IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2019

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case Appeal No.916 of 2009

S.Appaswamy ... Appellant

Vs.

The Deputy Commissioner of Income Tax
Central Circle IV(2)
No.46, Nungambakkam High Road,
Chennai. ... Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai Bench 'B' dated 30.04.2009 in ITA No.1693/MDS/2008 against the order of the Commisioner of Income Tax (Appeals) vi Chennai. Dated 27.02.2008 made in ITA.NO. 46/06-07.

against the order of the Joint Commisionser of Income Tax (OSD) Circle -I, Chennai. Dated 22.03.2006 made in PA/GI NO. 2114054/A Under Section 143(3) r.w sec 254 of I.T.Act for the assessment year 1991-1992.

For Appellant : Ms.Sreelakshmivalli for Mr.N.Muthukumar

For Respondent : Mr.T.R.Senthilkumar, Sr.Standing Counsel

JUDGMENT

(Delivered by DR.VINEET KOTHARI, J.)

The Assessee has filed this appeal under Section 260A of the Income Tax Act, 1961 ('Act' in short) raising the following substantial question of law, arising from the order of the Income Tax Appellate Tribunal, Chennai Bench 'B' dated 30.04.2009 in ITA No.1693/MDS/ 2008.dated 30.04.2009 for the Assessment Year 1991-1992, whereby the learned Tribunal allowed the appeal of the Revenue and upheld levy of interest under Section 220(2) of the Act, on the Assessee.

> "Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in upholding the levy of interest u/s 220(2) of the Income Tax Act?"

2.A Co-ordinate Bench of this Court, admitted the appeal on 07.10.2009, on the above substantial question of law raised by the Assessee.

3.Learned counsel for the Assessee has urged before us that since by the order dated 30.04.2009, the learned Tribunal has set aside the order of the Assessing Authority, the levy of interest for the period till the fresh Assessment Order is passed upon such remand by the Tribunal stood suspended and the Assessing Authority has erred in adding back such amount of interest under Section 220(2) of the Act in the Appeal Effect Order dated 22.03.2006 amounting to Rs.10,05,030/- which was imposed in the Original Assessment Order dated 15.03.1999 for the Assessment Year 1991-1992 in question. She relied upon the Circular of the Central Board of Direct Taxes, in Circular No.334 dated 03.04.1982 and submitted that if the Assessment Order is cancelled under Section 146 or set aside by an Appellate / Revisional Authority and that cancellation / setting aside becomes final, then, interest under Section 220 if any, can be charged only after a fresh demand notice upon fresh assessment re-framed in pursuance of such remand by the Higher Appellate Authority. She also relied upon the decision of the Rajasthan High Court in the case of Commissioner of Income Tax vs. Rajesh Kumar Dinesh Kumar in (2010) 325 ITR 346.

4.Learned counsel for the Revenue, however submitted that the order imposing interest under Section 220(2) of the Act is not even appealable before the Commissioner of Income Tax (Appeals) in view of Section 246A of the Act, which enumerates various orders against which the appeal lies before the Commissioner of Income Tax (Appeals) and none of the clauses of Section 246A of the Act includes the order passed for imposing interest under Section 220(2) of the Act. Therefore, such an appeal of Assessee was not even maintainable before the Commissioner of Income Tax (Appeals). He further submitted that the Tribunal, vide order dated 24.08.2004 in ITA Nos.1070 to 1072/Mds/1997 had only remanded the matter back to the Assessing Authority on a limited issue of tallying the extent of Rs.4,54,566/- and the entire Assessment Order was not set aside by the Tribunal and therefore, the aforesaid Circular

No.334 dated 03.04.1982 will not apply to the facts of the present case. He therefore submitted that the present appeal filed by the Assessee before this Court has no merit and it has to be dismissed.

5.We have heard the learned counsels.

6.The provisions of Section 220 of the Act including Sub-Section(2), are quoted below for ready reference:

> "When tax payable and when assessee deemed in default.
> 220. (1) Any amount, otherwise than by way of advance tax, specified as payable in a notice of demand under section 156 shall be paid within thirty days of the service of the notice at the place and to the person mentioned in the notice :
>
> Provided that, where the Assessing Officer has any reason to believe that it will be detrimental to revenue if the full period of thirty days aforesaid is allowed, he may, with the previous approval of the Joint Commissioner, direct that the sum specified in the notice of demand shall be paid within such period being a period less than the period of thirty days aforesaid, as may be specified by him in the notice of demand.
>
> (2)If the amount specified in any notice of demand under section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at one per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid :
>
> Provided that, where as a result of an order under section 154, or section 155, or section 250, or section 254, or section 260, or section 262, or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded :
>
> Provided further that in respect of any period commencing on or before the 31st day of March, 1989 and ending after that date, such interest

shall, in respect of so much of such period as falls after that date, be calculated at the rate of one and one-half per cent, for every month or part of a month."

7.The Tribunal, vide its earlier order dated 24.08.2004, had made the following observations, while remanding the matter to the Assessing Authority:

> "8.The learned counsel for the Assessee, on the other hand submitted that as per the decision of the Tribunal relied upon by the CIT (Appeals), the actual expenditure was Rs.4,54,566/- for the asst.year under consideration, apart from Rs.1,50,064/- debited to the trading account and claimed as relief in a sum of Rs.3,58,877/- as allowable expenditure.
>
> 9.We have heard the rival parties and perused the record. Even as pointed out by the learned counsel for the Assessee, the amount of Rs.1,50,064/- and Rs.3,58,877/- does not tally with the total expenditure of Rs.4,54,566/-. Further, according to the learned Departmental Representative, the estimation was warranted because of non-production of bills and vouchers. In view of this position, we set aside the matter to the file of the Assessing Officer with a direction to recomputed the total income with regard to this issue after giving adequate opportunity of being heard to the assessee. This appeal is partly allowed for statistical purpose."

8.While passing the Appeal Effect Order again on 22.03.2006, the Assessing Authority has added back the interest under Section 220(2) as computed in the earlier Assessment Order dated 15.03.1999 amounting to Rs.10,05,030/-. Though the Assessee in its appeal filed before the Commissioner of Income Tax (Appeals) did not raise specifically the challenge to the levy of interest under Section 220(2) of the Act and it only challenged the levy of interest under Sections 234A, 234B and 234C of the Act and prayed that interest could be levied only from 22.03.2006, the date on which the said Appeal Effect Order was again passed by the Assessing Authority, and though no such appeal was specifically maintainable as per the clear provisions of Section 246A of the Act, the Assessee raised such ground of levy of interest under Section 220(2) of the Act during the course of appeal hearing before the Commissioner of Income Tax (Appeals), relying upon the aforesaid CBDT Circular No.334, and the Commissioner of

Income Tax (Appeals) granted the said relief and set aside the levy of interest of Rs.10,05,030/- levied under Section 220(2) of the Act. The relevant portion of the order passed by the learned Commissioner of Income Tax (Appeals) in ITA No.46/06-07 dated 27.02.2008 is also quoted below for ready reference:

> "4.2 Ground relating to levy of interest u/s.220 (2) of the I.T.Act:-
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> During the course of appellate proceedings the AR has submitted the following written submissions:
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> > "The Assessment Order in this case has been passed after the original order was partially set aside by the Honourable Income Tax Appellate Tribunal with a direction to the Assessing Officer to reconsider certain issues. We invite your kind attention to Circular 334 dated 3/4/82 which states that no interest u/s.220(2) can be levied when the order of the Assessing Officer is set aside by the Appellate authority."
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> The AR has also produced the copy of the said circular, a portion of which is as under:-
>
> > Levy of interest u/s.220(2) when the original assessment is set aside – instructions regarding...
> >
> > "Where an assessment order is cancelled under Section 146 or cancelled / set aside by an appellate / revisional authority and the cancellation / setting aside becomes final (i.e.it is not varied as a result of further appeals / revisions), no interest under Section 220(2) can be charged pursuant to the original demand notice."
>
> 5.I have gone through the facts and circumstances of the case. I have gone through the written submissions and the circular No.334 dated 03.04.1982 submitted by the appellant. After careful consideration, I am of the view that interest u/s.220(2) of the I.T.Act, has wrongly been levied by the Assessing Officer. I hereby delete the interest of Rs.10,05,030/- levied u/s.220(2) of the I.T.Act. Thus, the appellant

succeeds on this ground."

9.Being aggrieved by the same, the Revenue took up the matter further before the learned Tribunal and the learned Tribunal has allowed the appeal of the Revenue with the following observation and therefore, the Assessee has again come up before this Court in an appeal under Section 260A of the Act. The learned Tribunal, in its order dated 30.04.2009 has made the following observation:

> "5.We have heard both the sides, considered the material on record as well as precedents relied upon by the ld.DR and find it to be undisputed fact that the ITAT has set aside only limited issue and not the whole assessment and hence the demand will continue to exist. Therefore, levy of interest under Section 220(2) was warranted and reliance placed by the ld.DR in this regard on the decision of Hon'ble Kerala High Court in the case of K.Venugopalan Nambiar vs. ACIT (supra) is appropriate and the head notes read as under:
>
> > "Recovery of tax - delay in payment of tax - interest - assessment and issue of notice of demand - appeal and order of remand by Tribunal to recomputed income - notice of demand remained valid and effective to extent tax was finally determined - assessee liable to pay interest under section 220(2) - Income-tax Act, 1961, s.220."
>
> While holding so, the Hon'ble Kerala High Court has considered the view of the Hon'ble Supreme Court in the case of CIT vs. Chitoor Electric Supply Corporation and Another 212 ITR 404 and took the view that where an assessment order is set aside and a fresh assessment is directed to be made, the assessment must be deemed to be still pending, which is to be completed. Moreover, the order of charging interest under section 220(2) does not come within the purview of the appealable order as envisaged under relevant provision and as power to waive / reduce such interest lies with the Administrative Commissioner / CCIT.
>
> 6.Therefore, in our considered view, the ld.CIT(A) is not legally correct either in adjudicating upon the issue or directing to delete the interest charged under section 220(2),

as such, the impugned order of the ld.CIT(A) is reversed and that of the Assessing Officer is restored.”

10.Having heard the learned counsels for the parties, we are of the clear opinion that the present appeal filed by the Assessee is devoid of merits and the question of law framed above deserves to be answered against the Assessee and in favour of the Revenue. The reasons are as follows:

Firstly, the levy of interest under Section 220 of the Act quoted above, is consequential and the interest is payable if the Assessee fails to pay the tax payable as determined in the Assessment Order and a Notice of Demand is issued to the Assessee under Section 156 of the Act. The levy of interest naturally therefore, depends upon the levy of tax itself. If the above Assessment Order is set aside or set at naught and the Assessing Authority is required to pass fresh Assessment Order, then naturally unless the tax liability is re-determined by the Assessing Authority, the question of interest as determined in the earlier Assessment Order, which has been set aside by the Tribunal, cannot arise.

11.Thus, in this context only, the Board seems to have issued Circular No.334 on 03.04.1982, which is quoted below for ready reference:

1211.Levy of interest under sub-section (2) when original assessment is set aside / cancelled

1.Doubts have been raised as to the quantum of interest chargeable under section 220(2) when the original assessment order passed by the Income-tax Officer is-

(a)cancelled by him under section 146;

(b)set aside / cancelled by an appellate / revisional authority and such appellate / revisional order has become final; or

(c)set aside by one appellate authority but, on further appeal, the order setting aside the assessment is varied by the second appellate authority and the demand gets finally determined.

2.These issues were comprehensively examined in consultation with the Ministry of Law and the Board has been advised:

1.Where an assessment order is cancelled under section 146 or cancelled / set aside by an appellate /revisional authority and the cancellation / setting aside becomes final (i.e., it is not varied as a result of further appeals / revisions), no interest under section 220(2) can be charged pursuant to the original demand notice. The necessary corollary of this position will be that even when the assessment is reframed, interest can be charged only after the expiry of 35 days from the date of service of demand notice pursuant to such fresh assessment order.

2.When the assessment made originally by the Income-tax Officer is either varied or even set aside by one appellate authority but on further appeal, the original order of the Income-tax Officer is restored either in part or wholly, the interest payable under section 220(2) will be computed with reference to the due date reckoned from the original demand notice and with reference to the tax finally determined. The fact that during an intervening period, there was no tax payable by the assessee under any operative order would make no difference to this position.
3.The foregoing legal position will apply mutatis mutandis to the proceedings under other direct taxes also.

Circular: No.334[F.No.400/3/81-ITCC], dated 3-4-1982."

12.The present case is not a case of total cancellation or setting aside of the Assessment Order fully. It was for a limited purpose that the Tribunal in its order dated 24.08.2004 had asked the Assessing Authority to reconcile the accounts with regard to the amounts of Rs.1,50,064/- and Rs.3,58,877/- which two figures did not tally with the total of Rs.4,54,566/-. Therefore, such re-computation at the hands of the Assessing Authority, pursuant to the remand of the learned Tribunal, will not amount to setting aside the Assessment Order altogether. No fresh determination of the tax liability was to take place upon such remand by the learned Tribunal. Therefore, the question of suspension of the levy of interest for the interim period, upon the order passed by the learned Tribunal dated 24.08.2004 upto 22.03.2006, when a fresh Assessment Order was passed by the Assessing Authority, could not arise. Circular No.334 dated 03.04.1982 had no application to the facts of the present case and therefore, the contention of the learned counsel for the Assessee raised before us, is devoid of merit.

13.Secondly, we also do not find that the order under Section 220(2) of the Act as such, namely, adding of interest of Rs.10,05,030/- in the Appeal Effect Order dated 22.03.2006 was per se appealable. Such provision is not included in the category of 'Orders Appealable' under Section 246A of the Act. If the levy itself is challenged, the levy of interest consequentially could only be challenged and if the tax liability is reduced or enhanced, the quantum of interest could go up or down, but without making a challenge to the tax liability itself, the levy of interest independently cannot be challenged before the learned Commissioner of Income Tax (Appeals). That is why it seems that the Assessee, conscious of this restriction, did not raise this issue as such in the "Grounds of Appeal" initially, but during the course of hearing of Appeal wrongly relying on the aforesaid CBDT Circular No.334 dated 03.04.1982, had raised the ground, against levy of interest under Section 220(2) and the same came to be not only entertained by the Commissioner of Income Tax (Appeals) but even the relief was granted by him, which in our opinion, was rightly reversed by the learned Tribunal.

14.The judgment of the Rajasthan High Court in the case of Commissioner of Income Tax vs. Rajesh Kumar Dinesh Kumar (supra), relied upon by the learned counsel for the Assessee, was rendered in a different factual background. The assessments were set aside entirely by the Tribunal twice over, in the case before the Rajasthan High Court and thereupon a fresh Assessment Order was passed, in pursuance of the said remand order and in that context, the Division Bench of the Rajasthan High Court held that as per Sub-Para (i) of Circular No.334 dated 03.04.1982, the interest under Section 220(2) of the Act could not be levied for the past period.

15.There is no quarrel over the said proposition laid down by the Rajasthan High Court. But the facts of the present case are different and there is no complete setting aside of the Assessment Order in the present case, as noted by us above. Therefore, the said judgment is of limited help to the learned counsel for the Assessee.

16.Therefore, the present appeal of the Assessee is liable to be dismissed and accordingly it is dismissed and the question of law framed above, is answered against the Assessee and in favour of the Revenue. No costs.

Sd/--
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

KM
To

1.THE INCOME TAX APPELLATE TRIBUNAL, CHENNAI BENCH 'B'

2. THE COMMISIONER OF INCOME TAX (APPEALS) VI CHENNAI.
3.THE JOINT COMMISIONSER OF INCOME TAX (OSD) CIRCLE -I, CHENNAI.

+1cc to Mr.Muthukumar, Advocate SR.No. 28173

gp(CO)

A.SK(06/05/2019)