

(2018) 08 UK CK 0209

In the Uttarakhand High Court

Case No : Writ Petition No. 2103 Of 2007 (M/S)

Sanjay Ghai @APPELLANT@Hash Chief Commissioner Of Income Tax & Another

Date of Decision : 30-08-2018

Acts Referred:

Income Tax Act, 1961 — Section 140A, 142(1), 220(2), 234A, 234B

Citation : (2018) 08 UK CK 0209

Hon'ble Judges : Alok Singh, J

Bench : Single Bench

Advocate : Mohit Maulekhi, H. M. Bhatia

Final Decision : Dismissed

Judgement

Alok Singh, J

1) Heard Mr. Mohit Maulekhi, Advocate for the petitioner and Mr. H. M. Bhatia, Advocate for the respondents.

2) By means of present writ petition, petitioner seeks following reliefs, among others:

â??(i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 29.12.2006 passed by the respondent no.1 for the assessment year 1997-98 under Section 234A, 234B and 220 (2) of the Income Tax Act, 1961.

(ii) issue a writ, order or direction in the nature of mandamus commanding the respondents to waive the interest as per the assessment order dated 27.03.2003 under Section 234A, 234B and 220(2) of the Income Tax Act, 1961 and notification dated 23.05.1996.â??

3) Brief facts of the case are that when the assessee-petitioner did not file his income tax return for the assessment year 1997-98, a notice dated

05.05.1998 under Section 142 (1) of the Income Tax Act, 1961 (hereinafter

referred to as the Act) was issued to the petitioner, which was served upon him on 08.05.1998. Petitioner filed income tax return on 31.03.1999 for the assessment year 1997-98 declaring his income of Rs.12,18,900/-

alongwith the evidence of paying tax thereon at Rs.4,50,000/- under Section 140A of the Act. The assessing officer proceeded ex parte and vide order

dated 24.02.2000, the income of the petitioner had been assessed at Rs.20,50,000/- and the total liability including interest was assessed accordingly.

Feeling aggrieved by the order dated 24.02.2000, the petitioner preferred an appeal before the Commissioner of Income Tax, who, in turn, dismissed

the appeal, vide order dated 15.02.2001.

4) Feeling aggrieved, an appeal was preferred by the petitioner before the Income Tax Appellate Tribunal (ITAT). The ITAT set aside the

assessment for making the same de novo.

5) Still feeling aggrieved by the penalty towards interest, the petitioner preferred an application under Section 234A, 234B and 220(2) of the Act

seeking waiver of interest.

6) The Chief Commissioner of Income Tax, vide impugned order dated 29.12.2006, rejected the application of the petitioner. Hence, present writ

petition has been filed by the petitioner.

7) Learned counsel for the petitioner argued that the respondent no.1 while relying upon the CBDT guidelines failed to appreciate that no opportunity

was ever afforded to the petitioner calling upon him to explain as to why the advance tax was not deposited; no opportunity of hearing was granted to

the petitioner by respondent no.1 before deciding the application for waiver of interest under Section 234A, 234B and 220(2) of the Act; and the

impugned order is bad in law.

8) The moot questions for consideration of this Court are whether the petitioner is entitled to waiver of the interest under the relevant provisions of the

Act and whether the impugned order is liable to be set aside since the assessee was not afforded any opportunity of hearing.

9) Learned counsel for the petitioner has referred to the Notification F.No.400/234/95- IT(B) dated 23.05.1996, which provides guidelines for waiver

of interest under Sections 234A, 234B and 234C of the Act. The same is quoted below :

â??In exercise of the powers conferred under clause (a) of sub -section (2) of Section 119 of the Income Tax Act, 1961, the Central Board of Direct

Taxes hereby direct that the Chief Commissioner and Director General of Income tax may reduce or waive interest charged u/s 234A or section

234B or 234C of the Act in the classes of cases or classes of income specified in paragraph 2 of this order for the period and to the extent the Chief

Commissioner / Director General of Income Tax deem fit. However, no reduction or waiver of such interest shall be ordered unless the assessee has

filed the return of income for the relevant assessment year and paid the entire tax due on the income as assessed except the amount of interest for

which reduction or waiver has been requested for. The Chief Commissioner or the Director General of Income Tax may also impose any other

conditions deemed fit for the said reduction or waiver of interest.â??

2. The class of incomes or class of cases in which the reduction or waiver of interest u/s 234A or sec.234B or as the case may be section 234C can

be considered, are as follows:

(a) Where during the course of proceedings for search and seizure under section 132 of the Income Tax Act, or otherwise, the books of account and

other incriminating documents have been seized and for reasons beyond the control of the assessee, he has been unable to furnish the return of

income for the previous year, during which the action under section 132 has taken place, within the time specified in this behalf, and the Chief

Commissioner / Director General is satisfied, having regard to the facts and circumstances of the case, that the delay in furnishing such return of

income cannot reasonably be attributed to the assessee.

(b) Where during the course of search and seizure operation u/s 132 of the Income Tax Act, cash is seized which is not allowed to be utilized for

payment of advance tax installment or installments as they fall due after the seizure of cash and the assessee has not paid fully or partly advance tax

on the current income and the Chief Commissioner or the Director General is satisfied that the assessee is unable to pay the advance tax.

(c) Where any income chargeable to income -tax, under any head of income, other than Capital gains is received or accrued after due date of

payment of the first or subsequent instalments of advance tax which was neither anticipated nor was in the contemplation of the assessee, and the

advance tax on such income is paid in the remaining instalment or instalments, and the Chief Commissioner / Director General is satisfied on the facts

and circumstances of the case that this is a fit case for reduction or waiver of the interest chargeable under section 234C of the Income-tax Act

(d) Where any income which was not chargeable to income-tax in the case of an assessee on the basis of any order passed by the High Court within

whose jurisdiction he is assessable to income-tax, and as a result, he did not pay income- tax in relation to such income in any previous year, and

subsequently, in consequence of any retrospective amendment of law or the case may be the decision of the Supreme Court of India in his own case,

which event has taken place after the end of any such previous year, in any assessment or reassessment proceedings the advance tax paid by the

assessee during the financial year immediately preceding the relevant assessment year is found to be less than the amount of advance tax payable on

his current income, the assessee is chargeable to interest u/s 234B or section 234C and the Chief Commissioner / Director General is satisfied that this

is a fit case for reduction or waiver of such interest.

(d) Where a return of income could not be filed by the assessee due to unavoidable circumstances and such return of income is filed voluntarily by the

assessee for his legal heirs without detection by the Assessing Officer. 3. The Chief Commissioner / Director General of Income Tax may order the

waiver or reduction of interest under sections 234A, 234B and 234C under this order with reference to the assessment year 1989-90 or any

subsequent assessment year but shall not so reduce or waive penal interest in those cases where waiver or reduction of such interest has been

rejected in the past on the merits of the case. If any petition in the past has been rejected because the Board had not issued this direction earlier, these

may be reconsidered and decided in accordance with this order.â??

10) The notification shows that the interest under Sections 234A & 234B of the Act can be waived only when two criteria incorporated above are

fulfilled. Considering the facts of the case, this Court hold that the assessee did not fall in any of the five classes as per the first criteria. In so far as

the second criteria is concerned, the assessee has not paid entire tax on the income assessed. A show cause was issued to him as to why the petition

for waiver of interest be not rejected on account of failure to satisfy the above

conditions. Then, the case was fixed for 17.08.2004, on which date, on the request of petitioner, the case was adjourned to 23.12.2005, but no compliance was made by him. Hearing was then fixed on 28.02.2006. The wife of petitioner filed a letter stating therein that her husband was in judicial detention in Delhi, hence, another date for hearing be given. Another date for hearing was fixed for 20.03.2006, but compliance was not made. Thus, the assessee had failed to meet the said criteria and hence the interest under Sections 234A & 234B of the Act could not be waived.

11) The interest can be waived on meeting out following conditions as per sub-Section (2A) of Section 220 of the Act:

(i) Payment of such amount has caused or would cause genuine hardship to the assessee.

(ii) Default in the payment of amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and

(iii) The assessee has cooperated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

12) The aforesaid three conditions are required to be satisfied for waiving of interest. The petitioner has specifically mentioned in his waiver petition

that he was not entirely responsible for delay in assessment and he was facing financial crisis, hence, tax was not paid in time. This Court is of the

considered view that the assessee might be facing financial crises, but he had never cooperated in any enquiry relating to the assessment or any

proceedings for the recovery of outstanding dues. The petitioner could not establish from any of the documents filed by him that the payment of due

amount would cause genuine hardship (i.e. genuine difficulty) to him and the default in payment of tax was due to the circumstances beyond his

control. The petitioner could not show any circumstance which was beyond his control.

13) Perusal of the documents brought on record reveals that since the income tax return was not filed by the petitioner within the stipulated date,

hence, a notice dated 05.05.1998 under Section 142(1) of the Act was issued to him, which was duly served upon him on 08.05.1998. When the

petitioner did not pay any heed to the said notice, another notice dated 16.10.1998 under Section 142(1) of the Act was issued to him, which was duly

served upon him on 21.10.1998. But, the return was not filed by the petitioner in response to these notices. The authority levied penalty on the petitioner under Section 271(1)(b) for non-compliance of notice issued under Section 142(1). The return was filed on 31.03.1999, after the due date of filing of return, declaring his income at Rs.12,18,900/-. After filing return on 31.03.1999, notice under Section 143(2) of the Act was issued on 28.09.1999, which was served upon him on 28.09.1999. All these notices were not complied with by the petitioner. Perusal of the impugned order itself reveals that the petitioner did not make compliance inspite of several opportunities being granted to him. Even though, several notices were issued to him, he did not give response, resulting which, the assessment was made ex-parte on 24.02.2000. Even arrest warrant was issued against him, but the police reported that he was not traceable and ultimately the coercive measures were taken to realize the tax.

14) In view of above, three conditions as provided under sub-Section (2A) of Section 220 of the Act are not satisfied in this matter for waiving of interest. The impugned order of the Chief Commissioner of Income Tax does not suffer from any illegality.

15) Honâ??ble Supreme Court in B. M. Malani vs. Commissioner of Income Tax, (2008) 10 SCC 617 held as under :

â??5. Section 220(2A) of the Act contains a non-obstante clause. It confers a jurisdiction upon the Chief Commissioner or Commissioner to reduce or waive the amount of interest paid or payable by an assessee thereunder, if he is satisfied that: (i) Payment of such amount has caused or would cause genuine hardship to the assessee; (ii) Default in the payment of amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and (iii) Assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

8. The term â??genuineâ?? as per the New Collins Concise English Dictionary is defined as under:

â??Genuineâ?? means not fake or counterfeit, real, not pretending (not bogus or merely a ruse)â??

For interpretation of the aforementioned provision, the principle of purposive construction should be resorted to. Levy of interest although is statutory

in nature, inter alia for re-compensating the revenue from loss suffered by non-deposit of tax by the assessee within the time specified therefor. The said principle should also be applied for the purpose of determining as to whether any hardship had been caused or not. A genuine hardship would, inter alia, mean a genuine difficulty. That per se would not lead to a conclusion that a person having large assets would never be in difficulty as he can sell those assets and pay the amount of interest levied. The ingredients of genuine hardship must be determined keeping in view the dictionary meaning thereof and the legal conspectus attending thereto. For the said purpose, another well-known principle, namely, a person cannot take advantage of his own wrong, may also have to be borne in mind. The said principle, it is conceded, has not been applied by the courts below in this case, but we may take note of a few precedents operating in the field to highlight the aforementioned proposition of law. [See *Priyanka Overseas Pvt. Ltd. & Anr. v. Union of India & ors.* 1991 Suppl. (1) SCC 102, para 39, *Union of India & ors. v. Major General Madan Lal Yadav (Retd.)* (1996) 4 SCC 127 at 142, paras 28 and 29, *Ashok Kapil v. Sana Ullah (dead) & ors.* (1996) 6 SCC 342 at 345, para 7, *Sushil Kumar v. Rakesh Kumar* (2003) 8 SCC 673 at 692, para 65, first sentence, *Kusheshwar Prasad Singh v. State of Bihar & ors.* (2007) 11 scc 447, paras 13, 14 and 16). Thus, the said principle, in our opinion, should be applied even in a case of this nature. A statutory authority despite receipt of such a request could have kept mum. It should have taken some action. It should have responded to the prayer of the appellant. However, another principle should also be borne in mind, namely, that a statutory authority must act within the four corners of the statute. Indisputably, the Commissioner has the discretion not to accede to the request of the assessee, but that discretion must be judiciously exercised. He has to arrive at a satisfaction that the three conditions laid down therein have been fulfilled before passing an order waiving interest. Compulsion to pay any unjust dues per se would cause hardship. But a question, however, would further arise as to whether the default in payment of the amount was due to circumstances beyond the control of the assessee. Unfortunately, this aspect of the matter has not been considered by the learned Commissioner and the High Court in its proper perspective. The Department had taken the plea that unless the amount of tax due was

ascertainable, the securities could not have been sold and the demand draft could not have been encashed. The same logic would apply to the case of the assessee in regard to levy of interest also. It is one thing to say that the levy of interest on the ground of non-payment of correct amount of tax by itself can be a ground for non-acceding to the request of the assessee as the levy is a statutory one but it is another thing to say that the said factor shall not be taken into consideration at all for the purpose of exercise of the discretionary jurisdiction on the part of the Commissioner. Appellant volunteered that the securities be sold. Why the said request of the appellant could not be acceded to has not been explained. It was a voluntary act on the part of the appellant.

16) In these circumstances, this Court holds that petitioner-assessee is not entitled to waiver of the interest and he was afforded due opportunity of hearing. Therefore, this Court is not inclined to invoke its extraordinary discretionary jurisdiction under Article 226 of the Constitution of India. The writ petition is devoid of merit and is hereby dismissed.