

## AO can't ask for the pre-deposit for stay of demand without examining the facts and circumstances of the case

**Summary – The High Court of Madras in a recent case of Uthangarai Sri Vidya Mandir Educational and Social Welfare Trust., (the Assessee) held that where during pendency of appellate proceedings, Assessing officer directed assessee to remit 20 per cent of tax demand in order to allow its stay application without examining appropriateness of facts and circumstances of assessee's case, impugned order passed by him was to be set aside**

### Facts

- The assessee was a trust that managed a school, affiliated to the State Metriculation Board. Assessments under section 153A was made, pursuant to search and seizure action under section 132.
- The assessee filed appeal before the Commissioner (Appeals), challenging assessment order and the same was pending. In the meanwhile, the assessee also filed an application seeking a stay of recovery of the disputed demand.
- The Assessing Officer passed an order under section 220(6) calling upon the assessee to remit 20 per cent of the disputed demand of tax as a pre-condition for the grant of stay of recovery.
- On writ:

### Held

- Normally the Court would not interfere with the exercise of discretion by the Assessing Officer in the grant of stay of recovery, unless such exercise is shown to be perverse or excessive.
- The Assessing Officer is, while adjudicating upon a request for stay of recovery, is required to test the existence of a *prima facie* case, financial stringency and the balance of convenience in the matter and the Assessing Officer has, in this matter, proceeded to do so.
- The respondent in the writ petition, proceeds on the basis that the payment of 20 per cent of the tax, as per Office Instruction dated 31-7-2017, is a pre-condition for consideration of stay of demand and therein lies the flaw in the order. In the case of **Mrs. Kannammal v. Income Tax Officer** (W.P.No.3849 of 2019 dated 13-02-2019) the Court discussed various Circulars/Instructions issued by the Department on the matter of grant of stay, concluding that the grant of stay is conditional upon the satisfaction of three primary aspects, *i.e.*, the existence of a *prima facie* case, financial stringency demonstrated and established by the assessee and the balance of convenience in the matter. Thus, the Office Instruction directing the Assessing Authority to call upon the assessee to remit 20 per cent of the disputed tax, is, at best, only a thumb rule and not a mandatory pre-condition.

- In the present case, the officer proceeds mechanically in calling upon the assessee to remit 20 per cent of the demand without examining the appropriateness of the direction to the facts and circumstances of the assessee's case. For this sole reason, the impugned order has to be set aside.
- The writ petition is disposed of accordingly.