
(1998) 04 MP CK 0033

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 2403 of 1988 22nd April, 1998

CHANDRA MOHAN

APPELLANT

Vs

UNION OF INDIA and Others

RESPONDENT

Date of Decision : 22-04-1998

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 140A, 143, 144, 147, 148

Citation : (1999) 155 CTR 272 : (1998) ILR (MP) 648 : (1998) 2 MPLJ 261

Hon'ble Judges : D.P.S. Chauhan, J

Bench : Division Bench

Judgement

D.P.S. CHAUHAN, J.:

The petitioner is an assessee assessed to Income Tax under the provisions of the IT Act, 1961 (for brevity, hereinafter referred to as "the Act")

2. The petitioner, by means of this petition, has approached this Court seeking relief for insurance of a writ in the nature of mandamus commanding the respondents i.e., Union of India, the CIT, Madhya Pradesh-II, Jabalpur, and the ITO, Headquarters (Admn.), ITO, Jabalpur, for making refund of Rs. 58,326.01 together with interest at the rate of 12 per cent p.a. in accordance with the provisions of s. 244 of the Act to the petitioner.

3. The case of the petitioner is that for the asst. yr. 1982-83, he filed his return in time on 31st July, 1982, showing his taxable income as Rs. 1,17,468 and tax payable was shown at Rs. 58,326.01. The assessment was to be completed within the statutory period of two years as provided under s. 153(1)(a)(iii) of the Act and accordingly no assessment order was passed within the aforesaid period of two years i.e., upto 31st March, 1985. Therefore, the tax already paid by the petitioner, in the absence of any order of assessment, had to be refunded to the petitioner.

The petitioner accordingly put forth his claim for the refund of the tax paid by

him on the basis that since no order of assessment was passed within the statutory period under the Act, the tax already paid has become due for refund. Thus, the petitioner applied for refund of the entire tax paid by the petitioner but the application for refund was rejected and the rejection was communicated vide communication dt. 21st March, 1988. Accordingly, present petition under Art. 226 of the Constitution of India.

4. Heard the learned counsel for the petitioner, Shri P.R. Bhave and the learned counsel for the respondents, Shri V.K. Tankha.

5. Learned counsel for the petitioner submitted that the respondents were not legally entitled for retention of the tax paid by the petitioner without there being any assessment order and as such action of non-refund of the tax on the part of the ITO was illegal. Learned counsel for the petitioner in support of his contention invited the attention of the Court to the provisions of s. 153 of the Act which provided a deadline for making an order of assessment under s. 143 or s. 144 of the Act and that deadline is for two years from the end of the assessment year in which the income was first assessable.

Learned counsel submitted that the assessing authority failed to make any order within the time provided and thereafter under the law authorities were sans any power to pass any assessment order. Since no assessment order has been passed, it would be treated as if the petitioner owes no liability for tax. He relied on the provisions of s. 240 of the Act wherein he applied for refund of the entire tax paid by the petitioner. Sec. 240 of the Act is as extracted below :

"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 ITO shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf."

Sec. 240 of the Act speaks that as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee. Here the liability for refund of any amount which becomes due to the assessee must be in consequence of any order passed in appeal or other proceeding under the Act. Here in the present case, learned counsel for the petitioner has not disputed the fact that the petitioner made claim for refund before the ITO not as a result of any order passed in appeal or other proceeding. It is not the case of the petitioner that in the return filed by the petitioner, the petitioner claimed for refund of excess tax paid. The petitioner's claim is on different premises i.e., since no order of assessment has been made within the period provided under the Act and thereafter concerned authorities were incapacitated to pass any order and, therefore, whole of the tax paid by the petitioner becomes refundable. So far as position under s. 240 of the Act is concerned, it is clear that in the case of the petitioner, provisions of s. 240 would not be attracted as the petitioner's claim for refund was not as a result of any order passed in appeal or other proceeding.

6. The question for consideration is two-fold; (i) in such a situation whether the petitioner is entitled for refund of entire tax paid by him accepting his liability for payment of tax, and (ii) as to what consequence flows from the provisions of s. 153 of the Act for the default on the part of the Revenue for not making assessment within the time-limit provided by law.

7. For the first proposition, learned counsel for the petitioner placed reliance on the case of *R. Gopal Ramnaryan Vs. Third Income Tax Officer, Circle-II, Bangalore*, . It is a decision of Single Judge of the Karnataka High Court. This case has no foundation so far as the proposition in the present case is concerned. In this case so relied on, the position was different i.e., for the asst. yr. 1973-74, pursuant to an order passed under s. 143(3) of the Act, the petitioner paid a sum of Rs. 94,179 as advance tax and also a further sum of Rs. 4,883.89 was deducted as tax at source under the Act. The petitioner also paid for that assessment year a sum of Rs. 2,367 on self-assessment when he filed his return and the total tax paid by the assessee for the relevant assessment year was Rs. 1,01,429.89. Similarly, for the asst. yr. 1975-76, the petitioner paid a total sum of Rs. 60,396.75 as advance tax, tax deducted at source and tax on self-assessment. The petitioner was aggrieved by certain legal infirmities in the assessment orders and filed appeals before the AAC, which were dismissed. On further appeal to the Tribunal, the petitioner contended that the ITO had not quantified the tax in the assessment orders as required by s. 143(3). The Tribunal found that while the ITO had signed the assessment orders, he had quantified the tax due in a separate sheet annexed to the assessment order, and, therefore, annulled the assessment orders. The Revenue did not pursue the matter further. Thereafter, the petitioner made a demand for refund of the tax paid, which was rejected by the ITO. The petitioner filed a writ petition under Art. 226 of the Constitution praying for an appropriate direction to the ITO to refund the tax paid by the petitioner for the relevant assessment years on the ground that there being no assessment order validly made in accordance with law, the tax retained by the ITO was without the authority of law and was liable to be refunded under s. 240. On a reference, it was held that nothing was done by the Revenue after the assessments were annulled by the Tribunal with the result there were no assessments at all for the relevant assessment years, The Tribunal's order having become final in terms of s. 254(4) of the Act, the retention by the ITO of the moneys paid by the petitioner without any assessment and without the ITO being capable of making fresh assessments in accordance with law was impermissible.

Firstly, in this case there was an order which falls in the category of any order within the meaning of s. 240 of the Act. Secondly, the ITO did not accept the return as filed by the petitioner but he imposed the different tax and that tax liability was set aside by the Tribunal on the plea that quantum was not mentioned in the order passed by the ITO. Thus, this case has no application to the facts and circumstances of the present case, as in the present case there is no order of variation of the return filed by the petitioner. The petitioner filed

Income Tax return admitting his liability to tax and on the return of Income Tax no order, whatsoever, was passed by the ITO as required under the law.

8. The next case relied on by the learned counsel for the petitioner is of Deep Chand Jain Vs. Income Tax Officer, C-Ward and Others, . It is a case of the Punjab & Haryana High Court. In this case also the position was different as in this case there was a demand notice under s. 156 of the Act in regard to the asst. yr. 1971-72 and thereafter the assessee filed the Income Tax return for the said year on 1st Oct., 1971, showing an income of Rs. 39,569. He thereafter filed a second return wherein he showed his income of only Rs. 6,130 and no orders were passed either on the original return or on the revised return for the relevant year within the period provided by law and, therefore, claim for refund of the advance tax was made. The petitioner deposited a sum of Rs. 9,400 by way of advance tax in compliance with the order passed under s. 210 of the Act. Here the position is different. There was a revised return before the IT authorities at the time when no order on original return was passed and in the revised return income was shown at Rs. 6,130 which was not taxable and as such the entire advance tax paid was sought to be refunded. Here the position is different. The revised return attained finality and in the revised return income shown was at Rs. 6,130 which was not taxable and as such the petitioner was entitled for refund of the advance tax paid by him and accordingly a direction was issued by the Court in the case relied on.

Here in the present case the position is not so. The petitioner has admitted his liability of tax and it is not the case of the petitioner that he paid the excess amount or the income was not taxable. The return of income filed by the petitioner is his admission in regard to his income.

9. Learned counsel for the respondents placed reliance on the Full Bench decision of the Gujarat High Court in the case of Saurashtra Cement and Saurashtra Cement and Chemical Industries Ltd. Vs. Income Tax Officer, . In this case the position was more or less similar to the present case and the Court held that there is no warrant for holding that the entire amount of Income Tax which is properly chargeable under the Act and is collected by the Department in accordance with the provisions of the Act should be refunded on failure of the regular assessment. When the provisions do not authorise for refund which is properly collected, what could be refunded is the tax paid wrongly or paid in excess of what is properly chargeable. This case has got applicability in the facts and circumstances of the present case.

10. The next case relied on by the learned counsel for the respondents is the case of Saraya Sugar Mills Ltd. Vs. Income Tax Officer and Others, . It is a case of Division Bench of the Allahabad High Court. In that case the position was that an assessment order was made on 25th Sept., 1980, determining Income Tax. This assessment order was subjected to appeal and the Tribunal held that the assessment was barred by time and was accordingly annulled. After the annulment of the assessment, the petitioner asked the AO to refund the whole

amount of Rs. 12,43,780 paid by it but the AO did not do so. Instead, he initiated proceedings under s. 147 r/w s. 148 for making a reassessment. The petitioner then filed a writ petition for the reliefs, but since no interim order was passed during the pendency of the writ petition, the assessment was completed overruling the petitioner's objection that there was no cause for initiating action under ss. 147, 148 of the Act. Against this order, the petitioner appealed and ultimately the Tribunal by order dt. 12th April, 1989, quashed the reassessment holding that the assessee having filed a return of income, proceedings under s. 147(a) could not be taken against the assessee. The refund was claimed as there was no order of assessment and no liability of Income Tax on the petitioner and, therefore, he was entitled to refund of paid tax.

The tax payable on the basis of the returns filed by the assessee is treated as 11 assessed tax". It is not at all made dependent on any regular assessment being made, though in the event of regular assessment, the amount paid under sub-s. (1) of s. 140A is deemed to have been paid towards the regular assessment. Therefore, by no stretch of imagination, can the tax paid and collected under s. 140A be described as a mere ad hoc or interim payment which can be said to fail in the absence of a regular assessment as was sought to be contended on behalf of the petitioners.

11. In view of above, the petitioner is not entitled for the refund of paid tax on the basis that no assessment was done by the ITO within the time provided by law as it is not a case of the petitioner in the return that he paid excess tax which he is entitled to refund. In such a situation, the taxable income shown in the return, so filed by the petitioner, shall be treated as admission of the petitioner and the same shall be binding on him unless he files a revised return claiming some non-taxable income and on that basis refusing the liability of tax payment.

12. The second submission is that as to what consequence flows from s. 153(1) (a)(iii) of the Act. In this connection it is submitted by the learned counsel for the petitioner as well as by the learned counsel for the respondents that this section itself does not provide for any consequence for default on the part of the authorities in not completing assessment within time-frame under the Act.

This provision has not provided that the return filed by the petitioner shall be deemed to have been an order of assessment of Income Tax accepting the return of the petitioner, in many matters under the law and otherwise an assessee is asked for an assessment order and in the case like present one if assessee prays for issuing assessment order, then the AO would tell him that no assessment order exists as the person is not assessed by any order and as such cannot be issued. It would create a difficulty as well as hardship to the taxpayers for non-action on the part of ITO. It is the matter which may invite the attention of the Government of India and the legislative body or functionary which may consider this aspect of the matter. it is not in the domain of this Court.

13. In view of the above, the writ petition is sans substance and is rejected. In the peculiar circumstances of the case. I make no order as to costs. Security amount deposited, if any, may be refunded.

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