
(1999) 09 MAD CK 0024

In the Madras High Court

Case No : Writ Petition No. 17826-291 of 1997 30 September 1999

J. JAYALALITHA

APPELLANT

Vs

COMMISSIONER OF INCOME TAX

RESPONDENT

Date of Decision : 30-09-1999

Acts Referred:

Income Tax Act, 1961 — Section 220(2A)

Citation : (1999) 107 TAXMAN 476

Hon'ble Judges : N.V. Balasubramanian, J

Bench : Division Bench

Advocate : V. Ramachandran, Anitha Sumanth and G. Ashokapathy, for the Petitioner and C.V. Rajan, for the Appellant;

Judgement

1. The above writ petitions have been filed to quash the order in C. No. 1747/1/97-98/C-H, dated 15-10-1997 passed by the Commissioner,

Central II, Chennai-34, by which the petitions filed by the writ petitioner u/s 220(2A) of the Income Tax Act, 1961 (the Act") for waiver of

interest levied u/s 220(2) of the Act as well as under rule 5 of the H Schedule to the Act for the assessment years 1987-88 to 1992-93 were

rejected.

2. The facts leading to the filing of the writ petitions are that the petitioner filed applications for waiver of interest under rule 5 of the 111 Schedule

levied by the TRO for the assessment years 1987-88 to 1992-93. The Assistant Commissioner, Central Circle H(2), Chennai, also levied interest

by a separate order dated 20-2-1997 u/s 220(2) for the said assessment years, and the petitioner also filed separate applications u/s 220(2A) for

various years mentioned earlier and the circumstances leading to the levy of interest for various assessment years are as under:

The petitioner is an assessee on the file of the Deputy Commissioner, Special Range-II, Chermai-34. For the assessment years 1987-88 to

1992-93, the petitioner filed returns of income declaring the income derived by her. The assessments were completed by the Assistant

Commissioner/ Deputy Commissioner on various dates determining the income and the particulars regarding the years of assessment, dates of

completion of assessments and the income assessed are as under:

Asst. year Date of completion of assessment Income

assessed (Rs.)

1987-88 23-12-1994 9,29,080

1988-89 23-12-1994 21,29,243

1989-90 13-2-1995 30,97,075

1990-91 2-3-1995 1,27,59,043

1991-92 13-3-1994 80,65,250

1992-93 21-3-1995 2,18,37,350

The petitioner preferred appeals against the aforesaid orders of assessment before the Commissioner (Appeals) and the appeals were rejected by

the Commissioner (Appeals). The petitioner thereafter preferred appeals against the orders of the Commissioner (Appeals) before the Tribunal,

and it is stated that the appeals are still pending on the file of the Tribunal.

3. Apart from the tax levied in the orders of assessment made for the above-said assessment years, the Deputy Commissioner also levied interest

u/s 139(8) and section 217 of the Act in respect of the assessment years 1987-88 and 1988-89, and the details of the tax assessed and the

interest levied are as under:

Assessment year Tax assessed Interest under section

139(8) 217

Rs. Rs. Rs.

1987-88 4,55,540 3,64,400 5,26,690

1988-89 11,08,401 7,19,700 11,18,170

In respect of the assessment years 1989-90 to 1992-93, apart from tax assessed, the Deputy Commissioner, Chennai, has also levied interest

under sections 234A, 234B and 234C of the Act, and the particulars of tax assessed and interest levied are as under:

Assessment Tax assessed Interest under section
year

234A 234B 234C

Rs. Rs. Rs. Rs.

1989-90 16,16,513 12,60,870 22,95,430 119

1990-91 68,69,147 38,46,696 82,42,920 860

1991-92 44,81,141 13,44,330 31,87,460

1992-93 1,21,63,022 7,29,780 87,57,360 8432

4. According to the petitioner, while the appeals are pending before the Commissioner (Appeals), she filed applications before the third respondent

for stay of collection of the disputed tax. According to her, on the basis of the direction of the third respondent, various amounts were paid in

respect of the assessment years 1987-88 to 1991-92 which are as under:

Assessment year Date Amount Total Cumulative Total

Rs. Rs. Rs.

1987-88 28-8-95 2,27,770 2,27,770 2,27,770

1988-89 5,54,200 5,54,200 7,81,770

1989-90 -do- 8,08,256 8,08,256 15,90,226

1990-91 20-11-95 5,00,000

8-12-95 5,00,000

18-1-96 5,00,000

25-2-96 5,00,000

19-3-96 5,00,000 25,00,000 40,90,226

1991-92 1-10-94 10,00,000

26-12-94 5,00,000

22-1-95 7,00,000 22,00,000 62,90,276

According to her, after the disposal of the first appeal, she was not in a position to continue to make the payments in accordance with the scheme

granted by the third respondent as all her properties were attached and bank

accounts were frozen by the Income Tax department as well as by other Governmental agencies. Then she approached the Director general of Income Tax (Investigation). According to her, until her bank accounts and properties were frozen by the Directorate of Vigilance and Anti-corruption, Chermai, as well as by the Incometax department, she made the payments in accordance with the instalment scheme granted by the third respondent as well as by the Director General of Income Tax (Investigation) and she has paid towards tax and interest when the appeals are pending before the Tribunal totalling a sum of Rs. 5,62,40,124. The case of the petitioner is that she had raised loans and effected a one-time payment of Rs. 3,97,26,573 covering the entire demand including the demands which are under dispute before the Tribunal. The case of the petitioner is that she has made the payments even before due dates for payment in accordance with the scheme for payment sanctioned by the Director-General of Income Tax (Investigation). It is also her case that she is also entitled for the refund of a sum of Rs. 4,14,714 for the assessment year 1996-97. The petitioner received a notice levying interest u/s 220(2) in respect of the assessment years 1987-88 to 1992-93 and she was required to pay the following* sums towards interest for the said assessment years:

Assessment year	Amount of interest
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levied u/s 220(2)	
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Rs.	
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1987-88	3,71,064
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1988-89	8,00,238
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1989-90	13,67,181
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1990-91	46,97,536
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1991-92	25,31,565
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1992-93	56,81,645
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According to her, no notice or opportunity was given before the levy of interest u/s 220(2). Against the levy of interest u/s 220(2), the petitioner

filed petitions for waiver of the same before the Commissioner, Central H(5), Chennai-34, u/s 220(2A). Section 220(2A) reads as under:

"(2A) Notwithstanding anything contained in sub-section (2), the Chief Commissioner or Commissioner may reduce or waive the amount of

interest paid or payable by an assessee under the said sub-section if he is satisfied that-

(i) payment of such amount has caused or would cause genuine hardship to the assessee;

(ii) default in the payment of the amount on which interest has been paid or was payable under the said sub-section was due to circumstances

beyond the control of the assessee, and

(iii) the assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

5. The petitions filed by the petitioner for waiver of interest u/s 220(2A) of the Act were disposed of by the Commissioner, Central Circle H,

Chennai, by his order dated 15- 10- 1997, wherein he has rejected the petitions on the ground that all the three conditions required for the

exercise of jurisdiction u/s 220(2A) are not satisfied, and it is against this order that the present writ petitions have been filed by the writ petitioner.

6. According to the petitioner, insofar as the first condition "'payment of such amount would cause genuine hardship to the petitioner" is concerned,

she has mobilised funds for the payment of tax by raising loans which she had to pay because of the pressure of the Income Tax department.

According to her, her residential house and all other properties were attached by the Income Tax department as well as by the Directorate of

Vigilance and Anti-corruption and she was put to considerable pressure and hardship. According to her, the amounts were paid, though appeals

were pending and the entire demand was disputed, and as a leader of a political party, she would not have availed of any financial support given by

the party, but for the hardship she was subjected to by the respondents, and she was forced to seek financial support from the party and she could

not have raised any fund from any other source since wide publicity was given to the fact that her assets had been attached by the Income Tax

department and the Directorate of Vigilance and Anti-corruption. She, therefore, submitted that since she has already availed of whatever sources

she could for mobilising funds for the payment of tax, it was impossible for her to raise any further fund for the payment of interest. She, therefore,

stated that payment of interest would cause genuine hardship and the view of the first respondent that it would not cause genuine hardship is totally unjustified on the facts of the case.

7. She has also pleaded that she has complied with the second condition u/s 220(2A) as she has stated that the demand raised against her was so

huge and all her bank accounts and other properties were attached and since her bank accounts were frozen, she was not in a position to pay tax.

According to her, she has produced all evidence before the first respondent to show that even on the date when the amounts became due, she was

not in a position to pay the huge tax liability. According to her, she also filed appeals against the orders of assessment and during the pendency of

the appeals, the assessing officer granted stay. She, therefore, stated that it is erroneous on the part of the first respondent to conclude that the

non-payment of tax on the dates on which the amounts were demanded would show that the non-payment of tax was not beyond her control.

According to her, the alleged default in the payment of tax on the relevant dates was due to circumstances beyond her control. It is stated that she

has fulfilled the second condition mentioned in section 220(2A).

8. The petitioner also stated that she has co-operated in the enquiry relating to assessments or other proceedings for the recovery of the amounts.

According to the petitioner, the Commissioner has taken into consideration the irrelevant fact of non-filing of the returns of income and, according

to the petitioner, there is a total non-application of mind by the first respondent with reference to fulfilment of the third condition. She submitted that

it is not the case of the Commissioner that she has not co-operated in the enquiry relating to the assessment proceedings and the mere fact that

additions were made to the income is not a ground to hold that there was non-co-operation on her part in the matter of assessment. She, therefore,

stated that the conclusion that she has not co-operated in the matter of assessment on the ground that she filed returns beyond the time and

additions were made to the income is totally unjustifiable and opposed to the facts and law. She has raised several other grounds also challenging

the order of the Commissioner rejecting her petitions for waiver of interest u/s 220(2A).

9. A common counter-affidavit has been filed by the Deputy Commissioner,

Central 11(2), Chermali-34. According to the Deputy Commissioner, the Commissioner has elaborately considered the various submissions and dealt with each one of them in detail. According to him, the Commissioner has exercised his discretion properly. The Deputy Commissioner also placed reliance on the decisions of the Supreme Court in Smt. Harbans Kaur etc. Vs. Commissioner of Wealth-tax, Jullundur, and KISHAN LAL Vs. UNION OF INDIA AND ANOTHER., and stated that the order of the Commissioner is supported by reasons. Referring to the additions made in the orders of assessment, the Deputy Commissioner stated that even after the confirmation of the orders of assessment by the Commissioner (Appeals), the petitioner did not choose to take any effective step to clear the arrears of tax for the aforesaid assessment years and she sought only time to make payment, and even after the instalment facility was provided to her, she has-not availed of the same and she has failed to pay tax in accordance with the instalment scheme. The Deputy Commissioner has stated that all the three conditions mentioned in section 220(2A) were not satisfied. Insofar as the first condition is concerned, it is stated, though her bank accounts were attached, such attachment was made by the Directorate of Vigilance and Anti-corruption only on 27-9-1996, whereas she had to pay tax in May 1994 for the assessment year 1991-92 and between February and April 1995 for the assessment years 1987-88 to 1990-91 and 1992-93. It is, therefore, stated that the claim of the petitioner that payment could not be made in view of the attachment is not correct.

10. It is also stated in the counter-affidavit that the petitioner had considerable money available in her proprietary concern, Dak Exports and the department on coming to know of the same, attached the amount and realised the same by means of taking garnishee proceedings. It is stated that if the petitioner had really wanted to discharge the liability, she could have utilised the amount for discharging her liabilities, but, for the reasons best known to her, she did not do so and she had used it for her benefit. Insofar as the condition regarding default in payment was due to circumstances beyond the control of the petitioner, it is stated that the petitioner has not given any evidence to state as to why she could not make the payment of demands as and when they were made. It is also

stated that the petitioner did not effect payment of the amounts due from her on due dates, but sought for time for making the payment which request was granted by permitting her to pay the amount in instalments, but the petitioner did not adhere to the instalment order and, hence, the recovery proceedings were initiated for the recovery of the amount. It is stated that even after the orders of assessment were confirmed on appeal by the Commissioner (Appeals), the Director General by order dated 31-7-1996, permitted the petitioner to pay 50 per cent of the tax before 5-8-1996 and also permitted to pay the balance of tax in six equal monthly instalments and as regards interest, the petitioner was directed to pay the same in twelve monthly instalments from October 1996. It is stated that the petitioner did not comply with the order and did not approach the Tribunal to obtain any order of stay and only after recovery proceedings were initiated, the payments were made. It is, therefore, stated that the non-payment of the tax on which interest is payable cannot be stated to be due to circumstances beyond the control of the petitioner. It is also stated that the petitioner could have utilised the amounts received as gifts from various persons for making the payment in discharge of the amounts due to the department.

11. Insofar as the last condition, W7-, the petitioner should co-operate in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from her is concerned, the petitioner was not able to explain the source of the large amounts that were disclosed by her and the petitioner could not produce any satisfactory evidence to substantiate her statement that the amounts were gifts made by her friends and wellwishers on the occasion of her birthdays and other occasions. It is stated that the petitioner cannot be stated to have co-operated in the enquiry and in the assessment proceedings. It is stated that the petitioner postponed the payment of tax due from her for various assessment years from May 1994 in respect of the assessment year 1991-92 and from February to April 1995 for the earlier assessment years 1987-88 to 1990-91 and 1992-93 till January 1997 without any reasonable justification and even after the department permitted the petitioner to make the payment in instalments. It is stated that it cannot be stated that the petitioner had cooperated with the department in the proceedings for the recovery

initiated against her. It is, therefore, stated that the petitioner, has not satisfied any one of the conditions and the Commissioner was perfectly

Justified in rejecting the petitions filed by the petitioner for waiver of miterest.

12. The petitioner also filed a reply affidavit. According to the petitioner, the petitioner had taken effective steps to discharge the liability and her

conduct in the assessment proceedings clearly shows that she has cooperated with the department. It is stated that she has paid the entire arrears

including the disputed tax notwithstanding the fact that the petitioner has not accepted the assessments and filed appeals which are still pending on

the file of the Tribunal. According to her, the assessments are arbitrary and the Commissioner has not applied his mind and unjustly declined to

exercise the power u/s 220(2A). It is stated that the petitioner has explained the reasons as to why the demands could not be paid on due dates

and it was not possible for her to raise necessary funds at that time. It is stated that the observation of the Commissioner that since the petitioner

did not make the payment of tax as demanded, the interest could not be waived, clearly shows his non-application of mind. It is stated that it is

incorrect to state that gifts were available and it is equally incorrect to state that funds from Dak Exports were available. According to her, the

funds from Dak Exports were attached and realised by the respondents. She has stated that she has established lack of resources for payment of

tax on due dates and paid the tax including the disputed tax out of borrowed funds. The petitioner also stated that the petitioner produced evidence

in support of her claim that there were gifts and according to her, she has extended full co-operation in completing the assessment proceedings as

well as the proceedings relating to recovery of tax. She has stated that her co-operation was evident from the fact that the entire disputed

demands, even though appeals are pending, were paid by borrowing funds. According to her, all conditions u/s 220(2A) are satisfied and the

Commissioner should have exercised the power of waiver. She has stated that the Commissioner has arbitrarily rejected her applications without

application of mind and, consequently, the order is liable to be quashed.

13. Mr. V. Ramachandran, the learned senior counsel appearing for the petitioner, submitted that the petitioner has complied with all three

conditions u/s 220(2A). The learned senior counsel referred to various orders of

assessment for various assessment years, and submitted that the orders of assessment clearly show that the petitioner has extended full co-operation and even on Sundays, the authorised representative of the petitioner attended the hearing and in the absence of any material, the Commissioner was not justified in holding that the petitioner had not co-operated in the assessment proceedings. He also submitted that the appeals filed by the petitioner were disposed of on 25-3-1996 and the Director General (Investigation) has permitted the petitioner to pay 50 per cent of the tax and directed her to pay the balance 50 per cent of the tax in six monthly instalments starting from the month of September 1996. The learned senior counsel submitted that 50 per cent of the tax should have been paid on 5-8-1996, but the Directorate of Vigilance and Anticorruption attached the properties of the petitioner and because of the attachment, the petitioner was not able to pay the tax on the due date and she has paid a sum of Rs. 3.97 crores on 9-1-1997 by raising loans from the party, and according to the learned senior counsel, even before the expiry of six months, the petitioner had paid the sum of Rs. 3,97,26,573. He submitted that all funds of the petitioner were locked up and the Commissioner has taken into consideration irrelevant materials and rejected the applications for waiver. The learned senior counsel submitted that circumstances were beyond her control and, hence, the tax due could not be paid on the due dates, and it is nobody's case that amounts were available with her and in spite of the same, the petitioner did not pay the tax demanded. He also submitted that the petitioner applied for stay and the department also granted stay and the fact that the department as well as the Director General granted stay clearly shows that the department accepted the position that the petitioner did not have sufficient funds and, accordingly, allowed the petitioner to pay the tax and interest in instalments. The learned senior counsel, therefore, submitted that the order of the Commissioner rejecting the petitions for waiver of interest is unjustified and this Court should set aside the order. It is also submitted that since the first respondent has failed to exercise his discretion properly, this Court should allow the writ petitions.

14. Mr. C.V. Rajan, the learned standing counsel for the department, submitted that the order of the Commissioner is a speaking order and it is

wrong to state that the petitioner has complied with all the conditions for the waiver of interest. He submitted that there was no genuine hardship

and since she mobilised the funds for payment of tax, no genuine hardship would be caused to her in the payment of interest also. He also

submitted that the default in the payment of tax amount cannot be said to be due to circumstances beyond the control of the petitioner and on the

due dates of payment, there was no freezing of bank accounts and the petitioner has also not extended co-operation in the matter of assessment.

He also submitted that the petitioner has paid the amount only after the TRO initiated proceedings and there was no co-operation even in the

matter of recovery also. Therefore, he submitted that the petitioner did not satisfy any one of the conditions required for waiver of interest u/s

220(2A) and as the conditions for waiver of interest are not satisfied, the petitioner has not made out any case for waiver of interest. 15. Before

considering the rival submissions, it is relevant to notice the decisions relied upon by the learned counsel for the parties. In Kishan Lal's case

(supra), the Supreme Court has held that the decision of the authority u/s 220(2A) is a quasi-judicial decision. The Supreme Court has laid down

the following proposition of law as to the mode of exercise of the power u/s 220(2A) of the Act:

When an application is filed under sub-section (2A) of section 220, the authority concerned is called upon to take a quasi-judicial decision. If it is

satisfied that the reasons contained in the application would bring the case under clauses (i), (it) and (iii) of section 220(2A), then it has the power

either to reduce or waive the amount of interest. Even though in the said sub-section, it is not stated that any reasons are to be recorded in the

order deciding such an application, it appears to us that it is implicit in the said provision that whenever such an application is filed, the same should

be decided by a speaking order. Principles of natural justice in this regard would be clearly applicable. It will be seen that a decision which is taken

by the authority u/s 220(2A) can be subjected to judicial review, as was sought to be done in the present case by filing a petition under article 226,

this being so and where the decision of the application may have repercussions with regard to the amount of interest which an assessee is required

to pay, it would be imperative that some reasons are given by the authority while disposing of the application.... (p. 87)

16. The learned standing counsel for the department relied upon the decision of the Supreme Court in the case of *Carborundum Universal Ltd. Vs.*

Central Board of Direct Taxes, New Delhi, wherein the Supreme Court has held that the power u/s 220(2A) is a discretionary power and where

the petitioner had an opportunity to represent his case in writing and the Board (then authority) has taken into consideration the report of the

Commissioner, the petitioner was not entitled to the right of being heard by the Board before the petition was disposed of by the Board.

17. In *Mahalakshmi Rice Mills v. CIT* [1981 129 ITR 53/5 Taxman 97], the Karnataka High Court has held that the word "co-operation" in

section 273A of the Act would mean that the assessee did not resort to litigation, obstruction or evasive tactics in concluding the assessment and

no more.

18. In *N. Subhakaran Vs. Commissioner of Income Tax and Others*, the Kerala High Court laid down the following propositions:

The Commissioner of Income Tax exercises discretionary power when passing an order u/s 273A of the Income Tax Act. 1961, on an

application for waiver of interest. The order should ex facie disclose the application of mind and should contain reasons in support of the order.

When an order is sought to be impugned on the ground that the officer concerned has not exercised his discretion properly in the sense that the

reason in support of the order has not been disclosed in the order, the defect cannot be cured by furnishing the reason by an affidavit. If that is

allowed, an order which is bad in the beginning may, by the time it comes to the Court when challenged, get validated by the grounds supplied in

the affidavit." (p. 720)

19. In *Smt. Harbans Kaur's case* (supra), the Supreme Court held that if the conditions are satisfied, the Commissioner has the discretion to

reduce the amount of penalty or waive the entire penalty and the Supreme Court held as under:

Even if the Legislature has to use the words "in his discretion" in section 1813(1), the Commissioner could have exercised only a discretionary

power in view of the employment of the word "may". Now, when Parliament used both expressions "may" and "in his discretion" together, the

position is placed beyond the pale of any doubt that the Legislature wanted an

officer of the rank of the Commissioner to be reposed with the discretionary power to choose between entire waiver or reduction in any proportion.

Of course, when the Commissioner, instead of giving a complete waiver, chooses to give only a reduction for the penalty amount he must indicate

in his order that he has applied his mind in that regard. In this view, there is no warrant for the proposition that the Commissioner, if satisfied of the

compliance of conditions, has only one choice, i.e., to waive the penalty in entirety. Otherwise, it may mean that the Commissioner can in a case

where conditions are not satisfied, reduce the penalty amount. When conditions are not satisfied, the Commissioner cannot do either. Only when

the said conditions are satisfied that the occasion arises for the Commissioner to exercise his discretion not before." (p. 420)

20. It is relevant to notice here that the counter-affidavit has been filed by the Deputy Commissioner, Central H(2), Chennai, having jurisdiction

over the files relating to the petition. The order that is the subject-matter of challenge is an order passed by the Commissioner, Central H,

Chennai, but the said authority has not chosen to file any counter-affidavit.

21. There is no dispute that the power to be exercised by the Commissioner u/s 220(2A) is a quasi-judicial power. It is implicit in the provisions of

section 220(2A) that the application should be decided by way of a speaking order and it is imperative that reasons must be given by the

Commissioner while disposing of the said application. As observed by the Supreme Court in *Smt Harbans Kaur*:q case (supra), the Commissioner

has the discretion to reduce the amount of interest or waive the entire interest, if the conditions are satisfied, which clearly shows that reasons given

by the Commissioner must be relevant and germane and the order must indicate that the Commissioner has applied his mind to the questions raised

in the application for waiver of interest. There is also no doubt that all the conditions specified in section 220(2A) must be satisfied before the

Commissioner exercises the power of waiver or reduction of interest. I am unable to accept the submission that before the levy of interest u/s

220(2), an opportunity should be given to the assessee as the accrual of interest is automatic u/s 220(2), and it is made more specific in section

220(3) which provides that the power to grant extension of time for payment of

tax in instalments would be without prejudice to the levy of interest u/s 220(2).

22. Insofar as the conditions mentioned in section 220(2A) are concerned, it is imperative that the Commissioner should record a finding that he is

satisfied that the conditions mentioned in section 220(2A) of the Act are fulfilled before reducing or waiving the interest paid or payable under the

Act. On the facts of the case, it is seen that the order of the Commissioner does not show that he has applied his mind to the various conditions

mentioned in section 220(2A) while rejecting the applications filed by the petitioner for waiver or reduction of the interest. Insofar as the first

condition, viz., payment of tax amount would cause any hardship to the assessee, is concerned, the Commissioner has held that the said condition

is not satisfied as the petitioner is a wealth-tax assessee. The fact that the petitioner is a wealth-tax assessee is not a relevant consideration at all.

The Commissioner has not taken into consideration the total value of the assets of the petitioner during the relevant valuation periods relating to the

assessment years in question, what were her liabilities during the relevant period relating to the assessment years, and what was the net worth of the

assets during the previous years relating to the assessment years in question. The Commissioner has also not indicated in his order whether the

petitioner had assets and whether the assets were movable or immovable properties and whether the assets were in the form of cash or they were

realisable assets. The mere statement of the Commissioner that the petitioner is a wealth-tax assessee is not a relevant circumstance to establish

that the payment of interest amount would cause genuine hardship to the petitioner.

23. The second reason given by the Commissioner that the petitioner had paid a sum of Rs. 93,23,325 and Rs. 3,97,26,573 on 3-8-1996 and 9-

1-1997 and, therefore, the petitioner had the capacity to mobilise funds and things were under her control is also not a relevant consideration at all.

The case of the petitioner was that she had borrowed money from her party to discharge the liability and the view of the Commissioner that she

should have borrowed more money and paid the interest also is not a relevant consideration. It is also not clear what the Commissioner meant by

stating "things are under her control."

24. The third reason given by the Commissioner regarding existence of genuine hardship is also not a relevant consideration. The Commissioner

has stated that the Assistant Commissioner in his report, has stated that nowhere the petitioner has represented in courts that she was not able to

mobilise funds to engage a lawyer because of her bank accounts and other assets being attached by the Directorate of Vigilance and Anti-

corruption and, therefore, according to the Commissioner, the payment of interest would not cause any genuine hardship to the petitioner. The

reasoning of the Commissioner suffers from two infirmities. The Commissioner has not furnished a copy of the report of the Assistant

Commissioner to the petitioner before placing reliance on that report. Secondly, the report also does not establish that the petitioner had funds and

with that amount the lawyers were engaged. The Commissioner has overlooked that the payment to a lawyer would depend upon the terms of

engagement between a client and the lawyer and the Commissioner has also not stated the material for the statement of the Assistant Commissioner

that the petitioner had not made any representation before any Court that due to want of funds, she could not engage a lawyer. Therefore, all the

three reasonings given by the Commissioner that mobilisation of funds for payment of legitimate tax was not beyond her control, and no genuine

hardship would be caused to her, cannot be considered to be relevant reasons. Further, the Commissioner has not denied that the petitioner had

borrowed money and discharged the tax liability. The view of the Commissioner seems to be that as she has mobilised the funds for the payment of

tax by borrowing the same from her party, she could have borrowed more money for the payment of interest, and no genuine hardship would be

caused to her, is not at all a relevant consideration for the rejection of the applications for waiver of interest.

25. Insofar as the second condition, viz., default in the payment of tax is due to the circumstances beyond the control of the assessee is concerned,

the Commissioner has not shown any valid reason for the rejection of the applications. The Commissioner accepted the position that the

petitioner's bank accounts were frozen by the Directorate of Vigilance and Anti-corruption and her properties were also attached. The

Commissioner was, however, of the view that in spite of the same, she was able to make the payment of Rs. 3.97 crores on 9-1-1997. The

Commissioner failed to notice that she had borrowed the money from her party to make the payment as the recovery proceedings were initiated against her. Therefore, the reason given by the Commissioner that the petitioner could have taken steps to pay the interest also by borrowing more money from her party is not relevant at all. The Commissioner was also not correct in his view that the circumstances were under the control of the petitioner. The petitioner in her applications before the Commissioner has stated that as against the income of Rs. 12,91,008 admitted by her for the assessment years 1987-88 to 1992-93, the income assessed for the said assessment years was Rs. 4,88,17,041 and the difference has mainly arisen because of the different views expressed by the department treating her birthday gifts as assessable to tax. It is also stated that because of the huge additions to her major source of income, the circumstances went beyond the control of the petitioner and, hence, the tax amounts could not be paid on due dates. It is also stated that in addition to that her bank accounts were frozen and properties were attached by the Directorate of Vigilance and Anti-corruption as well as by the Income Tax department. The Commissioner was of the view that on the due dates of payment, there was no freezing of bank accounts and, hence, the non-payment could not be termed as "beyond her control and circumstance~ were under her control". That apart, in the affidavit filed in support of the writ petition, W.P. No. 17286 of 1997, the petitioner has made a categorical statement as under:

The first respondent failed to note that the demands made against me were so large that even without the freezing of my bank accounts, I would not be in a position to pay the taxes demanded on the due dates. I had also produced evidence and materials before the first respondent to show that even on the due dates on which the amounts were demanded, I was not in a position to pay taxes.

26. As already noticed by me, the Commissioner who has passed the order impugned has not chosen to file the counter-affidavit denying the statement made by the petitioner. As a matter of fact, in the counter-affidavit filed by the Deputy Commissioner, Central H(2), Chermali, having jurisdiction over the files relating to the petitioner, the statement of the petitioner has not been controverted. The first respondent has also not

produced the relevant records to establish that the statement of the petitioner in the affidavit filed in support of the aforementioned writ petition is, in

any way, incorrect. The above statement of the petitioner clearly shows that the petitioner had produced evidence and materials before the

Commissioner to establish that even on the due dates of payment, she was not in a position to pay the taxes. The Commissioner has not even

adverted to the materials, nor did he consider the case of the petitioner that due to the additions made in her assessments and due to different

views expressed by the department on the treatment of the gifts received by her on her birthday occasions and other occasions, she was not in a

position to pay the taxes on the due dates of payment and it was due to the circumstances beyond her control, the amounts could not be paid by

her. The Commissioner has given two reasons. The first reason is that the petitioner paid Rs. 3.97 crores on 9-1-1997. It was explained by the

petitioner that the amount was borrowed from her party and the said statement of the petitioner was not denied by the Commissioner in his order.

The second reason given by the Commissioner is that there was no freezing of bank accounts on the due dates of payment. But, the case of the

petitioner was that even on those due dates, she was not in a position to raise requisite money and due to the circumstances beyond her control,

she could not pay the amounts due. The order of the Commissioner clearly shows that he has omitted to take into account the relevant

circumstances before holding that the second condition prescribed u/s 220(2A) is not satisfied.

27. Insofar as the third condition, viz, co-operation in the matter of assessment, is concerned, the reason given by the Commissioner is also faulty.

The Commissioner has stated that the returns were filed beyond the due dates and the petitioner did not pay any advance tax on the admitted

income. Sub-section (3) of section 220 of the Act postulates the co-operation of the assessee in any inquiry relating to the assessment or any

proceeding for the recovery of any amount due from him and the Commissioner has overlooked the fact that the inquiry relating to assessments

would commence after the filing of the return and the belated filing of the return is not a relevant circumstance to hold that the assessee has not co-

operated in the inquiry relating to the assessment. The Commissioner has not adverted to the assessment records of the petitioner and examined

the question whether the petitioner had co-operated in the inquiry relating to the assessment. He should have seen various orders of assessment

made in the petitioner's case and examined the question with reference to assessment records as to whether the petitioner has cooperated in the

inquiry relating to the assessment. In this connection, various orders of assessment passed by the assessing officer are relevant. In the order of

assessment for the assessment year 1991-92, the assessing officer has stated that the Chartered Accountant on behalf of the petitioner attended

the hearing in response to the notice issued by the assessing officer and witnesses were examined on the side of the petitioner even on a Sunday. In

the order of assessment for the assessment year 1987-88, it is also stated that the Chartered Accountant of the petitioner represented the assessee

and furnished various details and clarifications sought for. The above statement is found to be repeated in the other orders of assessment as well.

The Commissioner without noticing the statement made by the assessing officer in various orders of assessment has held that the petitioner filed the

returns belatedly and, hence, she was not eligible to get the relief u/s 220(2A). The non-payment of advance tax on the admitted income is also not

a relevant consideration in considering the question whether the petitioner has co-operated in the inquiry relating to the assessment.

28. Insofar as the matter of recovery is concerned, the Commissioner was of the view that the petitioner has not paid the amounts within the

stipulated time and the petitioner made the payment only after the TRO initiated the proceedings. Here also, the Commissioner has overlooked the

fact~ that the department granted time for payment of the amounts in instalments and by order dated 4-6-1995, the petitioner was earlier directed

to pay 50 per cent of the amount due and the balance was directed to be paid in instalments. Subsequently, the appeals were dismissed by the

Commissioner (Appeals) on 25-3-1996 and the petitioner was directed to pay the balance by a notice dated 30-5-1996. Then, the petitioner

sought for time for payment of tax and interest by her letter dated 10-7-1996. The Director General by his order dated 31-7-1996 has permitted

the petitioner to pay 50 per cent of the tax component of Rs. 1,86,46,651 before 5-8-1996 and the balance of tax in six monthly instalments from

September 1996 to March 1997. The petitioner was also directed to pay interest component of Rs. 3,04,03,247 in 12 monthly instalments. The

petitioner on 3-8-1996 paid a sum of Rs. 93,23,325 being 50 per cent of the tax due and did not effect any other payment. When the recovery

proceedings were initiated on 17-10-1996, the petitioner paid the entire amount of Rs. 3,97,26,573 on 9-1-1997. Then, the petitioner filed

petitions for waiver of interest levied under rule 5 of the Second Schedule and interest levied u/s 220(2). The Commissioner has not considered the

question as to what is the effect of the order directing the petitioner to pay the amounts in instalments and the Commissioner has also not

considered the effect of payment of the entire amount when the TRO initiated the proceedings. He has also not adverted to the question that due to

the freezing of bank accounts and attachment of the properties, whether the petitioner could have made the payment. The Commissioner has not

considered the question, despite the attachment of her properties, whether there was co-operation extended by the petitioner in the matter of

payment of tax by raising loan and discharging the liability. The order of the Commissioner shows that the Commissioner has not taken into

consideration relevant circumstances, but has taken into consideration irrelevant circumstances while rejecting the applications filed for the waiver

of interest. Since there is a non-application of mind to the relevant circumstances while rejecting the applications for waiver or reduction of interest,

I hold that the order passed by the Commissioner is liable to be set aside and, accordingly, it is set aside.

29. In the view I have taken, it is not necessary to consider various allegations made by the petitioner in the affidavit and reply-affidavit as well as

the statements made by the respondents in the counter-affidavit. However, it must also be mentioned here that certain new facts are stated in the

counter-affidavit filed by the Deputy Commissioner, Central R(2), Chennai, and it is well-settled that the order impugned has to be tested on the

reasoning stated in the order and it is not permissible to improve the order by placing new facts in the counter-affidavit. Further, I am unable to

accept the submission of the learned counsel for the petitioner that this Court under article 226 of the Constitution should grant the relief as prayed

for in the applications filed by the petitioner. In my view, the proper course would be to remit the matter to the Commissioner of Income Tax to

reconsider the matter de novo and consider the applications in accordance with law.

30. The result is all the writ petitions are allowed and the matter is remitted to the Commissioner of Income Tax for fresh consideration. However, in the circumstances, there will be no order as to costs.