IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 14.02.2019

CORAM
THE HON'BLE Dr. JUSTICE ANITA SUMANTH

W.P.No.1865 of 2019
and
W.M.P.No.2066 of 2019

M/s.Cavinkare Private Limited
Rep.by its Authorized Representative
Mr.S.S.Vinoth Kumar ....Petitioner

--Vs--

The Assistant Commissioner of Income-Tax,
Central Circle 2(1),
Chennai 600 034 ...Respondent

PRAYER in WPs: Writ Petition filed under Article 226 of the Constitution of India praying for a writ of Certiorari to call for the records of the petitioner on the file of the respondent in PAN:AAACB3754B and quash the impugned order passed u/s.143(3) dated 30.12.2018 for the Assessement Year 2016-17 in ITBA/AST/S/143(3)/2018-19/1014669391(1).

For Petitioner : Mr.R.Vijayaragavan
for M/s.Subbaraya Aiyar Padmanabhan & Ramamani

Respondent : Mr.A.P.Srinivas
Standing Counsel

O R D E R

This writ petition is filed challenging an order of assessment under Section 143(3) of the Income Tax Act, 1961 ('Act'), in respect of Assessment Year 2016-17.

2. At the threshold, though the impugned order of assessment is subject to statutory appeal, no appeal has been filed till date challenging the same, despite there being no interim order of stay passed by this Court.

3. Various challenges have been raised to the additions made in the impugned assessment order. The main ground of challenge relates to an addition made under the head 'unaccounted sales of unaccounted production of dairy products'. Mr.R.Vijayaragavan, learned counsel appearing for the petitioner submits that that the aforesaid addition, quantified at a figure of Rs.103,36,13,286/- has been made without issuance of a show cause notice and without reference to the detailed submissions

advanced by the assessee in that regard. He points out to errors in the methodology adopted for computation that I am not inclined to go into insofar as the same involves appreciation of facts which this Court will not do in a Writ Petition under Article 226 of the Constitution of India.

4. The second ground canvassed is in relation to a disallowance made under section 35(2AB) of the Act in respect of a deduction for expenditure incurred on scientific research and development. The specific submission made is that the petitioner is entitled for the deduction claimed and in the event that the Assessing Officer was to consider the question of whether, or if so, to what extent, any activity constitutes or constituted, or any asset is or was being used for the purposes of scientific research, the Board shall refer the question to the Central Government/prescribed Authority and the decision of the Board/prescribed Authority in this regard shall be final. In the present case, this statutory exercise has not, according to the petitioner, been carried out by the Assessing Authority. Other disallowances are also under challenge before me that are not pursued very seriously.

5. Mr.Vijayaragavan, also states that the petitioner had approached the Assessing Authority for grant of stay vide petition dated 30.01.2019. The request was rejected by the Officer on 06.02.2019 stating as follows:-

> 'Ref: Your letter dt.29.01.2019
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> Please refer to the above,
>
> 1. Kindly refer to the above assessment order of A.Y.2016-17 passed in the case of M/s.Cavinkare Pvt.Ltd.
>
> 2. A writ petition in No.1865/2019 along with stay petition in WMP No.2066/2019 are filed before the Hon'ble Court of Madras against the above assessment order and came up for hearing on 24.01.2019. Our legal counsel's communication on the status of Writ Petition and Stay petition which explains the current position is enclosed as Annexure-1 for your kind consideration.
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> 3. As the aforementioned writ & stay petitions are heard and pending before the Hon'ble High Court of Madras, the petitioner most humbly prays that this respectful authority may not to treat the petitioner as assessee-in-default and be pleased to keep the collection proceedings on the demanded tax amount of Rs.70,06,02,535/- in abeyance until the disposal of writ & stay petitions by the Hon'ble Court.

4. The petitioner further prays that this respectful authority may be pleased to grant an opportunity of being heard before disposal of this petition.

The Assessee's submission was considered and it was noted that:-

(i) The assessee has filed a W.P. against the assessment order and for stay of demand before the Hon'ble Madras High Court, which was heard on 24.01.2019 but the Hon'ble High Court has not granted any stay from recovery of outstanding demand.

(ii) The assessee has filed a stay petition before undersigned on 29.01.2019 for granting stay a demand, which is not valid because the issue is subjudicied before the Hon'ble Court. Since, the stay petition is pending before High Court undersigned has no jurisdiction to grant the stay from recovery proceedings.

(iii) Further, with regards to the assessee's request a granting an opportunity of hearing before disposal a stay petition has no relevance. Since the undersigned has seized of the jurisdiction for granting stay from recovery proceeding on the day on which W.P. was filed by the assessee.

In view a above facts, the undersigned has no power to grant the stay from recovery proceeding a subjudicied matter. Further, as the Hon'ble High Court has not granted stay from recovery of proceeding, the assessee in default. Therefore, you are requested to pay the entire demand within three day of receipt of this letter failing which recovery proceeding will be initiated as provision of I.T.Act'

6. Consequent to the above, learned counsel for the assessee states that all bank accounts of the assessee, in ICICI Bank, IDBI, Federal Bank, State Bank of India and Punjab National Bank have been attached on 12.02.2019 vide orders of attachment passed under section 226(3) of the Act. According to him, the petitioner does not have any means of doing business and the attachment of the bank accounts has brought its business to a grinding halt. Mr.Vijayaraghavan thus prays that some interim protection be granted in so far as recovery is concerned, particularly since the returns of income in respect of the later assessment provide for a substantial refund of amounts remitted by the petitioner.

7. Mr.A.P.Srinivas, learned counsel appearing for the respondent has filed a detailed counter affidavit, the sum and substance of which is that the order of the Assessing Officer is correct and that if the petitioner were aggrieved with the same, the proper course of action would be to avail the appellate remedy before the first Appellate Authority by way of statutory appeal. As far as stay is concerned, the provisions of Section 220(6) mandate that a petition for stay be filed by an assessee upon condition that the assessee has challenged the assessment by way of appeal. Mr.Srinivas thus urges that the writ petition be dismissed in limine.

8. Heard learned counsel. A perusal of the assessment order would indicate that at least nine hearings have been granted to the assessee prior to framing of the order of assessment. I am thus not inclined to accept the submissions advanced by the petitioner in relation to the violation of principles of natural justice. However, I have in conclusion, permitted the petitioner to file a statutory appeal within a period of one week from today and if so filed, the Commissioner of Income Tax (Appeals) shall take the same on file without reference to limitation and dispose it in accordance with law.

9. An application for stay of demand in terms of section 220 (6) of the Act states that an Assessing Officer may, at his discretion, consider a petition for stay only upon the assessee presenting an appeal to the first appellate authority under Section 246 of the Act. In the present case, admittedly, an appeal is yet to be filed. Learned counsel for the petitioner however, states on instructions that the petitioner proposes to challenge the impugned order of assessment forthwith and has not done so till date only on account of the pendency of this writ petition.

10. In the facts and circumstances as I have noted above, this Court has proposed a via media as far as recovery is concerned, bearing in mind the interests of both parties. It was suggested that the petitioner remit a sum of Rs.5,00,00,000/- to the Income tax Department upon receipt of which the assessing officer will lift the attachments on three bank accounts of the petitioner namely, the accounts in the ICICI, HDFC and SBI. The petitioner is permitted to file an appeal within one week from today and if the lime limit as imposed is complied with, the Commissioner of Income Tax (Appeals) will take the appeal on file without reference to limitation. Further orders in regard to stay or otherwise, of recovery of the disputed demand, will be considered by the assessing officer upon proof that the appeal has been filed and the amount of Rs.5,00,00,000/- remitted. The above proposal finds acceptance with both learned counsel, the learned standing counsel, Mr.Srinivas, as well as the learned counsel for the petitioner, the latter having taken instructions in this regard from representatives of the petitioner who are present in Court.

11. In summary the following order is passed with the concurrence of all concerned:

(i) The petitioner shall remit a sum of Rs.5,00,00,000/- (Rupees Five Crores only). Upon compliance of this condition, the following shall come into play:

(ii) The present writ petition has been filed on 22.01.2018 which is within the period of statutory limitation provided for filing of first appeal. Accordingly, the petitioner is permitted to file an appeal on or before 25.02.2019 and if so filed, the Commissioner of Income Tax (Appeals) shall take the same on file without reference to limitation and dispose it in accordance with law

(iii) Upon presentation of proof of filing of appeal as well as remittance of Rs.5,00,00,000/- as aforesaid, the Assessing Officer will take up for consideration the stay petition filed by the petitioner on 29.01.2019 for disposal on merits, also keeping in mind the Circulars issued by Central Board of Direct taxes. The petition shall be disposed of as expeditiously as possible after affording an opportunity of personal hearing to the petitioner.

12. This writ petition is disposed of with the above directions. Connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

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

2.The Commissioner of Income Tax (Appeals)
Chennai.

+1cc to Mr.Subbaraya Aiyar Padmanabhan, Advocate, S.R.No.13626
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.13523

W.P.No.1865 of 2019
and
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rrs 19/02/2019