
(2008) 06 SHI CK 0010
In the High Court Of Himachal Pradesh

Commissioner of Income Tax

APPELLANT

Vs

Prakash Nath

RESPONDENT

Date of Decision : 17-06-2008

Acts Referred:

Income Tax Act, 1961 — Section 147, 154, 155(13), 263

Citation : (2008) 220 CTR 593 : (2008) 306 ITR 1

Hon'ble Judges : Sanjay Karol, J;R.B. Misra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sanjay Karol, J.—I.T.A. No. 12 of 1999 pertains to the assessment year 1984-85; I.T.A. No. 9 of 1999 pertains to the assessment year 1985-86; I.T.A. No. 14 of 1999 pertains to the assessment year 1986-87 and I.T.A. No. 8 of 1999 pertains to the assessment year 1987-88 of the same assessee.

2. All the appeals arise out of a common order dated April 12,1999, passed by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh, in I.T.A. Nos. 2138 to 2141/Chandi/91 and as such are being disposed of by a common judgment.

3. The appeals were admitted on the following substantial questions of law:

(i) Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in coming to the conclusion that in revision order passed u/s 154/155 for charging interest under Sections 139(8) and 215, the application of the provisions of Section 154(3) are mandatory, when in the notice issued u/s 154/155, it has been specifically made clear that the enhancement of income will also increase the assessee's liability?

(ii) Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal was justified in law in entertaining the assessee's appeal against charging of interest under Sections 139(8) and 215 in the order passed u/

s 154, when the assessee had not challenged the enhancement of income which has made assessee liable to pay interest?

For the purpose of convenience the facts of I.T.A. No. 8 of 1999 are being referred to for the purpose of adjudication of the issue in question.

4. The assessee Shri Prakash Nath, partner derived his share from the firm M/s. Kailash Nath and Associates, New Delhi. His assessment u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), was provisionally completed on March 28, 1988, on the income assessed at Rs. 80,360. The assessment being provisional it was subjected to rectification u/s 154/155 of the Act. On March 28, 1988, the respondent was issued show-cause notice indicating that the assessment order required to be amended under the provisions of Section 154/155 of the Act which would have the effect of "enhancing the assessment/reducing the refund/increasing the liability". Opportunity to present and plead the case was adequately afforded to the assessee.

5. To the proposed revision/rectification, the assessee issued no objection and as such the assessment was revised and the revised share was adopted and the total income of the assessee was determined to be Rs. 1,56,345, vide orders dated April 16, 1991. In the said order, the assessee was also directed to pay interest u/s 139(8)/215/217 of the Act.

6. The assessee filed an appeal before the Commissioner of Income Tax (Appeals), Shimla, on the ground that the Assessing Officer had erred in law in levying interest u/s 155 as the same was not chargeable on the facts and circumstances of the case. In terms of the order dated October 4, 1991, the appellate authority dismissed Appeal No. IT/69/91-92, IT/68/91.

7. The assessee, further, approached the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh, assailing the aforesaid order and in terms of its order dated April 12, 1999 in Appeals Nos. 2142 to 2145/Chandi/91, the Appellate Tribunal, relying upon the decision rendered by the (1998) 67 ITD 23 holding that without giving any specific notice u/s 155 the Assessing Officer could not have charged interest under the provisions of the Act, allowed the appeal. It is this order which is the subject-matter of the present appeals.

8. It is important to notice that in response to the show-cause notice issued u/s 154/155 of the Act, the assessee filed the assessment order of the firm Kailash Nath and Associates and stated that he had no objection to the proposed rectification. The necessity to revise the original assessment order arose only when the determined share of the assessee from the firm was adopted and the taxable income and the tax liability has increased. While carrying out the rectification u/s 154, positive income, which was undisputed was determined resulting into the payment of enhanced tax on the enhanced taxable income. As a consequence thereof the provisions of Section 215 became enforceable.

9. Mr. Ajay Kumar, learned Counsel for the respondent, has strenuously argued

that before invoking the provisions of Section 215 of the Act, the Assessing Officer was duty bound to have issued notice. The same is stipulated u/s 215(3) of the Act. For the sake of convenience and ready reference, the relevant provisions of Section 215 of the Act are reproduced hereinbelow:

215.(1) Where, in any financial year, an assessee has paid advance tax u/s 209A or Section 212 on the basis of his own estimate (including revised estimate), and the advance tax so paid is less than seventy five per cent, of the assessed tax, simple interest at the rate of fifteen per cent, per annum from the 1st day of April next following the said financial year up to the date of the regular assessment shall be payable by the assessee upon the amount by which the advance tax so paid falls short of the assessed tax:

2.

3. Where as a result of an order u/s 147 or Section 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 on which interest was payable under Sub-section (1) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and-

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee, a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be a notice u/s 156 and the provisions of this Act shall apply accordingly;

(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

4. In such cases and under such circumstances as may be prescribed, the Assessing Officer may reduce or waive the interest payable by the assessee under this section....

10. A careful reading of the provisions would show that the Section requires only issuance of "notice of demand" in the prescribed form specifying the "sum payable". The requirement of the statute is to only issue the notice of demand in contrast with a show-cause notice, which is not envisaged under the statute. It is evident that if the interest payable is reduced then the Revenue is statutorily required to refund the amount to the assessee. Sub-section (4) empowers the Assessing Officer to "reduce or waive" the interest payable by the assessee under this section. On the principle of harmonious construction, there can be no other interpretation which can be given to the aforesaid provisions.

11. The assessee is statutorily required to pay the advance tax as stipulated u/s 209 or 212 on the basis of his own estimate including revised estimate and if the tax so paid is less than 75 per cent, of the assessed tax it statutorily entails simple interest at 15 per cent, with further revisions in accordance with law.

12. That the assessee had the adequate opportunity to present and plead its case is evident from the fact that a show-cause notice indicating the rectification of original assessment which may entail enhancement of assessment/increase of liability had already been issued to the assessee to which he had consented/not objected.

13. It cannot be said that the Income Tax Appellate Tribunal was right in law in coming to the conclusion that in the revision order passed u/s 154/155, for charging interest u/s 139(8) and 215 notice before levying of interest ought to have been issued. The requirement of issuing the "notice of demand" is for the purpose of exercising the power of waiving or reducing the interest as envisaged u/s 215(4) of the Act.

The question of law No. (i) is answered accordingly.

14. It is an admitted case of the parties that the assessee had not challenged the amount of income assessed; the amount of tax determined; the status under which the assessee was assessed; but had restricted his ground only to the interest payable u/s 215 of the Act.

15. For ready reference, Clause (c) of Section 246 is reproduced hereinbelow:

(c) an order against the assessee, where the assessee denies his liability to be assessed under this Act or any order of assessment under Sub-section (3) of Section 143 or Section 144, where the assessee objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed.

16. While considering the issue as to whether order levying interest under Sections 139 (8) and 215 are appealable u/s 246 of the Act, the apex court in Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax, , has held that Clause (c) of Section 246 provides an appeal against an order where the assessee denies his liability to be assessed under the Act or against any assessment order under Sub-section (3) of Section 143 or Section 144, where the assessee objects to the amount of income assessed or to the amount of tax determined or to the amount of loss computed or to the status under which he is assessed.

The following observations made by the court are relevant (page 966):

...Inasmuch as the levy of interest is a part of the process of assessment, it is open to an assessee to dispute the levy in appeal provided he limits himself to the ground that he is not liable to the levy at all. Iii this connection, we may usefully refer to the decision of the Karnataka High Court where, in a judgment in National Products Vs. Commissioner of Income Tax, Mysore, Govinda Bhat C.J. explained the position in regard to the levy of interest u/s 139 and u/s 215. After referring to the earlier cases on the point, he observed (page 945):

All decided cases except one have uniformly taken the view that levy of interest

u/s 18A(6) or Section 18A(8) of the 1922 Act or levy of interest u/s 215 of the Act is not appealable but in the appeal against a regular assessment, it is open to the assessee to take every contention which, if accepted, must result in the Income Tax Officer holding that there was no liability to pay advance tax and, therefore, there was no liability to pay penal interest. In other words, it is open to an assessee to contend in the appeal against an order of assessment that he is not liable to pay any advance tax at all or the amount of advance tax determined as payable by the Income Tax Officer is not correct; but if the assessee does not dispute the amount of advance tax determined as payable by the Income Tax Officer, he merely cannot object to the levy of penal interest or question its quantum....

The levy of penal interest u/s 139 or Section 215 is made in the regular assessment order; the demand issued pursuant to the assessment order is for the total amount of liability imposed inclusive of tax and interest. While levy of penal interest u/s 18A of the 1922 Act up to April 1, 1952, was automatic as was noticed by Chagla Commissioner of Income Tax, Bombay City Vs. Jagdish Prasad Ramnath, under the Act such levy is not automatic; discretion is vested in the Income Tax Officer to waive or reduce penal interest in the cases and circumstances mentioned in Rule 117A and Rule 40 of the Income Tax Rules, 1962. If the case of the assessee falls within the scope of the said Rules, the Income Tax Officer is bound in law to consider whether the assessee was entitled to waiver or reduction of interest. It is, therefore, clear that levy of penal interest under Sections 139 and 215 is part of the assessment. When such penal interest is levied, the assessee is "assessed", meaning thereby, he is subjected to the procedure for ascertaining and imposing liability on him. If the assessee denies his liability to be assessed under the Act, he has a right of appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied u/s 215 by the order of assessment, the assessee may altogether deny his liability to pay such interest on the ground that he was not liable to pay advance tax at all or that the amount of advance tax determined by the Income Tax Officer as payable ought to be reduced. In either case, he denies his liability, wholly or partially, to be assessed. Similarly, where interest is levied u/s 139 of the Act, the assessee may deny his liability to pay such interest on the ground that the return was not belated or that the penal provision was not attracted at all to his case. In such a case also, he denies his liability to be assessed to interest.

The decision was noted with approval by the Gujarat High Court in Bhikhoobhai N. Shah Vs. Commissioner of Income Tax, Gujarat-V, The only dissent expressed in the matter by the Gujarat High Court arose on the question whether the assessee could challenge in appeal his partial liability to be assessed to interest. In this area of dissent, we need not enter. But we have no hesitation in endorsing the legal position which has commonly found favour with the two High Courts. We hold that the question whether a case is made out for waiver or reduction of the interest levied under Sub-section (8) of Section 139 or u/s 215 cannot be the

subject of an appeal under Clause (c) of Section 246 of the Income Tax Act. That is a matter which can more appropriately be dealt with by the Commissioner of Income Tax in the exercise of his revisional jurisdiction.

18. The court further observed that before the revisional jurisdiction of the Commissioner of Income Tax could be invoked, it is necessary for the assessee to demonstrate before the Income Tax Officer that there is a case for waiving or reducing the levy of interest. The court has further held that in cases where the jurisdictional fact attracting the levy is not disputed, it is merely a question satisfying the relevant authority that there are circumstances calling for a reduction or waiver of the interest. If an opportunity to do so has not been made available to the assessee before the order levying interest is made, it will be open to the assessee to apply to the Income Tax Officer after such order has been made to show that a reduction or waiver of interest is justified. Admittedly, in the present case, the assessee did not exercise his right u/s 155(4) of the Act.

In view of the aforesaid discussion and the observations made by the apex court, the assessee's appeals were not maintainable as the same were filed only against the levy of interest payable u/s 215 pursuant to the orders passed under Sections 154/155 of the Act. The question of law No. (ii) is answered accordingly.

19. For the aforesaid reasons, the appeals are allowed.