IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.12.2019

Pronounced on : 31.01.2020

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.15399 & 15400 of 2007

M/s.Rayala Corporation Pvt. Ltd.,
Rep.by its Managing Director,
Ranjit Pratap
144/7, Old Mahabalipuram Road,
Kottivakkam,
Chennai 600 041. .. Petitioner in both W.Ps.

vs.

1.The Chief Commissioner of Income Tax,
Chennai II,
Office of the Chief Commissioner Income Tax,
121, Mahatma Gandhi Road,
Chennai 600 034.

2.Deputy Commissioner of Income Tax,
Company Circle V (3)
121, Mahatma Gandhi Road,
Chennai 600 034. .. Respondents in all W.Ps.

Prayer in both W.Ps.:Writ Petitions filed under Article 226 of the Constitution of India to issue a writ of Certiorarified Mandamus to call for the records of the proceedings of the 1st respondent in No.CC II/B(159)/2000-2001 dated 07.03.2007 for the assessment year 1991-92 and No.CC II/B(159)/2000-2001 dated 07.03.2007 for the assessment year 1992-93 to quash the same and to further direct the 1st respondent to waive the interest levied u/s.234 A & B of the Income Tax Act, 1961.

For Petitioner:Mr.Vikram Vijayaraghavan for
Subbaraya Aiyar Padmanabhan
(in both W.Ps.)

For Respondents:M/s. Hema Muralikrishnan
Sr.Standing Counsel.
(in both W.Ps.)

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C O M M O N O R D E R

The petitioner is aggrieved by the impugned order dated 7.3.2007 passed by the 1st respondent, the Chief Commissioner of Income Tax,-II. By the aforesaid order, the 1st respondent has dismissed be application filed by the petitioner for waiver of interest under section 234 B of the Income Tax Act, 1961 for the Assessment Years 1991-92 and 1992-93.

2. The petitioner was the owner of land on which a massive infrastructure has been put up. Earlier the petitioner had signed a joint-venture agreement dated 30.08.1987 with M/s. Shriram Capital Trust Private Limited (for brevity the developer).

3. The said joint-venture agreement contemplated payment of Rs.670 lakhs to the petitioner by the said developer with built up area of 75,000 ft². The agreement also contemplated deadlines and timelines for payment of the aforesaid amount of Rs.670 lakhs to the petitioner. The amounts were to be paid from 3.5.1987 to 31.12.1992 in 8 instalments. It appears over a period amounts were also paid but the developer took time to get approval from the CMDA to commence the construction.

4. Meanwhile, the petitioner and the developer signed a Memorandum of Understanding(MOU) dated 7.3.1992 which party altered the arrangement under the Joint Venture Agreement on 13.8.1996. The petitioner had filed income tax returns under section 139 of the Income Tax Act, 1961 the respective assessment years. For the assessment years 1988-89 and 1989-90 scrutiny assessments were completed on 12.3.1991 and on 26.3.1992 respectively. In these two assessment years, the petitioner had declared a total loss of Rs.56,51,991/- and Rs.47,27,993/- and accordingly claimed depreciation loss and business loss.

5. Meanwhile, for the assessment years 1990-91, 1991-92 and 1992- 93 regular returns were filed and scrutiny assessment orders were passed under section 143 (3) on 31.3.1990, 31.3.1994 and on 22.3.1999 respectively.

6. The completed assessment for the assessment years 1988-89 and 1989-90 were reopened and reassessment orders dated 27.3.1995 came to be passed by treating a sum of Rs.31,22,667/-as the income earned from the joint-venture on accrual basis for each of these assessment years.

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7. Thus, the carry forward loss of the petitioner was reduced to Rs.25,29,324/-and Rs.15,99,523/- in the respective assessment years which impacted the assessment for the assessment years 1990-91, 1991-92 and 1992- 93.

8. For the assessment year 1990-91 and assessment year 1991-92, rectification petitions were filed by the 2nd respondent under Section 154 of the Income Tax Act, 1961. Rectification orders dated 22.11.1996 were passed.

9. For the assessment year 1991-92, the assessment was completed on 31.03.1994 under Section 143 (3) of the Income Tax Act, 1961 determining the profit receivable at Rs.41,41,790/- and compensation receivble at Rs.43,31,250/- .

10. For the assessment year 1992-93, the assessment was completed on 22.03.1999 under Section 143(3) read with section 147 of the Income Tax Act, 1961 determining the capital gain at Rs.63,05,886/- after setting off the business loss of Rs.1,01,43,191/-and capital gain of Rs.1,64, 49,077./-.

11. These developments have culminated in levy of interest under section 234 A and levy of interest under section 234 B.

12. It is a contention of the petitioner that the levy of interest on the petitioner under Section 234 B is purely on account of recasting of the taxable income for the assessment years 1988-89 and 1989-90 and not because of any fresh income being assessed to tax which the petitioner had failed to return. Under these circumstances the petitioner filed an application for waiver of interest on 16.2.2001 before the 1st respondent which came to be rejected by an order dated 13.9.2002 by the 1st respondent.

13. Under these circumstances the petitioner had earlier filed WP Nos.2439-2442 of 2003 to direct the 1st respondent herein to consider the petitioner's application for waiver of interest under section 234 A and 234 B of the Income Tax Act, 1961. These writ petitions were disposed on 28.1.2003 with the direction to pass orders in accordance with law after giving an opportunity to the petitioner.

14. By the impugned order the 1st respondent has rejected the application filed by the petitioner with the following observations:-

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9.. In the waiver petitions the assessee company also submitted that interest unde Section 234A and that under Section 234B were incorrectly levied. This contention was made on the basis of the following case laws:

164 CTR 200

217 ITR 72

In its petition for waiver the assessee-company did not specify as to hoiw the above mentioned case laws supported its case. However, I assume that the petitioner company intended to put forward the argument that since the income returned by it for each of the two assessment years, 1991-92 & 1992-93, was nil there was no liability to pay advance tax and, therefore,no interest should have been charged, basis of charge being the returned income (as decided in the two cases referred to by the petitioner). I am unable to accept this contention of the assessee for the reason that these Court decisions had been pronounced on the basis of Explanation 4 to Section 234A which has since been deleted by Finance Act, 2001 with restropective effect from 01.04.1989. Therefore, the decisions cited by the assessee-company cannot be considered to decide the waiver petitions in its favour.

9. In view of the discussion made in the foregoing paragraphs, the two petitions for waiver of interest filed by M/s.Rayala Corporation Pvt.Ltd., for the two assessment years 1991-92 and 1992-93 are hereby rejected.

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15. It is the contention of the petitioner that the petitioner had not deliberately avoided payment of tax for the respective assessment years. The tax liability for the relevant assessment years namely 1991-92 and 1992-93 was due to the cascading effect in the reopening of the assessments for the Assessment Years 1988-89 to 1990-91. The petitioner therefore submits that, petitioner’s request for waiver of interest under the above said provisions should be allowed.

16. It is further submitted that JV agreement dated 30.08.1987 was not acted upon and the petitioner did not

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receive instalments, share of profits and interest on delayed payment specified in the aforesaid agreement. Therefore, it is submitted that it cannot be said to that income can be said to have accrued to the petitioner in view of the alteration of the terms of the JV agreement vide MOU dated 7.3.1992.

17. Petitioner submits that the recasting of the income of the petitioner for the Assessment Years 1988-89 to 1990-91 were without any justifiable basis. Since the petitioner chose to avoid litigation for these assessment years the tax liability was minimal, the petitioner cannot be saddled with interest liability for the Assessment Years 1991-92 and 1992-93.

18. It is further submitted that but for the reassessment/rectification for the Assessment Years 1988-89 to 1990-91, the petitioner would not have been exposed to huge interest liability under section 234B amounting to Rs.20,43,792/-for the assessment year 1991-92 and Rs.54,82,176/-for the assessment year 1992-93.

19. It is submitted that interest under section 234 B cannot be imposed on an income which did not accrue to the petitioner and therefore it would be unfair to levy interest under the aforesaid provision. It is submitted that while filing returns, the petitioner did not anticipate that the assessment would be reopened or rectified Section 148 of the Income Tax Act, 1961 for the preceding three assessment years.

20. It is therefore submitted that the petitioner's request for waiver of interest under Section 234 of the Income Tax Act, 1961 has been wrongly denied by the 1st respondent herein.

21. The respondents in their counter have defended the impugned order stating that the petitioner had failed to elaborate how the 1st respondent had not considered the Board circular while rejecting their application. It is further submitted that the appeal filed by the petitioner for the respective assessment years were decided against the petitioner and no further appeal was preferred by the petitioner. Having accepted the assessment made by the 2nd respondent for the respective assessment years, it is not open for the petitioner to seek waiver of interest payable under Section 234B and C of the Income Tax Act, 1961.

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22. It is further submitted that as per clause 23 of the JV agreement, payments were made to be made through deposit certificates which were issued for every subsequent instalment after due date of the earlier instalment and that "the developer shall make the stipulated payments fully and promptly on the specified date to the owner (petitioner herein) irrespective of whether the commercial complex is put up and/or completed as scheduled and programmed above".

23. I have considered the arguments advanced on behalf of the petitioner and the respondent. I have also considered the case of submitted by the learned counsel for the petitioner and the records of the case.

24. The question to be examined in the present petition is whether the petitioner is entitled for waiver of interest under section payable under section 234 B of the Income Tax Act, 1961.

25. The petitioner seeks to assail the impugned order in the light of the Notification No.400/234/95-IT (B) dated 23.5.1996 issued under section 119 (2)(a) of the Income Tax Act, 1961. The said notification has given guidelines to be followed for reduction or waiver of penal interest. Paragraph 2 of the said notification reads as under:-

> 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.

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(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 instalment or instalments 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 Direcor-General is satisfied that the assessee is unable to pay the advance tax.

© 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 instalments 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 instalment or instalments 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 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

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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 AO.

26. It is a contention of the petitioner that the petitioner was entitled for waiver in terms of the situation contemplated in clause (e). According to the learned counsel for the petitioner, the petitioner could not pay tax due to uncertainty in the implementation of the JV agreement dated 30.8.1987 and therefore claimed higher depreciation loss and business loss during the assessment years 1988-89 to 1990-91. Not only the assessments were completed but also scrutiny assessment were completed as well. As a ongoing requirement under the Act the petitioner had declared loss during the assessment year 1991-92 and 1992-93.

27. In this case, the petitioner had accepted the assessment which were revised pursuant to proceedings initiated under section 154/148 of the Income Tax Act, 1961 for the assessment years 1988-89, 1989-90, 1990-91. The petitioner has also accepted the assessment made by the respondents for the assessment years 1991-92 and 1992-93 as no further appeal was filed by the petitioner against the assessments completed for these assessment years.

28. Pursuant to recasting of the income for the assessment years 1988-89, 1989-90, 1990-91, the taxable income for the assessment years 1991-92 and 1992-93 increased, which the petitioner has accepted. The increase in the tax liability for the assessment years 1991-92 and 1992-93 are no doubt due to cascading effect on account of recasting of the carryforward losses for the assessment years 1988-89, 1989-90, 1990-91.

29. It is the contention of the petitioner that since the JV agreement dated 30.8.1987 could not be acted upon, the petitioner claimed the carry forward loss for the assessment years 1988-89, 1989-90 and 1990-91. They were however recast which had a cascading effect on the tax liability of the petitioner for the assessment years 1991-92 and 1992-93 and therefore the petitioner cannot be held liable to interest.

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30. The Memorandum of Understanding dated 7.3.1992 which was signed between the petitioner and the respondent did not substitute the JV agreement dated 30.08.1987. The commercial arrangement was slightly altered. The JV Agreement was not rescinded. The MOU contemplated payment of Rs.210 lakhs for the year 1992 and the petitioner agreed to vacate the place by 30/04/1992 by which time the developer was required to obtain the permit from the Madras Metropolitan and Development Authority.

31. The petitioner was required to transfer approximately 25% of the UDS to the nominees of developer on before 31.3.1992 as and when the aforesaid amount of Rs.210 lakh was received by the petitioner. The MOU also acknowledged that with the payment of Rs.2 lakhs on the date of MOU, the petitioner would have received Rs.434 lakhs and the developer was to ensure that the joint venture nature of the agreement was maintained by taking all precautions while carrying out documentation. The MOU further records that the developer would pay the entire balance before 30/03/1992.

32. With reference to the delay and consequential interest accruing, it was agreed that the petitioner and the developer will refer to an arbitrator.

33. Under Section 145 of the Income Tax Act, 1961 income chargeable under the head of "Profit and gains of business or professional" or " Income from other sources" shall be subject to the provisions of sub-section (2) and be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

34. For the aforesaid purpose, the Central Government may also notify in the Official Gazette from time to time accounting standards to be followed by any class of assessee or in respect of any class of income. The petitioner has followed mercantile system of accountancy.

35. The Honourable Supreme Court in CIT versus Ashok Bhai Chimanbhai (1965) 1 SCR 758:(1965) 56 ITR 42 has held that under the Income Tax Act, 1961 income is taxable when it accrues or arises or is received or when it is by fixation, deemed to accrue, arise or is deemed to be received. The Court held that receipt is not the only test of chargeability of tax. If income accrues or arises it may become liable to tax. After referring to In Re The Spanish Prospecting Co. Ltd [(1911) 1Ch 92], the Honourable Supreme Court observed "For the purpose of this case it is unnecessary to dilate upon the distinction between income "accruing" and "arising". But there

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is no doubt that the two words are used to contra- distinguish the word "receive". Income is said to be received when it reaches the assessee: when the right to receive the income becomes vested in the assessee, it is said to accrue or arise."

36. In United Nilgiri Tea Estates Co. Versus Deputy (2012) 210 Tax Man 62 (Mad), this Court held that if the accounts are maintained in the mercantile system, it is necessary to see whether the income could be said to have really accrued taking probability or improbability of realisation in realistic manner.

37. This Court further held that under the mercantile system of accounting, accrual had occurred and therefore it has to be treated as income. Recognition of income on accrual basis pre-supposes the satisfaction of two conditions, namely that the revenue is measurable and that the revenues collectible without any uncertainty.

38. In the present case, it is not as if amounts were not paid under the JV agreement or amounts due were written off by the petitioner. The petitioner however claimed higher business loss and the depreciation loss during the assessment years 1988-89 to 1990-91 as the amount was not paid by the developer in time as per the JV agreement dated 30.8.1986. However, the JV agreement dated 30.8.1986 was not frustrated as was projected. The project was delayed and during the course of time there were further payments made by the developer to the petitioner and therefore there was accrual of income in the books of account of the petitioner and therefore the petitioner was liable to that extent.

39. The assessments for the assessment years 1988-89 to 1990-91 were reopened/rectified as the petitioner had wrongly claimed business loss and depreciation loss. The re-assessments were completed for the assessment years 1991-92 and 1992-93 on 22.11.1996 and on 22.3.1999 which resulted in the increase of the positive income of the petitioner.

40. The petitioner had however failed to pay advance tax by wrongly claiming business loss/depreciation loss during the assessment years 1988-89 to 1990-91. Therefore it cannot be stated that the petitioner was entitled to the benefit of the above notification issued under section 119 (2) (a) of the Income Tax Act, 1961. None of the situation contemplated under the attracted the CBDT Notification dated 23.05.1996

41. The decision cited in Prime Securities Ltd versus The Asst Commissioner of Income Tax(2011) 333 ITR 464 cited on

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behalf of the petitioner deals with the situation where the assessee could not anticipate increase. There the assessee had paid advance tax but had estimated the same wrongly. Whereas in this case, the petitioner had wrongly claimed business loss and depreciation loss and therefore failed to pay advance tax during 1991-92 and 1992-93. Therefore, the said decision of the Division Bench of the Hon'ble Bombay High Court cannot be applied to the facts of the case.

42. Similarly the decision of the Karnataka High Court in Shriram Chits (Bangalore) Ltd versus Joint Commissioner of Income Tax (2010) 325 ITR 0219 and that of this court in Commissioner of Income Tax Versus Revathi Equipment Ltd (2008) 298 ITR 67 cited on behalf of the petitioner are not applicable to the facts of the present case. There the liability to pay interest arose on account of amendment to the provision whereas the levy of interest in the present case is not account of these factors.

43. Therefore, these decisions cited are of no relevance to the facts of the case. As a passing reference it may also be relevant to refer to the decision cited by the learned counsel for the respondent in Chief Commissioner of Income Tax VersusRanjinikant and Sons (2017) 396 ITR 171. A division bench of this court held that since the tax was paid only after the revenue had passed the reassessment order, waiver from payment of interest cannot be allowed. This is similar to the present case.

44. In the light of the above discussion, I do not find any reasons to interfere with the impugned order passed by the 1st respondent while rejecting the application filed with the petitioner for waiver of interest under Section 234 B of the Income Tax Act, 1961 in terms of Notification No.400/234/95-IT (B) dated 23.5.1996. Therefore, these writ petitions are hereby dismissed and are accordingly dismissed. No costs.

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Sd/-
Assistant Registrar(CS-VI)

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Sub Assistant Registrar

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To

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+1cc to M/s.Hema Muralikrishnan, Advocate SR.No.7716

+1cc to Mr.Subbaraya Aiyar Padmanabhan, Advocate SR.No.8704

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