

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reservation : 14.08.2019
Date of Pronouncement : 14.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP No.15097 of 2007

Tushin T.Mehta
Legal heir of Late Tushaar Mehta ... Petitioner

Vs.

The Chief Commissioner of Income Tax,
Chennai - II,
No.121, Mahatma Gandhi Road,
Chennai - 600 035. ... Respondent

Prayer : This Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records of the respondent relating to proceedings in C.No.CC.II/B(54)2001-2002 dated 19.08.2003 and quash the same.

For Petitioner : Mr.R.Sivaraman

For Respondent : Mr.D.Naveen Durai Babu
for Mrs.Hema Muralikrishnan

ORDER

The writ petitioner's father late Mr.Tushaar Mehta voluntarily filed his return of income for the assessment year 1996-97 on 28.03.1997 admitting the total income of Rs.11,06,129/-. The assessee had claimed long term capital gains of Rs.3,26,813/- on sale of property made during that year. The property in question was a leasehold property registered in his name. He had entered into a transaction with Mrs.Utility Builders for construction of multi storied structure. An agreement was executed on 06.03.1992. However, the lease deed was registered only on 21.04.1994. The claim of the assessee was that even though the registration was done later, he had taken possession of the land on 06.03.1992 itself, the date when he entered into builders agreement with Mrs.Utility Builders. The property was sold to Mrs.Shriram Asset Management Company Limited by sale deed dated 14.08.1995

for a sum of Rs.11,25,000/-. The consideration mentioned in the builders agreement was Rs.5,20,000/-. Thus, there has been a capital gain of Rs.6,05,000/-.

2.The question that arose was whether it should be treated as short term capital gains or long term capital gains. According to the assessee, he took possession of the land on 06.03.1992 itself. The sale in favour of Shriram Asset Management Company Limited was on 14.08.1995. Thus, the period of holding the asset was more than three years. But, this stand of the assessee was not accepted by the assessing officer. The assessing officer took the view that the construction was done by the builders on behalf of the assessee. There was no purchase of building. The purchase was only in respect of undivided leasehold interest in the land. The interest in the land was assigned by deed that was executed on 20.01.1994 and registered only on 02.03.1994. According to the assessing authority the legal right to use of the property came only on 20.01.1994 with assignment of leasehold interest in the land and not on 06.03.1992. After so reasoning out, the assessment was completed under Section 143(3) of the Income Tax Act, 1961, on 29.10.1998 by treating the capital gains of Rs.6,05,000/- as short term capital gains. The claim of the assessee that it was a long term capital gains was rejected. The assessing officer determined the total income at Rs.17,30,930/- for the said assessment year and demanded a sum of Rs.5,46,742/- as the total net tax payable. The assessing officer charged interest under Section 234 A of the Act at Rs.45,108/- and under Section 234 B at Rs.1,73,766/- and under Section 234 C at Rs.5,640/-.

3.It is not in dispute that the entire tax as demanded by the assessing officer was paid. The writ petitioner's father thereafter filed a waiver petition under Section 119(2) (a) of the Income Tax Act on 18.08.2000 for waiver of the interest charged under the aforesaid provisions. The stand taken in the said waiver petition was that on 06.03.1992 he purchased an immovable property at Royapettah High Road for Rs.5,20,000/- vide builders agreement dated 06.03.1992 and that the same was sold vide sale deed dated 14.08.1995 for a sum of Rs.11,25,000/-. Since he was under the bonafide belief that the capital gains yielded by the aforesaid transaction would amount to long term capital gains, he filed his return of income on that basis.

4.The writ petitioner's father invoked the Circular issued by the Central Board of Direct Taxes in F.No.400/234/95-IT(B) on 23.05.1996 which provided for waiver of interest under certain circumstances. He pointed out that the filing of return was voluntary without detection by the Income Tax Department. However, by order dated 22.10.2002, the waiver petition was

rejected. Challenging the same, the petitioner's father filed WP No.7940 of 2003. By order dated 22.04.2003, the High Court set aside the rejection order on the ground that proper reasons have not been assigned and that the order was rather laconic. The matter was remitted to the file of the authority with a direction to reconsider the matter and dispose of the application afresh after giving an opportunity of hearing to the assessee. After hearing the assessee, the assessing officer once again rejected the waiver petition and confirmed the levy of interest under the aforesaid provisions. The assessee died in September, 2005 and his son continued the battle and that is how this writ petition came to be filed.

5. Heard the learned counsel appearing for the petitioner and the learned standing counsel appearing for the respondent.

6. The learned counsel for the petitioner would contend that interest under Sections 234 A, 234 B and 234 C of the Income Tax Act, 1961 are statutorily levies and payable for belated/non payment of advance tax/income tax etc, and that the same is automatic and mandatory. However, the request for waiver of interest will have to be considered in the light of Section 119 (2)(a) of the Act read with the Circular issued by Central Board of Direct Taxes in F.No.400/234/95-IT(B), dated 23.05.1996. Clause 2(e) of the said circular provides that 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 AO, then levy of interest can be waived.

7. The learned counsel for the petitioner pointed out that the petitioner's father duly filed his return of income on time without detection by the assessing officer. According to the petitioner's counsel, the respondent erroneously invoked Clause (e) and that the applicable clause will be clause (v) of the Board's circular dated 23.05.1996. According to the petitioner, the said clause reads as under :

"(v) Where return of income is filed voluntarily without detection by the Income-tax Department and due to circumstances beyond control of the taxpayer such return of income was not filed within the stipulated time-limit or advance tax was not paid at the relevant time."

The writ petitioner's father was under a bonafide belief that the transaction is liable only for long term capital gain. However, the assessing officer chose to treat the transaction as a short term capital gain. This according to the petitioner's counsel was beyond the control of the assessee.

After the assessing officer made the stand clear, the petitioner's father duly paid the tax. Therefore, the petitioner's counsel contend that the impugned order will have to be set aside and the writ petition allowed. The learned counsel also placed reliance on the following decisions :

"1.N.Haridas & Co. vs. Chief Commissioner of Income Tax & Anr (2008) 296 ITR 246 (Mad).

2.Bhanuben Panchal and Chandrakaben Panchal vs. Chief Commissioner of Income Tax (2004) 269 ITR 27 (Guj)

3.S.Nagoor Babu @ Manu vs. Chief Commissioner of Income Tax-II and Anr in WP NO.379-382 of 2005."

8.Per contra, the learned standing counsel appearing for the department submitted that the impugned order does not warrant any interference and wanted this Court to dismiss this writ petition. The learned standing counsel also filed his written arguments and placed reliance on the following judicial precedents :

"1.MRF vs. Deputy Commissioner of Income Tax, Larger Tax Payer Unit, Chennai reported in 76 Taxmann 283 (Mad).

2.Commissioner of Income Tax IV vs. Insilco Ltd reported in 190 Taxmann 306(Del).

3.Chief Commissioner of Income Tax vs. Rajanikant and sons reported in 83 Taxmann.com 162(Mad)."

9.I carefully considered the rival contentions. It must be noted that the issue as to whether the capital gains made by the assessee should be treated as short term or long term had already attained finality. The assessee/the father of the writ petitioner had accepted the decision of the assessing officer and paid the entire tax as determined by him. The only issue is whether the levy of interest under Sections 234 A, 234 B and 234 C of the Act is to be waived or not.

10.As fairly stated by the learned counsel appearing for the petitioner Sections 234 A, 234 B and 234 C provide for levy of interest for delay/default/deferment in the payment of advance tax/income tax etc. They are statutory levies. Therefore, there can be relief from the said liabilities only if the case of the petitioner can be brought within the scope of the notification issued by the Central Board of Direct Taxes vide F.No.400/234/95-IT(B), dated 23.05.1996. In the affidavit filed in support of the writ petition as well as in the written arguments, the stand of the petitioner is that clause 2 (v) of the Board's circular dated 23.05.1996 must be invoked and

not clause (e).

11.This Court carefully went through the contents of the notification bearing F.No.400/234/95-IT(B), dated 23.05.1996. Nowhere is there any clause (v) as claimed by the petitioner in his affidavit as well as in his written arguments. Notification bearing F.No.400/234/95-IT(B), dated 23.05.1996 reads as follows :

"In exercise of the powers conferred under clause (a) of sub-section (2) of section 119 of the Income-tax Act, 1961, the Central Board of Direct Taxes hereby direct 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 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 tax due on the income as assessed except the amount of interest for which reduction or waiver has been requested for. The Chief Commissioner of Income-tax or the Director-General of Income-tax may also impose any other conditions deemed fit for the said reduction or waiver of interest.

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 utilised

for payment of advance tax installment or installments 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 gains" 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.

3.The Chief Commissioner of Income-tax/Director-General of Income-tax may order the waiver or reduction of interest under sections 234A, 234B and 234C under this order with reference to the assessment year 1989-90 or any subsequent assessment year but shall not so reduce or waive penal interest

in those cases where waiver or reduction of such interest has been rejected in the past on the merits of the case. If any petition in the past has been rejected because the Board had not issued this direction earlier, these may be reconsidered and decided in accordance with this order. Order : [F. No. 400/234/95-IT(B)], dated 23-5-1996"

However, two days prior to the issuance of the notification, a press note was released. The said press note dated 23.05.1996 reads as under :

"Prior to 1989, taxpayers who had failed to furnish the return of income within the specified time-limit or had paid inadequate or not paid advance tax within the stipulated time-limit were charged penal interest for such defaults and also subjected to penalty proceedings. The Direct Tax Laws (Amendment) Act, 1987 inserted new sections 234A, 234B and 234C in the Income-tax Act from assessment year 1989-90 to provide for penal interest at higher rates for the defaults in late furnishing of the return of income, defaults in payment of advance tax and for deferment of advance tax respectively and omitted separate penalty provisions for these defaults. The interest payable under these sections was mandatory and there was no provision for reduction or waiver of the penal interest, as was provided specifically in this behalf prior to 1989. As a result, several taxpayers faced unintended hardships in certain circumstances.

2.The Central Board of Direct Taxes, in exercise of powers, specified in section 119(2) (a) has decided to authorise Chief Commissioners and Directors-General (Investigation) to reduce or waive penal interest charged under the aforesaid sections in the following circumstances, namely:-

(i)where, in the course of search and seizure operation, books of account have been taken over by the Department and were not available to the taxpayer to prepare his return of income;

(ii)where, in the course of search and seizure operation, cash had been seized which was not permitted to be adjusted against arrears of tax or payment of advance tax installments falling due after the date of the search;

(iii) any income other than "Capital gains" which was received or accrued after the date of first or subsequent installment of advance tax, which was neither anticipated nor contemplated by the taxpayers and on which advance tax was paid by the taxpayer after the receipt of such income;

(iv) where, as a result of any retrospective amendment of law or the decision of the Supreme Court after the end of the relevant previous year, certain receipts which were hitherto treated as exempt, become taxable. Since no advance tax would normally be paid in respect of such receipts during the relevant financial year, penal interest is levied for the default in payment of advance tax;

(v) where return of income is filed voluntarily without detection by the Income-tax Department and due to circumstances beyond control of the taxpayer such return of income was not filed within the stipulated time-limit or advance tax was not paid at the relevant time.

3. The Chief Commissioners and Directors-General are being authorised to reduce or waive penal interest under sections 234A, 234B and 234C with reference to assessment year 1989-90 and any subsequent assessment year subject to certain specified conditions. This is a major step taken by the Central Board of Direct Taxes to mitigate the hardships in deserving cases. Press Note : Dated 21-5-1996."

12. Even this is an official press statement released by the department, the issues will have to be adjudicated only in terms of the formal notification and not in terms of the press release. The case laws referred to by the learned counsel for the petitioner are to the effect that if the assessee can establish that the default or delay in remitting the tax was due to circumstances beyond his control, then the department will have to adopt a liberal approach in granting waiver of interest under the aforesaid provisions. Even though the expression "due to circumstances beyond control of the tax payer" is not found in Clause (e) of the notification dated 23.05.1996, one can assume that it is equivalent to the expression "unavoidable circumstances". The expression "for reasons beyond the control of the assessee" is found in clause 2(a) of the very same circular. Therefore, instead of quibbling over the text, one can directly go for the jugular vein.

13. Here is a case where the assessee entertained a bonafide belief that the transaction entered into by him had yielded only long term capital gains. But, his stand was rejected by the assessing authority. The order passed by the assessing authority that the capital gains yielded only short term capital gains and not long term capital gains had become final. The bonafide nature of belief entertained by the assessee is wholly irrelevant. The expression "unavoidable" has been defined as something impossible to avoid or prevent (Oxford Advance Learner's Dictionary, 9th Edition). In Black's Law Dictionary (Eight Edition), the expression "unavoidable-accident doctrine" has been explained as a rule holding that no party is liable for an accident that was not foreseeable and which could not have been prevented by the exercise of reasonable care. In judicial and quasi judicial proceedings, the possibility is that one's contention may be either accepted or rejected. Rejection of one's legal contention cannot be characterised as an unavoidable circumstance. The decision of the adjudicator is something that is always beyond the control of the assessee and it cannot be foreseen unless of course there is something like match-fixing! The expression "unavoidable circumstance" occurring in clause 2(e) of the circular dated 23.05.1996 cannot obviously encompass outcomes of judicial and quasi judicial proceedings. This is all the more so because, clause 2(d) deals with arising of liability on account of a subsequent decision of the Hon'ble Supreme Court. If adverse judicial or quasi judicial decisions are to furnish a cause for seeking waiver of interest, it would have been expressly stated in clause 2(e) as in clause 2(d). When a person embarks on the journey of litigation, one should always be prepared for an adverse verdict. Therefore, there is nothing unforeseeable about the outcome of judicial or quasi judicial proceeding.

14. As the preambular paragraph of the notification dated 23.05.1996 states, reduction or waiver of penal interest charged under Sections 234 A, 234 B and 234 C of the Act can be made only in the classes of cases or classes of income tax specified in paragraph 2 of the order. In other words, unless the case of the assessee can be brought within one of the five clauses, there can be no scope for claiming reduction or waiver. It is not the case of the petitioner that his case will fall under clause 2 (a) or (b) or (c) or (d) of the notification. His case will have to fall only within clause 2(e). That is why, even though the petitioner talks about clause (v) in the earlier part of ground (d) of his affidavit filed in support of the writ petition, he would contend in the very same ground a little later, that he had satisfied the conditions laid under clause (e) of the Board's circular.

15.I have already held that rejection of one's stand in a legal proceeding cannot be construed as an "unavoidable circumstance". The case on hand clearly falls outside the scope of clause 2(e) of the circular dated 23.05.1996. The impugned order is sustained. I find no merit in this writ petition. It stands dismissed. No costs.

Skm

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Chief Commissioner of Income Tax,
Chennai - II,
No.121, Mahatma Gandhi Road,
Chennai - 600 035.

+lcc to Mrs.Hema Muralikrishnan, Advocate, SR.No.70145

WP No.15097 of 2007

Kak(20/09/2019)