

(2011) 09 MAD CK 0081

In the Madras High Court

Case No : Tax Case (Appeal) No. 154 of 2008

Commissioner of Income Tax

APPELLANT

Vs

Infrastructure Development Finance Co. Ltd.

RESPONDENT

Date of Decision : 08-09-2011

Acts Referred:

Finance Act, 2003 — Section 234D, 234D(1)
Income Tax (Fourth Amendment) Rules, 1983 — Rule 6AA
Income Tax Act, 1961 — Section 116, 143(1), 143(2), 143(3), 154

Citation : (2012) 340 ITR 580 : (2012) 21 TAXMAN 48

Hon'ble Judges : M. Venugopal, J; Elipe Dharma Rao, J

Bench : Division Bench

Advocate : K. Subramaniam, for Income-tax, for the Appellant; Ferrokh V. Irani for O.R. Santhanakrishnan, for the Respondent

Final Decision : Allowed

Judgement

Elipe Dharma Rao, J.—This tax case appeal has been filed against the order dated March 29, 2007, passed by the income tax Appellate Tribunal, Madras "A" Bench in I. T. A. No. 748/Mds/2005.

2. The brief facts of the case are as follows :

The assessee is a finance company involved in infrastructure development. It filed its return of income for the assessment year 2001-02 on October 30, 2001, admitting a total income of Rs. 22,74,54,579. Again, the assessee filed a revised return on March 27, 2003, admitting a total income of Rs. 18,99,10,630. The return was processed u/s 143(1) of the income tax Act on November 30, 2002. On June 24, 2003, a notice u/s 143(2) of the Act was issued to the assessee. In response to the same, the assessee produced all the material documents and after hearing the assessee and scrutinizing the documents produced by the assessee, the Assessing Officer passed the assessment order u/s 143(3) of the income tax Act on March 30, 2004. The Assessing Officer, while giving effect to the order, levied interest u/s 234D of the income tax Act. Challenging the same,

the assessee filed an appeal before the Commissioner of income tax (Appeals), who partly allowed the appeal. Aggrieved by that portion of the order passed by the Commissioner of income tax (Appeals) holding against the assessee, the assessee filed an appeal before the income tax Appellate Tribunal and the Tribunal partly allowed the appeal. Challenging the same, the Revenue has filed the above tax case appeal.

3. We have heard the learned counsel appearing on either side and perused the entire materials available on record.

4. Learned counsel appearing for the appellant submitted that though the Assessing Officer had charged interest only for the period after the introduction of the section and not for the prior period, yet, the Tribunal has committed an error in deleting the interest charged u/s 234D of the Act. Learned counsel also submitted that merely because the assessment year is prior to the introduction of the section, it would not mean that interest cannot be levied at all for those assessment years. As far as the levy of interest is concerned, it is settled law that the law applicable as on the date of levying interest alone is applicable and not the law that is applicable for the assessment year or the date of issuing the notice.

5. On the other hand, learned counsel appearing for the assessee submitted that section 234D of the income tax Act having been introduced only with effect from June 1, 2003, it can be applied only from the assessment year 2004-05 onwards since the law in force on the first day of the assessment year applies. He also submitted that unless it is specifically provided in the section, the provisions contained in the section cannot be given retrospective effect. In any event, according to the learned counsel for the assessee, section 234D of the Act will apply only to refunds granted after June 1, 2003, and even in equity, section 234D cannot be applied retrospectively. Therefore, the order passed by the Tribunal cannot be interfered with in any manner since the same had been passed on appreciation of the entire materials available on record. In support of his case, learned counsel appearing for the assessee relied upon the decisions of the hon'ble Supreme Court of India the decisions of this court as well as the decisions of various other High Courts.

6. At the time of admitting the tax case appeal, the following substantial questions of law were framed by this court :

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that interest u/s 234D cannot be levied in respect of assessment years prior to the introduction of the section ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in deleting the interest u/s 234D, even for the period subsequent to the introduction of the section, on the ground that the assessment years were prior to the introduction of the section ?

7. The assessee filed its return of income for the assessment year 2001-02 on October 30, 2001, admitting a total income of Rs. 22,74,54,579. Again, the assessee filed a revised return on March 27, 2003, admitting a total income of Rs. 18,99,10,630. The Assessing Officer, after processing the same under the provisions of the Act, passed the assessment order u/s 143(3) of the Act on March 30, 2004. Since in this tax case appeal we are called upon only to decide as to whether the payment of interest for excess refund, as provided for u/s 234D of the income tax Act, can be levied in respect of the assessment years prior to the introduction of the said section or not, we are not going into any other points raised, discussed and decided by the authorities below.

8. To decide this issue, it is necessary to extract section 234D of the income tax Act, which deals with interest on excess refund. The said section reads as follows :

234D.(1) Subject to the other provisions of this Act, where any refund is granted to the assessee under sub-section (1) of section 143, and--

(a) no refund is due on regular assessment; or

(b) the amount refunded under sub-section (1) of section 143 exceeds the amount refundable on regular assessment, the assessee shall be liable to pay simple interest at the rate of one-half per cent, on the whole or the excess amount so refunded, for every month or part of a month comprised in the period from the date of grant of refund to the date of such regular assessment.

(2) Where, as a result of an order u/s 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount of refund granted under sub-section (1) of section 143 is held to be correctly allowed, either in whole or in part, as the case may be, then, the interest chargeable, if any, under sub-section (1) shall be reduced accordingly.

9. According to the assessee, interest u/s 234D cannot be charged, since the provisions of the said section will come into operation only on and from June 1, 2003, and that, levy of interest cannot be done by way of a proceeding u/s 154 of the Act. Section 154 of the Act deals with rectification of mistake and as per the said section, with a view to rectify any mistake apparent from the record, an income tax authority referred to in section 116 of the Act, may, amend any order passed by it under the provisions of this Act and also amend any intimation or deemed intimation under sub-section (1) of section 143.

10. Before going into the question, viz., whether the interest levied u/s 234D of the Act in respect of assessment years prior to the introduction of the said section is correct or not, we will first deal with the proposition of law laid down by various courts in this regard. In the judgment reported in Commissioner of Income Tax Vs. South Indian Bank Ltd., , one of the questions that came up for consideration was, whether the Department was entitled to collect interest u/s

234D of the income tax Act ? In that case, the High Court of Kerala held that the said issue was covered by its earlier decision in the case reported in Commissioner of Income Tax Vs. Kerala Chemicals and Proteins Ltd., , wherein, it was held as follows :

Admittedly, section 234D was introduced by the Finance Act, 2003, with effect from June 1, 2003. This provision on interest is not introduced with reference to any assessment year, which is obvious from the fact that it is not effective from the beginning of the financial year. On the other hand, this provision on interest will apply to all cases of refund granted u/s 143(1) but interest could be levied only with effect from June 1, 2003. Even though refund in this case was granted while sending intimation u/s 143(1) on June 28, 2000, and regular assessment u/s 143(3) was completed converting the refund to demand of tax on January 22, 2004, interest could be demanded only for the period from June 1, 2003, till January 22, 2004, which is what is done by the Assessing Officer. The Revenue has no answer to query as to whether interest u/s 234D could be levied in cases of regular assessment completed u/s 143(3) prior to June 1, 2003, leading to demand of refunded amount as tax determined on regular assessment. Therefore, the Commissioner of income tax's order u/s 263 was rightly found to be untenable by the Tribunal. However, the finding of the Tribunal that section 234D is applicable only from the assessment year 2004-05 onwards is vacated. The view taken by the Assessing Officer that section applies from June 1, 2003, is the correct position.

11. In the case reported in Sree Karpagambal Mills Ltd. Vs. Commissioner of Income Tax, decided by this court, the question that came up for consideration was, whether the depreciation as per the income tax (Fourth Amendment) Rules, 1983, was to be allowed in all cases which were pending on April 2, 1983, irrespective of the assessment year involved or was to be allowed only from 1984-85 and subsequent years ? In that case, this court, while observing that the income tax (Fourth Amendment) Rules, 1983, do not at all provide for retrospective operation of the rules and this aspect of the matter was of signal importance in deciding the tangle posed in that case and that the rules under the income tax Act are framed by the Board, of course, subject to the control of the Central Government pursuant to the salient provisions adumbrated u/s 295 of the income tax Act, 1961, has held as follows (page 844) :

The power to make rules with retrospective effect for the Board is there within the parameters prescribed in the said sub-section. But, the power while enacting the income tax (Fourth Amendment) Rules, 1983, did not specifically provide for the increased rate of depreciation at 15 per cent, operable retrospectively on and from a particular date. That being so, to contend that the income tax (Fourth Amendment) Rules, 1983, is to operate retrospectively to cover the case of the assessee relatable to the assessment year 1981-82, in the sense of the assessee getting the enhanced rate of depreciation at 15 per cent, cannot at all be countenanced, inasmuch as the amended rules came into force from April 2,

1983.

12. Following the above decision, this court had disposed of some of the cases relied upon by the learned counsel appearing for the assessee. In the case reported in Commissioner of Income Tax Vs. S.A. Wahab, the question that was referred to the Kerala High Court was, whether the assessee in that case was entitled to depreciation at the rate of 40 per cent. ? In that context, the Kerala High Court, observed that (page 467) : "though the subject of the charge is the income of the previous year, the law to be applied is the law that is in force in the assessment year, unless the law is changed. In fact, what has to be looked into is the law of income tax. The provisions of the income tax Act as they stand on the 1st April of a financial year must apply for that year. Further, since the law that has to be applied is the law as it stands on the 1st April of a financial year, any amendments in the Act, which come into force after 1st April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force". On the basis of the above observation made, the Kerala High Court answered the question of law framed in that case in the following manner (head note) :

The amendment sought to be relied on was an amendment to the income tax Rules, 1962. The notification amending the rule came into effect only on July 24, 1980, and the amendment did not have retrospective operation. The provisions relating to depreciation as they stood on April 1, 1980, had to be applied in the instant case. The assessee was not, therefore, entitled to depreciation at the rate of 40 per cent.

13. In the case reported in Yuvaraj International Vs. Commissioner of Income Tax, one of the questions that came up for consideration before this court was, "whether the Tribunal was right in holding that rule 6AA of the income tax Rules, which came into effect on August 1, 1981, was not applicable to the assessment year 1981-82 ?" In that judgment, after elaborate discussions, this court has held as follows (page 645) :

...we are of the view that the Tribunal was right in holding that rule 6AA of the income tax Rules, which came into effect on August 1, 1981, is not applicable to the assessment year 1981-82. The reasons are rather obvious. The rule has come into force only on and from August 1, 1981, is not in retrospective operation with effect from April 1, 1981, the date of the commencement of the assessment year. Axiomatic a proposition of law it is, that a rule or a provision of a statute, which is in force on and from the date of the commencement of the assessment year alone is applicable to the assessment year in question and to put it otherwise, as the rule or statutory provision came into force subsequent to the day of commencement of the assessment year, such rule or statutory provision is not at all applicable to the assessment year in question.

No decision for such a proposition is necessary and if any decision is needed even for such a proposition of law, we may quote here the decision emerging

from a Division Bench of this court, in the case of Commissioner of Income Tax Vs. S. Palaniswamy, , wherein their Lordships of this court expressed that though the subject of the charge of income tax is the income of the previous year, the law to be applied is the law that is in force as on the first day of April of the assessment year, unless the law is changed.

In the case reported in Karimtharuvi Tea Estate Ltd. Vs. State of Kerala, the question that came up for consideration before the hon"ble Supreme Court of India was, "whether any surcharge can be levied on the agricultural income tax payable for the assessment year 1957-58 ?" In that case, the Supreme Court while answering the said question of law in the following manner, viz. (age 266) : "the Surcharge Act having come into force on September 1, 1957, and the said Act not being retrospective in operation, it could not be regarded as law in force at the commencement of the year of assessment 1957-58 and since the Surcharge Act was not the law in force on April 1, 1957, no surcharge could be levied under the said Act against the appellant in the assessment year 1957-58", held as follows (page 264) :

It is well settled that the income tax Act as it stands amended on the first day of April of any financial year must apply to the assessment of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force.

15. In the case reported in J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, , the hon"ble Supreme Court of India, while interpreting the charging section vis-a-vis the machinery section with regard to the provision for levy of interest, has held as follows :

Ordinarily, the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. Regardless of the reasons which impelled the Legislature to provide for charging interest, the court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, it is found that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the Legislature.

16. In the present case, the assessment year pertains to 2001-02; the intimation u/s 143(1) regarding refund was sent to the assessee on November 30, 2002, and the order of assessment was passed on March 30, 2004. The Assessing Officer, on the basis of the materials available, calculated the interest on excess refund. The Commissioner of income tax (Appeals), held that, once the regular assessment is made on or after June 1, 2003, on the excess sum refunded earlier, interest is to be charged and the assessment having been completed on November 30, 2002, and the assessee having enjoyed the benefit of excess refund, it is liable to pay interest as provided for u/s 234D of the Act. However, the Tribunal held that, since the assessment year involved in this case is 2001-02 and the provisions of section 234D came into effect only from June 1, 2003, interest cannot be charged in respect of assessment years falling prior to the introduction of the said section and that the amendment cannot be given retrospective effect.

17. On a perusal of the entire materials placed on record and the authorities relied on by both the parties, we have no quarrel with regard to the principle of law applied by the hon'ble apex court.

18. While applying the above stated principles of law to the facts and circumstances of the case, it is seen that the assessee has filed its return of income on October 30, 2001, admitting the income of Rs. 22,74,54,579. Again, the assessee has filed the revised return on March 27, 2003, admitting the income of Rs. 18,99,10,630. The return was processed u/s 143(1) on November 30, 2002, and the notice u/s 143(2) was issued on June 24, 2003. In response to the said notice, the representatives of the assessee appeared before the officials of the Department and the case has also been discussed with them and in the course of hearing, the assessee filed a revised statement of income and, ultimately, the assessment order came to be passed on March 30, 2004.

19. Section 234D was amended and it came into force with effect from June 1, 2003. As per section 234D(1), "subject to the other provisions of the Act, where any refund is granted to the assessee under sub-section (1) of section 143 and no refund is due on regular assessment; or the amount refunded under sub-section (1) of section 143 exceeds the amount refundable on regular assessment, the assessee shall be liable to pay simple interest at the rate of one-half per cent, on the whole or the excess amount so refunded, for every month or part of a month comprised in the period from the date of grant of refund to the date of such regular assessment".

20. In the case on hand, though previously, the amount has been refunded to the assessee, the subsequent check made by the Revenue, made it clear that the assessee is not entitled to get refund, which has necessitated the Revenue to claim refund. In this case, the assessment was completed only on March 30, 2004, the date on which the order of assessment came to be passed. But, the amended provision of section 234D came into force with effect from June 1, 2003. When once the regular assessment is completed after the amended

provision of law came into operation, we have no hesitation to hold that the assessee is liable to pay interest on the refunded amount, as contemplated u/s 234D. It is not the year of assessment that falls for consideration in such circumstances, but the date on which the regular assessment order has been passed. In the case on hand, though the assessment year is 2001-02, the regular assessment was made on March 30, 2004, by which time, the amended provision of law, having into operation on and from June 1, 2003, is in force. Therefore, the order passed by the Assessing Officer, levying interest on the amount of refund, is well within the parameters of law and the contra orders passed by the Commissioner of income tax (Appeals) and the income tax Appellate Tribunal, to the effect of ignoring this principle of law, are illegal and they are accordingly set aside.

21. Before parting with, we place on record our concern for the public money. If the contention of the assessee that he is not liable to pay any interest for the excess amount of refund, which is a public money, received and enjoyed by him for considerably a long period of time is entertained, the same, besides being against the purport of section 234D, also puts great dent to the exchequer. Therefore, we are not inclined to accept this contention of the assessee, who knowing fully well that it is a public money, has enjoyed the excess refund for considerably a long period of time. At the cost of repetition, we hold that since the regular assessment has been completed only on March 30, 2004 and the amended provision of law, i.e., section 234D came into operation on and from June 1, 2003, which is well prior to the completion of the regular assessment certainly, the assessee is liable to pay interest on the excess refund amount received and enjoyed by him all these years as contemplated u/s 234D of the Act.

22. Accordingly, this appeal preferred by the Revenue is allowed, answering both the questions of law in favour of the Revenue. No costs.