In the High Court of Judicature at Madras

Dated : 06.4.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mr.Justice N.SESHASAYEE

Writ Petition Nos.6648 to 6650 of 2018
& WMP.Nos.8241 to 8245 of 2018

M/s.Turbo Energy Private Limited,
rep.by its whole time Director
Mr.S.Ravindran ...Petitioner

Vs

1.The Assistant Registrar, Income Tax Appellate Tribunal, Rajaji Bhawan, Besant Nagar, Chennai-90.

2.The Deputy Commissioner of Income Tax, Large Tax Payer Unit (Appeals)-I, Chennai-34. ...Respondents

PETITIONS under Article 226 of The Constitution of India praying for the issuance of Writs of Certiorarified Mandamus to call for the impugned orders passed by the 1st respondent dated 16.2.2018

(i) for the assessment year 2011-12 in SP.No.57/CHNY/2018 in ITA No.190/CHNY/2018,IN WP.6648/18

(ii) for the assessment year 2012-13 in SP.No.58/CHNY/2018 in ITA No.191/CHNY/2018 and IN WP.6649/18

(iii) for the assessment year 2014-15 in SP.No.59/CHNY/2018 in ITA No. 193/CHNY/2018, IN WP.6650/18

quash the impugned orders and consequently direct the 2nd respondent not to take any coercive steps to collect the outstanding demand respectively for the assessment years 2011-12, 2012-13 and 2014-15.

For Petitioner : M/s.Subburaja Aiyar Padmanabhan

For Respondents: Mrs.Hema Muralikrishnan, SSC

COMMON ORDER

(Order of the Court was made by T.S.SIVAGNANAM,J)

Heard the learned counsel for the petitioner and the learned Senior Standing Counsel appearing for the respondent Department. With consent, the writ petitions are taken up for joint disposal.

2. These writ petitions are directed against the common order passed by the Income Tax Appellate Tribunal rejecting the petitions filed by the petitioner requesting for stay of recovery of the outstanding demand for the assessment years 2011-12, 2012-13 and 2014-15.

3. The demands arose on account of denial of deduction claimed by the petitioner - assessee under Section 80IC of the Income Tax Act, 1961 (hereinafter called the Act for brevity). The starting point of the controversy was an Order-in-Original passed by the Assistant Commissioner of Central Excise dated 04.3.2015 with regard to the claim for exemption made by the petitioner in respect of their manufacturing unit at Rudrapur. The petitioner claimed exemption under Notification No.50/2003/CE dated 10.6.2003.

4. During the course of audit of the accounts for the period from April 2010 to November 2012, the Central Excise Authorities noticed that the goods namely 'overhaul kit' and 'secondary kit' of turbo chargers were cleared to Rudrapur from Paiyanoor Unit and that such goods were cleared by the Rudrapur Unit after repacking the same and claiming exemption under the said Notification. The Central Excise Authorities stated that the exemption Notification shall not apply to such goods, which were subjected to one or more of the following processes namely preservation during storage, cleaning operations, packing or repacking of such goods in unit container or labeling or re-labeling of containers, sorting, declaration or alteration of retail sale price and have not been subjected to any other process or processes amounting to manufacture in the State of Uttarakand or Himachal Pradesh.

5. The Audit Department came to the conclusion that the goods sent to Rudrapur were subjected to only processes, which were stated to be not amounting to manufacture before clearance to their customers. Therefore, the Central Excise Authorities came to the conclusion that the appropriate central excise duty on such goods have not been paid and not reported to the Department.

6. This led to the issuance of show cause notice dated 15.12.2014. The petitioner submitted their reply and the

Assistant Commissioner of Central Excise, by Order-in-Original dated 04.3.2015, confirmed the demand in the show cause notice and held the petitioner liable to payment of duty of Rs.1,06,193/-, other cess charges and penalty. The petitioner appears to have not contested the said proceedings and cleared the duty in full. In respect of the subsequent periods, it appears that the Central Excise Department had issued similar demands, which have been paid by the petitioner without contest. The details in this regard have been stated in paragraph 10 of the affidavit in support of the writ petition.

7. Based on the information received from the Central Excise Department, the Assessing Officer, under the Income Tax Act, 1961, issued a show cause notice dated 24.3.2015 stating that the processes adopted by the petitioner do not amount to manufacture and that the unit at Rudrapur is not eligible for deduction under Section 80IC of the Act. As pointed out by the Central Excise Department, certain of the petitioner's products such as 'overhaul kit' and 'core assembly' are not subjected to any manufacturing activity and thus, it is evident that the profits derived from the other units are shifted to the 80IC unit for the purpose of claiming deduction. Therefore, the petitioner was directed to show cause as to why the claim under Section 80IC of the Act should not be disallowed.

8. The petitioner submitted their reply dated 28.3.2015 and also furnished a summary of the total value of the manufacturing activity and the trading activity in a tabulated format. The petitioner also furnished the details relating to process flow chart for the core assembly, etc. The Assessing Officer, by orders dated 31.3.2015, 26.2.2016 and 22.12.2016, rejected the stand taken by the petitioner and disallowed the entire claim for deduction under Section 80IC of the Act.

9. These orders were put to challenge by the petitioner before the Commissioner of Income Tax (Appeals), who, by a common order dated 20.11.2017, dismissed the appeals. As against the common order passed by the Commissioner of Income Tax (Appeals), the petitioner preferred appeals before the Income Tax Appellate Tribunal. Pending appeals before the Tribunal, the petitioner filed petitions for stay of recovery of the outstanding demand for all the three assessment years. The Tribunal, by the impugned orders, dismissed the stay petitions on the ground that the petitioner has not been able to show strong prima facie case.

10. After elaborately hearing the learned counsel for the parties and perusing the materials placed on record, we, prima facie, find that the Assessing Officer could not have gone beyond the observations rendered or findings recorded by the Central Excise Department, as, even in the show cause notice,

there is a reference only to the findings recorded by the Central Excise Department. Therefore, we are of the prima facie view that the observations made by the Assessing Officer that 50% of the products sold at Rudrapur are not subjected to any manufacturing activity, appear to be in contradiction with the findings rendered by the Central Excise Department.

11. Furthermore, this aspect also touches upon the jurisdiction of the Assessing Officer to render such a finding, when he had no independent material at the first instance while issuing the show cause notice dated 24.3.2015. If this interpretation is to be accepted, then, to the extent where there is no manufacturing activity, the Assessing Officer would be justified in denying deduction under Section 80IC of the Act. However, such procedure was not followed by the Assessing Officer. The Appellate Authority, while testing the correctness of the orders passed by the Assessing Officer, appears to have not made an independent exercise to refer to the findings recorded and the observations made by the Assessing Officer.

12. This aspect of the matter ought to have been considered by the Tribunal while exercising jurisdiction by stating that the petitioner has made out a prima facie case. In fact, in paragraph 5 of the order of the Tribunal, it explained the fact that the trading volume was only minuscule. If this is the prima facie observation made by the Tribunal, a thorough exercise should have been done by the Tribunal as to whether the Income Tax Officer was justified in denying the entire deduction as claimed by the assessee. The further observation of the Tribunal that no separate books of accounts were maintained, prima facie, appears to be not a finding and more so, when the law laid down by the Bombay High Court in the case of CIT Vs. Mazagaon Dock Ltd. [reported in (1991) 191 ITR 460].

13. Thus, considering the facts and circumstances as stated above, we are of the view that the petitioner has made out a prima facie case for grant of interim order during the pendency of the appeals before the Tribunal.

14. It is seen that the total demand as per the order under Section 143(3) of the Act is Rs.29,93,49,175/-, out of which, an amount of Rs.4,61,39,680/- has been adjusted as against the refund, which was sanctioned to the petitioner for the assessment year 2010-11, thus leaving the remaining demand of Rs.,25,32,09,495/-. After giving effect to the order passed by the Commissioner of Income Tax (Appeals), the demand payable is Rs.14,79,89,350/-, out of which, a sum of Rs.5,00,00,000/- has been paid on 14.3.2018. Thus, the above figures show that 30% of the demand has already been adjusted/paid by the petitioner/assessee. In our considered view, 30% of the demand, having been adjusted/paid, will sufficiently safeguard the

interests of the Revenue and will be in tune with the Office Memorandum issued by the Central Board of Direct Taxes, which rationalizes grant of stay orders for the Appellate Authority to follow by imposing a condition of payment of 20%. Hence, we are of the view that the petitioner has made out a prima facie case for grant of interim order, as payment of 30% sufficiently safeguards the interests of the Revenue.

15. Accordingly, the writ petitions are allowed, the impugned orders are set aside and there will be a stay of recovery of remaining outstanding demand for all the three assessment years till the disposal of the appeals by the Income Tax Appellate Tribunal. It is made clear that the observations made in the preceding paragraphs are only for the purpose of recording a prima facie finding to show as to how the petitioner is entitled to grant of interim order during the pendency of the appeals before the Tribunal and this shall, in no manner, weigh in the minds of the Income Tax Appellate Tribunal while deciding the appeals, which shall be done on merits and in accordance with law. No costs. Consequently, the connected WMPs are closed.

Sd/-
Asst.Registrar (CS IX)

/true copy/

Sub Asst. Registrar

To

1.The Assistant Registrar, Income Tax Appellate Tribunal, Rajaji Bhawan, Besant Nagar, Chennai-90.

2.The Deputy Commissioner of Income Tax, Large Tax Payer Unit (Appeals)-I, Chennai-34.

+ 3 cc to M/s.Subburaja Aiyar Padmanabhan Advocate, SR.25903,25904,25905

+ 1 cc to Mrs.Hema Muralikrishnan Advocate,SR.25536

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