

IN THE HIGH COURT OF JUDICATURE AT MADRAS

| <i>Date of Reserving the Order</i> | <i>Date of Pronouncing the Order</i> |
|------------------------------------|--------------------------------------|
| 09.09.2016 | 14.09.2016 |

Coram**The Hon'ble Mr.Justice T.S.Sivagnanam****Writ Petition No.26821 of 2016,**

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W.M.P.Nos.23051 and 23052 of 2016

M/s. Coromandel Oils Pvt., Ltd.,
(PAN : AAACC8855E)
A Private Ltd., Company,
rep. by its Director, Mr.Harshad V Doshi,
having its Office at Doshi Towers,
9th Floor, 156, Poonamallee High Road,
Kilpauk, Chennai – 600 010.

...Petitioner

Vs.

1. The Tax Recovery Officer – 1,
Company Range – 1,
Room No.503, New Block, 5th Floor,
121 Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034.
2. The Assistant Commissioner of Income Tax,
Corporate Company Range – 1,
121 Mahatma Gandhi Road, Nungambakkam,
Chennai – 600 034.

3. The Commissioner of Income Tax-1,
Company Circle – 1,
121 Mahatma Gandhi Road, Nungambakkam,
Chennai – 600 034.'

...Respondents

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified Mandamus to call for records of the first respondent in T.R.No.69-C/2012-13/AAACC8855E, dated 08.01.2013, relating to the assessment years 2009-10, 2010-11, and 2011-12, and to quash the order of attachment of the immovable property, and to direct the first respondent to lift the order of the attachment of the immovable property, and to return the original document given as a surety to the second respondent by letter, 04.09.2012.

For Petitioner : Mr.R.Sivaraman

For Respondents : Mr.T.Ravikumar
Senior Standing Counsel for
Income Tax Department

ORDER

The petitioner is a Private Limited Company, and they filed this Writ Petition, challenging the order of attachment of the immovable property, passed by the first respondent/Tax Recovery Officer, under the provisions of the Income Tax Act, 1961 (hereinafter, referred to as 'the Act') dated 08.01.2013, and to quash the same, and consequently, to direct the

first respondent to lift the order of attachment and to return the original documents, given as surety to the second respondent/Assistant Commissioner of Income Tax, by letter, dated 04.09.2012.

2. To decide the issue involved in this Writ Petition, the following facts are relevant:-

i) The petitioner, for the assessment years 2009-10, 2010-11, and 2011-12, admitted income from capital gains, on the gain so arrived at under the development of a residential project. The Assessing Officer/second respondent, by order, dated 27.06.2012, passed under Section 143 (3) of the Act, disallowed the capital gain computation, and assessed the entire profit under normal computation, apart from levying penalty, by order, dated 31.12.2012. Even before the completion of the assessment for the said three years, the second respondent, by order, dated 06.02.2012, made provisional attachment in respect of the undivided shares of land, remaining unsold, out of the total extent of land as on 08.01.2013, in the property, at Perungudi Village, where the petitioner's Manufacturing Unit was located. The provisional attachment was also intimated to the Sub Registrar, Neelankarai.

ii) As against the orders passed by the second respondent, both on merits and levying penalty, the petitioner preferred Appeals before the Commissioner of Income Tax (Appeals -I), viz., the third respondent herein. In the meantime, the petitioner was treated as an assessee in default by the second respondent, and certified the arrears for all the assessment years. Pursuant to such certificate, the first respondent, by proceedings, dated 08.01.2013, passed an order of attachment of the immovable property, under Form No.I.T.C.P.-16, Rule 48 of second schedule to the Act. Apart from attaching the said property, the properties belonging to the Directors/Beneficial Owners of the petitioner-Company were attached. Thereafter, the respective owners of the property had given surety by producing documents.

iii) Thus, the petitioner would contend that, not only the property of their Company has been attached, but also the sureties obtained from other Directors/Beneficial owners of the petitioner-Company. In the interregnum, the Appeals filed against the orders of the second respondent were partly allowed by the Commissioner of Income Tax (Appeals -I) and

the entire penalty was deleted. Therefore, the demand raised by the second respondent had substantially reduced to nil.

iv) Therefore, it is the contention of the petitioner that the order of attachment effected by the first respondent on the immovable property does not survive. Pursuant to the order passed by the Commissioner of Income Tax (Appeals -I), the second respondent/Assessing Officer passed a consequential order, dated 27.09.2013, giving effect to the order of the Commissioner of Income Tax (Appeals-I).

v) Challenging the order passed by the Commissioner of Income Tax (Appeals -I), the petitioner as also the Revenue Department filed Second Appeals before the Income Tax Tribunal 'C' Bench, Chennai (for short, ITAT). The ITAT, by order, dated 26.06.2015, allowed the Appeal filed by the petitioner and dismissed the Appeal filed by the Revenue Department. As a consequence thereof, the second respondent passed orders, dated 08.09.2015 and 14.09.2015, giving effect to the order of ITAT. In terms of giving effect to the order of ITAT for the aforesaid three assessment years, the demand of tax in respect of the assessment year 2009-

10 was Nil, and with regard to two assessment years, 2010-11 and 2011-12, the petitioner was entitled for refund.

vi) It appears that the petitioner has also filed an Application under Section 154 of the Act, on 13.01.2016, which is stated to be pending. Even before that, the petitioner had submitted a letter, dated 30.10.2015, requesting for lifting the attachment. This was followed by two other representations, and similar prayer was also made by the Directors of the petitioner-Company, who had furnished surety, but, no action had been initiated, which has necessitated the petitioner to approach this Court, challenging the order of attachment.

3. The learned counsel appearing for the petitioner contended that the petitioner cannot be treated as a defaulter, and even if the Revenue has challenged the order of ITAT, by filing Tax Case Appeal before this Court, still the petitioner cannot be treated as defaulter. Even assuming that the Revenue succeeds in the Tax Case Appeal filed before this Court, yet, the petitioner cannot be treated as assessee in default, as they are entitled to a notice of 30 days, and if the liability is cleared by then, they are not a

defaulter. Therefore, the impugned order of attachment cannot survive after ITAT passed orders, which order has been given effect to by the second respondent.

4. It is further submitted by the learned counsel that for four years, the petitioner is suffering. Apart from that, their Directors are also suffering, as they are unable to sell the property. The value of the property, which has been attached is more than Rupees Ten Crores, the value of the property, given as surety by Directors, is more than Rupees Twenty Crores, and action of the Revenue Department, in refusing to consider the petitioner's request for raising attachment not tenable. It is submitted that, this Court, in the case of **(Sri Lakshmi Brick Industries Vs. The Tax Recovery Officer)** reported in **(2013) 351 ITC 0345** has considered a similar issue to release the property, which was the subject matter of attachment, and rendered the decision, following the decision of the Hon'ble Supreme Court, in the case of **(Sri Mohan Wahi Vs. Commissioner of Income Tax and others)** reported in **(2001) 248 ITR 799**.

5. The learned Senior Standing Counsel for the respondent/Income Tax Department has referred to Section 225 (3) of the Act, and submitted that, where a certificate has been drawn up, and subsequently, the amount of the outstanding demand is reduced as a result of an Appeal, or other proceeding, under the Act, the Tax Recovery Officer shall, when the order, which was the subject matter of such Appeal, or other proceeding has become final and conclusive, amend the certificate, or cancel it, as the case may be. Placing emphasis on the words "final" and "conclusive", it is submitted that the order passed by ITAT has not attained finality, and it has not become conclusive, as the Department as filed Tax Case Appeal before this Court, under Section 260 A of the Act, and the same is to be numbered shortly, as there is a delay in re-presenting the papers. Therefore, it is submitted that, as long as the order passed by ITAT has not become final and conclusive, the question of raising the attachment does not arise.

6. Further, it is submitted by the learned Senior Standing Counsel that the procedure under Rule 12 of second schedule to the Act has to be followed, and such a contingency would arise only after finality is arrived at

the proceeding, and therefore, the prayer sought for by the petitioner cannot be acceded to, by the Department. In support of the said contention, reliance has been placed on the decision of this Court, in the case of **(Pyramid Saimira Theatre Ltd., Vs. Commissioner of Income Tax)** reported in **(2009) 316 ITR 75 Madras** and the decision of the Hon'ble High Court of Calcutta, in the case of **(Income Tax Officer Vs. Ghanshyamdas Jatia)** reported in **(1976) 105 ITR 693 (CAL)**.

7. Heard Mr.R.Sivaraman, the learned counsel appearing for the petitioner, and Mr.T.Ravikumar, learned Senior Standing Counsel (Income Tax Department) appearing for respondents, and perused the materials placed on record.

8. The factual matrix of the case, as set out in the preceding paras, pertaining to the assessment, and, culminating in the order of ITAT, is not disputed by the Revenue. The fact that, giving effect to orders have been passed by the second respondent pursuant to the order passed by ITAT, on 08.09.2015 and 14.09.2015, for all three assessment years, is not disputed. The only defence, putforward by the Revenue for refusing to accede to the

prayer sought for by the petitioner for raising the attachment is that, the order passed by ITAT has not become final and conclusive. In this regard, reference was made to Section 225 (3) of the Act, and Rule 12 of second schedule to the Act.

9. As noticed above, sub-section 3 of Section 225 uses the expressions “final” and “conclusive”. It has to be seen, as to how the expressions should be understood, in the given facts and circumstances of the case.

10. The contention of the Revenue is that, the terms "final" and "conclusive" would mean the finality attached to the order, when the order is challenged and taken to the logical end, or in the case, where the Department accepts the judgment. In other words, the stand taken by the Revenue is that, even if the Revenue fails to succeed in the Tax Case Appeals, yet, they got a remedy of Appeal to the Hon'ble Supreme Court, and only thereafter, the proceeding could be construed as final and conclusive. However, I am not in a position of subscribing to such a submission, as Section 225 (3) should not be read in isolation, but should be

read along with Section 222. This is so because, in terms of Section 222, where, an assessee is in default, or is deemed to be in default in making payment of tax, the Tax Recovery Officer may issue a certificate, specifying the amount of arrears due from the assessee, and shall proceed to recover from such assessee, the amount so specified, by one or more of the modes, which includes attachment and sale of the assessee's immovable properties. The second schedule sets out the procedure for recovery of tax. Therefore, the action, that is required to be taken prior to the property being attached is that, the Tax Recovery Officer should issue a certificate that the assessee is in default.

11. In **Sri Mohan Wahi's case (supra)**, a house property, owned by one late B.P. was the subject matter of attachment, and the proclamation of sale was issued for sale of the property, and the property was sold and the highest bidder deposited the money. The widow of the owner of the property filed a Suit to restrain the sale, claiming that the shares of two of her sons could not have been attached, and advertised for sale. In the said Suit, order of interim injunction was granted by the Civil Court, as a result of appellate and other proceedings, all the demands against the Firm stood

wiped out and reduced to nil. Therefore, the assessee addressed the Income Tax Officer that the demand had been cancelled, and the Tax Recovery Officer may be informed accordingly. In spite of the same, the Tax Recovery Officer confirmed the sale, and the Revision Petition filed against the same before the Commissioner, under Section 264 of the Act was dismissed. As did the High Court, when a Writ Petition challenging the dismissal of Revision Petition was filed, and on Appeal to the Hon'ble Supreme Court, the Hon'ble Supreme Court reversed the decision of the High Court, and held that the Tax Recovery Officer could not have confirmed the sale, when the demands on account of tax, for the recovery of which certificates were issued, had admittedly ceased to exist.

12. It was further held in **Sri Mohan Wahi's case (supra)** that the term "reduced" in Section 225 (3) of the Act would include a case, where the demand, consequent upon an appeal, or any proceeding, under the Act has been reduced to nil also. Further, it was pointed out that the combined effect of Section 225 (3) of the Act and Rules 56 and 63 of schedule II is that, before an order confirming the sale is actually passed by the Tax Recovery Officer, the demand of tax consequent upon an order made in

appeal, or other proceedings under the Act had been reduced to nil, the Tax Recovery Officer is obliged to cancel the certificate, and, as soon as the certificate is cancelled, he shall have no power to make an order confirming the sale. Though this interpretation was made, taking note of Rules 56 and 63 of schedule II to the Act, yet, the underlying legal principal is that, once the demand has been reduced to nil, the Tax Recovery Officer has no power to confirm the sale. If that be the case, then, it would apply with more force in a case of attachment, which is a step anterior to sale.

13. The decision rendered in **Sri Mohan Wahi's case (supra)** was taken into consideration by the learned Single Judge of this Court, in **Sri Lakshmi Brick Industries case (supra)** wherein, it was held as follows:-

“ 12 . In the present case, the order of the Income Tax Appellate Tribunal, which is the highest fact finding authority, held infavour of the petitioner assessee andthat order has been given effect to. As a consequence,the Tax Recovery Officer is bound to give effect of the order of the Assistant Commissioner, who accepted the order of the Tribunal. It is another matter for the Department to proceed in Appeal, and the

Department is always at liberty to proceed for recovery, if they succeed in the Appeal before the Court. The provisions of Section 225(2) of the Income Tax Act, 1961, gives a mandate to Tax Recovery Officer to pass appropriate orders based on the orders passed in Appeal, or other proceedings.

13. In such view of the matter, the first respondent Tax Recovery Officer is directed to pass necessary orders, consequent to the proceedings of the Assistant Commissioner of Income Tax, Circle XIV, accepting the order of the Tribunal. Taking note of the nil payment in favour of the assessee for all the assessment years, the Tax Recovery Officer has to release the property from attachment in terms of the order of the Tribunal, and consequent to the order of the Assistant Commissioner of Income Tax, Circle XIV.

The Writ Petitions are allowed as above. No costs.”

14. The learned Senior Standing Counsel for the Revenue pointed out that, in the decision rendered in **Sri Lakshmi Brick Industries (supra)**, the Court did not interpret the expressions "final" and "conclusive", and therefore, the said decision cannot be applied to the facts of the case on

hand. This contention does not merit acceptance, as the decision in **Sri Mohan Wahi's case (supra)** was rendered, taking into consideration the scope of Section 225 (3) read with Rule 12 of second schedule to the Act. This was taken note of in **Sri Lakshmi Brick Industries (supra)**, and therefore, the ground raised by the Revenue, is not a ground to distinguish the decision in **Sri Lakshmi Brick Industries (supra)**.

15. In the considered view of this Court, the decision in **Sri Lakshmi Brick Industries (supra)** would apply with full force to the case of the petitioner herein.

16. The learned Senior Standing Counsel for the Revenue has referred to the decision in **Ghanshyamdas Jatia's case**, and submitted that, unless the outstanding demand is reduced by an order in Appeal, or other proceeding, and such order has become final and conclusive, the question of lifting the attachment does not arise, and the position would be that, the certificate proceeding already started under the original assessment in such case remains in abeyance, subject to the provisions of Section 225 (4) abiding with the last order, as it attains finality and conclusiveness. In the

said decision, the matter was pending before the Tribunal, and the Court observed that the matter had not attained the character of final and conclusive order, and therefore, it did not have any effect on the certificate proceeding, which remained in abeyance pending decision by a final and conclusive order.

17. However, in contradistinction to the present case, the Appeal filed by the petitioner/assessee has been allowed in full by ITAT, and demand of tax, in respect of the assessment year 2009-10 was Nil, and with regard to two assessment years, it has resulted in refund. Thus, to say that the order of attachment should still continue till the matter reaches the Hon'ble Supreme Court would be an interpretation, which would be inconsistent with the provisions of the Act, more particularly, by reading together Sections 222 and 225 of the Act.

18. As rightly pointed out by the learned counsel for the petitioner, the object of the demand is to secure the interest of the revenue. The Income Tax Officer acquires jurisdiction to attach the property based on a certificate issued by the Tax Recovery Officer, certifying that the assessee is

a defaulter. As on date, the Tax Recovery Officer has not issued such a certificate. Even assuming that the Tax Case Appeal filed by the Revenue is entertained, that by itself, will not make the petitioner as an assessee in default, on account of the fact that the entire tax liability is wiped of pursuant to the order of ITAT.

19. Assuming further that the Revenue succeeds in the Tax Case Appeal, automatically, the assessee will not be treated as defaulter, since the consequential orders have to be passed, notice of demand have to be issued, time has to be granted, thereafter, proceeding has to be initiated and certificate has to be issued by the Tax Recovery Officer, declaring the petitioner as defaulter, and only then, the order of attachment of immovable property of the petitioner could be effected. Furthermore, the decision in the case of **Sri Lakshmi Brick Industries (supra)** was challenged by the Revenue, by way of Writ Appeal, being Writ Appeal No.1527 of 2013 and it is pending, and it is submitted that the issue involved in the Writ Appeal has become infructuous.

20. Thus, the decision of this Court in the case of **Sri Lakshmi Brick Industries (supra)** being the jurisdictional Court for the respondent,

the same would bind over the respondent, as held by the Hon'ble Supreme Court in the case of **(M/s. East India Commercial Co. Ltd., and another Vs. Collector of Customs, Calcutta)** reported in **A.I.R. (1962) S.C. 1893**, that the law declared by the highest court in the State is binding on authorities, or tribunals under its superintendence, and that they cannot ignore it, either in initiating a proceeding or deciding on the rights involved in such a proceeding.

21. The learned Senior Standing Counsel for the Revenue relied upon the decision of this Court in **Pyramid Saimira Theatre Ltd.,(supra)**. On a carefully going through the said decision, it is noted that the decision was on an entirely different issue, not with specific reference to the point, which has been agitated as to the effect of expressions "final" and "conclusive". Therefore, the said decision does not render support to the stand of the Revenue.

22. For all the aforesaid reasons, the Writ Petition is allowed, and the first respondent/Tax Recovery Officer is directed to pass appropriate orders for lifting the order of attachment of the immovable property of the

petitioner, and return the original documents given as surety to the second respondent, vide letter, dated 04.09.2012, and pass necessary consequential orders with due intimation to the Sub Registrar, Neelankarai. The above direction shall be complied with by the first respondent, within a period of four weeks from the date of receipt of a copy of this order. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

14.09.2016

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Index : yes/no

To

1. The Tax Recovery Officer – 1,
Company Range – 1,
Room No.503, New Block, 5th Floor,
121 Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034.
2. The Assistant Commissioner of Income Tax,
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T.S.Sivagnanam, J.

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Pre-delivery order
in
Writ Petition No.26821 of 2016

14.09.2016