(2011) 06 DEL CK 0010

In the Delhi High Court

Case No : Writ Petition (C) No. 21428 of 2005

Vishwanath Khanna APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 03-06-2011

Acts Referred:

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

Citation : (2012) 20 TAXMAN 828

Hon'ble Judges : M.L. Mehta, J;A.K. Sikri, J

Bench : Division Bench

Advocate : C.S. Gupta, for the Appellant; Sanjeev Sabharwal, for the Respondent

Judgement

A.K. Sikri, J.—The petitioner is a proprietor of M/s. Foto Traders, a firm started in the year 1993, to trade in gold, silver and bullion. The income tax Department conducted search and seizure operations on February 4, 1995, whereby cash and silver were retained initially but subsequently seized as under:

Cash

Rs. 49,86,500

Silver

222 bars of total weight 70003.859 kgs. Having market value estimated at Rs. 4,44,66,395 by the income tax Department.

The Assistant Commissioner of income tax, Investigation Circle (20)(1), New Delhi, passed an order u/s 132(5) of the income tax Act, 1961 (hereinafter referred to as "the Act"), dated June 2, 1995, declaring that cash found during the search as unexplained and, hence, the cash seized of Rs. 49,86,500 was retained and not released. Subsequently, vide another order u/s 132(5) dated June 19, 2005, various disputed additions were made and tax and penalty at 200 percent. were raised. Therefore, the entire silver seized valuing Rs. 4,44,66,395 was retained and not released. We may mention at this stage that the income tax Department disputed the status of M/s. Foto Traders, as according to it, it was an unregistered partnership firm. Therefore, the Department intended to tax the income in the hands of this firm. The concerned Assessing Officer (AO) passed the assessment order u/s 143(3) in the name of M/s. Foto Traders after making huge additions of Rs. 10,49,53,527 on protective basis. In the appeal filed against the said order, additions of Rs. 6,32,84,274 were deleted and the rest additions were confirmed. We may also mention at this stage that in the meantime and before the aforesaid protective assessment orders were passed in the case of M/s. Foto Traders, the petitioner had approached the Department to allow him to sell the seized silver after deposing the amount of equal value. As no heed was paid to this request, the petitioner filed Writ Petition (Civil) No. 4767 of 1998 in this court. While disposing of the writ petition, this court directed the Department to release the seized silver after depositing rotational deposits of Rs. 50 lakhs or equal amount of silver to be released. In this manner, the Department released silver in instalments against deposit of Rs. 50 lakhs each time. The entire silver was, thus, released against the total payment of Rs. 4,20,50,000 deposited by the petitioner from time to time on the sale of released silver. Details of this deposit are as under:

Date of deposit

Amount deposited (Rs.)

05-02-1999

50,00,000

15-02-1999

46,00,000

01-03-1999

60,00,000

29-10-1999

25,00,000

05-11-1999

25,00,000

15-11-1999

25,00,000

22-11-1999

25,00,000

26-11-1999

44,00,000

14-12-1999

24,00,000

16,00,000

14-02-2000

50,00,000

05-04-2000

30,50,000

Total

4,20,50,000

Cash seized and retained on 04-02-1995

49,86,500

Grand total

4,70,36,500

2. The necessary consequence of the aforesaid developments/orders was that against the deposit of Rs. 4,70,36,500 lying with the Department, liability of the petitioner was ascertained to Rs. 17,22,608 and, thus, he was entitled to refund of the balance amount along with interest. To give effect to the orders of the Settlement Commission, the Deputy Commissioner of the income tax (Investigation Circle, 20 (1)) passed orders dated March 11, 1999, u/s 250 of the Act. The net demand after giving effect was arrived at Rs. 3,57,73,695 including interest u/s 234A of Rs. 10,63,883, interest u/s 234B of the Act of Rs. 1,27,66,599, interest u/s 234C of the Act of Rs. 6,142, interest u/s 220(2) of the Act of Rs. 50,66,660. This amount, however, was not released to the petitioner, in spite of his request to release the same and also return the original title deeds of the property kept as security.

3. In the meantime, the petitioner also approached the Settlement Commission by moving application u/s 245C of the Act to determine his income for the assessment year 1995-96. This application was admitted on March 7, 2000, for assessment. During the pendency of this application, certain events which took place and have a bearing on the dispute involved in this writ petition may now be recapitulated. As mentioned above, according to the petitioner, the amount deposited with the Department was much more than the tax liability and, therefore, he had been making request for refund of the same and till it is refunded, to keep the same in the fixed deposit bearing interest. This was not done. The petitioner was supposed to file the income tax returns for the successive years, i.e., the assessment years 1999-2000, 2000-01, 2001-02,

2002-03 and 2003-04. He filed these returns. He was also required to pay the advance tax due and payable in respect of these income tax returns. According to the petitioner, since he was facing cash flow problems in his business and there was sufficient surplus money lying with the Department which belonged to the petitioner, he made request, vide various letters for adjusting the advance tax payable out of the aforesaid amount lying with the Department. Separate letters and reminders were written in respect of each of the aforesaid assessment year. These requests of the petitioner also remained unattended. On the contrary, the Assessing Officer, while passing the assessment order, imposed/ levied interest u/s 234B, section 234C and section 220 of the Act for making deposit of advance tax. A total demand raised was as under:

Rs.

Assessment year 1999-2000

15,86,347

Assessment year 2000-01

22,75,638

Assessment year 2001-02

8,30,476

Total

46,92,461

4. Letter dated February 11, 2002, was written by the Department stating that the aforesaid amount would be adjusted in the P.D. account with which deposit of the petitioner was lying. The petitioner objected to the levy of these interest and demand and filed rectification application u/s 154 of the Act in respect of these assessment years.

5. While this was pending, the income tax Settlement Commission finally disposed of the settlement application preferred by the petitioner, vide order dated July 7, 2003, passed u/s 245D(4) of the Act. Vide this order, the income of the petitioner for the assessment year 1995-96 was assessed at Rs. 43,69,023 on which tax was of Rs. 1,78,430. After this order was passed, the petitioner again requested for release of the amount as the final tax payable for the assessment year 1995-96 was only Rs. 17.22 lakhs. The petitioner approached various authorities in this behalf including the income tax Officer, Central Board of Direct Taxes, Commissioner of income tax, etc. He even faced claim from one M/s. Inter Gold (India) Limited, his supplier to whom he could not make payment who filed OMP No. 61 of 2004. In that OMP, this court directed the Department to issue refund due to the petitioner by making the payment of Rs. 4,20,00,000 to the said M/s. Inter Gold (India) Limited.

6. Ultimately, order dated September 27, 2004, was passed by the Assessing

Officer giving effect to the orders of the income tax Settlement Commission. As per this order, refund payable to the petitioner was Rs. 4,69,50,288 and since the sum of Rs. 4,20,00,000 was already paid to the Inter Gold (India) Limited, the balance amount of Rs. 49,50,288 was refunded to the petitioner. While computing the amount, the Assessing Officer adjusted the interest charged from the petitioner in respect of non-payment of advance tax pertaining to the assessment years 1999-2000, 2001-02. That is the first grievance of the petitioner. The interest charged is as under:

Assessment year

1995-96

1999-2000

2000-01

2001-02

2003-04

Total

Interest u/s 234A

68,226

?

?

?

?

Interest u/s 234B

8,18,712

5,30,541

5,54,920

1,03,581

38,391

2,75,491

5,06,491

Interest u/s 234C

?

55,042

90,471

38,220

Total

11,62,429

5,85,583

6,45,391

6,48,292

38,391

30,80,086

Interest u/s 220(2)

Interest u/s 220(2)

3,33,960

3,70,798

5,31,927

57,220

15,310

4,64,886

30,105

Total

7,98,846

3,70,798

5,31,927

87,325

15,310

18,04,206

7. Secondly, while calculating interest payable to the petitioner, the Department has admitted that an amount of Rs. 4,39,91,00 against the amount of Rs. 4,70,36,500. However, the alleged draft of Rs. 30.50 lakhs dated April 5, 2000, to have been paid finds no mention in the Public Deposit account of M/s. Foto Traders. No original record is available in this regard with the Department. We are not concerned with this, as it is fairly stated that in this regard, litigation between the parties is pending in this court.

8. Insofar as interest payable to the petitioner on the aforesaid deposit is concerned, the Department has calculated the same with effect from the date when the amount was transferred into the account of the Assessing Officer from the P. D. account. The petitioner claims that he is entitled to interest u/s 132B of the Act at least till the time order is passed by the income tax Settlement Commission on July 7, 2003, whereas the Department on September 27, 2004, had granted interest u/s 244A of the Act ignoring the provisions of section 132B completely. The claim of the petitioner is that u/s 132B of the Act, he is entitled to interest after six months from the date of order passed u/s 132(5) of the Act on the initial seized amount of Rs. 49,86,500 minus tax due/payable and on further deposits in the P. D. account from the date of such deposit. In this backdrop, the following reliefs are sought by the petitioner in this petition:

(a) (i) Issue appropriate writ, direction or order to the respondents declaring that no interest could be charged on such alleged demands raised for the assessment years 1995-96, 1999-2000, 2000-01, 2001-02, 2002-03 and 2003-04 in view of the sufficient amount lying and deposited with the income tax Department since 1995.

(ii) Issue appropriate writ, direction or order to the respondent to quash and/or set aside the impugned actions of the respondents in levying interest charged for the assessment years 1995-96, 1999-2000, 2000-01, 2001-02, 2002-03, 2003-04 in view of sufficient amount lying and deposited with the income tax Department since 1995.

(iii) Issue appropriate writ, direction or order to the respondents that they should refund an amount of Rs. 48,16,066 as being interest illegally recovered (as per the statement marked as annexure 43 enclosed) by deducting from amount refundable.

(b) (i) Issue appropriate writ, direction or order to the respondent that petitioner is entitled for interest from the date of deposit of money in the Public Deposit Account and consequentially, respondent be directed to pay the petitioner the interest amount in accordance with law and as described in statement enclosed marked as annexure 42.

(ii) Issue appropriate writ, direction or order to the respondents that the petitioner is entitled for interest on the amount illegally adjusted from refund. Interest has already been covered in the statement marked as annexure 42.

(c) Award cost to the petitioner.

(d) Pass such further order or orders as this court may deem fit and proper in the facts and circumstances of the case.

9. It would be clear from the above that this petition basically raises two issues, viz.,

(i) Whether interest under sections 234A, 234B, 234C and 220(2) of the Act could be charged when, according to the petitioner, sufficient amount of the petitioner was lying deposited with the Department wherever advance tax could be adjusted?

(ii) From which date the petitioner is entitled to interest on the amount which became refundable after giving effect to the orders passed by the income tax Settlement Commission?

Issue No. (1)

10. The submissions made by the learned counsel for the petitioner on the basis of which he has argued that no interest could be charged for nonpayment of advance tax was that there was sufficient amount was already lying with the Department. The Department, however, contends that it was not permissible for the petitioner to seek adjustment from the amount lying with the Department, which in fact belonged to M/s. Foto Traders and the same was assessed as unregistered partnership and not as the sole proprietorship of the petitioner. To support this plea, the Department has relied upon the statement of the petitioner himself at the time of search/ survey, which was given on oath stating that material seized belonging to M/s. Foto Traders. The panchnama was also prepared at the address of M/s. Foto Traders at Chandni Chowk. It is the petitioner who had changed the stand later on contending that M/s. Foto Traders was not a partnership firm, but his sole proprietorship, a protective assessment order was passed in the status of firm. This order was even confirmed by the Commissioner of income tax (Appeals), vide order dated March 17, 1999, and only thereafter, adjustments from the P. D. account of M/s. Foto Traders beginning from March 31, 1999, were made. Therefore, as per the Department, there was a dispute about the amounts seized and/or rotational payments either belonged to M/s. Foto Traders or Mr. Khanna in his personal capacity. That dispute was ultimately settled, vide order u/s 245D(4) of the Act dated July 7, 2003, passed by the income tax Settlement Commission. Hence, no amount was available for adjustment of the demands raised in the case of Shri V. N. Khanna up to July 7, 2003.

11. u/s 234B of the Act, interest is payable by the assessee if there is default in payment of advance tax. Likewise, u/s 234C of the Act, interest can be charged for deferment of advance tax. On the other hand, when the income is assessed and the tax is payable for which notice of demand u/s 156 of the Act is issued and the tax payable is not deposited within 30 days of the service, the assessee would be deemed in default.

12. Taking shelter of all these provisions, the Department has levied interest. It is not in dispute that when the assessee filed his income tax returns for the assessment years 1999-2000 to 2003-04, he did not deposit advance tax due and payable in respect of these income tax returns. However, his case is that sufficient amount was tending to his credit with the Department and his request for adjustment of the advance tax, etc., was legitimate which should have been

allowed by the Department. It is also not in dispute that at least Rs. 4.2 crores were lying with the Department. The only reason given by the respondent for not making adjustment from this account is that it was not permissible for the petitioner to seek adjustment from this amount, as this belonged to M/s. Foto Traders which was assessed as unregistered partnership and not as the sole proprietorship of the petitioner.

13. However, to our mind, this plea taken by the respondent is totally misconceived. No doubt, M/s. Foto Traders was assessed as unregistered partnership. However, the petitioner was clamouring that it was his sole proprietorship concern and had submitted proofs in respect thereof. If the plea of the petitioner was not accepted erroneously by the Department, it cannot take advantage of its own wrong. Ultimately, the petitioner was vindicated when the Settlement Commission accepted that he was the sole proprietor of M/s. Foto Traders. There is an ample discussion in this behalf in the order of the Settlement Commission. The arguments of the learned counsel for the respondent that it is only on July 7, 2003, when the Settlement Commission passed the orders u/s 245D(4) of the Act that the amount became available to the petitioner, is without any substance. As stated above, the petitioner was questioning the assessment of M/s. Foto Traders as unregistered partnership firm. He has been proved correct. Merely because the order to this effect passed by the Settlement Commission on July 7, 2003, would not mean that it is on this date the amount became available at the hands of the petitioner. What is held by the Settlement Commission is that M/s. Foto Traders is the sole proprietorship concern of the petitioner and it would follow from this finding that the request of the petitioner to adjust the advance tax from the amount lying deposited with the Department in the accounts of M/s. Foto Traders was justified, which was unnecessarily turned down by the Department.

14. We are of the view that the respondent would not be justified in levying interest, as the amount of advance tax payable by the petitioner for these assessment years could be adjusted from the amount lying with the Department in the petitioner''s own account.

Issue No. (2)

15. Insofar as the petitioner''s entitlement to interest on the amount which became refundable after giving effect to the orders passed by the Settlement Commission, it cannot be disputed that the petitioner is entitled to interest on such an amount u/s 132B(4) of the Act. This provision clearly mandates the Central Government to pay simple interest at 1A percent. for every month on amount by which the credit money seized u/s 132, etc., of the Act. Clause (b) sub-section (4) of section 132B of the Act stipulates that such interest shall run from the date immediately following the expiry of the period of 120 days from the date on which the last of the authorizations for search u/s 132 or requisition u/s 132A was executed to the date of completion of the assessment. In accordance with this provision, from the date of search and seizure of the gold,

120 days would be calculated and from the expiry of this period, the interest shall become payable.

16. This interest is up to the date of assessment. However, in the present case, even after giving effect to the orders of the Settlement Commission, the excess amount was not refunded to the petitioner. On this count, the petitioner has demanded interest u/s 132B of the Act.

17. The petitioner would, thus, be entitled to interest u/s 244A of the Act from the date the amount was transferred into the account of the Assessing Officer from the PD account after adjusting Rs. 49,86,500, which was the tax due/ payable. The amount shall be calculated accordingly. Writ petition is allowed in the aforesaid terms. The petitioner shall also be entitled to cost quantified at Rs. 10,000.

