

**INCOME TAX : Where Assessing Officer made an addition under section 69A to income of assessee primarily on basis of statement of a person and raised tax demand, since said person did not appear for cross-examination and, further, for previous assessment year he had retracted such statement, reliance placed on such uncorroborated statement of said person for making impugned addition was highly questionable, thus, entire tax demand was to be kept in abeyance till disposal of appeal on merits by Commissioner (Appeals)**

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**[2021] 125 taxmann.com 187 (Bombay)**

**HIGH COURT OF BOMBAY**

**Dilipkumar P. Chheda**

**v.**

**Income Tax Officer-4(1), Thane\***

**UJJAL BHUYAN AND MILIND N. JADHAV , JJ.**

**WRIT PETITION NO. 537 OF 2021**

**FEBRUARY 4, 2021**

Section [220](#), read with section [69A](#), of the Income-tax Act, 1961 - Collection and recovery of tax - When tax payable and when assessee deemed in default (Stay of demand) - Assessment year 2012-13 - Assessing Officer passed an assessment order in case of assessee making addition of certain amount under section 69A on basis of a statement of one NB and tax demand was raised - Assessee filed an appeal against such addition before Commissioner (Appeals) - During pendency of said appeal, assessee filed an application under section 220(6) for stay of demand before ITO who granted same subject to payment of 20 per cent of outstanding demand - Assessee contended that total demand was to be kept in abeyance till disposal of appeal by Commissioner (Appeals) - It was noted that said addition was made primarily on basis of statement of NB - However, it was found from materials on record that though summons were issued to NB for cross-examination, he did not appear and, therefore, he could not be cross-examined - Further, for previous assessment year he had retracted such statement - Thus, reliance placed on such uncorroborated and untested statement of NB while making additions to income of assessee was highly questionable - That apart, assessee had pleaded financial hardship to meet demand even to extent of 20 per cent - Whether, on facts, entire demand was to be kept in abeyance till disposal of appeal on merits by Commissioner (Appeals) - Held, yes [Paras 15 and 16] [In favour of assessee]

**Circulars and Notifications : CBDT instructions dated 29-2-2016 and 31-7-2017**

#### **CASE REVIEW**

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*Mayur Kanjibhai Shah v. ITO* [Writ Petition No. 812 of 2020, dated 13-3-2020] (para 14) *followed*.

#### **CASES REFERRED TO**

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*Mayur Kanjibhai Shah v. ITO* [Writ Petition No. 812 of 2020, dated 13-3-2020] (para 9), *Raj Kumar*

*Shivhare v. Asstt. Director, Directorate of Enforcement* [2010] 4 SCC 772 (para 10), *Karmvir Builders v. Pr. CIT* [2020] 113 taxmann.com 138 (Guj.) (para 10) and *Karmvir Builders v. Pr. CIT* [2020] 113 taxmann.com 139/269 Taxman 45 (SC) (para 10).

**Devendra Jain**, Adv. *for the Petitioner*. **Sham Walve**, Adv. *for the Respondent*.

## **ORDER**

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1. Heard Mr. Devendra Jain, learned counsel for the petitioner and Mr. Sham Walve, learned standing counsel revenue for the respondents.
2. By filing this petition under article 226 of the Constitution of India, petitioner seeks quashing of order dated 22-1-2020 passed by the Income-tax Officer, Ward-4(1), Thane *i.e.* respondent No. 1 allowing the stay of demand application filed by the petitioner to the extent of 20% of the demand raised as well as the order dated 9-3-2020 passed by the Principal Commissioner of Income Tax-3, Thane *i.e.* respondent No. 2 reiterating the earlier order of respondent No. 1 dated 22-1-2020 by directing the petitioner to pay 20% of the outstanding demand.
3. Petitioner is an assessee under the Income-tax Act, 1961 (briefly "the Act" hereinafter). For the assessment year 2012-13 petitioner had filed e-return of income on 29-9-2012 declaring total income of Rs. 11,52,191.00. It appears that initial assessment order was reopened by the assessing officer *i.e.* respondent No. 1 under section 147 of the Act and thereafter assessment order on reopening was passed on 21-12-2019 under section 143(3) r/w section 147 of the Act determining the total assessed income of the petitioner at Rs. 3,68,49,960.00.
  - 3.1 Following the assessment order notice of demand under section 156 of the Act was issued to the petitioner.
4. Against the aforesaid order of assessment, petitioner has preferred appeal before the Commissioner of Income-tax (Appeals), Thane-3 in respect of which registry of the appellate authority has provided acknowledgement bearing No. 291474711140120.
5. During pendency of the appeal, petitioner filed an application dated 15-1-2020 before respondent No. 1 under section 220(6) of the Act for stay of the demand. By order dated 22-1-2020 respondent No. 1 by relying upon instructions and notifications of the Central Board of Direct Taxes (CBDT) dated 29-2-2016 and 31-7-2017 ordered that 80% of the outstanding demand would be kept in abeyance subject to payment of balance 20% of the outstanding demand on or before 5-2-2020.
6. Aggrieved by the above, petitioner preferred further stay application before respondent No. 2. However, by the order dated 9-3-2020 respondent No. 2 rejected the said application by reiterating the order of respondent No. 1 and directing the petitioner to pay 20% of the outstanding demand.
7. Aggrieved, present writ petition has been filed.
8. Respondent No. 1 has filed affidavit. Reliance has been placed on CBDT instructions dated 29-2-2016 and 31-7-2017 on the basis of which conditional stay was granted subject to payment of 20% of the demand by the petitioner. On *prima facie* case, it is stated that addition of Rs. 3,50,00,000.00 was made in the order of assessment on the basis of seized documents as well as statement of the partner of M/s. Evergreen Enterprises recorded under sections 131 and 132 of the Act. Since petitioner failed to provide satisfactory explanation regarding the transaction with M/s. Evergreen Enterprises the said amount was added to the income of the assessee under section 69A of the Act. Particular reference has been made to the statement of Shri. Nilesh Bharani recorded under section 132(4) of the Act who is one of the partners of the M/s. Evergreen Enterprises which indulged in activities of money lending and borrowing of

unaccounted cash. Besides various entries in telephone diary etc. were seized which formed the basis for the above addition.

**9.** Mr. Devendra Jain, learned counsel for the petitioner submits that in the case *Mayur Kanjibhai Shah v. ITO* [Writ Petition No. 812 of 2020, dated 13-3-2020], this Court had kept in abeyance the entire demand raised till disposal of appeal by the Commissioner of Income-tax (Appeals) further directing the appellate authority to decide the appeal within four months. In that case also, statement of Shri. Nilesh Bharani was relied upon for making the addition to the income of the assessee. This Court found that Shri. Nilesh Bharani was not subjected to any cross-examination by the petitioner; rather in the affidavit of the revenue, it was admitted that Shri. Nilesh Bharani had retracted his statement. Insofar present case is concerned, Mr. Devendra Jain has pointed out from the order-sheet annexed to the writ petition that though summons were issued on 29-11-2019 to the assessee (petitioner) and Shri. Nilesh Bharani for cross-examination, while petitioner had appeared, Shri. Nilesh Bharani did not appear on the date fixed *i.e.* on 29-11-2019 as a result of which Shri. Nilesh Bharani could not be cross-examined. He submits that for the previous assessment year *i.e.* assessment year 2011-12 Shri. Nilesh Bharani had retracted his statement. In such circumstances, statement of Shri. Nilesh Bharani could not have formed the basis for making the addition to the income of the petitioner under section 69A of the Act. Therefore, petitioner has a good *prima facie* case in appeal, but without considering this aspect, respondents had mechanically followed the instructions of the CBDT and ordered only conditional stay subject to payment of 20% of the demand which itself is a very high figure and would be oppressive to the petitioner considering the poor financial condition of the petitioner.

**10.** On the other hand, Mr. Sham Walve, learned standing counsel revenue has referred to the instructions of the CBDT and thereafter has taken us to the impugned orders. He submits that respondents have duly considered the case of the petitioner and after proper application of mind has granted stay to the demand subject to payment of 20% of the demand. Such an order cannot be said to be an unreasonable or an arbitrary order. That apart, petitioner could have filed stay application before the appellate authority before whom the appeal is pending but instead of doing that he has moved the High Court under article 226 of the Constitution of India. Mr. Sham Walve has also pressed into service a judgment of the Supreme Court in *Raj Kumar Shivhare v. Asstt. Director, Directorate of Enforcement* [2010] 4 SCC 772, to contend that when a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, writ petition should not be entertained ignoring statutory dispensation. He has also placed reliance on a decision of the High Court of Gujarat dated 19-10-2016 in the case of *Karmvir Builders v. Pr. CIT* [2020] 113 taxmann.com 138 (Guj.) where also conditional stay of demand was granted by the Principal Commissioner of Income Tax. Special Leave Petition filed against the said decision was dismissed by the Supreme Court in *Karmir Builder v. Pr. CIT* [2020] 113 taxmann.com 139/269 Taxman 45. He therefore submits that there is no error or infirmity in the impugned orders to warrant interference under writ jurisdiction.

**11.** In his reply submission, Mr. Devendra Jain contends that reliance placed on *Raj Kumar Shivhare* (*supra*) is misplaced inasmuch as the said decision pertains to challenge to the order in original in writ jurisdiction without filing appeal as provided under the relevant statute. Here petitioner has filed appeal; thereafter petitioner filed stay application under section 220(6) of the Act. The manner of disposal of such application is being questioned in the present proceeding. Insofar the decision in *Karmvir Builders* (*supra*) is concerned, no principle of law is laid down therein as in the facts and circumstances of the case Supreme Court did not find any reason to interfere with the order passed by the High Court.

**12.** Submissions made by learned counsel for the parties have received the due consideration of the Court.

**13.** Short point for consideration is whether the two impugned orders dated 22-1-2020 and 9-3-2020 are

liable to be interfered with by granting complete stay of demand till disposal of the appeal or liable to be upheld ?

**14.** After careful consideration of the relevant materials on record, we find that there is great deal of similarity between the case in hand and the case in *Mayur Kanjibhai Shah (supra)*. In fact to a certain extent present case stands on better footing than the one in *Mayur Kanjibhai Shah (supra)*, in which case, addition was made based on the statement of Shri. Nilesh Bharani. This Court found that Shri. Nilesh Bharani was not subjected to any cross-examination by the petitioner: rather it was found that he had retracted his statement. This Court *prima facie* held that on the basis of coded language diary entries and retracted uncorroborated statement of an alleged beneficiaries, additions made by the assessing officer were highly questionable. Instead of taking a mechanical approach by directing the assessee to pay 20% of the tax demand on the basis of the CBDT instructions, it was held that respondents ought to have considered the *prima facie* case, balance of convenience and financial hardship, if any of the petitioner. That having not been done, this Court directed that the payment be kept in abeyance till disposal of the appeal by the Commissioner of Income-tax (Appeals), further directing the appellate authority to decide the appeal within four months. Relevant portion of the order dated 13-3-2020 passed in the case of *Mayur Kanjibhai Shah (supra)* is extracted hereunder :—

"11. We have heard rival submissions as well as considered the pleadings on record. Only to satisfy ourselves as to whether a *prima facie* case had been made out by the petitioner seeking stay, we have given our attention to the assessment order dated 21st December, 2019. We find that the assessment order on reopening has been made primarily on the basis of certain entries (in coded language) made in the diary recovered from the premises of Shri Nilesh Bharani in the course of search and seizure under section 132 of the Act. The finding that the petitioner had lent/provided cash amount of Rs. 3.25 crores to M/s Evergreen Enterprises/Shri Nilesh Bharani was also reached on the statement made by Shri Nilesh Bharani. From the assessment order, we do not find that Shri Nilesh Bharani was subjected to any cross-examination by the petitioner; rather in the affidavit of the respondents it is stated that Shri Nilesh Bharani has retracted his statement made. *Prima facie* on the basis of coded language diary entries and retracted uncorroborated statement of an alleged beneficiary, perhaps, the additions made by the Assessing Officer is highly questionable. In such circumstances, we feel that instead of taking a mechanical approach by directing the petitioner to pay 20% of the tax demand or providing instalments, respondent Nos. 1 and 2 ought to have considered the *prima facie* case, balance of convenience and financial hardship, if any, of the petitioner. From the impugned order, we do not find that respondents had alluded to the above aspects. That apart, petitioner's appeal before the Commissioner of Income-tax (Appeals) is pending for consideration. In such circumstances, we are of the view that it would be in the interest of justice if the demand raised is kept in abeyance till disposal of the appeal by the Commissioner of Income-tax (Appeals).

12. Ordered accordingly.

13. Let the appeal be decided by the Commissioner of Income-Tax (Appeals) within a period of four months from the date of receipt of an authenticated copy of the order. Till disposal of the appeal within the said period, notice of demand dated 21st December, 2019 pursuant to assessment order for the assessment year 2012-13 shall be kept in abeyance.

14. Before parting with the record, we make it clear that the discussions and observations made in this order are only in the context of considering the prayer for stay of the petitioner and that the same should not in any manner be treated as final observations or findings on merit."

**15.** Insofar the present case is concerned, here also the additions have been made primarily on the basis of the statement made by Shri. Nilesh Bharani and also on the basis of certain entries in the telephone

diary. However, we find from the materials on record that though summons was issued to Shri. Nilesh Bharani for cross-examination by the petitioner, Shri. Nilesh Bharani did not appear on the date fixed and therefore he could not be cross-examined. Thus, we are *prima facie* of the view that reliance placed on such uncorroborated and untested statement of Shri. Nilesh Bharani while making the additions to the income of the petitioner is highly questionable, that too, when for the previous assessment year *i.e.*, the assessment year 2011-12 he had retracted the statement. In such circumstances, it cannot be said that petitioner does not have a good *prima facie* case on merit. That apart, petitioner has pleaded financial hardship to meet the demand even to the extent of 20%.

**16.** Considering the above and to maintain parity, we direct that till disposal of the appeal by the Commissioner of Income-tax (Appeals), the demand raised pursuant to the assessment order dated 21-12-2019 for the assessment year 2012-13 shall be kept in abeyance. However, Commissioner of Income-tax (Appeals) shall make an endeavour to dispose of the appeal within a period of four months from the date of receipt of an authenticated copy of this order. We make it clear that observations made in this order are only for considering the prayer for stay and the same should not in any manner be construed as final observations or findings on merit.

**17.** Writ petition is accordingly disposed of.

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\* In favour of assessee