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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 01.02.2019

Pronounced on : 12.06.2019

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.12595 of 2018

M/s.Karur Vysya Bank Limited,
(Rep.by its Managing Director),
Post Box No.21, Erode Road,
Karur - 639 001.

... Petitioner

Vs.

The Principal Commissioner of Income Tax,
Trichy - 1, Trichy,
No.44, Williams Road, Cantonement,
Tiruchirappalli - 620 001.

... Respondent

Prayer : This Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records relating to the impugned order dated 19.03.2018 in C.No.6144(2)/PCIT/TRY-1/2016-17.

For Petitioner : Mr.R.Parthasarathy for
M/s. Lakshmikumaran & Sridharan
Attorney

For Respondents : Mr.N.Dilipkumar

ORDER

The writ petitioner is a banking company. It is an assessee registered under the Income Tax Act and liable to pay income tax on the income earned by it. In terms of Section 115 WB of the Income Tax Act, 1961, apart from levying tax on the writ petitioner's income, fringe benefit tax was also levied with effect from 01.04.2006 on certain defined benefits provided to the employees of the writ petitioner bank.

2.The writ petitioner filed fringe benefit tax return for the assessment year 2007-08 (in respect of the financial year 2006-07) on 30.10.2007 as per Section 115 WD of the Act. Later revised return was filed declaring fringe benefit value of Rs.7,75,33,846/- as per section 115 WD (4) of the Act on 29.02.2008. It is relevant to note that as early as on 16.05.1996, the Commissioner of Income Tax, Madras - 34 granted recognition/approval to M/s.Karur Vysya Bank (Employees') Pension Fund, Karur with effect from 29.09.1995. The value of fringe benefit in relation to the contribution made by the writ petitioner to the approved pension

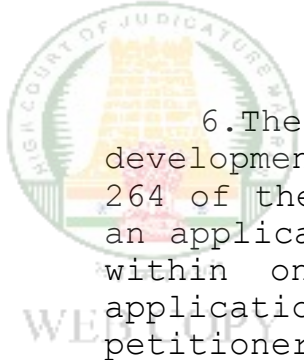
fund and the notional tax thereon for the assessment year 2007-08 is as under :

Particulars	Amount (In Rs.)
Value of fringe benefit in relation to contribution to approved pension fund assessed to FBT for AY 2007-08	6,01,54,994/-
Notional Tax thereon	2,02,48,171/-

3.The writ petitioner paid FBT for the said assessment year 2007-08 to the extent of Rs.2,60,97,892/- including the tax for the contributions mentioned above. While so, on 23.06.2008, an intimation under Section 115 WE of the Act was served on the writ petitioner calculating interest due under Sections 115 WJ (3) and 115WK to the extent of Rs.46,97,621/- which resulted in tax due to the extent of Rs.49,96,310/-. Against the said intimation under Section 115 WE of the Act, a rectification application dated 04.08.2008 under Section 154 of the Act was filed contending that there has been an erroneous charge of interest. The Assessing Officer was satisfied that there was a mistake apparent on the face of record. The tax payable was reduced to NIL and resulted in refund of Rs.1,310/-.

4.While so, for the assessment year 2006-07, the writ petitioner had filed FBT return on 29.11.2006 declaring Fringe benefit value of Rs.2,87,06,054. It was processed and an intimation under Section 115 WE (1) of the IT Act was sent to the writ petitioner on 20.09.2007. A rectification order was passed on 26.08.2008. the writ petitioner took the stand that the value of contribution to statutory pension fund cannot be considered as a perquisite and therefore, cannot be regarded as a fringe benefit under the IT Act. But, the FBT assessment was reopened and a notice dated 30.03.2011 was issued under Section 115 WH of the IT Act on the ground that contribution to statutory pension fund should also be regarded as fringe benefit to the employees and should be subject to FBT. The assessing officer, passed an order under Section 115 WG of the IT Act r/w Section 115 WE of the Act on 22.02.2012 treating the sum of Rs.8,27,00,000/- being the value of contribution made to superannuation fund as the value of fringe benefit provided by the petitioner to its employees and subject to FBT.

5.The writ petitioner filed an appeal before the Commissioner of Income Tax (Appeals). The appellate authority confirmed the addition made by the assessing officer. Questioning the same, the petitioner filed an appeal before the income Tax Appellate Tribunal (ITAT) in ITA No.1639/Mds/2014 challenging the treatment of contribution made to superannuation fund as fringe benefit. The Tribunal following its own earlier decisions vide order dated 29.02.2016, allowed the appeal holding that the statutory contribution made to a superannuation fund is outside the ambit of FBT.



6.The writ petitioner woke up in the light of this development. They thereafter filed an application under Section 264 of the IT Act dated 26.10.2016 before the respondent. Since an application under Section 264 of the Act should have been filed within one year and there was delay in submission of the application, a prayer was made for condonation of delay. The writ petitioner wanted their application dated 26.10.2016 to be admitted and decided on merits. The said application was dismissed as not maintainable by the impugned order dated 19.03.2018. The same is put to challenge in this writ petition.

7.The learned counsel appearing for the writ petitioner reiterated all the contentions set out in the affidavit filed in support of the writ petition. He also placed reliance on the case laws which were filed in the form of a compilation. The respondent had also filed a detailed counter affidavit and the learned Standing Counsel elaborately argued and wanted this Court to sustain the impugned order passed by the respondent.

8.I carefully considered the rival contentions. Section 264 of the Income Tax Act reads as under :

"Revision of other orders.

"264.(1) In the case of any order other than an order to which section 263 applies passed by an authority subordinate to him, the Principal Commissioner or Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

(2)The Principal Commissioner or Commissioner shall not of his own motion revise any order under this section if the order has been made more than one year previously.

(3)In the case of an application for revision under this section by the assessee, the application must be made within one year from the date on which the order in question was communicated to him or the date on which he otherwise came to know of it, whichever is earlier :

Provided that the Principal Commissioner or Commissioner may, if he is satisfied that the assessee was prevented by sufficient cause from making the application within that period, admit an application made after the expiry of that period.

(4)The Principal Commissioner or Commissioner shall not revise any order under this section in the following cases—



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(a) where an appeal against the order lies to the Deputy Commissioner (Appeals) or to the Commissioner (Appeals) or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired, or, in the case of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal, the assessee has not waived his right of appeal; or

(b) where the order is pending on an appeal before the Deputy Commissioner (Appeals); or

(c) where the order has been made the subject of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal.

(5) Every application by an assessee for revision under this section shall be accompanied by a fee of five hundred rupees.

(6) On every application by an assessee for revision under this sub-section, made on or after the 1st day of October, 1998, an order shall be passed within one year from the end of the financial year in which such application is made by the assessee for revision.

Explanation.—In computing the period of limitation for the purposes of this sub-section, the time taken in giving an opportunity to the assessee to be re-heard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

(7) Notwithstanding anything contained in sub-section (6), an order in revision under sub-section (6) may be passed at any time in consequence of or to give effect to any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court."

Explanation 1.—An order by the Principal Commissioner or Commissioner declining to interfere shall, for the purposes of this section, be deemed not to be an order prejudicial to the assessee.

Explanation 2.—For the purposes of this section, the Deputy Commissioner (Appeals) shall be deemed to be an authority subordinate to the Principal Commissioner or Commissioner."

9. Thus, the condition precedent for invoking this provision is that an order should have been made by the authority subordinate to the respondent. Section 264(1) commences with the expression "in the case of any order". Section 264(2) also forbids the revising authority from revising any order on its own motion, if it has been made more than one year previously. Section 264 (3) prescribes the limitation of one year and empowers the revising authority to condone the delay in filing an application by the assessee if sufficient cause is made out. But even the said sub-section talks about making of application within one year from the date on which the order in question was communicated or the date on which

the assessee came to know of it whichever is earlier.

10. Therefore, unless there is a revisable order, the jurisdiction under this provision cannot be invoked. Therefore, I have to necessarily concur with the submission of the learned Standing Counsel that the application filed by the petitioner under Section 264 of the Income Tax Act was not maintainable since there was no assessment order to be challenged. The learned standing counsel would also submit that the legal issue projected by the writ petitioner has not attained finality. This is because, questioning the orders of ITAT, the department has gone on appeal to the Madras High Court and the final outcome is awaited. The core contention of the respondent is that the writ petitioner having made a voluntary assessment and consequential payment cannot now claim to be aggrieved. It has to file a revised return and the question of invoking the jurisdiction under Section 264 of the Act will not arise.

11. No doubt, the submissions of the learned standing counsel are technically sound. But then, this is not the way in which the issue should have been approached by the authority. The Madras High Court in the decision reported in (2001) 248 ITR 681 (Venkatadri Traders Ltd vs. Commissioner of Income Tax), while dealing with the case of delay in seeking refund observed as follows :

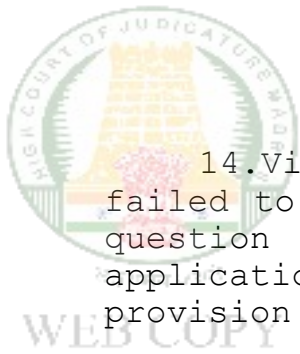
"5. The delay, which the assessee was required to explain, is indeed the period from the expiry of period of one year from the date on which the order sought to be revised was made. While considering the question of condonation, the revisional authority is not to altogether exclude from consideration the merits of the revision petition. If the cause of justice requires that a liberal view be taken, then a liberal view would indeed be warranted while considering the question of condoning the delay. The case of the assessee being that the same receipt has been taxed twice over once by way of accrued interest and for the second time by way of capital gain has not been found to be incorrect even prima facie. In matters where refunds are involved and the assessee's right to such refund is beyond any reasonable doubt, a liberal view of the conditionalities subject to which the relief can be granted is warranted. It is not the policy of the Act to enable the State to collect monies from citizens and retain the same even when the money is not required to be paid as tax. The fact that the payment had been made erroneously cannot by itself be allowed to stand in the way of the relief being granted to the assessee, if relief is permissible by the exercise of a discretionary power vested in the statutory authorities. The discretion so vested is required to be exercised in a manner which would protect and promote



the just interest of the assessee. The position of the assessee vis-a-vis the Revenue is not strictly adversarial, although more often than not, that is the manner in which the two parties perceive their role. The Revenue is not to be regarded as interested in scoring points against the assessee, but only in the just enforcement of the provisions of the Act. The discretion of the authority, therefore, on the facts of this case, was required to be exercised by bearing the aforementioned considerations in mind."

12.The writ petitioner's counsel wants me to bear in mind the aforesaid observations made by the eminent Judge. He also placed reliance on the decision of the Hon'ble Supreme Court reported in (1965) 57 ITR 349 (SC) (Dwarka Nath vs. Income Tax Officer). The Hon'ble Supreme Court observed that Article 226 of the Constitution of India is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found.

13.The writ petitioner had succeeded before the Tribunal in respect of the assessment year 2006-07. The Tribunal had held that the statutory contribution made to superannuation fund is outside the ambit of FBT. This is, of course subject to the determination of the issue by the higher courts. But, the position as on date is that the contribution made to the superannuation fund is not leviable to FBT. The question that arises is whether the department is justified in retaining the tax paid by the petitioner towards the FBT tax for the contribution made by them to pension fund for the subsequent assessment year 2007-08. It is true that the writ petitioner had made voluntary payment. But, it is not the question of voluntariness or otherwise of the assessee in the matter of making payment. The question is one of liability. The department represents the sovereign power of the State in matters relating to taxation. Whether the department had illegally collected the tax from the citizen or whether the assessee mistakenly paid the tax to the department, the consequence is one and the same. If the assessee had mistakenly paid, it is a case of illegal retention by the department. In labour matters, the Hon'ble Supreme Court on several occasions had held that the State must conduct itself as a model employer. In fact, when a just claim is put forth by a citizen, the State will not plead limitation to defeat it. In a fight between the two private individuals, such ethical considerations may not find place. It is not so when the State is a party to a lis. This is because we are governed by a transformative Constitution, to use the evocative title of Gautam Bhatia's book. Going by the Preamble, the people are the masters. The State is only an instrument to fulfil the vision set out in the founding document. While Chanakya Niti can be applied in matters of national security and crime control, the other actions of the State will have to be informed by the principle of fairness.



14. Viewing in this perspective, I hold that the authority failed to see if the assessee had any liability to pay the tax in question and if not whether any refund should be made. The application must have been treated as one for refund. The relevant provision is Section 119 of the Income Tax which reads as follows :

"Instructions to subordinate authorities.

119.(1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board :

Provided that no such orders, instructions or directions shall be issued-

(a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner (Appeals) in the exercise of his appellate functions.

(2) Without prejudice to the generality of the foregoing power,-

(a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time (whether by way of relaxation of any of the provisions of sections 115P, 115S, 115WD, 115WE, 115WF, 115WG, 115WH, 115WJ, 115WK, 139, 143, 144, 147, 148, 154, 155, 158BFA, sub-section (1A) of section 201, sections 210, 211, 234A, 234B, 234C, 234E, 270 A, 271, 271 C, 271 CA and 273 or otherwise), general or special orders in respect of any class of incomes or fringe benefits or class of cases, setting forth directions or instructions (not being prejudicial to assessee) as to the guidelines, principles or procedures to be followed by other income-tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information;

(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise any income-tax authority, not being a Commissioner (Appeals) to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified



by or under this Act for making such application or claim and deal with the same on merits in accordance with law;

(c) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement contained in any of the provisions of Chapter IV or Chapter VI-A, where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder, subject to the following conditions, namely:-

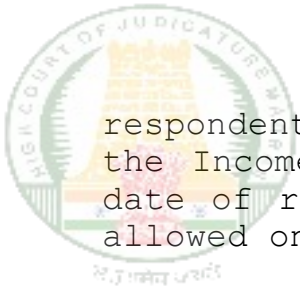
(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee; and

(ii) the assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed :

Provided that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament."

15. The respondent definitely had the power and jurisdiction to make an appropriate order in this case. It is a well settled principle of administrative law that if the authority otherwise had the jurisdiction, mere non quoting or misquoting of the provision will not vitiate the proceedings. I sustain the stand of the authority that Section 264 of the Income Tax Act was clearly not applicable in this case. But then, Section 119 of the Income Tax Act could have been invoked. The authority ought to have posed only one question to himself i.e., whether the assessee was liable to pay the tax in question or not. If he was not liable to pay the tax in question, the department had no business to retain it even if it was wrongly paid. Of course, the question of paying interest for the retained amount will not arise. It is subject to the outcome of the challenge that is pending before the Madras High Court at the instance of the department. It is open to the respondent to pass such orders as the facts and circumstances warrant. But then, an applicant ought not to have been simply shown the door.

16. "*Volenti non fit injuria*" is a maxim invoked in the law of torts. It means that there is no injury to one who consents. The respondent appears to have applied the said principle while considering the petitioner's application. The respondent failed to note that the issue was not one of revisability of an order but one of refund. While the authority is right in holding that no revisable order existed, he should have also looked a little beyond and seen that no liability also existed. While I sustain the stand of the respondent that Section 264 of the Act is inapplicable, an appropriate order should have been passed on the petitioner's application dated 26.10.2016. In this view of the matter, the order impugned in this writ petition is quashed and the



respondent is directed to pass orders afresh under Section 119 of the Income Tax Act, 1961 within a period of eight weeks from the date of receipt of a copy of this order. This writ petition is allowed on these terms. No costs.

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Assistant Registrar(co)

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Sub Assistant Registrar(CS)

Skm

To

The Principal Commissioner of Income Tax,
Trichy - 1, Trichy,
No.44, Williams Road, Cantonment,
Tiruchirappalli - 620 001.

+1CC TO MR.N.DILIP KUMAR, Advocate Sr. No.68401

+1CC TO MR.LAKSHMI KUMARAN, Advocate Sr. No. 68421

WP(MD)No.12595 of 2018

12.06.2019

DKS (CO)

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