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

% *Date of Decision: 17.03.2025*

\+ **W.P.(C) 10867/2024**

HUAWEI TELECOMMUNICATIONS INDIA COMPANY PRIVATE LIMITED .....Petitioner

Through: Mr Kamal Sawhney, Mr Nikhil Agarwal and Mr Puru Medhira, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CENTRAL CIRCLE 2 & ANR. .....Respondents

Through: Mr Indruj Singh Rai, senior standing counsel with Mr Sanjeev Menon, Mr Gaurav Kumar and Mr Rahul Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

VIBHU BAKHRU, J. (*ORAL*)

1. The petitioner has filed the present petition, *inter alia,* impugning the rectified intimation dated 07.07.2022 [**the impugned intimation**] passed under Section 143(1) of the Income Tax Act, 1961 [**the Act**]. The petitioner, essentially, impugns the action of the Revenue in adjusting the refund of ₹19,37,43,880/- payable to the petitioner for assessment year [**AY**] 2020-21 against the outstanding demands in respect of AY 2016-17, AY 2017-18 and AY 2018-19. The petitioner also claims that the amounts adjusted be refunded along with interest as applicable.

2. A plain reading of the impugned intimation indicates that the Revenue has adjusted a sum of ₹7,12,46,726/- against the demand outstanding in respect of AY 2017-18 and a sum of ₹3,13,20,749/- in respect of AY 2018-19. It is the petitioner's case that, there was an absolute stay of recovery of a demand for the said assessment years being AY 2017-18 and 2018-19; therefore, the refunds due to the petitioner in respect of AY 2020-21 could not be adjusted against the demands for the said assessment years.

3. The learned Income Tax Appellate Tribunal [**ITAT**] had stayed the demand in respect of AY 2017-18 and 2018-19 by an order dated 23.09.2022. The relevant extract of the said order reads as under:

> "6. Considering the aforesaid factual position, we direct the assessee to pay a sum of Rs.10,00,00,000 against the aggregate outstanding demand, as a condition of stay.
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> 7. We further direct, out of the amount of Rs.10,00,00,000 as directed, upfront, the assessee shall pay an amount of Rs.4,36,11,069 within four weeks from the date of this order. The balance amount of Rs.5,63,88,931 shall be paid by assessee after disposal of its rectification application, stated to be pending before the Assessing Officer/TPO, either by way of adjustment of refund, in case, it arises or assessee shall pay it within two weeks from the date of disposal of rectification application. Subject to the above, recovery of the balance outstanding demand shall remain stayed for a period of 180 days or till disposal of the corresponding appeal of the assessee, whichever is earlier."

4. Clearly, in view of the above, the refund due to the petitioner in respect of other assessment years could not be adjusted against the demands that were raised and stayed. Undisputedly, the said issue is covered by the

earlier decisions of this Court in ***Lease Plan India and Anr. v. Deputy Commissioner of Income Tax: Neutral Citation: 2012: DHC:5280-DB***. In the said case, this Court had observed as under:

> "12. It is thus evident that in this case that the actions of the Revenue were violative of the stay order of this Court; they were also contrary to the provisions of Section 245 of the Income Tax Act. The term "recovery" includes adjustment of the refund due to the assessee. Thus, the High Court order which directed that the assessment proceedings "*would not be given effect to without the leave of the court*" translated to a bar on adjustments as well. Furthermore, Section 245 is clear in its mandate regarding the requirement of prior intimation in writing to the assessee whose refunds are being adjusted against amounts payable to the Revenue; the assessee has to be given notice, and heard. The revenue clearly did not follow the provision, and give any notice or hearing before making adjustments, impugned in this case."

5. The question whether any amount of refund could be adjusted against the demands outstanding for AY 2017-18 and AY 2018-19 was considered by this court in *W.P.(C) 10835/2024* captioned *Huawei Telecommunications India Company Private Limited v. Assistant Commissioner of Income Tax Central Circle 2 & Anr.*, decided on 04.12.2024. This court had following the decision in the case of ***Lease Plan India and Anr. v. Deputy Commissioner of Income Tax*** (*supra*), allowed the petition preferred by the petitioner and directed that the amount of refund in respect of AY 2022-23, which was adjusted against the outstanding demands for the AY 2018-19, be refunded to the petitioner.

6. In view of the above, adjustments of the amounts of ₹7,12,46,726/-

and ₹3,13,20,749/- against the outstanding demands for the AY 2017-18 and 2018-19 respectively, are required to be set aside and the said amounts are required to be refunded to the petitioner.

7. In addition to the above, the Revenue had also adjusted an amount of ₹3,02,64,095/- and ₹6,09,12,310/- against the outstanding demand for the AY 2016-17. According to the petitioner, the said refund could not be adjusted in view of the interim orders passed by the learned ITAT. However, this is stoutly disputed by the learned counsel for the Revenue. He submits that the learned ITAT has not passed any blanket order proscribing the Revenue from adjusting the refunds due to the petitioner against outstanding demands for AY 2016-17. He points out that by an order dated 26.11.2021, passed by the learned ITAT in SA 141/DEL/ 2021 in respect of AY 2016-17, it had granted ad interim relief in the following terms:

> "Ld. Counsel for Assessee submitted that on the last date of hearing it was informed to the Hon'ble tribunal that rectification application was pending. He submitted that rectification order has now been passed. However, there are still some issues which would need reconsideration by the Assessing officer. Further, the issues are covered in favour of assessee by the decision of the tribunal. In case these issues, are decided by following the earlier order then in that event no demand will remain. On the contrary ld. DR submitted that the assessee be directed to make payment of atleast 20% of outstanding demand. We have heard the rival submissions. After considering the facts and the submission of both parties we deem it proper to adjourn the stay application to be fixed alongwith ITA appeal and be fixed for hearing on 20/01/2022. In the meantime department is directed not to take any coercive action till the next date of hearing. Copy of

ordersheet be provided to both parties."

(emphasis added)

8. The aforementioned order was, subsequently, extended from time to time. We also consider it apposite to set out the order passed by the learned ITAT on 12.07.2023. The same reads as under:

> "At the outset, learned DR informed the court that ld. CIT(DR), who is to argue this case, is on leave due to medical reasons. Hence, he requested for adjournment of appeal.
>
> Accordingly, on the request of learned DR, the matter is adjourned to 11-Sep-2023 (Monday). In the meantime, the Department is directed not to take any coercive action for recovery of outstanding demand till the next date of hearing i.e. 11/09/2023. Both parties are informed in the open Court."

9. It is submitted by the learned counsel for the Revenue that a distinction needs to be drawn between an order granting complete stay of recovery and an order restraining the Revenue from taking "coercive action". It is the Revenue's case that an order interdicting coercive action for recovery of dues would not impede the Revenue from adjusting the refunds against the outstanding demands, as the same does not amount to coercive action.

10. Mr Sawhney, the learned counsel appearing for the petitioner countered the aforesaid submission. He referred to the decision of the Punjab and Haryana High Court in the case of ***Kulbhushan Goyal v. Union of India and Ors.: 2018 SCC OnLine P&H 103*** and drew the attention to paragraph 7 of the said decision, which is set out below:

> "7. The first question is whether the adjustment of a refund granted amounts to a coercive step. It does. Merely because an amount is lying with the respondents the adjustment thereof by the respondents, makes no difference. The unilateral action of adjustment constitutes a coercive measure as much as any step or action to recover an amount lying with the petitioner or with any other party on behalf of the petitioner."

11. The learned counsel for the Revenue, on the other hand, referred to the decision of a Coordinate Bench of this Court in ***Maruti Suzuki India Limited v. Deputy Commissioner of Income Tax : (2012) 347 ITR 43***. And drew the attention of this court to the following passage from the said decision:

> "17. At the same time, different parameters and requisites may apply when the appellate authority considers the request for stay against coercive measures to recover the demand and when stay of adjustment under Section 245 of the Act is prayed for. In the first case, coercive steps are taken with the idea to compel the assessee to pay up or by issue of garnishee notice to recover the amount. In the second case, money is with the Revenue and is refundable but adjusted towards the demand. Thus, while granting stay, the appellate authority or the ITAT (for that matter, even under Section 220(6)), the authority can direct stay of recovery by coercive methods but may not grant stay of adjustment of refund. However, when an order of stay of recovery in simplistic and absolute terms is passed, it would be improper and inappropriate on the part of the Revenue to recover the demand by way of adjustment. In case of doubt or ambiguity, an application for clarification or vacation/modification of stay to allow adjustment can be, and should be filed. But no attempt should be made and it should not appear that the Revenue has tried to over-reach and circumvent the stay order. Obedience and compliance

> with the stay order in letter and spirit is mandatory. A stay order passed by an appellate/higher authority must be respected. No deviancy or breach should be made."

12. Thus, the principal controversy that needs to be addressed is whether an order restraining the revenue from taking coercive steps for recovery of its demand would include adjustment of refunds against outstanding demands.

13. While the Punjab and Haryana High Court has in unequivocal terms held that an adjustment would amount to coercive proceedings, we note that this Court has drawn a distinction between a blanket stay against recovery of demand and a stay of coercive measures. In ***Maruti Suzuki India Limited v. v. Deputy Commissioner of Income Tax*** (supra), the Division Bench has clearly held that an appellate authority may order stay of recovery in absolute terms. However, it could also direct stay of recovery by coercive methods, but not interdict adjustment of refund against outstanding demands.

14. We are inclined to accept that adjustment of refund against outstanding demand may in some cases amount to a coercive measure as held by the Punjab and Haryana High Court in ***Kulbhushan Goyal v. Union of India and Ors*** (supra). However, as held by this court, it is open for the appellate authority to further specify that the stay order is limited to interdicting other coercive measures for recovery and would not extend to adjustment of refunds. Clearly, in case of ambiguity in this regard, the apposite course for the parties would be to apply to the appellate authority

for a clarification. In the present case, none of the parties have chosen to take the said action.

15. It is also material to note that the application filed by the petitioner before the learned ITAT seeking stay of recovery in respect of AY 2016-17 is pending and has not been decided as yet. This also lends this Court to understand that the interim orders passed by the learned ITAT are, essentially, to interdict the Revenue from taking any steps in the meanwhile.

16. Apart from the above, there is yet another reason why the Revenue's action for adjustment of refund against the outstanding demand for AY 2016-17 is unsustainable. Concededly, the Revenue has not issued any prior notice or intimation under Section 245 of the Act for making any such adjustment. Thus, the mandatory provisions for effecting an adjustment under Section 245 of the Act have not been followed.

17. In ***Vijay Singh Kadan v. Chief Commissioner of Income Tax: (2016) 384 ITR 69***, this Court had not accepted that the Revenue could issue an *ex post facto* notice to cure the said defect. The relevant extract of the said decision is set out below:

> "18. Incidentally the show cause now issued to the Assessee under Section 245 of the Act is dated 21st March 2016, i.e., two months after notice had been issued by this Court in the present petition. Whatever the demand may be for the AYs 2008-09 and 2010-11, the fact remains that prior making the adjustment of such demand against the refund due to the Petitioner, no notice was issued to the Petitioner as mandatorily required under Section 245 of the Act. By issuing a notice on 21st March 2016 under Section 245 of the

> Act, two months after the notice was issued in the present petition, the Revenue cannot seek to correct the fatal error arising from the clear violation of the mandatory requirement under Section 245 of the Act."

18. In ***Kshipra Jatana v. Asstt. Commissioner of Income Tax Circle 63 (1) & Ors.: 2022:DHC:1997-DB***, this Court had, *inter alia*, considered the non-issue of notice under Section 245 of the Act and had directed the Revenue to refund the amount adjusted against outstanding demands to another assessment year.

19. In the given circumstances, we allow the present petition and set aside the action of the Revenue and adjust the refunds due to the petitioner for assessment year 2020-21 against the outstanding demands for the AYs 2016-17, 2017-18 and 2018-19 and direct that the amount of refund determined, be paid to the petitioner along with the applicable interest as expeditiously as possible, and preferably within a period of eight weeks from date.

20. The petition is allowed in the aforesaid terms.

VIBHU BAKHRU, J

TEJAS KARIA, J

MARCH 17, 2025
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Click here to check corrigendum, if any