THE HON'BLE SRI JUSTICE DILIP B. BHOSALE
AND
THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

WRIT PETITION Nos.4668 and 4669 of 2004

COMMON ORDER: (Per Hon'ble Sri Justice A.Ramalingeswara Rao)

Heard the learned Counsel for the petitioner and the learned Standing Counsel for the respondents.

These two Writ Petitions are being disposed of by this common order in view of the common point of law involved in both the cases. The petitioner in both the cases is also the same.

The petitioner is engaged in the business of running holiday resorts. A survey operation was conducted under Section 133A of the Income Tax Act, 1961 (for short, the Act), on 27.01.2000. During the course of survey operations, the respondents pointed out that the method of accounting followed by the company wherein it accounted only 30% of the time share consideration as the year's income was not correct and it should have returned 100% of the amounts in the year of receipts itself. The petitioner explained to them that it adopted the same procedure as was followed by other resort companies. The petitioner did not file any return of income for the assessment year 1997-98, but filed returns for the assessment years 1998-99 and 1999-00. It filed revised returns for the years 1998-99 and 1999-00 on 30.03.2000. The assessing officer determined the total income accepting the income filed by the assessee and charged interest under Sections 234A, 234B and 234C of the Act. The petitioner submitted an application to the Chief Commissioner of Income Tax-III on 07.11.2001 for waiver of interest on the ground that the tax liability arose only due to the change in the accounting policy of the time share receipts. The accounting procedure was changed subsequently and revised statements of accounts were filed only to purchase peace with the department. The petitioner paid the entire tax, but did not pay the interest. The said application was rejected by the first respondent on 11.11.2003. Challenging the said order, the present Writ Petitions were filed.

The first respondent rejected the application of the petitioner on the ground that non-filing of return of income for the assessment year 1997-98 was not proper and it ought to have been filed before the due date and the returns of income have been revised for the assessment years 1998-99 and 1999-00, subsequent to the survey of returns under Section 133A of the Act conducted on 27.01.2000. Therefore, it cannot be held that the assessee was prevented by unavoidable circumstances from filing returns of income within the time for all the three assessment years. He further held that even assuming that return of income was voluntary, the four conditions prescribed by the CBDT in the circular dated 23.05.1996 are not applicable to the assessee's case. In respect of the fifth condition in para 2(e), the Board has clarified by circular No.783 dated 18.11.1999 that waiver of interest for non-payment of advance tax based on press note dated 21.05.1996 is not sustainable since para 2(e) of the order dated 23.05.1996 contains no such stipulation. He ultimately rejected the application on the ground that the assessee's case does not fulfill any of the conditions laid down by the order under Section 119(2)(a) of the Act, dated 23.05.1996.

We have noticed that Sections 234A, 234B and 234C of the Act were introduced by the Direct Tax Laws (Amendment) Act, 1987 from the assessment year 1989-1990 and there was no provision for reduction or waiver of penal interest unlike Section 273A of the Act, which provides for waiver and reduction of penalty. But, the Central Board of Direct Taxes issued a circular in exercise of powers conferred under Section 119(2)(a) of the Act on 23.05.1996, providing for reduction or waiver of interest. In the absence of a specific provision in the Act, the only source of power is the notification dated 23.05.1996 in F.No.400/234/95-IT(B). In the said notification a direction was issued to the Chief Commissioner of Income Tax and the Director General of Income Tax to reduce or waive interests charged under Section 234A or 234B or 234C of the Act in the classes of income specified in paragraph 2 of the said order. Paragraph 2 of the said notification reads as follows:

> "2. The class of incomes or class of cases in which the reduction or waiver of interest under section 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 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 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 under section 132 of the Income Tax Act, cash is seized which is not allowed to be utilized 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 gain" is received or accrues after the due date of payment of the first or subsequent installments 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 installment or installments 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 under section 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 under section 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."

We have elaborately considered the said issue of nature of a return consequent to survey and effect of circular in our order in W.P.No.14088 of 2004, dated 22.01.2015, and dismissed the case of the petitioner in that case. In the above cases also, the first respondent has considered the effect of the circular dated 23.05.1996 and its non-application to the facts of the petitioner's case.

We find that the first respondent had not omitted to consider the relevant aspects while coming to the conclusion. On the other hand, he has taken relevant factors into consideration while rejecting the applications. The discretionary order of the first respondent does not suffer from any error.

Accordingly, the Writ Petitions are dismissed. The miscellaneous petitions, if any, stand disposed of. No costs.

(DILIP B. BHOSALE, J)

(A.RAMALINGESWARA RAO, J)

27.01.2015
vs