, you are directed to pay 50% of the outstanding demand on or before 31st March 2016 in equal monthly instalments starting from November 2015 and submit the copies of the challans to the Assessing Officer with intimation to this office. Only in that circumstances, balance 50% of outstanding demand will be stayed till the disposal of first appeal. Failure, if any on your part to pay 50% of arrear demand on or before 31st March 2016 will be considered as lack of interest on your part to avail benefit of stay of 50% of demand and entire demand will be collectible through suitable measures as per Income tax law. Further, your request to lift the attachment placed on the bank accounts and business assets (residential flats) can be considered subject to furnishing bank guarantee of amount of total

outstanding demand.

[7] Please note that as per the provisions of the Income Tax Act, 1961, if the assessee fails to make the payment of demand as mentioned above, then it may be treated as "assessee in default" and proceedings under sections 220, 221, 222, 226, 227, 228A and 232 of the I. T. Act, 1961 will be initiated separately/simultaneously."

8. Section 220 of the Act bears the heading "When tax payable and when assessee deemed in default". Sub-section (3) thereof provides that without prejudice to the provisions contained in sub-section (2), on an application made by the assessee before the expiry of the due date under sub-section (1), the Assessing Officer may extend the time for payment or allow payment by instalments, subject to such conditions as he may think fit to impose in the circumstances of the case. Thus, sub-section (3) of section 220 of the Act can be invoked in a case where an assessee has accepted the order passed by the Assessing Officer and seeks extension of the time for payment of the instalments, in which case, it is permissible for the Assessing Officer to extend the time for payment and allow payment to be made by instalments subject to such conditions as he may think fit to impose. Sub-section (6) of section 220 of the Act, under which the petitioner had made the stay application, provides that where an assessee has presented an appeal under section 246 or section 246A, 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. On a conjoint reading of sub-sections (3) and (6) of section 220 of the Act, it appears that while subsection (3) thereof stipulates the period within which an application under such provision is required to be made, viz., before the expiry of the due date under sub-section (1) of section 220 of the Act, sub-section (6) thereof does not provide for any period of limitation. In the opinion of this court, therefore, the Assessing Officer was not justified in reading the provisions of sub-section (3) of section 220 of the Act into the provisions of sub-section (6) of section 220 of the Act, which do not provide for any period of limitation. In fact, sub-section (6) of section 220 of the Act clearly says that the Assessing Officer may, in his discretion, 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. Therefore, the stand taken by the Assessing Officer for not deciding the application of the petitioner, viz. that the time limit for making an application under sub-section (3) had expired, does not appear to be in consonance with the provisions of sub-section (6) of section 220 of the Act.

9. As can be seen from the order dated 06.11.2015, the petitioner had raised objections against the action of the Tax Recovery Officer before the Principal Commissioner of Income Tax and had also raised a grievance regarding the stay applications not being decided by the Assessing Officer. The Principal

Commissioner of Income Tax, instead of referring the matter to the Assessing Officer for deciding the stay applications, has after hearing the petitioner, disposed of the applications with reference to the circular No.1914 dated 02.02.1993 of the Board and has observed that, "On going through the grounds raised by you for keeping demand in abeyance, it appears that no such valid grounds have been put forth to consider your stay application favourably." However, considering the request of the petitioner, the Principal Commissioner of Income Tax has directed it to pay 50% of the outstanding demand in equal monthly instalments on or before 31st March, 2016 subject to which the demand of the outstanding amount would be stayed till the disposal of the first appeal. It is also stated that the request of the petitioner to lift the attachment placed on the bank accounts and business assets (residential flats) can be considered subject to furnishing bank guarantee of amount of total outstanding demand. Thus, in effect and substance, the Principal Commissioner of Income Tax has directed the petitioner to pay 50% of the outstanding demand and to furnish a bank guarantee for the remaining 50% for lifting the attachment on the properties of the petitioner.

10. At this juncture, reference may be made to Instruction No.1914 dated 02.02.1993 of the Board. Paragraph 2(A)(i)(d) thereof provides that it shall be the responsibility of the Assessing Officers and the Tax Recovery Officer to collect every demand that has been raised, except the following: Demand stayed in accordance with paras B & C below. Paragraph (B) provides for stay petitions and says that stay petitions filed with the Assessing Officers must be disposed of within two weeks of the filing of petition by the taxpayer and the assessee must be intimated of the decision without delay. In the facts of the present case, apart from the fact that the Assessing Officer has not disposed of the stay applications within the period stipulated under the said Instructions, the Assessing Officer has refused to entertain the applications on the ground that the same had been filed after the expiry of the period stipulated in the demand notice. In the opinion of this court, if for any reason, the Assessing Officer is not entertaining the application, even then, within a period of two weeks of the filing of the stay application, he should intimate the assessee about such decision. It is incumbent on the Assessing Officer to take a decision on the application under section 220(6) of the Act one way or the other, and it is not permissible for him to sit tight over the application and proceed further to make coercive recoveries without informing the assessee about the outcome to his application.

11. Paragraph (C) of the said Instructions provides for guidelines for staying demand. Sub-paragraph (ii) thereof provides that in granting stay, the Assessing Officer may impose such conditions as he may, - (a) require the assessee to offer suitable security to safeguard the interest of revenue; (b) require the assessee to pay towards the disputed taxes a reasonable amount in lump sum or in instalments; (c) require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled; (d) reserve the right to review the order passed after expiry of reasonable period,

say upto 6 months, or if the assessee has not cooperated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations; (e) reserve a right to adjust refunds arising, if any, against the demand. Thus, even according to the said Instructions, the Assessing Officer has discretion to grant stay by requiring the assessee to offer suitable security to safeguard the interest of the revenue. The Assessing Officer can also require the assessee to pay towards the disputed tax a reasonable amount in lump sum or in instalments. Thus, it is not in every case that the entire demand amount is required to be deposited while granting stay. In fact directing an assessee to deposit the entire amount as a condition for granting stay is incongruous inasmuch as if the entire amount is recovered there is no purpose of granting stay. Sub-section (6) of section 220 of the Act vests in the Assessing Officer the discretion to treat the assessee as not being in default in respect of the amount in dispute even though time for payment has expired as long as such appeal remains undisposed of subject to such conditions as he may think fit to impose. Clause (iv) of paragraph (C) of the said Instructions provides that since the phrase "stay of demand" does not occur in section 220(6) of the Income Tax Act, the Assessing Officer should always use in any order passed under section 220(6) or under section 220(3) or section 220(7), the expression that occurs in the section viz., that he agrees to treat the assessee as not being in default in respect of the amount specified, subject to such conditions as he deems fit to impose. Clause (v) thereof provides that while considering an application under section 220(6), the Assessing Officer should consider all relevant factors having a bearing on the demand raised and communicate his decision in the form of a speaking order.

12. In the facts of the present case, while the Assessing Officer has not passed any order on the applications made by the petitioner under section 220(6) of the Act, including not informing the petitioner that the application is not being entertained, the Principal Commissioner of Income Tax, in the order dated 06.11.2015, has nowhere considered the relevant factors having a bearing on the demand raised, nor has he made any reference to the grounds stated by the petitioner for keeping the demand in abeyance. From various cases coming before this court wherein more or less similar orders have been passed, the court can take judicial notice of the fact that the order dated 06.11.2015 is in the nature of a standard cyclostyle type of order which is being passed on applications made under section 220(6) of the Act in a most cases, wherein all that is stated is that on going through the grounds raised by the assessee for keeping demand in abeyance, it appears that no such valid grounds have been put forth to consider his stay application favourably. On a plain reading of the order dated 06.11.2015, it is evident that it is a non-speaking order which does not deal with any of the submissions advanced by the assessee and also suffers from non-application of mind to the facts of the case, it being a standard order passed in such matters. Under the circumstances, apart from the fact that the application made under section 220(6) of the Act was required to be decided by

the Assessing Officer, even if the order passed by the Principal Commissioner of Income tax is treated to be the one under section 220(6) of the Act, it cannot be said that the same meets with the requirements laid down in Instruction No.1914 dated 02.02.1993.

13. As noted herein above, the application under sub-section (6) of section 220 of the Act was made by the petitioner on 04.05.2015. The Assessing Officer not only did not pass any order thereon, but even though he was not inclined to entertain the application, he did not even deem it fit to inform the petitioner about the same. It is for the first time, in the affidavit-in-reply filed in these proceedings that the Assessing Officer has come out with the case that the application could not be entertained as it was filed after the period stipulated in the notice under section 156 of the Act had expired. On the other hand, the Assessing Officer has chosen not to take any decision on the application under section 220(6) of the Act and on the other hand, despite the pendency of the stay application, the respondents have resorted to coercive recovery against the petitioner by attaching the bank accounts as well as 114 flats of the petitioner. In the opinion of this court, during the pendency of the stay application, which had been filed almost immediately after the period stipulated in the notice under section 156 of the Act had expired, there was no warrant for the respondents to resort to drastic measures of making coercive recovery without first taking the decision on the application under section 220(6) of the Act. The action of the respondents in attaching the bank accounts and flats of the petitioner, therefore, cannot be sustained.

14. In the aforesaid premises, the court is of the view that the interests of justice would best be served if the fourth respondent herein ? Commissioner of Income Tax (Appeals-4), Surat is requested to conclude the appeal proceedings within a period of three months from the date of receipt of a copy of this judgment and in the meanwhile, the petitioner may be put to some conditions to secure the interest of the revenue.

15. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned order dated 06.11.2015 passed by the Principal Commissioner of Income Tax (Central), Surat (Annexure "L" to the petition) as well as the recovery notices issued by the Tax Recovery Officer (Annexures "G", "I" and "J" to the petition) are hereby quashed and set aside. The fourth respondent herein ? Commissioner of Income Tax (Appeals) ? 4, Surat is requested to conclude the appeal proceedings within a period of three months from the date of receipt of a copy of this judgment. In the meanwhile the demand under the recovery notices shall remain stayed subject to the petitioner depositing with the Tax Recovery Officer a total amount of Rs.2,25,00,000/- (Rupees two crore twenty five lacs only) in three equal instalments of Rs.75,00,000/- (Rupees seventy five lacs only) each on 31st May, 2016, 30th June, 2016 and 29th July, 2016. Shri Ankit Manubhai Kuchhadiya, Partner of the petitioner firm, shall file an undertaking before this court that he shall regularly make payment to the Tax

Recovery Officer as stipulated herein above as well as to the effect that he will cooperate in the early disposal of the appeal, failing which the stay order will be cancelled. Upon the petitioner filing such undertaking before this court, the respondents shall forthwith lift all attachments made on (i) all properties belonging to the petitioner, particularly on 114 flats and the land belonging to the petitioner and (ii) Bank Account No.05332560003644 of the petitioner with HDFC Bank Ltd., Varachha, Surat. The respondents shall also ensure that the registration of attachment in the revenue records shall be forthwith deleted.

16. Rule is made absolute accordingly, to the aforesaid extent with no order as to costs. Direct Service is permitted.