

(1997) 11 MP CK 0033

In the Madhya Pradesh High Court

Case No : A.K. Mathur, C.J. and S.K. Kulshrestha, J. Writ Petition No. 4796 of 1996

PITAMBARDAS DULICHAND

APPELLANT

Vs

UNION OF INDIA and Others

RESPONDENT

Date of Decision : 13-11-1997

Acts Referred:

Income Tax Act, 1961 — Section 139, 146, 154, 155, 156

Citation : (1998) 148 CTR 352 : (1998) 99 TAXMAN 408

Hon'ble Judges : A.K. Mathur, C.J.; S.K. Kulshrestha, J

Bench : Full Bench

Judgement

A.K. MATHUR, C.J.:

The petitioners by this writ petition have prayed that no interest can be levied under s. 220(2) of the IT Act, 1961. It is also prayed that the computation of interest from the date of original assessment may be held illegal and without jurisdiction. It is also prayed that the orders passed under s. 154 of the IT Act, i.e. Annexures P/25 and P/26 may be quashed.

2. The petitioner No. 1 is carrying on the business of gold and silver ornaments and money lending at Burhanpur, district-Khandwa. He was assessed to Income Tax by the respondent No. 4. The petitioners No. 2, 3, 4 and 5 are partners in the said firm. There were search and seizure operations in the business premises of the petitioner No. 1 and residential premises of petitioners No. 2 to 5 from 3rd Aug., 1987 to 8th Aug., 1987. Consequent to that, assessments were made for asst. yrs. 1985-86, 1986-87, 1987-88, 1988-89 and 1989-90. The assessment in the case of the firm was originally made for the asst. yr. 1985-86 on 28th March, 1988 determining the total tax, inclusive of interest under s. 139(8) and 217 of the IT Act, 1961, (hereinafter referred to as the "Act" in short), at Rs. 8,55,830. It is alleged that the said demand was reduced to Rs. 1,61,374. It is also alleged that prior to creation of demand by order dt. 30th Jan., 1986, the petitioner No. 1 had paid tax amounting to Rs. 1,63,489. Interest was calculated at Rs. 83,213,

counting the period from the original order dt. 28th March, 1988 to 30th Jan., 1996. It is alleged that since the demand was created only on 30th Jan., 1996, interest under s. 220(2) of the Act could be charged from the date provided the demand is not paid. A detailed chart has been placed on record showing the order for asst. yr. 1985-86, date of the notice of demand, date of its service, total income assessed and the amount payable accordingly to the orders together with interest and the net amount payable. Similar details are also given in respect of the petitioner No. 1 firm for the asst. yrs. 1986-87, 1987-88, 1988-89 and 1989-90 in Annexure P/2 to P/5 respectively. The respondent No. 4 charged interest under s. 220(2) of the Act.

3. An application was filed by the petitioner No. 1 on 6th March, 1996 before the respondent No. 5 under s. 154 of the Act objecting to the levy of interest under s. 220(2) of the Act on the ground that the original order was passed on 28th March, 1988 under which a demand of Rs. 8,55,830 was raised. The assessment of the petitioner No. 1 for the asst. yr. 1985-86 was objected and finally, an order was passed on 25th Aug., 1994 resulting into the remand of assessment, therefore, interest payable came to be nil. It is alleged that the interest is only payable if the amount has not been paid in accordance with s. 220(2) of the Act. Since there was no demand by order dt. 25th Aug., 1994, no interest could be charged. Similar applications were also filed for asst. yrs. 1986-87, 1987-88, 1988-89 and 1989-90, by the petitioners No. 2 to 5 for rectifying the interest wrongly charged for the asst. yrs. 1985-86, 1986-87 and 1987-88, but that application was rejected by order dt. 14th May, 1996 on the basis of the instructions issued by the CWT, vide Circular No. 334, dt. 3rd April, 1982. It is alleged that according to this circular, the demand raised relates back to the first order of assessment dt. 28th March, 1988 for the asst. yr. 1985-86 and similarly, other applications were also rejected. In those circumstances the present writ petition has been filed by the petitioners that the circular issued by the CBDT is not correct and the interpretation put by them of s. 220(2) of the Act is also not proper.

4. In order to appreciate the controversy involved in the present petition, it would be proper to refer to s. 220(2) of the Act, which reads as under

"Sec. 220.. When tax payable and when assessee deemed in default.

(1)

(2) If the amount specified in any notice of demand under s. 156 is not paid within the period limited under sub-s. (1), the assessee shall be liable to pay simple interest at (one and one-half per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-s. (1) and ending with the day on which the amount is paid :

Provided that, where as a result of an order under s. 154, or s. 155, or s. 250, or s. 254, or s. 260, or s. 262, or s. 264 (or an order of the Settlement Commission

under sub-s. (4) of s. 245D), 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.

Provided further that in respect of any period commencing on or before the 31st day of March, 1989, and ending after that date, such interest shall, in respect of so much of such period as falls after that date, be calculated at the rate of one and one-half per cent for every month or part of a month."

The CBDT has also issued Circular No. 334, dt. 3rd April, 1982 (Annexure P/31) which reads as under :

Circular No. 334, dt. 3rd April, 1982.

To,

All CIT,

Sir,

Subject : Levy of interest under s. 220(2) when the original assessment is set aside-Instructions regarding.

Doubts have been raised as to quantum of interest chargeable under s. 220(2) of the IT Act, when the original assessment order passed by the ITO is:

(i) cancelled by him under s. 146 of the IT Act."

(ii) set aside/cancelled by an appellate/revisonal authority and such appellate/revision order has become final,- or

(iii) set aside by one appellate authority but, on further appeal, the order setting aside the assessment is varied by the second appellate authority and the demand gets finally determined:

2. These issues were comprehensively examined in consultation with the Ministry of law and the Board has been advised:

(i) Where an assessment order is cancelled under s. 146 or cancelled/set aside by an appellate/revisonal authority and the cancellation/setting aside became final (i.e., it is not varied as a result of further appeals/revisions), no interest under s. 220(2) can be charged pursuant to the original demand notice. The necessary corollary of this position will be that even when the assessment is reframed, interest can be charged only after the expiry of 35 days from the date of service of demand notice pursuant to such fresh assessment order.

(ii) where the assessment made originally by the ITO is either varied or even set aside by one appellate authority but, on further appeal, the original" order of the ITO is restored either in part or wholly, the interest payable under s. 220(2) will be computed with reference to the due date reckoned from the original demand notice and with reference to the tax finally determined. The fact that during an

intervening period there was no tax payable by the assessee under any operative order would make no difference to this position.

(3) The foregoing legal position will apply mutatis mutandis to the proceedings under other direct taxes also. These instructions may be brought to the notice of all the officers working in your charge.

Yours faithfully,

(SD) H. Venkataraman,

Director, Central Board of Direct Taxes (F. No. 400/3/81-ITC)."

5. Sec. 220(1) of the Act lays down that any amount, otherwise than by way of advance tax, specified as payable in a notice of demand under s. 156 shall be paid within thirty days of the service of the notice at the place and to the person mentioned in the notice. Proviso attached to sub-s. (1) of s. 220 of the Act lays down that where the AO has any reason to believe that it will be detrimental to Revenue if the full period of thirty days aforesaid is allowed, he may, with the previous approval of the Dy. CIT, direct that the sum specified in the notice of demand shall be paid within such period being a period less than the period of thirty days aforesaid, as may be specified by him in the notice of demand. Sub-s. (2) says that if the amount specified in any notice of demand under s. 156 is not paid within the period limited under sub-s. (1), the assessee shall be liable to pay simple interest at 1/2 per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-s. (1) and ending with the day on which the amount is paid. The rate of interest, of course, was amended by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1st April, 1989. Prior to this, the rate of interest was 15 per cent per annum from the day commencing after the end of the period mentioned in sub-s. (1). The proviso further lays down that where as a result of an order passed under s. 154, i.e. after rectification or under s. 155 i.e. amendment of the assessment order, or under S. 250 i.e. procedure in appeal, or under s. 254 i.e. order of the Tribunal; or under s. 260, i.e., decision of High Court or Supreme Court, or under s. 263, i.e., hearing before Supreme Court and/or under s. 264 as a result of revisional orders or under the order of Settlement Commission under s. 254 and the amount of interest shall be payable on that amount if reduced and the excess amount shall be refunded. The idea behind s. 220 of the Act is that if any tax demand is raised then it has to be paid within 30 days from the date of demand of notice and if it is not paid, then the Revenue will be entitled to interest on that demand. The interest is compensatory in nature; therefore, if the demand is raised and amount is not paid that would amount to that amount which was lawfully due to the State, has been detained and the interest would start accruing to State on that amount. Therefore, in order to compensate the State by not paying the amount after the demand notice, the exchequer should be adequately compensated with interest. But the question before us is when the interest will start accruing on that amount.

6. Shn 131. Nema, learned counsel for the assessee, submits that the amount should be due from the date of demand, i.e., in case the demand is set aside or stayed then on issuing a fresh demand alone, the Revenue is entitled to interest. The learned counsel further submits that in case the demand is set aside and if it is restored back by an appellate order, then it shall relate from the date of fresh order and it shall not relate back to the original demand raised by the Revenue. We are of the opinion that the contention of the learned counsel appears to be not well founded.

7. Once the AO's order is reversed or affirmed by the CIT(A) then it is merged in the order of the CIT(A). Likewise, if it is further confirmed or reversed by the Tribunal, then that order will also merge in the order of the Tribunal. Therefore, the theory of merger will apply and the order of the lower authority will stand merged with the order of the higher authorities. Therefore, if the principle of merger is applied then it will be clear that in case the AO passed an order and demand notice is issued on the basis of assessment order, then the assessment order in appeal is set aside by the CIT(A) and then automatically the demand raised by the AO in pursuance of the assessment order will stand merged in the appellate order and that demand will cease to exist. In case, the order of CIT(A) on appeal by the Revenue or the assessee is set aside then the order of AO is restored back, then automatically the demand raised by the Revenue on the basis of assessment will revive and the assessee will be liable to pay interest on that demand. This is so because of the principle of merger. But here, we would like to add that this would only apply with regard to original assessment made by the AO and same being confirmed. It is possible that assessment orders sometime is affirmed by the appellate authority and sometimes it is reversed and some time the Tribunal can take a different view in the matter and it can remand the case and direct to make fresh enquiry on certain item which was not assessed to tax by the assessee in the original order and the same is sought to be reassessed and the tax demand is raised on this new item, then the interest will be payable for this new item from its demand. However, if other items remain intact then interest will be payable to the exchequer in pursuance of the original demand. There could be other eventuality that amount of tax could be reduced then of course, on the reduced amount and in case certain fresh item is to be taxed and fresh notice for that part of demand will have to be issued and if the assessee does not pay the amount within the time prescribed then the interest will start accruing from that fresh date of demand. Therefore, in order to work out the rate of interest, care will have to be taken to segregate between the original demand and the fresh order of assessment resulting in fresh dues. For the new demand raised, interest will be accrued from the date of fresh order issued under s. 156 whereas from the original order, which is maintained as it is or on the reduced amount then the interest will be due on that whole demand.

8. In this connection, our attention was also invited to various decisions from both sides of the High Courts as also that of Honble Supreme Court. In A.V. Thomas and Co. Ltd. Vs. Income Tax Officer, "A" Ward and Others, , that was a

Single Bench decision. In that case, the Tribunal restored the order of the ITO and fresh notice of demand was issued after the order of Tribunal to pay back tax refunded with interest. It was also observed that liability to pay interest to Department arises only from the date of fresh notice of demand and not from the original date. In a reversed case in *K.P. Abdul Kareem Hajee Vs. Income Tax Officer, A-Ward and Another*, certain amount seized by the Enforcement Directorate from H was claimed by the assessee/petitioner as his. As a result of claim of the petitioner, the ITO made a protective assessment on the petitioner and an assessment on H. Both the assessments were set aside by the AAC. On further appeal, the Tribunal affirmed the order of the AAC relating to H., however, affirmed the order of the ITO relating to the petitioner. Since the petitioner alone became liable for the tax due in respect of the seized amount, the Department claimed interest under s. 220(2) of the IT Act, 1961, from the petitioner. The petitioner contended that since the AAC had set aside the assessment order in respect of the petitioner, no interest was payable by him on the tax demanded and his liability arose only upon the final order of the Tribunal. It was also held by the Kerala High Court that the finality of the assessment order of the ITO was qualified by and subject to appeal, which was taken before the AAC. The order of the AAC itself was likewise provisional during the period allowed for filing an appeal or during the pendency of the appeal. When the order of the AAC concerning the petitioner was finally set aside by the Tribunal thereby affirming the order of the ITO, the finality of the order of the ITO was affirmed. Therefore, for the period commencing from the order of the AAC and ending with the order of the Tribunal, the assessment order of the ITO must be deemed to have operated and the petitioner was liable to pay interest under s. 220(2). In *Shri Ambica Mills Ltd. Vs. Income Tax Officer*, , that was a case of Gujarat High Court where the petitioner had complied with the notice of demand issued under s. 156 of the IT Act and, therefore, there was no question of applying the provisions of sub-s. (2) of s. 220 of the Act, the order levying interest under s. 220(2) was liable to be quashed. In *Birla Cotton Spg. and Wvg. Mills Ltd. Vs. Income Tax Officer and Others*, , it was held that notice of demand based on original assessment was passed in September, 1979, and appeals against assessment, income and tax determined afresh were preferred in May, 1986 and the interest was not payable under s. 220(2) from the date of the original assessment order dt. May, 1986. That case is not applicable to the present case as the demand was redetermined. But in a case where the original assessment was upheld by the Tribunal, then the interest will accrue from the date of the original order. In *Bharat Commerce and Industries Ltd. Vs. Commissioner of Income Tax and another*, : , it was held that when an order of rectification is made under s. 154 and a notice of demand is issued thereafter for the amount determined by that order, interest under s. 220(2) can be levied on the amount of demand only if there is no payment of amount covered by the rectification order in accordance with the notice of demand. The rectification order cannot include interest under s. 220(2) of the Act. This case also does not provide us any assistance.

In K. Nachimuthu vs. STO (Ker) 95 STC 539, that was a case under the sales-tax from Kerala High Court and in that it was observed that the demand for tax was set aside in appeal but it was restored in subsequent proceedings and penal interest was not payable for interregum. But, as we have already observed above, by applying the principle of merger when the original order of AO is affirmed by the Tribunal though it might have been set aside by the AAC, then the interest shall relate back to the original order.

In Bharat Commerce and Industries Ltd. Vs. Union of India and Others, , it was held that demand for payment of interest shall be from the date of original demand.

9. On survey of the aforesaid decisions referred to from various High Courts, there is a conflict of opinion. But the view which we have taken is supported by the decision of Delhi High Court in Bharat Commerce & Industries Ltd. (supra). We have applied the principle of merger and on that basis when the original demand is affirmed by the last Court then that amounts to affirming the original demand and the amount becomes due to the Revenue, therefore, the interest being compensatory in nature, the Revenue is entitled to charge interest from the date of original order. In this view of the matter, we are of the opinion that the circular issued by the CBDT appears to be well founded. Hence, in the result, we do not find any merit in this petition and the same is dismissed. No order as to costs.

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