(1992) 11 KAR CK 0061

In the Karnataka High Court

Case No : Writ Petition No''s. 17068 to 17070 of 1988

Vikrant Tyres Ltd. APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 26-11-1992

Acts Referred:

Citation : (1993) 70 TAXMAN 423

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : K.S. Ramabhadran and K. Gajendra Rao, for the Appellant; H. Raghavendra Rao and M.V. Seshachala, for the Respondent

Final Decision : Dismissed

Judgement

K. Shivashankar Bhat, J.—An interesting question pertaining to levy of interest is involved in these writ petitions. The petitioner has

challenged the invocation of section 220(2) of the income tax Act, 1961 (''the Act'') under the following circumstances. The assessment years in

question are 1977-78, 1978-79 and 1980-81. In respect of each of these years, an assessment order was made and demand notices were issued.

The petitioner complied with the demands by paying the tax due. However, the petitioner challenged the order by filing the appeals. The appellate

authority allowed the appeals filed by the petitioner. Consequently, the taxes paid were refunded to the petitioner. The appeals filed by the revenue

before the Tribunal were also dismissed. However, this Court took a different view from that of the Tribunal and upheld the view taken by the

assessing authority resulting in upholding of all the assessment orders. Consequently, the assessee had to pay tax as assessed. After the High Court disposed of the references consequential orders were made by the Tribunal u/s 260. Thereafter, fresh demands were raised and the assessee paid

the taxes assessed. Not being satisfied with the success before the High Court, the revenue invoked section 220(2) and demanded interest in

respect of the assessed tax for the period commencing with the refund of the taxes consequent to the first appellate order till the taxes were finally

paid after the disposal of the references.

2. According to the petitioner, section 220(2) is not at all attracted to the fact situation. Mr. Ramabhadran, the learned counsel for the petitioner,

contended that the assessee is not at all in default in the present case and the original demands do not survive at all, because, the assessee paid the

taxes in compliance with those demands consequent to the order of the appellate authority and, therefore, this is not a case where the assessee-

petitioner failed to comply with the demands issued.

3. The learned counsel for the revenue, on the other hand, contended that, the order of assessment, the appellate orders and the order made on the

references resulting in the consequential order are only different steps in the same proceeding and the ultimate order relates back to the original

order itself and that, further, in view of section 3 of the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964

(''Validation Act'') original demand notices are revived by operation of law and due effect shall have to be given to such revival. According to Mr.

Ramabhadran, operation of the Validation Act shall have to be confined for the purpose of recovery of the assessed tax and the provisions of such

Act cannot be extended to treat an assessee as a defaulter and to pass an order to the effect that the assessee is liable to pay interest.

Section 220, so far as it relates to our purpose, reads thus:

220. When tax payable and when assessee deemed in default.--(1) Any amount, otherwise than by way of advance tax, specified as payable in a

notice of demand u/s 156 shall be paid within thirty days of the service of the notice at the place and to the person mentioned in the notice:

Provided that, where the (Assessing) Officer has any reason to believe that it will be detrimental to revenue if the full period of thirty days aforesaid

is allowed, he may, with the previous approval of the Deputy Commissioner, direct that the sum specified in the notice of demand shall be paid within such period being a period less than the period of thirty days aforesaid, as may be specified by him in the notice of demand.

(2) If the amount specified in any notice of demand u/s 156 is not paid within the period limited under sub-section (1), the assessee shall be liable

to pay simple interest at one-half percent for every month or part of a month comprised in the period commencing from the day immediately

following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid:

Provided that, where as a result of an order u/s 154, or section 155, or section 250, or section 254, or section 260, or section 262, or section 264

or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under this section had

been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded.

Sub-section (4) reads thus:

(4) If the amount is not paid within the time limited under sub-section (1) or extended under sub-section (3), as the case may be, at the place and

to the person mentioned in the said notice the assessee shall be deemed to be in default.

4. To complete the narration, we may also refer to section 221 of the Act which provides for the levy of penalty when an assessee is in default or is

deemed to be in default in making the payment of tax. This penalty is in addition to the amount of the arrears and the amount of interest payable u/s

220(2). The language of section 221 indicates that a discretionary power is given to the assessing authority to levy the penalty. Before proceeding

further, it is also necessary to refer to the Circular issued by the CBDT as per Circular No. 334, dated 3-4-1982. The Circular reads thus:

Subject: Levy of interest u/s 220(2) when the original assessment is set aside/ cancelled - Instructions regarding

1. Doubts have been raised as to the quantum of interest chargeable u/s 220(2) when the original assessment order passed by the income tax

Officer is-

(a) cancelled by him u/s 146;

(b) set aside/cancelled by an appellate/revisional authority and such appellate/ revisional order has become final; or

(c) set aside by one appellate authority but, on further appeal, the order setting aside the assessment is varied by the second appellate authority and

the demand gets finally determined.

2. These issues were comprehensively examined in consultation with the Ministry of Law and the Board has been advised:

1. where an assessment order is cancelled u/s 146 or cancelled/set aside by an appellate/revisional authority and the cancellation/setting aside

becomes final (i.e., it is not varied as a result of further appeals/revisions), no interest u/s 220(2) can be charged pursuant to the original demand

notice. The necessary corollary of this position will be that even when the assessment is refrained, interest can be charged only after the expiry of

35 days from the date of service of demand notice pursuant to such fresh assessment order.

2. where the assessment made originally by the income tax Officer is either varied or even set aside by one appellate authority but on further

appeal, the original order of the income tax Officer is restored either in part or wholly, the interest payable u/s 220(2) will be computed with

reference to the due date reckoned from the original demand notice and with reference to the tax finally determined. The fact that during an

intervening period, there was no tax payable by the assessee under any operative order would make no difference to this position."" [See -

Taxmann''s Direct Taxes Circulars, Vol. 2 1991 edn., p. 2161]

5. The learned counsel for the petitioner submitted that the petitioner is not a defaulter in the instant case. The petitioner was prompt in complying

with the demands raised immediately on the making of the assessment order. The refund was obtained by the petitioner, because the appellate

authority reversed the order of the assessing authority. In fact even the Tribunal upheld the contention of the assessee. In these circumstances, it

cannot be said that the assessee had not paid the tax specified in any notice of demand u/s 156 of the Act.

6. Sub-section (2) of section 220 is attracted if the amount specified in any notice of demand u/s 156 of the Act is not paid within the period

limited under sub-section (1), that is to say, within 30 days from the service of the notice. The petitioner has complied with this demand by paying

the tax originally. The learned counsel also referred to a decision of the Kerala

High Court in Income Tax Officer Vs. A.V. Thomas and Company,

. A Division Bench of the Kerala High Court accepted a similar contention; the Court observed thus:

We feel the statutory provision in section 220(2) is clean and clear. It is not difficult to understand what are the requirements under the provision

which will attract payment of interest. As stated by Lord Jenkins, our task is to construe the provision, section 220(2), according to the ordinary

and natural meaning of the language used and to apply that meaning to the facts of the case. As stated earlier, the facts of the case are simple.

When the assessing authority demanded payment of tax as assessed by the assessment order, exhibit P-1, the assessee paid the tax. Section

220(2) which provides for payment of Interest enjoins certain conditions for attracting the liability of payment of interest. The condition is that even

after the notice of demand u/s 156 and after a further period of 35 days as provided u/s 220(1), the assessee should continue as a defaulter in the

matter of payment of tax demanded. Only in case the assessee defaults in payment of tax assessed, 35 days after the notice of demand u/s 156, the

liability to pay interest accrues. It is admitted that the assessee has paid the tax when he received the demand notice u/s 156. The requirements u/s

220(2) for attracting the liability to pay interest are not present In this case."" (p. 823)

The counsel for the department relied on the Validation Act. The counsel particularly relies on section 3 of Act 11 of 1964. He contends that the

original notice u/s 156 survives by virtue of section 3 of Act 11 of 1964. He also referred us to the decision in Income Tax Officer, Kolar and

Another Vs. Seghu Buchiah Setty, . In that case, the Supreme Court held that as and when an assessment is challenged and the order of

assessment is set aside or modified by the appellate authority, all consequential proceedings pursuant to the assessment order are also rendered

ineffective. So, a notice issued u/s 156 of the Act pursuant to an assessment order which was set aside subsequently by the appellate authority

would not remain in force and the department has to proceed afresh by issuing a fresh demand notice u/s 156. This decision caused great difficulty

for the revenue and in order to tide over the difficulty, the said Act, namely, the Validation Act, was passed. Section 3 provided that if the assessment order is set aside or modified by the appellate authority and, subsequently, the original order is restored by a second appellate

authority, the actions taken pursuant to the first order including the demand notice will survive and a fresh demand notice is unnecessary. Basing on

this provision, the counsel developed his argument by urging that so long as no fresh demand notice is now required under law, the assessee is

liable to pay interest on the basis of the original notice of demand. It is difficult to accept this contention. Perhaps, no fresh demand notice may be

necessary and the original notice u/s 156 may be revived. Even if we accept that the original notice is revived, it has no consequence. The assessee

has paid the amount demanded as per the original notice. In a case where the assessee has paid the demand made in the original notice, there is no

liability on the part of the assessee to pay interest. So, even if we take that the original notice is revived, the department may not be justified in

demanding the interest from the date of the original notice. The non-compliance of the original notice is the event which attracts payment of interest.

In this case, there is no non-compliance of the original notice and so the assessee is not liable to pay interest.

7. Further, sub-section (4) was referred to point out that, the assessee becomes a defaulter only if the amount is not paid within the time limited

under sub-section (1) or extended under sub-section (3). This is not a case where the assessee failed to pay the tax within 30 days of the demands

issued earlier.

8. A literal reading of the provision, no doubt, prima facie, supports the contention of the petitioner. But we cannot ignore the other provisions of

relevant law which also operates on the fact situation.

9. In Seghu Buchiah Setty''s case (supra) the Supreme Court held that a demand notice issued consequent upon the assessment order would not

survive if the said order is reversed or modified in appeal or revision and in such a situation, a fresh demand notice has to be served before he

could be treated as a defaulter and recovery proceedings initiated against the assessee. To get over the difficulty caused by this decision, the

Validation Act came to be passed. As per section 3(1)(a), a fresh demand notice shall have to be served upon the assessee only when the tax is

enhanced. In case, the tax levied is reduced in an appeal or proceedings as per sub-clause (c), a fresh notice need not be served upon the assessee

for the amount payable. Sub-clause (c) states that no proceedings in relation to such Government dues including the imposition of penalty or

charging of interest shall be invalid, by reason that no fresh notice of demand was served upon the assessee after the disposal of the appeal or

proceeding, in which, there is a change in the liability of the assessee. Sub-section (2) is quite relevant here which reads thus:

For the removal of doubts it is hereby declared that no fresh notice of demand shall be necessary in any case where the amount of Government

dues is not varied as a result of any order passed in any appeal or other proceeding under any scheduled Act.

10. There is no dispute that the Act is one of the scheduled Acts. This provision makes it very clear that if the original assessment order is

ultimately upheld, the question of issuing a fresh notice of demand does not arise.

11. Immediate purpose of enacting this Validation Act was the decision of the Supreme Court in Buchiah Setty''s case. But the effect of the

Validation Act cannot be ignored on the operation and the working of the Act. We are of the view that sub-section (2) of section 3 keeps alive the

earlier demand notice or treats the said demand notice as having been kept alive all along, if ultimately the assessment order is upheld by the higher

forum.

12. While considering the provision of sub-section (2) of section 220 we cannot ignore the purpose behind the provision, providing for levy of

interest. Interest is payable as a matter of compensation towards deprivation of the benefits of money which lawfully belongs to a person or

authority. The income tax due to the State is certainly an amount which lawfully belongs to the State; if the payment is postponed for any reason,

there can be no doubt that the State is deprived of the benefits of the amount which lawfully belongs to the State. It is in this background that

section 220 will have to be considered. We find similar provisions under sections 214 and 215 as well as 244 of the Act where either the assessee

or the revenue, as the case may be, has been provided for the payment of interest when the payment of the amount due by the assessee or the

State gets postponed. The scheme of the Act, thus, is quite clear that it provides for awarding of compensation to the assessee or to the State by

way of interest.

13. In Commissioner of Income Tax Vs. Deepchand Kishanlal, this Court had to consider the scope of section 214 of the Act. The Court pointed

out that there is a substantial reciprocity between the class of taxpayers and the revenue in sections 214 and 215 and that the fluctuation in the

fortunes of an assessee or of the revenue, depending upon the facts and circumstances of a particular case, is inevitable. The law has to be

understood in a reasonable manner and the scheme of legislation should be deemed to have a logical base for it. The Court also pointed out that an

initial order of assessment gets affected by the appellate or revisional order and the only effective order is the ultimate order of the superior

authority. We may add here that this ultimate order of the appellate order would normally relate back to the date of the original order, as

otherwise, the very concept of having a hierarchy of appellate and revisional forums will be defeated. The Bench observed thus:

Payment of interest, essentially, is compensatory in nature. Logically, the compensation should cover the entire period during which the person to

whom the money belongs lawfully was made to part with it to another. To reduce the period for which compensation is payable, when, in fact, the

person was deprived of his money for a longer period, is to truncate the very concept of compensation."" (p. 309)

14. The liability to pay income tax as a debt due on the last date of the accounting period, is a principle now established by the decision of the

Supreme Court in Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, The Supreme Court observed:

...A liability to pay income tax is a present liability though it becomes payable after it is quantified in accordance with ascertainable data. There is a

perfected debt at any rate on the last day of the accounting year and not a contingent liability...."" (p. 784)

15. Therefore, jurisprudentially, the revenue is a creditor and the taxpayer is a debtor and there is nothing strange if the law contemplates that the

debtor should compensate the creditor by paying interest on the amount due. The fact that the law has postponed the discharge of tax liability to

the date of issuance of a demand notice and the period of 30 days from the date of the demand, would not alter the nature of the said liability.

16. In M.N. Jadhav (Decd. by Legal Representatives) Vs. Fourth Income Tax Officer and Another, this Court referred to the circular of the

Board (which we have already quoted) and observed that this circular correctly expounds the legal position. The learned Judge, in fact, referred to

clause (ii) of the circular which states that the interest payable u/s 220(2) will be computed with reference to the due date reckoned from the

original demand notice and with reference to the tax finally determined. Mr. Ramabhadran, the learned counsel, pointed out an earlier passage in

the said decision, from which it is clear that the assessee had not made the payment on receipt of the demand notice originally in the said case. That

may be so, but we are concerned with the legal effect of sub-section (2) of section 220 of the 1961 Act, read with section 3(2), of the Validation

Act. The circular of the Board may not be binding on the assessee and the interpretation of the provision of law cannot depend upon the meaning

given by the Board, in all cases. The circular has been issued to facilitate the due administration of the Act by the authorities under the Act. The

effect of section 220(2) has been duly clarified by the Board while issuing the circular.

17. With utmost respect, we cannot agree with the observations of the Kerala High Court referred to earlier. The nature of the interest payable

under the Act has not been considered in the said decision.

18. The view we have taken is in accordance with the view taken by a Bench of the Delhi High Court in Bharat Commerce and Industries Ltd. Vs.

Union of India and Others, . The Delhi High Court held that the first notice of demand issued after the original assessment order was passed by the

ITO could not be deemed to have been extinguished by virtue of the appeal having been filed before the Commissioner or the conditional stay of

the operation of the assessment having been ordered by the Commissioner (Appeals), pending disposal of the appeal before him or by virtue of the

subsequent reduction of the taxable income. The Court pointed out that, under the order of the Tribunal which had attained finality, the original

assessment had been restored with the result that the first demand notice became operative and therefore, section 220(2) was attracted. The

Bench also pointed out that to levy interest on delayed payment of tax is not to penalise the party but to make a provision for compensating the

revenue on the failure of the assessee to make payment as per the first demand notice.

19. We have already referred to section 221 which provides for levy of penalty in case the assessee defaults in the payment of tax demanded. The

present argument of Mr. Ramabhadran certainly could be accepted in case the department proceeds to levy any penalty. A comparison of sections

220(2) and 221 highlights the quality of levy u/s 220(2) as compensatory in nature as against the penalty that is imposed u/s 221.

20. In A.V. Thomas and Co. Ltd. Vs. Income Tax Officer, ""A"" Ward and Others, it was observed:

Where the tax computed by the ITO was paid in full and within time by the assessee and a portion of the tax was refunded to the assessee

consequent to the order of the AAC but, on further appeal, the Tribunal reversed the order of the AAC and restored that of the ITO and,

thereafter, a fresh notice of demand was served on the assessee calling upon him to pay back to the department the tax refunded to him, the

liability to pay interest to the department u/s 220(2) of the income tax Act, 1961, arises only from the date when the fresh notice of demand is

issued to the assessee and not from the date when the tax was refunded to the assessee."" (p. 275)

This decision was affirmed by the Division Bench which we have already referred to and reported in Income Tax Officer Vs. A.V. Thomas and

Company,

21. In K.P. Abdul Kareem Hajee Vs. Income Tax Officer, A-Ward and Another, the learned Judge held that the assessment order which was

modified or reversed by the appellate authority which in turn was reversed by the Tribunal, thus, reviving the original assessment order and

therefore, the liability for interest u/s 220(2) got attracted from the date of the original demand. No doubt, in the said case, the assessee had not

paid the tax demanded earlier, but, obviously the assessee had the advantage of the interim order of stay made by the higher authorities. Having

regard to the nature and quality of interest leviable u/s 220(2), we have no hesitation in upholding the claim made by the revenue in the instant case.

The writ petitions are, accordingly, dismissed and rule discharged. However, there shall be no order as to costs.

