IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 12637 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA **Sd/-**

and
HONOURABLE MR. JUSTICE ILESH J. VORA **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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SUN PHARMACEUTICAL INDUSTRIES LIMITED
Versus
DEPUTY COMMISSIONER OF INCOME TAX

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Appearance:
MR B S SOPARKAR(6851) for the Petitioner(s) No. 1,2
MR.VARUN K.PATEL(3802) for the Respondent(s) No. 1,2

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CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 26/08/2021

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ application under Article 226 of the Constitution of India, the writ applicants have prayed for the following reliefs;

> *"(A) Quash and set aside the order dated 12.07.2019 passed by Respondent No.1 at Annexure-A to the extent it does not issue refund to the Petitioner No.1 but adjusts against the demand of A.Y.2012-13.*
>
> *(B) Direct the Respondent No.1 to issue refund to the Petitioner No.1 arising out of the order giving effect of the order of CIT(A) for A.Y.2014-15;*
>
> *(C) Quash and set aside the order dated 12.07.2019 passed by Respondent No.2 at Annexure-A to the extent it puts a condition of adjustment of future refunds arising to the Petitioner without any limit and to direct the Respondent No.2 to grant unconditional stay of demand against the application filed by the Petitioner dated 10.07.2019 till the disposal of appeal by the Income Tax Appellate Tribunal.*
>
> *(D) Prohibit the Respondent No.1 to recover any amount from the Petitioner No.1 towards the demand raised for AY 2012-13 or 2010-11 or adjust any refunds arising to the petitioner No.1 against the demand of A.Y.2012-13 to 2010-11 till the disposal of appeal by the Income Tax Appellate Tribunal.*
>
> *(D1) Quash and set aside intimations dated 22.07.2019 at Annexure-A1.*
>
> *(D2) Stay the operation of intimations dated 22.07.2019 at Annexure-A1 and Prohibit the Respondent No.1 to recover any amount from or adjust any refunds arising to the petitioner No.1 towards the demand raised for the Assessment Year A.Y. 2012-13 or 2010-11 till the final disposal of appeal by the Income Tax Appellate Tribunal.*

(E) Pending the admission, hearing and final disposal of this petition, prohibit the Respondent No.1 to recover any amount from the Petitioner No.1 or adjust any refunds arising to the Petitioner No.1 against the demand of A.Y.2012-13 or 2010-11.

(F) Any other and further relief deemed just and proper be granted in the interest of justice."

2. The facts, giving rise to the present litigation, may be summarized as under;

2.1 The writ applicant filed its return of income for the A.Y. 2012-13 on 30th November, 2012.

2.2 The respondent passed the draft assessment order dated 31st March, 2016 under Section 143(3) read with Section 92CA read with Section 144C of the Income Tax Act (for short "the Act").

2.3 Against the aforesaid draft assessment order, the writ applicant made a reference dated 28th April, 2016 to the Dispute Resolution Panel under Section 144C of the Act.

2.4 The Dispute Resolution Panel vide its directions dated 30th December, 2016, by an large, confirmed all the additions/disallowances.

2.5 The respondent No.1 herein passed the final assessment order dated 23rd January, 2017 under Section 143(3) read with Section 92CA read with Section 144C of

the Act in accordance with the directions of the Dispute Resolution Panel at Rs.3946,48,67,610/- and raised a demand of Rs.2004.94 Crore to the writ applicant No.1.

2.6 Against the aforesaid assessment order, the writ applicant No.1 filed First Appeal before the Income Tax Appellate Tribunal (ITAT) on 10th February, 2017.

2.7 On 14th February, 2017, the writ applicant preferred an application under Section 220(6) of the Act with a request to the respondent No.1 to stay the demand.

2.8 The respondent No.1 rejected the aforesaid application vide order dated 17th February, 2017.

2.9 The writ applicant No.1, thereafter, preferred an application for stay before the ITAT dated 20th February, 2017.

2.10 The ITAT Vider order dated 10th March, 2017, relegated the writ applicant No.1 to seek stay by preferring application addressed to the respondent No.2.

2.11 On 15th March, 2017, the writ applicant filed an application addressed to the respondent No.2.

2.12 The respondent No.2, vide his order dated 27th March, 2017, granted stay till 30th June, 2017 or the order that may be passed by the ITAT whichever would have been earlier with a condition to adjust the future refunds arising in favour of the writ applicant No.1 against the

demand of A.Y.2012-13.

2.13 The writ applicant No.1 filed a fresh application dated 19th August, 2017 before the respondent No.2.

2.14 The respondent No.2, vide his order dated 21st August, 2017, granted stay till 28th February, 2018 or the order of the ITAT whichever would have been earlier but with further condition to adjust the future refunds accruing in favour of the writ applicant No.1 against the demand of A.Y.2012-13.

2.15 On 16th March, 2018, the writ applicant No.1 received a letter, seeking to review the status of the stay.

2.16 On 22nd March, 2018, the writ applicant No.1 filed its reply and further made an application to the respondent No.2 for stay.

2.17 The writ applicant No.1, vide letters dated 14th May, 2019 and 20th May, 2019 respectively sent reminders to the respondent No.2 for passing appropriate order, granting stay.

2.18 The respondent No.1 issued an intimation dated 28th June, 2019 proposing to adjust the refund of Rs.222,93,38,240/- emanating from the order giving effect to the appellate order for the A.Y. 2014-15 against the outstanding demands of the writ applicant No.1 for the A.Y.. 2012-13 and A.Y. 2010-11.

2.19 The writ applicant No.1, thereafter, preferred a stay application dated 1st July, 2019 under Section 254 of the Act before the ITAT for the purpose of getting the demand stayed. The ITAT disposed of the application vide its order dated 5th July, 2019 relegating the writ applicant to the respondent No.2.

2.20. The writ applicant No.1, vide letter dated 10th July, 2019 addressed to the respondent No.2 explained why the facts and the circumstances necessitated the grant of unconditional stay against the demand raised for A.Y.2012-13.

2.21 The respondent No.2, vide its letter dated 12th July, 2019, granted the relief and thereby stayed the demand with the condition to adjust the future refunds arising in favour of the writ applicant No.1 against the demand of A.Y. 2012-13.

2.22 The respondent No.1, vide order dated 12th July, 2019, while giving effect to the order of the CIT (A) adjusted the refund of Rs.224 Crore for A.Y. 2014-15 as against the demand of the writ applicant No.1 for A.Y.2012-13.

2.23 In such circumstances, referred to above, the writ applicants had to come before this Court with the present writ application.

2.24 The writ applicants received an intimation dated 22nd July, 2019 issued under Section 245 of the Act proposing to adjust the refund arising for A.Y. 2012-13 of Rs.336 Crore and A.Y. 2010-11 of Rs.318 Crore as against the demand for A.Y. 2012-13 (Ranbaxy).

3. On 23rd July, 2019, this Court passed the following order;

> *"Draft amendment is allowed. The same shall be carried out at the earliest.*
>
> *Let Notice be issued to the respondents returnable on 14th October, 2019.*
>
> *Having heard Mr. S.N. Soparkar, the learned senior counsel appearing for the writ applicants and having gone through the materials on record, we are of the view that the writ applicants have been able to make out a strong prima facie case to have an interim order in their favour in terms of paragraph 7(d2).*
>
> *We accordingly grant such relief. Direct service is permitted."*

4. The Schedule of payment is as under:

Date	Event	Amount (Rs. In crores)
23.01.2017	Final Assessment Order passed raising demand of Rs.	2004.99
14.02.2017	Tax Demand Paid	50
07.03.2017	Tax Demand Paid	75
24.03.2017	Tax Demand Paid	75
20.07.2017	Tax Demand Paid	360.56
12.07.2019	Refund of AY 2014-15 adjusted	224.44
	Total taxes paid/adjusted	**785**

Ranbaxy Laboratories Limited (Now merged with Sun Pharmaceutical Industries Limited)

Assessment order for AY 2012-13 u/s.143(3) r.w.s. 92CA r.w.s.144C(13) dated 23.01.2017

Details of covered issues in favour of assessee and working of tax demand

Sr. No.	Nature of Additions	Addition Rs.	Covered by Authority	Ref. Of Order	rate	Relief in tax Amount Rs.
1.	Upward adjustment on account of transfer pricing	10,35,06,00,000	ITAT	ITA No.195/Del/2013	50.80	5,25,84,22,916
2.	Deduction under section VI A	80,95,76,144	ITAT	ITA No.196/Del/2013	50.80	41,12,89,563
3.	Deduction u/s.35(2AB) of the act	4,40,22,43,702	ITAT HC of Guj. S.C.	ITA No.1390/Ahd/2016 Tax App. No.541/2017 SLP21485 of 2018 (Dismissed SLP of department)	50.80	2,23,64,75,099
4.	Disallowances u/s.14A read with rule 8D	5,45,95,563	ITAT	ITA No.1390/2016 (Ranbaxy Lab, Ltd.	50.80	2,77,36,224
5.	Disallowance of Marked to Marker losses	6,67,29,40,000	S.C.	Suzlon Energy Ltd. (2020) 21 Taxmann.com 137(SC) 390 ITR 36 (Bom HC) 85 TC 354 (Ahd. ITAT)	50.80	3,39,00,58,6060
	Total	22,28,99,55,409				11,32,39,82,408

Total tax demand as per assessment order 20,04.93,660

Less Tax relief on issues covered by various orders 11,32,39,82,408 56.5% of total demand

Balance taxdemand on issues which are not in favour of Assessee 8,72,53,83,252 43.5% of total demand

Total taxes paid/refund adjusted 7,85,00,00,000 40% of total demand,

90% of demand on issues which are not in favour of assessee.

5. It appears that out of the aforesaid five issues, the CIT agreed with the second, third and fourth issue. So far as the first issue is concerned, the CIT took the view that the same, being factual in nature, could not be said to be

covered in favour of the assessee.

6. So far as the issue No.5 is concerned, the CIT took the view that the decision of the Supreme Court in the case of Woodward Governor, as relied upon, was distinguishable on facts. However, prima facie, it appears that that the CIT overlooked the fact that the decision of this High Court in Suzlon Energy, against which, by a speaking order, the SLP came to be dismissed by the Supreme Court (2020 121 taxmann.com 137) following Woodward and in such circumstances, the issue of disallowance of mark to market losses stood concluded in favour of the assessee.

7. Mr. S.N. Soparkar, the learned senior counsel appearing for the writ applicants submitted that out of the total payment of Rs.2004 Crore the demand of Rs.1132 Crore pertains to the issues that are covered in favour of the writ applicant and, in such circumstances, unconditional stay should have been granted against the recovery. Mr. Soparkar brought to the notice of this Court the office memorandum dated 20th February, 2016 providing guideline for stay of demand on payment of 20% of the disputed demand (earlier 15%) till the final disposal of the first appeal. Mr. Soparkar pointed out that as against the disputed demand of Rs.872 Crore, the writ applicant has already made payment (got refund adjusted of Rs.785/- Crore). The amount of Rs.785 Crore comes to 40% payment against the total demand of Rs.2004 Crore

and almost 90% payment against Rs.872 Crore of the disputed demand.

8. Mr. Soparkar submitted that his client having already paid substantial tax, no further tax needs to be recovered. He would submit that unconditional stay may be granted until appropriate decision is taken by the First Appellate Authority, i.e, the ITAT. Mr. Soparkar further pointed out that the notices issued by the respondent No.1 for the purpose of further adjusting the refund of Rs.336 Crore (A.Y.2012-13) and Rs.318 Crore (A.Y.2010-11) respectively are erroneous inasmuch as the same would amount to recovering far more tax from his client as against the disputed issues in the assessment order.

9. In the last, Mr. Soparkar also took us through the observations made by the respondent No.1 while declining to grant unconditional stay. Those are as under;

Issue	Para and issue in order of CIT	Submission
1.	12,13: Rate of tax computed should not be 50.80% but 31.5% or 34.62%	The Petitioner has computed 50.80% based on tax demand/total income (2004/3946) as per assessment order (at pg. 500). The denominator cannot be 5791.05 as claimed by CIT because net assessed income is 3946 crores only on which tax is levied.
2.	14: TP adjustment is fact-based issue	As noted by DRP on page 232, Identical issue of TP adjustment arose in earlier years where

	(pg.22)	Assessee succeeded before ITAT but because the revenue is in appeal before High Court issue is not decided in favour. Therefore, this is an issue decided in favour of the petitioner.
3.	15: Mark to market loss is debatable (pg.22-23)	Issue is not debatable as the controversy is put to rest by the Hon'ble Supreme Court in Suzlon Energy 121 taxmann.com 137

10. Mr. Soparkar seeks to rely upon the following case law;

Sr. No.	Case Law	Page No.
1.	Soul (2010) 323 ITR 305 (Delhi)	1-6
2.	M.G.M. Transports (2008) 303 ITR 115 (Madras)	7-9
3.	Taneja Developers & Infrastrcuture (2010) 324 ITR 247	10-14
4.	Charu Home Products (2015) 53 taxmann.com 103	15-16
5.	D. Chetan & Co. (2017) 390 ITR 36 (Bombay)	17-20
6.	Jindal Steel & Power 391 ITR 42 (Punjab & Haryana)	21-29
7.	Andrew Telecommunications (2017) 77 taxmann.com 312 (Bombay)	30-33
8.	Organon (India) (P.) Ltd. (2018) 94 taxmann.com 421 (Kolkata-Trib)	34-35
9.	Vodafone India Services (2019) 418 ITR 376 (Guj.)	36-50
10.	Suzlon Energy Ltd. (2020) 121 taxmann.com 137 (SC)	51-53

11. On the other hand, this writ application has been vehemently opposed by Mr. Varun Patel, the learned senior standing counsel appearing for the Revenue. Mr. Patel raised a preliminary objection as regards the maintainability of the present writ application on the

ground of alternative remedy.

12. Mr. Patel would submit that the writ applicant has a remedy of filing stay application before the Income Tax Appellate Tribunal. Mr. Patel submitted that the contention raised on behalf of the writ applicant that the impugned order is not appealable before the ITAT is devoid of any merit. Mr. Patel argued that the impugned order of PCIT is an administrative order, granting conditional stay against the recovery and the same cannot put fetters on the statutory and judicial power of the ITAT to grant appropriate stay.

13. Mr. Patel invited the attention of this Court to the provisions of Section 254(1) and(2A) of the Act, and Rule 35(A) of the Income Tax (Appellate Tribunal) Rules, 1963. Mr. Patel seeks to rely on the decision of the Supreme Court in the case of ***ITO vs. M.K. Mohammed Kunhi***, (1969) 71 ITR 815 (SC). This judgment is relied upon in support of his contention that the ITAT has the power to grant stay pending the appeal before it. Mr. Patel also seeks to rely upon a decision rendered by the Madhya Pradesh High Court in the case of ***Northern Coals Fields Ltd. vs. Asst. Commissioner of Income-Tax & Ors***., reported in (2017) 398 ITR 508 (MP).

14. Mr. Patel submitted that the impugned order, imposing condition for adjustment of refund is just, proper and legal as the same is in conformity with the provisions

of Section 245 of the Act. He would argue that Section 245 does not provide for any limit so far as the adjustment of refund is concerned.

15. Mr. Patel submitted that the respondent No.2 -PCIT, while passing the impugned order, considered all the aspects relevant for the purpose of deciding the stay application.

16. Mr. Patel submitted that the office memorandums dated 29th February, 2016 and 31st July, 2017 respectively are not applicable to the cases wherein the appeals are pending before the ITAT. The said office memorandums would be applicable only in case where the appeals are pending before the CIT (A). He argued that in the case on hand, as the appeals are pending before the Tribunal, the said two office memorandums would have no application. In such circumstances, referred to above, Mr. Patel prays that there being no merit in this writ application, the same be rejected and the interim relief granted may be vacated forthwith.

ANALYSIS

17. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the action on the part of the Revenue is in accordance with law.

18. If we have to summarize the stance of the Revenue, we may do so as under;

> *"1. There is an alternative remedy.*
>
> *2. The Office Memorandum dated 20th February, 2016 of the CBDT does not apply because they pertain to appeal before the CIT appeals and not the Tribunal.*
>
> *3. It is always open to the Department to adjust the refund of and the assessee cannot dispute it in view of the provision of section 245 of the Act.*
>
> *4. In past whenever stay was granted to the writ applicant, such a condition was incorporated but the writ applicant never challenged it and therefore the writ applicant is estopped from raising this condition now.*
>
> *5. The writ applicant has not been able to show any financial hardship."*

19. So far as the first contention as regards the alternative remedy is concerned, we are not much impressed with the same. It is not that the CIT has not granted stay in favour of the writ applicant, but the same is conditional. It is highly doubtful whether such an order can be challenged in an appeal before the ITAT. We are not inclined to reject this writ application only on the ground of alternative remedy.

20. So far as the CBDT instructions are concerned, there is an underlying principle behind the same. The underlying principle is that pending the first appeal, the assessee may be afforded with some protection against coercive

recovery on the condition of deposit of some money. In the aforesaid context, we may refer to one order passed by the ITAT (Kolkata) Bench 'C' in the case of ***Organon (India) (P.) Ltd. vs. Deputy Commissioner of Income-tax, Circle 12(1), Kolkata***, reported in (2018) 94 taxmann.com 421 (Kolkata-Trib.). We quote the order;

> *"By virtue of this stay application the assessee seeks to keep the demand of Rs.6,16,12,850/- in abeyance raised for the assessment year 2013-14 pursuant to transfer pricing adjustment made in respect of advertising, marketing and promotion (AMP in short) expenses in the sum of Rs.15,60,70,679/-. The Ld. AR argued that except adjustment towards AMP, all other international transaction of the assessee were accepted by the Ld. TPO to be at Arm's length. He argued that the transaction of AMP does not fail within the ambit of international transaction as defined u/s. 92B of the Act in support of which he placed reliance on the decision of Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. vs. CIT (2015) 64 taxmann.com 150 / (2016) 237 Taxmann 256/381 ITR 117 among others. He further stated that the assessee had filed a letter dated 07.03.2018 before the Ld. AO expressing its willingness to pay 20% of the total demand in consonance with the requirement of the recent CBDT Circular dated 29.02.2016 and also gave his consent for adjustment of refunds of the various years for appropriation towards tax arrears of assessment year 2013-14 till the disposal of the appeal by the Tribunal. He also argued that though the said circular would apply only for matters pending before the Ld. CIT(A) , i.e, the first appeal, the impugned appeal before this Tribunal also would have to be construed as first appeal, inasmuch as on the final assessment order passed by the Ld. AO u/s.143(3) read with Section 144C(5) of the Act pursuant to directions of Hon'ble Dispute Resolution Panel (DRP), and appeal would lie*

for the first time only before this Tribunal. Hence, the impugned appeal before this Tribunal also becomes the first appeal preferred by the assessee and accordingly requirements laid down for keeping the demand in abeyance in the circular dated 29.02.2016 would also apply for the assessee before us. In response to this, the L. DR vehemently relied on the decision of Hon'ble Delhi High Court I the case of Sony Ericson Mobile Communication India (P) Ltd. vs. CIT (2015) 55 taxman.com 240/231 taxman 113 arguing that AMP expenditure is an international transaction.

2. We have heard the rival submissions. In the facts and circumstances of the case, we are inclined to accept the arguments of the Ld. AR to the extent that the appeal filed before us would have to be construed as first appeal and accordingly, the assessee is directed to pay a sum of Rs.1.20 crores on or before 27.03.2018 and produce the evidence of payment of the same to the Registry on the very same date. The assessee is also directed not to alienate his immovable properties, if any, without the prior consent of the Administrative Commissioner of Income Tax having jurisdiction over this case in order to protect the interest of the revenue till the arrears are discharged for assessment year 2013-14. The Ld. AR stated that the appeal for the assessment year 2012-13 i.e, immediately preceding year, is listed for hearing on 02.05.2018 wherein similar issue is involved. Accordingly, we direct the Registry to list this case also along with appeal for assessment year 2012-13 on 02.05.2018. In view of the aforesaid findings, we are inclined to keep the demand in abeyance for a period of six months from today or till the disposal of the appeal whichever is earlier, subject to fulfillment of aforesaid conditions. In case, if the assessee fails to make remittance of 1.20 crores on or before 27.03.2018, the conditional stay granted herein would stand automatically vacated.

3. In the result, the stay application of the

assessee is disopsed off accordingly."

21. So far as Section 245 of the Act is concerned, there need not be any debate as regards the power of the Department to adjust the refund, however, such power should be exercised in a reasonable manner. Here is a case wherein the assessee is sought to be deprived of a huge amount towards the refund. A huge amount towards refund is being declined on the ground that a demand is pending for the previous year. If such unbridled power is assumed by the Revenue to adjust the refund, it would result in a situation where two assessees against whom equal demands are raised will be treated differently. One assessee who has to recover significant amount towards the refunds and another who has not to recover the refunds would be put in two different categories because in the first case refund would be adjusted whereas in the second case, no such adjustment is possible.

22. We are also not impressed by the submission canvassed on behalf of the Revenue as regards estoppel. First, there cannot be any estoppel against the statute.

23. In the last, we may only observe that the writ applicant has raised issues relating to financial hardships. The writ applicant has pointed out that it has suffered losses in earlier four years. In the aforesaid context, we may refer to a decision rendered by the Punjab & Haryana High Court in the case of ***Jindal Steel & Power Ltd. vs. Principal Commissioner of Income Tax***, (2016) 75

taxmann.com 224 (Punjab & Haryana). We quote the relevant observations;

> *"20. The Pr.CIT rightly did not grant a complete stay but considered the petitioner's application in the alternative for a stay subject to its paying 15% of the outstanding demand in terms of the Office Memorandum dated 29.02.2016. Considering the facts of the case, the financial position of the petitioner and having regard to the said guidelines dated 29.02.2016, the Pr.CIT granted the petitioner a stay of the demand till the disposal of the appeal before the CIT(A) subject to the petitioner paying 15% of the outstanding demand, namely, ` 41.64 crores in the installments stipulated. In paragraph-5, the petitioner's request for adjusting a refund of ` 15.14 crores in respect of the assessment year 2008-09 was accepted. The assessee was accordingly directed to pay the balance amount of ` 26.18 crores in varying installments between 20th June, 2016 and 20th March, 2017. The concluding portion of the order passed by respondent No.1 reads as under:-*
>
> > *"5. It may be mentioned that installments in the initial months have been kept at lower side considering the assessee's request for lower installments on account of pressing financial position. The assessee shall make the payment by 20th day of each month and furnish the copy of the challan before the AO. On payment of 15% of outstanding demand as stated above, the assessee shall not be treated as the assessee in default in respect of the balance demand till the disposal of appeal of the learned CIT(A) and the AO shall not take any coercive measure to recover the said demand. However, the Assessing Officer is free to adjust any refund which may arise in favour of the assessee company in any assessment year.*
> >
> > *6. In case the assessee company does not*

comply with the above directions and does not adhere to the above payments of installments, the AO shall be free to take steps as per law to recover the demand."

21. It is clear that the stay was granted subject to the assessee paying the said amounts which constituted 15% of the total demand and nothing more. There is, however, a dispute regarding the last sentence in paragraph-5. It entitles the Assessing Officer "to adjust any refund which may arise in favour of the assessee company in any assessment year". The petitioner contends that this liberty to adjust is only in respect and to the extent of the balance of the said 15%, namely, ` 26.18 crores which was to be paid in the said installments and on the other it could be to the extent of the entire demand. The Assessing Officer, however, interpreted the order to mean that he was entitled to adjust the refund that the petitioner may be entitled to against the entire demand. This compelled the petitioner to seek a clarification before the Pr.CIT. The Pr.CIT by the said order dated 26.08.2016 referred to the guidelines and to the previous order. In particular a reference was made to Clause-C of the original instructions dated 02.02.1993 which reads as under:-

"C. GUIDELINES FOR STAYING DEMAND.
(i) .....

(ii) In granting stay, the Assessing Officer may impose such conditions are he may think fit. Thus he may,-

a) Require the assessee to offer suitable security of safeguard the interest of revenue;

b) Require the assessee to pay towards the disputed taxes a reasonable amount in lump sum or in installments;

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 situation;

e) Reserve a right to adjust refund arising, if any, against the demand."

After quoting the above provision, the order dated 26.08.2016 concludes as under:-

"*4. From the above instruction issued by the CBDT, it is clear that for granting of stay of outstand demand the Department may impose such conditions, which inter-alia includes that the Assessing Officer/Department may reserve the right to adjust the refund arising, if any, against the demand.*

5. In view of the above, the request of the assessee company to amend the stay order dated 14.06.2015 is hereby rejected."

22. The order dated 26.08.2016 does not clarify the order dated 14.06.2016. It does not state that the order dated 14.06.2016 entitled the Assessing Officer to adjust the refunds against the entire demand. The order merely states that in view of Clause-C of the original instructions dated 02.02.1993 the Department has a right to do so. This was not a clarification.

23. We will assume that the Department's interpretation of the orders is correct. In any event the order dated 26.08.2016 does not construe the further Office Memorandum dated 29.02.2016. The Office Memorandum forms a part of the original instruction No. 1914 dated 02.02.1993. This is clear

from paragraphs-1 and 4 thereof. Paragraph-4 expressly states that the modified guidelines contained in the Office Memorandum were being issued "in partial modification of the instruction No.1914". Instruction No. 1914 dated 02.02.1993 as clarified by instruction No.1914 dated 21.03.1996 must, therefore, be read together with the Office memorandum dated 29.02.2016.

24. It is necessary now to interpret the Office Memorandum dated 29.02.2016. Under clause-4A where the outstanding demand is disputed before the CIT(A), the Assessing Officer "shall" grant a stay of the demand on payment of 15% of the disputed demand unless the case falls in para-B of Clause-4. In the case before us, the demand is disputed before the CIT(A). The present case does not fall under para(B) either. Clause-4(B)(a) provides that in a situation where the Assessing Officer is of the view that the nature of the addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted, the Assessing Officer shall refer the matter to the Administrative Pr.CIT/CIT who after considering all the relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as lump-sum payment for granting a stay of the balance For Subsequent orders see CM-11613-CWP-2016 13 of 16 demand. Admittedly, a reference under clause 4(B)(a) was not made by the Assessing Officer to the Pr.CIT. In that event, Clause-4(A) alone would operate. As we mentioned earlier, clause 4(A) provides that where the outstanding amount is disputed before the CIT(A), the Assessing Officer "shall" grant stay of demand till disposal of the first appeal on payment of 15% of the disputed demand. In other words, the Assessing Officer is bound to grant a stay of the entire demand on payment of 15% of the disputed demand unless the case falls under category-B of clause-4. The Assessing Officer is not entitled to insist upon the assessee depositing a higher amount.

25. Faced with this, Mr. Putney relied upon clause-4(E)(iii). He submitted that the Assessing Officer is entitled to impose such conditions as he thinks fit. A plain reading of the clause, however, militates against the submission on behalf of the Department. It entitles the Assessing Officer to reserve the right to adjust the refunds arising "to the extent of the amount required for granting stay....." Therefore, the right to adjust the refund is limited to the amount to be deposited by the assessee as a condition for the stay.

26. The Assessing Officer in the order dated 26.08.2016 referred to guidelines-C(ii)(e) which we set out earlier. It provides that in granting a stay the Assessing Officer may impose such conditions as he may think fit and that he may reserve a right to adjust the refund arising, if any, against the demand. However, this guideline stands modified by the Office Memorandum dated 29.02.1996 which entitles the Assessing Officer to reserve the right to adjust the refund arising "to the extent of the amount required for granting stay....." . Clause-4 of the Office Memorandum expressly stated that the guidelines therein were issued in partial modification of the instruction No. 1914. Thus guideline-C(e) of the original instructions dated 02.02.1993 stood modified by para-4(e)(iii) of the Office Memorandum.

27. As we observed earlier in the present case by the impugned order dated 14.06.2016 the petitioner was required to deposit 15% of the outstanding demand, namely, ` 41.64 crores. This figure attained finality. At the cost of repetition, the Assessing Officer did not refer the matter to the Administrative Pr.CIT for an amount higher than 15% of the amount to be deposited as a condition for stay. This in fact indicates that the last sentence in paragraph 5 of the order dated 14.06.2016 granted the Assessing Officer the right to adjust any refund which may arise in favour of the assessee in respect and to the extent

of the said 15% of the demand only. In any event, even if it entitles the Assessing Officer to adjust any refund against the entire tax demand, it would be contrary to the instructions of the CBDT contained in the Office Memorandum dated 29.02.2016.

28. Lastly, Mr. Putney submitted that the Assessing Officer has unbridled powers under section 220(6) of the Act. However, in view of the circular dated 02.02.1993 as clarified by the circular dated 21.03.1996 and modified by the Office Memorandum dated 29.02.2016 the Assessing Officer's powers have been circumscribed to the extent provided therein.

29. We quite see the force in Mr. Putney's contention that the department must safeguard its interest and that its interest may be jeoparadized if the petitioner is entitled to avail of the refund and at the same time enjoy the benefit of the stay. However, the Department is bound by the circular as modified by the Office Memorandum. Had the circulars/Office Memorandum not been in force, it may have been a different matter altogether.

30. In the circumstances, the writ petition is disposed of by holding that the petitioner shall be entitled to a stay of the demand subject to its depositing the installments as required by the order dated 14.06.2016 and that the future refunds can be adjusted only to the extent of the balance amount directed to be paid as a condition for the stay.

The respondents shall, however, be entitled to withhold the refund(s) upto and including 31.10.2016 to enable them to challenge this order."

24. The aforesaid decision of the Punjab & Haryana High Court, as has been referred to and relied upon by the Bombay High Court in the case of ***Andrew Telecommunications India (P.) Ltd. vs. Principal***

Commissioner of Income-tax, Goa, (2017) 77 taxmann.com 312 (Bombay), wherein the following has been observed;

> *"7. On the contrary, it is submitted by Ms. Asha Desai, the learned Counsel for the respondents that the impugned orders passed by the competent authorities, refusing to grant stay, are passed by the respondents, what she calls to be on the administrative side. It is submitted that the petitioner has filed an appeal, which is pending before the CIT (A) and the petitioner can seek appropriate order of stay in the appeal and in view of this, the petition may not be entertained. The learned Counsel in this regard has pointed out the decision of this Court in the case of Ulhas Jewellers Pvt. Ltd. Vs. PR. Commissioner of Income Tax, Panaji and Another (Writ Petition No. 906/2016 decided on 29.09.2016). It is submitted that the refund, which is said to be due to the petitioner, is under process and that is for a different assessing year and has nothing to do with the impugned demand for the Assessment Year 2012-13.*
>
> *8. We have carefully considered the rival circumstances and the submissions made. The impugned demand is for Rs.16,90,79,380/-. Admittedly, the petitioner has challenged the said demand in an appeal, which is pending before the CIT (A). According to the respondents, the impugned order refusing to grant stay is passed on the administrative side. Be that as it may, the O.M. dated 29.02.2016, to the extent relevant, reads thus:*
>
> *4. In order to streamline the process of grant of stay and standardize the quantum of lump sum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT (A), the following modified guidelines are being issued in partial modification of Instruction No. 1914:*

(A) In a case where the outstanding demand is disputed before CIT (A), the assessing officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in para (B) hereunder:
(B) .....
(C) .....
(D) .....
(E) In granting stay, the Assessing Officer may impose such conditions as he may think fit. He may, inter alia,:

(i) require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled;

(ii) reserve the right to review the order passed after expiry of reasonable period (say 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;

(iii) reserve the right to adjust refunds arising, if any, against the demand, to the extent of the amount required for granting stay and subject to the provisions of Section 245."

9. It can thus be seen that under para 4(A) of the O.M., a case where outstanding demand is disputed before the CIT(A) (as in the present case), the assessing officer shall grant stay of demand, till the disposal of the first appeal on payment of 15% of the disputed demand, unless the case falls in category discussed in para 4(B). It is not in dispute that the present case would not fall in the category as provided in para 4(B) of the O.M. and thus, would be governed by para 4(A).

10. It is further not in dispute that a refund for Rs.12,25,45,340/- is pending before the Principal CIT

for the Assessment Years 2006-07 and 2007-08. It is further undisputed that the said refund is pending since 20.01.2016 (Assessment Year 2006-07) and since 20.04.2016 (Assessment Year 2007-08).

11. It would further appear that para 4(E) contemplates some additional conditions, which may be imposed by the assessing officer, while granting stay, which includes a right to adjust the refund, if any, to the extent of demand required for granting stay and subject to the provisions of Section 245. It was not disputed during the course of the arguments at bar that such a demand can be adjusted against the pending refund for the previous year, if any. The dispute is really about the extent of such adjustment. While it is claimed by the respondents that the entire amount of the refund shall be adjusted as against the impugned demand as a condition for stay, on behalf of the petitioner, it is contended that 15% of the impugned demand may be adjusted, out of the total amount due, which is in excess of Rs. 12 crores. Presently, we are only concerned with the issue of grant of stay of the impugned demand. Considering the overall circumstances and para 4(A) of the O.M., we find that the impugned order can be stayed, subject to an amount of Rs. 2,53,61,907/- (15% of the total demand of Rs. 16,90,79,380/-) being adjusted out of the refund, which is due for the Assessment Years 2006-07 and 2007- 08.

12. Thus, the petition is partly allowed. The impugned communication/order, rejecting the application for stay, is set aside. There shall be interim stay of the impugned demand, pending disposal of the appeal before the CIT (A), on condition of an amount of Rs. 2,53,61,907/-, from out of the refund for the Assessment Years 2006-07 and 2007-08, being retained towards 15% of the amount as stipulated in O.M. Dated 29.02.2016. This shall be subject to the final order that may be passed in the appeal. In the circumstances, there shall be no order as to costs."

25. We may also refer to a decision rendered by this High Court in the case of ***Vodafone India Service P. Ltd. vs. Union of India***, (2020) 113 taxmann.com 120 (Gujarat), wherein the following has been observed;

> *"7. Before adverting to the merits of the case, reference may be made to the provisions of sub-section (6) of section 220 of the Act, which reads thus:*
>
> *"220. When tax payable and when assessee deemed in default-*
>
> *(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."*

26. In the overall view of the matter, we are convinced that the writ applicants have been able to make out a case in their favour.

27. In the result, this writ application succeeds and is hereby allowed. The impugned order dated 12th July, 2019 passed by the respondent No.2, Annexure-A is hereby set aside to the extent it puts a condition of adjustment of future demands arising to the writ applicants. There shall be unconditional stay of demand against the application filed by the writ applicants dated 10th July, 2019 till the

final disposal of the appeal pending before the Income Tax Appellate Tribunal. The intimations dated 22nd July, 2019, Annexure-A1 are also hereby quashed and set aside.

28. In the facts and circumstances of the case, we request the ITAT to take up the ITA appeal No.360/AHD/17 filed by the writ applicants against the final assessment order and dispose of the same within a period of two months from the date of the receipt of the writ of this order.

(J. B. PARDIWALA, J)

(ILESH J. VORA,J)

Vahid