IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.21769 of 2015
Date of decision:17.11.2015

M/s Perfetti Van Melle India Private Limited

……Appellant

Vs.

Deputy Commissioner of Income Tax and another

…..Respondents

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Nageshwara Rao, Advocate with
Mr. Sandeep Goyal, Advocate for the appellant.

Mr. Tejinder K.Joshi, Advocate for the revenue.

Ajay Kumar Mittal, J.

1. The petitioner prays for quashing the order dated dated 28.9.2015, Annexure P.8 passed by the Commissioner of Income Tax (Appeals) [CIT(A)], respondent No.2 on the stay application dated 8.5.2015, Annexure P.6/A for the assessment year 2008-09. Prayer has also been made for quashing the recovery proceedings. Further, direction has been sought to CIT(A) to dispose of the appeal of the petitioner expeditiously.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner is a company duly incorporated under the provisions of the Companies Act,

1956. It is engaged in the business of manufacturing and sale of confectionary products from its factories situated at Tamil Nadu, Haryana and Uttarakhand. For the assessment year 2008-09 i.e. the financial year 2007-08, the petitioner filed its return of income on 29.9.2008 declaring income of ₹ 13,00,68,080/-. The case was selected for scrutiny and notices under Section 143(2) and 142(1) of the Act were issued by the first respondent to the petitioner. During the assessment proceedings, it was noticed by the Assessing Officer that the petitioner had made international transactions with its associate enterprise and made a reference to the Transfer Pricing Officer (TPO) under Section 92 CA(1) of the Income Tax Act, 1961 (in short, "the Act") for determination of Arm's length price in respect of the international transactions. The petitioner filed its objections before the TPO. The TPO passed order dated 5.10.2011, Annexure P.1 determining the Arm's Length price of the international transactions at ₹ 117,99,66,691/- and directed respondent No.1 to make an adjustment to the total income of the petitioner by ₹ 117,99,66,691/-. On receipt of the order dated 5.10.2011 passed by the TPO, respondent No.1 passed draft assessment order dated 27.12.2011 re-computing the total income of the petitioner at ₹ 131,00,34,771/- and consequently raised a demand of ₹ 64,53,77,009/-. The petitioner submitted its objections before the Dispute Resolution Panel (DRP). Vide order dated 21.9.2012, the DPR rejected the objections and directed respondent No.1 to complete the assessment proceedings in terms of the direction in the order passed by it. In pursuance to the order dated 21.9.2012, respondent No.1 passed final assessment order dated 8.11.2012, Annexure P.2 assessing the petitioner company to the total income of ₹ 131,00,34,771/- and created demand of ₹ 64,53,77,009/-. The petitioner filed appeal before the Tribunal being ITA No.5897/Del/2012. It also filed an application for staying the outstanding demand of ₹ 64,53,77,009/-. In the meantime, same issue regarding transfer pricing adjustment in relation to advertisement, marketing and sales promotion came before the Tribunal in the case of M/s L.G.Electronics India Pvt. Limited vs. The Assistant Commissioner of Income Tax. The President of the Tribunal constituted Special Bench referring two legal questions for adjudication. However, in the meantime, the Tribunal vide order dated 30.11.2012 decided the stay application and stayed 50% of the outstanding demand upto six months or disposal of appeal whichever was earlier subject to the payment of balance 50% of the demand in six equal monthly isntalments, first to be payable on 28.12.2012. In compliance with the said order, the petitioner deposited the monthly installment on 28.12.2012 and then on 28.1.2013 In the meantime, on 23.1.2013, the Special Bench of the Tribunal passed judgment in the case of M/s L.G.Electronics India Pvt. Limited. It was held by majority that the adjustment in relation to Advertisement and Market Promotion (AMP) expenses and earning a mark up from associated enterprise was permissible. Consequently, the matter in that case was restored back to the TPO for de novo adjudication on the basis of guidelines given in the order. Thereafter, the petitioner filed writ petition before this court to stay the remaining instalments to be paid till the disposal of the main appeal. This court directed the petitioner to pay 50% of the demand as per the order of the Tribunal to avail the benefit of stay. The petitioner paid the remaining instalments towards 50% of the demand raised i.e. ₹ 32,26,88,505/-. The petitioner's appeal was also heard by the Tribunal and it vide order dated 18.10.2013, Annexure P.3 remanded the matter back to the file of TPO for deciding the same in view of its decision in ***M/s LG Electronics***' case (supra). Aggrieved thereby, the petitioner filed appeal before this court which is still pending. In the meantime on 16.3.2015, the Delhi High Court passed order on the issue of advertising and marketing expenses. It rejected the application of 'Bright Line Test' as a method to compute the adjustment related to AMP. Respondent No.1 passed revised final assessment order dated 30.3.2015, Annexure P.4 creating a demand of ₹ 29,79,66,020/- but did not refer the matter to the TPO. According to the petitioner, respondent No.1 failed to give effect to the demand already paid in protest amounting to ₹ 32,66,88,505/-. The petitioner filed rectification application under section 154 of the Act. The petitioner also filed civil miscellaneous application before this court seeking stay against coercive steps by respondent No.1 against the demand raised in pursuance to the notice dated 31.3.2015. This court while disposing of the application vide order dated 27.4.2015, Annexure P.5 directed the petitioner to file an appeal and application of interim relief before respondent No.2. This court also directed respondent No.1 not to take any steps for recovery of demand for a period of two weeks after the decision on the stay application before respondent No.2. Accordingly, the petitioner filed the appeal and stay application before respondent No.2. In the rectification application filed by the petitioner, respondent No.1 passed order dated 18.8.2015 under section 154 of the Act re-computing the total demand amounting to ₹ 46,23,25,903/-. After giving credit for the amount already deposited, net outstanding demand was determined at ₹ 13,96,37,398/-. Respondent No.1 also issued a notice of demand dated 18.8.2015 for the outstanding demand payable. Respondent No.2 while rejecting the petitioner's request for stay on recovery of balance disputed demand passed order dated 28.9.2015, Annexure P.8 directing the petitioner to pay the entire balance outstanding demand of ₹ 13,96,37,398/- in following equalized instalments as under:-

"Ist instalment	₹ 3,50,00,000/- to be paid on 15.10.2015
2nd instalment	₹ 3,50,00,000/- to be paid on 15.11.2015
3rd instalment	₹ 3,50,00,000/- to be paid on 15.12.2015
4th instalment	Balance outstanding demand to be paid on 15.1.2016."

Hence the instant writ petition.

3. In the reply filed on behalf of the respondents in court today, it has been inter alia stated that respondent No.2 passed a detailed and reasoned order and allowed the petitioner to pay outstanding income tax in four installments starting from 15.10.2015 to 15.1.2016. There was no reason to stay the recovery of the remaining outstanding amount. The TPO passed an order under section 92CA of the Act proposing an adjustment of ₹ 117,99,66,691/- on account of excess advertisement and marketing expenditure incurred by the petitioner for promoting the branch of its associated enterprise. No prejudice would be caused to the petitioner in case of depositing the outstanding tax demand. On these premises, prayer for dismissal of the writ petition has been made.

4. We have heard learned counsel for the parties.

5. A perusal of the impugned order dated 28.9.2015, Annexure P.8

shows that for the assessment year 2008-09, the petitioner filed its return of Income on 29.9.2008 declaring income of ₹ 13,00,68,080/-. After scrutiny, the Assessing Officer made a reference under section 92CA of the Act to the TPO for determination of Arm's Length Price of international transactions undertaken by the petitioner. The TPO vide order dated 5.10.2011 proposed adjustments on account of advertisement and market promotion expenses against which the petitioner filed objections before DRP. The said objections were rejected and consequently the Assessing Officer passed assessment order dated 8.11.2012 incorporating adjustment of ₹ 1,17,99,66,691/- proposed by TPO. The petitioner challenged the said order before the Tribunal. Vide order dated 18.10.2013, the Tribunal directed the Assessing Officer to apply the decision of Special Bench in L.G.Electronics India Pvt. Limited's case (supra). Consequently, the Assessing Officer created a demand of ₹ 29,76,66,020/-. The petitioner challenged the said order before this Court by filing appeal. Vide order dated 27.4.2015, this court directed the respondents not to take any coercive steps for a period of two weeks after the communication of the decision on the application for interim relief. The petitioner thereafter moved an application dated 8.5.2015 for stay of demand of ₹ 29,79,66,020/-. The petitioner also filed an application under section 154 of the Act for rectification and vide order dated 18.8.2015, the Assessing Officer modified the amount payable to ₹ 13,96,37,398/-. After considering the matter, the petitioner was asked to pay the said demand either at once or in the three equal installments of ₹ 3,50,00,000/- within the period starting from 15.10.2015 to 15.12.2015 and the balance outstanding demand to be paid on 15.1.2016. The order passed by the CIT(A) appears to be just and reasonable. The petitioner was given sufficient time to pay the outstanding demand.

6. It is true that while considering an application for stay, it is neither expedient nor appropriate for the Court to initiate a detailed enquiry to find out whether the stand of the assessee is on solid ground, because expression of a final opinion on the merits at that stage, without examining the entire material and affording full opportunity of hearing, is likely to cause prejudice to either side. But, at the same time, the Court is required to consider whether, on the basis of the material placed before it, a prima facie case for grant of stay is made out or not. Similarly, the Court has to consider whether on the basis of the pleadings and the material placed before it, undue hardship is likely to be caused to the assessee in case the stay is declined or when a conditional stay is granted, the conditions imposed are so burdensome that the assessee is unable to comply with the same and, thus, rendering the right of appeal non-existent. Needless to point out that the power of stay by the Court is not likely to be exercised in a routine manner or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the court will consider whether to stay the recovery proceedings and on what conditions and the stay will be granted in most deserving and appropriate cases where the court is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal.

7. In the present case, applying the aforesaid guiding principles and keeping in view the totality of facts and circumstances of the case as

noticed herein before, once the petitioner has already been granted opportunity to pay the outstanding demand in four installments as noted above and no prejudice has been demonstrated to be caused to the assessee on that account, there appears to be no error in the impugned order passed by respondent No.2. Further, learned counsel for the petitioner has also not been able to show that the order is unjustified. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

November 17, 2015
'gs'

(Ramendra Jain)
Judge