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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF FEBRUARY 2017

BEFORE

THE HON'BLE MR.JUSTICE RAGHVENDRA S. CHAUHAN

Writ Petition Nos.1339-1342/2017 (T-IT)

Between :

Flipkart India Private Limited
A Company incorporated under the
Companies Act, 1956 and validly existing
under the Companies Act, 2013
Having its office at:
Vaishnavi Summit, No.6/B,
7th Main, 80 Feet Road,
3rd Block, Koramangala Industrial Layout,
Bengaluru-560034,
Through its duly authorized signatory
Mr. R. Rama Chandra. ...Petitioner

(By Sri K. G. Raghavan, Senior Counsel for
Sri Arun Sri Kumar, Advocate)

And :

1. The Assistant Commissioner of Income Tax
Circle 3(1) (1),
BMTC Building, 80 Feet Road,
Koramangala,
Bengaluru-560095.

2. The Principal Commissioner of Income Tax-3
BMTC Building, 80 Feet Road,
Koramangala,
Bengaluru-560095.

3. The Commissioner of Income Tax (Appeals)-3
BMTC Building, 80 Feet Road,
Koramangala,
Bengaluru-560095. ...Respondents

(By Sri K. V. Aravind, Advocate)

These Writ Petitions are filed under Articles 226 & 227 of the Constitution of India praying to directions in the nature of certiorari or any other writ, order or direction of like nature to declare the impugned Orders dated 23.11.2016 passed by the Respondent No.1 and the impugned Order in review dated 04.01.2017 passed by the respondent No.2 as null and void and hold it to be contrary to the provisions of the Act and / or call for, examine the records in relation to and quash the impugned Orders being illegal and arbitrary.

These Writ Petitions coming on for preliminary hearing in `B' group this day, the Court made the following :

ORDER

The petitioner has challenged the order dated 23.11.2016 (Annexure-A), passed by the Assistant Commissioner of Income Tax, whereby the learned Assistant Commissioner has refused to stay the collection of demand for the Assessment Year 2014-15, and has directed the petitioner to deposit 15% of the disputed demand, amounting to Rs.3,37,11,514/- by 5.12.2016. The petitioner has also challenged another order, also dated 23.11.2016 (Annexure-B), whereby again the learned Assistant Commissioner has refused to stay the collection of demand for the Assessment Year 2015-16, and has directed the petitioner to deposit 15% of the disputed demand, amounting to Rs.22,92,02,561/- by 5.12.2016. Lastly, the petitioner has challenged the order dated 25.1.2016,

whereby the Prl.Commissioner of Income Tax (`Prl. CIT' for short), has confirmed the order dated 23.11.2016, passed by the Assistant Commissioner, and has directed the petitioner to deposit 15% of the total disputed demand amount within one month from the date of receipt of the order.

2. Briefly the facts of the case are that the petitioner is a Private Limited Company, incorporated under the Companies Act, 1956. The petitioner entered the E-Commerce sector; it is engaged *inter alia* in the business of wholesale distribution of books, mobiles, media, computers, gaming consoles, and other related accessories. The petitioner submitted its Income Tax Return on 1.10.2014, for the Assessment Year 2014-15, wherein it declared a loss of Rs.3,58,81,84,343/-. According to the petitioner, in order to enter the E-commerce sector, and in order to secure a market, the petitioner is selling the goods at prices lower than the purchase price. Thus, ever since the beginning of its business in the year 2011, it has been suffering losses for the Assessment Years 2012-13, 2013-14, 2014-15, and also for the Assessment Year 2015-16.

3. On 28.10.2016, the petitioner's Income Tax Return for the Assessment Year 2014-15 was selected for scrutiny under Section 143(2) of the Income Tax Act, 1961 (`Act' for short). Meanwhile, for the Assessment Year 2015-16, the petitioner filed its Income Tax Return on 10.9.2015, wherein it had declared that again it suffered a loss of Rs.7,96,34,36,865/-. On 28.10.2016, two separate assessments orders were passed, namely for the Assessment Year 2014-15, and 2015-16. For the Assessment Years 2014-15, an amount of Rs.5,01,86,62,282/- was added, whereas, for the Assessment Year 2015-16, an amount of Rs.12,04,67,98,537/- was added. The balance tax payable by the petitioner was determined to be Rs.28,94,96,028/- for the Assessment Year 2014-15, and Rs.1,36,99,99,033/- for the Assessment Year 2015-16. The petitioner was directed to deposit the said amount within a period of thirty days.

4. Challenging both the Assessment Orders, the petitioner filed Appeals before the Commissioner of Income Tax (Appeals) (`CIT (A)' for short). Moreover, while filing the appeals, it filed two separate applications before the learned

Assistant Commissioner for keeping the demand in abeyance. However, by two orders, dated 23.11.2016, the respondent No.1, the learned Assistant Commissioner directed the petitioner to deposit 15% of the disputed demand amounting to Rs.3,37,11,514/- for the Assessment Year 2014-15, and to deposit Rs.22,92,02,561/- for the Assessment Year 2015-16.

5. Since the petitioner was aggrieved by both the orders dated 23.11.2016, directing it to deposit 15% of the disputed demand amount, it filed two Review Petitions before the Prl. CIT, respondent No.2. However, by orders dated 28.11.2016 and 25.1.2017, the Prl. CIT has rejected the petitioner's Review Petitions, and has confirmed the order dated 23.11.2016. Hence these petitions before this Court.

6. Mr. K. G. Raghavan, the learned Senior Counsel for the petitioner, has raised the following contentions :-

Firstly, although Section 246 of the Act, and Section 246A of the Act deal with appelable orders, neither of the sections impose any liability upon the assessee for depositing any amount before filing the appeals. The issue with regard to

the amount to be deposited, and the power to stay the demand for depositing, was dealt with by the Circular Instruction No.1914, dated 2.2.1993 (`Circular No.1914' for short). The Circular No.1914 deals with "*Collection and Recovery of the Income Tax*". Instruction No.2-B of Circular No.1914 also deals with the "*Stay Petitions*", which could be filed before the Assessing Officer, while an appeal is to be filed before the Appellate Authority. Instruction No.2-C of Circular No.1914 deals with the "*Guidelines for staying the demand*". According to the learned Senior Counsel, a decision in the matter of stay of demand shall normally be taken by the Assessing Officer, who is the immediate superior. However, a higher superior authority is empowered to interfere with the decision of the Assessing Officer in certain extraneous circumstances, namely if the assessment order appears to be "*unreasonably highpitched*", or "*where genuine hardship is likely to be caused to the assessee*". Moreover, according to Instruction No.2-C of Circular No.1914, certain guidelines have been provided by the said Circular, which clearly demarcate the circumstances in which the stay can be granted.

Secondly, the Circular No.1914 was partially modified by the Circular dated 29.2.2016. However, the Circular No.1914 was never superceded, in toto, by the subsequent Circular dated 29.2.2016. The partial modification merely relates to streamlining the process of granting stay, and for standardising the quantum of lumpsum payment required to be made by the assessee as a pre-condition for stay of disputed demand before the CIT (A). Furthermore, according to the learned Senior Counsel, while Instruction No.4(A) in Circular dated 29.2.2016 seems to prescribe the minimum percentage that would be required to be deposited by the assessee as 15% of the disputed demand, but Instruction Nos.4(B)(a), and 4(B)(b) sufficient discretionary power to either ask for a higher amount than 15%, or a lower amount than 15%, respectively. The discretion is bestowed upon the Assessing Officer. But, in case the Assessing Officer were to demand less than 15%, he is required to seek the permission from the Prl. CIT. Moreover, according to Instruction No.4(C) of the said Circular, in case the assessee is aggrieved by the fact that the Assessing Officer has stayed the demand of 15% of the disputed demand should

be deposited, but the assessee is still aggrieved, then the assessee would be free to approach the Prl. CIT for reviewing the decision of the Assessing Officer.

Thirdly, in the present case, by order dated 23.11.2016, the Assessing Officer had directed the petitioner to deposit 15% of the disputed demand amount for the Assessment Year 2014-15, and for the Assessment Year 2015-16, despite the request of the petitioner that less than 15% of the disputed demand amount should be required from the petitioner. Since the petitioner was aggrieved by both the orders dated 23.11.2016, the petitioner had approached the Prl. CIT. However, without examining the inter-relationship between Circular No.1914, and the Circular dated 29.2.2016, the Prl. CIT has dismissed the petition filed by the petitioner. According to the learned Senior Counsel, although the process for granting of stay was streamlined, and standardized by Circular dated 29.2.2016, but it could not mean that Instruction No.2-B(iii) contained in Circular No.1914, namely dealing with the situation of "*unreasonably highpitched*", or dealing with the situation of "*genuine hardship caused to the*

assessee", was erased by the Circular dated 29.2.2016. Therefore, both these factors should have been considered by both, the Assessing Officer, as well as by the Prl. CIT.

Fourthly, in the orders dated 23.11.2016, the Assessing Officer has opined that "*no case of hardship exist*", the said opinion is merely a conclusion, which unsupported by any reason. Therefore, this part of the impugned orders dated 23.11.2016 is a non-speaking order.

Lastly, even the order dated 25.1.2017 is legally unsustainable. For, the learned Prl. CIT has failed to see the inter-relationship between the two Circulars mentioned above. Further, the learned Prl. CIT has relied upon a judgment of this Court in the case of ***M/s.Teleradiology Solutions Pvt. Ltd., v. DCIT Circle-12(4) & Others*** *(Writ Petition NO.26370/2015, decided by this Court on 18.04.2016).* But, the said judgment does not deal with the issue which was raised before the Prl. CIT. Hence, the impugned orders deserve to be interfered with by this Court.

7. On the other hand, Mr. K. V. Aravind, the learned counsel for the Revenue, has pleaded that the Circular dated 29.2.2016 had superceded the Circular No.1914 in toto, as it was later in time, and a new procedure was prescribed for streamlining the process of granting of stay. According to him, the assessee would be entitled to deposit less than 15% of the disputed demand amount, provided "*where addition on the same issue has been deleted by the Appellate Authorities in earlier years, or the decision of the Hon'ble Supreme Court, or of the jurisdictional High Court, was in favour of the assessee*". According to the learned counsel, the petitioner's case does not fall in either of these two categories.

Secondly, Instruction No.4(A) of the Circular No.1914 prescribes, as a general rule, that 15% of the disputed demand amount has to be deposited by an assessee. Therefore, both the Assessing Officer, and the Prl. CIT were justified in directing the petitioner to deposit 15% of the disputed demand amount.

Thirdly, the petitioner is running a business concern. It has neither made out any case that it is facing hardship, nor

revealed any circumstance which would impose a hardship upon the petitioner, in case it were to be asked to deposit 15% of the disputed demand amount. Thus, the learned counsel has supported the three impugned orders.

8. Heard the learned counsel for the parties, perused the impugned orders, and considered the Circular No.1914, and the Circular dated 29.2.2016.

9. Undoubtedly, the present case raises the issue of balancing the interest of the Revenue, and the interest of an assessee. Needless to say, the Revenue does have the right to realise the assessed income tax amount from the assessee. However, while trying to realise the said amount, the Revenue cannot be permitted, and has not been permitted by the Circulars mentioned above, to act like a Shylock. It is precisely to balance the conflicting interests that certain guidelines have been prescribed by Circular No.1914, and Circular dated 29.2.2016.

10. The Circular dated 29.2.2016 clearly states that the circular is "*in partial modification of Instruction No.1914*".

Therefore, the Circular dated 29.2.2016 does not supersede the Circular No.1914 in toto, but merely "*partially modifies*" the instructions contained in Circular No.1914.

11. A comparative perusal of both the Circulars clearly reveal that Circular No.1914 deals with collection and recovery of the income tax, broadly divided into four parts: firstly responsibility of the collection and recovery; secondly, the stay petitions; thirdly, the guidelines for staying the demand; fourthly, the miscellaneous provisions. In the second part, namely the part dealing with the stay petitions, the relevant portion of said part, marked as Instruction No.2-B(iii) is as under :

> " ***2-B (iii) :-*** *The decision in the matter of stay of demand should normally be taken by Assessing Officer/TRO and his immediate superior. A higher superior authority should interfere with the decision of the AO/TRO only in exceptional circumstances e.g. where the assessment order appears to be unreasonably highpitched or where genuine hardship is likely to be caused to the assessee. The higher authorities should discourage the assessee from filing review petitions*

before them as a matter of routine or in a frivolous manner to gain time for withholding payment of taxes."

12. The third part, marked as `2-C', deals with "*Guidelines for staying the demand*". This part stipulates the conditions under which the demand can be stayed; it also deals with certain conditions which the Assessing Officer is free to impose upon the assessee.

13. However, interestingly, the Circular No.1914 does not standardize the quantum of lumpsum payment required to be made by the assessee, as a pre-condition of stay of disputed demand before CIT (A). Since the Circular No.1914 is silent on this aspect, the vacuum has been filled up by Circular dated 29.2.2016. The relevant extract of Circular dated 29.2.2016 is as under :

> ***" 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) 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.) or,*
>
> *(b) 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 lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.), the assessing officer shall refer the matter to the administrative Pr.CIT/CIT, who after considering all 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 demand.

(C) In a case where stay of demand is granted by the assessing officer on payment of 15% of the disputed demand and the assessee is still aggrieved, he may approach the jurisdictional administrative Pr.CIT/CIT for a review of the decision of the assessing officer.

(D) The assessing officer shall dispose of a stay petition within 2 weeks of filing of the petition. If a reference has been made to Pr.CIT/CIT under para 4 (B) above or a review petition has been filed by the assessee under para 4 (C) above, the same

shall also be disposed of by the Pr.CIT/CIT within 2 weeks of the assessing officer making such reference or the assessee filing such review, as the case may be.

(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 review the order passed after expiry of reasonable period (say 6 months) or if the assessee has not co-operated 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."*

14. Instruction No.4 uses the words "*partial modification of Instruction No.1914*". Thus, obviously Circular dated 29.2.2016 has left Instruction No.2-B(iii) contained in Circular No.1914 absolutely untouched. In fact, Circular dated 29.2.2016 merely prescribed the percentage of the disputed demand that needs to be deposited by the assessee.

15. According to Instruction No.4(A) of Circular dated 29.2.2016, it is a general rule, that 15% of the disputed demand should be asked to be deposited. But, according to Instruction No.4(B)(a) of the Circular dated 29.2.2016, the demand can be increased to more than 15%; according to Instruction No.4(B)(b) of the Circular dated 29.2.2016, the percentage can be lower than 15%, provided the permission of the Prl. CIT is sought by the Assessing Officer. However, in case the Assessing Officer does not seek the permission from the Prl.CIT, and in case the assessee is aggrieved by the demand of 15% to be deposited, the assessee is free to independently approach the Prl. CIT. The assessee would be

free to request the Prl. CIT to make the percentage of disputed demand amount to be less than 15%.

16. It is true that Instruction No.4 (B)(b) of the Circular dated 29.2.2016, gives two instances where less than 15% can be asked to be deposited. However, it is equally true that the factors, which were directed to be kept in mind both by the Assessing Officer, and by the higher superior authority, contained in Instruction No.2-B(iii) of Circular No.1914, still continue to exist. For, as noted above, the said part of Circular No.1914 has been left untouched by the Circular dated 29.2.2016. Therefore, while dealing with an application filed by an assessee, both the Assessing Officer, and the Prl. CIT, are required to see if the assessee's case would fall under Instruction No.2-B(iii) of Circular No.1914, or not? Both the Assessing Officer, and the Prl. CIT, are required to examine whether the assessment is "*unreasonably highpitched*", or whether the demand for depositing 15% of the disputed demand amount "*would lead to a genuine hardship being caused to the assessee*" or not?

17. A bare perusal of the two orders, both dated 23.11.2016, Annexures-`A' and `B', clearly reveal that the Assessing Officer has relied upon Instruction No.4(B)(b) of the Circular dated 29.2.2016, and has concluded that since the petitioner's case does not fall within the two illustrations given therein, therefore, it is not entitled to seek the relief that less than 15% should be demanded to be deposited by it. Moreover, the Assessing Officer has jumped to the conclusion that the petitioner's finances do not indicate any hardship in this case. However, the Assessing Officer has not given a single reason for drawing the said conclusion. Since the petitioner has been constantly claiming that it has suffered loss from the very inception of its business. from 2011 to 2016, the least that the Assessing Officer was required to do was to elaborately discuss as to whether "*genuine hardship*" would be caused to the petitioner in case the petitioner were directed to pay 15% of the disputed demand amount or not? Yet the Assessing Officer has failed to do so. Therefore, this part of the order, naturally, suffers from being a non-speaking order. Hence, the said orders are legally unsustainable.

18. A bare perusal of the order dated 25.1.2017 also reveals that the Prl. CIT has failed to appreciate the co-relation between Circular No.1914, and Circular dated 29.2.2016. The Prl. CIT has failed to notice the fact that the latter Circular has only "*partially modified*" the former Circular, and has not totally superceded it. The Prl. CIT has also ignored the fact that Instruction No.2-B(iii) contained in Circular No.1914 continues to exist independently of and in spite of the Circular dated 29.2.2016. Therefore, it has failed to consider the issue whether the assessment orders suffers from being "*unreasonably highpitched*", or whether "*any genuine hardship would be caused to the assessee*" in case the assessee were required to deposit 15% of the disputed demand amount or not? Thus, the Prl. CIT has failed to apply the two important factors mentioned in Circular No.1914.

19. Most curiously, the Prl. CIT has relied upon the case of ***M/s.Teleradiology Solutions Pvt. Ltd.,*** *(supra)*, without realizing that the issue whether an assessee can be directed to pay 15% of the disputed demand amount, and under what circumstances he can be so directed, and under what

circumstances less than 15% of the disputed demand amount could be asked for, these issues were not even involved in the case of ***M/s.Teleradiology Solutions Pvt. Ltd.,(supra).*** Despite the fact that totally different issues were raised in the said case, the Prl. CIT has blindly applied the order passed in the said case to the present case. Considering the fact that this blind appreciation of a precedent is a frequent occurrence, in catena of cases, the Hon'ble Supreme Court has clearly opined that a judgment should not be read as a provision of law. A judgment is confined to the facts and circumstances of its own case. It is only when the facts and circumstances in two cases are similar that the ratio of the former case becomes applicable to the latter case. But without realizing this aspect of rule of *stare decisis,* the Prl. CIT has erred in applying the reasons given in ***M/s.Teleradiology Solutions Pvt. Ltd.,(supra)***. Therefore, even the impugned order dated 25.1.2017 is legally unsustainable.

20. Mr. K. G. Raghavan, the learned Senior Counsel for the petitioner, has also pleaded before this Court that another anxiety and the pain of the petitioner is that, despite the fact

that appeals have been filed against the Assessment Order dealing with Assessment Year 2012-13, and 2013-14, they are still pending before respondent No.3; the respondent No.3 is yet to decide the appeals. The learned Senior Counsel submits that the issues in the said appeals are similar to the issues that have been raised by the petitioner in the present appeals, *vis-à-vis*, Assessment Year 2014-15, and 2015-16. Since the legal issues are the same, since the appeals of the subsequent assessment years can easily be decided if the appeals of the previous assessment years were to be decided, the learned Senior Counsel seeks directions from this Court to respondent No.3 to decide the appeals of the Assessment Year 2012-13, and 2013-14, within a limited time frame.

21. To this request made by the learned Senior Counsel, the learned counsel for the Revenue submits that respondent No.3 is over-burdened with large number of appeals to be decided. Therefore, a limited time frame should not be imposed upon the respondent No.3 by this Court. Therefore, the

learned counsel opposes the prayer made by the learned Senior Counsel.

22. Needless to say, appeals cannot be kept in an animated suspension over a long period of time. Keeping any appeal pending will adversely affect not only the interest of the assessee, but also adversely affects the interest of the Revenue, and, therefore, of the nation at large. Thus, it will be in the interest of justice if the appeals filed by the petitioner for the Assessment Year 2012-13, and 2013-14 were to be decided as expeditiously as possible by respondent No.3.

23. For the reasons stated above, this Writ Petition is, hereby, ***allowed.*** The twin orders dated 23.11.2016, and the order dated 25.1.2017, are set aside. The case is remanded back to the Prl. CIT to again decide the Review Petitions filed by the petitioner. The Prl. CIT is further directed to decide the Review Petition within a period of two weeks from the date of receipt of the certified copy of this order.

The Revenue is directed not to take any coercive action against the petitioner as long as the matter is pending before the Prl. CIT.

Sd/-
JUDGE

*bk/-