

(1977) 03 KL CK 0018

In the High Court Of Kerala

Case No : Report No. 80 in C.P. No. 14 of 1969

Official Liquidator

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 04-03-1977

Acts Referred:

Companies Act, 1956 — Section 446, 446(1), 446(2)
Income Tax Act, 1961 — Section 220, 220(2)

Citation : (1978) 48 CompCas 59 : (1978) 111 ITR 398

Hon'ble Judges : Viswanatha Iyer, J

Bench : Single Bench

Advocate : T.V. Ramakrishnan, for the Appellant; P.A. Francis and P.K. Raveendranatha Menon, for the Respondent

Judgement

Viswanatha Iyer, J.—By this report the official liquidator seeks for a decision and direction regarding his liability to pay Rs. 6,228 as interest on the tax demand of Rs. 73,187 demanded u/s 220(2) of the Income Tax Act by the Income Tax Officer. For the assessment year 1973-74, the company in liquidation was assessed under the Income Tax Act to pay a tax of Rs. 1,00,759 and a notice of demand dated February 17, 1975, was served on the liquidator. Subsequently, the assessment order was rectified by the Income Tax Officer and a revised tax demand to pay Rs. 97,037 was served on the company. This assessment was considered to be legally unsustainable by the official liquidator and so he filed an appeal. Pending that appeal the official liquidator requested the Income Tax Officer to stay the collection of tax under demand. But the Income Tax Officer directed the payment of Rs. 40,000 within the due date and gave time till June 30, 1975, or the date of the disposal of the appeal whichever is earlier to pay the balance. This sum of Rs. 40,000 was paid on April 8, 1975. After that the liquidator submitted a report to the court for ratification of the said payment and for stay of collection of the balance demand till the disposal of an application filed by him as Application No. 372 of 1975 Income Tax Officer, B-Ward Vs. Official Liquidator, Swaraj Motors (P.) Ltd. (In liquidation), . By order dated June 6,

1975, this court ratified the said payment and also issued an interim order restraining the Income Tax Officer from enforcing the demand to pay the balance till the company court considered the legality of the assessment. The appeal filed by the liquidator against the order of assessment was later dismissed. The revised demand of Rs. 97,037 was inclusive of Rs. 23,850 as interest under sections 215 and 217(1A). This was found to be not legal and the Commissioner of Income Tax by his order dated March 8, 1976, reduced this amount from the tax demand of Rs. 97,037. Application No. 372 of 1975 Income Tax Officer, B-Ward Vs. Official Liquidator, Swaraj Motors (P.) Ltd. (In liquidation), was one seeking a direction as to whether the tax demand on the income of the company which comes under the category of " capital gains " arising on account of the sale of the assets of the company during the course of its winding-up has to be treated as a preferential claim or as an ordinary claim or as expenses of the winding-up to be met before the distribution of dividends. A Bench of this court held that this tax demand will come under the expression "costs, charges and expenses " referred to in sections 476 and 520 of the Companies Act and the same has to be paid before distributing the dividend (see Income Tax Officer, B-Ward Vs. Official Liquidator, Swaraj Motors (P.) Ltd. (In liquidation), . The Division Bench gave one month's time to pay the tax demand. But since there was some other difficulty in getting back the amounts previously invested in the fixed deposits the balance tax of Rs. 33,187 was remitted by the liquidator only on September 1, 1976. The Income Tax Officer by his order passed on September 20, 1976, has charged a sum of Rs. 6,228 as interest payable u/s 220(2) of the Income Tax Act and a demand was made on the liquidator to pay the sum on or before October 26, 1976. By the present report the liquidator submits that there has not been any default in the case, because there was an order of interim stay passed by this court during the pendency of the appeal and Application No. 372 of 1975 [Income Tax Officer, B-Ward Vs. Official Liquidator, Swaraj Motors (P.) Ltd. (In liquidation), and that application was disposed of only on July 21, 1976, and the delay of 7 days to comply with the direction of this court to pay within the period of one month allowed was on account of the procedural delay and cannot be treated as default. As such, it is submitted the levy of interest is not just and proper and the same is not payable. Further, he submits that leave of the court has not been obtained before issuing the notice of demand. For these reasons the order of the Income Tax Officer is contended to be erroneous and since there is no appeal provided for under the statute against that order the liquidator has moved this court to scrutinise the claim made by the Income Tax Officer and to decide whether under the law the additional demand should be met as a lawful liability on the funds of the company in liquidation.

2. Notice of this application was served on the Income Tax Officer and counsel for the department entering appearance contended that the demand comes u/s 220(2) of the Income Tax Act and that there is no illegality in the demand. The question for consideration is whether this court can go into the correctness of the additional demand and issue the direction claimed by the liquidator. The order of

the Income Tax Officer u/s 220(2) of the Income Tax Act dated September 20, 1976, is in the following terms:

"For the assessment year 1973-74 an amount of Rs. 1,00,759 was due from the assessee on or before March 23, 1975, as per the demand notice issued on 17-2-1975. Subsequently the demand was reduced to Rs. 73,187. But the assessee has paid the demand only in instalments on 7-5-1975 and 7-9-1976. As there is delay in making the payment an amount of Rs. 6,228 is charged as interest Sub-section 220(2). They should be paid as per demand notice and challan enclosed."

3. Section 220 to Section 232 of the Act relate to the collection and recovery of tax. Section 220(1) requires the assessee to pay the tax demanded within a period of 35 days mentioned in the notice of demand. Sub-section (2) is in the following terms :

" (2) If the amount specified in any notice of demand u/s 156 is not paid within the period limited under Sub-section (1), the assessee shall be liable to pay simple interest at twelve per cent, per annum from the day commencing after the end of the period mentioned in Sub-section (1):

Provided that, where as a result of an order u/s 154, or Section 155, or Section 250, or Section 254, or Section 260, or Section 262, or Section 264, the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded."

4. Rules 118, 119 and 119(a) prescribe the procedure to be followed in calculating interest before or after recovery certificate is issued. The purpose of Section 220 is compensatory in character. It is provided by way of compensation for delay in the payment of tax and Section 220(2) makes the assessee liable to pay interest and it assumes that an order is required to demand the interest charged. The order is not appealable u/s 246 of the Act. At the same time, it is a legal proceeding subsequent to the assessment of tax to recover the tax assessed. The tax assessed in respect of the income of the company after liquidation is payable as costs, charges and expenses incurred in the winding-up. It is for the court to decide how much should be awarded as costs, charges or expenses. It may be that the entire tax demanded will be included as expenses of winding up. But, when it comes to the question of payment of interest on the tax demand, it is for the court to decide whether this should be paid or not. That will be a matter depending on the facts and circumstances of each case. The Supreme Court had occasion to consider the power of the liquidation court to scrutinise the claim of the revenue in respect of assessment and recovery of Income Tax. In *S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another*, it is observed thus:

" We have not been shown any principle on which the liquidation court should be

vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the revenue after Income Tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of Income Tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding-up court can fully safeguard the interests of the company and its creditors under the Act."

5. Generally interest is not allowed in respect of claims against the company after the commencement of the winding up proceedings. The available assets may have to be distributed subject to preferential claims *pari passu* among the creditors. Though the Income Tax payable in respect of income accruing to the company after the commencement of the winding-up is payable as charges and expenses of the winding-up, if interest has to be paid on the amount so due, it can practically swallow the entire assets and the interests of the other creditors will be very much affected. Section 220(2), no doubt, makes the assessee liable to pay interest. But the assessee in this case has not the freedom to utilise the funds without the approval of the court and the claims of the other creditors. On the one hand, Section 220(2) makes the assessee liable. On the other hand, the assessee is not free to pay the amount without the sanction of the court. If any delay in getting the sanction of the court will cause loss to the company in liquidation, it will be interfering with the power of the court to issue directions regarding the distribution of assets of the company. So, the Income Tax Officer should obtain the sanction of the court or move that court that the claim for interest u/s 220(2) of the Income Tax Act may be considered and orders passed in respect of it. Demand to pay the amount without observing this requirement of Section 446(2) and (1) makes the demand unenforceable against the company in liquidation. It follows that the demand to pay Rs. 6,220 as interest on the Income Tax due is, for the above reasons, invalid and the Income Tax Officer is, therefore, restrained from enforcing this claim except in the manner provided for by Section 446(1) and (2) of the Companies Act. Ordered accordingly.