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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 21.09.2016**

+ W.P. (C) 2569/2015

SHAKTI BHOG FOODS LIMITED Appellants
Through: Mr. Ajay Vohra, Sr. Advocate with Mr.
Vaibhav Kulkarni, Advocates.

Versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR. Respondents
Through: Mr. Rahul Chaudhary, Sr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.

1. The petitioner seeks quashing of the notice dated 12.03.2015 issued under section 226(3) of the Income-tax Act, 1961('the Act') and a further direction to the respondent Income tax authorities (hereafter "the revenue") to vacate the orders issued by it- for attaching its bank accounts.

2. The Petitioner is an unlisted public limited company incorporated under the Companies Act, 1956, engaged amongst others, in the integrated business of purchasing, transporting, storing, processing, handling of food grains (i.e. rice and wheat) and thereafter selling the same in the domestic and overseas market. For assessment year 2013-14, it filed return of income on 31.03.2014 declaring total income of ₹289,61,04,740. On the said income, total tax and interest payable in accordance with the provisions of

the Act worked out to ₹113,60,91,737/-. Against this, the Petitioner claimed credit of prepaid taxes amounting to ₹27,63,84,333/-. Since the Petitioner was facing liquidity crunch at that point of time, the Petitioner, therefore, in the return of income showed ₹85,97,07,400/- as balance tax payable. The Petitioner also paid ₹65 Crores on different dates in April 2014 thereby leaving the balance of tax along with interest payable at ₹20,97,07,400/-. The Petitioner received notice dated 29.10.2014 issued by the Respondent under section 139(9) of the Act. By that notice, the revenue's position was that non-payment of tax and interest, as shown in the return of income, constituted 'defect' under Explanation (aa) to the proviso of section 139(9) of the Act. The Petitioner was therefore, required to rectify the defect within the specified period, failing which the return of income was to be treated as invalid return. As the defect was not rectified, the revenue issued a letter dated 03.11.2014 declaring the return of income filed by the Petitioner for the assessment year 2013-14 as invalid return under section 139(9) of the Act. The petitioner, on 26.12.2014 through a letter to the revenue, contended that the defect of non-payment of tax and interest was not rectified due to the financial crisis faced by it.

3. After declaring the above return of income as invalid return, the revenue invoking coercive action for recovery of the tax and interest shown in the above invalid return of income, issued impugned notice dated 12.03.2015 under section 226(3) of the Act, thereby attaching various bank accounts of the Petitioner maintained by the respondent bank, without any prior or even any subsequent notice to it.

4. Mr. Ajay Vohra, learned senior counsel for the petitioner, argues that

once the return of income has been treated as invalid, then, the said return of income would become *non est*, thereby, ousting all the officers of the revenue from taking cognizance whatsoever, of the information furnished in the said return of income. Reliance is placed upon Section 139 (9) particularly the *non-obstante* clause to contend that in case an assessee fails to rectify the defect in the return of income within the stipulated time period, then, overriding all other provisions of the Act, the said return of income shall be treated as invalid return of income and it would be deemed that no return of income has been filed by the assessee. In other words, the provisions of the Act would then apply as if the assessee has not furnished any return of income. It is next contended that liability to pay self-assessment tax under Section 140A arises only on the basis of the return of income furnished, inter-alia, under section 139 of the Act. In other words, existence of valid return of income under section 139 is *sine-qua-non* to fasten liability for payment of self-assessment tax under section 140A of the Act.

5. The petitioner argues that since the return of income filed by it was treated as invalid by the revenue, the tax and interest shown as payable in the said invalid return of income would become nugatory and would be of no consequence. Further, submitted senior counsel that presently, no valid demand of tax and interest has been raised by the revenue upon the petitioner inasmuch as neither any notice has been issued under Section 156 nor any intimation under Section 143(1) of the Act or any order, much less any assessment order. Consequently, since no self-assessment tax or assessed tax is due against the petitioner, the revenue is not clothed with the

jurisdiction to recover any amount on that aspect. Mr. Vohra relies on *K. Nagesh v Asst. Commissioner of Income Tax* 2015 (376) ITR 473 (Kant) for saying that the amounts paid as advance tax are in fact refundable, because of Section 139 (9) read with Section 240A. Reliance is also placed on *Telengana State Beverage Corporation Ltd v Union of India* 2015 60 Taxmann.com 236. Mr. Vohra further states that after filing of the present petition, on 14.03.2015, the assessee filed a belated return, claiming total income of ₹139.60 crores, on which after adjusting amounts paid, a refund of over ₹21 crores was claimed. Later, during pendency of the present proceedings, search proceedings took place in the petitioner's premises, after which it received notice under Section 153A. In response, it filed its returns for the block period, including the assessment years in question in this case, whereby it claimed refund of ₹30.17 crores after claiming deduction under Chapter VI A of the Act. In these circumstances, the revenue has no authority to retain the amounts or insist upon the continuation of the attachment orders.

6. The revenue argues that it is an admitted position, that for Assessment year 2013-14, Petitioner filed its return of income on 31.03.2014 declaring an income of ₹289,61,04,740/-. On the said income, total tax and interest payable then was ₹113,60,91,737/-. Hence it is clear and evident that the total admitted tax and interest liability payable at that point of time amounted to ₹113,60,91,737/-. After adjusting pre-paid taxes amounting to ₹27,63,84,333/-, the balance amount payable was ₹85,97,07,400/-. Thereafter the petitioner paid ₹65 crores only on different dates in April 2014. Yet, the balance of admitted tax and interest payable amounts to more

than ₹24 crores. It is highlighted that by virtue of Section 140A (3) there is no manner of doubt that the Petitioner is an assessee in default and therefore, all the resultant consequences are attracted and apply to it under the provisions of the Act. The revenue relies on the judgment of the Supreme Court in *Commissioner of Income Tax v Shelly Products* 2003 261 ITR 367 (SC).

Analysis and findings

7. There is no dispute that when the petitioner filed its return, it admitted tax liability. Though the return was initially without the full tax amount, it claims that after filing returns it deposited ₹65 crores. There was yet a shortfall of about ₹24 crores; since this shortfall was not made good- not because the assessee disclaimed liability, but rather because of its financial constraint, the assessing officer declared the return invalid. When the revenue has sought to take coercive measures, the assessee petitioner contends that because of the declaration of the AO under Section 139 (9), the amounts paid or deposited by it, are refundable and that the return was in effect a nullity; consequently the revenue has no authority to claim the amounts that it does. It relies on Section 139 (9), 140A and Section 240 of the Income Tax Act.

8. Section 139 (9) reads as follows:

"(9) Where the Assessing Officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such further period which, on an

application made in this behalf, the Assessing Officer may, in his discretion, allow; and if the defect is not rectified within the said period of fifteen days or, as the case may be, the further period so allowed, then, notwithstanding anything contained in any other provision of this Act, the return shall be treated as an invalid return and the provisions of this Act shall apply as if the assessee had failed to furnish the return:

Provided that where the assessee rectifies the defect after the expiry of the said period of fifteen days or the further period allowed, but before the assessment is made, the Assessing Officer may condone the delay and treat the return as a valid return.

Explanation.—For the purposes of this sub-section, a return of income shall be regarded as defective unless all the following conditions are fulfilled, namely :—

¹⁶(a) the annexures, statements and columns in the return of income relating to computation of income chargeable under each head of income, computation of gross total income and total income have been duly filled in;

¹⁷[(aa) the tax together with interest, if any, payable in accordance with the provisions of section 140A, has been paid on or before the date of furnishing of the return;]

^{17a}(b) the return is accompanied by a statement showing the computation of the tax payable on the basis of the return;

(bb) ^{17a} the return is accompanied by the report of the audit referred to in section 44AB, or, where the report has been furnished prior to the furnishing of the return, by a copy of such report together with proof of furnishing the report;

(c) the return is accompanied by proof of—

(i) the tax, if any, claimed to have been deducted or collected at source and the advance tax and tax on self-assessment, if any, claimed to have been paid :

Provided that where the return is not accompanied by proof of the tax, if any, claimed to have been deducted or collected at source, the return of income shall not be regarded as defective if—

(a) a certificate for tax deducted or collected was not furnished under section 203 or section 206C to the person furnishing his return of income;

(b) such certificate is produced within a period of two years specified under sub-section (14) of section 155;

(ii) the amount of compulsory deposit, if any, claimed to have been made under the Compulsory Deposit Scheme (Income-tax Payers) Act, 1974 (38 of 1974)”

Section 140A reads as follows:

“140A. (1) Where any tax is payable on the basis of any return required to be furnished under section 115WD or section 115WH or section 139 or section 142 or section 148 or section 153A or, as the case may be, section 158BC, after taking into account,—

(i) the amount of tax, if any, already paid under any provision of this Act;

(ii) any tax deducted or collected at source;

(iii) any relief of tax or deduction of tax claimed under section 90 or section 91 on account of tax paid in a country outside India;

(iv) any relief of tax claimed under section 90A on account of tax paid in any specified territory outside India referred to in that section; and

(v) any tax credit claimed to be set off in accordance with the provisions of section 115JAA or section 115JD,

The assessee shall be liable to pay such tax together with interest payable under any provision of this Act for any delay in furnishing the return or any default or delay in payment of advance tax, before furnishing the return and the return shall be accompanied by proof of payment of such tax and interest³³.

Explanation. - Where the amount paid by the assessee under this sub-section falls short of the aggregate of the tax and interest as aforesaid, the amount so paid shall first be adjusted towards the interest payable as aforesaid and the balance, if any, shall be adjusted towards the tax payable.

(1A) For the purposes of sub-section (1), interest payable,—

(i) undersection 234A shall be computed on the amount of the tax on the total income as declared in the return as reduced by the amount of,—

(a) advance tax, if any, paid;

(b) any tax deducted or collected at source;

(c) any relief of tax or deduction of tax claimed under section 90 or section 91 on account of tax paid in a country outside India;

(d) any relief of tax claimed under section 90A on account of tax paid in any specified territory outside India referred to in that section; and

(e) any tax credit claimed to be set off in accordance with the provisions of section 115JAA or section 115JD;

(ii) undersection 115WK shall be computed on the amount of tax on the value of the fringe benefits as declared in the return as reduced by the advance tax, paid, if any.

(1B) For the purposes of sub-section (1), interest payable under section 234B shall be computed on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid falls short of the assessed tax.

Explanation.—For the purposes of this sub-section, "assessed tax" means the tax on the total income as declared in the return as reduced by the amount of,—

(i) tax deducted or collected at source, in accordance with the provisions of Chapter XVII, on any income which is subject to such deduction or collection and which is taken into account in computing such total income;

(ii) any relief of tax or deduction of tax claimed under section 90 or section 91 on account of tax paid in a country outside India;

(iii) any relief of tax claimed under section 90A on account of tax paid in any specified territory outside India referred to in that section; and

(iv) any tax credit claimed to be set off in accordance with the provisions of section 115JAA or section 115JD.

(2) After a regular assessment under section 115WE or section 115WF or section 143 or section 144 or an assessment under section 153A or section 158BC has been made, any amount paid under sub-section (1) shall be deemed to have been paid towards such regular assessment or assessment, as the case may be.

(3) If any assessee fails to pay the whole or any part of such tax or interest or both in accordance with the provisions of sub-section (1), he shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of the tax or interest or both remaining unpaid, and all the provisions of this Act shall apply accordingly.

(4) The provisions of this section as they stood immediately before

their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.”

Section 240 reads as follows:

“Refund on appeal, etc.

240. *Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf:*

Provided that where, by the order aforesaid,—

(a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment;

(b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee.”

9. In *Shelly Enterprises (supra)*, discussing a full bench judgment of the Gujarat High Court, the Supreme Court observed that an assessee upon filing return under section 139 and payment of tax under section 140A by self- assessment, claiming allowance of the advance tax in the tax payable according to him admits the liability that has arisen under the Act to pay the tax on the total income as is computed by the assessee and duly quantified in the return. The court rejected the assessee's contention that upon

invalidation of the return, such admitted liability should be refunded, as a “startling contention”.

The Supreme Court upheld the view that liability to pay tax arises because of Section 4 (1) which does not depend on an assessment order, but upon the rate or rates applicable for a given assessment year. The liability to pay tax arises on the total income on the publication of rates; such tax is to be computed by the assessee in accordance with the provisions of the Act. By the process of self-assessment, the assessee is required to pay tax on the basis of his return and such tax is treated as assessed tax. Therefore, until it is disturbed by any further regular assessment, it remains as tax levied and collected in accordance with law. The Gujarat Full Bench had ruled:

"We are, therefore, of the view that, on failure of a regular assessment being made within the time prescribed or in the event of annulment of the assessment order pursuant to which any further demand is required to be made under section 156, no consequence of refund of the entire tax collected according to the total income shown in the returns filed by the assessee can ensue and such tax which is collected on the basis of the return filed by the assessee remains a valid and legal recovery in accordance with the provisions of the said Act and there is no question of any violation of Article 265 of the Constitution of India in respect of the tax so recovered on the basis of the total income shown by the assessee in his return."

10. The Gujarat High Court had also said that Section 240 as it stood prior to the addition of the proviso, the entire amount of tax properly chargeable under the Act was required to be refunded; therefore, the provision contained in clause (b) of the proviso to section 240 clarified what was always implicit, namely, was to refund the amount which exceeded the

tax which was properly chargeable under the Act. The Supreme Court observed as follows:

“In the cases in hand the question is only with regard to the refund of tax paid by way of advance tax or self-assessment tax which was paid by the assessee themselves admitting their liability to pay such tax. The assessee does not contend that the tax of which refund is claimed was not chargeable or payable, but claim refund on the sole ground of the failure of the authorities to pass an order of assessment.

Having considered the authorities on the subject, we find ourselves in agreement with the view of the Gujarat High Court in Saurashtra Cement and Chemical Industries Ltd. (supra). The question that falls for our consideration in these appeals is whether on the failure or inability of the authorities to frame a regular assessment after the earlier assessment is set aside or nullified, the tax deposited by an assessee by way of advance tax or self assessment tax, or tax deducted at source is liable to be refunded to the assessee, since its retention by the revenue would result in breach of Article 265 of the Constitution which prohibits the levy or collection of any tax except by authority of law. The revenue does not dispute the position that if an assessment is framed, which is later nullified in appeal or revision or other proceedings, any amount paid by way of income tax pursuant to the order of assessment, over and above the advance tax and self-assessment tax is undoubtedly refundable under Section 240 of the Act. The only dispute is with regard to the refund of the advance tax and self-assessment tax which is paid by the assessee on his own assessment of his liability and is based on the return of income filed by him. According to the revenue, the tax so paid represents the admitted liability of the assessee, and failure or inability to frame another assessment after the earlier assessment is set aside or nullified in appropriate proceedings, does not entitle the assessee to claim refund because to this extent the assessee has admitted his liability to pay tax in accordance with law. The tax liability is

computed on the basis of the relevant Finance Act laying down the rate or rates at which the tax is payable and provides for other matters relevant to the computation of tax. Thus the tax is required to be paid in advance by the assessee, even before assessment is made, and he himself is required to compute his liability having regard to the rates and exemptions applicable. Thus, both the levy and collection of tax is in accordance with law.

We find considerable force in the submission of the revenue and it must be upheld. We have earlier noticed the scheme of the Act. [Section 4](#) of the Act creates the charge and provides inter alia for payment of tax in advance or deduction of tax at source. [The Act](#) provides for the manner in which advance tax is to be paid and penalises any assessee who makes a default or delays payment thereof. Similarly the deduction of tax at source is also provided for in the Act and failure to comply with the provisions attracts the penal provisions against the person responsible for making the payment. It is, therefore, quite apparent that the Act itself provides for payment of tax in this manner by the assessee. [The Act](#) also enjoins upon the assessee the duty to file a return of income disclosing his true income. On the basis of the income so disclosed, the assessee is required to make a self-assessment and to compute the tax payable on such income and to pay the same in the manner provided by the Act. Thus the filing of return and the payment of tax thereon computed at the prescribed rates amounts to an admission of tax liability which the assessee admits to have incurred in accordance with the provisions of the Finance Act and the Income Tax Act. Both the quantum of tax payable and its mode of recovery are authorized by law. The liability to pay income tax chargeable under section 4 (1) of the Act thus, does not depend on the assessment being made. As soon as the Finance Act prescribes the rate or rates for any assessment year, the liability to pay the tax arises. The assessee is himself required to compute his total income and pay the income tax thereon which involves a process of self-assessment. Since all this is done under authority of law, there

is no scope for contending that Article 265 is violated.

What then is the effect of the failure to make an order of assessment after the earlier assessment made is set aside or nullified in appropriate proceedings? If the assessing authority cannot make a fresh assessment in accordance with the provisions of the Act it amounts to deemed acceptance of the return of income furnished by the assessee. In such a case the assessing authority is denuded of its authority to verify the correctness and completeness of the return, which authority it has while framing a regular assessment. It must accept the return as furnished and shall not in any event raise a demand for payment of further taxes. Accepting the income as disclosed in the return of income furnished by the assessee, it must refund to the assessee any tax paid in excess of the liability incurred by him on the basis of income disclosed. Even if the tax paid is found to be less than that payable, no further demand can be made for recovery of the balance amount since a fresh assessment is barred. In other words, the tax paid by the assessee must be accepted as it is, and in the event of the tax paid being in excess of the tax liability duly computed on the basis of return furnished and the rates applicable, the excess shall be refunded to the assessee, since its retention may offend Article 265 of the Constitution.

We cannot lose sight of the fact that the failure or inability of the revenue to frame a fresh assessment should not place the assessee in a more disadvantageous position than in what he would have been if a fresh assessment was made. In a case where an assessee chooses to deposit by way of abundant caution advance tax or self- assessment tax which is in excess of his liability on the basis of return furnished or there is any arithmetical error or inaccuracy, it is open to him to claim refund of the excess tax paid in the course of assessment proceeding. He can certainly make such a claim also before the concerned authority calculating the refund. Similarly, if he has by mistake or inadvertence or on account of ignorance, included in his

income any amount which is exempted from payment of income-tax, or is not income within the contemplation of law, he may likewise bring this to the notice of the assessing authority, which if satisfied, may grant him relief and refund the tax paid in excess, if any. Such matters can be brought to the notice of the concerned authority in a case when refund is due and payable, and the authority concerned, on being satisfied, shall grant appropriate relief. In cases governed by section 240 of the Act, an obligation is cast upon the revenue to refund the amount to the assessee without his having to make any claim in that behalf. In appropriate cases therefore, it is open to the assessee to bring facts to the notice of the concerned authority on the basis of the return furnished, which may have a bearing on the quantum of the refund, such as those the assessee could have urged under Section 237 of the Act. The concerned authority, for the limited purpose of calculating the amount to be refunded under section 240 of the Act, may take all such facts into consideration and calculate the amount to be refunded. So viewed, an assessee will not be placed in a more disadvantages position than what he would have been, had an assessment been made in accordance with law.”

11. This court is of opinion that the reliance on the Karnataka High Court ruling in *K. Nagesh (supra)* is inapt. That court, with respect, appears to have overlooked the salient aspect underscored by the Supreme Court, i.e., the levy of tax is under Section 4 (1); the rates may vary. Likewise, filing of return, self assessment tax, advance tax, etc. and provisions which flesh out the mechanisms under the Act for collection cannot be construed literally. Even Section 240 presupposes an order, leading to refund. Now, it is moot whether the nullification on ground of non-compliance due- not due to denial of liability - but other reasons, automatically leads to a situation contended by the assessee. Facially, the contention is insubstantial, because Section 139, even while obliging the officer to a course of action, i.e.,

declaring the return invalid, also says significantly that “*and the provisions of this Act shall apply as if the assessee had failed to furnish the return.*” Furthermore, as clarified by the Supreme Court, Section 240 itself is premised upon some authority of the revenue officials to decide whether the entire amount deposited, or part of it, or none at all, is to be refunded.

12. Besides the above conclusion, this court is also of the view that the assessment is at large, given that the search resulted in a notice to the assessee under Section 153A. No doubt, it has claimed refund; yet those issues are to be adjudicated. Therefore, its claim cannot succeed.

13. In the light of the above conclusions, the writ petition is without merit. It is therefore, dismissed. No costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

SEPTEMBER 21, 2016