

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.02.2021
PRONOUNCED ON : 20.04.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.17313 of 2011

The Thanthi Trust
Represented by its Director
B.Sivanthi Adityan
86, E.V.K.Sampath Road,
Vepery, Chennai - 600 007. Petitioner

Vs

- 1.Director-General of Income Tax (Exemptions)
Plot No.15, 2nd Floor,
Laxmi Nagar District Centre,
New Delhi - 110 092.
- 2.Assistant Director of Income Tax
(Exemptions)-II
(Now Deputy Director of Income Tax)
(Exemption)-II
121, Nungambakkam High Road,
Chennai - 34. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a writ of Certiorarified Mandamus to call for the records on the files of the first respondent in F.No.DGIT(E)/waiver under Section 234 B of the IT Act 2011-12/33 dated 4.5.2011 and quash the order of the first respondent as illegal, without jurisdiction and against the provisions of law and direct the first respondent to allow the petitioner's prayer for waiver of interest of Rs.1,41,87,344/- levied under Section 234B of the Act in respect of the petitioner's Income Tax assessment for the assessment years 1989-1990, 1990-1991 and 1991-1992.

For Petitioner : Mr.R.Meenakshi Sundaram
For Respondents : M/s.Hema Muralikrishnan
Senior Standing Counsel

ORDER

The petitioner has challenged the impugned order dated 04.05.2011 passed by the first respondent in F.No.DGIT(E)/2011-12/133 denying the waiver of interest to the petitioner under Section 234B of the Income Tax Act, 1961.

2. The dispute pertains to delay in payment of tax for the Assessment Years 1989-1990, 1990-1991 and 1991-1992. It is case of the petitioner that the petitioner trust was created in year 1954 and all along upto 1976-1977, exemption was granted to the petitioner from payment of tax under the provisions of the Income Tax Act, 1922 and thereafter Income Tax Act, 1961 after the said Act came into force. For the period upto 1983-84 (Assessment Year 1984-1985), the petitioner had claimed exemption under Section 13(1)(bb) of the Income Tax Act. With effect from 01.04.1984 the exemption in form of Section 11(4) was introduced.

3. The petitioner claims that it was under bonafide belief for the period after the introduction of Section 11(4) of the Income Tax Act with effect from 01.04.1984, the petitioner was still exempt from payment of income tax as 75% of its surplus was deployed for the educational purpose in another trust named Aditanar Educational Institution.

4. The learned counsel for the petitioner further submits that right from the beginning, there has been disputed with the respondents Department with regard to the exemption. The matter would get sort out after prolonged litigation.

5. The learned counsel for the petitioner further submits that for the Assessment Years 1979-1980 to 1983-1984, the Division Bench of this Court vide its order dated 19.12.1994, *Thanthi Trust Vs Asst. Commissioner of Income Tax* 1994 SCC OnLine Mad 781 : (1995) 213 ITR 626 (Mad), had allowed the exemption to the petitioner under Section 13(1)(bb) of the Income Tax Act. Similarly, for the Assessment Years 1984-1985 to 1991-1992, the Division Bench of this Court vide its order dated 19.12.1994, in *Thanthi Trust Vs CBDT and others* 1994 SCC OnLine Mad 782 : (1995) 213 ITR 639 and for the Assessment Year 1992-1993, a single Judge of this Court vide order dated 15.10.1998 in *Thanthi Trust Vs. Asst. Director of Income Tax and Another* 1998 SCC OnLine Mad 999 : (1999) 238 ITR 635 (Mad), had allowed the exemption.

6. It is submitted that all the above three orders of the Division Bench of this Court were appealed by the Income Tax Department before the Hon'ble Supreme Court. The Hon'ble Supreme Court by its order dated 31.01.2001, reversed the decisions of this Court reported in 1994 SCC OnLine Mad 781 : (1995) 213 ITR 626 (Mad) for the Assessment Year 1979-1980 to 1983-1984 and reported in 1994 SCC OnLine Mad 782 : (1995) 213 ITR 639 for the Assessment Year 1984-85 to 1991-1992 while upholding the decision reported in 1998 SCC OnLine Mad 999 : (1999) 238 ITR 635 (Mad) which allowed for grant of exemption to the petitioner for the Assessment Years 1992-93, 1995-96 and 1996-1997 in terms of Section 11(4A) of the Income Tax Act, 1961.

7. In the light of the above development, the petitioner has

also paid the tax payable for the Assessment Years 1989-1990, 1990-1991 and 1991-1992 on various dates, i.e. on 17.07.2001, 17.08.2001, 18.09.2001, 18.10.2001 and 19.11.2001 respectively.

8. Thus, in all, the petitioner had paid a sum of Rs.2,47,57,082/- on the net surplus of Rs.4,69,62,119/-, out of which, the petitioner had transferred a sum of Rs.3,89,70,000/- for the charitable purpose of Aditanar Educational Institution/Trust. It is the contention of the learned counsel for the petitioner that if an amount of Rs.3,89,70,000/- and tax of Rs.2,47,57,082/- are considered as prayed towards Section 11 of the Income Tax Act, 1961, the application and tax liability, the total amount that was used out of the petitioner's packet would be Rs.6,37,27,082/- which would be over and above the net surplus generated by the petitioner.

9. It is further submitted that assuming the petitioner had paid the amount as advance tax, the petitioner would have paid such amount out of its pocket for the application of charitable purpose. The learned counsel for the petitioner further submits that the Central Board of Direct Taxes (CBDT) has issued certain Circulars/Notification under Section 119(2)(a) of the Income Tax Act, 1961 bearing reference F.No.212/495/92-IT (A-II), dated 02.05.1994 and F.No.400/234/95-IT(B), dated 23.05.1996 and F.No.400/234/95-IT(B), dated 30.01.1997.

10. He further submits that the case of the petitioner is covered by the CBDT Circular F.No.400/234/95-IT(B), dated 23.05.1996. The relevant clause from the said clause is reproduced below:-

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)
- (b)
- (c)

(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.

11. He further submits that there were further relaxations in CBDT Circular F.No.400/234/95-IT(B), dated 23.05.1996. He further submits that said CBDT Circular liberalized the relaxation vide Clarification One dated 30.01.1997, wherein, in paragraph No.2, it has been clarified as follows:-

2. In partial modification of this para of the Order, the Central Board of Direct Taxes has decided that there shall be no condition that the decision of the High Court or the Supreme Court, as referred to therein, must be given in the assessee's own case. Also the condition that any retrospective amendment of law or the decision of the Supreme Court or the jurisdictional High Court must have been made after the end of the relevant year stands withdrawn.

12. The learned counsel for the petitioner further submits that the petitioner requested the respondent for waiver of interest on the ground that the first respondent on the earlier occasion passed an order dated 18.02.2005 and that order came to be challenged before this Court in W.P.No.7457 of 2005. He further submits that considering the submissions of the petitioner, this Court allowed the said writ petition by setting aside the order dated 18.02.2005 passed by the first respondent vide order dated 12.03.2007 with the following observations:-

10. A perusal of Section 234-B shows that an assessee shall be liable to pay interest for non-payment/short payment of advance tax. The interest payable is held as compensatory in character. The Central Board of Direct Taxes, in exercise of its powers under Section 119(2)(a), authorised the Chief Commissioner and Director General of Investigation to reduce or waive penal interest charged under Section 234-A, 234-B and 234-C in the following circumstances:

i. Where, in the course of search and

seizure operations, books of account have been taken over by the Department and were not available to the tax-payer to prepare his return of income;

ii. Where, in the course of search and seizure operations, cash had been seized which was not permitted to be adjusted against arrears of tax or payment of advance tax instalments falling due after the date of the search;

iii. Any income other than "Capital gains" which was received or accrued after the date of the first or subsequent instalment of advance tax, which was neither anticipated nor contemplated by the taxpayer 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 the return of income is filed voluntarily without detection by the Income-tax Department and due to circumstances beyond the 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.

11. Learned senior counsel appearing for the petitioner emphasized on Clauses 4 and 5 of the Board's circular and pleaded that the first respondent had not considered the two clauses while considering the prayer for waiver. He further submitted that considering the decision of this Court and the order passed thereupon, the liability could only be said to arise on the decision of the Supreme Court reversing the judgment of this Court. In the circumstances, the view of the first respondent on the question of the petitioner lacking in bona fide is not

correct.

12. It is no doubt true that given the provisions of Section 11(4A), the demand was raised on the assessee. However, the subsequent declaration of law and the cancelling of the orders of assessment merit to be considered on the question of bona fides while considering the plea for waiver. It is not denied that the fresh order of assessment itself came to be passed after the Supreme Court decision. In the light of the above facts and considering the scope of the Board's notification, the case of the petitioner merits to be reconsidered and a fresh order passed accordingly. In the circumstances, we set aside the order of the first respondent and direct the first respondent to consider the case of the petitioner afresh and pass orders in accordance with law.

13. In the circumstances, the writ petition is allowed, but with a direction as stated above, remanding the matter back to the first respondent to pass orders in accordance with law and in terms of the Board's circular cited above. There will, however, be no order as to costs.

13. He further submits that thereafter, the case was taken again by the respondents for considering the case of the petitioner for grant of exemption/waiver of interest and by an order dated 03.03.2010, the first respondent once again rejected the request of the petitioner for waiver of interest under Section 234B of the Income Tax Act, 1961. He further submits that the petitioner thereafter filed the second writ petition in W.P.No.5859 of 2010. By an order dated 23.09.2010, this Court once again set aside the order dated 03.03.2010 passed by the first respondent with the following observations:-

7. Learned Senior Counsel appearing for the petitioner pointed out that the petitioner satisfied the conditions in Clause 2(d) of the circular of the Board. Having regard to the order passed by this Court in W.P.No.7457 of 2005, dated 12.03.2007, the first respondent should have considered the claim of the petitioner and granted the relief. He further pointed out that having regard to the order of this Court quashing the assessment orders as reported in 213 ITR 626 Thanthi Trust Vs. Assistant Commissioner of Income-tax and 213 ITR 639 (Thanthi Trust Vs. Central Board of Direct Taxes and others) and

that the second respondent had passed fresh assessment orders declaring the petitioner as not assessable, the petitioner's claim should have been favourably considered.

8. As rightly pointed out by the learned Senior Counsel appearing for the petitioner, the claim of the petitioner rested not just on the applicability of the circular alone. The petition for waiver narrates the grounds for granting waiver of interest that there was no willful default on his part for non-payment of tax or delayed filing of the return. In the light of the specific plea made by the petitioner placing reliance on the decision of this Court in the assessee's case and the subsequent reversal by the Supreme Court, the first respondent should have considered the plea of the petitioner on the aspect of genuine hardship. In the background of the facts thus projected, there being no discussion on this aspect. I agree with the submission of the petitioner that the order passed by the first respondent merits to be set aside with a direction that the first respondent shall consider the plea of the petitioner for waiver in the light of the facts as stated in the petitioner and pass order in accordance with law within a period of eight from the date of receipt of a copy of the order of this Court.

14. The petitioner's case was thereafter considered by the first respondent for the third time and by the impugned order dated 04.05.2011, the first respondent had rejected again the request of the petitioner for waiver of interest on the ground that the petitioner's case was not covered by the CBDT Circular F.No.400/234B/95/IT(3), dated 23.05.1996 and that the petitioner has not made out any case for genuine hardship on account of payment of interest.

15. The learned counsel for the petitioner submits that all along, the petitioner was under bonafide belief that it was not made liable to pay tax and that the petitioner paid the tax promptly since the issue attained finality as per the decision of the Hon'ble Supreme Court in the petitioner's own case vide order dated 31.01.2001 which was reported in (2001) 2 SCC 707 : (2001) 247 ITR 785 (S.C.).

16. He further submits that right from the beginning up to the Assessment Year 1986-1987, there were no disputes relating to the availability of exemption in terms of the decision of the Hon'ble Supreme Court in Additional Commissioner of Income Tax

Vs. Surat Art Silk Cloth Manufacturers Association, (1980) 2 SCC 31 : (1980) 121 ITR 1 (SC) and as per the decision of the Hon'ble Supreme Court in Asst. Custodian of Evacuee Property Vs. Brij Kishore Agarwala, (1975) 1 SCC 21 and the decision of this Court in Commissioner of Income-tax Vs. Rao Bahadur Calavala Cunnan Chetty Charities, (1979) SCC OnLine Mad 219 : (1982) 135 ITR 0485 (Madras).

17. He further submits that the petitioner was under bonafide belief with a view that the exemption under Section 11 (4A) of the Income Tax Act, 1961 which was inserted by the Finance Act, 1983, w.e.f. 01.04.1984, was available to the petitioner and the issue finally settled by only the Hon'ble Supreme Court vide order dated 31.01.2001 which was reported in (2001) 2 SCC 707 : (2001) 247 ITR 785 (S.C.) and therefore, the petitioner is entitled for waiver of interest in terms of the above CBDT Notification issued under Section 119(2)(a) of the Income Tax Act, 1961.

18. The learned counsel for the petitioner further drew my attention to a recent decision of the Division Bench of this Court in petitioner's own case in T.C.A.No.822 of 2018, dated 29.10.2020 which pertains to the Assessment Years 2006-2007 to 2009-2010. He further submits that the issue relating to the bonafide of the petitioner's trust was considered by the Division Bench in T.C.A.No.822 of 2018 under Section 12A(a) of the Income Tax Act, 1961 in the context of Circular No.1 of 2011. He further submits that the Division Bench of this Court after considering the said Circular ultimately came to the following conclusion:-

89. Circular No.1 of 2011 will clearly show that the amendment brought out in Section 12AA is applicable with effect from 1st June, 2010, i.e., from the assessment year 2011-12 and subsequent years. Therefore, the retrospective cancellation of the registration of the assessee is wholly without jurisdiction and the assessee cannot be vexed repeatedly on the same issue and reason for invoking the power under sub-Section (3) of Section 12AA is wholly unsustainable, without any basis and suffers from perversity writ large on the face of the order. Unfortunately, the Tribunal misdirected itself by addressing a wrong question without taking note of the earlier decisions rendered in the assessee's own case. The DIT(E) has not recorded his satisfaction that the activities of the assessee Trust are not genuine, nor he has made any observation that the assessee had carried out activities which are not covered in the Trust Deed or in the judgment and decree in C.S.No.90 of 1961. The decisions relied on by the Revenue, in fact, would go to assist the case

of the assessee, rather the Revenue. The DIT(E) committed gross error in restricting the meaning of the word 'education' and did not appreciate the effect of the decision in Loka Shikshana Trust (supra), which was considered in several other subsequent decisions. Above all, the DIT(E) and the Tribunal violated the rule of consistency by showing utter disregard to the judgments of the Hon'ble Supreme Court and this Court in the assessee's own case on the very same subject and the orders of the DIT(E) and the Tribunal have to be termed to be 'utterly perverse'. The Tribunal lost sight of the distinction between a claim for registration under Section 12AA and a claim for exemption under Section 11 of the Act. To say the least, the Tribunal's justification would amount to judicial indiscipline for not following the decision of the Hon'ble Supreme Court and this Court in the assessee's own case. The DIT(E) failed to adhere to the instructions issued by the CBDT which is binding on the DIT(E). As observed earlier, the recent pandemic has taught very many lessons and one of which is that, mode and method of education cannot be in any manner restricted, but should be given the widest meaning that is possible.

19. Defending the impugned order, the learned Senior Standing Counsel for the respondents submits that the exemption was claimed by the petitioner under Section 13(1)(bb) of the Income Tax Act, 1961 for the earlier assessments years cannot be the basis for claiming exemption under the newly inserted exemption Section 11(4A) of the Income Tax Act, 1961 which was introduced by the Finance Act, 1983, w.e.f. 01.04.1984. She submits that these writ petitions pertain to the Assessment Years 1989-1990, 1990-91 and 1991-1992 and advance tax was not paid on the due date as is evident from the dates and the particulars given in these writ petitions which came up for consideration in 1994 SCC OnLine Mad 782 : (1995) 213 ITR 639.

20. She further submits that the writ petitions were filed only during 1989, 1991, 1992 and 1993 and since the advance tax had to be paid for the relevant Assessment Years 1989-1990, 1990-91 and 1991-1992 during the corresponding previous year, it cannot be said that the petitioner entertained a bonafide belief. She also submits that the waiver of interest that was demanded from the petitioner under Section 234B of the Income Tax Act, 1961 is only for the period between the due date and the date of assessment and therefore, there are no merits in the present writ petition. She further submits that the petitioner has also not made out any case for genuine hardship and therefore, the respondent has rightly rejected the request of

the petitioner for waiver of interest under Section 234B of the Income Tax Act, 1961.

21. The learned Senior Standing Counsel drew my attention to the following three decisions of this Court in support of her submission:-

i. Chief Commissioner of Income-tax, Chennai-34 Vs. Rajanikant & Sons, (2017) 83 taxmann.com 162 (Madras).

ii. Tushin T. Mehta Vs. Chief Commissioner of Income-tax, Chennai - II, (2019) 108 taxmann.com 257 (Madras).

iii. M/s.Rayala Corporation Pvt. Ltd. Vs. The Chief Commissioner of Income Tax, Chennai II and Others, in W.P.Nos.15399 & 15400 of 2007, dated 31.01.2020.

22. She further submits that the Division Bench of this Court in Rajinikant case referred to supra has answered the issue against the petitioner as follows:-

11. Having heard the learned counsel for the parties and perused the record, what emerges, in nutshell is that, this Court is required to look at the contents of the Circular dated 26.06.2006, in order to come to a conclusion, in one way or the other, as to whether or not, the respondent would be entitled to seek waiver of interest.

11.1. We may also note herein that the learned counsel for the Revenue, Ms.Muralikrishnan, is right in her submission that the Chief Commissioner in his order dated 04.01.2010, had exhaustively dealt with merits of the waiver petitions and, then, come to a conclusion that the circumstances obtaining in the case did not fall within the provisions of clauses 2(a) to 2 (d) of the Circular.

11.2. Therefore, what is required to be seen is what is the scope and ambit of the Circular dated 26.06.2006. A bare perusal of the Circular would show that the CBDT has delegated its power to the Chief Commissioner and/or the Director General of Income Tax to reduce or waive interest charged under Section 234A or under Section 234B or under Section 234C of the 1961 Act, in the classes of cases or classes of

incomes specified in paragraph 2 of the said Circular.

11.3. The extent to which the said delegates, i.e., Chief Commissioner/Director General of Income Tax, may waive or reduce the interest has been left to their discretion.

11.4. Furthermore, the Circular makes it clear that no reduction or waiver of interest under the provisions referred to above shall be ordered, unless the assessee has filed a return of income for the relevant AY and paid the entire income tax (principal component of demand due on the income, as assessed).

11.5. In addition thereto, the Chief Commissioner/Director General of Income Tax has been empowered to impose any other condition, as it may deem fit, while granting reduction or waiver of interest.

11.6. Therefore, what emanates upon perusal of the Circular is that, unless the Assessee's case falls under the circumstances set out in paragraph 2(a) to 2(d) of the Circular dated 26.06.2006, which includes classes of cases and/or classes of incomes, the Chief Commissioner/Director General of Income Tax has no power to reduce or waive interest.

11.7. In the instant case, as indicated in the narration of facts above, though returns were filed for the subject periods, the assessment made in the usual and normal course, was reopened under Section 148 of the 1961 Act. The reassessed tax was paid only after the Revenue had passed the reassessment order. As noted above, the assessee, at that stage, as advised, it appears, has also paid interest under Sections 234A, 234B and 234C of the 1961 Act.

11.8. However, what emerges from the record, is also, that in so far as AY 2001-2002 is concerned, at the assessment stage itself, the deduction claimed under Section 80HHC qua the local sales was denied to the respondent. The matter was carried in appeal, which was sustained by CIT(A), in his order dated 27.08.2004.

11.9. Therefore, in a sense, at that stage itself, the respondent was made aware that Section 80HHC deduction was not available.

23. She also drew my attention to the decision in Tushin T. Mehta case referred to supra, wherein, the learned Single Judge of this Court has held as under:-

'' 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, 9 th 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.''

24. Finally, she drew my attention to the decision of this Court in M/s.Rayala Corporation Pvt. Ltd. case referred to supra, in support of her plea that the petitioner has not made out any case for exemption/waiver from the payment of interest under Section 234B of the Income Tax Act, 1961.

25. The petitioner had not only challenged the following assessment orders and few other assessment order for few other assessment years starting from 1984-85 to 1988 -89 but had also CBDT Circular No 372 dated 8.12.1983 reported in [1984] 146 ITR (ST) 9 in W.P.No. 203, 6632, 6633, 10838 of 1989 and in W. P.No. 14032 of 1991 14827 of 1992 and 2228 of 1993 and W.P.No. 8971 of 1993.

Serial No	Assessment Years	Due date for payment of Advance Tax	Date	Tax Details	Interest under Deduction 234B of the Income Tax Act, 1961
1	1989-90	15.9.1988 (20%) 15.12.1988 (30%) 15.3.1989 (50%)	30.03.1992	6,29,325	4,40,524/-
2.	1990-91	15.9.1989 (20%) 15.12.1989 (30%) 15.03.1990 (50%)	22.12.1992	1,04,90,045	69,23,400/-
3.	1991-92	15.9.1990 (20%) 15.12.1990 (30%) 15.03.1991 (50%)	19.02.1993	1,36,37,712	68,23,420/-

26. These writ petitions were answered in favour of the petitioner by a Division Bench of this Court by its order dated 19.12.1994 reported in [1995] 213 ITR 639 holding that the petitioner was indeed entitled to exemption under Section 11(1) of the Income Tax Act, 1961.

27. The Court held that amendment to Section 11 of the Income Tax Act, 1961 vide Finance Act, 1983 with effect from 1.4.1984 with the insertion of Sub-Section (4-A) to Section 11 of the Income Tax Act, 1961 did not apply to the case of the petitioner in trust as the petitioner was public charitable trust, whereas clause (a) of subsection (4-A) deals with income being profits and gains of business carried on by a trust created only for public religious purpose; and clause (a) does not deal with income derived from the business undertaking a lender the trust for Public charitable purpose. It was further held that "Similarly, clause (b) will apply only to income being

profits and gains of persons carried on by an institution and not by a Trust.

28. The Court followed its view for the assessment year 1979-80 to 1983-1984 rendered on the same day in petitioner's own case reported in [1995] 213 ITR 625.

29. However, the order passed by the Division Bench of this court in [1995] 213 ITR 639 were ultimately reversed by the Honourable Supreme Court in its order dated 31.1.2001 reported in [2001] 247 ITR 785.

30. In view of the adverse order of the Honourable Supreme Court in holding that the petitioner was indeed liable to pay tax and no exemption was available to the petitioner under Section 11 of the Act. The petitioner has also remitted the tax for these assessment years through belatedly.

31. The petitioner thereafter approached the first respondent for exemption from payment of interest under section 234 B of the Income Tax Act, 1961.

32. The first respondent by an order dated 18.2.2005 rejected the application for waiver of interest under the aforesaid provision of the Income Tax Act, 1961. The petitioner therefore filed W.P.No. 7457 of 2005 which set aside the aforesaid order dated 18.2.2005 of the first respondent dated 18.2.2005 and remanded the case back to the respondent to consider the case afresh with the following observation:-

"It is no doubt true that given the provisions of Section 11 (4A), the demand was raised on the assessee. However, the subsequent declaration of law and the cancelling of the orders of assessment merit to be considered on the question of bona fides while considering the plea for waiver. It is not denied that the fresh order of assessment itself came to be passed after the Supreme Court decision. In the light of the above facts and considering the scope of the Board's notification, the case of the petitioner merits to be reconsidered and a fresh order passed accordingly. In the circumstances, we set aside the order of the first respondent and direct the first respondent to consider the case of the petitioner afresh and pass orders in accordance with law".

33. The 1st respondent thereafter passed another order dated 3.3.2010. Once again, the 1st respondent rejected the request of

the petitioner for the second time. The said order was again set aside by an order dated 23.9.2010 In W.P.No. 5859 of 2010 with the following observation:-

" As rightly pointed out by the learned Senior Counsel appearing for the petitioner, the claim of the petitioner rested not just on the applicability of the circular alone. The petition for waiver narrates the grounds for granting waiver of interest that there was no wilful default on his part for non-payment of tax or delayed filing of the return. In the light of the specific plea made by the petitioner placing reliance on the decisions of this Court in the assessee's case and the subsequent reversal by the Supreme Court, the first respondent should have considered the plea of the petitioner on the aspect of genuine hardship. In the background of the facts thus projected, there being no discussion on this aspects. I agree with the submission of the petitioner that the order passed by the first respondent merits to be set aside with a direction that the first respondent shall consider the plea of the petitioner for waiver in the light of the facts as stated in the petition and pass orders in accordance with law within a period of eight from the date of receipt of a copy of the order of this Court".

34. Therefore this is the third round by the petitioner for the same relief. The 1st respondent has rejected the request of the petitioner for the 3rd time vide impugned order dated 28.06.2011 with the following observation:

(A) Regarding the applicability of CBDT instruction for waiver of interest it has been very elaborately discussed in the earlier order of the DGIT (E) dated 18.02.2005 and 03.03.2010 that the case of the assessee is not covered by any mitigating circumstances mentioned in the CBDT instruction governing waiver of interest under section 234B. The repeated contention of the assessee that it was under bonafide belief that advance tax was not payable because of favourable High Court's order in its own case has been rebutted in both the earlier order of the DGIT(E). The first due dates of liability for payment of advance tax for Assessment Years 1989-90, 1990-91 and 1991-92 were 15.09.1988, 15.09.1989 and 15.09.1990. The order of the

Madras High Court which was in favour of the assessee (subsequently reversed by the Hon'ble Supreme Court in favour of the Department) was passed only on 19.12.1994. Therefore, the said order was not in existence when advance tax was due and therefore, the contention of the applicant is contrary to the facts of the case.

(B) Regarding genuine hardship, the assessee was asked to furnish evidence by producing bank pass books and also relevant copies of accounts to prove that on due dates for payment of advance tax for all the relevant assessment years, the assessee was having serious financial problems for payment of advance tax. The assessee during the course of hearing and also in its written submission filed on 22.01.2011 and on 26.01.2011 frankly admitted that genuine hardship in the shape of financial problem and shortage of liquid funds did not exist in the assessee's case. However, the assessee has contended that payment of interest will cause genuine hardship to the assessee. It is the contention of the assessee that assessee filed nil return of income and it was only because of Supreme Court's order that the assessee had to pay tax and interest. The assessee also pleaded that the assessee has applied huge amounts under section 11 for educational purpose and has also paid huge taxes and further payment of interest will cause genuine hardship to the assessee. Any justifiable demand of tax and interest upheld by the Supreme Court, however, unpleasant it may be, cannot be treated as genuine hardship. Any payment of tax and interest will lead to diminution of gross asset of the assessee and this cannot be treated as hardship. This will lead to an absurd situation where every assessee will contest the payment of interest on the ground of so called hardship. Genuine hardship means lack of liquid resources and acute financial distress and as frankly admitted by the assessee these conditions did not exist in this case. Therefore, the ground of genuine hardship fails.

(C) Regarding the issue of wilful default, it has been held and not disputed that the favourable High Court's order did not exist when

the payment of advance tax for all the three assessment year was due to the revenue. Thus the assessee has taken a unilateral stand on its own without any support of High Court's order for not paying advance tax. This conscious stand of the assessee clearly indicates wilful default and not an act unintended omission. Therefore, the assessee is not entitled to any relief on the ground that there is no wilful default on its part for non-payment of advance tax.

35. There is no dispute that the petitioner has failed to pay the advance tax in time. The records indicate that the Court had earlier granted interim relief to the petitioner's by its order dated 6.1.1989 and 12.6.1989, as is evident from reading of order dated 18.5.2005 of the 1st respondent. While rejecting the petitioner's request for waiver of interest charitable under Section 234 B of the Income Tax Act, 1961.

36. There is also no dispute that the petitioner has paid tax belatedly. By the time the third and final instalment of the advance tax was due from the petitioner for the assessment year 1989-90, an interim order was passed by this Court on 6.1.1989. Thereafter, another order came to be passed by this court on 12.6.1989.

37. Though, content of these orders have not been furnished, it is evident that the petitioner took a bonafide stand that it was not liable to pay tax though the Section 11 had been amended vide Finance Act, 1983 with effect from 1.4.1984. The contention of the petitioner was also accepted by this court in its order dated 19.12.1994 in [1995] 213 ITR 639. That position continued to 31.1.2001 till the Honourable Supreme Court reversed the said order dated 19.12.1994 vide its order dated 31.1.2001 in [2001] 247 ITR 785.

38. Therefore, the question to be answered is whether the petitioner is entitled for complete or partial waivers or no waiver at all from payment of interest under section 234 B of the Income Tax Act, 1961.

39. As per clause (d) to CBDT Circular F. No. 400/234/95-IT (B) dated 23.5.1996, 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 such assessee was assessable to income tax, and as a result, such assessee did not pay income tax in relation to such income in any previous year and subsequently, in consequence of any retrospective amendment of law, as the case may be, 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 years found to be less than the amount of advance tax payable on his current income, the assessee chargeable to interest under section 234B and/or 234C is entitled to reduction or waiver of such interest if the Chief Commissioner or the Director-General of Income Tax is satisfied for grant of such reduction or waiver interest.

40. Thus, the facts as they stand out make it clear that the petitioner was indeed entitled for partial waiver of interest under section 234 B of the Income Tax Act, 1961 inasmuch as there was stay granted by this court on 6.1.1989 and on 12.6.1989. These orders continued to be in force as these writ petition filed by the petitioner came to be allowed on 19.12.1994 and was reversed only on 31.1.2001.

41. Therefore, up to the date of the order of the Honourable Supreme Court this was a fit case for exercising the discretion vested with the first respondent for reducing the proportionate interest under section 234B of the Income Tax Act, 1961.

42. First respondent ought to have also considered the mitigating circumstances in as much as the total surplus generated by the petitioner during the relevant assessment year was Rs. 4,69,62,119/-. Out of the aforesaid cumulative surplus generated Rs. 3,89,70,000/- being 75% of the aforesaid surplus generated by the petitioner was given for a charitable purpose to another Trust named Aditanar Educational Institution for educational purpose as was done in the past since inception. The cumulative tax that has been determined to be paid by the petitioner by the Income Tax Officer in the respective assessment order was Rs. 2,47,57,082/-. The cumulative out flow on account of tax would have been Rs. 6,37,27,082/- which ought to have been considered by the first respondent before rejecting the application for waiver of interest. It would imply that the petitioner would have to borrow the amounts for keeping its commitment to the said Trust and to the department. Up to the date of the decision of the Honourable Supreme Court on 31.1.2001, the respondent department could not have demanded tax. After all, some form of exemption on the payment/transfer made to the aforesaid trust for educational purpose has been exempted right from beginning and all along the petitioner had to approach the court for relief which was also granted to the petitioner and stand of the petitioner was upheld. The amendment to the law in 1983 with effect from 1.4.1984 changed the perspective and the issue attained finality only after the Honourable Supreme Court pronounced its judgement in [2001] 247 ITR 785 on 31.1.2001. Therefore, this was a fit case for

granting waiver by the first respondent to the petitioner upto 31.01.2001.

43. Under these circumstances, this court is inclined to modify the impugned order and grants partial waiver of interest to the petitioner upto 31.01.2001, being the date of the order of the Honourable Supreme Court reported in [2001] 247 ITR 785 which reversed the decision of the Division Bench of this Court in [1995] 213 ITR 639 on 19.12.1994.

44. The second respondent is therefore directed to re-quantify the proportionate interest to be paid by the petitioner on account of the delay in payment of advance tax from the date of disposal of the appeal of the Income Tax Department by the Honourable Supreme Court on 31.1.2001 reported in [2001] 247 ITR till the actual date of payment aforesaid tax by the petitioner. This exercise shall be carried out within a period of three months from the date of receipt of a copy of this order. On such quantification, the petitioner shall pay the interest within a period of one month thereafter.

45. This writ petition stands allowed with the above observation. No cost.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

jen/drl

To

1.The Director-General of Income Tax (Exemptions)
Plot No.15, 2nd Floor,
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New Delhi - 110 092.

2.The Assistant Director of Income Tax
(Exemptions)-II
(Now Deputy Director of Income Tax)
(Exemption)-II
121, Nungambakkam High Road, Chennai - 34.

+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No. 23874

W.P.No.17313 of 2011

AJB(CO)
GN(29/06/2021)