R

IN THE HIGH COURT OF KARNATAKA

DHARWAD BENCH

DATED THIS THE 18th DAY OF DECEMBER, 2015

BEFORE

THE HON'BLE MR. JUSTICE RAGHVENDRA S. CHAUHAN

WRIT PETITION Nos. 114181-184/2015 (T-IT)

BETWEEN:

BANK OF BARODA
REP BY CHIEF MANAGER,
BELAGAVI BRANCH, 1568,
MARUTI GALLI,
BELAGAVI-590002

... PETITIONER

(BY SRI. B S N PRASAD & SRI.H R KAMBIYAVAR, ADVOCATES)

AND:

1. THE INCOME TAX OFFICER (TDS)
   FK COMMERCIAL COMPLEX,
   OPP DISTRICT HOSPITAL,
   DR.B.R.AMBEDKAR ROAD,
   BELAGAVI-560001

2. THE COMMISSIONER OF INCOME TAX (APPEALS)
   FK COMMERCIAL COMPLEX,
   OPP CIVIL HOSPITAL,
   DR.B.R.AMBEDKAR ROAD,
   BELAGAVI-560001

... RESPONDENTS

THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DIRECT TO THE SECOND RESPONDENT TO CONSIDER THE PETITIONER's APPLICATIONS DATED:16.03.2015 ENCLOSED WITH THIS PETITION AS ANNEXURE-M, AND GRANT STAY OF RECOVERY OF THE DISPUTED DEMANDS FOR ASSESSMENT YEARS (AYs)2011-12 TO 2014-15 UNTIL DISPOSAL OF THE APPEALS FILED BY THE PETITIONER UNDER SECTION 246A(1)(ha)., DATED:16.03.2015 ENCLOSED WITH THIS PETITION AS ANNEXURE-L AGAINST THE ORDERS PASSED BY THE FIRST RESPONDENT ON 23.02.2015 UNDER SECTIONS 201(1) AND 201(1A) OF THE ACT FOR THE AFORESAID ASSESSMENT YEARS, VIDE ANNEXURE-K.

THESE PETITIONS COMING ON FOR PRELIMINARY HEARING THIS DAY, THE COURT MADE THE FOLLOWING:

O R D E R

The petitioner, Bank of Baroda, has challenged the order dated 15.04.2015, passed by the Commissioner of Income Tax (Appeals), Belagavi, whereby the learned Commissioner has rejected the petitioner's prayer for stay of demand dated 16.03.2015.

2. Briefly, the facts of the case are that the Income Tax Officer, respondent No.1 (the 'ITO', for short), had issued

summons on 15.12.2014 under Section 131 along with notice under Section 133(6) of the Income Tax Act, 1961 ('the Act', for short), calling upon the petitioner-Bank to submit details of the Fixed Deposits held by the Visveswarayya Technological University, Belagavi ('the VTU', for short) and the interest paid on such deposits during the financial years 2010-2011 to 2013-2014, and the Tax Deducted at Source ('TDS', for short) on such payment, and to show reasons as to why these deductions have not been made, and quarterly statements filed under Section 194A of the Act, in respect of such payments. By letter dated 26.12.2014, the petitioner Bank informed the ITO that it did not deduct any TDS on the interest paid to the VTU, because by letter dated 03.09.2014, the VTU had informed the Bank that the University is exempted from filing the returns under Section 10(23C)(iiiab) Section 139 of the Act. The Bank further claimed that since it had no reason to disbelieve the assertion made by the payee-VTU, it did not deduct the TDS.

3. Not satisfied by the explanation offered by the petitioner-Bank, on 29.12.2014, the ITO issued a show cause notice to the petitioner, calling upon it to explain why it should not be considered as an assessee in default, for failing to make the TDS under Section 194A of the Act. Subsequently, on 16.01.2015, the ITO issued summons under Section 131 of the Act, and also sent a letter to the petitioner-Bank calling upon the Bank to appear before him on 22.01.2015. The Bank was directed to produce the additional documents related to interest payments made to the VTU, without deducting TDS. Consequently, on 19.01.2015, the Bank filed a written submission explaining the reasons why the TDS was not made on interest paid to the VTU. The Bank further explained the reason why it should not be treated as an assessee in default.

4. Notwithstanding the explanation given by the petitioner-Bank, on 19.02.2015, the Income Tax Officer passed four separate, but identical orders, and treated the petitioner-Bank as an assessee in default, and raised an aggregate

interest payment of Rs.15,22,963/- under Section 201(1)/(1A) of the Act, for the assessment year 2011-12 to 2014-2015.

5. Since the petitioner-Bank was aggrieved by the assessment order dated 19.02.2015, it filed an appeal under Section 246A(1)(ha) and filed the petition under Section 220(6) of the Act before the Commissioner of Income Tax (Appeals).

6. On 19.03.2015, the Income Tax Officer issued an order under Section 220(6) of the Act, directing the petitioner to pay 50% of the disputed demand before 27.03.2015. However, by letter dated 27.03.2015, the petitioner-Bank expressed its strong objections to the said order, and requested the ITO to grant stay of recovery of the disputed demand until disposal of the appeal pending before the Commissioner (Appeals).

7. On 06.04.2015 and on 10.04.2015, the petitioner-Bank filed two written submissions before the Commissioner (Appeals) and prayed that the disputed demand be stayed and that the ITO should be directed not to treat the petitioner as an

assessee in default until disposal of the appeals pending before the Commissioner (Appeals). However, by order dated 15.04.2015, the learned Commissioner (Appeals) has rejected the application for stay, but has assured the petitioner-Bank that its appeal would be considered on priority basis. Hence the present petition before this Court.

8. Mr. B. S. N. Prasad, the learned counsel for the petitioner, has contended that, while Section 201 of the Act lays down the consequence of failure to deduct the tax at source, the proviso attached to Section 201(1) of the Act creates an exception in favour of the deductor. According to the proviso, in case the tax liability imposed upon the VTU were paid by the VTU, then the petitioner-Bank is not required to deduct the TDS.

Secondly, in the impugned order, the learned Commissioner (Appeals) is unjustified in claiming that the petitioner-Bank does not fall within the illustrations enumerated in para-C of the Instruction No.1914. According

to the learned counsel, the petitioner-Bank clearly fails within the first illustration, namely *"if the demand in dispute relates to issues that have been decided in assessee's favour by an Appellate Authority or the Court earlier"*, then the demand should be stayed by the learned Commissioner. However, the learned Commissioner has ignored the illustration (a) contained in para-C of Instruction No.1914. Therefore, the impugned order deserves to be set aside by this Court.

9. Heard the learned counsel for the petitioner, and perused the impugned order.

10. This Court has asked a pointed question to the learned counsel for the petitioner: whether the petitioner-Bank had raised the contention before the ITO with regard to the benefit granted to the petitioner Bank under the proviso attached to Section 201 (1) of the Act or not? To this pointed query, the learned counsel has given a very evasive answer. According to him, the said contention was, indeed, raised before the Income Tax Officer. However, when this Court

asked him to point out where the said contention was recorded in the Assessment Order, the learned counsel could not show that such contention had, indeed, been raised before the ITO. Therefore, this Court is of the opinion that the said contention was not raised before the ITO, although it may have been mentioned in the written submission filed by the Bank. In catena of cases, the Hon'ble Supreme Court has opined that, if any contention is contained in the written submission, but unless and until it is recorded and reflected in the impugned order, the Court shall presume that the said contention was not raised before the concerned authority or the Court.

11. A bare perusal of the assessment order clearly reveals, that the stand taken by the petitioner-Bank was that since they were informed by the VTU that they were exempted from filing the return under Section 10(23C)(iiiab) Section 139 of the Act, the Bank never deducted the TDS.

12. The issue whether the VTU is exempted under Section 10(23C)(iiiab) of the Act or not, the issue whether the

petitioner-Bank was statutorily bound to deduct the TDS, has been discussed threadbare by the ITO. Since it would not be correct for this Court to express any opinion about the findings of the ITO, this Court restrains itself from expressing any opinion on these two issues. For, expression of any opinion on these two points may adversely affect the appeal pending before the Commissioner (Appeals).

13. The moot question before this Court is whether the petitioner-Bank can claim the right to be exempted from depositing the tax liability or not, prior to its appeal being admitted for hearing?

14. According to Section 249 (4) of the Act, no appeal in the chapter shall be admitted, unless at the time of filing an appeal, the assessee has paid an amount equal to the amount of advance tax, which was payable by him. Thus, Section 249(4) of the Act clearly stipulates that the assessee is duty bound to pay the amount equal to the amount of advance tax. However, the proviso bestows a discretionary power upon the

Commissioner (Appeals) to exempt the assessee from the portion of the provisions of clause-B mentioned above.

15. Therefore, the question before this Court is whether the Commissioner(Appeals) has exercised his discretion legally or illegally? According to the proviso, in case the Commissioner were to grant any exemption from the payment of the amount equal to the amount of advance tax, he should record his good and sufficient reason in writing.

16. A bare perusal of the impugned order clearly reveals that the learned Commissioner has opined that, since the petitioner-Bank does not fall within any of the illustrations contained in para C of the Instruction No.1914, the benefit of staying the demand cannot be given to the petitioner-Bank.

17. Of course the learned counsel for the petitioner has pleaded that the petitioner-Bank does fall within the illustration (a) of para C of instruction No.1914 which is as under:

"C.............

(a) if the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier;..................

(b) ....

(c) ....

it is clarified that in these situations also, stay may be granted only in respect of the amount attributable to such dispute points. Further, where it is subsequently found that the assessee has not cooperated in the early disposal of appeal or where a subsequent pronouncement by a higher appellate authority or court alters the above situation, the stay order may be reviewed and modified. "

18. According to the illustration (a), the demand can be stayed by the learned Commissioner, provided that demand in dispute relates to issues that have been decided in assessee's favour by an Appellate Authority, or the Court earlier. However, the learned counsel for the petitioner has not been able to show this Court as to which Appellate Authority, or by which Court the issues involved in the present case have already been decided, that, too, in favour of the petitioner-

Bank. Thus, obviously, the petitioner-Bank cannot claim that it falls under illustration (a) of para-C of Instruction No.1914.

19. The learned counsel has further pleaded that, since the petitioner-Bank is a public sector undertaking, it should not be imposed with the liability to deposit the entire tax liability. However, the said contention is unacceptable. For a statutory duty has been imposed upon the Bank to deduct the TDS. In case the Bank does not deduct the TDS, it has to face the consequences as mentioned in Section 201 of the Act. Since Section 249(4) of the Act imposes a duty upon the assessee to deposit the entire amount, before that appeal can be admitted, the Bank cannot escape from its liability to follow the mandate of Section 249(4) of the Act. Although Instruction No.1914 does create exception to Section 249(4) of the Act, as mentioned above, the petitioner-Bank cannot take any benefit from Instruction No.1914, as it does not come within the ambit and scope of the said instruction.

20. For the reasons stated above, this Court does not find any illegality or perversity in the impugned order. These petitions, being devoid of any merit, are hereby dismissed.

Sd/-
JUDGE

gab/-

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