

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.12.2017

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.21477 of 2004

R.Mani

... Petitioner

Vs.

The Chief Commissioner of Income Tax,
Tiruchirappalli.

... Respondent

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, calling for the records of the respondent in C.No.932(245)/CCIT/TRY/2001-02 dated 11.12.2003 and quash the same and further direct the respondent to grant waiver of interest under Sections 234A, 234B and 234C of the Income Tax Act, 1961 for the assessment years 1997-1998 and 1998-1999.

For Petitioner : Mr.T.Vasudevan

For Respondents : Mr.A.P.Srinivas, Senior Panel Counsel

ORDER

Heard Mr.T.Vasudevan, learned counsel appearing for the petitioner and Mr.A.P.Srinivas, learned Senior Panel Counsel appearing for the respondent.

2.The writ petition has been filed challenging an order passed by the Chief Commissioner of Income Tax, Tiruchirappalli dated 11.02.2003 under Section 119(2)(a) of the Income Tax Act, 1961 (hereinafter referred to as “the

Act”), by which the petitioner’s application for waiver of interest payable under Sections 234A, 234B and 234C of the Act for the assessment years 1997-1998 and 1998-1999 was rejected. The petitioner is an assessee on the file of the Deputy Commissioner of Income Tax for Circular I, Salem and has been assessed in the status of HUF for nearly two decades. The petitioner’s income is mainly from the property, sago commission income and income from a Trust. For the assessment years 1997-1998 and 1998-1999, the petitioner filed his return of income on 20.12.2000 which was processed and the petitioner was assessed to tax and interest was levied under Sections 234A, 234B and 234C for both the assessment years. Hence the petitioner approached the respondent under Section 119(2)(a) of the Act for waiver of interest under Sections 234A, 234B and 234C of the Act which was levied for the delay in furnishing the return of income, default in payment of advance tax and for shortfall/deferment in the payment of advance tax respectively. The petitioner in his application for waiver stated that (1) he was under the bonafide belief that he had no taxable income and therefore not required to file a return; (2) there was a family dispute among the members with regard to the properties and a partition suit was pending; (3) there was a case pending before the Debt Recovery Tribunal and as a consequence of which, the petitioner was attending banks, Courts and authorities and (4) there was slump in the sago business.

3.The respondent has rejected the petition for waiver on the following grounds:

- 1) The petitioner failed to voluntarily file their returns but the returns were filed consequent upon a survey conducted on 23.01.1999 under Section 133A of the Act and issuance of notice under Section 148 of the Act;
- 2) Tax on the assessed income was not paid which is a pre-condition for waiver of interest;
- 3) There was no reasonable cause as required under the Circular of the Central Board bearing Circular No.400, and
- 4) The conditions prescribed in the Board's circular were not satisfied for waiver of interest under Sections 234A, 234B and 234C of the Act.

4.It has to be seen as to whether the respondent was right in rejecting the petitioner's application for waiver of interest. The power for waiver granted to the respondent emanates from the guidelines framed by the Central Board in the form of a circular. The circular which held the field during the relevant time was Circular No.400 and in order to be entitled to the benefit of the Circular, the assessee should fall within one of the conditions stipulated therein. So far as the waiver of interest under Section 234A of the Act, Clauses 2(a) and 2(e) of the Board Circular No.400 have to be fulfilled which are as follows:

"Clause 2(a) - where the accounts and documents have been seized u/s. 132 of the Income Tax Act, 1961 and because of the seizure of account books, the assessee could not file the return of income within the due date u/s. 139(1).

Clause 2(e) - the return of income could not be filed by the assessee due to unavoidable circumstances and the return of income was filed voluntarily before detection by the Assessing Officer."

5. So far as the waiver of interest under Sections 234B and 234C of the Act is concerned, the assessee has to satisfy the following conditions:

- i. Where there was a seizure of case u/s 132/132A and the assessee had no other source to pay the advance-tax other than the cash seized and the cash was NOT allowed to be utilised to pay the advance-tax.
- ii. The total income (admitted/assessed) of the assessee, inter alia includes income other than Capital Gains which accrued to or received by the assessee after the due date for the first or subsequent instalment and the assessee has paid the advance-tax paid the remaining instalments and the assessee could not anticipate the accrual/receipt of such income.
- iii. The total income of the assessee includes income which is held by the High Court in his own case as not chargeable to tax and the Supreme Court has held it as assessable in the assessee's own case or the law is amended to that effect after the expiry of last date of last installment of advance-tax.

6.The respondent has rejected the petitioner's request for waiver on the ground that he has not voluntarily filed the returns of income but has filed after deduction by the Assessing Officer. This appears to be the stand in the counter affidavit as well. The assessment years in question are 1997-1998 and 1998-1999. Record of the proceedings shows that the petitioner had not filed return of income for the assessment years 1994-1995, 1995-1996 and 1996-1997 and the explanation given is that he had no taxable income during the said years. Further, the property continued to remain as HUF property i.e. it remained undivided and there were serious civil disputes between the family members and to establish the same the petitioner had filed the copy of the plaint in O.S.No.200 of 2014 on the file of the Sub Court, Salem, filed for partition in which the petitioner was the 6th defendant. Thus, it is the petitioner's case that he was under the bonafide belief that there is no taxable income and consequently not required to pay any advance tax.

7.It has to be seen as to whether the case pleaded by the petitioner could brought under Clause 2e of Board Circular No.400 (referred supra). A survey was conducted in premises of the petitioner on 22.01.1999. However, the survey did not lead to any immediate issuance of notice under Section 148 of the Act which was issued only on 21.12.2000. However, in the interregnum,

during February 1999 itself the petitioner filed his return of income. Thereafter the Assessing Officer has taken up the matter and completed the assessment under Section 143(2) of the Act and passed an order dated 30.03.2001 accepting the return filed by the petitioner with no further additions. Thus, merely because there was a survey conducted in the premises on 22.01.1999, can it be stated that the petitioner had not voluntarily filed the return before deduction. In this regard, it will be worthwhile to refer to the decision of the Hon'ble Division Bench in the case of **Commissioner of Income Tax vs. S.Khader Khan son** reported in **(2008) 300 ITR 157 (Mad)**. One of the substantial questions framed for consideration was that the Court was called upon to consider whether the materials collected and the statement elicited during survey operation under Section 133A of the Act had any evidentiary value. After taking note of Sections 132(4) and 133A of the Act, it was held as follows:

"6. In the instant case, there was a survey operation conducted under Section 133A of the Act in the assessee's premises and a statement was recorded from one of the partner. Assuming there were discrepancies and irregularities in the books of accounts maintained by the assessee, an offer of additional income for the respective assessment years was made by the partner of the firm. But, such statement, in view of the scope and ambit of the materials collected during the course of survey action under Section 133A shall not have any evidentiary value, as rightly

held by the Commissioner and the Tribunal, since such statement was not attached to the provisions of Section 133A of the Act. It could not be said solely on the basis of the statement given by one of the partner of the assessee-firm that the disclosed income was assessable as lawful income of the assessee. Since there was no material on record to prove the existence of such disclosed income or earning of such income in the hands of the assessee, it could not be said that the Revenue had lost lawful tax payable by the assessee."

8. Further, with regard to the statement recorded during the course of search, the Division Bench referred to the decision of the Hon'ble Apex Court in the case of *Pullangode Rubber Produce Co. Ltd. vs. State of Kerala* reported in (1973) 91 ITR 18, wherein the Hon'ble Apex Court held that time is an extremely important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect. After noting several other decisions, the question of law was answered in favour of the assessee and against the revenue on the following terms:

"14. From the foregoing discussion, the following principles can be culled out:-

(i) An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is

incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts, vide decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala (1973) 91 I.T.R. 18;

(ii) In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. Commissioner of Income-tax (2003) 263 I.T.R. 101 (Ker);

9. In the light of the above referred decision, it cannot be stated that the material collected at the time of survey can be any evidentiary value. In fact well before the issuance of notice under Section 148 of the Act, the petitioner had filed the return of income as early as in February 1999. Therefore, the survey conducted in the premises cannot be treated to be one of circumstances to show that there was a deduction of any income which has escaped assessment to tax. Therefore, this Court is of the view that the

petitioner's case would squarely fall under Section Clause 2(e) of the Board Circular. Further, the Central Board of Direct Taxes by circular issued a Notification in F.No.286/2/2003-IT (Inv) dated 10.03.2003 with regard to the confessions recorded during the survey, search and seizure operations and it was held that while recording the statement during the course of search, seizure and survey operations, no attempt should be made to obtain confession as to the non-disclosed income. The above circular would add to the interpretation given by this Court to show that a survey cannot tantamount to deduction by the Assessing Officer as referred to Clause 2(E) of the Act. Thus, this Court is fully satisfied that the assessee due to unavoidable circumstances did not file return of income and had done so before issuance of notice under Section 148 of the Act which at best can be treated to be a deduction by the Assessing Officer. If the petitioner is to succeed on the request for waiver of interest under Section 234 of the Act, it has to be seen as to whether the petitioner would be entitled for waiver under Section 234B and 234C of the Act.

10. Learned counsel appearing for the revenue would strongly contend that there are separate conditions to be adhered to by the assessee to be entitled for waiver of interest under Sections 234B and 234C of the Act. As pointed out earlier, the petitioner's case was that he had no taxable income.

This plea had not been controverted by the revenue and this is evident from the conduct of the assessee in not filing returns for earlier three years, i.e. 1994-1995 to 1996-1997. That apart, the petitioner has been able to establish that the property in question still remains undivided and no definite share in property or share to any co-parcener has been allotted and the suit for partition was pending. Apart from that, returns filed by the petitioner has been accepted and assessment has been completed with no further additions. The consistent case of the assessee is that the property continues to remain undivided and no income arose from the property to the petitioner and as there was no taxable income, returns were not filed. The petitioner established his bonafides by referring to the suit for partition, which was pending trial, in which the petitioner/assessee is arrayed as 6th defendant. Thus, when the property continues to remain undivided, the assessee cannot anticipate the accrual/receipt of such income. The circular issued by the Board empowering the Chief Commissioner to consider the waiver petition for waiver of interest under Section 234A as well as 234B would show that even in cases covered by Section 234B and even though these provisions are compensatory in nature, special orders for grant of relaxation could be passed. Thus, this Court is convinced that the dispute with regard to the division of property was a bonafide dispute which directly relates to the assessability of the petitioner to tax. Therefore, if the petitioner is entitled for waiver of

interest under Section 234A of the Act for the reasons set out above, the question of payment of advance tax nor a portion thereof will not arise and therefore, the petitioner is entitled for waiver of interest under Sections 234B and 234C of the Act. The above observations have been made by this Court considering the facts and circumstances of the case much of which has not been disputed by the revenue. Thus, for the above reasons the petitioner is entitled to succeed.

11. Accordingly, the writ petition is allowed, the impugned order is set aside and it is held that the petitioner is entitled for waiver of interest under Sections 234A, 234B and 234C of the Act. No costs.

04.12.2017

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Index:Yes/No
Internet:Yes/No
Speaking Order/Non-speaking Order

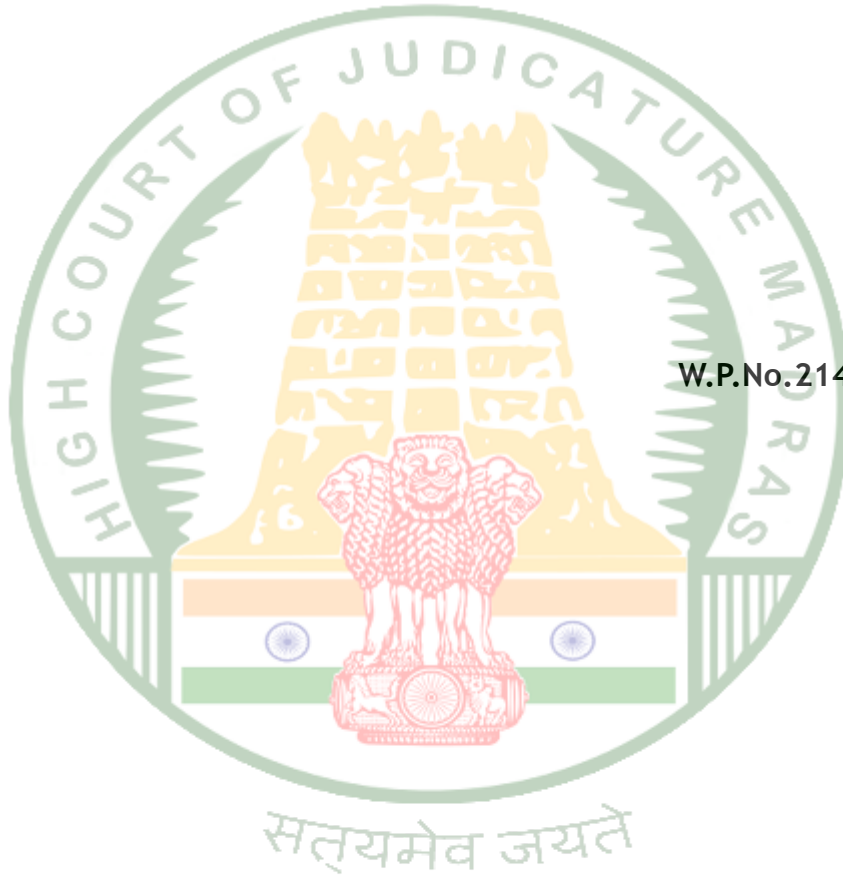
To

The Chief Commissioner of Income Tax,
Tiruchirappalli.

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T.S.SIVAGNANAM, J.

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