

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

**BEFORE:
THE HON'BLE JUSTICE RAJA BASU CHOWDHURY**

WPO/198/2023

**MUKUL SOMANY
VERSUS
UNION OF INDIA & ORS.**

AND

WPO/200/2023

**MUKUL SOMANY
VERSUS
UNION OF INDIA & ORS.**

AND

WPO/201/2023

**MUKUL SOMANY
VERSUS
UNION OF INDIA & ORS.**

For the petitioner : Mr. J.P. Khaitan, Sr. Advocate
Mr. Pratyush Jhunjhunwala, Advocate
Mr. Mrigank Kejriwal, Advocate
Ms. Rishi Raju, Advocate
Ms. Sretapa Sinha, Advocate
Ms. Sruti Datta, Advocate
Mr. Akkal Dudhewala, Advocate

For the respondents : Mr. Smarajit Roychowdhury, Advocate
Mr. Amit Sharma, Advocate

Heard on : 07.04.2025, 08.04.2025, 10.04.2025,
17.04.2025 & 21.04.2025
Judgment on : 21st April, 2025

RAJA BASU CHOWDHURY, J:

1. Challenging the orders passed under Section 264 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') in respect of the assessment years 2016-2017, 2017-18 and 2018-19 all dated 29th March 2021, the instant writ petitions have been filed. To consider the scope of the challenge, it is necessary to note down the facts giving rise to the same.
2. It is the petitioner's case that while he was Vice-Chairman and Managing Director of Hindustan National Glass and Industries Limited (hereinafter referred to as the "said Company") which is a public company and an existing company within the meaning of Companies Act, 2013 (hereinafter referred to as 'the Companies Act') by a special resolution of the members of the company passed on 30th March, 2015, the petitioner was reappointed as the Vice-Chairman and Managing Director of the said company for a period of three years w.e.f. 1st April, 2015 at a salary of Rs.16,67,500/- per month with an annual increment with the limit of 15% of the salary last drawn subject to the condition that such increase is in compliance with the provisions of Sections 196, 197, 203 read with Schedule V and other applicable provision of the Companies Act.

3. According to the petitioner, by reasons of absence/inadequacy of profits on 21st March, 2015, an application was made by the said company to the Central Government in terms of Sections 196 and 197 read with Schedule V of the Companies Act seeking approval for payment of the aforesaid higher remuneration to the petitioner. Initially, the Central Government vide its communication dated 30th May, 2016 informed that the total remuneration of the petitioner should be Rs.18,00,000/- per annum for a period of three years without any annual increment as the said company had not furnished no objection certificate in favour of the proposal from all its lenders to whom it had allegedly made default in payment of debt. To remove the above short coming the company subsequently obtained no objection certificate from the lead banker and had filed another application with the Central Government on 16th February, 2017 incorporating such no objection. Unfortunately, the Central Government required the petitioner to furnish 'no objection certificate' from HSBC Bank as well.
4. During the pendency of the aforesaid application before the Central Government, Section 197 of the Companies Act was amended by the provisions of the Companies (Amendment) Act, 2017 with effect from 12th September, 2017. In the light of the aforesaid amendment, the

Central Government no longer had power to approve the payment of higher remuneration and accordingly, the application filed by the said company seeking approval which was pending before the Government abated.

5. The factum of abetment of the company's application as aforesaid was communicated to the said company by the Government by a communication dated 9th October, 2019. Consequent thereupon, as required in terms of Section 197(17) upon the application of the company having abated, the company was required within one year from the commencement of such amended provision to obtain approval in accordance with the provisions of the said section. To more fully appreciate, the aforesaid provision of Section 197(17) of the Companies Act as amended by the Amending Act, 2017 which came into effect from 12th September, 2018 the same is reproduced hereinbelow:

“197(17) On and from the commencement of the Companies (Amendment) Act, 2017, any application made to the Central Government under the provisions of this Section [as it stood before such commencement], which is pending with that Government shall abate, and the company shall, within one year of such commencement, obtain the approval in accordance with the provisions of this section, as so amended.”

6. It would transpire from the records that the company had thereafter upon considering the matter on the basis of the resolution taken by the Board Members on 13th November, 2019 by letter in writing dated 2nd December, 2019 called upon the petitioner to refund the excess remuneration paid to him for the financial years 2015-16, 2016-17 and 2017-18. Following the above, the petitioner had refunded the excess remuneration for the financial years 2015-16, 2016-17 and 2017-18 as more fully detailed in his communication in writing dated 16th December, 2019, to the company. In the interregnum, however, the petitioner had already filed the returns for the relevant assessment years being 2016-17, 2017-18 and 2018-19 respectively.
7. According to the petitioner, since the amount which was refunded by the petitioner no longer formed the part of the remuneration, the petitioner applied for revision of his returns by filing appropriate applications under Section 264 of the said Act. While in the case of assessment year 2018-19, there was no delay, there was delay in respect of applications for the assessment years 2016-17 and 2017-18. It would transpire from the records that all the applications under Sections 264 of the said Act were made on 13th January, 2020 contemporaneously with the claim for refund of the excess amount of tax already paid. Records would reveal that since admittedly, the

applications were barred by limitation, show-cause notice was issued on the petitioner as to why such applications shall not be rejected. The petitioner appears to have responded to the same and had highlighted the power of the Principal Commissioner/the Chief Commissioner to condone the delay if he found that the assessee was prevented by sufficient cause from making the application within the prescribed period and to admit the application after expiry of that period. The respondent no.2, however, passed three several orders all dated 29th March, 2021. In respect of assessment year 2016-17 as also 2017-18 he was of the view that the refund applications under Section 264 was received on 17th January, 2020 while the limitation for filing of such petition had expired on 31st May, 2018 and 2nd November, 2018 respectively. He was further of the view that there was no sufficient reason to condone the delay for more than one year and seven months in the case of the application made in respect of the assessment year 2016-17 while in the case of the assessment year 2017-18 the return filed by the petitioner was processed on 3rd November, 2017 and there was no sufficient reason to condone the delay for more than one year and three months and the applications being beyond the prescribed period were not entertained.

8. Notwithstanding the aforesaid, as and by way of a passing remark he had observed by placing reliance on Section 16 and 17 of the said Act that since there is no provision to allow any deduction from salary for recovery made in the subsequent year against the salary paid in the previous year, hence, the claim for deduction in respect of the recovery made in the subsequent year paid in earlier year cannot be allowed.
9. By placing reliance on the extract of the minutes of the meeting dated 30th March, 2015, Mr. Khaitan, learned senior Advocate appearing in support of the aforesaid writ petitions would submit that pursuant to the appointment of the petitioner as Vice-Chairman and Managing Director of the said company for a period of three years, the payment of salary and other allowances was subject to compliance of the provisions contained in Sections 196 read with Schedule V and other applicable provisions of the said Act. He would submit that the application made before the Central Government for approval could be granted by reasons of the amendment of Section 197 of the Companies (Amendment) Act, 2017 w.e.f. 12th September, 2018. The said application then pending before the Central Government abated and the said company were required to obtain approval as required under Section 197 of the Companies Act.

10. Admittedly, in this case the company had called upon the petitioner to refund the excess remuneration by a communication dated 2nd September, 2019. In compliance whereof, the petitioner, having refunded the remuneration, had applied before the Income Tax Authority under Section 264 of the said Act for revising its assessment order since, according to the petitioner, the amount which was refunded did not constitute part of his salary. He would submit that the petitioner did not pray for any deduction rather the petitioner was all along holding the aforesaid excess amount in trust for and on behalf of the company which was required to be refund by him. According to him, the cause of action for the applications for revision under Section 264 had arisen after the company had called upon the petitioner to refund the same and on the petitioner having actually refunded such amount. According to him, there was sufficient explanation for the delay. The revising authority had, however, failed to exercise jurisdiction by not considering the proviso to Section 264 of the said Act and such fact had already been acknowledged by the authority in its affidavit affirmed on 11th March, 2025. In support of his contention that the authority is required to act judiciously even while exercising its discretion and cannot ignore the explanation for delay, he has placed

reliance on the judgment delivered by this Hon'ble Court in the case of **Nicco Corporation Limited v. Commissioner of Income Tax & Ors.** reported in **(2001) 251 ITR 791**. In the facts of the case mentioned above, it is submitted that the orders passed under Section 264 of the said Act for the assessments year 2016-17 and 2017-18 refusing to condone the delay cannot be sustained and the same should be set aside.

11. In so far as the rejection order passed in respect of the assessment year 2018-19 is concerned, he would submit that since the respondent no.2 has proceeded to treat the refund of excess salary as a deduction from the salary on an erroneous premise, the said finding also cannot be sustained, the same is perverse. On the aforesaid issue whether the salary paid in excess on being refunded as per statutory requirement could be treated as a reduction as salary, reliance is placed on the judgment delivered by the Hon'ble High Court of Delhi in the case of **Commissioner of Income Tax-XVI v. Raghunath Murti** reported in **(2009) 178 Taxman 144 (Delhi)**. By drawing attention of this Court to the affidavit affirmed by the respondent no.2 on 11th March 2025, he would submit that the deponent of the said affidavit being the Principal Commissioner of Income Tax, Kolkata-2 had made a categorical statement that the

contention of the petitioner with regard to return of the salary was not claimed as deduction and the same was held in trust, was not considered. In the facts of the case as stated above, he would submit that the order passed by the respondent no.2 for the assessment year 2018-19 also cannot be sustained and the matter be remanded to the Revising Authority for a fresh decision on merits.

12. *Per contra*, Mr. Roy Chowdhury, learned advocate appearing for the respondent authority/department, on the other hand, had taken me through the records of the proceeding in detail. He has highlighted that admittedly in the case of assessment years 2016-17 and 2017-18, there was delay in filing the applications under Section 264 of the said Act. He would submit that by the time the applications seeking revision were filed, the assessment orders had already been passed and there was delay for more than a year in each of the cases. The explanation provided by the petitioner was not sufficient. He would further submit that in the facts narrated hereinabove, this Court should not interfere with the orders passed by the respondent no.2. In so far as the order passed in respect of the assessment year 2018-19 is concerned, he would submit that the order is clear and in paragraph 4 of such order a finding has been recorded by the respondent no.2 on merits and, as such, no interference is called for.

13. Heard the learned advocates appearing for the respective parties and considered the materials on record. It would transpire that the only issue involved in the writ petitions concerning the assessment years 2016-17, 2017-18 is whether the petitioner could maintain the applications under Section 264 of the said Act beyond the prescribed period of limitation. To appreciate the above, it is necessary to note that although Sub-section 3 of Section 264 of the said Act provides for a prescribed time limit for filing an application, the proviso after sub-section, in my view, enables the revising authority to receive a belated application. To morefully appreciate the same, the said provision is extracted below:

“264. Revision of other orders.”—(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 [Chief Commissioner or Chief Commissioner or 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 [Chief Commissioner or Chief Commissioner or 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 [Chief Commissioner or Chief Commissioner or 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 [Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner shall not revise any order under this section in the following cases—

(a) where an appeal against the order lies to the [Deputy Commissioner (Appeals) or to [the Joint Commissioner (Appeals) or 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 Joint Commissioner (Appeals) or 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 Joint Commissioner (Appeals) or the Commissioner (Appeals)] or to the Appellate Tribunal.”

14. As would evident for the above, the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner has the power to admit an application after expiry of period provided, he is satisfied that the assessee was prevented by sufficient cause from making the application within that period. In the instant case, from the terms of the appointment of the petitioner, it would transpire that his payment of remuneration was made subject to compliance of the provisions of Sections 196, 197, 203 read with Schedule V and other applicable provisions of Companies Act and having regard thereto, the company by reasons of inadequacy of profits was compelled to make an application on 25th March, 2015 to the Central Government under Sections 196 and 197 read with Schedule V of the said Act for approval of higher remuneration. Although, the Central Government sought for clarification from the company from time to time, however, before actual approval was granted, by reasons of amendment of Section 197 of the Companies Act which came into effect by insertion of Section 197(17) by the Companies (Amendment) Act, 2017 w.e.f. 12th September, 2018, the pending application before the Central Government abated and the company was required to take approval

as provided in Section 197 which has already been discussed hereinabove.

15. Records revealed that the company had subsequently decided to call upon the petitioner to refund the excess remuneration. The petitioner had immediately complied with such direction and had refunded the excess remuneration. In the interregnum, however, the petitioner had already filed the returns for the assessment years 2016-17, 2017-18 and 2018-19 by treating the said excess remuneration as part of the salary. Based on the aforesaid returns, the assessment order had already been passed. This necessitated filing of revision applications under Section 264 of the said Act in respect of the assessment years 2016-17, 2017-18 and 2018-19. When the applications were filed on 17th January, 2020 the said applications insofar as assessment years 2016-17 and 2017-18 are concerned the same were barred by limitation. A show-cause in that regard was issued. The petitioner appears to have responded to the show-cause issued by the respondent no.2 and had clarified the reasons for delay and had also referred to the proviso after Sub-section (3) of Section 264 of the said Act which authorised the Principal Chief Commissioner/Chief Commissioner/Principal Commissioner/Commissioner to condone the delay and accept the application for revision. It was specific case

of the petitioner that he was prevented from sufficient cause from applying within the period of limitation as the cause of action for such application had only accrued upon the petitioner refunding the amount. It appears that the respondent no.2 by treating the applications as barred by limitation and by making an observation that there is no sufficient ground to condone the delay had rejected such application.

16. It may be noted here that the respondent no.2 did not appropriately consider the application filed by the petitioner. Though, it is true that the order passed by the respondent no.2 is a discretionary order, however, as rightly pointed out by Mr. Khaitan, learned Senior Advocate representing the petitioner that such discretion must be exercised lawfully following judicious principles. Admittedly, in this case, it would transpire from the orders impugned and as admitted in the affidavit filed by the respondent no.2 that the respondent no.2 did not take note of the proviso after Sub-section (3) of Section 264 of the said Act which, in my view, constitutes failure to exercise jurisdiction. In this context, reliance is placed on the judgment delivered in the case of **Nicco Corporation Limited** (supra).

17. Although Mr. Roy Chowdhury, learned Advocate representing the department had indicated that this Court ought not to interfere in

these matters especially when the department is not permitted to challenge an order which may be barred by limitation, I am of the view, having regard to the scheme of Section 264 of the said Act, the opportunity to offer an explanation and seek condonation of delay is exclusively vested with the assessee and not the department. The right of the department to seek revision of orders prejudicial to the revenue is governed by Section 263 of the said Act. Having regard thereto, and taking note of the fact that the respondent no.2 had ignored the statutory provision especially with regard to the power to condone the delay as provided for in the proviso to Section 264 of the said Act, and had not considered the explanation lawfully and judicious and also noting that the cause of action for filing such application had only arisen after the direction to refund the excess salary and upon the petitioner actually refunding the same, I am of the view that the aforesaid orders in respect of the assessment years 2016-17, 2017-18 cannot be sustained and the same are, accordingly, set aside and the matters are remanded to the respondent no.2.

18. In so far as the observation made by respondent no.2 is concerned, in the aforesaid orders, I am of the view that the respondent no.2 could have decided the applications on the merits after having condoned

the delay. In my view, since the delay was not condoned the observation made on the merits of the application can at best said to be passing remarks made by the respondent no.2 in respect of the assessment years 2016-17 and 2017-18, the same are *non-est* and not binding and, accordingly, quashed.

19. In so far as the assessment year 2018-19 is concerned, I find that the said application has been rejected by the respondent no.2 on the ground, inter alia, proceeding on the premise that income under the head 'Salaries' is chargeable to tax as per the provision of Section 15 of the said Act. According to the respondents, since there is no provision to allow any deduction for recovery made in the subsequent year against the salary paid in the earlier year, the application under Section 264 had been rejected. In this context, I may note that it has never been the petitioner's case that there had been deduction in the salary paid in the previous year rather the petitioner was at all material time holding the excess amount in trust on behalf of the company having regard to the specific terms indicated in the letter of appointment with regard to the payment of salaries which required the annual increment within the limit of 15% of the salary last drawn to be subject to the condition that such increase be in compliance with the

provisions of Sections 196, 197, 203 read with Schedule V and other applicable provisions of Companies Act, 2013.

20. The above position becomes clear having regard to the provisions contained in Section 197(9) of the Companies Act, which is extracted hereinbelow:

“.....

(9) If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without approval required under this section, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust for the company.

.....”

21. Admittedly, in this case, the petitioner was paid the remuneration subject to the approval. Since, the approval could not be obtained and the application pending before the Central Government abated by operation of law, and subsequently, the petitioner was required to refund the sum having regard to decision taken by the company, the petitioner at best could have held the sum in trust and the same could not be termed as deduction from salary, for previous year. In any event, since respondent no.2 in paragraph 10 of its affidavit-in-opposition affirmed on 11th March, 2025 has claimed that the aforesaid aspect has not been considered as such without finally

adjudicating the same, I am of the view that the aforesaid order passed by the respondent no.2 in respect of the assessment year 2018-19 also cannot be sustained and the same is, accordingly, set aside and the matter is remanded to the respondent no.2 for an adjudication afresh.

22. With the above observations, the writ petitions stand disposed of.

23. There will be no order as to costs.

24. All parties shall act on the basis of the server copy of this order duly downloaded from the official website of this Court.

(RAJA BASU CHOWDHURY, J.)

R. Bose/akg/