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

% *Date of decision: 07.08.2023*

+ **W.P.(C) 9292/2023**

JINDAL STAINLESS LTD

..... Petitioner

Through: Mr Neeraj Jain with Mr Aniket D. Agrawal and Mr Saksham Singhal, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ORS.

..... Respondents

Through: Mr Shailendera Singh, Sr. Standing Counsel.

**CORAM:**

**HON'BLE MR JUSTICE RAJIV SHAKDHER**

**HON'BLE MR JUSTICE GIRISH KATHPALIA**

**ORDER**

% **07.08.2023**

[Physical Hearing/Hybrid Hearing (as per request)]

**RAJIV SHAKDHER, J.: (ORAL)**

1. On the previous date i.e., 14.07.2023, we had heard the counsels for the parties and etched out the broad contours of the matter. For the sake of convenience, the relevant parts of the said order are extracted hereafter:

“2. *The principal grievance of the petitioner is, that the respondents/revenue have adjusted against the refund payable qua Assessment Year (AY) 2022-23, demands outstanding with respect to AYs 2011-12, 2012-13 and 2013-14.*



3. Mr Ajay Vohra, learned senior counsel, who appears on behalf of the petitioner, says that there are several flaws with regard to the steps taken by the respondents/revenue:

(i) First, the adjustment made is more than 20% which is contrary to the Office Memorandum [in short, "OM"] dated 29.02.2016, as amended by OM dated 31.07.2017.

(ii) Second, it disregards the fact that an appeal vis-a-vis the aforementioned AYs is pending adjudication with the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"].

(iii) Third, the adjustment has been made without passing an order, as required in law under Section 245 of the Income Tax Act, 1961 [in short, "Act"]. In this regard, it is submitted that a mere intimation was given on 02.03.2023.

4 We may note, that the adjustment which has been made, amounts to Rs.40,09,91,031/-.

4.1 Resultantly, the petitioner was released with regard to the refund claimed vis-a-vis AY 2022-23 i.e., Rs.52,78,60,069/-.

5. The petitioner, via this writ action, claims the balance amount i.e., Rs.32,07,13,625/- along with applicable interest, which is the amount in excess of 20% of the disputed demand concerning the aforementioned AYs.

5.1 Mr Vohra, in support of the plea that the respondents/revenue had to pass an order under Section 245 of the Act has relied upon the judgment of the coordinate bench of this Court in **Glaxo Smith Kline Asia (P.) Ltd vs. CIT 290 ITR 35 (Del)**.

5.2 To be noted, the said judgement stands affirmed by the Supreme Court in the judgement rendered in **CIT vs Glaxo SmithKline Asia (P) Ltd 236 CTR 113 (SC)**.

6. As regards the prayer made in the application, that the amount adjusted over and above 20% disputed demand ought to be refunded, reliance is placed on the judgment rendered by the Punjab and Haryana High Court in **Jindal Steel and Power Ltd vs. PCIT 391 ITR 42 (P&H)**.

7. According to us, prima facie, Mr Vohra, is right, which is, for making an adjustment over and above the stipulated percentage i.e., 20% of the disputed demand, in terms of the aforementioned OM dated 29.02.2016, the concerned officer will have to furnish reasons and satisfy himself, as to why disputed tax cannot be collected by other means if it ultimately bears fruition.

8. Accordingly, issue notice.

8.1 Mr Shailendera Singh, learned senior standing counsel accepts notice on behalf of the respondents/revenue.

9. Mr Singh will return with instructions.



*9.1 In case instructions are received to resist the petition, a counter-affidavit will be filed before the next date of hearing.*

*10.List the matter on 07.08.2023.”*

2. Before we proceed further, it is relevant to note that a typographical error has crept in paragraph 2 of the order, wherein, instead of AY 2013-14, what should have been included is AY 2014-15.

2.1. The order dated 14.07.2023 shall stand corrected to the aforesaid extent.

3. Admittedly, no counter-affidavit has been filed.

4. We have asked Mr Shailendera Singh, learned senior standing counsel, who appears on behalf of the respondents/revenue, as to whether the facts and circumstances adverted to in our order dated 14.07.2023 are disputed.

4.1 Mr Singh says that although the facts and events recorded in the order dated 14.07.2023 are not disputed, the petitioner ought to have filed an application under Section 220 of the Income Tax Act, 1961 [in short, “the Act”] so that an appropriate order could have been passed by the Assessing Officer (AO), with regard to the outstanding deposit against the disputed demand.

5. On the other hand, the counsel for the petitioner/assessee has submitted that this is a case where intimation was given on 02.03.2023 under Section 245 of the Act and the adjustment was made on the very same date, despite the petitioner/assessee submitting its response on the designated portal.

6. Furthermore, the counsel for the petitioner/assessee has drawn our



attention to the fact that the petitioner/assessee had brought this aspect to the notice of the Deputy Commissioner of Income Tax *via* communication dated 01.05.2023. For this purpose, our attention has been drawn to the following part of the said communication:

*“Further in response to notice issued by CPC u/s 245 of income tax act,1961 the assessee company has agreed with disputed demand with the plea that" the assessee company has filed appeals before Ld CIT(A) against the penalty orders. Your honour is requested to kindly stay the disputed demand and not to treat the assessee in default till the disposal of first appeals before Ld. CIT(Appeals)". Even though the CPC has adjusted full disputed demand instead of adjusting 20 % demand as per CBDT circular. The same has caused working capital and cash flow issues to the company.”*

7. Besides this, our attention has also been drawn to the response dated 03.10.2022 to the notice issued under Section 221 of the Act. The response, being brief, is extracted hereafter:

*“Respected Madam, With reference to the DIN & Notice no. ITBA/RCV/S/221/2022-23/1046009252(1) dated 27.09.2022 under section 221(1) of the Income Tax Act, 1961 regarding outstanding demand. In this regards, it is submitted that A.Y. 2006-07 Demand u/s 271(1(c) The penalty has been deleted vide order u/s 154 r.w.s. 254/271(1(c) of the Income Tax Act, 1961 dated 10.07.2020 but demand has not been deleted at income tax portal. Therefore, your honour is requested to kindly arrange to delete the demand at income tax portal. A.Y. 2007-08 – Demand u/s 271(1(c) The assessee company has filed letter for appeal effect. There is refund due to the assessee company instead of demand. Therefore, your honour is requested to kindly arrange to process the appeal effect and issue a refund to the assessee company. **A.Y. 2011-12, 2012-13 & 2014-15 – Demand u/s 271(1(c) The assessee company has filed appeals before Ld. CIT(A) against the penalty orders. Your honour is requested to kindly stay the demand and not to treat the assessee in default till the disposal of first appeals before Ld. CIT(Appeals). A.Y.2018-19- Demand u/s 143(3) The demand of Rs.16299520/- for A.Y. 2018-19***



*has been adjusted from refund of A.Y. 2020-21 on 23.03.2022.*  
*Therefore, your honour is requested to kindly arrange to delete the demand on income tax portal. Hope your goodself will find the same in the order. An opportunity of being heard is prayed. Thanking You”*

[Emphasis is ours]

8. It is the submission of the learned counsel for the petitioner/assessee that the AO did not provide any time to respond to the intimation dated 02.03.2023 proposing adjustment of outstanding demand against the refund due to the petitioner/assessee. Furthermore, according to the counsel for the petitioner/assessee, the AO was required to apply his mind and pass an appropriate order.

8.1 In this context, the counsel for the petitioner/assessee relies upon the judgment of a Division Bench of the Bombay High Court in *Hindustan Unilever v. DCIT* [2015] 377 ITR 281 (Bom).

9. Having heard the counsels for the parties, we are of the view that the impugned action of the AO in adjusting the refund due to the petitioner/assessee for AY 2022-23, against the disputed demands for AYs 2011-12, 2012-13, and 2014-15 was not only hasty, but was also contrary to law.

10. Under the Office Memorandum (“OM”) dated 29.02.2016, as amended by OM dated 31.07.2017, the AO should have, ordinarily, in terms of para 4A adjusted not more than 20% of the disputed demand, considering the fact that an appeal concerning the disputed demand was, admittedly, pending before the CIT(A). Higher amount can only be retained, only if, as per the aforementioned OMs, the assessee’s case falls in the situation captured in para 4B (a).



10.1. No material has been furnished by the respondent/revenue which would suggest that the petitioner/assessee's case would fall within 4(B)(a).<sup>1</sup>

11. Given this position, the writ petition is disposed of with the direction to the respondents/revenue to release the amount, along with applicable interest, which is in excess of 20% of the disputed demand, concerning the aforementioned AYs.

12. We may also note (something we have recorded in our order dated 14.07.2023), according to the petitioner/assessee, the excess amount which is available with the respondents/revenue is Rs.32,07,13,625/-.

13. The respondents/revenue will make their own calculation and ascertain whether the amount indicated by the petitioner/assessee is the excess amount. Thus, the excess amount beyond 20%, along with applicable interest, will be released to the petitioner within four (4) weeks of the receipt of a copy of the judgement.

14. The writ petition is disposed of in the aforesaid terms.

15. Parties will act based on the digitally signed copies of the order.

**RAJIV SHAKDHER, J**

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(B) In a situation where, (a) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15%\* is warranted (e.g. in a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of Revenue or addition is based on credible evidence collected in a search or survey operation, etc.) .....



**AUGUST 7, 2023 / tr**

**GIRISH KATHPALIA, J**

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\*Increased to 20%, as per OM dated 31.07.2017.