IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :15.11.2017

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THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.Nos.4464 to 4466 of 2006 and
W.P.M.P.Nos.4785 to 4790 of 2006

M/s.Scorpion Industrial Polymers (P) Ltd.,
30, Sri Venkateswara Colony,
Nehru Nagar, Chennai - 600 041.
... Petitioner in all WPs

Vs.

The Commissioner of Income Tax,
Chennai - III,121,
Mahatma Gandhi Road,
Chennai - 600 034. ... Respondent in all WPs

Prayer in WPs.4464 & 4465/2006: Petitions filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records and quashing the impugned order bearing C.No.3032/50&51/III/2003-04 dated 31.03.2005 for the assessment years 1993-94, 1994-95 respectively passed by the respondent under Section 264 of the Income Tax Act, 1961.
Prayer in WP.4466/2006: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records and quashing the impugned order bearing C.No.3032/36/III/2002-03 dated 27.11.2003 for the assessment year 1996-97 respectively passed by the respondent under Section 264 of the Income Tax Act, 1961.

For Petitioner : Mr.V.S.Jayakumar

For Respondent : Mr.A.P.Srinivas
Senior Panel Counsel

COMMON ORDER

Heard Mr.V.S.Jayakumar, learned counsel for the petitioner and Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the respondent.

2.The petitioner is a Private Limited Company carrying on business in manufacturing and trading of rubber products. The petitioner filed its return of income for the assessment year

1993-1994 on 31.12.1993. This return was not accompanied by the Auditor's Report. Though the respondent would state that notice under Section 139(9) was issued on 15.06.1994 and 17.10.1995 calling upon the petitioner to rectify the defect, the petitioner would state that no such notice was received by them.

3.Though these writ petitions are pending from 2006, no counter affidavit has been filed denying the said averment. For the first time, the petitioner came to know that his return was rejected as being defective only when the order of assessment dated 23.01.2002 for the assessment year 1996-1997 was passed wherein there is a reference that the returns filed for the assessment years 1993-1994 and 1994-1995 were treated as defective and as the assessee has not rectified the mistake, it was treated as invalid by the Assessing Officer and communicated to the petitioner on 13.08.1996. The petitioner's case is that no such communication was received by the petitioner dated 13.08.1996. The petitioner had filed revision petition initially for the assessment year 1996-1997 against the order of the Assessing Officer dated 23.01.2002 disallowing the carry forward and set off of loss claimed by the petitioner company for the assessment years 1993-1994 and 1994-1995. This revision petition was dismissed stating that the issue related only to the assessment years 1993-1994 and 1994-1995 and denied the benefit for the assessment year 1996-1997 and also for the earlier years 1993-1994 and 1994-1995. As against the action of the Assessing Officer in treating the return of income as invalid, the petitioner filed revision under Section 264 of the Income Tax Act, 1961 for the assessment year 1993-1994. This was dismissed by the respondent, by common order dated 31.03.2005 for the assessment years 1993-1994 and 1994-1995 stating that the disallowance of carry forward loss in the year 1993-1994 is proper.

4.The petitioner's grievance is that the Assessing Officer did not give any opportunity to the petitioner with regard to the defective returns which has to be cured by the petitioner for the assessment year 1993-1994 and the petitioner came to know about it only when the order of the Assessing Officer giving effect to the order of the CIT(A) was passed for the assessment year 1996-1997 on 23.01.2002. Therefore, the petitioner filed a revision petition before the respondent praying for an opportunity as well as a relief by way of carry forward benefit. The petitioner placed reliance on the decisions of the Hon'ble Supreme Court in the case of CIT V. Dharma Reddy 73 ITR 751, CIT V. Jaipuria China Clay Mines Limited, 59 ITR 555(SC) and CIT V. Veeramani Industries Private Limited, 216 ITR 607 (SC). In support of the contention that the relevant year for consideration of carry forward of loss and depreciation and set off of the same is the year in which losses are to be set off and not in any earlier years. Thus, three orders were passed by the respondent. In so far as the revision petitions filed for the assessment years 1993-1994 and 1994-1995 are concerned, the respondent has passed an order dated 31.03.2005 rejecting the petitioner's revision petitions. This order is impugned in W.P. Nos.4464 and 4465 of 2006. In respect of the revision petition filed for the year 1996-1997, the respondent passed a separate order dated 27.11.2003 holding that the disallowance of setting off of the losses for the assessment year 1996-1997 is only consequential, as the main grievance of the assessee arises for the assessment years 1993-1994 and 1994-1995 and there is nothing to revise the assessment for the year 1996-1997 under Section 264 of the Act. Thus, the net result is the assessee has been shut out from availing any benefit under the provisions of the Act. In my considered view, the assessee cannot be left remedy-less. In other words, the assessee cannot be wrong on both the counts. The first and foremost issue that the respondent should have considered is as to whether the communication dated 13.08.1996 was received by the petitioner. This communication is stated to be a communication sent by the Assessing Officer to the petitioner stating that the returns for the assessment years 1993-1994 and 1994-1995 are defective and accordingly treated as invalid.

5.The petitioner's specific case is that they have never received any such communication and they came to know about it only when they received the assessment order dated 23.01.2002 for the assessment year 1996-1997 which was an order giving effect to the order of the CIT(Appeals) in ITA.No.375/1999-00 dated 17.02.2000. The petitioner's case is that on being informed that the return filed for 1993-1994 and 1994-1995 were not accompanied by Audit Reports, they had filed their Audit Reports on 31.10.1995 well before the end of the assessment year i.e. 31.03.1996. However, the respondent in the impugned order dated 31.03.2005 shifts the burden on the petitioner. If according to the petitioner, they had filed the Audit Report and the same is received by the Assessing Officer across his table and invariably acknowledgments are not given, then, the easiest procedure would be to call for a remand report from the Assessing Officer. If that had been done, the factual discrepancy could have been set right and the respondent could have taken a decision on merits especially when the petitioner relies upon the decisions of the Hon'ble Supreme Court to state that they are entitled to carry forward the loss for the assessment year 1996-1997.

6.Thus, I find that there has not been an examination of the merits of the matter, rather the petitioner has been shut out on technicalities. If the petitioner's contention that they had filed Audit Report on 31.10.1995 had been verified by either for calling for them before the Assessing Officer or calling for the assessment file, the factual dispute would have been cleared and a decision could have been taken on the merits of the matter. Thus, I am of the considered view that the matters require to be re-examined by the respondent by calling for the assessment files, examining the correctness of the stand taken by the petitioner that the tax Audit Reports were filed vide their letters dated 30.10.1995 and also examine the legal issue placed by the petitioner and pass fresh orders on merits.

7.For the above reasons, these Writ Petitions are allowed and the impugned orders are set aside and the matter is remanded to the respondent for fresh consideration to take a decision in the matter, in the light of the observations made in this regard. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-)

//True Copy//

Sub Assistant Registrar

Sgl

To

The Commissioner of Income Tax,
Chennai - III,
121, Mahatma Gandhi Road,
Chennai - 600 034.

+2cc to Mr.A.P.SRINIVAS Advocate, S.R.No. 81444, 81499

W.P.Nos.4464 to 4466 of 2006

TR(06/12/2017)