

(2013) 04 DEL CK 0130

In the Delhi High Court

Case No : Writ Petition (C) 16143 of 2006

Ram Kishan Gupta

APPELLANT

Vs

UOI and Another

RESPONDENT

Date of Decision : 11-04-2013

Acts Referred:

Income Tax Act, 1961 — Section 132, 132(5), 132A, 132B, 132B(4)

Citation : (2013) 5 AD 51 : (2013) 263 CTR 583 : (2013) 357 ITR 534 : (2013) 215 TAXMAN 525

Hon'ble Judges : R.V. Easwar, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Rajender Agarwal, for the Appellant; Pradeep K. Shukla with Ms. Saakshi Agrawal for R-1/UOI and Mr. Amol Sinha with Mr. Deepak Anand, Anshum Jain and Mr. Rahul Kochar, for the Respondent

Judgement

Badar Durrez Ahmed, J.—By way of this petition, a writ of mandamus is sought against the respondents for release of the amount of interest on a sum of Rs. 5,35,000/- which was seized from the business premises of the petitioner during the search and seizure operation conducted on 17.03.1985. The said amount of Rs. 5,35,000/- was returned to the petitioner on 17.02.2000 but without any interest thereon. The petitioner furnished an application to the Central Board of Direct Taxes on 11.11.05 wherein he claimed that interest on the said amount of Rs. 5,35,000/- should be allowed to the petitioner. The prayer made in the said application was that interest be directed to be paid to the petitioner u/s 240 or Section 244A of the Income Tax Act, 1961 (hereinafter referred to as the said Act). The said application was rejected by a communication dated 23.06.2006 by simply stating that the petitioner was not eligible to claim any interest for the assessment year 1986-87 u/s 240, 244A or u/s 132B(4) as per the report of the Commissioner of Income Tax, New Delhi. The said communication also stated that the grievance was treated as having been closed. Thereupon, the petitioner filed the present writ petition seeking a mandamus as indicated above as also the setting aside of the communication dated 23.06.2006.

2. The facts necessary for us to determine the issues raised by the petitioner need to be examined. A search and seizure operation was carried out in the business premises of the petitioner u/s 132 of the said Act on 23.07.1985. Cash, amounting to Rs. 5,35,000/-, as well as some jewellery were seized. Thereafter, an order u/s 132(5) of the said Act was passed on 20.11.1985 whereby the tax amount was determined to be Rs. 10,57,154 and the penalty amount, which was 200% of the tax amount, was determined at Rs. 21,14,308/-. As such, the total tax and penalty computed under the said order dated 20.11.1985 was of Rs. 31,71,462/- which was far in excess of the seized assets namely cash (Rs. 5,35,000/-) and jewellery valued at Rs. 80,808/-. To be clear, the value of the seized assets was only Rs. 6,15,808/- as against the tax and penalty liabilities of Rs. 31,71,462/-. As such, the seized assets were retained.

3. Thereafter, regular assessment in respect of the assessment year 1986-87 was completed and the assessment order was framed on 30.3.1989 whereby a demand was raised of Rs. 5,92,980/- including interest. The cash amount which was available with the department was Rs. 5,35,000/-. It is obvious that the demand as per the assessment order exceeded the cash available with the department.

4. It is an admitted position that the petitioner wrote a letter on the very next day, that is, on 31.3.1989, seeking adjustment of the cash against the demand raised in terms of the assessment order dated 30.3.1989. In fact, the petitioner wrote several other letters over the years for adjusting the said demand, which was not done by the revenue.

5. The petitioner being aggrieved by the assessment order dated 30.3.1989 filed an appeal against the same sometime in April 1989. During the pendency of the appeal, the Kar Vivad Samadhan Scheme, 1998 was introduced by virtue of Finance (2) Act, 1998. Taking advantage of the said scheme, the petitioner paid an amount of Rs. 3,29,670/- in February, 1999 and obtained a certificate under the said scheme. In other words, by payment of the said sum of Rs. 3,29,670/- the entire dispute with regard to the assessment year 1986-87 stood closed and no amounts were due from the petitioner from that day on. This meant that the sum of Rs. 5,35,000/- became returnable to the petitioner on that day itself. However, the same was returned on 17.2.2000. In the meanwhile, the appeal which had been filed by the petitioner against the assessment order dated 30.3.1989 was also dismissed as having become infructuous in view of the petitioner invoking the Kar Vivad Samadhan Scheme, 1998.

6. The petitioner's case is that since he had asked for adjustment at the very beginning, and the adjustment had not been given by the department, he should be paid interest on the said sum of Rs. 5,35,000/-.

7. We have heard the learned counsel for the parties at length on this issue. It is the case of the learned counsel for the respondent that no interest is payable to the petitioner. First of all, the learned counsel for the revenue submitted that no

interest would be payable to the petitioner u/s 132B(4) of the said Act (as it was applicable at the relevant time). Secondly, the learned counsel for the revenue submitted that no interest was payable even after the assessment order dated 30.3.1989 in as much as the demand exceeded the amount of cash available with the department. Thirdly, it was contended by the learned counsel for the revenue that as the petitioner had approached the department under the Kar Vivad Samadhan Scheme, 1998, payment of Rs. 3,29,670/- by the petitioner in February, 1989 closed all issues with regard to the assessment year 1986-87 and therefore, no interest was payable in respect of that assessment year. He submitted that on 17.2.2000 the entire amount of Rs. 5,35,000/- was returned to the petitioner. The learned counsel for the respondent also placed reliance on the provisions of Section 244A of the said Act to indicate that the said provision came into effect in April, 1989. This is clear from sub-section (4) of Section 244A. Therefore, the learned counsel for the respondent submitted that no interest would be payable u/s 244A as claimed by the petitioner. He also submitted that Section 240 would also not apply as it was a provision dealing with appeals and, in the present, there was no "refund" due on an appeal because, in the meanwhile, the petitioner had taken the benefit of the Kar Vivad Samadhan Scheme, 1998.

8. We may straightaway state that we are in agreement with the learned counsel for the respondent that neither Section 240 nor Section 244A would apply in the facts and circumstances of the present case. Section 240 of the said Act would not apply because it deals with the provision of refund on an appeal. In the present case the petitioner has not received any refund consequent upon an appeal. On the contrary, the petitioner had opted for the Kar Vivad Samadhan Scheme, 1998 and had paid the amount under that scheme in February, 1999. The appeal was dismissed, as it had become infructuous, subsequently on 30.3.1989.

9. Insofar as the argument u/s 244A of the said Act is concerned, the provisions of sub-section (4) makes it clear that Section 244A applied only in respect of assessment for the assessment year commencing on 1.4.1989 and subsequent assessment years. The assessment year with which we are concerned is 1986-87. Therefore, Section 244A is clearly inapplicable in the case of the petitioner.

10. We are also in agreement with the second submission made by the learned counsel for the revenue that no amount of interest would be payable to the petitioner after the passing of the assessment order dated 30.3.1989 in as much as the demand raised under the said assessment order was to the extent of Rs. 5,92,980/- which exceeded the amount of cash which was retained by the department to the extent of Rs. 5,35,000/-. We may also point out that, had the petitioner's request for adjustment been accepted immediately after the passing of the assessment order dated 30.3.1989, there would still have been an amount of Rs. 57,980/- due from the petitioner to the department. In other words, no

interest could have been claimed by the petitioner at that point of time.

11. Lastly, we shall deal with the first point raised by the learned counsel for the revenue pertaining to interest u/s 132B(4) of the said Act as it was then applicable. Section 132B as it was applicable at the relevant time is as under:

132B. Application of retained assets. - (1) The assets retained under sub-section (5) of section 132 may be dealt with in the following manner, namely:-

(i) The amount of the existing liability referred to in clause (iii) of the said sub-section and the amount of the liability determined on completion of the regular assessment or reassessment for all the assessment years relevant to the previous years to which the income referred to in clause (i) of that sub-section relates (including any penalty levied or interest payable in connection with such assessment or reassessment) and in respect of which he is in default or is deemed to be in default may be recovered out of such assets.

(ii) If the assets consist solely of money, or partly of money and partly of other assets, the Assessing Officer may apply such money in the discharge of the liabilities referred to in clause (i) and the assessee shall be discharged of such liability to the extent of the money so applied.

(iii) The assets other than money may also be applied for the discharge of any such liability referred to in clause (i) as remain undischarged and for this purpose such assets shall be deemed to be under distraint as if such distraint was effected by the Assessing Officer or, as the case may be, Tax Recovery Officer under authorisation from the Chief Commissioner or Commissioner under subsection (5) of section 226 and the Assessing Officer or, as the case may be, Tax Recovery Officer may recover the amount of such liabilities by the sale of such assets and such sale shall be effected in the manner laid down in the Third Schedule.

(2) Nothing contained in sub-section (1) shall preclude the recovery of the amount of liabilities aforesaid by any other mode laid down in this Act.

(3) Any assets or proceeds thereof which remain after the liabilities referred to in clause (i) of sub-section (1) are discharged shall be forthwith made over or paid to the persons from whose custody the assets were seized.

(4)(a) The Central Government shall pay simple interest at the rate of fifteen per cent per annum on the amount by which the aggregate of money retained u/s 132 and of the proceeds, if any, of the asset sold towards the discharge of the existing liability referred to in clause (iii) of sub-section (5) of that section exceeds the aggregate of the amounts required to meet the liabilities referred to in clause (i) of sub-section (1) of this section.

(b) Such interest shall run from the date immediately following the expiry of the period of six months from the date of the order under sub-section (5) of section 132 to the date of the regular assessment or reassessment referred to in clause

(i) of sub-section (1) or, as the case may be, to the date of last of such assessments or reassessments.

We may also notice the provisions of Section 132(5) as it was applicable at the relevant time which reads as under:

(5) Where any money, bullion, jewellery or other valuable article or thing (hereinafter in this section and in sections 132A and 132B referred to as the assets) is seized under sub-section (1) or sub-section (1A), as a result of a search initiated or requisition made before the 1st day of July, 1995, the income tax Officer, after affording a reasonable opportunity to the person concerned of being heard and making such enquiry as may be prescribed, shall, within one hundred and twenty days of the seizure, make an order, with the previous approval of the Joint Commissioner,-

(i) estimating the undisclosed income (including the income from the undisclosed property) in a summary manner to the best of his judgment on the basis of such materials as are available with him;

(ii) calculating the amount of tax on the income so estimated in accordance with the provisions of the Indian income tax Act, 1922 (11 of 1922), or this Act;

(iia) determining the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the Indian income tax Act, 1922 (11 of 1922), or this Act, as if the order had been the order of regular assessment;

(iii) specifying the amount that will be required to satisfy any existing liability under this Act and any one or more of the Acts specified in clause (a) of sub-section (1) of section 230A in respect of which such person is in default or is deemed to be in default, and retain in his custody such assets/or part thereof as are in his opinion sufficient to satisfy the aggregate of the amounts referred to in clauses (ii), (iia) and (iii) and forthwith release the remaining portion, if any, of the assets to the person from whose custody they were seized:

Provided that if, after taking into account the materials available with him, the Income tax Officer is of the view that it is not possible to ascertain to which particular previous year to years such income or any part thereof relates, he may calculate the tax on such income or part, as the case may be, as if such income or part were the total income chargeable to tax at the rates in force in the financial year in which the assets were seized and may also determine the interest or penalty, if any, payable or imposable accordingly:

Provided further that where a person has paid or made satisfactory arrangements for payment of all the amounts referred to in clauses (ii), (iia) and (iii) or any part thereof, the income tax officer may, with the previous approval of the Chief Commissioner or Commissioner, release the assets or such part thereof as he may deem fit in the circumstances of the case.

In the present case the Income Tax Officer passed an order u/s 132(5) on 20.11.1985. We have also mentioned that in terms of the said order the tax amount determined was Rs. 10,57,154/- and the penalty was also determined at Rs. 21,14,308/-. The total amount of tax and penalty came to Rs. 31,71,462/-. As against this the seized assets namely cash and jewellery totaled only Rs. 6,15,808/- and therefore the income tax officer retained the seized cash of Rs. 5,35,000/- in terms of the provisions of Section 132(5).

12. The question of payment of interest retained u/s 132 is covered by the provisions of sub-section (4) of Section 132B, which we have already set out above. The said sub-section (4) has two parts - (a) and (b). Insofar as part (a) is concerned it is clear that interest would be payable only if the assets seized were in excess of the aggregate amount required to meet the liabilities referred to in clause (i) of sub-section (1). If we read sub-section (1) of section 132B and more particularly clause (ii), it is apparent that where the assets consist solely of money and or partly of other assets the assessing officer may apply such money in the discharge of liabilities referred to in clause (i) and the assessee would be discharged of the said liability to the extent of money so applied. We have also noticed above that the assets available for such application were not in excess of the liabilities which were sought to be discharged. Therefore, there was no question of any interest running u/s 132B(4)(a) of the said Act. That being the position, the question of determining the rate of interest u/s 132B(4) or the date from which the interest was to run, does not arise. Therefore, we are in agreement with the submission made by the learned counsel for the respondent that no interest would be payable even u/s 132B(4) of the said Act. We are however, left with one period which is yet not covered and that is the period commencing on February, 1999 when the petitioner made the payment of Rs. 3,29,670/- under the Kar Vivad Samadhan Scheme, 1998 and closed all issues pertaining to the assessment year 1986-87. Because all issues stood closed in February, 1999 the entire amount of Rs. 5,35,000/- became immediately returnable to the petitioner. However, that amount was returned a little later on 17.2.2000. Therefore, the said amount of Rs. 5,35,000/- was retained by the department to the detriment of the petitioner from February, 1999 to February, 2000 which is approximately one year. Therefore, we feel that the petitioner is entitled to interest on the said amount. We feel that the rate of interest that should be applied would be 10% simple interest which was close to the rate of interest which was being provided by banks on fixed deposits. The amount of interest payable by the department to the petitioner would, therefore, be Rs. 53,500/-. The said amount shall be paid by respondents to the petitioner within four weeks. The writ petition is partly allowed. There shall be no order as to costs.