

(1996) 06 KL CK 0045

In the High Court Of Kerala

Case No : O.P. No"s. 11187 and 11190 of 1991-F

P.M. Manuel

APPELLANT

Vs

Income Tax Officer and Others

RESPONDENT

Date of Decision : 14-06-1996

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 215, 215(4), 264

Citation : (1997) 226 ITR 616

Hon'ble Judges : S. Sankarasubban, J

Bench : Single Bench

Advocate : P. Balachandran, for the Appellant; M. Lalitha Nair, Government Pleader, P.K.R. Manon and N.R.K. Nair, for the Respondent

Judgement

S. Sankarasubban, J.—Both the original petitions raise the same issue and hence they were heard together. The petitioners in both the original petitions are partners of a number of firms (to be exact of six firms). The income from the firms is the substantial income of the petitioners. They filed returns and paid advance tax under the Income Tax Act (hereinafter called "the Act"), as per the accounts of the firm. The assessment years in question are 1983-84, 1984-85 and 1985-86. The assessment orders for the three years were passed on March 25, 1987, March 7, 1988 and March 28, 1988. The firms were also assessed for the above years and it was found that the income returned filed by the firms was not correct. Consequently, the income returned by the petitioners as income from the firms had to be changed. It was further found that the advance tax paid was less than 75 per cent. of the assessed tax and so the Assessing Officer levied interest u/s 215 of the Act for all the three assessment years. The petitioners filed separate petitions for waiver of interest u/s 215(4) of the Act for the above assessment years. The petitioners highlighted the fact that they could not anticipate the increase in the income at the time of filing the advance tax and that they were guided by the income statement given to them by the firms. These applications were considered by the Deputy Commissioner of Income Tax

(Central Range), Ernakulam. The orders passed by the Deputy Commissioner is exhibit P-7 in both the cases. In O. P. No. 11187 of 1991, the relevant portion of exhibit P-7 is as follows :

" The main plea of the assessee is that he has mainly share income from various firms and the addition to the income of the firm was not anticipated. This contention is partially acceptable. However, I find that there is no case for full waiver of interest since the assessee has also not estimated the income for advance tax purposes correctly and completely. Taking the circumstances of the case into account, interest chargeable u/s 215 of the Income Tax Act, for the assessment years 1983-84, 1984-85 and 1985-86 is reduced by 50 per cent. The Assistant Commissioner of Income Tax, Central Circle, Ernakulam, will pass suitable orders immediately."

2. In O. P. No. 11190 of 1991, the relevant portion of exhibit P-7 is as follows :

" The petition for waiver of interest of the above assessment years has been considered in the light of Rule 40(5) of the Income Tax Rules. After considering the circumstances of the case, I direct the assessee to pay-50 per cent. of the interest charged u/s 215 of the Income Tax Act for the assessment years 1983-84, 1984-85 and 1985-86. The balance interest is waived under Rule 40(5) of the Income Tax Rules."

3. Thus, the officer reduced the interest by 50 per cent. Against the above orders, the petitioners filed revisions u/s 264 of the Act before the third respondent. The Commissioner disposed of the petitions by exhibit P-11 order dated December 21, 1990. The Commissioner refused to interfere since the second respondent had reduced the interest under Rule 40, Sub-rule (5), of the Income Tax Rules (hereinafter called "the Rules"). The original petitions are filed challenging exhibits P-7 and P-11 orders.

4. On behalf of the petitioners, Sri George K. George contended that both respondents Nos. 2 and 3 have not exercised the discretion vested in them u/s 215, Sub-section (4), read with Rule 40(5) of the Income Tax Rules. He traced the fact that no reasons are given for not completely waiving the interest, especially, when in exhibit P-7 in O. P. No. 11187 of 1991, the Deputy Commissioner held that he was partially accepting the contentions of the assessee that his main share of income was from the firms and that the addition to the income of the firms was not anticipated. He relied on the decisions in Patel Engineering Co. Ltd. Vs. C.B. Rathi and Another, , MALAYALAM PLANTATIONS (INDIA) LTD. Vs. COMMISSIONER OF Income Tax., , Commissioner of Income Tax Vs. Pratap Chand Maheshwari, ; Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax, and Sudhinendra Nath Patra Vs. Income Tax Officer, "A" Ward and Others, .

5. Counsel for the Revenue contended that in passing exhibits P-7 and P-11 orders, the authorities have exercised their discretion properly and the court may not interfere under Article 226 of the Constitution of India. He further contended

that interest was levied as compensation for loss of realisation of the correct amount of advance tax in time. He even contended that the assessee was not entitled to the 50 per cent. reduction given. Section 215(4) of the Act reads as follows :

" In such cases and under such circumstances as may be prescribed, the Assessing Officer may reduce or waive the interest payable by the assessee under this section."

6. With reference to Section 215(4), Rule 40 has been framed. Rule 40 deals with waiver of interest. We are concerned with Rule 40(5) which reads as follows :

" Any case in which the Deputy Commissioner considers that the circumstances are such that a reduction or waiver of the interest payable u/s 215 or Section 217 is justified."

7. The question that arises is whether the authorities have exercised their power in accordance with the above rules.

8. If the discretion given to the authorities is not exercised properly on the facts of the case, this court is entitled to interfere under article 226 of the Constitution. A similar question arose before the Supreme Court with respect to non-waiver of interest and penalty in exercising the power u/s 273A of the Act. In *Apex Finance and Leasing Ltd. Vs. Commissioner of Income Tax, Delhi and Others*, , the Supreme Court held as follows (headnote) :

"The question whether the Commissioner was justified on the facts and in the circumstances of the case, in refusing to exercise his power u/s 273A of the Income Tax Act, 1961, to waive interest and penalty where the assessee has disclosed income voluntarily in a revised return, is a question to be examined on the merits and the High Court, on a writ petition challenging such a refusal, ought not to dismiss the petition on the ground that the order was not liable to interference in exercise of its extraordinary jurisdiction."

9. In *Patel Engineering Co. Ltd. Vs. C.B. Rathi and Another*, , a Division Bench of the Gujarat High Court held (at page 552) :

"... where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out . . . that power ought to be exercised, and the court will require it to be exercised (see *Julius v. Lord Bishop of Oxford* [1880] 5 AC 214)."

10. Thus, if the conditions laid down for the exercise of discretion are satisfied, the authority has no discretion to refuse to exercise the discretion. If there is omission to exercise the discretion on account of the failure on the part of the authority to genuinely address itself to the matter before it, mandamus can be issued directing such authority to rehear and determine the matter afresh according to law. The interpretation of Section 215 read with Rule 40 came up for

consideration before a Division Bench of the Gujarat High Court in the above case and the court decided to quash the order passed by the authorities and issued a direction to the authorities to grant waiver of interest. The court interpreted the word "justified" in Rule 40(5) as follows (page 554) :

" The word "justified" is a word of wide import. Something could be said to be justified if it is proved or shown to be fair or right or according to justice or backed by sufficient reason."

11. Exhibit P-7 order passed by the Deputy Commissioner says that the contentions of the assessee are partially acceptable, nothing more is stated in that regard. The petitioners' contention was that they paid the advance tax as per the information given to them with regard to that income by the firms. So at the time of paying the advance tax, they could not anticipate that the income disclosed by the firm was not correct. When it was found that the income disclosed by the firm was not correct, the petitioners had to pay more tax. This is a matter which the second respondent and the third respondent ought to have considered more objectively. From a reading of exhibits P-7 and P-11, it appears as though the officers were of the view that a person who has not paid the advance tax in accordance with the assessment and comes within the ambit of Section 215 has to pay interest, they forgot the purposes for which Section 215(4) was enacted and also the conditions mentioned in Rule 40(5). They have to objectively consider the circumstances and find out whether the assessee is entitled to it. There should not be a mechanical consideration of the claim put forward by the assessee and it should not be that if some benefit is given to the assessee, he will be satisfied. From the assessment orders, it is clear that more than 95 per cent. of the income of the assessee is from the firms. So if, as a matter of fact, they bona fide paid the advance tax as per the accounts given to them from the firms, they should not be penalised with interest if it is subsequently found that their income was high. This is a matter which the authorities should have taken into consideration.

12. Thus while maintaining the 50 per cent. reduction to the assessee as per exhibits P-7 and P-11, I direct the second respondent to consider afresh as to whether the petitioners are entitled to waiver of the entire interest levied on them u/s 215 of the Act.

13. The original petitions are allowed as indicated above.