
(2002) 02 DEL CK 0126

In the Delhi High Court

Case No : Civil Writ Petition No. 68 of 1979 6 February 2002 A.Y. 1975-76

Dalmia Dairy Industries

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 06-02-2002

Acts Referred:

Citation : (2002) 174 CTR 296

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Full Bench

Advocate : V.P. Gupta and Ms. Rohina Nath, for the assessed, R.C. Pandey and Ms. Prem Lata Bansal, for the Revenue, for the Appellant;

Judgement

S. B. Sinha, C. J.

In this writ petition revisional order, dated 12-12-1978, passed by the Commissioner Delhi, purported to be u/s 264 of the Income Tax Act, 1961, is in question.

By reason of the said order the petitioner's application for exemption from payment of interest in terms of section 215(1) read with rule 40 of the Income Tax Rules, 1962, was allowed in part. The said order was passed for the year ending 30-9-1974, for the assessment year 1975-76. The petitioner furnished a return showing his income during the relevant assessment year on 30-6-1975. He furnished a revised Income Tax return. The petitioner, before the assessing authority claimed depreciation. An order of assessment was made on 2-6-1978, assessing the total income at Rs. 81,38,810 and holding the petitioner liable to pay a sum of Rs. 37,13,047 on account of Income Tax and interest. A demand notice for the said sum was accordingly served on the petitioner. The petitioner applied for waiver of interest in terms of section 215 of the Act. The said claim of the petitioner was rejected by an order dated 24-8-1978, where after the petitioner filed a revision petition in terms of section 264 of the Act which as noticed hereinabove, was allowed in part in its impugned order, the second

respondent rejected partly the prayer for waiver of interest inasmuch as, interest for a period of 15 months, i.e., for the period 1-4-1975, to 30-6-1976, was not waived and interest for the period for 1-7-1976, to 21-6-1978, was waived.

2. Learned counsel appearing for the petitioner would submit that the Commissioner committed an illegality in passing the impugned order insofar as it proceeded on the basis that the interest could not be fully waived. The petitioner contended that the demand of interest is attributable in full to the additions and disallowance wherefor the petitioner is not responsible and the same was disputed by the petitioner.

Learned counsel would contend that clauses (1) and (5) of rule 40 of the Income Tax Rules, 1962, are distinct and separate and thus only because clause (1) thereof had been applied, the Commissioner could not have refused to invoke the provisions of clause (5) thereof. In support of the said contention the learned counsel relied on the decisions in Commissioner of Income Tax Vs. Bennett Coleman and Co. Ltd., Sir Shadilal Enterprises Ltd. Vs. Commissioner of Income Tax, P.M. Manuel Vs. Income Tax Officer and Others,

3. Mr. Pandey, the learned counsel for the respondent however, would submit that part waiver is permissible in law. Learned counsel would contend that in the instant case sub-rule (5) of rule 40 of the Income Tax Rules was not attracted as the petitioner had not approached the Inspecting Assistant Commissioner. In this regard reliance has been placed on Amrit Narain Vs. Commissioner of Income Tax,

4. Sub-section (4) of section 215 empowers the assessing officer to reduce or waive interest payable by the assessed under the said section. Rule 40 of the Income Tax Rules provides for circumstances wherein the assessing officer may reduce or waive the interest payable u/s 215 which is in the following term :

"Rule 40. Waiver of Interest. The Income Tax Officer may reduce or waive the interest payable under sections 215 and 217 in the cases and under the circumstances mentioned below, namely :

(1) When the relevant assessment is completed more than one year after the submission of the return, the delay in assessment not being attributable to the assessed.

(2) Where a person is u/s 163 treated as an agent of another person and is; assessed upon the latter's income.

(3) Where the assessed has income from an unregistered firm assessed under the provisions of clause (b) of section 183.

(4) Where the previous year is the financial year or any year ending about the, close of the financial year and large profits are made after the 1st March (or the 15th March in cases where the proviso to section 211 applies), in circumstances which could not be foreseen.

(5) Any case in which the Inspecting Assistant Commissioner considers that the

circumstances are such that a reduction or waiver of the interest payable u/s 215 or section 217 is justified".

5. There cannot be any doubt whatsoever that in terms of rule 40 of the rules, an order of waiver is permissible if one or more circumstances specified therein exist. It is also true that in a given case both sub-rule (1) and (5) may be held to be applicable.

6. Be it recorded that the petitioner preferred an appeal against the order of assessment claiming depreciation as also other deductions which were held to be taxable and thus, if and when the said appeal is allowed, the same will have a bearing on the demand also. The question as to whether the delay in assessment is attributable to the assessed having regard to the provisions of sub-rule (1) of rule 40 of the Income Tax Rules would be essentially a question of fact. The Commissioner has arrived at a finding that there was nothing on record to show that the assessed had adopted dilatory tactics for postponement of the assessment proceedings.

Allowing interest for a part of the period, although is permissible in law, but in the instant case the Commissioner has not assigned any reason in support of the impugned order. However, we may notice that in *J.K. Jute Mills Co. Ltd. v. ITO & Anr.* 1978 CTR (All) 250, a Division Bench of Allahabad High Court has held that the power of the Commissioner u/s 264 is discretionary in nature and the writ court in exercise of power under Article 226 of the Constitution shall not interfere therewith. We are however of the opinion that it cannot be said as a general proposition of law that in no case the High Court is precluded from exercising its jurisdiction in a proceeding under Article 226 of the Constitution of India.

Although the Commissioner is a high dignitary but it is trite that he must exercise his discretion judicially. Discretion cannot be exercised in a whimsical or fanciful manner. The Commissioner while exercising his jurisdiction u/s 264 of the Income Tax Act exercises a judicial function and assignment of reasons is one of the basic ingredients of natural justice.

7. In *Chaitnya Charan Das Vs. State of West Bengal and others*, one of us held :

"50. The submission of the learned counsel appearing on behalf of the respondents to the effect that the Central Government has an unfettered discretion in the manner of grant of pension and thus, these writ applications should not be entertained cannot again be accepted.

51. Discretion as is well known must be exercised by the state in a reasonable manner.

52. In *Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import*, the Supreme Court while considering the exercise of discretion by a court observed:

"Discretion, said Lord Mansfield in *R v. Wikes* (1770) 98 ER 327 when applied to a court of justice, means sound discretion guided by law. It must be governed by

rule, not by humour, it must not be arbitrary, vague and fanciful, but legal and regular (see Craies on Statute Law, 6th Edn, p. 273)"

53. In *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, the Supreme Court observed :

"A. repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or when he abuses power by acting in bad faith or by an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness.

The true position, Therefore, is that any act of the repository of power, whether legislative or administrative or quasi judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.

54. In *Rohtas Industries Vs. S.D. Agarwal and Others*, the Supreme Court observed :

"In public regulation of this sort there is no such thing as absolute and untrammelled discretion that is that action can be taken on any ground or for any reason that can be suggested to mind of the administrator, no legislative, Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however, capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. Discretion necessarily implies good faith in discharging public duty there is always a perspective within which a statute is intended to operate and any clear departure from its lines or objects is just as objectionable as fraud or corruption."

55. In *Krishan Kumar Vs. Union of India (UOI) and Others*, has been held :

"It is true that in exercise of powers of revoking or cancelling the permission is akin to and partakes of a quasi judicial complexion and that in exercising of the former power the authority must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with the principles of natural justice. The authority cannot permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. It would then not be the authority's discretion that is exercised, but someone else's. If an authority hands over its discretion to another body it acts ultra vires. Such an interference by a person or body extraneous to the power would plainly be contrary to the nature of the power conferred upon the authority."

56. In *Wade and Forsyth's Administrative Law* (1994 Edn) 393, the learned authors state:

"For the same reasons there should in principle be no such thing as unreviewable administrative discretion which should be just as much a contradiction in terms as unfettered discretion."

57. Lord Denning in his book "What next in law" has decided to look into the future and set down something in the hope that they may be done by those who came after him. The learned Judge desired :

"Let us build up a body of law to see that these powers are not misused or abused, combined with upright judges to enforce the law. It is a task which I command to all."

As regards the question of exercise of discretion by a high functionary, the court noticed :

"105. It will, however, not be correct to urge that only because the State Advisory Committee was headed by a former judge of this court, the same is sacrosanct, and the Central Government is precluded from taking a different view in the matter. The Central Government in its own right had the jurisdiction to consider the materials itself, having regard to the recommendation of the State Government. The Central Government is required to act in public interest and for public good. It would, Therefore, in my opinion, not be correct to contend that while the Central Government considers the matter upon scrutiny of the materials placed before it, it sits in judgment over the recommendations of the State Advisory Committee. The State Advisory Committee and the State Government are only recommendatory authorities and thus their recommendations are not binding upon the Central Government. The Central Government, in my opinion cannot be stultified from exercising its functions."

106. In re : The Special Courts Bill, 1978 AIR 1979 SC 478 the Supreme Court while considering the reference made to it by the President of India in terms of article 143(1) of the Constitution of India relating to constitutionality of the Special Courts Bill, 1978, observed .:

"The second infirmity from which the procedural part of the Bill suffers is that by clause 7, Special Courts are to be presided over either by a sitting Judge of a High Court or by a person who has held office as Judge of a High Court to be nominated by the Central Government in consultation with the Chief Justice of India. The provision for the appointment of a sitting High Court Judge as Judge of the Special Court is open to no exception. Insofar as the alternative source is concerned, we entertain the highest respect for retired Judges of High Courts and we are anxious that nothing said by us in our judgment should be construed as casting any aspersion on them as a class. Some of them have distinguished themselves as lawyers once again, some as members of administrative Tribunals and many of them are in demand in important walks of life, unquestionably they occupy a position of honour and respect in society. But one cannot shut one's eyes to the constitutional position that whereas by article 217 a sitting Judge of a High Court enjoys security of tenure until he attains a particular age, the retired

Judge will hold his office as judge of the Special Court during the pleasure of the government. The pleasure doctrine is subversive of judicial independence.

A retired Judge presiding over a Special Court, who displays strength and independence may be frowned upon by the government and there is nothing to prevent it from terminating his appointment as and when it likes."

107. In Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, , the Supreme Court observed :

"There is need to minimise the scope of the arbitrary use of power in all walks of life. It is inadvisable to depend on the good sense of the individuals, however, high placed they may be. It is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection and fairness does not go with the posts, however, high they may be. There is only a complainant presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law".

8. In Amrit Narain v. CIT (supra) Kirpal, J. as his Lordship then was, held :

"It is clear that the legislature has left the discretion with the Commissioner and the Commissioner is a high functionary and merely because the discretion is left with the functionary, it cannot mean that the said provision is arbitrary. The discretion of course has to be exercised judicially. If the discretion has not been properly exercised, then it cannot mean that the application of the petitioner u/s 273A has to be allowed. The non-exercise or improper exercise of the discretion would only result in the relief not being granted to the assessed which would possibly require reconsideration of the application by the Commissioner."

The contention of Mr. Pandey, Therefore, to the effect that this court should not interfere with the order cannot be sustained.

9. In CIT v. Bennett Coleman & Co. (supra) a Division Bench of the High Court has held:

"The only requirements of sub-rule (1) are that (a) assessment should have been completed more than one year after the submission of the return and (b) the delay in the assessment is not attributable to the assessed. The rule does not even faintly indicate that where these conditions are satisfied, interest for the first year must be levied. The rule in fact provides for waiver or reduction of interest without any such limitations. No doubt, section 215(1) gives the date from which interest can be charged but the said sub-section cannot be read in isolation. Sub-section (4) cannot be ignored and all parts of section 215 will have

to be read harmoniously as a whole. From the general scheme of rule 40, it would be clear that under sub-rule (5) the Inspecting Assistant Commissioner has the widest power in the matter of waiver of interest with no statutory limitations or conditions prescribed for its exercise. All the five sub-rules of rule 40 deal with different situations and they are independent of each other. Therefore, it cannot be said that sub-rule (5) will not operate in cases governed by sub-rule (1). Rule 40 nowhere limits the discretion, once the conditions are satisfied. To hold otherwise would amount to rewriting the rule."

10. In *Sri Shadilal Enterprises Ltd.* (supra), it was observed as under:

"Under rule 40(5) such waiver was permissible, though waiver under rule 40(1) of the rules was already granted to the petitioner. The sub-rules of rule 40 are independent of each other and deal with different situations. Sub-rule (1) would not restrict cases covered by sub-rule (5). The authorities should exercise their discretion once the conditions under rule 40(5) are satisfied in view of the decision in the case of *Commissioner of Income Tax Vs. Bennett Coleman and Co. Ltd.*, In view of my above observations, I think this is a fit case which should go back on remand to the Commissioner who will exercise their discretion and pass an appropriate order."

11. In *P.M. Manuel* (supra), the court observed thus :

"Thus, if the conditions laid down for the exercise of discretion are satisfied, the authority has no discretion to refuse to exercise the discretion. If there is omission to exercise the discretion on account of the failure on the part of the authority to genuinely address itself to the matter before it, mandamus can be issued directing such authority to rehear and determine the matter afresh according to law. The interpretation of sections 215 read with rule 40 came up for consideration before a Division Bench of the Gujarat High Court in the above case and the court decided to quash the order passed by the authorities and issued a direction to the authorities to grant waiver of interest. The court interpreted the word "justified" in rule 40(5) as follows :

"The word "justified" is a word of wide import. Something could be said to be justified if it is proved or shown to be fair or right or according to justice or backed by sufficient reason."

12. However, for invoking sub-rule (5) of rule 40, the petitioner was required to approach the Inspecting Assistant Commissioner (now Dy. CIT) at the first instance. The petitioner having not approached him and having approached the Commissioner, he in exercise of his revisional power u/s 264 could not have given any discretionary relief as provided in sub-rule (5), which discretion could be exercised only by Inspecting Assistant Commissioner.

13. Furthermore, the impugned order does not contain sufficient or cogent reason. Assignment of reason, as is well known is a part of the principle of natural justice. In *The Siemens Engineering and Manufacturing Co. of India Ltd.*

Vs. The Union of India (UOI) and Another, wherein the Apex Court held :

"If courts of law are to be replaced by administrative authorities and Tribunals, as indeed, in some kinds of cases, with the proliferation of administrative law, they may have to be so replaced, it is essential that administrative authorities and Tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and Tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."

This aspect of the matter has again been considered by the Apex Court recently in Paul George Vs. State,

14. However, having regard to the fact that no reason has been assigned in support of non-waiver of interest for 15 months, we are of the opinion that the matter should be considered afresh. The petitioner may also approach the Inspecting Assistant Commissioner if it is permissible under law. For the reasons aforementioned this writ petition is allowed, impugned order is set aside and the matter is remitted to the Commissioner for consideration of this matter afresh in line of the observations made hereinbefore. No order as to costs.

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