

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Writ Petition No.3735 of 2018
and W.M.P.No.4550 of 2018

Orders reserved on 22.06.2018	Orders pronounced on 28.06.2018
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M/s.Samms Juke Box,
No.6, Sehaj Enclave Shivagiri,
Off Krishnaveni Nagar, Mugalivakkam,
Chennai – 600 125.
Rep., by its partner Mr.P.M.Shankar

.. Petitioner

VS.

Assistant Commissioner of Income Tax,
Non Corporate Circle – 14 (1),
Chennai – 600034.

.. Respondent

Petitions filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records of the respondent in respect of AAVFS3778G/2017-18, dated 14.02.2018 for the assessment year 2015-16, quash the same, and direct the respondent to treat the petitioner as not being an assessee in default of income-tax under Section 220(6) of the Income Tax Act, 1961, for the assessment year 2015-16.

For Petitioner : Mr.M.V.Swaroop

For Respondents : Mr.Rajkumar Jhabkh for
Mr.J.Narayanaswamy

ORDER

The petitioner has filed this Writ Petition challenging an order passed by the respondent, the Assessing Officer under the provisions of the Income Tax Act (hereinafter referred to as the 'Act'), directing the petitioner to pay 20% of the tax demanded from the petitioner for the assessment year 2015-16 as per the CBDT Office Memorandum, dated 31.07.2017, for being entitled for stay of the demand of the remaining tax till the disposal of the appeal before the Commissioner of Income Tax (Appeal).

2. Heard M.V.Swaroop learned counsel for the petitioner and Mr.Rajkumar Jhabkh learned counsel appearing for Mr.J.Narayanaswamy learned Standing counsel for the Revenue and perused the materials placed on record.

3. The respondent completed the assessment for the year 2015-16 under Section 143(3) of the Act by order dated 29.12.2017. In the said assessment order, it has been stated that on perusal of the

documents submitted by the assessee, it was noticed that the assessee has shown gross receipts of Rs.28,05,852/-, from M/s.Conde Nast (India) Limited, while as per form 26AS, the figure shown is Rs.6,62,03,927/-. The assessee explained by stating that the deductor has wrongly deducted TDS on the assessee's PAN, who is a coordinator instead of OMCs [actual deductees]. It appears that the assessee sought some more time to get details and since no details were forthcoming for nearly two months, the Assessing Officer issued show cause notice dated 04.10.2017, directing them to explain as to why the difference should not be added back to the returned income of the assessee for the assessment year 2015-16. The assessee submitted a reply dated 14.11.2017, explaining that the differences arose as the said company, who supplied journals to Oil Marketing companies for free distribution as gifts, had wrongly deducted TDS on the value of journals amounting to Rs.6,33,98,078/-, which has been supplied by them to the Oil Marketing companies such as HPCL, BPCL and IOCL, which in turn distributed as free gifts and that the assessee has only acted as a coordinator between both of them and it was a wrong entry and the same needs to be rectified or reversed by them and also intimated to the said party who failed to carry out necessary correction. Further, the assessee stated that they have not claimed the TDS amount of

Rs.12,67,962/- as the transaction and credit are not relating to them, which can be evidenced from the income tax compilation for the financial year 2015-16. During the personal hearing, the assessee informed that they were facing great difficulty in getting the rectification done and requested for some more time. Subsequently, they sent a letter stating that due to non-cooperation of the deductor, they could not get the revision done. Consequently, the said difference amount was added to the returned income of the assessee and an order was passed. Challenging the said order, the petitioner has preferred an appeal before the Commissioner of Income Tax (Appeals) on 19.01.2018. In the mean time, notice for imposition of penalty under Section 271(1)(c) of the Act, dated 28.12.2017, was issued and notice of demand was issued by the respondent under Section 157 of the Act, dated 29.12.2017. As the appeal filed by the assessee was pending before the CIT (A), the petitioner filed an application before the respondent on 01.01.2018, requesting for stay of the demand made under Section 220(6) of the Act.

4. After briefly narrating the facts, the assessee stated that if they are to be declared as an assessee in default, when the appeal was pending before the CIT (A), they will be put to great prejudice. As the

income earned by the assessee in the said assessment year, is almost 1/4th of the assessed income in the assessment order dated 29.12.2017 and the tax demanded is multiple times. The petitioner thus contended that the assessment was unduly high pitched and they have a *prima facie* case and requested for stay. The respondent on receipt of the letter has sent the impugned reply stating that the assessee's request for absolutely stay was considered and as per the CBDT office memorandum dated 31.07.2017, they have to pay 20% of the demand. It is undoubtedly true that mere pendency of an appeal will not amount to a grant of stay. Under the scheme of the Income Tax Act, the assessee usually exercise multiple remedies. When statutory appeal is pending against an order of assessment they move the Assessing Officer requesting for stay of the demand of tax as assessed. If the order of the Assessing Officer is not accepted by the assessee, they prefer a regular appeal under the Act. The other remedy which the assessee invoke is to file a stay petition before the CIT (A) and seek for appropriate interim orders. Before whatever forum, an application for interim relief is sought, the said authority has to be necessarily be guided by the principles governing the exercise of jurisdiction under Order XXXIX, Rule 1 CPC. Thus, the authority while examining an application for grant of stay should consider whether the applicant has

made out a *prima facie* case; whether the balance of convenience is in his favour; and if stay is not granted whether the applicant would be put to irreparable hardship. Thus, when a statutory authority exercises power to grant interim relief, he cannot be scuttled down by directives, which leave no room for discretion of the authority.

5. In my considered view, the CBDT Office Memorandum, dated 31.07.2017, though appears to fix a percentage of tax to be paid for being entitled to an order of stay, exception has been carved out in a very same instruction and this is clear from the Office Memorandum dated 29.02.2016, in paragraph 4 [B(b)]. Thus, in my view the CBDT did not completely oust the jurisdiction of the officer, while examining a prayer for stay of the demand of tax pending appeal. Therefore, the respondent could not have passed the impugned order without taking note of the petitioner's case and without considering as to whether the petitioner has made out a *prima facie* case for grant of interim relief. The petitioner has specifically pointed out their financial position and the prejudice that is being caused to them on account of the high pitched assessment. They specifically pleaded that their income of the said year was 1/4th of tax assessed. This aspect was not dealt with by the respondent, while passing the impugned order.

6. The larger question which will be decided by the CIT (A) is whether merely because a payment was reflected in form 26AS and shown to have been made to the assessee, can it be brought to tax, in the absence of proof to show that the assessee was the actual beneficiary of the said payment.

7. The learned Standing counsel appearing for the Revenue based on the para-wise comments given by the Assessing Officer vide e-mail dated 22.06.2018, contended that the petitioner failed to demonstrate *prima facie* merits of the case and financial difficulty and balance of convenience, and therefore, there is no error in the impugned order. The learned counsel referred to paragraph 'C' of the parawise comments in response to ground 'C' of the writ affidavit, wherein the Assessing Officer has stated about the financial position of the petitioner and has furnished certain facts and figures and submitted that the assessee does not have any financial difficulty in making the payment demanded by the Assessing Officer. Further, it is submitted that there is no necessity to afford an opportunity of personal hearing.

8. I find that the information furnished by the Assessing Officer in the parawise comments are not contained in the impugned order. The

respondent cannot improve upon the impugned order by substituting fresh reasons in the form of a counter affidavit. Thus, the information furnished to the learned Standing counsel for the Revenue would clearly demonstrate that at the time of passing the impugned order, no such reasons weighed in the minds of the respondent and therefore, the respondent cannot justify his order by substituting fresh reasons, after the order is put to challenge.

9. Thus, for all the above reasons I am of the clear view that the impugned order calls for interference and the matter should be reconsidered by the respondent bearing in mind the observations made in this order.

10. In the result, the Writ Petition is allowed, the impugned order is set aside and the matter is remanded to the respondent for fresh consideration and to pass an order on merits and in accordance with law after affording an opportunity of personal hearing to the assessee. No costs. Consequently, connected Miscellaneous Petition is closed.

28.06.2018

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Index : Yes/No

To

Assistant Commissioner of Income Tax,
Non Corporate Circle – 14 (1),
Chennai – 600034.



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T.S.SIVAGNANAM, J.

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Pre-delivery order made in
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