

**(1983) 08 P&H CK 0112**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : Civil Writ Petition No. 8538 of 1976**

Deep Chand Jain

APPELLANT

Vs

Income Tax Officer, C-Ward and Others

RESPONDENT

**Date of Decision :** 03-08-1983

**Acts Referred:**

Constitution of India, 1950 — Article 265  
Income Tax Act, 1961 — Section 143, 144, 210, 214, 237

**Citation :** (1984) 41 CTR 149 : (1984) 145 ITR 676

**Hon'ble Judges :** D.S. Tewatia, J

**Bench :** Single Bench

**Advocate :** B.S. Gupta, for the Appellant; Ashok Bhan and Ajay Mittal, for the Respondent

## Judgement

D.S. Tewatia, J.—The petitioner-assessee (hereinafter referred to as the "assessee") deposited on March 20, 1971, a sum of Rs. 9,400 by way of advance tax in compliance with the order passed u/s 210 of the I.T. Act, 1961 (hereinafter referred to as "the Act"), and the demand notice u/s 156 of the Act in regard to the assessment year 1971-72.

2. The assessee filed the Income Tax return for the said year on October 1, 1971, showing an income of Rs. 39,469. The assessee thereafter filed a second return on November 27, 1973, which is alleged to be a revised return, therein showing an income of only Rs. 6,130. The prescribed period for passing an assessment order for the assessment year in question whether reckoned from the date of filing of the first return or from the date of filing of the second return, admittedly stood already expired when on April 28, 1975, the assessee addressed a communication, annex. P-1, terming the same as an application for the refund of the said advance tax. Thereafter, the assessee addressed a spate of letters and reminders to the IAC of Income Tax, CIT and the CBDT. Finally, he received a communication on September 21, 1976, annex. P-9, to the petition, informing him that no refund could be issued to the petitioner as the tax paid was on the

basis of income return originally and the revised return could not be filed in view of the provisions of Section 139(4), This led to the filing of the present petition claiming mandamus against the Department to make a refund. In the petition the assessee has asserted that he is entitled to the refund of the advance tax collected from him in pursuance of the order u/s 210 of the Act and demand notice issued u/s 156 of the Act with interest up to the date of the refund and that the amount of advance tax in question is being retained by the Department without any authority of law.

3. In the return filed to the writ petition respondent No. 1 has taken the stand that no tax is refundable, firstly, for the reason that when the first return was filed by the assessee, a sum of Rs. 2,400 odd, on the basis of self-assessment u/s 140A of the Act, was due to the Revenue, in addition to what had been already paid by way of advance tax and that the second return could not be considered to be a revised return under Sub-section (5) of Section 139 of the Act as the first return itself was under Sub-section (4) of Section 139, under which no revised return could be filed, and, secondly, in view of the provisions of Section 239(2) (c), the refund was barred by limitation as no application was moved on the prescribed form and within the prescribed period.

4. The first question in the light of the stand taken by the assessee and the Revenue, already noticed, that falls for consideration is as to whether the assessee is entitled to the refund of Rs. 9,400 collected from him in pursuance of the order u/s 210 of the Act and the demand notice issued u/s 156 of the Act.

5. Mr. Balwant Singh Gupta, appearing for the assessee, elaborating the assessee's claim, canvassed that tax becomes due and recoverable from an assessee only after an assessment order in accordance with the provisions of the Act is passed. In the present case, the assessment for a given year having become barred and no assessment order, therefore, has been passed and can be passed, no tax, therefore, is due from the assessee and liable to be recovered from him and that the amount of advance tax collected from the assessee could not be related for the given year to any order of assessment under the Act. In other words, the Revenue is not entitled to retain the amount collected by it u/s 210 of the Act as the retention of that amount is without any authority of law and is clearly violative of the mandate of the provisions of Article 265 of the Constitution of India. Mr. Gupta drew support for his aforesaid plural submissions from *Purshottam Dayal Varshney and Another Vs. Commissioner of Income Tax and Others*, and *R. Gopal Ramnaryan Vs. Third Income Tax Officer, Circle-II, Bangalore*, and drew pointed attention to the following observations of Gulati J. in *Purshottam Dayal Varshney's* case (at p. 190) :

"Under the Income Tax Act, although the liability to pay tax is cast upon an assessee each year in accordance with the Finance Act of that year, yet the tax becomes due and payable only when an assessment order is passed and a notice of demand u/s 29 of the Indian Income Tax Act, 1922, and Section 156 of the Income Tax Act, 1961, is served upon the assessee. If there is no assessment

order the assessee is not liable to pay any tax. It follows, therefore, that if an assessment order is set aside, the notice of demand becomes ineffective and the tax already paid under such a notice of demand becomes refundable. If a fresh assessment is made, the tax determined as a result of the fresh assessment order again becomes due and payable only after a fresh notice of demand is served upon the assessee."

6. The Andhra Pradesh High Court too in *G. Lakshminarayana Vs. Commercial Tax Officer and Another*, though in the context of sales tax legislation, enunciated the proposition that if there was no assessment order against the assessee, there was no amount of tax payable by him and, therefore, the assessee was entitled to refund of the whole of the amount paid by him.

7. The facts of *R. Gopal Ramnaryan Vs. Third Income Tax Officer, Circle-II, Bangalore*, were that an assessment order was set aside by the Income Tax Appellate Tribunal and thereafter no fresh assessment was made. The assessee claimed refund of the amounts collected from him by way of tax. His claim was rejected. That led him to file a petition in the High Court and the question that arose for consideration before the court was whether the petitioner was entitled to an appropriate direction for refund of the tax paid by him for the relevant assessment years or whether the same should be refused. It was contended before the court on behalf of the assessee that if there was no assessment order at all, then there was no tax liability, and if there was no tax liability it necessarily followed that the amount paid by way of tax ought to have been refunded and so the purported tax was liable to be refunded.

8. Reliance was placed on behalf of the assessee in the above case on *L. DWARKA DASS Vs. Income Tax OFFICER, SPECIAL CIRCLE "A" WARD, KANPUR.*, wherein the learned judge had observed that advance tax was in the nature of loan to be adjusted in the regular assessment and on which Government had to pay interest.

9. On behalf of the Revenue, it was contended before the said court that in the scheme of the Act, the income became liable to tax as soon as the charging section was attracted to the case of an assessee liable to pay the tax under the Act. *Chandrakantaraj Urs J. in R. Gopal Ramnaryan Vs. Third Income Tax Officer, Circle-II, Bangalore*, repelled the above contention with the following observations (at p. 374) :

"Now, therefore, the principal question for determination is as to when the tax can be said to be levied. There is no direct decision of the Supreme Court in so far as the peculiar and extraordinary facts of this case are concerned. However, it is a well settled principle of interpretation of taxation laws that if more than one view is possible on the construction of a taxing statute, the one which leans in favour of the assessee should be accepted by the courts. It is equally well settled in this country that no tax can be levied except with the authority of law as enjoined in Article 265 of the Constitution. In the case of *Rayalseema*

Constructions Vs. Deputy Commercial Tax Officer, Mannady Division, Madras 1 and Others, a Divi-Bench of the Madras High Court had occasion to consider the meaning and scope of Article 265 of the Constitution. Balakrishna Ayyar J., speaking for the Bench and repelling the contentions of the learned Advocate-General of Madras at the relevant time, ruled as follows (p. 386 of AIR 1959) :

"We do not by any means feel assured that article 265 can or ought to be cut up in the manner that the argument of the learned Advocate-General requires. The word "levy" is frequently used to include both of the first two stages involved in the process of taxation, viz., the levy properly so called and the determination of the amount of the tax. It appears to us that the words "levy" and "collection" are used in Article 265 of the Constitution in a comprehensive manner and that they are intended to include and envelop the entire process of taxation commencing from the taxing statute to the taking away of the money from the pocket of the citizen. And, what Article 265 enjoins is that every stage in this entire process must be authorised by the law."

I am in most respectful agreement with the above enunciation of the law. Therefore, it is necessary for me to examine Section 240 of the Act which provides for the refund of tax, which is as follows :

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

As is apparent from the language of the section, it is very wide in its scope and application. There is a mandate on the Revenue to make the refund even without a demand. That, in turn, leads me to the irresistible conclusion that if a demand is properly made then it certainly cannot be refused. Section 240 of the Act provides for refund of any amount that becomes due to the assessee. It cannot be restricted to excess payment only. It is possible in many instances that for a good number of reasons the whole of advance tax paid may become refundable, if the assessee is ultimately found not liable to pay tax after the assessment proceedings are completed. Such a possibility cannot be ruled out. If that be the position, the mere fact of the compulsion of payment u/s 210 of the Act, as contended by Shri Rajasekhara Murthy, cannot be accepted to mean that, by the operation of that section, that tax had been levied, assessed and collected. Assessment is the final process which completes the levy of tax u/s 4 of the Act.

This leads me to examine the question as to what is the effect of assessments made in the case of the petitioner for the two relevant assessment years, his appeals to the AAC and subsequently the annulment of those assessments by the Income Tax Appellate Tribunal. As rightly contended by Shri Prasad, the Appellate Tribunal which had the jurisdiction and the power vested in it to set aside the assessment, has annulled it. The effect of annulment is that there is no assessment at all in the eye of law. If the Revenue was aggrieved by that order,

the Act provides adequate remedies to rectify any error committed by the Tribunal. The Revenue not having had recourse to those remedies available to it cannot now take the stance that even without an assessment order in existence, the petitioner, for the relevant assessment years, is liable to tax u/s 4 of the Act. 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. This view has been expressed by the Supreme Court in several decisions arising under the Central Excises and Salt Act, 1944. In the case of *Patel India Private Limited Vs. Union of India and Others*, the Supreme Court was dealing with the question of refund claimed pursuant to an order made under that Act by the revisional authority. The Revenue resisted the claim on the ground that Section 40 of that Act had application and the claim for refund being belated in terms of that section, the appellant therein was not entitled to refund. Negating the contention, the Supreme Court first held that Section 40 of the Act had no application to the facts of that case at all and, therefore, the entire levy of excess excise duty on the appellant therein was one without jurisdiction and, therefore, without the authority of law, and in that circumstance, the Supreme Court laid down that since Section 40 of the Act did not apply to the facts, the respondent could not retain the excess duty except upon the authority of some other provisions of law. Similarly, in the instant case, unless the respondent-Revenue is able to show as to under what provision of the Act the Revenue can retain the tax paid without assessment being made or when the power to make the assessment afresh has ceased to be vested in the respondent by virtue of the operation of Section 153(1)(a)(iii) of the Act, inasmuch as more than two years have elapsed from the time the return was filed, the Revenue cannot retain the amount collected as tax. This is not disputed by the learned counsel appearing for the Revenue, nor has he placed any authority to the contrary before me."

10. The contention advanced on behalf of the Revenue before Chandrakantaraj Urs J. in *R. Gopal Ramnaryan Vs. Third Income Tax Officer, Circle-II, Banglore*, and reiterated before me appears to be authoritatively repelled by their Lordships in *Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others*, . Their Lordships" following observations in this regard are instructive (at p. 481) :

"With great respect, we have to state that we depend upon *State of Rajasthan and Others Vs. Ghasilal*, itself to hold that for purposes of Section 11B(a) the tax becomes payable before assessment is made by virtue of Section 3 read with Section 5 and Sub-sections (2) and (2A) of Section 7 of the Act and the rules framed thereunder, even though it becomes due when return is filed u/s 7(ii) or ascertained u/s 10. That a tax can become payable even before assessment is also clear from the observations of Sikri J. (as he then was) in *Ghasilal's* case to the effect that "Section 3, the charging section, read with Section 3, makes tax

payable, i.e., creates a liability to pay the tax... But till the tax payable is ascertained by the assessing authority u/s 10, or by the assessee u/s 7(ii), no tax can be said to be due within Section 16(1)(b) of the Act, for till then there is only a liability to be assessed to tax." Article 263 of the Constitution is in the following terms : "265. Taxes not to be imposed save by authority of law.--No tax shall be levied, or collected except by authority of law."

11. Before the Revenue can lay claim to the retention of the amount collected by it in pursuance of the order Section 210, it would have to be shown that the same had been levied in accordance with the provisions of the Act. That would require a consideration of the expression "levied" used in Article 265. Does the expression "levied" merely envisage the due prescribing of a certain rate of tax or does it include the tax that has been held to have become due and liable to be collected in accordance with law as a result of passing of a valid assessment order ?

12. Section 4 of the Act which is the charging section envisages Income Tax to be charged at a rate as prescribed by a Central Act for a given assessment year in accordance with and subject to the provisions of the I.T. Act in respect of the total income of the given previous year of every person.

13. Expression "total income" has been defined in Section 2(45) in the following words :

"Total income" means the total amount of income referred to in Section 5, computed in the manner laid down in this Act."

14. What is to be charged to income tax at the prescribed rate for a given previous year is the total income of the assessee computed in the manner laid down in the I.T. Act. It means that unless the computation has been done of the total income in terms of the provisions of the Act, one would not know as to what is the total income and what would be the Income Tax payable thereon at the prescribed rate. Unless that is known obviously, no amount could be considered to be due by way of tax from an assessee which can be lawfully collected from him or retained if already collected under certain provision of the Act envisaging the collection in advance either by way of advance tax or deduction at source or on self-assessment, which ultimately has to be given credit at the time of regular assessment.

15. It has been contended on behalf of the Revenue on the assumption that a second return filed by the assessee could not be considered as a valid return and the first one, filed on October 1, 1971, was the only valid return and the assessee was liable to make self-assessment on the basis of the income shown therein ; that the provision pertaining to self-assessment satisfied the requirements of the computation of the income and the assessment of tax thereon in terms as envisaged by the provisions of Sections 2(45) and 4.

16. In my opinion, there is no merit in this contention. Computation of total

income and tax thereon envisages the final determination by the assessing authority in terms of Section 143 or 144 of the Act. The assessee, who, for instance, had paid tax on the basis of self-assessment under a wrong assumption that the entire income shown therein was liable to tax, is entitled to assert before the assessing authority when the case is taken up for assessment that either whole or part thereof was not liable to form part of the taxable income and that the tax paid on the basis of self-assessment was not liable to be paid, and the assessing authority, if it finds that either the whole income or part thereof was not liable to be included in the taxable income, is bound to give effect to the claim of the assessee and compute the total income of the assessee in accordance with law and not accept self-assessment regarding his total income.

17. 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.

18. 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 after-

(a) 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.. "

19. 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.

20. Mr. Gupta, learned counsel for the assessee, in reply to the contention advanced on behalf of the Revenue that claim to refund was barred by limitation in view of the provisions of Section 239(2)(c) firstly urged that the refund provisions would not be attracted to a case of the present kind, as the collection of the tax was without the authority of law and thus de hors the Act and the Revenue was not entitled to retain the same as the retention of the same would be in violation of Article 265 of the Constitution of India. Secondly, Mr. Gupta

canvassed that Section 240 of the Act would be applicable and not Section 239 of the Act and lastly he contended that even if the provisions of Section 239(2) were held to be applicable, then too the demand for refund made by the assessee was within time, if, as the Revenue asserts, the return filed on October 1, 1971, was the only valid return.

21. In my opinion there is merit in the contention advanced by Mr. Gupta that the collection of the advance tax and retention thereof was de hors the Act and the provisions of Section 239(2)(c) of the Act would not be attracted to the facts of the present case.

22. Advance tax collected from the petitioner has to be related to a final assessment order and since no final assessment order could be passed, the same having become barred by limitation, the collection of the advance tax itself became illegal and so also its retention. To a case of this kind the ratio of *Patel India Private Limited Vs. Union of India and Others*, would be squarely attracted. That was a case in which the court was dealing with the question of refund claimed, pursuant to an order made under the given Act by the revisional authority. The Revenue resisted the claim on the ground that Section 40 of the Sea Customs Act had application and the claim for refund being belated in terms of that section, the appellant therein was not entitled to a refund. Negating the contention, the Supreme Court first held that Section 40 of that Act had no application to the facts of that case at all and, therefore, the entire levy of excess excise duty on the appellant therein was one without jurisdiction and, therefore, without the authority of law, and, in that circumstance, the Supreme Court laid down that since Section 40 of the Act did not apply to the facts, the respondent could not retain the excess duty except upon the authority of some other provisions of law.

23. The Karnataka High Court too in *R. Gopal Ramnaryan Vs. Third Income Tax Officer, Circle-II, Bangalore*, following the above decision of their Lordships, held in that case that unless the respondent-Revenue was able to show as to under what provision of the Act the Revenue could retain the tax paid without an assessment being made or when the power to make the assessment afresh had ceased by virtue of the operation of Section 153(1)(a)(iii) of the Act, inasmuch as, more than two years had elapsed from the time the return was filed, the Revenue could not retain the amount collected as tax.

24. In fact, in my opinion, in a case of this nature where the advance tax had been collected u/s 210 of the Act from an assessee and the assessment proceedings became time-barred, it became incumbent on the assessing authority to make an order for the refund of the given amount as envisaged u/s 240 on the assumption of the existence of an implied assessment order for the given year to the effect that the income of the assessee was not assessable to tax and no tax for that year fell due from the assessee.

25. In any case, if the provisions of Section 239(2) were held to be applicable,

then too the demand for refund made by the assessee would be held to be as being within time, if as the Revenue asserted in the written statement that the return filed by the assessee on October 1, 1971, was the only valid return.

26. Section 239(2), if it is to be read in consonance with the provisions of Section 240 as well, has to be read to mean that in a case as assessee on his own showing, that is on the basis of the return filed by him, was entitled to refund of tax, then he must claim refund thereof within the time prescribed which tallies with the time prescribed u/s 153 by way of limitation for passing the assessment order for a given previous year.

27. When so viewed, then it is the first Income Tax return filed by the assessee on October 1, 1971, that has to be taken as the valid return, which eventuality the assessee would not know as to whether he was entitled to refund of any amount till such time his total income was computed and assessment order passed identifying the amount that was payable as tax. In the present case, no such assessment having been made at all, there is no question of his becoming aware of his right to claim the refund till the date on which the limitation for making an assessment order expired. That event occurred on March 31, 1974. The assessee having moved his application on April 28, 1975, his application for refund was obviously within time.

28. As to the contention that the application was not on a prescribed form, it may be observed that the given form is prescribed to facilitate an inquiry, if one becomes necessary, to see whether the assessee was entitled to a refund. The existence of a prescribed form, to which an application for refund has to conform, cannot be used to bar the claim of the assessee to a refund of the tax on the super-technical ground that his application for refund was not on a given prescribed form. By prescribing a given form, the framers of the Rules intended to facilitate the refund and not to bar or hinder the right of an assessee for getting his money back.

29. The next question that falls for consideration is as to what interest and from which date the assessee is entitled on the amount now being ordered to be refunded. Mr. Gupta, counsel for the assessee, argued that it is only the provisions of Section 214 which is applicable to the facts of the present case while on behalf of the Revenue it is asserted that the provisions of Section 243 of the Act and not that of Section 214 this is attracted to the present case.

30. Sections 214 and 243 are in the following terms :

"214. Interest payable by Government.--(1) The Central Government shall pay simple interest at (twelve per cent.) per annum on the amount by which the aggregate sum of any instalments of advance tax paid during any financial year in which they are payable under Sections 207 to 213 exceeds the amount of the tax determined on regular assessment, from the 1st day of April next following the said financial year to the date of the regular assessment for the assessment year immediately following the said financial year, and where any such

instalment is paid after the expiry of the financial year during which it is payable by reason of the provisions of Section 213, interest as aforesaid shall also be payable on that instalment from the date of its payment to the date of the regular assessment :

Provided that in respect of any amount refunded on a provisional assessment u/s 141A, no interest shall be paid for any period after the date of such provisional assessment.

(1A) Where on completion of the regular assessment the amount on which interest was paid under Sub-section (1) has been reduced, the interest shall be reduced accordingly and the excess, if any, paid shall be deemed to be tax payable by the assessee and the provisions of this Act shall apply accordingly.

(2) On any portion of such amount which is refunded under this Chapter, interest shall be payable only up to the date on which the refund was made."

"243. Interest on delayed refunds.--(1) If the Income Tax Officer does not grant the refund,--

(a) in any case where the total income of the assessee does not consist solely of income from interest on securities or dividends, within three months from the end of the month in which the total income is determined under this Act, and

(b) in any other case, within three months from the end of the month in which the claim for refund is made under this Chapter,

the Central Government shall pay the assessee simple interest at (twelve per cent.) per annum on the amount directed to be refunded from the date immediately following the expiry of the period of three months aforesaid to the date of the order granting the refund.

Explanation.--If the delay in granting the refund within the period of three months aforesaid is attributable to the assessee, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which interest is payable.

(2) Where any question arises as to the period to be excluded for the purposes of calculation of interest under the provisions of this section, such question shall be determined by the Commissioner whose decision shall be final."

31. In my opinion, in the present case, it is the provisions of Section 214, which are attracted as admittedly the tax had been deposited in pursuance of an order passed u/s 210 of the Act and in compliance with the demand notice u/s 156 of the Act. The tax that was deposited was by way of advance tax. It is a different matter that the same cannot be given credit for in the final assessment, as no final assessment can take place, the same having become barred by limitation. The tax deposited by the assessee was in the nature of advance tax and, therefore, it will bear simple interest u/s 214 of the Act which, as then prescribed, was 12 per cent. per annum till the date of refund.

32. In this regard I receive support from the following observations from the decisions of the Madras and Delhi High Courts reported in RAYON TRADERS PRIVATE LTD. Vs. Income Tax OFFICER, COMPANIES CIRCLE I(2), MADRAS, AND ANOTHER., and National Agricultural Co-operative Marketing Federation of India Ltd. Vs. Union of India and others, respectively which were approvingly quoted by Rege, J. in Associated Cement Companies Ltd. Vs. Commissioner of Income Tax, Bombay, :

"Section 214(1) would apply to cases :

Madras High Court :

Where the refund is simultaneous with the regular assessment but if the refund is delayed, the assessee would be entitled to interest up to the date of refund u/s 214(2).

33. Whenever an assessee paid advance tax in excess of the tax found to be due, he would be entitled to interest u/s 214(2) read with Section 219 up to the date of refund if the refund is made or has to be made after the regular assessment.

34. Delhi High Court :

"After the introduction of Sub-section (2) in Section 214, whatever may be the interpretation that might be placed on the expression, " regular assessment "contained in Section 214, there is no escape from the conclusion that the assessee is entitled to refund along with interest up to the date of refund."

35. For the reasons aforementioned, this petition is allowed with no order as to costs. The respondents are directed to refund the amount with interest by or before 3rd October, 1983.