

(1998) 12 GUJ CK 0072
In the Gujarat High Court

Case No : Spl. Civil Application No. 2057 of 1998

Anilkumar Bhagwandas

APPELLANT

Vs

P.K. Tiwari

RESPONDENT

Date of Decision : 23-12-1998

Acts Referred:

Income Tax Act, 1961 — Section 132, 132(5), 132B, 132B(3), 132B(4)

Citation : (1999) 154 CTR 216 : (1999) 238 ITR 788

Hon'ble Judges : Rajesh Balia, J; Anil R. Dave, J

Bench : Division Bench

Advocate : S.N. Divatia, for the Appellant; Manish R. Bhatt, for the Respondent

Judgement

1. The brief facts which led to filing of this petition are that Rs. 1,45,680 were seized from petitioners on 7th October, 1986, in proceedings under s. 132 of the IT Act, 1961. On 3rd February, 1987, an order was made under s. 132(5) of the Act estimating undisclosed income in a summary manner and calculating the amount of tax on the income so estimated in accordance with the provisions of the Act and about other determination envisaged under said provision made an order for retaining in custody Rs. 1,41,800 out of said cash as was in his opinion sufficient to satisfy aggregate of amounts referred to in various sub-clauses of sub-s. (5) of s. 132. Regular assessment for the asst. yr. 1987-88, relevant to the previous year during which the search was conducted and money was seized from the petitioner was made on 19th June, 1989, As a result of which, entire amount detained by the respondents in proceedings under s. 132 became liable to be returned to the petitioner. The amount was not returned notwithstanding as a result of regular assessment the amount become so payable to the assessee in terms of s. 132B(3) of the Act. The assessee ultimately made a demand for refund of the amount which became payable to it by the respondents as a result of regular assessments dt. 19th June, 1989, vide letters dt. 16th December, 1991, and 18th December, 1991. As sum of Rs. 1,41,800 was finally paid to the assessee by way of refund voucher on 17th November, 1995, and interest on the

said amount between 3rd August, 1987, that is to say, with effect from the date of expiry of six months from the date of order under s. 132(5) to 19th June, 1989, the date of regular assessment under s. 143(3) of the Act, was computed and ordered to be refunded. The interest was worked out at the rate provided under the aforesaid provision. The said amount has also been paid by the respondents to the assessee.

2. Aggrieved with the calculation of interest payable on the amount which became due to the assessee on the making of assessment order dt. 19th June, 1989, assessee preferred a revision before the CIT, Ahmedabad, making a grievance that assessee is entitled to interest until the date of payment of amount which became due to be paid to the assessee as a result of assessment order dt. 19th June, 1989, in terms of s. 243 of the IT Act, 1961. That revision has been rejected by the CIT on 18th February, 1997, impugned order Annexure A to the petition, by holding that though the petitioner was entitled to claim interest under s. 243 within the ratio of decision of Gujarat High Court in Anilkumar D. Gajjar Vs. Commissioner of Income Tax, but as w.e.f. 1st April, 1989, the provisions of s. 243 of the Act has been made inapplicable, ratio of the judgment of Hon"ble Gujarat High Court is not applicable to the case of the assessee. The order also laments on the inordinate delay of five years caused in grant of refund of cash seized, even after assessee filed petition before the AO and for which he has to look into administrative level. He felt his hands are tied with the position of law.

3. It is in the aforesaid circumstances, this petition has been filed, seeking direction to quash the order of CIT dt. 18th February, 1997, and a mandamus to the respondents to grant interest under s. 240 r/w s. 244 in respect of period of payment of cash detained under s. 132(5) of the Act. There is no issue between the parties that no other remedy is available to the assessee against the order of CIT made under s. 264.

4. First considering, the grounds on which the CIT has rejected the revision by declining to interfere notwithstanding finding that the claim of the petitioner is governed by decision of the jurisdictional High Court be examined. Section 243(3) relevant for the purposes may be reproduced :

"243(3). The provisions of this section shall not apply in respect of any assessment for the assessment year commencing on the 1st day of April, 1989 or any subsequent assessment years."

The aforesaid provision leads to only one conclusion that the provision of s. 243 does not apply to orders relating to assessment years commencing from 1st April, 1989, or any subsequent assessment years but it does not affect the applicability of provisions for interest becoming payable under that provision in relation to proceedings for any assessment year prior to 1st day of April, 1989. The provision does not say that no interest is payable after 1st April, 1989, even if the refund was due in respect of an assessment for a period prior to 1st April,

1989.

5. The interpretation which has commended the CIT to get over the decision of this Court in Anil Kumar Gajjar's case (supra) is on total misreading of the provision. The matter would have rested at that inasmuch as but for the reason CIT has accepted the contentions of the petitioner that he is entitled to interest on delayed refund of the amount which became payable to it as a result of a regular assessment out of sums retained by the Revenue in proceedings under s. 132(5). It is also apparent from observation in the impugned order that there has been inordinate delay in refund of the amount to the petitioner for which he is not responsible. It is apparent from the very fact that, having expressed his regret, the revisional authority has stressed the need for taking the matter at administrative level. However, learned counsel appearing for the Revenue has urged that notwithstanding decision of this Court in Gajjar's case (supra), the provisions of interest whether under s. 243 or 244 are not applicable, to the amounts which become payable to the assessee out of sums retained under s. 132(5). For the purpose he relies on a decision of Kerala High Court in K.A. Karim and Sons Vs. Commissioner of Income Tax and Another, .

6. This takes us to look at the relevant provisions laying scheme of payment of interest on delayed refunds under the Act. Secs. 243 and 244 deals with the interest payable by Central Government for delayed refunds. Section 243 provides that where AO does not grant refund within three months from the end of the month in which claim for refund is made under Chapter XIX, Central Government shall pay simple interest at 15% per annum on the amount refunded from the expiry of three months from the date of application to the date of order granting the refund order and where income does not consist solely of income from interest as security within 3 months from the end of month in which total income is determined under this Act. Any delay caused on account of assessee or any delay which is attributable to the assessee is to be excluded from the period for which interest is allowed. Section 244 refers to a case where interest or refund is to be made where no claim is needed to be made. It posits that where refund is due to the assessee in pursuance of an order referred to under s. 240 and the AO does not grant the refund within the period of three months from the end of month in which such order is passed, Central Government shall pay interest at 15% per annum on the amount of refund due from the date immediately after expiry of three months from the date of order to the date on which refund has been granted.

Sub-s. (1A) of s. 244 refers to cases whole or any part referred to in sub-s. (1) is due to the assessee as a result of any amount having been paid by him after 31st day of March, 1975, in pursuance of any order of assessment or penalty and such amount or any part thereof is found in excess of the amount which assessee is liable to pay as tax or penalty, Central Government is liable to pay simple interest at the rate specified in sub-s. (1) on the (amount) so found to be in excess from the date on which such amount was paid, to the date on which

refund is granted. Section 244A which was inserted w.e.f. 1st April, 1989, by Direct Laws (Amendment) Act, 1987, simultaneous with the insertion of sub-s. (3) in s. 244 and 243 excluding the applicability of those provisions in respect of assessments for the assessment year commencing on or after 1st April, 1989, to provide interest on refunds, only governs the field for payment of interest of refunds relating to assessment years after 1st April, 1989.

7. We are here concerned with refund of an amount as a result to regular assessment for an assessment year prior to 1st April, 1989.

8. From the various provisions of the Act referred to above, the position that emerges is that retention of amount which takes place under s. 132(5) is directly related to the estimated tax liability upto that date, inasmuch as before retention of any asset which includes monies found during the course of search in possession of the assessee, determination has to be made of the estimate of the undisclosed income in a summary manner, the amount of tax on the income so estimated too has to be determined in accordance with the provisions of the Act, along with the determination of amount of interest payable and penalty imposable under various provisions of the Act. Order retaining the assets or cash seized during search is in respect of amount of tax, interest and penalty so determined which relates to assessment period upto the date of search and seizure, any existing liability under the Act and any one or more of the other Acts specified in clause (a) of sub-s. (1) of s. 230A in respect of which period is in default. That is to say retention of amount is directly referable to existing liabilities under the IT Act or under allied Acts as on the date of making the order under s. 132(5). Whether determined or ex hypothesi fixed on the income upto that date in the estimate of concerned authority. Section 132B deals with how assets retained under s. 132(5) are to be dealt with on regular assessment. It provides that the amount of existing liability and the amount of liability determined on completion of regular assessment or reassessments for all the assessment years relevant to the previous years to which the income referred to in clause (i) of sub-s. (5) of s. 132 relates including any penalties levied on interest payable in connection with such assessments or reassessments is to be recovered out of such assets. If the assets retained consists of money whether wholly or partly such money has to be applied first towards discharge of such liability. The assets other than money are also subject to the application for discharge of such liability and/or treated to be under restraint order and the amount realised from assets other than money may also be applied in discharge of the tax liabilities. Sub-s. (3) [of s. 132B] provides that any assets or proceeds thereof which remain after liabilities referred to in clause (i) of sub-s. (1) are discharged shall be forthwith made over or paid to the persons from whose custody the assets were seized.

9. These two provisions make it abundantly clear that right from the date retention order is made upto the date regular assessments have been made and the money seized or proceeds of assets realised is referable to the liability of

assessee to pay taxes including penalty and interest under the IT Act or allied Acts which are either existing or created by summary assessment under s. 132(5) (i). No part of the asset is retained when there is corresponding liability having been created under the Act or under the allied Acts, as on the date of the making of the order of retention, is satisfied. The amount or proceeds of assets are only to discharge such existing liability whether in respect of which he is already in default or deemed to be in default as well as which though ex hypothesi fixed but awaits final determination in regular proceedings. Each application of amount follows levy of tax, interest or penalty as per regular assessment, whether tax liability already existing or such determination follows order under s. 132(5) relates to period or periods prior to the date of order under s. 132(5). It is also apparent from the scheme of 132B(3) that any amount out of the retained sum becomes returnable only after regular assessment or reassessment has been made in respect of such income. In other words, the return of assets under sub-s. (3) of s. 132B is directly related to regular assessment and is a result and consequence of regular assessment. The fact that word "refund" has not been used would not make any difference inasmuch as s. 132B sub-s. (3) refers not only to making over of money but also return of assets other than money which may have been of value in excess of liability of the assessee ultimately established. That is why a comprehensive expression has been used to denote such refund by providing "any assets or proceeds thereof which remain after the liabilities referred to clause (i) of sub-s. (1) are discharged shall be forthwith made over or paid to the persons from whose custody the assets were seized". Sub-s. (4) which provides for payment of interest upto the date of assessment further makes it clear that it was dealing with the retention of an excess amount, more than the ultimate liability established prior to the date of regular assessment. Obviously for the reason that refund of the amount or return of the assets other than money could not have taken place prior to the regular assessments and any interest which was payable under the Act on any refund which becomes due as a result of regular assessment would not apply to the excess retention of extra amount or assets or money prior to that date. It also makes it abundantly clear that amount to the extent it is required to discharge liabilities on regular assessments is considered to have been retained throughout towards the discharge of such liability only, which notwithstanding determined on regular assessment is deemed to exist throughout. The appropriation of assets or moneys to the extent they correspond the liabilities, as is ultimately found on regular assessment, is deemed to be discharge of that liability and thereafter no interest becomes payable on the retained sum to that extent.

10. Refunds due as a result of any order under the Act carry interest under s. 243 and 244 of the Act. Where any sum paid as advance tax payable under provision of s. 207 to 213 of the IT Act, 1961, exceeds the amount of assessed tax, Central Government was made liable to pay interest on such excess amount from 1st of April following the payment of such advance tax until the date of regular assessment under s. 214 of the Act. For short payment of advance tax

like provision was made under ss. 215, 216 and 217 for payment of interest to Central Government. Interest on refund following regular assessment for period thereafter is governed, as noticed, in all situations under ss. 243 and 244 as the case may be. However, until provision under s. 132B(4) was made, no provision corresponding to s. 214 was there for payment of interest on excess amount retained than required to satisfy tax assessed on regular assessment from the date of retention upto the date of such regular assessment. To cover this unoccupied field, to rationalise the provision relating to retention of monies which was ultimately found to be more than existing liability estimated under s. 132(5), s. 132B(4) was enacted. Once the assessment order is made and it becomes apparent that the amount, if any, in possession of the Department is required to be paid to the assessee or the person from whose custody such amount has been seized, it is to be forthwith returned with interest upto the date of regular assessment. It is not as consequence of order under s. 132(5) but is as a consequence of regular assessment that amount becomes refundable and, therefore, any amount which becomes payable to the assessee as a result of regular assessment one must travel to the provisions dealing with payment of interest on delayed refund of amount which has become due as a result of assessments.

11. While interest upto the date of regular assessment, whether under s. 132B(4) or s. 214, is for having money in possession of Department then it was overdue to it though under law that amount has to be retained by the Department and there is no right of the assessee to get it, on regular assessment the amount with Department found to be in excess of amount realisable becomes an obligation of the Department to return with promptitude. Any delay beyond reasonable period, fixed by statute entails consequence of payment of interest, for non-discharge of that obligation with required promptness.

12. Section 239 provides that every claim for refund under the Chapter shall be made in prescribed form and verified in prescribed manner. However, distinction has been made in the provisions relating to the payment of interest where the refund depends on claim being made and where refund is required to be made without laying claim thereto s. 243 provides that where AO does not grant the refund in the case of clause (a) within three months from the end of the month in which income is determined which applies to the case where income of the assessee does not consist solely of income from interest on securities or dividends, in other cases within three months from the end of the month in which the claim for refund is made. The Central Government is made liable to pay the assessee simple interest at the rate prescribed therein. Section 244 is titled as "Interest on refund where no claim is needed." Section opens with the words "Where a refund is due to the assessee in pursuance of an order referred to in s. 240". Section 240 envisages "Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the AO shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf. In

this scheme as we have noticed mandate is on the Revenue to pay the amount retained by it in exercise of demand ultimately found against the assessee is though linked with making of regular assessment and creation of demand but is ultimately dependant on discharge of existing liability by appropriating the same against the amount lying with the Revenue by way of retention order under s. 132(5). That is to say payment is not immediately due as a result of regular assessment order but becomes payable where on appropriation it is found to be in excess of liability discharged. Therefore, the case must fall within province of s. 243 and not under s. 244. The interest becomes payable under s. 243 on such amount refundable if the same is not paid within three months from the end of month in which refund claim is made under the Chapter whereas under s. 244, the interest becomes payable, if the refund is not made within three months from the date on which refund becomes due. That is to say, on the expiry of three months from the date of the order as a result of which such refund becomes due.

13. Section 240 further postulates that in order that refund becomes due it must not be necessary as a result of order passed in appeal but it also applies if it becomes due as a result of any other proceedings under the Act. Section 237 also postulates that if any person satisfies the AO that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess. That is to say that amount which is treated as paid by the assessee to discharge tax liability under the Act to which he is properly chargeable and it is found to be in excess of that liability, he is entitled to refund of the excess. As we have noticed that under the scheme of the Act, any amount, money or proceeds of assets retained under s. 132(5) are directly related to discharging existing liability and where there is no existing liability by estimating the existing liability by making a summary estimate of the income and calculating tax, interest and penalty chargeable in that respect. The amount retained is directly referable to tax, interest or penalty properly chargeable under the Act, the amount so retained cannot but be deemed to be treated as payment by the assessee to discharge that liability, where on ultimate assessment it is found that such amount, which is to be treated as assessee's payment towards discharge of that liability, is in excess, he is entitled to its repayment. Viewed from any angle, the assessee is entitled to refund as a consequence of regular assessment is not in doubt. What is disputed is he is not entitled to interest on such amount from the date of regular assessment though he is entitled to interest on such excess retention prior to that date. It is difficult to understand if he is entitled to refund whether under s. 237 on discharge of liability or under s. 240 in pursuance of regular assessment resulting in creation of lesser liability than what is estimated under s. 132(5) and the proceeds of the asset is found to be in excess of such liability, what is the inhibition against the application of the provisions of s. 243 or 244 as the case may be. Section 243 or 244 are not inhibited in their operation

regarding payment of interest on delayed refund of any amount which becomes payable as a result of excess amount having been paid or deemed to be paid towards discharge of tax liability by any person. No distinction is made whether amount repayable is with the Department by way of payment by the assessee voluntarily or is as a result of retention order under s. 132(5). In either case the sum is of the assessee and remains with Department only to be appropriated finally on regular assessment against liabilities finally determined.

14. We are also not impressed by contention of learned counsel for the Revenue that s. 132B is a complete code in itself and there is no room for operation of Chapter XIX in that regard. Section 132B r/w s. 132(5) operates only until regular assessment is made, the existing liability as on the date of the order of s. 132(5) is actually crystallised and the amount in the hands of the Revenue becomes available to be applied for discharge of the liability finally determined and excess amount refundable. The amounts in the hands of the Revenue prior to regular assessment had the character of amount referable to the tax liability estimated to be existing on that date. On regular assessment, the said amount is appropriated to the tax liability existing as per final determination and the balance is to be refunded. The period after regular assessment, therefore, obviously cannot be part of the scheme of 132B which is in very nature of things of transient character, to bring about the state of affairs until regular assessments are made and the tax liability in regular way is determined.

15. We, therefore, see no reason to reconsider and take a different view from what has been expressed in Anil Kumar D. Gajjar's case (*supra*) by this Court.

Taking any other view will result in incongruity. The contention of the Revenue is that interest is payable only for the period prior to regular assessment when liability of assessee was not certain and there was a state of uncertainty about ultimate requirement of amount, but no interest is payable for period thereafter notwithstanding the obligation to return the amount is certain and unequivocal. That is to say interest is payable for a period during which it is not known whether the amount in hand is in excess of requirement, but no interest is payable for retaining the amount which is known for certain to be not retainable being in excess of liability of assessee under the Act and other allied Acts. Such an unfair result cannot be attributed to legislature within the framework of existing law.

In *Baqri Bibi & Ors. vs. ITO* (1998) 142 Taxation 288 (All) has opined :

"Assessment proceedings come within the purview of other proceedings as mentioned in s. 240 and if in case of search and seizure under s. 132 and assessment is ultimately made a part of the amount retained under s. 132(5) of the Act may become refundable to the assessee if the demand ultimately raised is lower than the amount retained and the AO will have to pass an order directing a refund of such excess and s. 240 may come into operation."

This view accords with the conclusion to which we have reached.

16. Another contention of learned counsel for the Revenue is that the interpretation which commends us will result in hitus of a period between the interest payable under s. 132B(4) and under ss. 243 or 244. We see no incongruity. Even in the case of regular refunds this hitus exists. Interest on excess advance tax is payable only upon date of regular assessment, and for a period thereafter interest on delayed refund is payable under s. 243 or 244 on failure to pay refund within specified period, with effect from the expiry of such specified periods. For the first period interest is for extra retention of an amount which could not be paid to assessee earlier to regular assessment. Interest for later period is to compensation for not making the refund of amount within reasonable time prescribed in the Act with effect from expiry of such specified periods. Same is the situation in refund of amount retained under s. 132(5), and not refunded in spite on regular assessment such amount becomes refundable. Merely because provision for interest upto the date of regular assessment finds place in different chapters than in Chapter XIX in the case of excess amount retained under s. 132(5) the provision for payment of interest for later period governed by provision under Chapter XIX, independently of provision for payment of interest for period upto regular assessment cannot be treated differently. On the contrary, this supports that independent provisions operate for the pre-assessment and post-assessment periods for the purpose of payment of interest and one does not exclude the operation of other.

17. With utmost respect, we have not been able to persuade ourselves to the reasoning adopted by the Kerala High Court in *K. A. Karim & Sons vs. CIT & Anr.* (supra). It appears that attention of the learned Judge was not invited to the various provisions in Chapter XIX and the arguments were confined to the provisions of s. 244(1A) which as we have noticed has a limited operation and applies only to payments made by the assessee towards regular tax assessment and penalties after 1st April, 1975.. What is not covered by s. 244(1A) does not cease to be governed by s. 244(1) or other provisions of the Chapter XIX which are of wider import.

18. As a result of aforesaid discussion, we hold that the order of CIT in refusing to grant interest with the period after regular assessments until the date of actual payment on the ground that because of sub-s. (3) of s. 243 the provision of interest is not applicable in the case of assessee because claim of the refund has been made after 1st April, 1989, is patently erroneous and contrary to the clear provisions of s. 243(3) itself, and we are further of the opinion that the petitioner is entitled to claim interest on delayed payment of amount payable to him under s. 132B(3) r/w s. 237 in terms of s. 243.

19. Accordingly, petition is allowed. The impugned order of the CIT dt. 18th February, 1997, is quashed and the respondents are directed to compute the amount of interest on the amount which become payable to the assessee after discharge of liabilities on regular assessment for the asst. yr. 1987-88 in terms of s. 243 and pay the same to the assessee petitioner within a period of 2 months

from today.

20. As it has been found by CIT(A) that there has been no delay on the part of assessee, no deduction of period on that ground shall be made.

21. Rule made absolute with no order as to costs.