
(2009) 04 KL CK 0070

In the High Court Of Kerala

Case No : IT Appeal No's. 94, 95, 98, 103, 104, 106, 108 and 109 of 2007

Dr. R.P. Patel

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 03-04-2009

Acts Referred:

Income Tax Act, 1961 — Section 147, 2(14), 2(24), 234A, 234B
Indira Vikas Patra Rules, 1986 — Rule 8(3), 8(4)

Citation : (2009) 225 CTR 378 : (2009) 182 TAXMAN 305

Hon'ble Judges : K. Surendra Mohan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Sarangan and Ramesh Cherian John, for the Appellant; P.K.R. Menon and Jose Joseph, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—These connected appeals filed by die assessee arise from the common order of the Income Tax Appellate Tribunal disposing of assessee's appeals for the assessment years 1991-92 to 1998-99. The assessee is a renowned Homoeo doctor engaged in medical practice at Kottayam. Besides income from profession, the assessee is engaged in sale of medicines and books. Admittedly assessee was not maintaining books of account for his professional income and income was returned on estimation basis. Search was conducted in the professional-cum-residential premises of the assessee on 30-12-1994. During the course of search substantial amount of cash, Indira Vikas Patras (IVP) valued at substantial amount and promissory notes were recovered. From the locker maintained by the assessee in the State Bank of India, Jawahar Nagar, Baroda, the Department seized IVPs of face value Rs. 67.60 lakhs out of which IVPs of Rs. 90,000 was found to be purchased by the assessee's son and balance Rs. 66.70 lakhs was found to be the investment of the assessee. Based on the recovered cash, IVPs and promissory notes and other recovered documents, the Assessing Officer revised assessments already completed u/s 147 of the Income Tax Act, hereinafter called the "Act", and regular assessments

were completed for later years. From the records, it was found that the assessee was maintaining Patients Register and assessee charges initial amount of Rs. 30 towards consultation fee and all charges later recovered are towards value of medicines supplied. However, the Department noticed that instead of writing the full amount, the assessee was using N for 90, S for 60, F for 50, etc. After decoding the entries in the seized books, entire amount recovered was found out and the Assessing Officer while assessing the income from profession granted an estimated expenditure of 20 per cent from the total receipts. It was the finding of the Assessing Officer that assessee would have drawn medicines from the trading division maintained by him as proprietor and so much so no deduction is called for towards purchase value of medicines. However, in first appeal, the CIT (Appeals) differed from the view taken by the Assessing Officer and held that assessee would have made unaccounted purchase of medicines and so much so he is entitled to deduction of cost of medicines. He estimated 85 per cent of the total receipt towards cost of medicines and out of the same he permitted addition of only 32 per cent which is gross profit received by the assessee in trading of medicines. When the matter went in appeal before the Tribunal, Tribunal granted further deduction in estimating professional income on the ground that assessee would have incurred overhead expenditure.

2. The assessee raised a contention that investment in IVPs is capital in nature and therefore interest in IVPs should be assessed towards capital gain on encashment. This claim was turned down by all the authorities including the Tribunal. The assessee alternatively raised a contention that even if IVPs are not capital in nature, interest should be treated as income only on receipt, that is on encashment of the IVPs and should not be taken on year to year basis, based on accrual of interest. This claim was also rejected by all the authorities, including the Tribunal. The last issue pertains to assessee's challenge against charging of interest u/s 234B of the Act. The assessee pointed out that except for the assessment years 1996-97 and 1998-99, the Assessing Officer has not mentioned anything about chargeability of interest u/s 234B in the body of the order, and for other years he has worked out interest in the last portion of the assessment order. Therefore the demand of interest is unauthorised, is the case of the assessee. However, all the authorities, including the Tribunal, upheld in principle the assessee's liability for interest for default in payment of advance tax u/s 234B of the Act. However, on the quantum of interest, Tribunal took note of the assessee's argument that Post Offices have not deducted tax at source and remanded the matter to determine the quantum of interest. It is against these findings of the Tribunal that the assessee has filed these appeals u/s 260A of the Act raising the following common questions:

1. Whether on the facts and circumstances of the case, the Appellate Tribunal being the final authority on questions of fact was justified in law in disallowing the claim of expense (sic) of salaries to doctors, staff and depreciation of car in computing the professional income by not entertaining the ground, treating the issue as factual and without dealing with the judgment of the Supreme Court in

(1992) 84 STC 383.

2. Whether on the facts and circumstances of the case the Appellate Tribunal is justified in holding that IVPs are not bonds and hence not capital asset inspite of the judgment of the Supreme Court in 2006 (2) KLT 423 SC holding that IVPs are bearer bonds.

3. Whether on the facts and circumstances of the case the Tribunal is justified in holding that there is no market value for IVP and it cannot be termed as capital asset by non-considering the decisions relied on and by stating that they are irrelevant.

4. Whether on the facts and circumstances of the case the Appellate Tribunal was justified in holding that the only decisions available on IVP is that of the Mumbai Bench of the Tribunal in 1989 ITD 282 and in view of the said decision IVP is neither a capital asset nor there can be any transfer on maturity of the IVP by treating the Apex Court decision in (2006) 2 KLT 423 as irrelevant and by misreading the Tribunal order.

5. Whether on the facts and circumstances of the case the Appellate Tribunal was justified in holding that it was held in 29 ITD 282 that IVP is not a capital asset while the very assessm ent was made by holding that IVP is a capital asset.

6. Whether on the facts and circumstances of the case the Appellate Tribunal was justified in law in holding that there is no transfer when the assessee gets back the money from post office and as such IVP is not a capital asset without dealing with the Supreme Court judgment in Commissioner of Income Tax, Lucknow Vs. Narang Dairy Products, Lucknow, and treating the said judgment as not relevant.

7. Whether on the facts and circumstances of the case the Appellate Tribunal was justified in law in holding that it is a condition precedent as per IVP Rules that IVP will be issued on condition that interest shall be deemed to have accrued at the end of each for Income Tax payable and the assessee is bound by such Rule even though such IVP Rule has not been incorporated in the Income Tax Act or Rules.

8. Whether on the facts and circumstances of the case the Income Tax Appellate Tribunal was justified in law on holding that (sic) by virtue of Rule 8(3) of the IVP rules interest accrued every year and is taxable under the Income Tax over looking the provisions of Section 2(24) and Sections 4 and 5 of the Income Tax Act.

9. Whether on the facts and circumstances of the case the Appellate Tribunal was justified in law in holding that the cash system of accounting followed is not acceptable, since the sheets as per KPA1 is not book maintained without dealing with the judgment in 110 STC 59.

10. Whether on the facts and circumstances of the case the Appellate Tribunal was justified in confirming the levy of interest u/s 234B after admitting that no

order is made in the assessment order for charging interest and there is no question of ITNS 150 without following the Supreme Court judgment in Commissioner of Income Tax and Others Vs. Ranchi Club Ltd., and Commissioner of Income Tax Vs. Insilco Ltd., and also the Tribunal decision in ITA 355/Coch./1999 and the judgment in 183 CTR 473.

11. Whether on the facts and circumstances of the case the Appellate Tribunal was justified in law in holding that there is no deficiency in the assessment order in respect of chargeability of interest (sic) u/s 234B when bona fide dispute was pending as to income estimated and levy was without hearing any reasons.

12. Whether on the facts and circumstances of the case is not the order of the Tribunal perverse inasmuch as the Tribunal has decided the issues not on the basis of law laid down by the Apex Court/High Court but on the basis of what the Tribunal decided by holding that the principles arising out of the precedents are not relevant.

We have heard Sri G. Sarangan, Senior Counsel appearing for the assessee and standing Counsel appearing for the revenue.

3. The first question pertains to disallowance of assessee's claim of deduction on salary paid to doctors, staff and depreciation for car, furniture, etc., in the determination of professional income of the assessee. The assessee's grievance is that the Tribunal rejected the claim for the reason that the claim was made for the first time before the Tribunal and the assessee never raised the issue in assessment before the officer or in first appeal before the first appellate authority. Admittedly the assessee did not make such a claim in the assessment or in first appeal. According to the assessee the claim pertains to salary paid to two doctors and staff members and the depreciation allowable on furniture, fixtures, car, etc. However, the assessee's claim before the Tribunal was only on estimation basis and not on actuals. The Tribunal rejected the claim on the ground that the claim made for the first time before it cannot be entertained. The assessee has relied on the decision in P.P. Varkey and Company Vs. Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam, and that of the Supreme Court in Commissioner of Income Tax, Delhi Vs. Stepwell Industries Ltd. and etc. etc., . However we notice that the Tribunal has relied on the Larger Bench decision of the Supreme Court in National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, and held that Tribunal can allow a new legal issue to be raised before it for the first time, if the facts are already available on record. Since facts pertaining to remuneration paid to doctors, staff and claim of depreciation were not available on record, the Tribunal declined to entertain the claim made before it for the first time. The Tribunal in their order noted that assessee has not produced any proof of payment to doctors and staff. We do not think the assessee is entitled to succeed on this issue not only for the reason stated by the Tribunal, but also for the reason that professional income of the assessee is refixed by the Tribunal on estimation basis whercunder over and above the relief granted in first appeal, the Tribunal has granted deduction

towards overhead expenditure. Admittedly assessee did not maintain any books of account and assessee himself returned professional income on estimation basis from total receipts. If assessee has regular employees we see no reason why the assessee could not maintain proper accounts showing the payments made to them and to claim eligible deductions, such as remuneration paid to staff, depreciation earned, etc. and return the actual income for assessment. On the other hand, assessee himself returned only estimation of income from gross receipts and therefore he cannot at the second stage of appeal before the Tribunal come forward with claims of deductions towards remuneration paid to employees, including doctors, depreciation for furniture, fixtures, etc. In fact, the officer himself allowed 20 per cent of earnings towards expenditure without any evidence at all and over and above this, the first appellate authority estimated additional expenditure of Rs. 60,000 per year, which was increased by the Tribunal on a percentage basis of the turnover, thereby granting substantial deduction. Therefore this is not a question of law as projected by the assessee, but only a question of fact, that is, whether this Court will be justified in interfering with the order of the Tribunal refixing the income of the assessee on estimation basis after granting further deductions, that too in a case where return of income itself is filed by the assessee on estimation basis. We are of the view that no substantial question of law arises in the claim of deduction made by the assessee towards salary paid to doctors, and staff and depreciation in a case where the assessee has not maintained books of account and has returned his professional income on estimation basis. In our view when assessee returns net income from gross receipts on estimation basis, and the same is substituted by granting deductions on percentage basis in assessment and further deductions of estimated expenditure as granted by first appellate authority and the Tribunal, all such deductions granted cover eligible deductions, allowances, and rebates admissible under the Act in full. In other words, assessee maintaining books of account only can claim deductions, allowances and rebates provided in the Statute. In any case in view of the Larger Bench decision of the Supreme Court in National Thermal Power Co. Ltd's case (*supra*) relied on by the Tribunal, the Tribunal is perfectly justified in rejecting the claim as the claim was raised for the first time before it. We therefore decide this issue against the assessee.

4. Question Nos. 2 to 6 pertain to one and the same issue, that is, whether IVP is a capital asset or not. It is seen from the orders of the Tribunal that investment in IVP is assessed in the case of the assessee as unexplained investment only to the extent of fresh investment made in the respective year and reinvestment after encashment of earlier deposits was in fact allowed. The assessee's claim that IVP is a capital asset is only for the purpose of evading payment of interest accrued on yearly basis in accordance with the scheme of IVP. The specific contention raised by the assessee is that IVP is a capital asset and therefore interest accrued is profit assessable as capital gains. The Tribunal rejected the claim by holding that IVP is nothing but a deposit with the Post Office which entitles the assessee to a specific rate of interest on compoundable basis and

assessee can encash the deposit only for the maturity value which is predetermined. The assessee has relied on several Courts' decisions for the proposition that IVP is a capital asset. IVP is admittedly a deposit scheme framed by the Government of India for making deposits in the Post Offices. Purchase of IVP amounts to depositing a specific amount in Post Office for a specific period at specified rate of interest. On maturity the holder can encash the same from the very same post office. The rate of interest for IVPs purchased before 31-3-1987 was 14.97 per cent per annum compounded on the initial sale value. For certificates purchased after 1-4-1987 the rate of interest was reduced to 13.43 per cent per annum. Government while framing IVP Rules of 1986 has provided for treatment of tax liability for the interest earnings. Rule 8(3) of the IVP Rules, 1986 is as follows:

8(3). In the case of certificate purchased on or before 31st March, 1987, interest at the rate of 14.97 per cent per annum compounded on the initial sale value of the certificate shall be deemed to have accrued at the end of each year, calculated from the date of initial purchase of the certificate from the Post Office up to the end of the fifth year for the purpose of tax payable by a holder in the relevant assessment year under any law for the time being in force.

Under Sub-rule (4) the above scheme is retained for deposits made after 1-4-1987 but with reduced rate of interest at 13.43 per cent per annum. Even though assessee contended that IVP Rules cannot be read into the scheme of the Income Tax Act or Rules, we are unable to accept this contention because Rule referred to in the IVP pertaining to tax can only be related to Income Tax payable under the Income Tax Act, 1961. Standing Counsel appearing for the department referred to the decision of the Supreme Court in *Commissioner of Income Tax, Madras Vs. Bagyalakshmi and Co., Udumalpet*, and contended that other statutory law not inconsistent with the Income Tax Act should be applied for the purpose of Income Tax. We are in agreement with this contention more so because post office deposits under IVP Rules specifically refer to tax on interest. So long as the Rule is not in derogation of the scheme of IT Act it is applicable for the purpose of the I.T. Act. Section 2(14) defines "capital asset" as property of any kind. Clauses (iv), (v) and (vi) specifically excludes certain bonds from the definition of "capital asset". Relying on these definition clauses, the assessee contended that all other bonds are capital assets and therefore IVPs are also in the nature of capital asset. The assessee has relied on the decision in *Madhya Pradesh Financial Corporation Vs. Commissioner of Income Tax*, and contended that bonds are capital assets. However, we do not think IVPs can be treated as bonds because it has no sale value or market value as such. It is nothing but a deposit made in the Post Office which entitles the depositor to receive pre-fixed specific rate of interest and on maturity only the principal amount, with accrued interest will be paid. Even though it is transferable it has no market value as such and has only maturity value which is nothing but invested amount with accrued interest. Further, the Tribunal rightly pointed out that the scheme of long-term, capital gains providing for granting benefits of indexed cost of acquisition

under Explanation (iii) to Section 48 of the Act cannot apply to IVP. We are of the view that repayment of the deposited amount with interest on maturity by the Post Office cannot be treated as consideration for transfer of IVP by the holder. Therefore the Tribunal rightly rejected the assessee's claim that IVP is a capital asset. We therefore dismiss the assessee's appeals on this issue.

5. Questions 7 to 9 pertain to assessee's claim that interest under IVP scheme is assessable on receipt basis that is on encashment of IVP on maturity. We have extracted above Rule 8(3) of the IVP Rules, 1986 which provides for treatment of interest accrued on IVP on yearly basis at the rate prescribed in the Rules. However, assessee's contention before the Tribunal and before us is that there is no incorporation of the IVP Rules in the IT Act and Rules and therefore IVP Rule has no application. The only question to be considered is whether in the absence of incorporation of Rule 8(3) of the IVP Rules in the Income Tax Act and Rules the assessment of interest annually on accrual basis is permissible. In the first place, assessee has not paid any tax on interest received on IVP on receipt basis. On the other hand, entire investment in IVPs and interest earned thereon were kept out of Income Tax return filed and only after search the assessee offered interest for assessment while filing return and revised return for the year 1995-96. We are of the view that the assessee who does not even maintain books of account can canvass for assessment of interest income on cash basis which applies only to assessees who maintain books of account. Charging Section under the Income Tax Act, namely Section 4, Section 2(24), which defines "income" and Section 5, which provides for total income, authorise assessment of income either received or deemed to be received or income accrued or deemed to be accrued in India. The assessee cannot raise the contention that conditions of issue of IVP do not bind him. In fact, conditions of issue of IVP are exhaustively provided in the IVP Rules above referred, which under Rule 8(3) provides for assessment of interest income for the purpose of Income Tax. We have already held that tax referred to in Rule 8(3) can only be the Income Tax liability under the Income Tax Act, 1961. Further by virtue of the decision of the Supreme Court in *Bagyalakshmi & Co.*'s case (supra) referred above, IVP rules apply for Income Tax purposes. Since Rule 8(3) of the IVP Rules binds all the depositors, and the assessee as well. The assessee after making deposit in IVPs cannot contend that interest on deposit does not accrue in terms of Rule 8(3). Even though assessee contended that no deduction of tax at source was made by the department on accrual basis, we do not think the same will entitle the assessee for exemption from payment of tax on interest income on accrual basis. We do not know whether specific provision for payment of tax by holder is made in the Rules only because recovery of tax at source on interest on accrual on yearly basis is practically impossible and further by virtue of transferability the holder of IVP may keep on changing. The scheme of IVP Rules provide for one time payment on maturity and under no circumstance IVP can be encashed before maturity. However, the contention of assessee that interest income can be assessed to tax only on maturity and after encashment cannot be accepted

because Rule 8(3) binds and obliges every investor in IVPs to pay tax on accrued interest in accordance with the rule. Even though assessee has relied on the recent decision of this Court in CIT v. Federal Bank Ltd. [2008] 1 KLT 982, we find that Government security referred to therein is not comparable to IVPs which is issued with specific Clause providing for accrual of interest on yearly basis. We therefore uphold the finding of the Tribunal and reject the assessee's appeals on this issue.

6. Question Nos. 10 and 11 pertain to assessee's challenge against levy of interest u/s 234B of the Act for non-payment of advance tax. The assessee has relied on the decision of the Supreme Court in Commissioner of Income Tax and Others Vs. Ranchi Club Ltd., and decision of the Delhi High Court in CIT v. Inchcape India (P.) Ltd. [2002] 124 Taxman 744 and the decision of this Court in Commissioner of Income Tax Vs. Travancore Titanium Products Ltd., and contended that interest cannot be levied u/s 234B. However Tribunal relying on the Special Bench decision of the Tribunal in Motorola Inc. v. Dy. CIT [2005] 95 ITD 269 (Delhi) upheld the levy in principle though remanded the matter for recomputation of the actual interest liability. Standing Counsel for the department has contended that Sections 234A, 234B and 234C are mandatory in nature and they relied on the decision of the Supreme Court in Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, and that of this Court in Commissioner of Income Tax Vs. R. Ramalingair, . The main contention raised by the assessee is that except for the assessment years 1996-97 and 1998-99, there is no statement in the assessment order about interest charged u/s 234B of the Act. However, assessee admits that in the computation portion, the Assessing Officer has worked out the interest due u/s 234B in all the assessment orders. We do not think the assessee's contention is tenable because after the amendment to the provisions in the statute by Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989 interest payable under Sections 234A, 234B and 234C are mandatory in nature and no discretion is vested in the Assessing Officer in this regard. In fact provisions prior to amendment gave discretion in regard to waiver of interest. Once interest is made mandatory, the liability falls automatically on the assessee on default. The balance is only working out the amount due. The Supreme Court in Kalyan kumar Ray Vs. Commissioner of Income Tax, West Bengal-IV, Calcutta, held that calculation part of tax payable need not be done in the assessment order itself, but can be done separately in Form No. ITNS 150, subject to the condition that the said form is signed or initialled by the Income Tax Officer. In this case, the omission in the assessments except for two years is that Assessing Officer does not say that interest is charged, but he has worked out the interest in the assessment order itself. When interest which is mandatory under the Act, falls automatically on default, there is no need for the Assessing Officer to write in the assessment order that he is charging interest. In fact there is a need to pass such an order only if he has the discretion about interest. Since liability is statutory on default, officer is left with only the duty to work out the interest which admittedly he has done in the

assessment order itself. Therefore technical objection raised by the assessee was rightly found to be untenable by the Tribunal. So far as quantum of interest demanded is concerned. Tribunal has remanded the matter for fresh consideration by the Assessing Officer. We do not find any ground to interfere with the order of the Tribunal on this issue also.

7. The last question is only of general nature, which does not deserve any independent consideration.

In view of our above findings, we dismiss the appeals filed by the assessee.