IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.04.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.3338 of 2018
and W.M.P.Nos.4080 & 4081 of 2018

M/s.Cavinkare Private Limited,
(formerly known as M/s.Hemalatha
Enterprises Private Limited)
Rep. by its Vice President - Finance,
Mr.R.Prabakara Kumar,
No.12, Cavinville, Cenotaph Road,
Chennai-600 018. ... Petitioner

Vs.

1.Commissioner of Income Tax
(Appeals) - 18, Chennai,
M.G.Road, Nungambakkam,
Chennai-600 034.

2.The Assistant Commissioner of Income Tax,
Central Circle - 2(1), Chennai,
M.G.Road, Nungambakkam, Chennai-600 034. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, to call for the records on the file of the second respondent in PAN AAACD2714R by passing the order in ACIT/C.Cir 2(1)/Stay/17-18 dated 07.02.2018 rejecting the stay petition filed by the petitioner for stay of demand for the assessment year 2011-12; quash the same as illegal, arbitrary and devoid of merit and direct the second respondent to grant stay of demand pending disposal of the appeal before the first respondent.

For Petitioner : Mr.R.Sivaraman

For Respondents: Mr.A.P.Srinivas,
Senior Standing Counsel

O R D E R

The petitioner has filed this writ petition challenging a communication sent by the second respondent to the petitioner dated 07.02.2018. The impugned communication dated 07.02.2018, is in response to the petitioner's request made, vide letter dated 25.01.2018, requesting for grant of stay of collection of the demand of tax in respect of the assessment for the year 2011-12. The petitioner in their letter dated 25.01.2018, had pointed out that, as against the assessment order dated 30.11.2017, the petitioner has preferred appeal before the Commissioner of Income-tax (Appeals) 18, Chennai, and the prospects of winning the appeal is very high and there are no lapses on the part of the assessee to disclose all the material facts truly and fully; and the assessee is undergoing financial constraints; and if the demand is enforced, they will be put to undue hardship; and the assessment is a high pitched assessment; and therefore, prayed for stay of the entire demand till the disposal of the appeal by Commissioner of Income Tax (Appeals). The second respondent by impugned communication dated 07.02.2018, informed the petitioner that there cannot be any stay of the entire demand, but directed the petitioner to pay 20% of the disputed demand. This communication is impugned in the present writ petition.

2. Mr.R.Sivaraman, learned counsel appearing for the petitioner submitted that the second respondent ought to have applied his mind to the points raised by the petitioner in their letter dated 25.01.2018, and without affording an opportunity of personal hearing, the impugned order could not have been passed. It is submitted that the instructions given by the Central Board of Direct Taxes (for brevity "CBDT") in Office Memorandum dated 29.02.2016, guidelines have been issued to the authorities as to how prayer for stay should be dealt with.

3. Further, it is submitted that the said circular was interpreted by the Hon'ble Division Bench of the High Court of Delhi in Virgin Mobile India (P) Ltd., vs. Assistant Commissioner of Income-tax reported in (2012) 25 taxmann.com 566 (Delhi) and it was pointed out that the instructions issued by the CBDT only reinforce the element of discretion and by no means can it be construed as limiting the choice of the Assessing Officer, who may have a greater latitude in taking into account the circumstances depending on the facts of the given case. The learned counsel has referred to another decision of this Court in the case of GMV Projects & Systems vs. Assistant Commissioner of Income-tax reported in [2017] 84 taxmann.com 14 (Mad.).

4. Mr.A.P.Srinivas, learned Senior Standing Counsel for the Revenue pointed out that the Assessing Officer has got no power to grant stay, and if the assessee is aggrieved, he should have filed an application before the Commissioner of Income Tax (Appeals), while filing the appeal against the assessment order dated 30.11.2017, and the Assessing Officer cannot grant unconditional stay, and he is bound by the instructions given by the CBDT, in this regard. The learned Senior Standing Counsel placed reliance on the decision of this Court in Paulsons Litho Works vs. Income-tax Officer reported in [1994] 76 TAXMAN 294 (MAD.) and the decision in J.Srinivasan vs. The Commissioner of Income Tax and others in W.P.No.29350 of 2017 dated 16.11.2017.

5. Heard the learned counsel for the parties and carefully perused the materials placed on record.

6. The first question is whether the petition filed before the second respondent/Assessing Officer could be treated as a stay petition in the normal sense, as popularly known. The answer to the above question should be in the negative, because the provisions of the Income Tax Act, 1961 does not specifically provided for a power with the Assessing Officer to grant stay of his own assessment order on the ground that an appeal has been preferred against the assessment order. However, the Assessing Officer is empowered to pass appropriate orders, not to treat the assessee as a defaulter by considering the facts and circumstances placed before it. This distinction was succinctly brought out in the decision in the case of Paulsons Litho Works (referred supra). It was pointed out that the Act confers power on the ITO under Section 220(6) to treat the assessee concerned is not in default, during the pendency of an appeal under Section 246 or upon the TRO, under Section 225(1), to grant further time or postpone the payment of tax to be recovered is no substitute for the power of stay, which is considered by the Supreme Court to be a necessary adjunct to the very powers of the appellate authority.

7. Further, it was pointed out that the powers conferred on the ITO and the TRO cannot be quoted with the powers of the appellate authorities, either in the nature, quality or extent or vis-a-vis the hierarchy. There can be no comparison on the same with each other, they being heterogeneous in nature. It was further, held that the power conferred on the ITO and the TRO cannot be considered to be either an effective substitute so as to render nugatory or destructive of the other. The undoubted power of an appellate authority to grant stay as an adjunct to its appellate jurisdiction, cannot be denied to such

authority merely because another authority can grant somewhat similar result oriented relief, which is merely subjected to the process of coercive recovery for the realization of the tax or penalty under dispute.

8. Bearing the above distinction in mind, if we consider the facts and circumstances of the case, the second respondent cannot be stated to be totally denude of jurisdiction to entertain a prayer from the assessee not to treat him as an assessee in default. As pointed out in the case of Paulsons Litho Works (referred supra), the power of stay confers on the appellate authority cannot be equated to the power granted to the Assessing Officer under Section 220(6) of the Income Tax Act. It is no doubt true that the Assessing Officer should first consider the petitioner's request for stay of the demand as referred to in the instructions/guidelines issued by the CBDT and directed 20% of the demand to be paid. The second respondent did not afford an opportunity of personal hearing.

9. In my considered view, the impugned communication dated 07.02.2018, cannot be treated to be an order, as it appears to be a reply given to the petitioner's request for grant of stay of the entire demand. On facts, this Court finds that the petitioner has not filed a stay petition before the Commissioner of Income Tax (Appeals), while filing the appeal on 25.01.2018. It is not known as to why the petitioner has not moved for stay before the appellate authority.

10. Thus, in my considered view, this is a fit case, where the petitioner has to approach the first respondent by way of a stay petition. This so because, according to the assessee, identical issue is pending in appeals for the earlier assessment years and those appeals are pending before the first respondent at various stages. However, the petitioner has not prayed for any stay in those appeals, because taxes have been remitted without prejudice. Thus, the petitioner has to necessarily move the first respondent by way of a stay petition, and if such petition is moved, then it is open to the first respondent to consider the prima facie case which the petitioner would place before the authority and take a decision on merits and in accordance with law.

11. In the light of the above, the impugned communication dated 07.02.2018, is directed to be kept in abeyance for a period of four weeks from the date of receipt of a copy of this order. Within such time, the petitioner is directed to file a

stay petition before the first respondent in the pending appeal dated 25.01.2018, and such stay petition shall be heard on merits and in accordance with law preferably within a period of three weeks from the date on which the stay petition is filed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

abr
To

1.The Commissioner of Income Tax
(Appeals) - 18, Chennai,
M.G.Road, Nungambakkam,
Chennai-600 034.

2.The Assistant Commissioner of Income Tax,
Central Circle - 2(1), Chennai,
M.G.Road, Nungambakkam,
Chennai-600 034.

+ 1 cc to Mr.R. Sivaraman, Advocate Sr.25250
+ 1 cc toMr. A.P. Srinivas, Advocate Sr.25044

W.P.No.3338 of 2018

KJ(CO)
EU(18/04/2018)