IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.06.2015

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

W.P.No.15959 of 2015

M/s Kalapet Primary Agricultural Co-op.
Credit Society Ltd., P-96
rep.by its Administrator, Sri A.Irysappan
Son of Sri M.Adhimulam
Kalapet Post
Pondicherry 605 014 .. Petitioner

-vs-

1. Income Tax Officer
Ward-4
Pondicherry

2. Commissioner of Income Tax (Appeals)-15
121, Mahatma Gandhi Road
Nungambakkam
Chennai 600 034 .. Respondents

Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus, calling for the records in PAN:AAAAK1570G dated 18.05.2015 relating to assessment year 2009-10 on the file of the first respondent and quash the same and further forbearing the first respondent from initiating or continuing with any proceedings for recovery of the disputed demand pursuant to the order of assessment in P.A.No./G.I.R.No.AAAAK1570G dated 10.03.2015 relating to assessment year 2009-10 passed by the first respondent.

For Petitioner :: Dr.Anita Sumanth

For Respondents :: Mr.T.Pramod Kumar Chopda
Senior Standing Counsel

ORDER

This writ petition has been directed against the impugned order dated 18.05.2015 passed by the first respondent-Income Tax Officer, Ward-4, Pondicherry in PAN:AAAAK1570G relating to the assessment year 2009-10, to quash the same with a further direction to forbear the first respondent from initiating or continuing with any proceedings for recovery of the disputed demand pursuant to the order of assessment in P.A.No./G.I.R.No.AAAAK1570G dated 10.03.2015 relating to the assessment year 2009-10.

2. Dr.Anita Sumanth, learned counsel for the petitioner submitted that the petitioner, being a primary agricultural cooperative credit society, maintains regular books of accounts and has been filing the returns of income regularly in terms of the provisions of the Income Tax Act within the statutory period, hence, assessments were also completed by the department with the co-operation of the petitioner. While so, when the petitioner filed the return of income claiming deduction under Section 80P of the Income Tax Act for the assessment year 2009-10, the claim of the petitioner was rejected holding that the petitioner did not satisfy the definition of 'agricultural credit society' set out in terms of the Explanation to Section 80P(4) of the Act. Yet another grievance of the petitioner is that when the impugned assessment order dated 10.3.2015 was passed under Section 143(3) effecting disallowance of Rs.91,92,883/- under Section 40(a)(ia) for the alleged violation of Section 194A and Rs.3,20,686/- and Rs.27,500/- as disallowances under Section 40(a)(ia) for the alleged violation of Section 194H and Section 194J of the Act, the order of re-assessment under Section 143 (3) read with Section 147 erroneously resulted in the determination of the income of the petitioner at Rs.1,28,87,139/- and the tax payable thereon at Rs.59,79,550/-. Aggrieved by the same, an appeal has been filed before the second respondent-Commissioner of Income Tax (Appeals), Chennai and the said appeal is pending after issuance of notice dated 4.2.2015. In this background, the grievance of the petitioner is that when the petitioner is a primary agricultural credit society and comes under the exclusion of Section 194A(viia), the disallowance brought under Section 40(a)(ia) is wholly unfounded. In any event the issue raised in the present writ petition has been decided in favour of the assessee by the jurisdictional bench of the Income Tax Appellate Tribunal 'D' Bench, Chennai in I.T.A.No.197/Mds/2013 dated 11.2.2014 (Income Tax Officer, Ward-II (3), Coimbatore v. M/s Veerakeralam Primary Agricultural Cooperative Credit Society, Coimbatore) in respect of the very same assessment year, therefore, the assessing authority cannot pass the assessment order nor refuse to grant stay during the pendency of the appeal, for the simple reason that when the petitioner, aggrieved by the impugned order of reassessment dated 10.3.2015, has preferred an appeal before the Commissioner of Income Tax (Appeals), Chennai and along with the appeal, when the petitioner has filed a petition before the assessing authority, the first respondent herein under Section 220(6) of the Income Tax Act on 15.4.2015 for being treated as 'not in default' during the pendency of appeal before the appellate authority, the assessing authority arbitrarily passed an order directing the petitioner to pay 50% of the demand raised for the assessment year 2009-10 as preliminary measure even before the disposal of the stay petition. Such an approach is a clear violation of the procedure and also running contrary to the issue decided in favour of the assessee by the jurisdictional Bench of the Tribunal as mentioned supra.

3. Continuing her arguments, Dr.Anitha Sumanth contended that in spite of bringing to the notice of the assessing authority that the petitioner is falling within the exclusion of Section 194A(vii)(a) being a primary agricultural credit society and the issue has been decided in favour of the assessee by the jurisdictional bench of the Tribunal in I.T.A.No.197/Mds/2013 dated 11.2.2014, more particularly, that the petitioner society does not have the resources to make any portion of the demand raised, the assessing authority has neither considered the same nor followed the instructions of the Central Board of Direct Taxes in File No.404/10/2009-ITCC dated 1.12.2009 affirming Instruction No.1914 dated 2.12.93, which mandates that stay of recovery is liable to be granted if the issue covered by orders of the superior authority, directly applicable to the present case. In support of her submissions, she also brought to the notice of this Court the various decisions of the Income Tax Appellate Tribunal, Panaji and Chennai Benches in (1) I.T.A.Nos.1 to 3/PNJ/2012 dated 30.3.2012 (Deputy Commissioner of Income Tax, Central Cirlce, Panaji, Goa v. M/s Jayalakshmi Mahila Vividodeshagala); (2) in I.T.A.No.174/Mds/2013 dated 23.8.2013 (Income Tax Officer v. Kasipalayam Primary Agricultural Co-operative Bank Ltd.) and (3) in I.T.A.No.197/Mds/2013 dated 11.2.2014 (Income Tax Officer v. M/s Veerakeralam Primary Agricultural Cooperative Credit Society), for the proposition that if the assessee is admittedly not a credit cooperative bank, but a credit cooperative society, the exclusion clause of sub-section (4) of Section 80P, therefore, would not apply.

4. Taking support from the above decisions, it was contended that when the petitioner had filed an appeal against the assessment order and the same is also pending consideration before the appellate authority, in the meanwhile, as against the demand of entire tax by the first respondent, a petition for stay was moved before the first respondent-assessing officer seeking to grant an order of stay of recovery till such time the appeal is finally heard and disposed of by the appellate authority. However, by a communication dated 20.4.2015, the petitioner was informed that the stay petition would be taken up only subject to the payment of 50% of the tax demand at once or on a proposal for making the payment of demand in installments. It was also further informed that in case of failure to respond to the said communication within a week, the stay petition would be treated as rejected and necessary coercive measures would be taken to recover the entire demand. The learned counsel further submitted that aggrieved by the demand of 50% tax as a condition precedent even for consideration of the stay petition, the petitioner again approached the second respondent-appellate authority seeking an absolute stay of the recovery proceedings pending appeal. When the appeal/stay petition has been pending consideration before the second respondent-appellate authority, the first respondent has wrongly rejected the stay petition by order dated 18.5.2015 directing the petitioner to pay the demand at once. On this basis, the learned

counsel sought the indulgence of this Court for an appropriate direction to the appellate authority to decide the appeal on merits, as otherwise irreparable loss would be caused to the petitioner.

5. On the other hand, Mr.T.Pramod Kumar Chopda, learned senior standing counsel for the respondents submitted that the writ petition cannot be entertained for the simple reason that when the order dated 18.5.2015 passed by the first respondent is explicitly clear that a mere pendency of the appeal would not be a ground for the petitioner to escape from the payment of the disputed liability, it is not open to the petitioner to bypass the pending appeal to maintain the present writ petition. The learned senior standing counsel also submitted that if at all the petitioner wants an early disposal of the matter, a direction may be issued to the second respondent-appellate authority to take up the stay petition and dispose of the same on merits expeditiously.

6. Replying to the said submission, the learned counsel for the petitioner requested this Court to direct the second respondent-appellate authority to take up the appeal itself in I.T.A.No.327/CIT (A)PDY/2013-14 for final hearing on merits expeditiously, as the petitioner had already received the notice dated 4.2.2015 fixing the date of hearing on 16.2.2015, since adjourned to subsequent date.

7. Heard the learned counsel on either side.

8. The circular issued by the Central Board of Direct Taxes in File No.404/10/2009-ITCC dated 1.12.2009 affirming Instruction No.1914 dated 2.12.93 clearly enlightens the duty, responsibility and the guidelines cast on the assessing authority for staying demand. In this context, it is appropriate to extract the relevant portions of the Instruction No.1914 dated 2.12.93, as follows:-

> ''A. Responsibility
> (i) It shall be the responsibility of the Assessing Officers and the TRO to collect every demand that has been raised, except the following:
> (a) Demand which has not fallen due;
> (b) Demand which has been stayed by a Court or ITAT or Settlement Commission;
> (c) Demand for which a proper proposal for write off has been submitted;
> (d) Demand stayed in accordance with paras B & C below.
> .....
>
> B. Stay petitions
> (i) Stay petitions filed with the Assessing Officers must be disposed of within two weeks of the filing of petition by the taxpayer. The assessee must be intimated of the decision

without delay.

(ii) Where stay petitions are made to the authorities higher than the Assessing Officer (DC/CIT/CC), it is the responsibility of the higher authorities to dispose of the petitions without any delay, and in any event within two weeks of the receipt of the petition. Such a decision should be communicated to the assessee and the Assessing Officer immediately.

(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 assesee. 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.

C. Guidelines for staying demand

(i) A demand will be stayed only if there are valid reasons for doing so. Mere filing an appeal against the assessment order will not be sufficient reason to stay the recovery of demand. A few illustrative situations where stay could be granted are--

(a) If the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or Court earlier; or

(b) if the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under whose jurisdiction the Assessing Officer is working); or

(c) If the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment.

....."

9. A careful reading of the above guidelines clearly shows that it shall be the duty of the assessing authority to collect every demand which has not fallen due or has been stayed by a Court or Tribunal etc. It appears that the jurisdictional Income Tax Appellate Tribunal 'D' Bench in I.T.A.No.197/Mds/2013 dated 11.2.2014 (Income Tax Officer, Ward-II(3), Coimbatore v. M/s Veerakeralam

Primary Agricultural Cooperative Credit Society, Coimbatore), while dealing with a similar issue, placing reliance on the judgment of the Gujarat High Court in the case of Commissioner of Income Tax v. Jatari Momin Vikas Cooperative Credit Society Ltd., 2014 (2) TMI 28, has held as follows:-

> ''7. From the above clarification, it can be gathered that sub-section (4) of Section 80P will not apply to an assessee which is not a co-operative bank. In the case clarified by CBDT, Delhi Coop Urban Thrift & Credit Society Ltd., was under consideration. Circular clarified that the said entity not being a cooperative bank, section 80P(4) of the Act would not apply to it. In view of such clarification, we cannot entertain the Revenue's contention that section 80P(4) would exclude not only the co-operative banks other than those fulfilling the description contained therein but also credit societies, which are not cooperative banks. In the present case, respondent assessee is admittedly not a credit cooperative bank but a credit cooperative society. Exclusion clause of sub-section (4) of Section 80P, therefore, would not apply. In the result, Tax Appeals are dismissed.
>
> The Revenue has tried to establish that the assessee although a credit cooperative society is carrying on banking business and is thus not eligible. In our opinion, the assessee is not a cooperative bank...''

10. The above observation, prima facie, brings the case of the petitioner under the guidelines-C(i)(a) for staying demand, which says that if the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or Court earlier, the demand will be stayed. While the issue appears to be clear, this Court does not find any justification why the assessing authority has not considered the guidelines under the Instruction No.1914 dated 2.12.93. Moreover, it is well settled legal position that all authorities, civil, criminal and judicial, coming within the territory of the High Court, shall act in the aid of the High Court. While so, the assessing authority is bound by the order passed by the jurisdictional Tribunal without taking any stand that the Tribunal or High Courts of other States are taking a different view.

11. Be that as it may, when the appeal has been filed by the petitioner before the appellate authority along with stay petition, keeping in mind that any further observation would have a cascading effect on the pending appeal of the petitioner, with all hesitation, is restraining to express anything on the merits, therefore, in the fitness of things, this Court, accepting the request made by the

learned counsel for the petitioner for a direction to dispose of the main appeal itself, as the petitioner had received the notice dated 4.2.2015, hereby directs the second respondent-appellate authority to dispose of the appeal in I.T.A.No.327/CIT(A)PDY/2013-14 on its own merits within a period of three months from the date of receipt of a copy of this order. Needless to mention that till then, the first respondent shall not proceed with the recovery, as it is well settled law that during the pendency of the appeal before the appellate authority, the department is not entitled to initiate the recovery proceedings. With the above direction, the writ petition stands disposed of. Consequently, M.P.No.1 of 2015 is closed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Income Tax Officer
   Ward-4
   Pondicherry

2. The Commissioner of Income Tax (Appeals)-15
   121, Mahatma Gandhi Road
   Nungambakkam
   Chennai 600 034

+1 cc to Mr.T.PramodKumar Chopda sr.26998
+1 cc to Dr.AnitaSumanth Sr.no.26847

rv(co)
aa13/07/2015