
(1990) 08 DEL CK 0044

In the Delhi High Court

Case No : Civil Writ Appeal No. 2116 of 1988

Bharat Commerce and Industries Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 29-08-1990

Acts Referred:

Citation : (1990) 2 BC 522 : (1990) 88 CTR 113 : (1990) 42 DLT 482 : (1990) 2 ILR Delhi 436 : (1991) 188 ITR 277

Hon'ble Judges : S. Duggal, J;B.N. Kirpal, J

Bench : Division Bench

Advocate : M.S. Syali, Satyam Sethi and R.K. Chaufa, for the Appellant;

Judgement

Santosh Duggal, J.

(1) The challenge in this writ petition filed by the assessed is directed in respect of demand of interest, by notice issued u/s 156 of the Income tax Act, 1961 (for short "the Act") on 29th July 1988. The interest has been levied, and demanded under two heads :

(1) Sum of Rs. 6,44,0551- for the period 1-4-1981 to 30-6-1982 u/s 215 of the Act, (2) Rs. 4,98,488!- for the period 29-10-1984 to 29-7-1988 u/s 220(2) of the Act. The assessment year under reference is 1981-82.

(2) The facts, in so far as these have a bearin"g on the issues raised in this petition are to the effect that the assessed has adopted calendar year as the accounting year, ending 31st of December, and thus the accounting year for the assessment period under reference ended with 31st December 1980. As per the schedule fixed by section 211 of the Act, the advance tax was payable on or before 15th June, 1980, 15th September 1980 and 15th December 1980, respectively. The payments of advance tax were made, however, as per details below :

Advance tax under Chapter XVII-C of the Act. (1) On 13th June, 1980 Rs.

19,85,024 (2.) On 15th Sept, 1980 Rs. 23,29,722 82,27,575 (3) On 15th Dec., 1980 Rs. 39,12,829 (.1.) On 13th March, 1981 Rs. 47,46,270 Rs-. 1,29,73,845

(3) The assessment was finalised by the Income Tax Officer on 21st September 1984, assessing the taxable income at Rs. 2,66,12,000. On appeal being filed, which was disposed of by the Commissioner of Income Tax [Appeals for short "CIT (A)] by order dated 29th December 1984; the assessed income was reduced to Rs. 2,24,24,732. The order passed by the Cit (A) was taken to the Income Tax Appellate Tribunal (for short "the Tribunal") both by the Department as well as by the assessed and by a common order dated 7th April 1988, the Tribunal disposed of the two appeals whereby the findings of the Commissioner of Income Tax (A) were reversed in part. The impugned demand dated 29th July 1988 has been raised pursuant to this whereby the total taxable income has been assessed at Rs. 2,28,06,553. This demand has been raised u/s 156 of the Act, as a sequel to the final order passed by the Tribunal, and includes, intent alia , the levy of interest, as noticed above, under sections 215 as well as 220(2) of the Act.

(4) Mr. M. S. Syali, Advocate, appearing for the petitioner. after giving a brief narrative of the facts, and various orders . passed, prior to the final notice challenged in the present writ petition, firstly took up the demand of interest u/s 215 of the Act. The learned counsel pointed out that it is not in dispute that the entire requisite amount of advance tax stood paid before the expiry of the financial year i.e. by 31st March 1981; the last payment having been of Rs. 47,46,270 made on 13th March, 1981. The only lapse or default, if it could be so treated, was that it had not been paid by 15th December 1980. He contended that the material date for levy of interest for failure to pay the advance tax or the .departmental liability to pay interest on" excess advance tax paid is 1st of April of a given financial year, and that mere default in not paying the advance tax or Installment thereof by the dates specified in section 211 of the Act would not attract the levy of interest u/s 215 for which the starting date is 1st April, and that this liability of the assessed to pay interest arises only if the assessed has paid in any financial year advance tax less than 75 per cent of the assessed tax. Mr. Syali, Therefore, argued that on a plain reading of Section 215, the failure to pay advance tax up to 75 per cent of the assessed tax ought to have occurred during the course of the financial year in question and the mere fact that it was not paid by a specified date would not attract liability for payment of interest.

(5) The learned counsel placed reliance on judgments of various High Courts in this respect where the view uniformly held is that section 215 of the Act provides for payment of interest in case of short-fall in the payment of advance tax in any financial year, and that where advance tax has been paid before the end of the financial year, even though after the end of the accounting year of the assessed or after the expiry of the specified dates, interest was not livable u/s 215 of the Act. The decisions of which Mr. Syali placed reliance are that of Punjab & Haryana

High Court Commissioner of Income Tax Vs. Atlas Cycle Industries, and of Calcutta High Court 45 Itr 252, (Commissioner of Income Tax v. Surajbhan Mahawar) , (2) where it was held that there was no warrant for the interpretation that any amount paid after the date on which the last Installment of advance tax was payable will not be an; amount paid in advance under Chapter XVII-C and that where all payments have been made within the financial year, and well before the filing of the return, all these payments have to be deemed as payment of the advance tax within the meaning of Section 215 of the Act.

(6) A similar view was taken by Madhya Pradesh High Court in Commissioner of Income Tax Vs. Jagannath Narayan Kutumbik Trust, ; (3) Madras High Court in Commissioner of Income Tax Vs. T.T. Investments and Trades Pvt. Ltd., ; (4) Gujarat High Court in 145 Itr 104 , (Anup Engineering Ltd. v. income tax Officer, Companies Circle II, Ahmadabad);(5) Orissa High Court in Orissa Ceramic Sales Vs. Income Tax Officer and Another, ;(6) Karnataka High Court in Commissioner of Income Tax, Karnataka-II Vs. T. Gopal Bhandary, ; (7) Bombay High Court in Commissioner of Income Tax, Bombay City-V Vs. Traub (India) P. Ltd., ; (8) and Pfizer Limited Vs. K.N. Anantharama Aiyar, Commissioner of Income Tax and others, ; (9) Kerala High Court in Santha S. Shenoy, A.S. Suresh, A.S. Sasidhara Shenoy, A.S. Narayana Shenoy, Sobhana V. Shenoy, A.V. Gopalakrishna Shenoy and A. Sethumadhavan Vs. Union of India (UOI) and Others, ; (10) and Andhra Pradesh High Court in Commissioner of Income Tax Vs. P. Ramagouda Satyam Reddy and Co., . (11).

(7) In face of this preponderance of judicial authority Mr. Gupta appearing for the Department did not have much to say on merits, regarding interpretation and correct import of the relevant provisions of Section 215 of the Act. He however contended that the present writ petition was not maintainable, and consequently the Court cannot go into the question raised by the petitioner for the reason that alternative remedy available to the assessed has not been availed of. On being told that this argument was not available at this stage, inasmuch as the writ petition stands admitted and Rule issued and was now being heard on merits, he persisted with this objection. In view of this insistence ,we deem it accessory to first deal with this objection raised by Mr. Gupta.

(8) It is to be seen that the order now under challenge in his writ petition is by way of demand notice issued off 29th July 1988. in terms of the Tribunal's final judgment in appeal passed on 7th April 1988. It is pertinent meant to note that the only challenge in this writ petition is to demand of interest, and not to the assessment itself, which in fact has become filial for that particular year as it was neither party's case that any further reference has been sought by either the Department or the assessed. A. bare read's of the provisions of Section 246 of the Act makes it clear that no appeal is provided for against the notice of demand issued u/s 156 of the Act. The provisions of Section 246(c) also do not contemplate any right of appeal in respect to levy of interest de hors the assessment. It is thus clear that when the assessment or the determination of

tax liability is not in question, no right of appeal is available simply in relation" to demand of interest. This would be so even when an order u/s 154 of the Act has been passed, on a revision being filed by the party, in relation to demand of interest, in case challenge in the revision petition was confined only to interest, as in the present case.

(9) The question as to whether an appeal can be taken against an order charging interest was considered by the Supreme Court in the case reported as 160 Itr 961. (Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income Tax, (12) and it was held that unless the assessed raises a dispute that he was not liable to levy at all, an order demanding or charging interest, was not appealable u/s 246(c) of the Act. It was further held that levy of interest is part of the process of assessment and although sections 143 and 144 do not specifically provide for the levy of interest and the levy is, in fact, attributable to section 139(8) or section 215, it is nevertheless a part of the process of assessing the tax liability of the assessed and to that extent it may be open to the assessed to dispute the levy in appeal provided he limits himself to the ground that he is not liable to the levy at all.

(10) It was further held that the question whether a case is made out for waiver or reduction of the interest levied u/s 139(8) or u/s 215 cannot be the subject of an appeal u/s 246(c).

(11) A division bench of this Court also held in the case reported as Commissioner of Income Tax Vs. Mahabir Prashad and Sons, (13) that although an appeal agitating the issue of charging of interest in regard to both its levability or quantum can be subject matter of a valid and competent appeal but that would be so if the levy was part of order of assessment and that an appeal would not lie against a separate order levying interest and nothing more.-.

(12) We are in respectful agreement with the view taken in the earlier judgment of this Court and also because of the proposition laid down by the Supreme Court in the case reported as 160 Itr 961 and in view of the nature of the order now impugned in this writ petition, we are of the clear view that no alternative remedy by way of appeal was available in this case in so far as the issues raised in this writ petition, namely, charging of interest is concerned.

(13) For the reason aforesaid, and for the reason that as held by the Supreme Court in the case reported as L. Hirday Narain Vs. Income Tax Officer, Bareilly, (14) that merely because a revision application could have been moved but was not moved, would not justify the High Court in dismissing the writ petition as not maintainable that had been entertained and heard by it on merits, and the present case being similar because here also Rule has been issued and matter heard and there being no statutory appeal provided, against such an order demanding interest, unless it was an integral part of the assessment itself, we proceed to dispose of the writ petition on merits having heard it, particularly when the question of alternative remedy is a matter of discretion of the Court

and not a rule of thumb.

(14) In so far as the merit of this demand is concerned on argument was advanced by Mr. Gupta to counter the contentions raised by petitioner's counsel. In view of the meaning of the statute being very clear, as interpreted by catena of authorities, noticed above, we hold that the demand of interest on account of the fact that one Installment of advance tax had been paid on 13th March 1981 instead of being paid on or before 15th December, 1980, was not sustainable and is liable to be quashed. It is pertinent to note that the Department itself has been treating this payment made on 13th March, 1981 as a part of the advance tax paid during the financial year in all demand noticed issued earlier, till the impugned order, when the first time interest was claimed on this count.

(15) We accordingly set aside the demand of interest to the extent of Rs. 6,44,055 for the period 1-4-1981 to 30-6-1982 raised u/s 215 of the Act.

(16) In so far as the demand of interest u/s 220(2) of the Act is concerned, Mr. Syali's main contention was that the event which made the petitioner liable for the payment of interest on this counter never arose in as much as there was no notice of demand earlier to the impugned notice which remained uncompleted for a period of 35 days and that, this being the essential condition to invoke the provisions of sub-section (2) of section 220, the demand was not sustainable. He Submitted that after the Income Tax Officer passed the order on 21st September, 1984, the demand notice was issued in terms thereof on the same day, but on appeal being filed, the CIT(A) granted conditional stay up to 28th February, 1985 or disposal of the appeal subject to payment of Rs. 1,00,000.00 each month and that while the assessed was making payments in compliance with this order, the appeal itself was decided vide order dated 29th December, 1984 and a fresh demand was raised by notice dated 10th January 1985 pursuant to the order under appeal and that demand was fully made on 24th January, 1985.

(17) Mr. Syali further argued that in between third notice was issued pursuant to an order u/s 154 of the Act having been passed and that demand of P.S. 6,066 was also paid on 11th June, 1985. He Therefore contended that there never subsisted any notice of demand which remained unpaid for 35 days within the meaning of section 220(2) of the Act, so as to attract the levy of interest under this provision. According to the learned counsel, in any case, no interest could be demanded for the " period between passing of the order by the CIT(A) and the final order by the Tribunal because during that period, there was no assessment which remained unsatisfied, in as much as whatever tax liability had been determined by the order in appeal passed by the CIT(A), that was satisfied including the demand of interest, as raised by the notice issued thereafter.

(18) Mr. Gupta in reply contended the arguments of Mr. Syali" by contending that so long as the assessment becomes final; the orders of original assessment remain in abeyance, and do not get totally obliterated or extinguished, and that on the passing of order by the Tribunal, which has become final between the

parties, the assessment as determined by the Income- tax Officer stands revived.

(19) Mr. Gupta has placed reliance on a judgment of the Kerala High Court reported as K.P. Abdul Kareem Hajee Vs. Income Tax Officer, A-Ward and Another, , where identical question was in issue and it was held that the order of a judicial or quasi judicial authority is not final for the purpose of resjudicata during the time allowed for filing an appeal or the pendency of an appeal and in the absence of any statutory provision to the contrary or an interim stay granted by a competent authority, the order although not final, is provisionally executable subject to restoration. The finality of the order was qualified by and subject to appeal, which was taken before the appellate authority and the order of the appellate authority itself was likewise provisional during the period allowed for filing an appeal or during the pendency of the appeal. It was further held that :

"Whether the order of the Aac concerning the petitioner was finally set aside by the Tribunal, thereby affirming Ex. P-2A order of the Ito, be cloud hanging over ex. P-2A was removed and its finality was affirmed. Consequently, "or the relevant period, ex. P-2A is deemed to have operated in full vigour to make the petitioner liable in law by reason of the bunal"s affirmative order. If this is the position in law, which I think it is, s. 220(2) of the I.T. Act was attracted in respect of the amount due from the petitioner as per ex. P-2A dated December 1, 1973. It is that interest which is now demanded by the Ito, vide ex. P-6, and affirmed by the Commissioner by ex. P-7. The challenge against the impugned orders accordingly falls."

(20) Mr. Syali, however, drew our attention to another judgment of the same court reported as Income Tax Officer Vs. A.V. Thomas and Company, wherein a slightly different context, it was held that in case the Assessee had paid the tax in response to notice u/s 156, and the tax was reduced by the Aac and excess tax was refunded and after the Tribunal restored the original assessment order of the Ito interest would not be levied on the amount which became payable by the assessed, as a result of the order of the Tribunal. As against that, Mr. Gupta relied on yet another Division Bench judgment of the same very High Court reported as MOHAMMED ESSA MOOSA SAIT Vs. GIFT-TAX OFFICER AND ANOTHER., which is with reference to the provisions of the Gift Tax Act but the relevant provisions being pari materia with the ones with which we are concerned in this case, we are of the considered view that the ratio of that judgment would be applicable. In this last judgment, the view taken in the case of K. B. Abdul Kareem Hajee (supra) has been endorsed, although reference was also made to the case of A. V. Thomas & Company (supra), and it has been interpreted to have confirmed the view taken up in the first case of Abdul Kareem Hajee (supra).

(21) We too find on a reading of the judgment of the Kerala High Court in the case of A. V. Thomas & Company (supra) on which Mr. Syali placed reliance that the view taken in the case of Abdul Kareem Hajee has not been dissented from but that case was held to be distinguishable on facts in as much as that was not a case of refund of tax paid but a case where the assessed had not paid the tax

as demanded u/s 156 of the Act. It was specifically held that :

"In such a case, the Department is fully justified in making the demand for payment of interest. This court rightly held so."

(22) This observation is with reference to the decision in the case of Abdul Kareem Hajee (supra). It is Therefore apparent that the view taken in the case of Abdul Kareem Hajee, was confirmed in the subsequent case, on which Mr. Syali placed reliance MOHAMMED ESSA MOOSA SAIT Vs. GIFT-TAX OFFICER AND ANOTHER., .

(23) The High Court of Calcutta also propounded similar view in the case reported as Income Tax Officer, Central and Another Vs. Ghanshyamdas Jatia and Others, The court in that case held on a combined consideration of the provisions of section 225(4) of the Act and that of section 3(2) of Taxation laws (Continuation and Validation of Recovery Proceedings) Act, 1964 that certificate proceedings already started order the original assessment in cases of appeal being filed remained only in abeyance subject to the provisions of section 225(4) abiding with the last order as it attains finality and conclusiveness, and that accordingly no question of extinction of the demand or certificate in such cases arises and if shall abide by the order in the proceedings under the Act which has become final and conclusive.

(24) The logical consequence of the view, enunciated by the High Courts of Kerala and Calcutta, in so far it has a bearing on the present case, would be that the first notice of demand, issued after original assessment order passed by the Income Tax Officer cannot be deemed to have extinguished by virtue of the appeal having been filed before the CIT(A) or conditional stay of the operation of the assessment having been allowed by the CIT(A) pending disposal of the appeal before him or by virtue of subsequent reduction of the taxable income, for the reason that under the order of the Tribunal which has attained finality between the parties, the original assessment has been restored with the result the first demand notice which at the most lay in abeyance or suspension would stand revived and it would be apposite to hold that there was non-compliance with this notice of demand apparently beyond 35 days so as to attract the provisions of section 220(2) of the Act. To accept the arguments advanced by Mr. Syali that by virtue of the order passed by the CIT(A) that demand cannot be said to have been in operation till the Tribunal's final order, would be indulging in over simplification. which is not warranted by the relevant provisions of the Act.

(25) We also make it clear that we are in full agreement with the contentions raised by Mr. Syali that the Public Order issued by the Department has no binding force as far as the courts are concerned, but we put it on record that we have arrived at our own independent judicial conclusion, that in such a case it cannot be argued that provisions of section 220(2) of the Act are not attracted: and we have not taken into consideration any circular the Central Board of Direct Taxes, might have issued, on the subject.

(26) We also do not find any force in the plea that the parties should not be penalised by levy of interest when there had been no actual demand for a certain period for the reason that this argument is based on misconception inasmuch as we do not treat the demand of interest as a penal provision, as the rationale behind this provision is not to penalise a party but to make a provision for compensation to the Department on the failure of the assessed to make payment on the first notice of demand. The concept for levy of interest in this respect being based entirely on different consideration, there is no force in the plea that it amounts to penalisation.

(27) We Therefore find ourselves unable to agree with the, contention of the petitioner that interest u/s 220(2) of the Act has been wrongly charged or demanded in this case.

(28) As a result, the writ petition is allowed partly to the effect that the demand of interest u/s 215 of the Act is quashed. whereas the demand u/s 220(2) of the; Act, by means of impugned notice dated 29th July 1988 is hereby sustained.

(29) In view of the partial success of the petitioner, the parties are left to bear their own costs.