

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.11.2017

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.18472 of 2009

&

MP.No.1 of 2009

Mr.John Baptist Lasrado
Petitioner

...

Vs.

1.Income Tax Settlement Commission,
Additional Bench,
No.640, Anna Salai, Nandanam,
Chennai - 600 035.

2.Commissioner of Income Tax - VI,
No.121, M.G.Road,
Chennai - 600 034.

3.The Assistant Commissioner of Income Tax,
Business Ward - III,
No.121, M.G.Road,
Chennai - 600 034.

... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records of the Petitioner on the file of the first respondent Settlement Commission in S.A.No.TN/CN6/06-06/36/IT dated 06.07.2009 and to quash the impugned Order dated 06.07.2009 rejecting the Miscellaneous Petition and consequently, directing the first respondent Settlement Commission to delete the levy of interest under Section 234B of the Income Tax Act for the block period in question.

For Petitioner : Mr.R.Sivaraman
For Respondents : Mr.A.P.Srinivas

O R D E R

The petitioner is an employee of a Multinational Company namely, M/s.Columbia Sportswear (Inc) of USA, which has a Liaison Office at Chennai. The petitioner Heads the Indian Operations of the aforesaid Company and has been employed in the company since 1995-1996 onwards. Part of the salary paid to the petitioner is received in India and the remaining part of salary received outside India. For the salary received in India, Tax was deducted at source by the employer. However, with regard to the salary received by the petitioner outside India, which represents larger portion, the employer did not deduct tax at source. Similarly, the petitioner was granted Stock option by his employer and these shares were listed in American Stock Exchange, which were sold by the petitioner on various dates and after making payment, the Stock Broker had credited the net proceeds into his bank account, which was held outside India. For the assessment years 1996-1997 to 2005-2006, the petitioner had filed his Income Tax Returns disclosing only the amount, he had earned in India as his income which he earned abroad, was not disclosed in the Income Tax Returns for the said assessment years. The petitioner approached the first respondent viz., the Income Tax Settlement Commission and filed an application for the relevant years, wherein, he had offered all income, which were earned abroad during the assessment years 1996-1997 to 2005-2006, which includes the salary income and the income through Employees Stock Option. According to the petitioner, the aggregate income offered for various years works out to Rs.9,45,27,328/-. The Settlement Commission admitted the application by order dated 16.06.2006 and ultimately, by order dated 05.02.2008, the case was settled accepting the additional income offered by the petitioner by passing an order under Section 245 D (4) of the Act and granting immunity from penalty and prosecution. In the said order, the Settlement Commission charged interest under Section 234B on the excess of the tax assessed over the advance tax paid for all the assessment years. Being aggrieved by the charging of interest, the petitioner filed a miscellaneous petition on 31.12.2008, before the Settlement Commission contending that there was a mistake apparent on the face of the record as the petitioner is not liable for payment of interest under Section 234B of the Act. The said Miscellaneous Petition was rejected by order dated 05.02.2008, which order is impugned in this Writ Petition.

2. Heard Mr.R.Sivaraman, learned counsel appearing for the petitioner and Mr.A.P.Srinivas, learned counsel for the respondents.

3. The facts pertaining to the order passed by the Settlement Commission under Section 245 D (4) dated 05.02.2008, insofar as it admits the additional income offered and the tax

paid by the petitioner, there is no dispute. The petitioner is aggrieved only with regard to the interest, which was ordered to be paid under Section 234 B of the Act.

4. The petitioner filed a Miscellaneous Petition before the Settlement Commission stating about his employment with the Multinational Company and what was the income earned by him outside India and to what extent the petitioner offered additional income before the Settlement Commission and tax paid thereon. The petitioner further contended that interest under Section 234B is chargeable provided the assessee, is liable to pay advance tax under Section 208. Thus, the pre-condition for levy of interest under Section 234B is liability to pay advance tax under Section 208. Advance tax shall be payable where the amount of such advance payable as computed in accordance with the provisions of Chapter-XVII is Rs.5000/- or more. It was further submitted that under Section 209, the assessee is to estimate his current income and find out the tax payable therein, as per sub-clause (1) of Section 209(1). Under Clause (d) of sub - section (1) of Section 209, the income tax calculated under (a) is to be reduced by the amount of income tax, which would be deductible at source during the said financial year. Therefore, it was stated that the petitioner can take credit of the tax deductible at source. Whether the tax is deductible is to be decided by the employer and not the employee i.e., the petitioner. Since the employer did not deduct tax on the said payments received by the petitioner, tax became payable by the petitioner. Therefore, the tax payable by the petitioner cannot exceed the tax deductible at source and in such a situation, the petitioner is not required to pay any advance tax. Therefore, the petitioner contended that interest under Section 234 B is not chargeable as Section 191 only requires that if the tax is not deducted at source, such income tax shall be payable by the assessee directly. Thus, the liability, which extends to the payment of tax under Section 191 do not extend to payment of interest under Section 234 D. In support of his contention, the petitioner placed reliance upon the two decisions of the Income Tax Appellate Tribunal reported in (79 ITD 481) Mitsui Engineering & Ship Building Company Ltd., dated 28.11.2000 and SNC - Lavalin International Incorporated (2008-TIOL-576-ITAIT-Delhi) dated 29.08.2008.

5. The petitioner further stated that his employer viz., M/s.Columbia Sportswear Company, abroad has paid the interest for the default for not deducting TDS under Section 201(1A) till the tax payment of the assessee/ petitioner to the Office of the Income Tax Officer, TDS Ward No.1 (1), Chennai and the charge of the interest under Section 234B will result in double taxation.

6. The revenue contended that the non-liability to pay advance tax and payment of interest under Section 201(1A) by the employer were not raised before the Income Tax Settlement Commission in the proceedings under Section 245D(4) and hence, the petitioner should not be allowed to raise the same, by way of Miscellaneous Petition as already final order has been passed by the Income Tax Settlement Commission and only mistakes can be amended.

7. The Tribunal considered the objection, which appears to be a preliminary objection raised by revenue regarding maintainability of miscellaneous petition before the Tribunal and held that the petitioner cannot be prevented from raising any issue of law apparent from facts before the Income Tax Settlement Commission, which was omitted to be considered by the Commission and in the facts of the case, the issue regarding current income, TDS, assessed tax, liability to advance tax etc., ought to be decided. It further held that since, the liability to interest under Section 234B is based on the submission that the petitioner was not liable to advance tax. So far as this finding is concerned, the revenue has not laid a challenge to the same and therefore, before this Court, the revenue is precluded from raising such contention having accepted the fact and contested the matter before the Settlement Commission.

8. Therefore, in the absence of any challenge by the revenue independently to the said finding, this Court cannot entertain a challenge at this stage. Therefore, in this petition this Court has not examined the maintainability of the petition before the Commission after final order was passed under Section 245D(4) as a need to consider the same, does not arise in the facts and circumstances of the case.

9. The Settlement Commission rejected the prayer sought for by the petitioner by holding that whether the person responsible for paying salary in foreign currency was a non-citizen, non-resident and hence not amenable to be responsible under Section 192 of the Act and the petitioner should reduce the amounts deductible at source from such payments in the computation of advance tax, still the petitioner was liable to pay advance tax under section 208 read with section 209 of the Act. This was because, the petitioner was in receipt of substantial income from deposits abroad and these items were not liable for TDS and hence, the assessee could not have excluded tax on these, in working out the advance tax liability.

10. Further, with regard to the contention raised by the petitioner that they have paid interest under Section 201(1A) of the Act on the defaulted TDS before the concerned Income Tax Officer in charge of TDS matters and therefore, charging

interest under Section 234B on the shortfall in advance tax would amount to subject to double levy, the Commission pointed out that the interest under Section 234(B) and interest under Section 201(1A) are two types of defaults and by different entities and the operation of these provisions are in two different spheres and on different subjects and it cannot be held that there is any double levy on the same subject for the same default. Though, the petitioner referred to two decisions of the Tribunal, the Commission did not consider the effect of those two decisions but observed that there are no such rulings by the jurisdictional High Court or the Hon'ble Supreme Court of India and accordingly, dismissed the miscellaneous petition.

11. We need not labour much to find a solution to the controversy raised in this Writ Petition as we have the benefit of several decisions on the point and in particular, this Court would refer to, three decisions namely, in the case of (i) Hindustan Coca Cola Beverage (P) Ltd., Vs. Commissioner of Income Tax, reported in [(2007) 293 ITR 226 (SC)] (Delhi) dated 16.08.2007, (ii) Commissioner of Income Tax Vs. Emilio Ruiz Berdejo & Ors., [(2010) 320 ITR 0190] (Bombay) dated 15.10.2009; and (iii) Director of Income Tax Vs. Jacobs Civil Incorporated, [(2011) 330 ITR 0578 (Delhi) dated 30.08.2010.

12. In the case of Hindustan Coca Cola, the assessee is engaged in the manufacture and sale of soft drinks and entered into an agreement with M/s. Pradeep Oil Corporation for use of their premises for receipt, storage and dispatch of goods belonging to the assessee company. The warehousing charges were paid to M/s. Pradeep Oil Corporation, on which, tax was deducted under Section 194C of the Income Tax Act, 1961 (for short 'the Act') at 2 per cent. The Assessing Officer held that the assessee to be an 'assessee in default' for failure to deduct tax at source in respect of warehousing charges and also levied of interest under Section 201 (1A) of the Act on the amount of tax alleged to be short deducted. The assessee preferred an appeal before the Commissioner of Income Tax (A) and thereafter, before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal took a view that the assessee to be an 'assessee in default' in respect of the amount of short deduction of tax and also upheld the levy of interest under Section 201(1A) of the Act.

13. On further appeal filed by the assessee before the High Court was dismissed, thereafter, the assessee preferred miscellaneous applications in the appeals, which were already disposed of, seeking rectification of the order of the Income Tax Appellate Tribunal. The grievance of the assessee was that it is an alternative contention that where the warehouse has been assessed on its income and the tax due has been recovered

from it by the Department and therefore, no further tax could be collected from the assessee has not been considered by the Income Tax Appellate Tribunal. In its order dated 05.02.2008, the Tribunal on re-hearing the matter held that though the assessee was rightly held to be an 'assessee in default', there could not be any recovery of the tax alleged to be in default once again from the assessee considering that M/s.Pradeep Oil Corporation had already been taxed on the amount received from the assessee. The Department conceded before the Tribunal that recovery could not once again be made from the tax deductor, where the payee included the income on which the tax alleged to have been short deducted in its taxable income and paid taxes thereon.

14. The High Court interfered with the order passed by the Tribunal on the ground that on account of the earlier order dated 12.07.2002, the Tribunal has attained finality and the order got merged with the order of the High Court and the Tribunal could not have re-opened the matter.

15. While examining the correctness of the said order, the Hon'ble Supreme Court pointed out that the assessee had paid interest under Section 201(1A) of the Act, and there is no dispute that the tax due had been paid by deductee M/s.Pradeep Oil Corporation and the Circular issued by the CBDT in Circular No.275/201/95-IT(B), dated 29.01.1997 would be applicable to the facts situation before it.

16.Thus, the Hon'ble Supreme Court held that the Tribunal came to the right conclusion that the tax once again could not be recovered from the deductor-assessee, since the tax has already been paid by the recipient of income.

17. By applying the above decisions to the facts of the case, the correct conclusion that can be arrived is that the taxes have been already paid by the deductor. In the instant case, the employer abroad had paid the interest under Section 201(1A) having already been remitted once again tax cannot be recovered from the petitioner/assessee.

18. In the case of "Emilio Ruiz Berdejo" the question of law, which arose for consideration was, whether the Tribunal erred in not appreciating that the assessee had failed to pay advance tax and hence, Sections 234B and 234C were rightly invoked?

19. The factual matrix of the said case is identical to that of the case on hand where also the assessee, an individual, an employee of a Multinational Company, deputed to work in India, did not disclose his original return income received by him in abroad. After proceedings were initiated

under Section 148 of the Act, the assessee filed revised return showing total income making an addition on account of the addition of the amount, which assessee had received from outside India, resulting in an order to the said effect with further order directing levy of interest under Sections 234(A), 234(B) and 234(C) of the Act. The appeal filed by the assessee against the assessment order was dismissed. On further appeal to the Tribunal, the appeal was allowed holding that the issue regarding levy of interest under Sections 234B and 234C of the Act is covered by the Special Division Bench decision in the case of Sumit Bhattacharya Vs. Asstt. CIT (2008) 300 ITR 347 (Mumbai) (SB) (AT) and held that the interest under Sections 234A, 234B and 234C of the Act was not permissible. The Revenue challenging the said decision before the High Court, after taking note of the relevant statutory provisions namely, Sections 192, 209, 234A and 234B held as follows:

The scheme of TDS, not only applies to the amount paid, such as salaries etc. but the said provisions also apply to gross sums, the whole of which may not be income or profits in the hands of the recipient, such as payment to contractors and sub-contractors. The purpose of the TDS provisions in Chapter XVIIIB is to see that the sum which is chargeable under Section 4 for levy and collection of income tax, the payer should deduct tax thereon at the rates in force. The said TDS provisions are meant for tentative deduction of income-tax subject to regular assessment.

20. After rendering the above finding, the Court proceeded to examine the consequences of failure to deduct advance tax in whole or part and held as follows:

"The said section 200 creates an obligation on the person deducting tax to pay the same within prescribed time to the credit of Central Government or as the Board may direct. Sec.201 provides for consequences of failure to deduct or to pay tax, whereas sub-section (1A) of section 201 provides for liability to pay interest. Now, liability to pay interest as stated under Section 201 is on the person who fails to deduct advance tax. As against this, if one turns to the Chapter XVII of the Act, it provides for chargeability of interest in certain cases. Section 234A provides for payment of interest for defaults in furnishing return of income, whereas section 234B provides for payment of interest for defaults in payment of advance tax and section 234C provides for payment of interest for

deferment of advance tax. All these three sections create liability on the assessee to pay interest for the default committed by him in the circumstances mentioned in the said sections".

21. Further, it was pointed out that the interest charged under Section 234A of the Act is not by way of penalty but it is levied to compensate revenue in order to avoid from being deprived of payment of tax on the due date. It was held that the interest payable where the tax had not been deposited prior to the due date of filing of the IT return and in other words, it was held that where the tax already paid by the assessee was not less than the tax payable on the returned income which was accepted the question of levy of interest under Section 234A does not arise.

22. With regard to Section 234 B, it was pointed out that with regard to the interest charged under this Section, the Court referred to the decision of the Uttarakhand High Court in the case of CIT Vs. Sedco Forex International Drilling Company Ltd., [(2003) 264 ITR 320 (Uttarakhand)], wherein, the Court held that Section 234B which imposes interest is compensatory in nature and not as a penalty and the very same view holds good for Section 234C of the Act.

23. The decision of the Hon'ble Supreme Court in the case of (Hindustan Coca Cola Beverage (P) Ltd., Vs. Commissioner of Police) (2007) 293 ITR 226(SC), was also referred to and it was held that in the said case, deductee has already discharged the tax liability with interest payable under Section 201(1A) of the Act and as such no further interest can be claimed by the revenue from the assessee either under Sections 234A or 234B or 234C of the Act. In the case of Jacobs Civil Incorporated cited supra, it was held that the liability to deduct or collect tax at source is that of the Payer, therefore, for the purposes of Section 234B of the Act, the question would be as to whether the Payee i.e., the assessee had any role in deducting or collecting the tax, it was held that once this is in the negative and it was not the duty of the Payee/Assessee, the question of payment of any interest did not arise as it cannot be said in such circumstances that the assessee is in default for the purposes of Section 234B of the Act. In the said case, as contended by the revenue before the Settlement Commission, they took a stand that Section 234B of the Act is an independent and standalone provision and once the ingredients/conditions contained in that section were satisfied, the liability to pay the interest would arise. This contention was negative on the following terms:

We are not persuaded by this submission of

Mr. Sabharwal. It is stated at the cost of repetition that the liability to deduct or collect the tax at source is that of the payer. Therefore, for the purposes of Section 234B of the Act, the question would be as to whether the payee, i.e. The assessee in this case, had any role in deducting or collecting the tax. Once that is in the negative, and it was not duty of the payee/assessee, the question of payment of any interest would not arise as it cannot be said, in such circumstances, that the assessee is in default for the purposes of Section 234B of the Act. No doubt, as per the judgment in the case of Anjum Ghaswala (supra), if there is a default in making the payment of advance tax, the consequence which is to follow is that the interest becomes payable under Section 234B of the Act. But in the instant case, the provisions of Section 234B of the Act would not be attracted at all.

24. The Division Bench of Delhi High Court went on to examine the definition of the advance tax as defined under Section 2 (1) of the Act and under Section 209 of the Act and examined the expressions "deductible or collectible at source" and held as follows:

This clause categorically uses the expression "deductible or collectible at source" and it is this clause which is incorporated by the Uttaranchal High Court in the said judgment (supra) in the manner already pointed above. The scheme of the Act in respect of non-residents is clear. Section 195 of the Act puts an obligation on the payer, i.e. Any person responsible for paying to a non-resident, to deduct income-tax at source at the rates in force from such payments excluding those incomes which are chargeable under the head 'Salaries'. Therefore, the entire tax is to be deducted at source which is payable on such payments made by the payer to the non-resident. Section 201 of the Act lays down the consequences of failure to deduct or pay. These consequences include not only the liability to pay the amount which such a person was required to deduct at source from the payments made to a non-resident but also penalties etc. Once it is found that the liability was that of the payer and the said payer has defaulted in deducting the tax at source, the Department is

not remedy less and therefore can take action against the prayer under the provisions of Section 201 of the IT Act and compute the amount accordingly. No doubt, if the person (payer) who had to make payments to the non-resident had defaulted in deducting the tax at source from such payments, the non-resident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident is liable to pay tax and the question of payment of advance tax would not arise. This would be clear from the reading of Section 191 of the Act along with Section 209 (1) (d) of the Act. For this reason, it would not be permissible for the Revenue to charge any interest under Section 234B of the Act".

25. The decisions referred in preceding paragraphs would apply with full force to the case on hand. This is so because, for the purposes of Section 234B of the Act, the question would be as to whether the assessee, who is the payee had any role in deducting or collecting the tax, if the answer to this question is in negative and it was not the duty of the assessee, the question of payment of interest would not arise as the assessee cannot be treated to be an 'assessee in default'.

26. In the case of Emilio Ruiz Berdejo & Others, cited supra, the High Court of Bombay examined Sections 200 and 201 of the Act, and pointed out that Section 200 creates an obligation on the person deducting tax to pay the same within the prescribed limit to the Central Government and Section 201 provides for consequences of failure to deduct or to pay tax and sub-section 1(A) of Section 201 provides for liability to pay interest and such liability is on the person, who fails to deduct advance tax. It was further pointed out that if one turns to Chapter XVII of the Act, which provides for chargeability to succeed in certain cases.

27. Section 234(A) of the Act provides for payment of interest for defaults in furnishing return of income, Section 234(B) for defaults in payment of advance tax and Section 234 (C) for deferment of advance tax and all the three Sections create liability on the assessee to pay interest for the default committed by him in the circumstances mentioned in the said Section. It was further held that under Section 234(B) which imposes interest is compensatory in nature and not as a penalty. When duty is cast upon the payer to pay the tax at source, on failure, no interest can be imposed on the payee/assessee.

28. In the impugned proceedings, the Income Tax Settlement Commission proceeds to confirm the demand of interest under

Section 234(B) of the Act, which has been held to be not sustainable in the afore mentioned decisions. Therefore, the levy of interest is held to be not sustainable and accordingly the question arising for consideration is answered in favour of the petitioner/assessee and against the revenue.

29. In the result, the Writ Petition is allowed and the impugned order dated 06.07.2009 is set aside and it is held that the petitioner is not liable for payment of interest under Section 234(B) of the Act, in respect of the salary income earned by the petitioner outside India. In respect of any other income, it is open to the Assessing Officer to proceed to levy interest in accordance with law. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

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