
(2004) 03 BOM CK 0002

In the Bombay High Court

Case No : Writ Petition No. 460 of 2004 16 March 2004

Umesh S. Bangara

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-03-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g)
Income Tax Act, 1961 — Section 234A, 234B, 234C

Citation : (2004) 137 TAXMAN 231

Hon'ble Judges : R.M. Lodha, J;J.P. Devadhar, J

Bench : Full Bench

Advocate : B.V. Jhaveri and A.R. Singh for the Assessee R.V. Desai, P.S. Jetley and R. Asokan for the Revenue, for the Appellant;

Judgement

R.M. Lodha, J.

Heard Mr. Jhaveri, the learned counsel for the petitioner and perused the petition and the documents annexed thereto.

2. The petitioner challenges the constitutional validity of the provisions of sections 234A, 234B and 234C of the Income Tax Act as ultra vires the Constitution. The petitioner also challenges the legality and correctness of the order of the Chief Commissioner dated 23-9-2003.

3. The aforesaid challenge arises in the facts and circumstances that we briefly narrate hereinafter.

4. The petitioner is proprietor of M/s. Unitech Marketing Services and has been providing services to various foreign principals in the field of petrochemical and textile projects. For the assessment years 1993-94 to 1996-97 the petitioner filed returns of income in time. He claimed deductions u/s 80-O of the Income Tax on the basis of gross foreign earnings. The said assessment for all the four assessment years was accepted by the concerned assessing officer u/s 143(1) and the intimations were issued to the petitioners. On 16-11-1999 the assessing

officer served upon the petitioner notices u/s 148 of the Income Tax Act for reopening of his assessment for the assessment years 1993-94 to 1996-97. The petitioner filed his return for the aforesaid four assessment years on 27-4-2000 declaring income. The assessing officer did not accept the case of the petitioner and for the assessment years 1993-94 to 1996-97 held and determined the income after allowing the deductions u/s 80-0 of the Income Tax Act on the net foreign earnings received by the petitioner in India. As per the assessment u/s 143(3) read with section 148, certain amount was held payable by the petitioner during all the four assessment years and the assessing officer also charged interest u/s 234B of the Income Tax Act. The petitioner preferred rectification applications u/s 154 of the Act for the assessment years 1993-94 to 1996-97 for correct working of the interest u/s 234B. The petitioner also filed petition on 20-5-2002 to the Chief Commissioner, Mumbai u/s 119(2)(a) and (b) for waiver of interest u/s 234B of the Income Tax Act, 1961. After hearing the petitioner, the petition u/s 119(2)(a) and (b) was rejected by the Chief Commissioner vide his order dated 23-9-2003. As already noted above, it is this order which is under challenge in this writ petition and the petitioner also challenges the constitutional validity of sections 234A, 234B and 234C of the Income Tax Act, 1961.

5. The learned counsel for the petitioner assailing the constitutional validity of sections 234A, 234B and 234C of the Income Tax Act submitted that the said provisions violated the fundamental rights of the petitioners under Articles 14 and 19(1)(g) of the Constitution of India. He contended that providing unfettered power to the assessing authority and that automatic imposition of interest without affording any opportunity of hearing is unconstitutional. He also submitted that few writ petitions wherein the constitutional validity of sections 234A, 234B and 234C are challenged have been admitted.

6. Since we heard the learned counsel for petitioner at quite some length, we deemed it fit to dispose of the matter finally instead of issuing the Rule, increase the docket and then dispose of the matter along with some matters wherein rule is said to have been issued.

7. In *Union Home Products v. Union of India* (1995) 215 ITR 758 (Karn), the learned Single Judge of the Karnataka High Court was seized with the question whether sections 234A, 234B and 234C of the Income Tax Act, 1961 were unconstitutional. The learned Single Judge of the Karnataka High Court held that on the face of the language employed in section 234A, 234B and 234C and the objects behind the introduction the said provisions by means of Direct Tax Laws Amendment Bill, 1987 was to remove uncertainty in the matter of assessments by cutting down the areas of subjective decisions of the tax authority with a view to ensure uniform treatment of persons similarly placed and to reduce litigation. The learned Judge held that sections 234A, 234B and 234C do not envisage the grant of any hearing; the levy was automatic the moment it was proved that the assessee committed a default within the comprehension of the provisions in

question. It was also held that section 119(2) confers the Central Board of Direct Taxes (for short, "the Board") powers of relaxation of any of the provisions mentioned in the sub-section including sub-sections 234A, 234B and 234C of the Act. The learned Judge, accordingly, did not find any constitutional infirmity in the provisions of sections 234A, 234B and 234C.

8. The Karnataka High Court in Union Home Products" case (supra) held thus :

"...The question whether the provision making interest payable on the happening of any event is a provision which is compensatory in character will have to be answered in the context of the language and the purpose behind the provision and not by reference to other provisions of similar or analogous nature. Viewed thus, it is not possible to hold that the provisions of sections 234A, 234B and 234C are provisions of a penal nature simply because, in actual application of these provisions there may be situations where an assessee may render himself liable to payment of interest under each one of these provisions simultaneously for the same period nor can the compensatory nature of the provisions be deemed to have been lost simply because in a given situation the provisions may, on account of their simultaneous application to an assessee raise the liability to pay interest for the overlapping period to a rate higher than two per cent per month. So long as the basic character of the levy remains compensatory the rate of interest which levied either by the provision itself or on account of its dual effect in a given situation will be wholly immaterial. I have, therefore, no hesitation in repelling the argument advanced by learned counsel for the petitioners that the levy envisaged by sections 234A, 234B and 234C is penal in character by reason only of the said provisions in certain situations applying for periods which are overlapping." (p. 771)

9. It was also held by the Karnataka High Court,

"The argument on its face value appears attractive and enticing. A closer examination, however, betrays its merits, precisely for two reasons. In the first place, the very purpose behind the introduction of sections 234A, 234B and 234C is to take away from the authorities concerned the discretion of reducing or waiving the levy of interest which was earlier exercisable by them. In other words, the impugned provisions do not envisage the grant of any hearing or the grant of any relief to the assessee concerned in so far as the levy of interest is concerned. The levy is automatic the moment it is proved that the assessee has committed a default within the comprehension of any one of the provisions in question. That being so it is difficult to accept the argument that the authorities must grant such a hearing and exercise the power to grant relief, the legislative intent to the contrary notwithstanding, The principles of natural justice upon which the petitioners rely do not supplant the law, they simply supplement it. These principles have no application where a statute either by express words or by necessary implication excludes the grant of a hearing to the assessee concerned. The provisions of section 234A, 234B and 234C are in my opinion incapable of being interpreted to mean that the assessee concerned has a right

of being heard against the levy which is otherwise automatic in nature (p. 776)

10. The Division Bench of Punjab & Haryana High Court in *Sant Lal v. Union of India* also considered the constitutionality of sections 234A, 234B and 234C of the Income Tax Act, 1961. The Division Bench agreed with the view of Karnataka High Court and held the said provisions intra vires. The Division Bench considered the submission that even in cases of extreme hardship no discretion has been conferred upon the assessing authority to waive or reduce the interest and, therefore, the provisions were unreasonable. Dealing with this aspect, the Division Bench of Punjab & Haryana High Court held thus:

"We shall now deal with the argument of learned counsel for the petitioners that even in cases of extreme hardship no discretion have been conferred upon the assessing authority to waive or reduce interest and, therefore, the provisions impugned are unreasonable. It is well-settled that the Legislature is presumed to be aware of the needs of the time and the measures to be adopted for collection of revenue and the courts cannot interfere with the legislative instrument merely because there does not exist a provision in the statute giving some discretion to the authorities constituted under the Act. It is well-settled that mere hardship to a particular party cannot be a ground for holding that the statute is unreasonable. Under the taxing statutes, greater latitude vests with the Legislature. The choice of the Legislatures in matters pertaining to taxes as well as the mode and manner of recovery of taxes cannot ordinarily be interfered with by the Court. In *R.K. Garg and Others Vs. Union of India (UOI) and Others*, a Constitution Bench of the Supreme Court examined the degree of discretion vesting in the Legislature in taxing statutes and held (at page 255):

"Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes J., that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in the case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey v. Doud* (1957) 354 US 457, where Frankfurter J., said in his inimitable style:

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judgments have been overruled by

events, self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The court must always remember that legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions are singular and contingent, that laws are to be measured by abstract symmetry; that exact wisdom and nice adoption of remedy are not always possible and that judgment is largely a prophecy based on meagre and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and, therefore, it cannot provide for all possible situations of anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone, it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agricultural v. Central Reig Refining Co.* (1950) 94 L.Ed. 381 (SC), be converted into Tribunals for relief from such a crudities and inequities. There may even be possibilities of abuse, abut that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any Legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation, which may be made by those subject to its provisions, and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The court must, therefore, adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse come to light, the Legislature can always step in and enact suitable amendatory legislation. That is the absence of the pragmatic approach which must guide and inspire the Legislature in dealing with complex economic issues.

The above passage provides a complete answer to the argument of the petitioners based on the possible hardship in certain situations and authoritatively sets at rest the challenge to the constitutionality of provisions on that ground."

11. What seems to us is it that the provisions contained in sections 234A, 234B and 234C are surely not penal provisions but the said provisions are compensatory in nature for breach of civil obligation. To obviate the arbitrariness and eliminate the subjective decisions of the tax authority, sections 234A, 234B and 234C seem to have been introduced. As a matter of fact by the said provisions uniform treatment to similarly situated persons is sought to be achieved and, therefore, there is no question of the said provisions being violative of article 14 can be said to arise. Nor the said provisions seem to be unreasonable. We also do not find any merit in the submission of the learned counsel that the said provisions infringe the petitioner's fundamental right under

article 19(1)(g). The learned counsel could not show how the said provisions restricts the petitioner's right to carry on business. Besides, in cases of extreme hardship, Board can exercise power.

12. Section 119(2) of the Income Tax Act confers power upon the Board to grant relaxation of any of the provisions mentioned in sub-section including sections 234A, 234B and 234C of the Act.

The Board can grant relaxation in respect of any class of income or class of cases by a general or special order. On the face of section 119(2) of the Income Tax Act, can it be said that even in the case of extreme hardship, the assessee is left with no remedy to seek waiver or reduction of interest. The answer has to be in the negative. The mechanism has been provided by the legislature for dealing with the cases of hardship and the power has been conferred on the Board u/s 119(2) of the Income Tax Act to issue appropriate directions to relieve the hardship in suitable cases.

13. As a matter of fact, the board in exercise of its power u/s 119(2) issued notification on 23-5-1996 which reads thus:

"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 of Income Tax and Director General of Income Tax may reduce or waive interest charged u/s 234A or section 234B or section 234C of the Act in the classes of cases of 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 of Income Tax or the Director-General of Income Tax may also impose any other conditions deemed fit for the said reduction of waiver of interest.

2. The class of incomes or class of cases in which the reduction or waiver of interest u/s 234A or section 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 u/s 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 u/s 132 has taken place, within the time specified in this behalf and the Chief Commissioner or, as the case may be, 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 utilised for payment of advance tax instalment or instalments 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 accrues after the 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 or Director-General is satisfied on the facts and circumstances of the case that this is a fit case for reduction or waiver of interest chargeable u/s 234C of the Income Tax Act.

(d) Where any income which was not chargeable to Income Tax on the basis of any order passed in the case of an assessee 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, as the case may be, the decision of the Supreme Court 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 or Director-General is satisfied that this is a fit case for reduction or waiver of such interest.

(e) 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 or his legal heirs without detection by the assessing officer."

3. The Chief Commissioner/Director General may order the waiver of 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. Notification No. F. No. 400/234/95-IT(B), dated 23-5-1996."

The said notification was partially modified on 13-1-1997 which reads thus :

"Order F. No. 400/234/95-IT(B), dated 30-1-1997

The Board has issued an order vide F. No. 400/234/95-IT(B), dated 23-5-1996, indicating the class of income or class of cases in which reduction or waiver of

interest under sections 234A, 234B or 234C, as the case may be, could be considered by Chief Commissioner of Income Tax and Director General of Income Tax. The clause"(d)"of para 2 of the said order read as under:

"where any income which was not chargeable to Income Tax on the basis of any order passed in the case of an assessee 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 as the case may be, the decision of the Supreme Court, in his own case, which event has taken place after the end of any such previous year, in any assessment or re-assessment 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 or Director General is satisfied that this is a fit case for reduction of waiver of such interest."

2. In partial modification of this para of the order, the Central Board of Direct Taxes has decided that there shall be no condition that the decision of the High Court or the Supreme Court, as referred to therein, must be given in the assessee's own case. Also the condition that any retrospective amendment of law or the decision of the Supreme Court or the jurisdictional High Court must have been made after the end of the relevant year stands withdrawn.

3. If any petition in the past has been rejected because the Board had not issued this modification, the same may be reconsidered and decided in accordance with this modification read with the order dated 23-5-1996."

14. It was in the backdrop of these two notifications that the petitioner filed petition for waiver of interest before the Chief Commissioner. The whole case of the petitioner is that in the return of income for the assessment years 1993-94 to 1997-98, the petitioner claimed deductions on gross receipts based on the judgment of Madras High Court in Additional Commissioner of Income Tax, Madras-I Vs. Isthmian India Maritime Private Ltd., and few decisions of the Income Tax Appellate Tribunal; the petitioner could not have anticipated that he would ultimately be entitled to get deduction u/s 80-O on the net income and not on the gross receipts on foreign earnings. According to the petitioner, the difference occurred due to the change in the judicial opinion about the deduction u/s 80-O of the Act and, therefore, interest charged under sections 234B and 234C ought to have waived by the Chief Commissioner.

15. The Chief Commissioner of Income Tax has dealt with this aspect and held in para 5 of the impugned order thus:

"5. From the perusal of the assessee's submissions it is seen that the assessee's plea is that the 80-O deduction for the above assessment years was claimed on gross foreign earnings in view of the decisions of various ITAT, Calcutta Bench

and Bangalore Bench in the case of *M.N. Dastur & Co. Ltd. v. DCIT (supra)* and the returns filed by him for assessment years 1993-94 to 1996-97 were accepted u/s 143(1) of the Income Tax Act. It is also seen that the revised returns for these years were filed in response to notice u/s 148 subsequent to the completion of the set-aside assessment for assessment year 1997-98 wherein the assessing officer restricted the assessee's claim for deduction u/s 80-0 on the net foreign earnings in view of the ITAT, Special Bench, Mumbai's decision in the case of *Petroleum India International v. DCIT (supra)*. The Bombay High Court's decision in the case of *M/s. Asian Cable Corporation* relied on by the assessee is in respect of the deduction u/s 80-0 as per which the 80-0 deduction should be based on the net foreign earnings of the assessee. Now, the question arises as to whether this judgment of the Mumbai High Court is applicable to the assessee's facts of the case in view of clause (d) of Board's above-referred notification dated 23-5-1996 read with its order dated 30-1-1997. The contents of the aforesaid clause should be read in its entirety. It speaks of the income which has not been offered for taxation by the assessee in view of High Court judgment in his own case or in any other case but subsequently liable for taxation as a result of retrospective of amendment of law, or in view of Supreme Court judgment in his own case or in any other case. The assessee's case cannot be said to be covered by the above notification of the Board primarily because, it is not the case that the assessee had not offered any income for taxation as a result of any High Court Judgment and subsequently that High Court Judgment was reversed by any amendment to law or by the Supreme Court."

16. The Chief Commissioner of Income Tax thus held that the assessee's prayer for waiver of interest cannot be said to be covered by the Notification dated 23-5-1996, partially modified by the subsequent Notification dated 30-1-1997. The learned counsel for the petitioner was not in position to dispute that the judgment of the Madras High Court was no longer a good law in the light of the amendment in the law.

17. Incidentally we may notice that the petitioner neither pleaded nor proved any case of hardship for waiver of interest before the Chief Commissioner of Income Tax.

18. We, therefore, do not find any infirmity in the order of the Chief Commissioner of Income Tax warranting interference by this court in its extraordinary jurisdiction under article 226 of the Constitution of India. The writ petition is, therefore, dismissed with no order as to costs.