IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI'G' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)
And Saktijit Dey(Judicial Member)]

ITA No. 6849/Mum/18
Assessment year: 2009-10

Sale Mohd Padamsee & Co **……Appellant**
22/29 Padamsee Apartment, Union Park
Pali Hill Road, Khar (West)
4th floor, Parmar Gallery
Mumbai 400 052 [PAN: ABVFS7235F]

Vs

Principal Commissioner of Income Tax- 25
Mumbai **……Respondent**

Appearances by
None *for the appellant*
V Vinod Kumar *for the respondent*

Date of concluding the hearing : September 12 and 17,2019
Date of pronouncement of the order : October 11, 2019

O R D E R

Per Pramod Kumar, VP:

1. This appeal, filed by the assessee, challenges correctness of the order dated 16th November 2018 passed by the Principal Commissioner of Income Tax- 25, Mumbai, said to be under section 220(6) of the Income Tax Act, 1961 and in respect of the assessment year 2009-10, on the following grounds:

> **1. On the facts and in the circumstances of the case and in law the Ld. Pr. CIT-25 Mumbai was not justified in rejecting the stay petition filed before him and directing the appellant to pay 20% of the demand as per Circular No. 1914 r.w. on dt. 29-02-2016. The order rejecting the stay application be set aside.**

2. On the facts and in the circumstances of the case and in law the Ld. Pr. CIT-25, Mumbai while rejecting the application of the assessee filed before him but defying the Hon'ble Bombay High Court judgment in the case of Bhupendra Murji Shah v. Dy. CIT & Ors 170 DTR (Bom) 423 copy of which was submitted before him. The Ld. Pr. CIT-25 Mumbai failed to follow the binding dictum of the jurisdictional High Court judgment. The order of Pr. CIT passed under S. 220(6) be set aside.

3. On the facts and in the circumstances of the case and in law the Ld. Pr. CIT-25, Mumbai also failed to take cognizance of another dictum of the Hon'ble Bombay High Court reported as Nu-Tech Corporate Services Ltd. v. ITO (2018) 171 DTR (Bom) 201. The order of the Pr. CIT be set aside.

2. When this appeal came up for hearing before us on 12th September 2019, our attention was invited to learned counsel's application arguing for adjournment on the ground that he is "required to attend High Court hearing at Aurangabad bench". On a perusal of this application, and on a quick look at the appeal papers, we considered it appropriate to hear the parties on maintainability of the appeal first. It was also explained to the counsel, appearing before us to seek the adjournment, that we have our serious reservations on whether this appeal is maintainable at all. It was in this backdrop that the assessee was put to notice as to why this appeal not be dismissed as non-maintainable, and was asked to address us on the maintainability of appeal first. With the consent of the parties, the hearing was adjourned to 17th September 2019. The record of proceedings, for 12th September 2019, reads as follows:

The assessee is required to show cause as to why the appeal not be dismissed as not maintainable. Adjourned to 17/09/2019. Both parties informed.

Sd/xx ***Sd/xx***
JM **VP**

3. On this rescheduled date of hearing, none appeared for the assessee. There was, however, yet another letter from the learned counsel, which, *inter alia*, as follows:

1. **In this case, the appellant has made a request to refer the matter to special bench in view of divergent opinions of two co-ordinate benches of the Hon'ble Tribunal…….**

2. **The application for early hearing filed and kept for hearing on 17-09-2019, after adjournment, be disposed off accordingly.**

4. There was, thus, not even a whisper of an argument on the maintainability of the appeal. All that has been pointed out to us is a request for reference to the special bench. We have perused the contents of the said application and the judicial precedents therein, heard the learned Departmental Representative and duly considered facts of the case in the light of applicable legal position. The operative portion of the content of application for reference to special bench is as follows:

> **The request for constitution of a Special Bench/Larger Bench to decide the contentions issue arising from the order of ITAT 'G' Bench-Mumbai under S. 255 of the Act. The question arising where Regular Bench Hon'ble ITAT Delhi Bench in the case of Employees Provident Fund Organization v. Addl. CIT (2015) 172 TTJ (Del) 140 decided on 10th April 2015 concluding that the order passed by Ld. CIT(A) rejecting stay petitions being an order under S. 250, appeal is clearly maintainable under Cl. (a) of sub S. (1) of 253 against the impugned order.**
>
> **2) The Hon'ble ITAT Lucknow Bench in the case of Rajya Krishi Utpadan Mandi Parishad v. ITO (II)(2) Lauknow in reported as (2015) 57 taxmann.com3 (Lucknow -Trib) similar issue arose before the Regular Bench-Luknow Bench. There was difference of opinion between Hon'ble J. M. and Hon'ble A. M. on the Bench. The Hon'ble J, M. rendered his verdict in favour of the appellant therein while Hon'ble A. M. held against the assessee therein.**
>
> **3) In view of difference of opinion between the Hon'ble Members the reference was made to Hon'ble Third member under section 255(4) of the Act.**
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> **4) The Hon'ble Third Member concurred with the Hon'ble A. M. and held against the assessee holding that the said appeal was not maintainable.**
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> **5) In the instant case also currently the Hon'ble H Bench, Mumbai ITA No. 1763/Mum/19 in the case of M/s Sale Mohammed Padamsee & Co. 22/29 Union Park, Padamsee Apartment Pali Hill Road, Knar (West) Mumbai 400052 for A. Y. 2009-10 is hearing the appeal of the assessee on the identical question of law. The appellant in the instant appeal was given to understand that the 'opinion' of the Hon'ble Third Member (supra) is binding on them and therefore, the appellant's appeal is liable to be dismissed.**
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> **6) The decision of the ITAT Lucknow Bench in Rajya Krishi Utpadan Mandi Parishad (supra) is dt. April 22, 2014 while favourable judgment of Hon'bie Delhi bench (supra) is dt. 10th April 2015 that is after the pronouncement by the Hon'ble Third Member in which this judgment of the Hon'ble Delhi Bench (supra) was noticed.**

5. It is interesting to note that the appeal before us is an appeal against the order passed by the Principal Commissioner of Income Tax said to be under section 220(6) of the Act, and all the judicial precedents, referred to in the petition above, are in the context of the orders passed by the Commissioner of Income Tax (Appeals) under section 250(6) of the Act. In the case of **Employees Provident Fund Organization**

Vs Addl CIT [(2015) 153 ITD 642 (Del)] relied upon by the learned counsel specifically notes that "**having held that the Commissioner of Income Tax (Appeals) has passed the order under Section 250 of the Act, in our considered opinion, the appeal is clearly maintainable under clause (a) of sub-section (1) of Section 253 of the Act**". Clearly, this decision will have no application in the present context when the order is passed by the learned Principal Commissioner of Income Tax, at best under section 220(6)- as the impugned order states in so many words and which, to the best of our limited knowledge of law, is not an appealable order before this Tribunal. Of course, we were keen have the benefit of guidance from the learned counsel so that we could enlighten ourselves with his perspectives on the issue but this opportunity was simply brushed aside. In contrast with this factual position of this case, the situation dealt with in the said judicial precedent was pertaining to an order passed by the learned Commissioner of Income Tax (Appeals) under section 250(6) which is specifically appealable under section 253(1)(a). As regards the Third Member decision in the case of **Rajya Krishi Utpadan Mandi Parishad Vs Income Tax Officer [(2015) 153 ITD TM 101 (Lucknow)]**, referred to by the learned counsel, that also a case in which the question before the Tribunal was, as noted with the learned Third Member, "**the main crux of issue relates to, whether in the absence of any appeal, the Tribunal has any jurisdiction to entertain the appeal of the assessee against the order passed by ld. CIT(A) on the application of the assessee for stay of recovery of demand when the appeal was pending before the first appellate authority but no appeal was pending before the Tribunal**". That is not the issue in this appeal. The issue in appeal is whether an order passed by the Principal Commissioner of Income Tax, declining the stay on collection of demand, can be appealed against before this Tribunal. None of the decisions cited by the learned counsel have anything to do with the appeal before us. We see no merits, not even *prima facie* merits, in the stand of the assessee or in the request of the assessee for constitution of a special bench.

6. Section 253(1) and (2), explaining the kind of orders against which appeals can be filed before this Tribunal and as it stood at the relevant point of time, is as follows:

> ***Appeals to the Appellate Tribunal.***
>
> *(1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order—*
>
> > *(a) an order passed by a Deputy Commissioner (Appeals)before the 1st day of October, 1998or, as the case may be, a Commissioner (Appeals) under section 154, section 250, section 270A,section 271, section 271A, section 271Jor section 272A; or*

(b) an order passed by an Assessing Officer under clause (c) of section 158BC, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995, but before the 1st day of January, 1997; or

(ba) an order passed by an Assessing Officer under sub-section (1) of section 115VZC; or

(c) an order passed by a Principal Commissioner or Commissioner under section 12AAor under clause (vi) of sub-section (5) of section 80G orunder section 263or under section 270A, or under section 271or under section 272Aor an order passed by him under section 154 amending his order under section 263or an order passed by a Principal Chief Commissioner or Chief Commissioner or a Principal Director General or] Director General or a Principal Director or Director under section 272A;

(d) an order passed by an Assessing Officer under sub-section (3), of section 143 or section 147 or section 153A or section 153Cin pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order;

(e) an order passed by an Assessing Officer under sub-section (3) of section 143 or section 147 or section 153A or section 153C with the approval of the Principal Commissioner or Commissioner as referred to in sub-section (12) of section 144BA or an order passed under section 154 or section 155 in respect of such order;

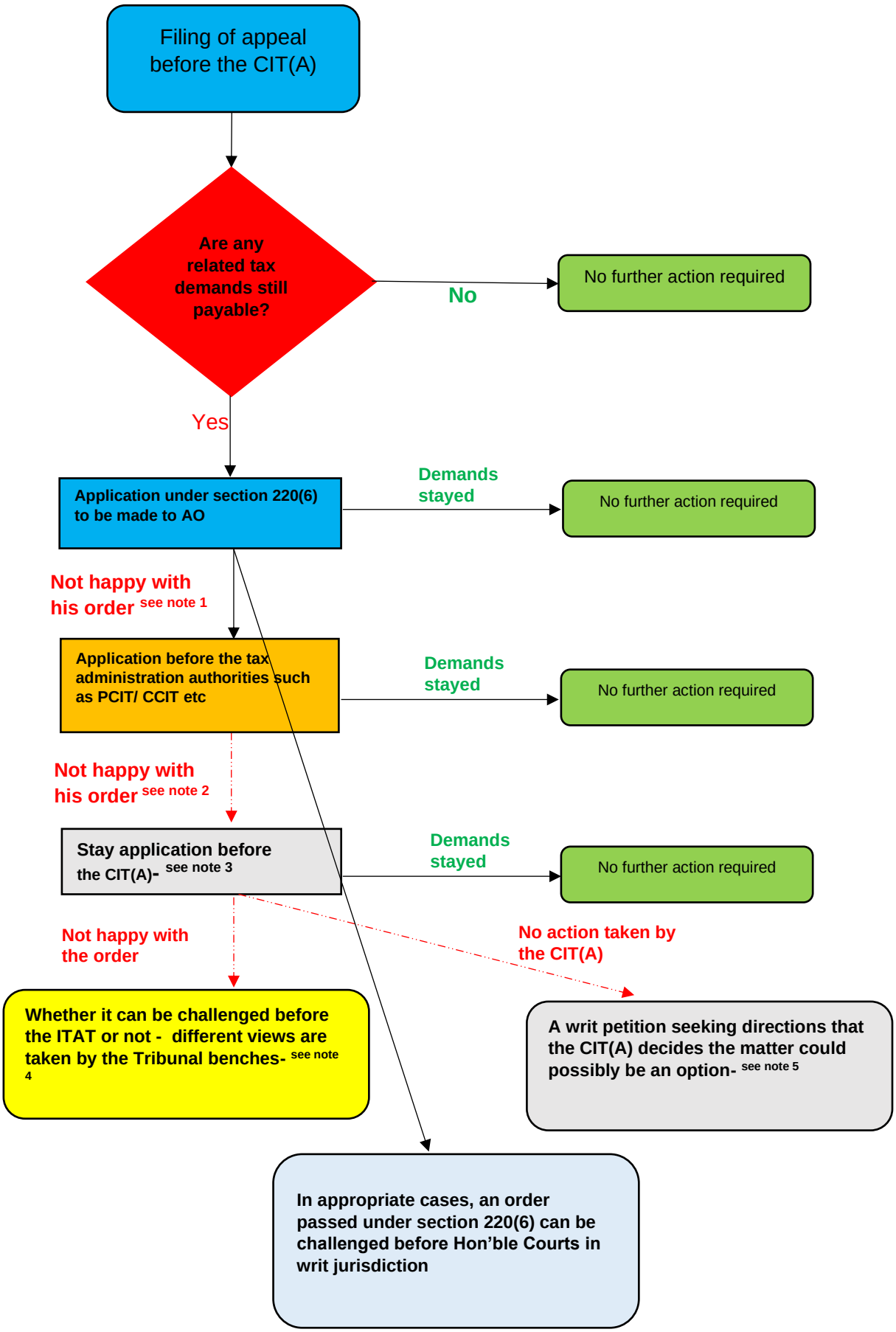
(f) an order passed by the prescribed authority under sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10.

(2) The Principal Commissioner or] Commissioner may, if he objects to any order passed by a Deputy Commissioner (Appeals)before the 1st day of October, 1998or, as the case may be, a Commissioner (Appeals) under section 154 or section 250, direct the Assessing Officer to appeal to the Appellate Tribunal against the order.

7. Obviously, there is no mention about orders passed under section 220(6) in the list of orders which can be appealed against before the Tribunal, and the right to appeal has to be a specific right conferred by the statue; such a right cannot be assumed or inferred. In our humble understanding, therefore, the orders passed under section 220(6) cannot be appealed against before this Tribunal. The present appeal is, therefore, not a maintainable appeal before us. In any event, the orders under section 220(6) can only be passed by the Assessing Officer, and not by a Principal Commissioner of Income Tax. Section 220(6), as it stood at the relevant point of time, is as follows:

> **Where an assessee has presented an appeal under section 246or section 246A 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.**

9. Recognizing the fact that Section 220(6) deals only with the powers of the Assessing Officer, for grant of stay during the pendency of first appeal, and contrasting the same with the powers of the Tribunal, Hon'ble Supreme Court, in the case of **ITO Vs M K Mohd Kunhi [(1969) 71 ITR 815 (SC)]**, had observed that, "*Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction.* ***This is particularly so when section 220(6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that when section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory****".* The question of stay application before the Tribunal thus normally comes into play only when the demands in question are impugned in appeal before us. That apart, the stay under section 220(6) can only be granted by the Assessing Officer, and not by his supervisory authorities such as the Principal Commissioner of Income Tax. As a matter of fact, an order passed by the Principal Commissioner of Income Tax, declining grant of stay during the currency of appeal before the first appellate authority i.e. CIT(A), is only an administrative order. The occasion to seek invocation of such an administrative indulgence comes after the Assessing Officer declines to exercise his powers of granting stay under section 220(6), and, perhaps for this reason, it is somewhat inappropriately described as an order under section 220(6). Such an order is not an appealable order before this Tribunal; the law does not provide so. Taking all these discussions, as also the scheme of the Act, into account, if we are to draw a flowchart in respect of the remedies available for stay on collection/ recovery of demands impugned in first appeal [i.e. before the CIT(A)], it will be something like this:


Filing of appeal before the CIT(A)
Are any related tax demands still payable?
No
No further action required
Yes
Application under section 220(6) to be made to AO
Demands stayed
No further action required
Not happy with his order see note 1
Application before the tax administration authorities such as PCIT/ CCIT etc
Demands stayed
No further action required
Not happy with his order see note 2
Stay application before the CIT(A)- see note 3
Demands stayed
No further action required
Not happy with the order
No action taken by the CIT(A)
Whether it can be challenged before the ITAT or not - different views are taken by the Tribunal benches- see note 4
A writ petition seeking directions that the CIT(A) decides the matter could possibly be an option- see note 5
In appropriate cases, an order passed under section 220(6) can be challenged before Hon'ble Courts in writ jurisdiction

Note 1: As for approaching the jurisdictional administrative exercise is concerned, it is a purely administrative exercise to exhaust the remedies before the lower authorities but then the order under section 220(6) can directly be challenged before the Hon'ble High Court in writ jurisdiction.

Note 2: It is only when the administrative remedies are exhausted, the assessee usually challenge the orders passed by the statutory authorities before the Hon'ble High Court in writ jurisdiction.

Note 3: The law does not specifically prescribe an appeal against the order, declining the stay by the AO and his superiors, before the CIT(A). There are, however, certain judicial precedents, beginning with Paulson Litho Works Vs ITO (208 ITR 676) which hold that the CIT(A) has the powers, and the corresponding duty, to grant stay in respect of demands which are impugned in appeal before him.

Note 4: There are Tribunal decisions, taking contrary stand, on the issue in the cases of Employees Provident Fund (supra) and Rajya Krishi Utpadan Samiti (supra), which is what the learned counsel, in his note, has referred but then these are the situations in which the stay filed before the CIT(A) has been disposed of, and the assessee is not happy with the order so passed.

Note 5: In a situation in which the CIT(A) does not take a call on the stay petition before him, and keeps it pending, one could possibly, relying upon the judicial precedents holding that the CIT(A) has the powers of granting the stay in appropriate cases, approach Hon'ble Court seeking directions for disposal of the stay petition.

9. The only possibility of the Tribunal coming into picture, so far as the stay of demands during the pendency of first appeal before the CIT(A), is in a situation in which the CIT(A) rejects the stay petition filed by the assessee. That proposition too is highly contentious, to say the minimum, but let's not bother about that hypothetical situation as on now. What is shown in the yellow boxes and the red dotted lines, in the flow chart given above, is the situation in which there is a controversy on the question whether the remedy against denial of stay by the CIT(A), in the absence of the Tribunal being *in seisin* of the matter in appeal, can be challenged before the Tribunal, besides the basic question whether the CIT(A) has the powers, at all, to grant the stay on collection or recovery of demands impugned in appeal before him. That, however, is not the controversy before us as it is the action of the PCIT, and not the CIT(A), which is in challenge before us. As for the stand taken by the PCIT, or, for that purpose, the Assessing Officer, the stand so taken cannot be assailed in appeal before us. As evident from the above flow chart, once the administrative remedies for stay on collection/ recovery are pursued, the outcome of such remedies cannot be challenged before this Tribunal. The remedy of such an administrative action, if at all, is with the Hon'ble Courts above in writ jurisdiction. If at all, therefore, such an administrative order has a relevance, so far as this Tribunal is concerned, it is only in the context of examining whether an applicant for stay, in respect of tax demands impugned in appeal before us, has exhausted all the remedies before lower forums. That is not the situation before us as on now.

10. In view of these discussions, as also bearing in mind entirety of the case, we are of the considered view that the present appeal is not an appeal maintainable before this Tribunal. Not only that the appeal is ill conceived, but, even after pointing out the legal position, rather than explaining his stand or expressing remorse for having filed this appeal, the assessee did not even bother to attend the court proceedings any further, and submitted this note pointing out, on the basis of, what appears to be, fallacious logic, as to why special bench is required to be constituted in this case. Such an approach cannot meet any judicial approval, including by this forum. We deprecate this kind of an approach.

11. In the result, the appeal is dismissed with costs of Rs 10,000. Pronounced in the open court today on the 11th day of October, 2019

Sd/xx *Sd/xx*

Saktijit Dey Pramod Kumar

(Judicial Member) (Vice-President)

Mumbai, dated the 11th day of October, 2019

Copies to: *(1) The appellant (2) The respondent*
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai