
(1990) 06 BOM CK 0067
In the Bombay High Court
Case No : Writ Petition No. 2874 of 1986

Suresh B. Jain

APPELLANT

Vs

P.K.P. Nair and others

RESPONDENT

Date of Decision : 28-06-1990

Acts Referred:

Income Tax Act, 1961 — Section 244, 244(1A), 245

Citation : (1992) 194 ITR 148

Hon'ble Judges : H.H. Kantharia, J

Bench : Single Bench

Advocate : Jehangir Mistry, for the Appellant; Dr. V. Balasubramaniam, for the Respondent

Judgement

H.H. Kantharia, J.—The petitioner had filed his return for the assessment year 1982-83 and the Inspecting Assistant Commissioner passed an assessment order assessing him on income to the extent of Rs. 60,60,234 on which the petitioner paid an amount of Rs. 4,29,000 by way of Income Tax. He then preferred an appeal against the assessment order before the Commissioner of Income Tax (Appeals). The said appeal was allowed and, therefore, the Income Tax Officer revised the assessable income of the petitioner for the assessment year 1982-83 and the revised assessment order was passed computing the total income of the assessee at Rs. 21,948 on which the Income Tax liability was only Rs. 2,294. Accordingly, the petitioner was entitled to a refund of Rs. 4,26,706. It appears that, while forwarding the revised assessment order for the assessment year 1982-83, the Income Tax Officer also simultaneously issued a notice for finalisation of the proceedings for the assessment for the year 1983-84. In the meanwhile, the petitioner, by a letter dated May 31, 1985, addressed to the Commissioner of Income Tax, requested that refund of Rs. 4,26,706 be granted to him forthwith and the tendency of the assessment for the year 1983-84 should not delay handing over to him of the said amount. However, the refund was not given to him and, therefore, he filed Writ Petition No. 1318 of 1985 Suresh B. Jain v. A. N. Shaikh [1987] 165 ITR 151 on July 8, 1985, invoking the

writ jurisdiction of this court under article 226 of the Constitution. The said writ petition was heard by Pendse J. who, by his judgment and order dated March 7, 1986, allowed it the directed the respondents to refund the amount of Rs. 4,26,090 to the petitioner within two weeks. Feeling aggrieved by the judgment of Pendse J., the respondents preferred an appeal bearing No. 252 of 1986 A.N. Shaikh and others Vs. Suresh B. Jain, , which was heard by a Division Bench March 27, 1986, summarily dismissed the same. Ultimately, the respondents refunded to the petitioner the said excess Income Tax amount of Rs. 4,26,090.

2. It also appears that action was taken against the petitioner u/s 132 of the Income Tax Act, 1961, (hereinafter referred to as "the said Act"), on September 13, 1982, and all his business as well as residential premises were raided as a result of which thirty drafts which were deposited by the petitioner with the Syndicate Bank, New Marine Lines Branch, Bombay, amounting to Rs. 1,24,558 were seized and also a prohibitory order u/s 132(3) of the said Act in respect of the bank account of the petitioner with the Syndicate Bank was passed whereby a balance of Rs. 22,507 remaining therein at that time was also injunctioned from being withdrawn by the petitioner. The petitioner, thereafter, deposited drafts amounting to Rs. 4,06,568.52 in the said Syndicate Bank whereby the balance of the said bank account was increased to Rs. 4,29,075.09. Subsequently, an order u/s 132(5) of the said Act was passed against the petitioner whereby the concerned Income Tax Officer estimated the total income of the petitioner for the assessment year 1983-84 u/s 132 at Rs. 6,26,133. The said Officer also imposed a penalty u/s 271(1) of the said Act to the extent of Rs. 3,49,886 and thus the petitioner was assessed to pay Income Tax to the tune of Rs. 7,43,579. The petitioner filed an application against the order of the Income Tax Officer before the Commissioner of Income Tax (Investigation) who, by his order dated November 7, 1983, upheld the order passed by the Income Tax Officer but modified it to the extent that credits appearing in the petitioners's bank account with the Syndicate Bank, after the prohibitory order u/s 132(2) was served on the petitioner, should not be retained.

3. As stated earlier, the petitioner was assessed for the year 1982-83 on an income of Rs. 21,948 for which he was required to pay Income Tax of Rs. 2,294. Thereafter, he demanded interest on Rs. 4,26,706 to the extent of Rs. 1,95,295 which had accrued in his favour u/s 244(1A) of the said Act. However, instead of paying to him the said amount of Rs. 1,95,295 being interest on the refund of Rs. 4,26,706, the 16th Income Tax Officer, C-IV Ward, Bombay, wrote a letter on July 21, 1986 (exhibit "K" to the petition), to the effect that it was seen from the records that an amount of Rs. 7,47,755 was outstanding against him for the assessment year 1983-84 and, therefore, it was proposed to adjust it against the interest due to him for the assessment year 1982-83 against this demand. It was further clarified that the said letter be treated as an intimation u/s 245.

4. Feeling aggrieved, the petitioner again invoked the writ jurisdiction of this court under article 226 of the Constitution by filling this writ petition and prayed

that the respondents be directed to forthwith refund and pay to him a sum of Rs. 1,95,295 on account of interest and they be refrained from adjusting and setting off the said amount against his outstanding tax liability for the assessment year 1983-84. A further prayer was made that a writ in the nature of mandamus be issued against the respondents ordering and directing them to forthwith deposit with the petitioner's bankers, viz. Syndicate Bank, New marine Lines, Bombay, thirty drafts duly revalidated or alternatively to pay to the petitioner a sum of Rs. 1,24,558 being the value of the said drafts.

5. In support of the petition, Mr. Mistry made three submissions for my consideration. Thus, learned counsel urged that the word "refund" in section 245 of the Income Tax Act will not apply to "interest" and as such the amount of interest cannot be adjusted towards the tax liability u/s 245. Mr. Mistry further submitted that, assuming for the sake of argument that the amount of interest can be adjusted u/s 245, even then it cannot be said that the Income Tax Department complies with the provisions of section 245 inasmuch as no prior intimation was given to the petitioner for doing so and they initiated the action almost after one and a half years. Mr. Mistry then argued that there was no reason for the respondents to detain thirty drafts seized from the bank account of the petitioner for such a long time and that the said drafts should be revalidated and forthwith returned to the petitioner. Dr. Balasubramaniam, appearing on behalf of the respondents, controverted these submissions of Mr. Mistry and urged that the payment of "interest" would amount to "refund" and the same could be adjusted u/s 245 and that the letter dated July 21, 1986 (exhibit-K to the petition), addressed to the petitioner was a prior intimation before the said interest amount was sought to be adjusted. Learned counsel further submitted that the thirty drafts recovered and seized from the petitioner were encased (except to the extent of Rs. 2,500) and the amounts so realised were appropriated towards the Income Tax liability of the petitioner and thus nothing was due to the petitioner in the nature of revalidated drafts or an amount equivalent to the value of the said drafts.

(June 28, 1990). Now, it is not in dispute that the petitioner was entitled to a sum of Rs. 1,95,295 on account of interest u/s 244(1A) of the said Act on the sum of Rs. 4,26,090 refunded to him. The crucial point is whether the said amount of interest could be refused to the petitioner and be set off and adjusted against his future tax liability u/s 245. In order to understand this controversy, it would be appropriate to set out here section 245 which reads as under.

"245. Where under any of the provisions of this Act, a refund is found to be due to any person, the Assessing Officer, Deputy Commissioner (Appeals), Commissioner (Appeals) or Chief Commissioner or commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section."

6. The argument of Mr. Mistry is that a careful reading of this provision of law shows that the set-off and adjustment towards the remaining tax liability of an assessee could be made only against the amount of "refund" due to an assessee and any amount of "interest" payable to such an assessee which does not form part of "refund" cannot be adjusted against the tax liability. In order to substantiate his argument, Mr. Mistry submitted that the word "refund" is not defined in the Income Tax Act but its meaning as found in the Oxford English Dictionary, Second Edition, Vol. XIII, at pages 493-494 are :

- (1) to pour back, pour in or out again
- (2) to give back, restore
- (3) to put back into something antecedent
- (4) to make return or restitution of (a sum received or taken); to hand back, repay, restore
- (5) to reimburse, repay
- (6) to make repayment."

7. Mr. Mistry also referred to Webster's Third New International Dictionary, at page 1910, in which the meaning of the word "refund" is given as " (1) to pour back, given or put back, (2) to return (money) in restitution, repayment or balancing of accounts" and submitted that, for the purpose of refunding, one has to be funded first and so long as the amount of interest is concerned, the petitioner had not funded the Department of Income Tax with anything and, therefore, the payment of interest cannot be equated with the payment of refund. Mr. Mistry also pointed out sections 237, 240, 243 and 244(1A) of the Income Tax Act and canvassed that "refund" is distinctly understood in the Income Tax law and it could not be the same as "interest". The argument of learned counsel is that "refund" they cannot be mixed up while interpreting section 245. Mr. Mistry also relied upon a ruling of the Madras High Court in *M. A. Khader and Co. v. Deputy Commercial Tax Officer* [1970] 25 STC 104 in support of his argument and drew my attention to the observations made by their Lordships of the Madras High Court that, in common law, only a person who had paid tax can ask for refund, if he is statutorily entitled to it and it would be strange if the dealer who paid the Central sales tax is permitted to obtain a refund of the local tax which he did not pay. The argument of Mr. Mistry appears to be attractive but I am unable to persuade myself to agree with him for the simple reason that, while interpreting the provisions of section 245 of the Income Tax Act, we cannot give such a restricted meaning to the word "refund". It is important to bear in mind in this connection that the expression "refund" is a commonly understood generic term which refers to the payment by the Income Tax Department of any amount due to an assessee and it does not mean only the return of an excess amount "paid" to the Department by an assessee. The Income Tax Act envisages several situations where amounts are to be paid to the

Department or by the Department which include Income Tax, penalty, interest, etc., for any assessment year, arrears in respect of these items for earlier years, amounts under any head wrongly paid or paid or in excess, amounts pertaining to one person considered in another's hands and, while computing the tax liability or penalty for any year, separate notices are issued for different items but the demand or refund is made of the net figure which cannot, therefore, be identified as tax, penalty, etc., as such. The Income Tax Act is wholesome statute aimed at levy and collection of the net tax liability of an assessee in which different operations are involved such as payment or receipt of interest, levy of penalty, waiver of interest or penalty which should not be treated as separate and independent activity but only as a part of an integrated scheme to levy and collect Income Tax I, therefore, find a lot of substance in the argument of Dr. Balasubramaniam that interest paid on refunds should not be treated in isolation and that the concept of the word "refund" does not admit of a limited meaning but must be held to mean any amount payable by the Department to an assessee whether as and by way of "refund" or "interest". After all, the amount of interest payable to an assessee u/s 244(1A) is also an amount that is refunded by the Department to an assessee and if the same is not permitted to be adjusted u/s 245, almost absurd, if not ridiculous, results may ensue inasmuch as the Income Tax Department would be required to pay certain sum of money to an assessee on account of interest with one hand and take back the same amount as tax liability with the other. This may not only be inconvenient and cumbersome procedure for the Income Tax Department but may also put an assessee to unnecessary inconvenience and harassment in that one has to take the amount of interest with one hand and pay back the same amount to the Income Tax Department as tax liability with the other. Therefore, if a restricted and technical meaning is given to the word "refund" while implementing the provisions of section 245, no useful purpose would be served either of the Income Tax Department or of an assessee. There is, therefore, nothing wrong if interest payable to an assessee u/s 244(1A) of the said Act is set off and adjusted against the tax liability of an assessee u/s 245 as if the said amount was a refund due to an assessee. Thus, I find no substance in the argument of Mr. Mistry that "refund" and "interest" in the Income Tax Act are two different things.

8. The second argument of Mr. Mistry is that, even if the provisions of section 245 apply and the interest amount payable to the petitioner can be adjusted against the tax liability of the petitioner, it cannot be said, in the facts and circumstances of this case, that the petitioner was given due intimation as is obligatory on the part of the Income Tax Department before such action was taken. In order to substantiate his argument Mr. Mistry urged that the Commissioner's order with regard to the correct assessment was dated March 5, 1985, and the right in favour of the petitioner for refund arose from the day of the said order and, therefore, the petitioner was entitled to the amount of interest on the refund from that day. The submission of learned counsel is that

Circular No. 209 dated January 11, 1977 (see C. Vs. MATHUKUTTY v. COMMISSIONER OF Income Tax, KERALA.,), issued by the Central Board of Direct Taxes which is a circular binding on the respondents envisaged that, in view of the fact that in cases falling for consideration u/s 244(1A), interest will have to be paid by the Central Government after one month itself from the date of the appellate or other order, it is of paramount importance to ensure that the appellate, revisionary or other orders are received in time and give effect to with extraordinary promptness ensuring that in any case they are given effect to within a month of the date of the order. Mr. Mistry, accordingly, submitted that, from March 5, 1985, the petitioner should have been paid interest within a month, i.e., on or before April 5, 1985, but exhibit-K to the petition which is the impugned letter dated July 21, 1986, shows that the Income Tax Department was claiming it to be an intimation u/s 245 after fifteen months which is not permissible either in law or under the circular issued by the Central Board of Direct Taxes. It is no doubt true that the amount of interest was payable to the petitioner on or before April 5, 1985, whereas the impugned letter (exhibit-K to the petitioner) was addressed to the petitioner only on July 21, 1986, but that would be only a technical lapse on the part of the Income Tax Department. After all, what is required u/s 245 is prior intimation to an assessee of the proposed action on the part of the Department that they will set off and adjust a certain sum of money payable to an assessee against the sum, if any, remaining payable by him to the Income Tax Department. The letter dated July, 21, 1986, makes it amply clear that the record of the Department showed that tax liability of Rs. 7,47,755 was outstanding against the petitioner for the assessment year 1983-84 and, therefore, it was proposed to adjust the amount of interest due to him for the assessment year 1982-83 against the said demand of tax liability for the assessment year 1983-84 and it was further made clear that the said letter was to be treated as an intimation u/s 245. This action on the part of the Department was thus a previous intimation of the proposed action for the adjustment and it was not a simultaneous intimation. I find no substance in the argument of Mr. Mistry that, on March 5, 1985, there was not even an assessment order for the year 1983-84 as the order in respect of the assessment for the said year was passed only on June 28, 1985, for which the set-off was claimed. Mr. Mistry also submitted that there is nothing on the record to show as to when the Income Tax Department quantified the amount of interest and, without such quantification, the Department could not have taken steps to adjust the said amount, which argument is also meritless. I find no substance in these arguments of Mr. Mistry because though the Department had not quantified the amount of interest, after a certain query, the Department did not agree to the payment of such amount of interest came, they noticed from the record that the petitioner was to pay a large sum of money to the tune of over rupees seven lakhs to the Department towards Income Tax for the assessment year 1983-84 when they thought it fit to write the letter dated July 21, 1986 (exhibit-K to the petition), to the petitioner. Mr. Mistry also canvassed that the tax liability of the petitioner for the year 1983-84 was under challenge and the petitioner had asked

for stay of that assessment order which could not have been refused in view of Circular No. 530 dated March 6, 1989 (see [1989] 176 ITR 240), issued by the Central Board of Direct Taxes and a Division Bench ruling of this court in TATA IRON and STEEL CO. LTD. Vs. N. C. UPADHYAYA AND ANOTHER. TATA IRON and STEEL CO. LTD. v. KUM. D. V. BAPAT and ANOTHER., . The question here is not whether stay was or was not granted but in view of the correct and proper interpretation of the provisions of section 245, whether an amount of interest can be set off and adjusted against the future tax liability of an assessee as it could be done with regard to an amount of refund.

9. The next question relates to the refund of thirty drafts or the value thereof to the extent of Rs. 1,24,558 to the petitioner. As stated earlier, these drafts were seized and taken charge of from the possession of the bankers of the petitioner u/s 132 of the Income Tax Act. The said drafts were could be appropriated towards the existing tax liability of the petitioner u/s 132 read with section 132B of the said Act. Initially, I was impressed by the argument of Mr. Mistry that, for no rhyme or reason, the Income Tax Department withheld the drafts of the petitioner and did not return the same to him with the result that they became invalidated and, therefore, the respondents should be directed to get the said drafts revalidated or, in the alternative, pay to the petitioner a sum of Rs. 1,24,558 being the value of the drafts. However, at a later stage, a return was filed on behalf of the respondents by Syed Abdul Hai, 1st Income Tax Officer, Ward 25, Bombay, who made it clear in his affidavit Rs. 1,22,058 (Rs. 1,24,558 minus Rs. 2,500) were revalidated and encased, 13 drafts prior to November 25, 1986, and 10 drafts after November 25, 1986 and a sum of Rs. 74,200 was credited to the petitioner's bank account and other amounts were adjusted as under :

Against assessment year "(i) Challan dated 1-2-89 Rs. 7,686 1983-84. (ii) Challan dated 1-2-89 Rs. 1,977 1981-82. (iii) Challan dated 5-12-89 Rs. 16,556 1983-84 (iv) Challan dated 4-10-85 Rs. 38,000 1983-84."

10. The Income Tax Officer also made it clear that the amount in the bank account frozen at the time of the raid was Rs. 4,01,575 and a sum of Rs. 4,29,000 was collected from the bank after the drafts were credited and thereafter a sum of Rs. 4,26,090 was refunded to the petitioner after deducting the tax liability of Rs. 2,190 for the assessment year 1982-83. This goes to show that the thirty drafts which were seized and taken charge of from the procession of the bankers of the petitioners were encased and the amounts released therefrom were appropriated towards the outstanding Income Tax liability of the petitioner except one draft for Rs. 2,500 which, I am told, now has been returned to the petitioner. However, it is not use returning the draft for Rs. 2,500 to the petitioner at this point of time because the same became invalidated. The invalidation of the draft to the extent of Rs. 2,500 was purely on account of the lapse on the part of the officers of the Income Tax Department and, therefore, the respondents are liable to refund a sum of Rs. 2,500 towards the invalidated

draft to the petitioner.

11. In this view of the matter, I find no substance in this writ petition except that a direction be issued to the respondents herein to refund an amount of Rs. 2,500 to the petitioner. Except for this direction, the writ petition fails and the same stands rejected. Rule is, accordingly, discharged but with no order as to costs.

12. The respondents are directed to pay Rs. 2,500 to the petitioner within two weeks from today.