

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH
MUMBAI**

**BEFORE: SHRI B.R.BASKARAN, ACCOUNTANT MEMBER
&
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**SA No.52/Mum/2023
(Arising out of ITA No.2378/Mum/2022
(Assessment Year :2019-20)**

M/s. eBay Singapore Services Pvt. Ltd. 1, Temasek Avenue #14-01, Millenia Tower Singapore – 039192	Vs.	Deputy Commissioner of Income Tax (International Taxation) Mumbai
PAN/GIR No.AAECE0650P		
(Appellant)	..	(Respondent)

Assessee by	Shri Porus Kaka & Shri Manish Kanth
Revenue by	Shri Anil Sant
Date of Hearing	07/07/2023
Date of Pronouncement	07/07/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

In this case the applicant assessee has been assessed for short term capital gain on sale of shares in Flipkart Ltd. of Rs.2257,91,95,035/-. On the said addition as well as after other adjustments, the rectified demand was raised on total income at Rs.1031,46,82,967/-.

2. The applicant assessee had filed application for stay of demand before the ld. AO on 24/08/2022 and then on 05/09/2022, wherein the ld. AO passed an order dated 21/09/2022 requiring the assessee to pay 20% of the outstanding demand on 22/09/2022. The case of the assessee was that assessee has already paid Rs.261.27 Crores by way of TDS which was more than 20% of the disputed tax liability. However, the ld. AO directed the assessee to pay 20% of the net demand. Aggrieved by the said order, assessee filed stay application before this Tribunal on 27/09/2022 in SA No.122/Mum/2022. Before the Tribunal it was pleaded that, assessee has already paid more than 20% of the disputed tax liability by way of TDS and AO ought to have stayed the balance disputed demand. The Tribunal accepting the assessee's plea remitted the matter to the file of the ld. AO after observing and holding as under:-

*“4” We are of the considered view that once the Assessing Officer takes a view that in terms of the CBDT instructions, 20% of demand is to be paid by the assessee and the balance demand can, by implication, be stayed during the pendency of the first appeal, **such a computation of 20% has to be with respect to total disputed demand, and not with respect to the outstanding demand specified under section 156.** We, therefore, deem it fit and proper to remit the matter to the file of the Assessing Officer, for the limited purposes of verification whether 20% of the disputed demand is paid, and if so, pass an appropriate order granting the stay to the assessee on such conditions as deemed appropriate. However, if for whatever reasons, the Assessing Officer passes an order, on the stay petition, which is adverse to the assessee, the Assessing Officer shall not take any coercive action against the assessee for two weeks from the service of such order, so as not to pre-empt the*

remedial measures that the assessee may seek to pursue against the same. In the meantime, with the consent of the parties, the related appeal is fixed for hearing on 16th November 2022. The parties are directed to ensure that the necessary paper books etc are filed in time so as to ensure expeditious disposal of this appeal on the scheduled date of hearing.

3. Thus, the Tribunal has categorically directed the AO that such a computation of 20% has to be with respect to total disputed demand, and not with respect to the outstanding demand specified under section 156 and remitted the matter to the AO for verification, whether 20% of the disputed demand has been paid and if so pass an appropriate order granting stay to the assessee.

4. The Id. AO in his order giving effect in clear violation of the direction of the Tribunal stay order directed the assessee to pay the entire outstanding demand of Rs. 1031,46,82,967/-. Thus, AO exceeded his jurisdiction and in his order dated 13/10/2022, he stated that the disputed demand which is Rs.1031.47 Crores is the net payable demand after allowing credit for prepaid taxes being TDS of Rs.261.37 Crores and not the gross demand.

5. Aggrieved by the aforesaid order of the Id. AO, the applicant assessee filed second stay application before the Tribunal on 18/10/2022 and this Tribunal vide order dated 21/10/2022 again directed the Id. AO in the following manner:-

3. From the perusal of the earlier stay order dated 03/10/2022, it is very clear that the matter was remitted to the Id. AO only for the limited purpose of verification of condition of 20% tax

*payment. Considering the facts and circumstances of the case we are inclined to grant stay subject to the condition that assessee deposits not less than 20% of the amount of tax, interest, fee, penalty or any other sum payable under provisions of the Act or furnishes security of equal amount in respect thereof in accordance with the provisions of Section 254(24) of the Act **The Id. AO is hereby directed to comply with the earlier directions of the Tribunal and examine the compliance to Section 254(2A) of the Act.***

6. The Id. AO despite having given direction twice by the Tribunal, directed the assessee to pay 20% of the outstanding demand of Rs. 1031,46,82,967/- which comes to Rs.206,29,36,589/- without considering the TDS paid by the assessee, by 06/03/2023. Aggrieved by the action of the Id. AO, assessee filed a writ petition before the Hon'ble Bombay High Court and the Hon'ble Bombay High Court vide order dated 29/03/2023 had admitted the writ petition and had issued notice to the department. However, it would be relevant to note the following observations of the Hon'ble High Court.

“The order of assessment dated 25th July, 2022 was passed against the Petitioner based upon which the Assessing Officer (A.O.) calculated the aggregate income tax liability of the Petitioner at Rs. 12,84,27,68,322/- including interest. However, after considering the prepaid taxes including the TDS, self assessment tax, advance tax etc., the outstanding demand payable was calculated at Rs. 10,31,46,82,946/-. An appeal came to be preferred by the Petitioner against the order of assessment which was filed before the Income Tax Appellate Tribunal ("TTAT") on 19 September, 2022.

2. It is stated that as per Instruction No 1914 dated 21 March, 1996 and the office memorandum dated 29 February, 2016 and circulars issued thereafter, the Petitioner was required to deposit 20% of the disputed tax demand. The A.O. however required the Petitioner to deposit 20% of the outstanding tax

demand, instead of 20% of the disputed tax demand Being aggrieved of the order passed by the A.O., the Petitioner invoked inherent power of the Tribunal under Section 254 of the Act. The Tribunal by virtue of its order dated 03 October, 2022 held that the 20% demand for purposes of staying the operation of the order of assessment was to be calculated in regard to the total disputed demand and not with respect to the outstanding demand specified under Section 156 of the Act. It is pertinent to mention that in terms of the notice of demand under Section 156 of the Act, the amount calculated was Rs. 10,31,46,82,950/-.

3. The A.O., however, despite the orders of the Tribunal, passed an order dated 13th October, 2022, wherein instead of following the order of the Tribunal, required the Petitioner to deposit the entire demand of Rs.10,31,46,82,946/- on the ground that the CBDT Circular was not applicable in the case of the Petitioner. Aggrieved of the said order, the Petitioner yet again approached the Tribunal which finally passed an order on 21 October, 2022, whereby the A.O, was directed to comply with the earlier directions of the Tribunal. While passing such an order the Tribunal also stayed the demand raised by the A.O.

Pursuant to the orders of the Tribunal, the A.O. yet again has passed an order dated 28th February, 2023, wherein it quantified the outstanding demand at Rs. 10,31,46,82,946/- and calculated Rs.206,29,36,589/- as the amount payable reflecting 20% of the said amount

4. Mr. Kaka, learned Counsel for the Petitioner states that the A.O. has yet again committed an error in determining the amount reflecting 20% of the disputed tax amount on the ground that the calculation was based upon a figure which is in fact the outstanding tax demand, whereas it ought to have been on the basis of the total tax demand. By resorting to a method of calculation as per the order of the Tribunal, the amount of tax deducted at source would be more than the 20% of the disputed tax amount, which was otherwise payable in terms of the circular mentioned above and Section 254 of the Act. Prima facie case is made out.

5. Issue notice. Service waived by Mr. Kumar, learned Counsel

for the Respondents. Objections be filed within six weeks from today.

6. List on 07 June, 2023.

7. Till the next date, the order impugned in the present writ petition shall remain stayed. The pendency of the present writ petition however would not prevent the Appellate Authority from deciding the appeal filed by the Appellant/Petitioner.

7. Now before us ld. Sr. Counsel, Shri Porus Kaka submitted that, now in view of the *first proviso* to Section 254(2A), time limit for grant of stay by the ITAT is 180 days which expires on 18/04/2023. He also informed that in the meantime, the appeal filed before the Tribunal in ITA No.2378/Mum/2022 was fixed for hearing on various occasions, i.e. 16/11/2022, 12/01/2023 and 05/04/2023 and in all these dates, the department sought adjournment on the ground that Special Counsel has been appointed and one who was appointed has resigned and they are searching for another Special Counsel. This Tribunal in regular hearing of the appeal vide interim order dated 28/06/2023 had made the following observations:-

“The matter was listed yesterday for hearing, Ld. CIT DR sought for adjournment on the ground that earlier Special Counsel appointed by the department has resigned and now new Special Counsel is being appointed. A Comment from the A.O. has sought for and matter was fixed for today. A letter from office of CIT Judicial/Division has been filed wherein department has requested for a short adjournment for 15 days. Since, it is stay Granted matter several adjournments has been sought by the department on the same grounds, therefore as a last opportunity, hearing is adjourned to 16.08.2023 on the consent of both the parties.”

8. The entire controversy revolves in the present case, whether 20% of the demand for the purpose of staying the balance demand should be calculated with regard to total disputed demand or in respect to outstanding demand specified u/s.156 of the Act. What is contemplated in Section 156 is the working of the demand in accordance with the Act after adjustments. It says “*when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand in the prescribed form*”. Such demand notice would be issued after adjustments of various demands / refunds, self-assessment, TDS, etc. **Proviso to Section 254A** empowers the Tribunal that after considering the merits of application made by the assessee may pass an order of stay **in any proceedings relating to appeal filed u/s. 253(1)** for a period not exceeding 180 days from the date of such order subject to condition that assessee deposits not less than 20% of the amount of tax, interest, fee, penalty or any other sum payable under the **provisions of this Act** or furnishes security of equal amount in respect thereof. Here in this case appeal before the Tribunal has been filed on disputed addition of short term capital gain, where the entire sum of capital gain has been challenged before this Tribunal. There is no admitted tax liability on capital gains. The assessee is aggrieved by this addition alone, on which demand has been created, which is to be reckoned here as ‘disputed demand’ and not ‘outstanding demand’. Once the appeal has been filed u/s.253(1) on an addition which has been challenged, then

demand on that addition alone the Tribunal has power to grant stay or can grant stay on merits and also further directing the assessee to pay 20% of the tax, interest, etc. The 'outstanding demand' may comprise of various components which assessee may not have even challenged or would be a result of various adjustments. Whereas, the disputed demand has to be seen qua the addition which has been disputed before this Tribunal on which the appeal has been filed u/s. 253(1). Here in this case, the assessee has deposited TDS on such capital gain but the entire addition was challenged before the ld. AO as well as before this Tribunal. Such TDS amount undisputedly is more than 20% of the demand as worked out by the ld. AO in his computation of demand relating to this addition. Accordingly, there cannot be any doubt of misinterpretation that 20% has to be reckoned with the disputed demand and precisely for this reason Tribunal has clearly directed the AO twice as mentioned above. Despite such direction, the ld. AO has blatantly ignored the directions and instead asked the assessee to firstly pay the entire demand which is outstanding and then second time 20% of the demand of the whole outstanding demand as worked out by him post credit of TDS. Such an action of the ld. AO is not correct and accordingly, balance disputed demand is hereby stayed;

- *firstly*, for the reason that there is no fault on the part of the assessee to conduct the appeals and it is the department who is been seeking adjournment time and again as noted above; and

- Secondly, already stay was granted by this Tribunal looking to the prima facie case on earlier occasions which has been misinterpreted by the ld. AO.

Accordingly, the stay is granted for the balance demand for a further period of six months or till passing of the order whichever is earlier.

9. In the result, stay application is allowed.

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated 07/07/2023
KARUNA, sr.ps

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai