

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.08.2018

Reserved on 23.08.2018
Delivered on 28.08.2018

C O R A M

THE HON'BLE Mr.JUSTICE K.RAVICHANDRABAABU

W.P.No.41940 of 2006

and

MP No.1 of 2006

Dr.Thirupathy Reddy (HUF),
6, Porur, Somasundarar Street,
T.Nagar,
Chennai 600 017.Petitioner

vs

1.The Assistant Commissioner of Income Tax,
Central Circle II (1),
121, Nungambakkam High Road,
Chennai 600 034.

2.The Income Tax Officer,
Company Ward VI (1),
121, N.H.Road,
Chennai 600 034.Respondents

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ mandamus to call for the records in Ref/WSA101/P1/Block Asst. dated 2.2.2006 read with Ref/WSA 101/P1/Block Asst. dated 5.5.2006 and quash the same and direct the second respondent to refund to the petitioner the entire sum of Rs.19,23,067/- together with interest under section 244 of the Income Tax Act, from the date of payment of the said amount till the date of refund.

For petitioner : Mr.M.P.Senthilkumar
For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel (I.T)

O R D E R

The petitioner is aggrieved against the orders of the second respondent dated 02.02.2006 and 05.05.2006, through which his request for refund of entire tax paid was rejected. Consequently, the petitioner seeks for refund of a sum of Rs.19,23,067/- together with interest under Section 244 of the Income Tax Act.

2. The case of the petitioner is as follows:

The petitioner is a Hindu undivided family and an assessee on the file of the first respondent. A search was conducted in terms of Samyuktha Foundations Pvt. Limited, a Company in which the petitioner is a shareholder. On the basis of the said search, a notice under Section 158 BD of the Income Tax Act was issued to the petitioner on 18.07.1996. The petitioner filed a return of income showing an undisclosed income of Rs.24,04,830/-. The return was not filed voluntarily but due to the pressure exerted by the officials of the respondent. Since the return was not voluntary, the petitioner did not pay any tax along with the said return. Thus, the said return was not valid in law, as it was not accompanied by the tax on the income declared in the return. Subsequently, the first respondent initiated proceedings for making assessment under Section 158 BD read with Section 143(3) and consequently, made an order of assessment on 27.08.1997. The petitioner challenged the said order of assessment in appeal before the Income Tax Appellate Tribunal. By order dated 30.03.2005, the Appellate Tribunal held that the assessment was barred by limitation. Thus, the Appellate Tribunal quashed the assessment order dated 27.08.1997. The said order of Appellate Tribunal was confirmed by this Court in T.C.No.1008 of 2015. On 15.06.2005, the second respondent made an order giving effect to the order passed by the Appellate Tribunal. In the aforesaid order, the second respondent, while calculating the reduction, adopted the tax as per the original order of assessment at Rs.39,09,468/- and interest at Rs.7,42,266/-, making a total income of Rs.46,51,734/-. He adjusted the revised demand of Rs.14,42,898/- against the same and determined the reduction at Rs.32,08,836/-. Along with the said order, the second respondent however refunded a sum of Rs.6,06,454/-. Since the entire assessment was annulled, the entire demand would stand cancelled and hence the tax paid, pursuant to the aforesaid illegal demand, is liable to be refunded in full together with interest. Therefore, the action of the second respondent in not refunding the entire tax paid is erroneous. The second respondent failed to accept the contentions made by the petitioner in this regard. Therefore, the present writ petition is filed questioning the action of the second respondent in not refunding the entire tax paid by the petitioner.

3. The respondents filed a counter affidavit, wherein it is stated as follows:

A search and seizure proceedings took place in the case of M/s.Samyuktha Foundation Pvt. Limited, in which the assessee represented by the Kartha is a promoter and shareholder. The search brought to light that the assessee made certain investments out of its undisclosed income. Therefore, proceedings under Chapter XIV B of the Act were initiated by

issuing notice under Section 158 BD on 09.08.1996. In response to the said notice, the petitioner filed its return of income on 10.09.1996, admitting a sum of Rs.24,04,830/- as its undisclosed income. The return filed by the petitioner was in response to the said notice, a statutory requirement. The assessee, in its return, furnished the details of total income as well as undisclosed income. Non payment of tax along with the return does not vitiate the validity of the return filed by the assessee. The return may be defective in terms of Section 139 (9) of the Act, which is curable. Therefore, it is not correct to contend that the return was not filed voluntary. The assessment was subsequently finalised under Section 158 BD read with Section 143(3) of the Act on 27.08.1997, determining the total undisclosed income at Rs.65,15,781/- and computing the tax liability at Rs.38,09,488/-. The assessee remitted tax on undisclosed portion of income admitted by it. The Income Tax Appellate Tribunal held that the assessment was not valid and thus quashed the same as null and void. In order to give effect to the order of the Appellate Tribunal, revision order was passed on 15.06.2005, deleting the addition made of Rs.41,11,451/- and determining the undisclosed income admitted by the assessee of Rs.24,04,834/-, as its total income and computing the tax at Rs.14,42,868/-. After discharging the tax payment of Rs.19,23,067/-, a sum of Rs.6,46,454/- was quantified as the amount refundable along with interest. For making assessment, the basic requirement is the return of income filed. Once the return is filed, the total income admitted by the assessee is taken as the basis for completion of assessment proceedings. Thus, when an assessment is annulled by the Appellate Authority, only the addition made over and above the income admitted in the income returned gets deleted. In the present case, the income admitted in the return was Rs.24,04,830/- and the addition made in the assessment order was Rs.41,11,451/-. While giving effect to the order of the Appellate Tribunal, the addition made in respect of assessment order was deleted, retaining the admitted undisclosed portion of income furnished in the return of income. Accordingly, the tax liability as well as the excess tax payment refundable was determined. Therefore, nothing is erroneous on facts and law, while giving effect to the order of the Appellate Tribunal. The petitioner assessee sought to mix up fact with regard to a "defective return" and "invalid return". Return submitted without proof of tax paid is only defective and not invalid. It is curable. An assessee, who defaults in making payment of tax along with return, is treated as "an assessee in default" as per Section 140A(3). Therefore, such return continues to be valid in the eye of law.

4.Mr.M.P.Senthilkumar, learned counsel for the petitioner made his submissions. He also filed written submission. The sum and substance of submissions made on behalf of the

petitioner are as follows:

The return of income filed by the petitioner on 10.09.1996, pursuant to the notice under Section 158 BD of the Act, without payment of tax, was not valid in the eye of law. Therefore, any amount paid by the petitioner was not based on any valid return of income. Once the assessment is annulled, no tax is chargeable on the total income returned by the assessee. Consequently, the full amount paid by the petitioner is liable to be refunded together with interest under Section 244. The entire tax was paid only pursuant to the demand and recovery action by the Department and not paid with the return and therefore, the tax paid is not covered by the proviso under Section 240. The decision of the Hon'ble Supreme Court relied on by the Revenue in the case of CIT vs Shelly Products and another, reported in 261 ITR 367, is distinguishable on facts and thus, the same would not apply to the present case. The tax paid in cases of tax chargeable on total income returned by the assessee would not apply for undisclosed income returned by the assessee. The term "total income" and "undisclosed income" are totally different. Merely because the petitioner declared certain income, the same cannot be termed as undisclosed income, unless the order of block assessment stands the test of validity, which, in this case, failed. Therefore, the entire tax payment should be refunded along with interest.

5. On the other hand, Mr. A.P. Srinivas, learned Senior Standing counsel for the respondents, after reiterating the averments made in the counter, has further submitted that there is a clear bar under Section 240(b) in refunding the tax on the income returned by assessee. He further contended that only such tax paid on income other than what is returned, can be refunded, in case, the assessment is set aside or annulled later. Accordingly, the excess tax paid by the petitioner over and above the tax paid on the returned income was already refunded to the petitioner. Therefore, the petitioner is not entitled for the full refund.

6. In support of his contention, the learned counsel relied on the decision of the Hon'ble Supreme Court reported in CIT vs Shelly Products and another, reported in 261 ITR 367.

7. Heard both sides.

8. The point for consideration is as to whether the petitioner is entitled to full refund of tax already paid, since the assessment was annulled later by the competent Authority and such annulment has become final and conclusive.

9. Though the learned counsel for the petitioner invited this Court various provisions under the Income Tax Act to elaborately go into the issue, the crux of the contentions so

raised can be narrowed down simply as follows:

a) The return filed by the petitioner pursuant to the notice under Section 158 BD did not accompany the tax payment and thus, the said return was not valid in law.

b) Consequently, all the payment of tax, based on such invalid return, is liable to be refunded, since the very assessment made based on such return, was subsequently annulled by the Appellate Tribunal and confirmed by this Court in Tax Case (Appeal) No.1008 of 2005.

10. On the other hand, the contention of the Revenue is that the claim of the petitioner for full refund is barred under Section 240(b) of the Income Tax Act, 1961. The Revenue, in support of its contention, relied on the decision of the Apex Court made in the case of Commissioner of Income Tax vs. Shelly Products, 261 ITR 367.

11. There is no dispute to the fact that in pursuant to the search and seizure action, in the case of a Company called Samyuktha Private Limited, wherein the petitioner assessee represented by its Kartha, is a shareholder, a notice under Section 158BD of the said Act, was issued to the petitioner on 09.08.1996. It is also not in dispute that in response to the said notice, the petitioner filed its return of income on 10.09.1996, admitting a sum of Rs.24,04,830/- as its undisclosed income. Even though it is contended before this Court as though filing of such return was under pressure of the officials of the Revenue, this Court is not in a position to appreciate the said contention, in the absence of any materials substantiating such allegation, more particularly, in the absence of any challenge by the petitioner against further proceedings in pursuance of such notice.

12. On the other hand, as rightly contended by the Revenue, the statutory obligation vested on the part of the assessee was discharged by filing a return with true and correct particulars of the total income including the undisclosed income in respect of which, the assessee was assessable for a concerned block. Therefore, the petitioner is not entitled to contend now that filing of such return itself was under pressure. On the other hand, it is to be taken that the petitioner has discharged its statutory obligation by filing its return, showing the above undisclosed income.

13. It is true that the petitioner at the time of filing the return had not paid the tax. But at the same time, it is not in dispute that the petitioner had paid such tax later on demand and recovery action. Whether the payment of tax was voluntary or out of such demand, the fact remains that such payment of tax was also towards the disclosed income in the return and therefore, the manner and time of payment of such

tax, do not have any significance. On the other hand, it is to be construed that such payment of tax was in respect of the return filed by the assessee containing disclosure of admitted income. Therefore, it is evident that the defective return filed earlier became valid later by the petitioner's own conduct of submitting to the assessment proceedings by paying the tax on demand. Thus, the petitioner is not justified in contending that the return filed by him without payment of tax is invalid one and consequently, subsequent payment of tax based on such return is liable to be refunded.

14. It is true that once the assessment is annulled, the assessee is entitled to refund of tax, as provided under Section 240 of the Income Tax Act, which reads as follows:

"240. Refund on appeal, etc.:

Where, as a result of any order passed in appeal or other proceeding the [Assessing] Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf:

[Provided that where, by the order aforesaid,--

(a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment.

(b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee.]

15. Perusal of the above provision would show that the entitlement to get refund of tax, in case the assessment is annulled, is confined only to the tax paid in case of tax chargeable on the total income returned by the assessee and not to the entire tax paid by the assessee including the tax chargeable on the total income including the tax chargeable on the income returned by the assessee. In other words, if the assessee has filed his return admitting certain amount as total income, such admission is binding on the assessee, even though the consequential assessment made is annulled later. To put it more precisely, an assessee, who admitted the income in his return as the total income, is not entitled to retract such admission or go against such admission, merely because the assessment made based on such return, was subsequently annulled. The annulment of the assessment, at the best, may result in refund of excess tax levied by way of such assessment over and above the admitted tax paid. Therefore, on any account, the assessee cannot be heard to say that even in respect of admitted liability, the assessee is entitled to refund of tax paid on such liability, once the assessment is set aside or annulled later.

16. At this juncture, it is to be noted that what was set aside or annulled by the competent forum, was only the order of assessment made in pursuance to the filing of return by the petitioner assessee. Therefore, it goes without saying that only such assessment made, either by making any addition or deletion, etc., consequent upon filing of such return by the assessee, cannot have any force in view of such annulment and not the very return filed by the assessee also in so far as the self declaration of undisclosed income in pursuance to the receipt of notice under Section 158BD. Such self declared undisclosed return stands, even though the assessment made thereafter either was set aside or annulled. Thus, the assessee, who discharged his statutory obligation in filing the return, in compliance of notice under Section 158BD, is bound by his own return and cannot be heard to say that such return also is invalid on account of annulment of the assessment made, based on such return.

17. It is vehemently contended by the learned counsel for the petitioner that non payment of the tax along with the return makes the very return itself invalid and therefore, based on such invalid return, any tax paid thereunder, cannot be retained by the Revenue. I am unable to accept the said contention for the following reasons.

18. Section 139 of the said Act deals with return of income. Section 140A deals with Self-assessment, wherein a return filed under Section 158 BC is also included. Section 140A contemplates that any tax payable on the basis of any return required to be furnished under Section 158BC, etc., shall be paid together with interest and the return shall be accompanied by proof of payment of such tax. Section 140 A(3) further contemplates that if any assessee fails to pay the whole or any part of such tax or interest or both, in accordance with the provisions of sub section (1) of Section 140A, he shall be deemed to be an assessee in default in respect of the tax or interest or both, remaining unpaid. However, under Section 139, sub clause (9), the Assessing Officer may intimate the defect to the assessee and give him an opportunity to rectify the defect. Only when such defect was not rectified within the time granted by the Assessing Officer, the return so filed is treated as an invalid return. In this case, it is not in dispute that though the assessee has not paid the tax along with the return at the time of filing the same, on notice from the Assessing Officer, he paid the same subsequently. Therefore, a defective return filed by the assessee in this case has become valid return on payment of tax subsequently on notice from the Assessing Officer. Thus, the return filed by the assessee had not become invalid return at any point of time. Consequently, the tax paid on the admitted income shown in such return is not liable to be

refunded, as prohibited under Section 240(b) of the said Act.

19. It is relevant to note at this juncture that the very same issue was already considered by the Apex Court in the case of Commissioner of Income Tax vs Shelly Products & Another, 261 ITR 367, wherein it was held as follows:

"..In the cases in hand the question is only with regard to the refund of tax paid by way of advance tax or self-assessment tax which was paid by the assessee themselves admitting their liability to pay such tax. The assessee does not contend that the tax of which refund is claimed was not chargeable or payable, but claim refund on the sole ground of the failure of the authorities to pass an order of assessment.

Having considered the authorities on the subject, we find ourselves in agreement with the view of the Gujarat High Court in Saurashtra Cement and Chemical Industries Ltd.'s case [1992] 194 ITR 659 [FB]. The question that falls for our consideration in these appeals is whether on the failure or inability of the authorities to frame a regular assessment after the earlier assessment is set aside or nullified, the tax deposited by an assessee by way of advance tax or self assessment tax, or tax deducted at source is liable to be refunded to the assessee, since its retention by the Revenue would result in breach of Article 265 of the Constitution which prohibits the levy or collection of any tax except by authority of law. The Revenue does not dispute the position that if an assessment is framed, which is later nullified in appeal or revision or other proceedings, any amount paid by way of income tax pursuant to the order of assessment, over and above the advance tax and self-assessment tax is undoubtedly refundable under section 240 of the Act. The only dispute is with regard to the refund of the advance tax and self-assessment tax which is paid by the assessee on his own assessment of his liability and is based on the return of income filed by him. According to the Revenue, the tax so paid represents the admitted liability of the assessee, and failure or inability to frame another assessment after the earlier assessment is set aside or nullified in appropriate proceedings, does not entitle the assessee to claim refund because to this extent the assessee has admitted his liability to pay tax in accordance with law. The tax liability is computed on the basis of the relevant Finance Act laying down the rate or rates at which the tax is payable and provides for other matters relevant to the computation of tax. Thus the tax is required to be paid in advance by the assessee, even before assessment is made, and he himself is required to compute his

liability having regard to the rates and exemptions applicable. Thus, both the levy and collection of tax is in accordance with law.

We find considerable force in the submission of the revenue and it must be upheld. We have earlier noticed the scheme of the Act. Section 4 of the Act creates the charge and provides, inter alia, for payment of tax in advance or deduction of tax at source. The Act provides for the manner in which advance tax is to be paid and penalises any assessee who makes a default or delays payment thereof. Similarly, the deduction of tax at source is also provided for in the Act and failure to comply with the provisions attracts the penal provisions against the person responsible for making the payment. It is, therefore, quite apparent that the Act itself provides for payment of tax in this manner by the assessee. The Act also enjoins upon the assessee the duty to file a return of income disclosing his true income. On the basis of the income so disclosed, the assessee is required to make a self-assessment and to compute the tax payable on such income and to pay the same in the manner provided by the Act. Thus the filing of return and the payment of tax thereon computed at the prescribed rates amounts to an admission of tax liability which the assessee admits to have incurred in accordance with the provisions of the Finance Act and the Income Tax Act. Both the quantum of tax payable and its mode of recovery are authorized by law. The liability to pay income-tax chargeable under section 4 (1) of the Act thus, does not depend on the assessment being made. As soon as the Finance Act prescribes the rate or rates for any assessment year, the liability to pay the tax arises. The assessee is himself required to compute his total income and pay the income tax thereon which involves a process of self-assessment. Since all this is done under the authority of law, there is no scope for contending that Article 265 is violated.

What then is the effect of the failure to make an order of assessment after the earlier assessment made is set aside or nullified in appropriate proceedings? If the assessing authority cannot make a fresh assessment in accordance with the provisions of the Act it amounts to deemed acceptance of the return of income furnished by the assessee. In such a case the assessing authority is denuded of its authority to verify the correctness and completeness of the return, which authority it has while framing a regular assessment. It must accept the return as furnished and shall not in any event raise a demand for payment of further taxes.

Accepting the income as disclosed in the return of income furnished by the assessee, it must refund to the assessee any tax paid in excess of the liability incurred by him on the basis of income disclosed. Even if the tax paid is found to be less than that payable, no further demand can be made for recovery of the balance amount since a fresh assessment is barred. In other words, the tax paid by the assessee must be accepted as it is, and in the event of the tax paid being in excess of the tax liability duly computed on the basis of return furnished and the rates applicable, the excess shall be refunded to the assessee, since its retention may offend Article 265 of the Constitution."

20. The Hon'ble Supreme Court in the above decision has categorically observed that the liability to pay income tax chargeable under Section 4(1) of the Act, does not depend upon the assessment being made and that the liability to pay the tax arises, as soon as the Finance Act prescribes the rate or rates for any assessment year. It is further observed therein that if the Assessing Authority cannot make a fresh assessment after the earlier assessment made was set aside or nullified, it amounts to deemed acceptance of the return of income furnished by the assessee. Going by the above law laid down by the Apex Court and applying the same to the present facts and circumstances, I am of the firm view that in pursuant to the nullifying of the assessment, a deemed acceptance of the return of income furnished by the assessee stands and holds good and consequently, any tax paid either along with the return or later under any circumstances would certainly fall under the purview of "tax chargeable on the total income returned by the assessee" as referred to in Proviso (b) of Section 240 of the said Act. Consequently, whatever the amount paid by the assessee in cases of the tax chargeable on the total income more than returned by the assessee alone could be refunded and not a full refund. This is what happened in the present case. Admittedly, the Revenue has refunded a sum of Rs.6,46,454/-, being the excess tax paid by the assessee. Hence, the tax paid by the Assessee on the admitted return filed by him cannot be refunded and thus, the respondents are justified in rejecting such claim. Accordingly, I find no merits in the writ petition and thus, the same is dismissed. No costs. The connected miscellaneous petition is dismissed.

s/d-

Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

vri

To

1.The Assistant Commissioner of Income Tax,
Central Circle II (1),
121, Nungambakkam High Road,
Chennai 600 034.

2.The Income Tax Officer,
Company Ward VI (1),
121, N.H.Road,
Chennai 600 034.

3.The Commissioner of Income Tax (Appeals)-VII,
121, Mahatma Gandhi Road,
Chennai 600 034.

+1 CC to Mr. Srinivas, Advocate sr 59027.

+1 CC to M/s. Mallika Srinivasan, Advocate sr 58547.

W.P.No.41940 of 2006

MG (CO)
SP(10/09/2018)



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