IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.
WRIT PETITION NO.544 OF 2019

Ultratech Cement Ltd.
(As the successor of Samruddhi Ltd.) … Petitioner

Vs

The Chief Commissioner of Income-tax – 1
& anr. … Respondents

Mr.J.D. Mistri, Senior Advocate with Mr.M.Agarwal i/b Mr.Atul Jasani for the Petitioner

Mr.Suresh Kumar with Sumandevi Yadav, Priyanka Tiwari for Respondents

CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.
DATED: AUGUST 5, 2019

P.C.:

1. Heard learned Counsel for the parties for final disposal of the petition. The petition is filed by one Ultratech Cement Limited, a company registered under the Companies Act challenging an order dated 30.11.2018 passed by Respondent No.1 Chief Commissioner of Income Tax rejecting the petitioner's application for waiver of interest u/s 234C of the Income Tax Act ('the Act', for short).

2. Brief facts are as under:

The petitioner company is a successor of one M/s.Samruddhi Cement Limited, a company registered under the

Companies Act, which was incorporated on 4.9.2009 as a subsidiary company of Grasim Industries Ltd. Grasim Industries Ltd. desired to demerge its cement unit which would be taken over by Samruddhi Cement Ltd. A scheme for such purpose, therefore, was framed. The appointed date provided in the scheme was 1.10.2009. The scheme provided that (i) Grasim Industries Ltd. will carry on the cement business from the appointed date to the effective date in trust on behalf of Samruddhi Cement Ltd. (ii) the advance tax payment made by Grasim Industries Ltd. in respect of the profits of the cement business from the appointed date and onwards shall be deemed to be paid by Samruddhi Cement Ltd. It is not in dispute that pursuant to such clause, Grasim Industries Ltd. paid advance tax of Rs.184 crores on its profits of the cement business for the period from 1.10.2009 and 31.3.2010 in the following manner:

> "Advance tax payment made by Grasim in respect of profits of the Cement Business on profits pertaining to profits from the appointed date and onwards shall be deemed to be paid by the Company.
>
> …

Date of Payment	Rs.
15.12.09	124,00,00,000
15.03.10	60,00,00,000
Total	**184,00,00,000**

3. The scheme of demerger was presented before the Madhya Pradesh High Court as well as Gujarat High Court for approval. The Madhya Pradesh High Court approved the scheme by an order dated 31.3.2010 whereas the Gujarat High Court granted approval by an order dated 6.5.2010. The scheme was subsequently duly notified and became effective from 18.5.2010.

4. Samruddhi Cement Ltd. filed its return of income for the AY 2010-2011 declaring an income of Rs.428.83 crores, which under section 115JB of the Act was assessed at Rs.931.70 crores. The Assessment order was passed on 26.3.2013. This order took into account the advance tax of Rs.184 crores paid by Grasim Industries Ltd. for the period between 1.10.2009 till 31.3.2010. This was adjusted against Grasim's tax liability giving rise to refund of Rs.25.66 crores (rounded off).

5. Samruddhi Cement Ltd. had not paid advance tax installments falling due on 15.6.2009 and 15.9.2009. The question of charging interest on non-payment of advance tax of two installments, therefore, would arise. It is not even the case of the Samruddhi Cement Ltd. that interest u/s 234C of the Act, ordinarily would not be leviable. Samruddhi Cement Ltd., however, contends that such advance tax was not deposited on account of

impossibility. Citing Circular of CBDT dated 26.6.2006, Samruddhi Cement Ltd., therefore, filed application dated 11.5.2012 to the Chief Commissioner of Income Tax seeking waiver of interest. In such application, Samruddhi Cement Ltd. pointed out that the scheme of demerger envisaged the appointed date of 1.10.2009. From such date, Samruddhi Cement Ltd. would continue to operate its cement business in trust for and on behalf of Samruddhi Cement Ltd. and the advance tax pertaining to profit from such date and onwards, would be deemed to have been paid by Samruddhi Cement Ltd. In that application, it was also pointed out that accordingly Samruddhi Cement Ltd. had paid advance tax of Rs.184 crores in two installments falling due on 15.9.2012 and 15.3.2012. It was pointed out that the scheme was approved by Madhya Pradesh High Court and the Gujarat High Court on 31.3.2010 and 6.5.2010 respectively. It was also pointed out that Grasim has not claimed benefit of such advance tax of Rs.184 crores. It was contended that the company was incorporated only on 4.9.2009 and company was not in existence on 15.6.2009. By the time second installment fell due on 15.9.2009, there was no proposal to acquire the cement business from Grasim. Samruddhi Cement Ltd. was in an infant stage. No business activity was carried on. It was further pointed out that the income was received after the due date for payment of first and second installments of advance tax. Such income was neither anticipated nor in contemplation on such dates. The request was, therefore, made to waive interest in terms of CBDT Circular dated 26.6.2006 since the case of the company fell squarely within the parameters of the said Circular.

6. The Principal Commissioner passed the impugned order dated 30.11.2018 and rejected the application of the petitioner. His principal ground was that in view of clear provisions contained in the scheme of demerger, it cannot be stated that the income was neither anticipated nor contemplated. Necessary conditions for waiver of the interest provided in the CBDT Circular dated 26.6.2006 were, therefore, not fulfilled. He also pressed in service yet another ground, namely, that the company ought to have paid all its installments which requirement in the present case according to him was not fulfilled. The relevant portion of his order reads as under:

> "5. I have carefully considered the facts of case the request of the assessee. Para 2(b) of the Board's instructions dated 26.6.2006, relied upon by the assessee company, reads as under:
>
> (b) Any income chargeable to income-tax under any head of income, other than "Capital gains" is received or accrued after due date of payment of the first or subsequent

installments of advance tax which was neither anticipated or 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/Director-General is satisfied on the facts and circumstances of the case that this is a fit case for reduction or waiver of the interest chargeable under section 234C of the Income-tax Act.

Thus, as per the Board's guidelines the income should be received after the due date of payment of first or subsequent installment of advance tax, which was neither anticipated nor was in the contemplation of the assessee. In the instant case, the cement business of Grasim Industries was contemplated to be transferred to the assessee w.e.f. 01.10.2009 under a well thought out and deliberate plan by the Scheme of arrangement. The assessee company being 100% subsidiary of GIL was an integral part of Grasim Industries who was carrying on the cement business. Therefore, it cannot be said that the income was not anticipated or not under contemplation. The benefit of this clause for waiver of interest is available only in a case where the income was not anticipated at all. When the assessee has executed a well thought out and deliberate plan to acquire the cement business it cannot be said that the income from cement business was not anticipated or not under contemplation. Thus, this condition of unexpected income which was not anticipated is not found fulfilled in this case.

6. The second condition as per this guideline is that the assessee should have made payment of advance tax on such income in the remaining installments. In this case no payment of advance tax was made by the assessee at all in any of the installments. The advance tax paid by GIL was in respect of its composite business including the cement unit as there is no provision to pay advance tax unit-wise. It is also found that the third and fourth installment of advance tax was paid by Gil on its own PAN and no payment was made on the PAN of the assessee company. The Boards' guideline for waiver of interest is applicable only in case where the assessee itself has paid the advance tax and there was a shortfall in the payments made in the earlier installments. Thus, the basic ingredient of payment of advance tax by the

> assessee, as contemplated in the Board's instructions is missing in this case. The assessee has only taken credit for the 3rd and 4th installment of advance tax paid by Grasim Industries Limited. However, the fact remains that no advance tax was paid by the assessee though its separate PAN was available. Therefore, the assessee is not eligible for any wavier of interest in accordance with Board's instructions as no payment of advance tax was made by the assessee company at all during the year."

7. Appearing for the petitioner, the learned Counsel Mr.Mistri submitted that the impugned order suffers from gross illegality. Samruddhi Cement Ltd., was not in existence when the first installment of 15.6.2009 had fallen due. By the time of second installment of 15.9.2009, the company had just come into existence. The proposal for acquiring the cement business from Grasim had not yet been finalised. In any case, the scheme of demerger was subject to approval by two High Courts. Till such approvals were granted, the scheme would not come into existence. Various provisions made in the scheme would not be effective. It was, therefore, not correct to hold that the profit in question could have been anticipated or could have been under contemplation. He further pointed out that the advance tax of Rs.184 crores paid by Grasim was not claimed by the said company but by Samruddhi Cement Ltd. and the Assessing Officer duly recognised the same while passing the order of assessment.

The Commissioner was, therefore, not correct in recording that all the installments were not paid by Samruddhi Cement Ltd.

8. On the other hand, the learned Counsel Mr.Suresh Kumar opposed the petition. He supported the impugned order. He argued that the crucial requirement of applicability of the Circular was that the income in question should neither be anticipated nor in contemplation. In the present case, both the conditions were not satisfied. The scheme of demerger was already framed which envisaged transfer of cement business of Grasim to Samruddhi. The Commissioner, therefore, had correctly come to the conclusion that the petitioner was not entitled to the benefit of Circular.

9. In exercise of powers under section 119(2) of the Act, CBDT has issued order/circular dated 26.6.2006 regarding waiver of interest under section 234A, 234B and 234C of the Act. Relevant portion of this Circular reads as under:

> "**"Sub: Order under section 119(2)(a) of the Income-tax Act, 1961 regarding waiver of interest under sections 234A, 234B & 234C of the Income-tax Act, 1961.**
>
> **SECTION 234A, 234B, 234C,**
> **In exercise of the powers conferred under clause (a) of sub-section (2) of section 19 of Income-tax Act 1961, Central Board of Direct Taxes, hereby directs that the Chief Commissioner of Income-tax and Director General**

of Income-tax may reduce or waive interest charged under section 234A, or section 234B or section 234C of the Act in the classes of cases or classes of income specified in paragraph 2 of this Order for the period and to the extent the Chief Commissioner of Income-tax / Director-General of Income-tax may deem fit. However, no reduction or waiver of such interest shall be ordered unless the assessee has filed the return of income for the relevant assessment year and paid the entire Income-tax (principal component of demand due on the income as assessed. The Chief Commissioner of Income-tax or Director-General of Income-tax may also impose any other conditions as deemed fit for the said reduction or waiver of interest.

The class of incomes or class of cases in which the reduction or waiver of interest under section 234Aof section 234B or, as the case may be section 234C can be considered, are as follows:

(a) ….

(b) Any income chargeable to income-tax under any head of income, other than "Capital gains" is received or accrued after due date of payment of the first or subsequent instalments of advance tax which was neither anticipated nor was in the contemplation of the assessee, and he advance tax on such income is paid in the remaining instalment or instalments, and the Chief Commissioner/Director-General is satisfied on the fact and circumstances of the case that this is a fit case for reduction or waiver of the interest chargeable under section 234C of the Income-tax Act.

….

…

4. Earlier Orders under section 119(2)(a) dt. 23rd May, 1996 and 30th January, 1997 on the subject stand superceded by this Order. If any petition in the past has been rejected because the Board had not issued this direction earlier, such petition may be reconsidered and decided in accordance with this Order. If any petition in the past was allowed in accordance with the Orders under section 119(2)(a) dt. 23rd May, 1996 and 30th

> **January, 1997, such Orders allowing waiver should not be reopened/revised as per the guidelines contained in this Order."**

10. It can thus be seen that to obviate the difficulty arising out of strict compliance of the interest provision, the CBDT has issued the said Circular for waiver of interest in certain circumstances. Para 4 of the Circular provides that these guidelines would be applied even in cases, applications for waiver of interest have been rejected in the past.

11. The facts of the case are not seriously in dispute. Samruddhi Cement Ltd. was incorporated on 4.9.2009 as a subsidiary of Grasim Industries. The scheme of demerger of Grasim's business was framed which envisaged 1.10.2009 as the appointed date. The scheme was approved by the Madhya Pradesh and Gujarat High Courts on 31.3.2010 and 6.5.2010, and the effective date being 18.5.2010. Till these orders were passed, the scheme would not be effective. The demerger as envisaged in the scheme, would not come into existence. It was, therefore, that the scheme itself provided that post 1.10.2009, Grasim Industries would continue to operate its cement business in trust for and on behalf of the Samruddhi Cement Ltd. The scheme also provided that all taxes paid by Grasim Industries on the profit of its cement

business arising on and after 1.10.2010 would be deemed to have been paid by Samruddhi Cement Ltd. That is how the two companies and even the assessing officer proceeded.

12. As per law, any scheme of amalgamation, merger or demerger of companies would have to be approved by the jurisdictional High Court. The effective date may be one provided by the High Court in its order. The appointed date may be one envisaged in the scheme or if any specification made in the order, that may be provided by the High Court. Necessarily, therefore, any such scheme would be approved having a retrospective effect. Till approval comes from the High Court, nevertheless, the scheme remains at the stage of proposal. Under the circumstances, at best, it can be stated that the Grasim Industries Ltd. and for that matter, Samruddhi Cement Ltd. could have anticipated the demerger of the cement unit and that such demerger was also in contemplation. However, accruing of income to Samruddhi Cement Ltd. cannot be stated to be either anticipated or under contemplation. One must draw a distinction between anticipation or contemplation of demerger of the business from anticipation or contemplation of income. Obviously, since it was Grasim Industries and Samruddhi Cement Ltd. who had applied to the

High Court for approval of the demerger scheme, the scheme was under contemplation and, therefore, approval anticipated. This does not mean that approval by the High Court was a certainty. Till the approval was granted, Samruddhi Cement Ltd. could not have anticipated or contemplated flowing of the income in its coffers. Any other view would act extremely harshly in a situation as the present one and defeat the very purpose for which the Circular has been issued by the CBDT. We can think of a reverse situation. Let us assume Samruddhi Cement Ltd. had paid advance tax. Grasim Industries obviously, therefore, would not. Or the scheme of demerger was not approved by the High Court or not approved till the completion of the financial year. Samruddhi Cement Ltd. may be able to claim refund, surely Grasim Industries would be charged interest for not depositing advance tax.

13. We may recall, Grasim Industries continued to discharge the tax liability on the profit of the cement business even after 1.10.2009. Consequently, Grasim had paid advance tax of Rs.184 crores. On account of demerger, Grasim never claimed benefit of such advance tax, instead, Samruddhi Cement Ltd. in return of income, claimed credit thereof, which was also recognised by the Assessing Officer. Second ground pressed in service by the

Commissioner is wholly untenable. We may recall, he was of the opinion that the Grasim Industries had not even paid all its installments and therefore also, waiver of interest could not be granted. This conclusion is based on a fallacious consideration that the installments were paid by Grasim Industries and not Samruddhi Cement Ltd. The relevant parties, namely, Grasim Industries and Samruddhi Cement Ltd. as well as the Assessing Officer treated the advance tax installments paid by Grasim Industries as deemed to have been paid by Samruddhi Cement Ltd. The Commissioner, therefore, was in error in pressing in service this clause of the Circular.

14. Under the circumstances, we find that the Commissioner committed a serious error in rejecting the application for waiver of interest. The impugned order dated 30.11.2018 is, therefore, quashed. It is directed that the respondents shall waive interest payable u/s 234C of the Act in terms of CBDT Circular dated 26.6.2006 for the period in question. Consequently, if such interest is already recovered, the same would become refundable.

15. The petition is allowed and disposed of accordingly.

(S.J. KATHAWALLA, J.) **(AKIL KURESHI, J.)**