
(2006) 05 P&H CK 0108
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 2280 of 2006

Bharti Engg. Corpn.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-05-2006

Acts Referred:

Constitution of India, 1950 — Article 265

Income Tax Act, 1961 — Section 119, 142(1), 143, 143(2), 144

Citation : (2006) 203 CTR 305 : (2008) 298 ITR 400

Hon'ble Judges : Rajesh Bindal, J; Adarsh Kumar Goel, J

Bench : Division Bench

Advocate : Varun Gupta, for Akshay Bhan, for the Appellant; N.L. Sharda, for the Respondent

Final Decision : Allowed

Judgement

1. The petitioner has approached this Court by making the following substantive prayers:

(i) issue a writ in the nature of certiorari for quashing the impugned order/letter dt. 12th Jan., 2006 (Annex. P-13) passed by respondent No. 3;

(ii) issue a writ in the nature of mandamus thereby directing the respondents to allow the claim for the refund of Rs. 5,61,380 along with interest for the asst. yr. 1989-90;

2. The petitioner, which is a partnership firm carrying on the business of manufacturing and sale of diesel engines and spares, filed its return of income, for the asst. yr. 1989-90 declaring net assessable income at Rs. 4,55,289. Not satisfied with the return filed by the petitioner, the AO issued notices to the petitioner under Sections 143(2)/142(1) of the IT Act, 1961 (for short "the Act") and vide assessment order dt. 31st March, 1992 assessed the income of the petitioner at Rs. 17,45,390. Aggrieved against the assessment order, the petitioner filed an appeal before the CIT(A), who vide order dt. 10th Nov., 1995

accepted the appeal of the petitioner and restored the matter back to AO to redetermine the liability of the petitioner after affording reasonable opportunity of being heard to the petitioner.

3. In compliance to the order of the C-IT(A), the AO vide order dt. 20th March, 1997 decided the issues again. Still aggrieved against the order passed, the petitioner again approached CIT(A), who vide his order dt. 10th Oct., 2000, again while setting aside the assessment order, restored the matter, back to AO to decide the same and to pass fresh order of assessment. As is evident from the record, a notice was issued to the petitioner for passing fresh order on 15th Feb., 2001 but admittedly no order was passed by the AO in compliance to the order passed by CIT(A).

4. Vide letter dt. 21st Aug., 2002, the petitioner made a request to the concerned ITO for refund of excess tax deposited by the petitioner. Various reminders were also sent on 17th June, 2003, 10th July, 2003, 15th April, 2004, 11th Nov., 2004, followed by a request to the CIT, Ludhiana, on 4th Aug., 2005. It was thereafter that the petitioner was informed vide letter dt. 12th Jan., 2006 that in the absence of any assessment having been made, no refund has become due to the petitioner. Feeling aggrieved against the action of the respondents whereby on the one hand the remand case was not decided by the AO and on the other hand the petitioner was being deprived of his entitlement of refund of the tax paid on the ground that the remand case has not been decided.

5. The respondents had placed on record brief facts of the case under the signatures of Dy. CIT, Phagwara Circle, Phagwara, wherein it is stated that after the issue of notice dt. 5th Feb., 2001 for decision of the remand case in terms of direction given by CIT(A), though the matter was fixed on two occasions namely, 19th Feb., 2001 and 14th March, 2001, but no final order was passed. It has further been stated therein that after the petitioner submitted his representation to CIT-II, Jalandhar, to know the reasons for non-completion of set aside assessment, an inquiry has already been instituted. The stand of the respondents further is that since the remand case of the petitioner has not been decided, he is not entitled to either refund of the amount of tax or the interest thereon. A further plea has been taken that the petitioner has alternative remedy of invoking the provisions of Section 119 of the IT Act seeking waiver of the condition laid down in Section 240, proviso (a) of the Act which debarred the grant of a refund during the period when the assessment is set aside till such time the fresh order of assessment passed by the AO....

6. We have heard Shri Varun Gupta, learned Counsel appearing for the petitioner and Dr. N.L. Sharda, advocate for the Revenue.

7. The relevant provisions of the Act applicable in the present case are extracted below:

Section 153. Time-limit for completion of assessments and reassessments...-(1)
xxxxxx

(2) xxxxx

(2A) Notwithstanding anything contained in Sub-sections (1), (1A), (1B) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order u/s 250 or Section 254 or Section 263 or Section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order u/s 250 or Section 254 is received by the Chief CIT or CIT or, as the case may be, the order u/s 263 or Section 264 is passed by the Chief CIT or CIT:

Provided that where the order u/s 250 or Section 254 is received by the Chief CIT or CIT or, as the case may be, the order u/s 263 or Section 264 is passed by the Chief CIT or CIT on or after the 1st day of April, 1999 but before the 1st day of April, 2000, such an order of fresh assessment may be made at any time up to the 31st day of March, 2002:

Provided further that where the order u/s 254 is received by the Chief CIT or CIT or, as the case may be, the order u/s 263 or Section 264 is passed by the CIT on or after the 1st day of April, 2005, the provisions of this Sub-section shall have effect as if for the words "one year", the words "nine months" had been substituted.

Section 240, 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:

Provided that where, by the order aforesaid,-

(a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment;

(b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee.

8. A bare perusal of provisions of Section 153(2A) of the Act reveals that notwithstanding anything contained in Sub-sections (1), (1A), (1B) and (2) of Section 153 of the Act an order of fresh assessment in pursuance of an order u/s 250 of the Act can be made at any time before the expiry of one year from the end of the financial year in which the order u/s 250 of the Act was passed. In the present case the order was passed by CIT(A) on 10th Oct., 2000 setting aside the order of the AO and directing him to pass fresh order. In conformity with the provisions of Section 153(2A) of the Act, the fresh order could be passed by the AO by 31st March, 2002 since the CIT(A) passed the order in financial year 2000-01 and one year thereafter would have expired on 31st March, 2002. Though the proceedings were initiated in the case for fresh order, admittedly no

order was passed within the permitted period u/s 153(2A) of the Act and even till date. Net result of the same is that now no order can possibly be passed because of bar of limitation prescribed u/s 153(2A) of the Act.

9. The counsel for the Revenue relied upon the provisions of Section 240 proviso (a) of the Act to state that when an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment but the counsel was unable to clarify as to how the provisions of the Act referred to above would be applicable when the AO has lost the jurisdiction to pass fresh order in compliance to the order passed by CIT(A) and fresh order cannot possibly be passed now because of the bar of time as provided u/s 153 of the Act. If the argument of the learned Counsel for the Revenue is accepted, the same would mean that the assessee will not be able to get their refund even if an assessment is set aside and the matter is sent back for redetermination and the AO is under legal bar to pass a fresh order because of expiry of period permitted under law for the purpose. The assessee cannot be made to suffer on account of lapse on the part of the AO or any other officer of the Department.

10. Other contention of the counsel for the Revenue is that the assessee, if so advised can approach the Board for relaxation of the condition laid down in Section 240, proviso (a) of the Act. In our view the argument raised by the counsel is totally misconceived. All what Section 240, proviso (a) of the Act bars is to grant refund to the assessee before the fresh order is passed in case the assessment is set aside and a fresh order is required to be made. Counsel for the Revenue is not right when he says that even if the time to pass the fresh order as per the provisions of the Act has already expired, still the provisions of Section 240, proviso (a) of the Act would continue to apply. The application of Section 240, proviso (a) of the Act is only upto the extent that either the order is passed by the competent authority as per the direction or the period of limitation prescribed for passing such order, whichever is earlier and not thereafter.

11. Net result of our above discussions is that in the absence of any order passed within the period prescribed for the purpose u/s 153(2A) of the Act, the Revenue has no authority to retain the tax which is in excess of any amount determined to be payable against the assessee. Such a retention would certainly be hit by Article 265 of the Constitution of India.

12. The view which we are taking above is supported by a judgment of this Court in *Deep Chand Jain v. ITO and Ors.* (1984) 41 CTR 149, wherein following the judgment of Karnataka High Court, this Court had held as under:

With respect, I entirely concur in the view taken by Chandrakantaraj Urs. J. in *R. Gopal Ramnaryan Vs. Third Income Tax Officer, Circle-II, Bangalore*, to the effect that until and unless the quantum of tax is determined in accordance with the procedure laid down by law, the Revenue has no right to collect the tax, and, if tax, by way of advance tax or on self-assessment or having been deducted at

source, has been paid by the petitioner, the same cannot be retained contrary to the requirements of Article 265 of the Constitution.

In the present case, admittedly, no assessment order has been passed nor any assessment order could be passed, the same having been barred by the provisions of Section 153(1)(a)(iii), which is in the following terms:

153. (1) No order of assessment shall be made u/s 143 or Section 144 at any time-

(a) after the expiry of-....

(iii) two years from the end of the assessment year in which the income was first assessable where such assessment year is an assessment year commencing on or after the 1st day of April, 1969; or....

with the result that there being no assessment regarding the given previous year and no assessment, order specifying any given amount due from the assessee, the assessee is, therefore, not liable to pay any amount by way of tax for the given year and the amount of tax already collected from him by the Revenue earlier by way of advance tax is without authority of law and its retention is in violation of the provisions of Article 265 of the Constitution of India.

13. In view of our above discussions, the writ petition is allowed and the respondents are directed to refund the excess" amount collected from the petitioner along with statutory interest thereon.

14. The compliance of the order be made within two months from the date of receipt of a certified copy of this order.