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License fee for liquor vending won't fall within ambit of sec. 43B

Summary – The High Court of Madras in a recent case of Coromandel Oils (P.) Ltd., (the Assessee) held that where in course of appellate proceedings, Tribunal passed an order whereby tax demand raised from assessee was completely wiped of, mere fact that revenue had filed an appeal against said order would not make assessee as an assessee-in-default and, thus, order of attachment of property of assessee against tax demand in question was to be struck down

Facts

- For the relevant years, the assessee admitted income from capital gains arrived at under the development of a residential project. The Assessing Officer passed an order under section 143(3) disallowing capital gain computation, and assessed the entire profit under normal computation, apart from levying penalty.
- The assessee filed an appeal before the Commissioner (Appeals) both on merits and levying penalty. In the meantime, the assessee was treated as an assessee-in-default by the second respondent *i.e.*, Assistant Commissioner who certified the arrears for all the assessment years. Pursuant to such certificate, first respondent 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.
- Subsequently, the assessee's appeal was partly allowed by the Commissioner (Appeals) and the entire penalty was deleted. The demand raised by the second respondent was also substantially reduced to *nil*.
- The appeal filed by revenue was dismissed by Tribunal. 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 assessee was entitled for refund.
- In aforesaid circumstances, the assessee filed instant petition seeking direction of the Court to quash the order of attachment of immovable property passed by the first respondent.
- The revenue referring to section 225(3) resisted the instant petition by raising a plea that the order passed by the Tribunal had not attained finality, and it had not become conclusive, as the Department had filed an appeal before the High Court which was still pending.

Held

- 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.
- 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 Supreme Court, and only thereafter, the proceeding could be construed as final and conclusive. However, such a submission cannot be accepted 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.
- In the present case, the appeal filed by the 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 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.
- As rightly pointed out by the assessee, 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. Even assuming that the Tax Case Appeal filed by the revenue is entertained, that by itself, will not make the assessee as an assessee-in-default, on account of the fact that the entire tax liability is wiped of pursuant to the order of ITAT.
- 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 assessee.