(1990) 05 AHC CK 0044

In the Allahabad High Court

Case No : Writ Petition No. 2122 of 1983

Raj Kishore Prasad APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 02-05-1990

Acts Referred:
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 240, 244, 263

Citation : (1990) 88 CTR 152 : (1992) 195 ITR 438

Hon'ble Judges : Virendra Kumar, J;S.H.A. Raza, J

Bench : Division Bench

Advocate : K.B. Jindal, for the Appellant; S.C. Misra, for the Respondent

Final Decision : Allowed

Judgement

Virendra Kumar, J.—The petitioner has filed this writ petition claiming different amounts by way of refund and interest besides costs. In the course of his arguments, learned counsel for the petitioner pressed only the claim of Rs. 28,225 by way of interest on delayed refund of Rs. 73,928 which had fallen due to the petitioner on March 29, 1979, while the actual payment of this amount was made on October 12, 1982. This interest is claimed at 12 per cent. per annum besides the costs of the writ petition.

2. The petitioner was assessed to Income Tax for the assessment year 1974-75 on October 5, 1974, by the Income Tax Officer, ''A'' Ward, Circle II, Lucknow. Thereafter, a notice was issued u/s 154 of the Income Tax Act, 1961 (for short "the Act"), to the assessee regarding the excess rebate allowed to him. It appears that the assessee had no objection to the proposed rectification ; hence the mistake was rectified by the Income Tax Officer u/s 154 of the Act on February 12, 1975. Thereafter, the Commissioner of Income Tax took up the matter suo motu and passed an order u/s 263(1) of the Act on the ground that the Income Tax Officer had wrongly omitted to charge interest from the petitioner u/s 217(1A). The Commissioner of Income Tax passed the order u/s

263(1) of the Act on September 30, 1976, setting aside the aforesaid assessment order which was passed by^ the Income Tax Officer and further directed the Income Tax Officer to make a fresh assessment. There-upon a fresh assessment order dated February 15, 1977, was passed by the income tax Officer making an additional demand of Rs. 90,391. This amount was fixed as a result of the revision of the second assessment order u/s 154 of the Act. Under the original assessment order dated October 5, 1974, a demand for Rs. 18,433 was created against the petitioner. On adding the demand made under the second assessment order, the total amount of demand of tax against the petitioner came to Rs. 1,08,824. The same was realised by the Income Tax Officer.

3. Against the order of the Income Tax Commissioner dated September 30, 1976, u/s 263 of the Act (referred to above), the petitioner went up in appeal before the Income Tax Appellate Tribunal which, under its order dated October 13, 1978, set aside the Income Tax Commissioner''s order dated September 30, 1976. Under the Appellate Tribunal''s order, the proceedings were remanded to the Income Tax Commissioner. Thereafter, the petitioner made a representation dated March 19, 1979, before the Commissioner, whereupon the Commissioner passed the following order on March 29, 1979 :

"Please refer to your counsel''s letter dated March 19, 1979. The proceedings initiated u/s 263 of the Income Tax Act for the assessment year 1974-75 have been dropped."

4. The second assessment order dated February 15, 1977, which was passed in pursuance of the Commissioner''s order dated September 30, 1976, stood automatically set aside when the Appellate Tribunal passed the order dated October 13, 1978, setting aside the Commissioner''s order dated September 30, 1976. As the Income Tax Commissioner finally dropped the proceedings u/s 263 of the Act on March 29, 1979, what remained in force was the original assessment order dated October 5, 1974. Under that assessment order, the petitioner was assessed to a tax of Rs. 18,433. The amount realised in excess of this amount became refundable to the petitioner on the passing of the Commissioner''s order dated March 29, 1979. The excess amount was Rs. 90,391 out of which a sum of Rs. 16,463 was deducted by the respondent for the reason that this amount was payable by the petitioner to the respondent in connection with the demand of the Income Tax Department for the earlier years. Thus, there remained a sum of Rs. 73,928 payable by the respondent to the petitioner as a result of the order of the Income Tax Commissioner dated March 29, 1979. In fact, this court has held in Writ Petition No. 1885 of 1980 between the present parties in its judgment dated April 12, 1982 Raj Kishore Prasad Vs. Income Tax Officer and Others, , that the petitioner was entitled to refund of the amount paid by him to the respondent in excess of the amount originally assessed against the petitioner for the assessment year 1974-75. The respondent, in his counter-affidavit, has admitted that as a result of the decision in the writ petition a sum

of Rs. 83,928 became due to the petitioner by way of refund and the same was refunded on October 12, 1982. Still the petitioner''s claim for interest on Rs. 73,928 from the date of the Income Tax Commissioner''s order of March 29, 1979, till October 12, 1982, is contested by the respondent on the following grounds.

5. In the first place, learned counsel for the respondent challenged the maintainability of the writ petition for the claim of interest on the ground of alternative remedy of filing a suit before the civil court. This contention has no force. This writ petition was filed on April 19, 1983, on which date, learned counsel for the respondent was given time to obtain instructions by the 3rd week of May, 1983, on which date the writ petition could have been decided finally. Thereafter, on August 24, 1983, the writ petition was admitted by the court. It appears that, at that time, its maintainability was not challenged from the side of the respondent who was given time earlier under the court''s order dated April 19, 1983. The respondent filed his counter-affidavit subsequently in 1984 taking up the plea of non-maintainability of this writ petition on the ground of availability of an alternative remedy. Further, in the writ petition, the petitioner had originally claimed refund of Rs. 16,463 also which was the amount realised and retained by the respondent in connection with the proceedings and orders passed by the Income Tax authorities under the Act. In addition to that relief, the claim of interest on Rs. 16,463 has been made by the petitioners in the writ petition. According to the petitioner, the claim for interest also arose on account of the proceedings taken and order made under the Act. Section 293 of the Act bars filing of a civil suit to set aside or modify any proceeding taken, or order made under the Act. The following cases give support to the petitioner''s contention that a writ petition under article 226 of the Constitution is maintainable when interest is claimed on the amount of refund payable to the assessee from the Income Tax Department in connection with the proceedings under the Income Tax Act :

1. Pandyan Insurance Co. Ltd. Vs. Commissioner of Income Tax,

2. Hira Lal Jagarnath Prasad Vs. Commissioner of Income Tax and Others, .

3. Panchanathan Chettiar Vs. Commissioner of Income Tax, Madras, .

6. In these cases, the High Court entertained the writ petitions for a claim of interest by the assessee. It is a different matter that the claim of the assessee for interest was not allowed for other reasons.

7. The petitioner''s claim for interest based on Section 244 read with Section 240 is challenged on the ground that, under the said provisions of law, interest is payable only when the refund arises, due to second appeal or reference under the Act and not as a result of the provisions u/s 263 of the Act. Section 240 of the Act, which provides for refund, runs as under :

"Where, as a result of any order passed in appeal or other proceeding under this

Act, refund of any amount becomes due to the assessee, the income tax Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf."

8. Section 244 of the Act provides for payment of interest on refund due to the assessee in pursuance of the order referred to in Section 240 which is not paid to him within a period of three months from the end of the month in which such order is passed. At the relevant time, the rate of interest provided under the section was 12% per annum on the amount of refund from the date immediately following the expiry of the aforesaid period of three months up to the date of payment of the refund. Section 240 refers to the order passed in appeal or other proceedings under the Act and Section 244 which provides for payment of interest on refund, does not restrict its applicability to the proceedings in the nature of appeal and reference only.

9. On the other hand, Section 244 allowing interest refers to all orders within the meaning of Section 240. The words "other proceedings under the Act", used in Section 240, are wide enough to include the proceedings or orders passed u/s 263 of the Act giving rise to the claim of an assessee for refund. The contention of learned counsel for the respondent restricting the meaning and scope of the phrase "other proceedings" only to references made under the Act is unwarranted and cannot be accepted. In the instant case, the claim of the petitioner-assessee arose for refund of the sum of Rs. 73,928 as a result of the decision of the Commissioner of Income Tax on March 29, 1979, when the proceedings u/s 263 were dropped giving rise to the setting aside of the second assessment order dated February 15, 1977, and revival of the original assessment order dated October 5, 1974. The contention of learned counsel for the respondent that, to understand the meaning of the words "other proceedings", s. (sic) of the repealed Act, i.e., Indian Income Tax Act, 1922, should be relied upon does not seem to be correct. The assessment in question was not made under the repealed Act, but was made under the Act of 1961 of which Section 240 read with Section 244 fully applies to this case.

10. The petitioner is, therefore, entitled to get interest on Rs. 73,728 to which amount he was entitled as refund at the rate of 12 per cent. per annum for the period envisaged u/s 244 of the Act keeping in view the fact that the petitioner''s claim for the refund arose in pursuance of the order dated March 29, 1979, u/s 263 of the Act and the refund of Rs. 73,728 was made to the petitioner on October 12, 1982.

11. The writ petition is allowed and mandamus is issued accordingly against the respondent. The petitioner will get his costs from the respondent.

