IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 29TH DAY OF AUGUST 2016/7TH BHADRA, 1938

WA.No. 1335 of 2016 () IN WP(C).18723/2016

AGAINST THE JUDGMENT IN WP(C) 18723/2016 of HIGH COURT OF KERALA DATED 27-06-2016

APPELLANT/PETITIONER:

KERALA STATE BEVERAGES (M&M) CORPORATION LIMITED
SASTHAMANGALAM, TRIVANDRUM, 695010,
REP. BY MANAGING DIRECTOR.

BY ADVS.SRI.ANIL D. NAIR
SRI.R.SREEJITH
KUM.SOUMYA PRAKASH
KUM.MEKHALA M.BENNY

RESPONDENTS:

1. JOINT COMMISSIONER OF INCOME TAX
SPECIAL RANGE, TRIVANDRUM - 693 001.

2. PRINCIPAL COMMISSIONER OF INCOME TAX,
TRINANDRUM-695001.

3. THE COMMISSIONER OF INCOME TAX, (APPEALS)
TRIVANDRUM-695001.

R BY SRI.K.M.V.PANDALAI, INCOME TAX DEPARTMENT

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 29-08-2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Antony Dominic & Dama Seshadri Naidu, JJ.

Writ Appeal No.1335 of 2016

Dated this the 29th day of August, 2016

JUDGMENT

Antony Dominic, J.

In this appeal, after we had dictated judgment dated 22.8.2016, counsel for the respondents sought for an opportunity to make further submissions. Thereupon this case was posted for spoken to and was heard today. Accordingly, this judgment is rendered.

2. Heard the learned counsel for the appellant and the learned standing counsel appearing for the respondents.

3. This writ appeal is filed against the judgment of the learned single judge in WPC No.18723 of 2016. The writ petition having been dismissed, this appeal is filed.

4. Briefly stated the facts of the case are that the appellant, a Government of Kerala undertaking, is an assessee under the Income Tax Act. Ext.P1 is an order of assessment passed against the assessee for the assessment year 2012-2013 where the total income was determined by adding

surcharge on sales tax under the Kerala General Sales Tax Act and turn over tax levied under the Kerala Surcharge on Taxes Act, 1957.

5. In so far as the assessments for the assessment years 2007-2008 to 2011-2012 are concerned, the assessee's total income in those years was determined by making similar additions. In those cases following the orders of the Income Tax Appellate Tribunal and the Commissioner of Income Tax (Appeals), additions were deleted and substantial amounts had become refundable. Immediately after Ext.P1 order of assessment was passed, the appellant was issued Ext.P2 dated 3.2.2015 informing that a total amount of Rs.223,57,34,050/- have been determined to be refunded on giving effect to the orders of the CIT(A) pertaining to the assessment years 2007-2008 to 2011-2012 and that it was proposed to adjust the refund amount against the demand of tax due under Ext.P1 for the assessment year 2012-2013. Ext.P2 itself makes it clear that the said intimation was given to the appellant under Section 245 of the Income Tax Act.

6. Subsequently the appellant received Ext.P10A to P10E dated 6.2.2015, issued under Section 240 of the Income Tax Act determining the amount due for refund for each of the

assessment years, viz. 2007-2008 to 2011-2012. It was at that stage, the assessee filed the writ petition contending that only after determining the refund amount due under Section 240, adjustment as per Ext.P2 under Section 245 is permissible. The learned Single Judge, making reference to the provisions of Section 245 dismissed the writ petition. It is this judgment which is challenged before us.

7. The learned counsel for the appellant contended that having regard to the judgment of this Court in ITA No.68 of 2015 and connected cases, whereby final orders passed by the Tribunal confirming the deletion of surcharge and turn over tax paid by the assessee were upheld, the addition made in Ext.P1 assessment order is patently illegal and, therefore, no adjustment could have been made by the department towards a non-existing liability. He also contended that having regard to the scheme of the provisions of Sections 240 and 245, except after determining the amount under Section 240 as is done by Exts.P10A to P10E, adjustment under Section 245 as per Ext.P2 could have been made. Therefore, according to the learned counsel, the learned single judge erred in dismissing the writ petition.

8. The learned counsel for the revenue contended that

even in spite of the orders of the Tribunal and the judgment of this Court concerning the assessment years 2007-2008 to 2011-2012, and irrespective of the correctness of the additions made in Ext.P1, until the assessment order is varied in appeal, the department was entitled to invoke its power under Section 245 and to adjust the amounts due for refund for the assessment years 2007-2008 to 2011-2012. He also referred to us Section 292B and Section 292BB and contended that a technical breach would not invalidate the notices issued by the department.

9. We have considered the submissions made. According to us, irrespective of the controversy concerning Sections 240 and 245, the appellant is entitled to succeed. Admittedly, for the assessment years 2007-2008 to 2011-2012, the turn over of surcharge and turn over tax paid by the assessee were added to their total income and tax was levied on that basis. The correctness of that issue was decided by the Tribunal in the assessee's favour for one of the assessment years. That order was followed by the Commissioner of Income Tax (Appeals) before whom the appeals concerning the remaining years were pending at that time. The revenue carried those matters also before the Tribunal and the Tribunal followed its

earlier order and upheld the order passed by the First Appellate Authority. All these orders were challenged by the revenue before this Court. This Court confirmed the order passed by the Tribunal in the judgment in ITA No.68 of 2015 and connected cases. As on date, there is no appeal against those judgments.

10. This, therefore, means that the total income of the assessee could not have been determined by adding the surcharge and turn over tax paid by the assessee. If that be so, not only that the assessee was entitled to have the amounts found to be refundable in Exts.P2 and P10 series refunded to it, but also the addition of the surcharge and turn over tax to the total income in Ext.P1 assessment order for the year 2012-2013 is also illegal. Therefore, despite the fact that an appeal filed against Ext.P1 is pending consideration of the Commissioner of Income Tax (Appeals), as of now, the department is not entitled to adjust the amount refundable to the assessee consequent to the orders passed by the Commissioner of Income Tax Appellate Tribunal and this Court.

For these reasons, we are inclined to set aside the judgment under appeal and also Ext.P2 and direct the first

respondent to refund the amount mentioned in Ext.P2 to the assessee forthwith.

The writ appeal is allowed as above.

Sd/- Antony Dominic, Judge

sd/- Dama Seshadri Naidu, Judge

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P.S.TO JUDGE

Antony Dominic & Dama Seshadri Naidu, JJ.

Writ Appeal No.1335 of 2016

Dated this the 22nd day of August, 2016

JUDGMENT

Antony Dominic, J.

The appellant filed writ petition No.18723 of 2016 seeking to quash Ext.P7 and to direct the respondents to refund the amounts adjusted vide Ext.P2. The writ petition having been dismissed, this appeal is filed.

2. We heard the learned counsel for the appellant and the learned standing counsel appearing for the respondents.

3. As a result of Ext.P1 order of assessment for the assessment year 2012-2013, substantial amounts were due from the appellant. At the same time on giving effect to the appellate orders pertaining to the assessment years 2007-2008 to 2011-2012, amounts were due to be

refunded to the appellant. According to the appellant, instead of refunding the amounts, those amounts were adjusted towards the amounts due under Ext.P1, issuing Ext.P2 dated 3.2.2015, in exercise of the department's right under Section 245 of the Income Tax Act, it is stated it was only subsequently that on 6.2.2015, the department issued Ext.P10 series under Section 240 of the Income Tax Act giving effect to the appellate orders for the assessment years 2007-2008 to 2011-2012. This, according to the counsel, is against the provisions of Section 240 and 245 of the Income Tax Act.

4. However, when this argument was raised, the learned standing counsel for the department submitted that as a result of the judgment of this Court in ITA Nos.112 of 2015 and connected cases whereby the appeals filed by the department against the orders of the Tribunal pertaining to the assessment years 2007-2008 to 2011-2012 were dismissed, the adjustment made as per Exts.P2 and P10 series cannot be sustained and that the amounts have to be refunded to the appellant.

5. Since the department is thus conceding the right of the appellant to get the amounts adjusted by Ext.P2

and Ext.P10 series refunded to it, it is not necessary for us to answer the legal question raised by the learned counsel for the appellant.

Therefore, recording the submission made by the learned standing counsel appearing for the respondents, that the amounts adjusted under Section 245 as per Exts.P2 and P10 series would be refunded to the appellant, this appeal is disposed of leaving open the contentions raised.

Antony Dominic, Judge

Dama Seshadri Naidu, Judge

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