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ORDER SHEET

WPO 113 of 2018
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

M/S GRAPHITE INDIA LTD
Vs
DY. COMMISSIONER OF INCOME TAX,
CIRCLE 11(1) KOLKATA & ORS.

BEFORE:

The Hon'ble JUSTICE MD. NIZAMUDDIN

Date : 15th February, 2022

(Via Video Conference)

Mr. Somak Basu, Adv.
...for the petitioner
Mr. S.N. Dutta, Adv.
...for the respondents

The Court: Heard learned advocates appearing for the parties.

In this matter petitioner has challenged the impugned action of the assessing officer making adjustment of the demand in question under Section 245 of the Income Tax Act, 1961 for the assessment year 2015-16 with the refund for assessment year 2008-09 without disposing the objection to the intimation of proposal to make adjustment under Section 245 of the Act and without disposing the application of the petitioner under Section 220 (6) in connection with the demand arising out of the assessment order relating to assessment year 2015-16 during the pendency of appeal before the CIT (Appeals) against the said assessment.

On perusal of relevant record and considering the facts of this case I am of the view that the following two legal questions arise in this writ petition :

(i) Whether impugned action of the assessing officer under Section 245 of the Income Tax Act, 1961 making adjustment of the demand for the assessment year 2015-16 with the refund for the assessment year 2008-09 without considering and disposing of the objection of the petitioner against the intimation of proposal to make adjustment under Section 245 of the said Act and without affording any opportunity of hearing to the petitioner and without passing a formal order of his satisfaction that the assessee petitioner will not be in a position to satisfy the demand for tax in question and the tax amount cannot be recovered at all, is legal and valid ?

(ii) Whether impugned action of the respondent assessing officer making adjustment of the whole amount of demand relating to assessment year 2015-16 under Section 245 of the Act and which is admittedly in excess of 20% of the demand in question, from the refund of assessment year 2008-09, during the pendency of the appeal against the assessment order for the assessment year 2015-16, without disposing and passing any formal order on the application of the assessee petitioner under Section 220 (6) of the Act, is contrary to and inconsistent with the office

memorandum F. No. 404/72/93-ITCC dated 29th February, 2016 and the office memorandum F. No. 404/72/93-ITCC dated 31st July, 2017 issued by the Central Board of Direct Taxes ?

Brief facts involved in this writ petition are as hereunder :

On 29th December, 2017 the assessing officer passed assessment order under Section 143 (3) of the Act relating to assessment year 2015-16 and the petitioner preferred an appeal against the same before the CIT (Appeals). The petitioner also filed an application under Section 220 (6) of the Act on 29th January, 2018 before the Respondent assessing officer concerned for not treating the assessee/petitioner as assessee in default relating to demand in question arising out of the assessment order passed relating to assessment year 2015-16. It appears from record that the respondent no. 1 issued an intimation on 12th March, 2018 under Section 245 of the Act proposing to adjust the demand relating to assessment year 2015-16 from the refund of the assessment year 2008-09 and against such intimation petitioner had filed its objection before the respondent no. 1 and also filed the instant writ petition being aggrieved by the aforesaid impugned order of intimation. It appears from record that during the pendency of the writ petition petitioner received income tax refund order advice from the State Bank of India relating to refund adjustment, without considering and disposing of the objection of the petitioner against the aforesaid impugned intimation of proposal for adjustment and without disposing and passing any formal order on

application of the petitioner under Section 220 (6) of the Act which is an admitted fact. It also appears from record that during pendency of appeal the amount which has been adjusted for the assessment year 2015-16 from the refund of assessment year 2008-09 is more than 20% of the demand raised in the assessment order relating to assessment year 2015-16.

Petitioner submits that such action of the respondent assessing officer in making adjustment in question without disposing its objection to the intimation under Section 245 of the Act and without disposing its application under Section 220 (6) of the Act is bad and not sustainable in the eye of law.

In support of his contention learned advocate appearing for the petitioner relies on a decision of the Division Bench of Delhi High Court in the case of "Glaxo Smith Kline Asia P. Ltd. vs. Commissioner of Income-Tax and Ors." reported in 290 ITR 35 and particularly on placitum 26 and 28 of the said decision which are as follows :

> "26. In our view, the power under section 245 of the act, is a discretionary power given to each of the tax officers in the higher echelons to "set off the amount to be refunded on or any part of that amount against the same, if any, remaining payable under this Act by the person to whom the refund is due." That this power is discretionary and not mandatory is indicated by the word "may". Secondly, the set off is in lieu of payment of refund. Thirdly, before invoking the power, the officer is expected to give an intimation in writing to the assessee to whom the refund is

due informing him of the action proposed to be taken under this section.

* * * *

28. As already noticed, this discretionary power has to be exercised after giving an opportunity to the assessee of being heard preceded by an intimation to the assessee in writing of the action proposed to be taken under section 245. A further implicit requirement is that the Revenue will have to be satisfied that the assessee will not be in a position to satisfy the demand of tax and that but for the set off, the outstanding tax amount cannot be recovered at all."

Similar view has been taken by the Delhi High Court in the case of "Oriental Insurance Co. Ltd. vs. Deputy Commissioner of Income-tax" reported in 229 Taxman 521 (Delhi). Petitioner has also relied on an unreported decision of Delhi High Court dated 3rd August, 2021 in the case of "Eko India Financial Services Private Limited vs. Assistant Commissioner of Income Tax Circle 7(1) & Anr." in W.P. (C) 5819/2021 and particularly on paragraphs 10,11,12 and 13 which are quoted hereinbelow :

"10. Having heard learned counsel for the parties, this Court is of the view that the Government is bound to follow the rules and standards they themselves had set on pain of their action being invalidated. [See : ***Amrit Singh Ahluwalia vs. State of Punjab & Ors. 1975 (3) SCR 82 and Ramana Dayaram Shetty vs.***

International Airport Authority of India & Ors. 1979 SCR (3) 1014].

11. This Court is also of the view that the office memorandum dated 29th February, 2016 read with office memorandum dated 25th August, 2017 stipulate that the Assessing Officer shall normally grant stay of demand till disposal of the first appeal on payment of 20% of the disputed demand. In the event, the Assessing Officer is of the view that the payment of a lump sum amount higher than 20% is warranted, then the Assessing Officer will have to give reasons to show that the case falls in para 4(B) of the office memorandum dated 29th February, 2016.

12. This Court finds that the order under Section 245 of the Act for adjustments of refunds as well as the order on stay of demand under Section 220(6) of the Act do not give any special/particular reason as to why any amount in excess of 20% of the outstanding demand should be recovered from the petitioner-assessee at this stage in accordance with paragraph 4(B) of the office memorandum dated 29th February, 2016. Consequently, this Court is of the view that the respondent is entitled to seek pre-deposit of only 20% of the disputed demand during the pendency of the appeal in accordance with paragraph 4(A) of the office memorandum dated 29th February, 2016, as amended by the office memorandum dated 25th August, 2017.

13. Accordingly, the respondent no. 1 is directed to refund the amount adjusted in excess of 20 % of the disputed demand for the Assessment Year 2017-18, within four weeks.

……."

On the similar issue petitioner has relied on another unreported decision of Delhi High Court in the case of "Skyline Engineering Contracts (India) Private Limited vs. Deputy Commissioner of Income Tax Circle 22(2), Delhi & Ors." in W.P. (C) 6172/2021 & CM Appl. 19561/2021 dated 23rd August, 2021 and particularly paragraphs 10, 11 and 12 which are quoted hereinbelow :

"10. This Court is also of the view that the office memorandum dated 29th February, 2016 read with office memorandum dated 25th August, 2017 stipulate that the Assessing Officer shall normally grant stay of demand till disposal of the first appeal on payment of 20% of the disputed demand. In the event, the Assessing Officer is of the view that the payment of a lump sum amount higher than 20% is warranted, then the Assessing Officer will have to give reasons to show that the case falls in para 4(B) of the office memorandum dated 29th February, 2016.

11. This Court finds that in the present matters no order has been passed by the Assessing Officer under Section 245 of the Act for adjustments of refunds. Moreover, there is no order by the Assessing Officer giving any special/particular reason as to why any amount in excess of 20% of the outstanding demand should be recovered from the petitioner-assessee at this stage in

accordance with paragraph (4B) of the office memorandum dated 29th February, 2016.

12. Consequently, this Court is of the view that the respondents are entitled to seek pre-deposit of only 20%^of the disputed demand during the pendency of the appeals in accordance with paragraph 4(A) of the office memorandum dated 29th February, 2016, as amended by the office memorandum dated 25th August, 2017."

Mr. Dutta, learned advocate appearing for the respondents opposing this writ petition submits that under Section 245 of the Act there is no provision for granting of hearing before taking action of adjustment and it is not mandatory. He also submits that the whole issue relating to assessment year 2015-16 can be resolved in the pending appeal before the CIT (Appeals) including the impugned action under Section 245 of the Act. I am not convinced with the argument and submission of Mr. Dutta in view of admitted facts as recorded above and the law laid down in the aforesaid judgments cited by the petitioner that affording of opportunity of hearing to the assessee/petitioner before making any adjustment under Section 245 of the Act is mandatory and just intimation of proposal to adjustment is a mere idle formality. More so when the petitioner has already filed an objection against the intimation proposing adjustment of refund from the due of another assessment year, respondent assessing officer was bound to dispose of the same and to take a decision on the said objection. Mr. Dutta could not satisfy this Court from any record that

any formal order was passed by the assessing officer on the objection to the aforesaid intimation under Section 245 of the Act and specifically recording regarding his satisfaction that the demand of tax in question cannot be recovered at all and has come to a specific conclusion that the petitioner is not in a position to pay the amount of demand in question. Mr. Dutta also could not satisfy from the record that any specific order was passed on the application of the petitioner under Section 220(6) of the Act either rejecting or accepting the same before taking such coercive action under Section 245 of the Act and more so in adjusting the amount more than 20% of the demand in question by disregarding and ignoring the aforesaid office memorandum of CBDT which was binding upon him is bad in law.

Considering the submissions of the parties and the judgments relied upon and the admitted facts which appear from record, this writ petition is disposed by allowing the same by holding that the impugned action of the assessing officer under Section 245 of the Income Tax Act, 1961 making adjustment of demand of assessment year 2015-16 in excess of 20 % from the refund of assessment year 2008-09 without disposing of the objection of the petitioner against the intimation under Section 245 of the Act and taking any formal decision on the said objection is bad and not sustainable in law and the impugned action under Section 245 of the Act without disposing of and taking any decision on application of the petitioner under Section 220 (6) of the Act and acting contrary to the aforesaid office memorandum of CBDT dated 29th February, 2016 and 31st July, 2017

is bad in law. Accordingly the Assessing officer concerned is directed to refund the amount adjusted in excess of 20% of the demand arising out of the assessment order relating to assessment year 2015-16 from the refundable amount from the assessment relating to assessment year 2008-09 within four weeks from the date of communication of this order.

It is expected that the appeal in question pending before the CIT (Appeals) relating assessment year 2015-16 will be disposed of expeditiously without granting any unnecessary adjournment to the petitioner.

With these observations and directions, this writ petition being WPO 113 of 2018 is disposed of.

(MD. NIZAMUDDIN, J.)

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