BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.02.2022

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P(MD).No.25512 of 2019
and
W.M.P(MD).Nos22073 and 22076 of 2019

A K M G Alloys Private Limited
Rep. by its Director,
G.Venkatachalkumar ... Petitioner

Vs.

1.The Commissioner of Income Tax (Appeals),
Office of the Commissioner of Income Tax (Appeals),
Bibikulam, Madurai.

2.The Assistant Commissioner of Income Tax,
Circle-1,
Office of the Assistant Commissioner of Income Tax,
Palani Road, Kottapatti Post,
Dindigul-624 002. ...Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, to call for the records on the file of the second respondent in PAN: AAICA7441E/DCIT/CIR/2018-19 dated 21.10.2019 and to quash the same as illegal, arbitrary and consequently direct the second respondent to stay the recovery of tax demand until the disposal of the appeal by the first respondent namely the Commissioner of Income Tax (Appeals), Madurai.

For Petitioner : Mr.S.Karunakar
For Respondents : Mr.N.Dilip Kumar
Senior Standing Counsel

ORDER

In this writ petition, the petitioner has challenged the impugned order, dated 21.10.2019 passed by the second respondent Assistant Commissioner of Income Tax, Circle 1, Dindigul. By the impugned order, the second respondent has rejected the petition filed by the petitioner under Section 220 (6) of IT Act, 1961 in the wake of order, dated 18.07.2018 passed under Section 271 D of the Income Tax Act, 1961, imposing a penalty of Rs.5.70 Crores on the petitioner.

2. In the impugned order reliance has placed on circular dated 31.07.2017 bearing reference F.No.404/72/93-ITCC. The only reason given in the impugned order is the failure of the petitioner to file evidence to substantiate financial hardship for non-payment of tax demanded and penalty that in terms of the above circular and therefore the petitioner has been directed to deposit 20% of the disputed amount.

3. The above circular amends an earlier circular, dated 29.02.2016. This was considered by this Court in **Queen Agencies Vs Assistant Commissioner of Income Tax (Circle-1) and others** vide order dated 01.04.2021 in W.P.(MD).No5550 of 2020 (THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN).

4. The learned counsel for the petitioner is however unable to confirm as to whether the appeal filed against order, dated 18.07.2018 passed under Section 271 D has been disposed of or not by the commissioner of Income Tax (Appeals), as on date.

5. The learned counsel for the respondent submits that there is no merits in the present writ petition. He submits that the appeal filed by the petitioner against the order passed under Section 271 D of the Income Tax Act, 1961 would have been disposed by now. That apart, it is submitted that the petitioner has an alternate remedy by way of revision in terms of circulars of the Central Board of Direct Taxes and therefore petitioner should have approached such authorities.

6. Heard learned counsel for the petitioner and the respondent. In this writ petition, the petitioner has challenged the impugned order dated 21.10.2019 passed by the second respondent disposing the application filed by the petitioner under Section 220 [6] of the Income Tax Act, 1961 to stay the recovery proceedings pending appeal before the commissioner of Income Tax [Appeals] against order dated 18.07.2018 passed by the respondent under Section 271 D of the Income Tax Act, 1961. By the last mentioned order, the second respondent has imposed a sum of Rs.5.7 Crores as penalty on the petitioner under the aforesaid provision of the Income Tax Act, 1961.

7. It is submitted that the impugned order merely states that the petitioner has failed to file any document to establish financial hardship. It is therefore submitted that the impugned order is liable to be quashed. In this connection, reference was made to few decision of this Court and that of the Hon'ble Supreme Court.

8. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the Income

Tax Department. I have also perused the orders of this Court and that of the Honourable Supreme Court. Guidelines have been issued by the Central Board of Direct Taxes.

9. As per circular, dated 29.02.2016 bearing Reference F.No.404/72/93-ITCC, it has been clarified as under:

> *4.In order to streamline the process of grant of stay and standardize the quantum of lump sum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT (A), the following modified guidelines are being issued in partial modifiaction of Instruction No.1914:*
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> *(A) In a case where the outstanding demand is disputed before CIT (A), the assessing officer shall grant stay of demand till disposeal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category dicussed in para (B) hereunder.*
>
> *(B) In a situation where,*
>
> *(a) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted (e.g. In a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court in favour of Revenue of addition is based on credible evidence collected in a search or survey operation, etc.) or*
>
> *(b) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee etc. the assessing officer shall refer the matter to the administrative Pr.CIT/CIT, who after considering all relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand.*
>
> *(C) In a case where stay of demand is granted by the assessing officer on payment of 15% of the disputed demand and the assessee is still aggrieved, he may approach the jurisdictional administrative Pr. CIT/CIT for a review of the decision of the assessing officer.*

(D) The assessing officer shall dispose of a stay petition within 2 weeks of filing of the petition. If a reference has been made to Pr. CIT/CIT underpara 4 (B) above or a review petition has been filed by the assessee under para 4 (C) above, the same shall also be disposed of by the Pr. CIT/CIT within two weeks of the assessing officer making such reference or the assessee filing such review, as the case may be.

(E) In granting stay, the Assessing Officer may impose such conditions as he may think fit. He may, inter alia,

(i) require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled;

(ii) reserve the right to review the order passed after expiry of reasonable period (say 6 months) or if the assessee has not cooperated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority of Court alters the above situations;

(iii) reserve the right to adjust refunds arising, if any, against the demand, to the extent of the amount required for granting stay and subject to the provision of Section 245.

10. The thumb rule as per the above circular is that mandatorily an assesse preferring any appeal before an Appellate Commissioner shall deposit 15% pending disposal of the first appeal. The aforesaid amount of 15% was later enhanced to 20% by a subsequent Office Memorandum dated 31.07.2017, bearing Reference F.No.404/72/93-ITCC.

11. The circular also states that in a case where a stay of demand is granted by the Assessing Officer on payment of 15% (now 20% amended) of the disputed demand and if the assessee is still aggrieved, he may approach the Jurisdictional Principal CIT for review of the decision of the Assessing Officer disposing an application.

12. The Hon’ble Supreme Court in **Principal Commissioner of Income Tax Vs LG Electronics India Private Limited reported in (2018) 18 SCC 447** has held that where orders passed under 220 (6) of the Act are without any reason, the case can be remitted back for determination of financial hardship The Hon’ble Supreme Court has also held that it is open to the authorities to examine the facts of case and grant an order directing deposit of an amount less than

20%, pending main appeal.

13. A reading of the impugned order indicates that it merely states that the petitioner has not brought any evidence of record to show financial hardship. However, what is required to be examined is whether the petitioner had made out a prima facie case on merits and whether the balance of convenience was overwhelmingly in favour of the petitioner for grant of an interim relief, apart from financial stringency as in held in **Kannammal Vs Income Tax Officer reported in (2019) 413 ITR 390(Mad).**

14. Since the circular also gives the revisional remedy to the petitioner, I am inclined to dispose the writ petition by permitting the petitioner to file appropriate application for revising the impugned order within a period of two weeks from the date of receipt of copy of this order, provided no order has been passed in the appeal filed by the petitioner against order dated 13.07.2019 before CIT (Appeals). In case, the appeal has been disposed of, it is open to the petitioner to file appropriate appeal before the Tribunal along with a stay application. In case, the appeal of the petitioner has not been disposed by the CIT (Appeals), there shall be an order of interim protection for a period of four weeks to facilitate to the petitioner to file revision application. If the petitioner files such application within a period of two weeks from the date of this order, before the Principal Commissioner/Commissioner of Income Tax, it shall be disposed within two weeks thereafter. Needless to state that the Principal Commissioner/Commissioner shall be guided by the above decision of this Court and that of the Hon'ble Supreme Court.

15. The writ petition stands disposed of with the above observation. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Deputy Registrar(LA & MC)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Commissioner of Income Tax (Appeals),
Office of the Commissioner of Income Tax (Appeals),
Bibikulam, Madurai.

2.The Assistant Commissioner of Income Tax,
Circle-1,
Office of the Assistant Commissioner of Income Tax,
Palani Road, Kottapatti Post,
Dindigul-624 002.

+1 CC to M/s.N.DILIPKUMAR, Advocate (SR-5456[F] dated 10/02/2022)

+1 CC to M/s.S.KARUNAKAR, Advocate (SR-5463[F] dated 10/02/2022)

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SK(CO)
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