

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 6830 of 2016****With****SPECIAL CIVIL APPLICATION NO. 6832 of 2016**

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AJANTA MANUFACTURING LIMITED....Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME TAX &

1....Respondent(s)

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Appearance:

MR MANISH J SHAH, ADVOCATE for the Petitioner(s) No. 1

MR PRANAV G DESAI, ADVOCATE for the Respondent(s) No.

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**

and

HONOURABLE MR.JUSTICE A.J. SHASTRI**Date : 27/07/2016****ORAL ORDER****(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. Since the facts are common, we may notice them from Special Civil Application No.6830 of 2016.

2. The petitioner has challenged an order dated 18.2.2016 passed by the Principal Commissioner and further, an order dated 16.3.2016 passed by the Assessing Officer giving effect to the order of the Commissioner. The petitioner has also challenged a demand notice dated 16.3.2016 under which the Assessing Officer has determined the demand of Rs.2,15,73,710/- towards interest already paid to the petitioner.

3. These challenges arise in following factual background. The petitioner is a Company registered under the Companies Act, 1956. For the Assessment Year 2008-09, the petitioner had filed the return of income on 29.9.2008 showing total income of Rs.56.02 crores (rounded off). During the year under consideration, the petitioner had received a subsidy of Rs.38.35 crores under Kutch Area Incentive Scheme and offered such sum to tax as revenue receipt. However, during the course of assessment proceedings under a letter dated 7.11.2009, the assessee corrected this error and claimed that the receipt was in the nature of capital receipt and therefore, not exigible to tax. The assessee, therefore, sought to reduce its total income for the said assessment year to Rs.17.67 crores (rounded off). The Assessing Officer, however, did not accept such revised claim on the ground that without revising the return, the assessee could not make a claim contrary to the declaration in the return.

4. The assessee carried the matter in appeal. The Commissioner (Appeals) allowed the appeal by order dated 28.3.2013 and directed the Assessing Officer to reduce the capital receipt of Rs.38.35 crores from the total income of the assessee for normal as well as MAT provisions of the Income Tax Act, 1961 (for short 'the Act').

5. This order of the Commissioner thus resulted into a claim of refund. The Assessing Officer, while giving effect to the order of Commissioner (Appeals), passed an order dated 12.6.2014 granting refund with interest. The Assessing Officer, however, later on, noted that the assessee was allowed the interest under Section 244A of the Act on the

principal claim of refund of tax. According to him, the assessee was not entitled to interest on the refund for a period from 1.4.2008 till 31.3.2013 i.e. from the beginning of the year till the date on which the Commissioner (Appeals) allowed the petitioner's appeal. Since the said interest was erroneously granted, he proposed to rectify his order in exercise of powers under Section 154 of the Act. For such purpose, he issued a notice dated 31.7.2015 to the petitioner in which, he conveyed as under :

"2. On verification of records it is noticed that you had filed the return of income for A.Y.2008-09 on 29.9.2008 showing total income at Rs.56,02,55,206/-. In the said return of income you had offered the receipt of Kutch Incentive Scheme as part of your total income and paid taxes thereon. However subsequently, you had filed revised computation of income during the course of assessment proceedings vide your letter dated 7.11.2009, showing total income Rs.17,67,05,584/-. In the revised statement of income the receipt from Kutch Incentive Scheme in the form of Excise and VAT refunds were reduced from the total income treating the same as capital receipts. Again vide order u/s. 154 of the IT Act dated 22.3.2014, the total income was passed and the total income further revised to Rs.(-) 3,02,98,318/- due to set off of loss granted for earlier years. Finally an order 154 of the IT Act was passed on 12.6.2014 granting you refund of Rs.4,36,72,050/-.

3. On perusal of computation of tax made in the order passed it is noticed that you have been allowed total interest u/s.244A of the IT Act at Rs.3,72,70,522/-. This interest has resulted as you had filed revised return of income on 7.11.2009 in which income offered for taxation in the original return of income was revised. This means that the claim of refund was made only in the revised statement of income. Therefore, the delay in claiming refund from the period 1.4.2008 to 7.11.2009 is attributable to you. As per the provisions of section 244A(2) of the IT Act interest is not allowable for the period for which the delay is attributable to the

assessee. Therefore interest u/s. 244A of IT Act granted to you for the period from 1.4.2007 to 5.5.2009, is required to be withdrawn as the delay for this period was attributable to you as discussed above. It is also noticed that in the revised return of income dated 7.11.2009 liability for MAT u/s.115-JB was computed at Rs.9,68,25,352/- on the book profit of Rs.85,45,92,694/-. Thus in the revised return of income also you had admitted that the liability for MAT was Rs.9,68,25,352/-. Subsequently in the appellate proceeding before the CIT(A), you had taken additional ground regarding your liability under MAT. The additional ground taken by was allowed in your favour by the CIT (A). This resulted in further refund. On verification of records it is seen that interest u/s. 244A of the IT Act, has been allowed for entire period. However such interest was required to be withdrawn for the period from 1.4.2008 to 31.3.2013 (date of CIT(A) order).

4. An order u/s.154 of the IT Act is therefore proposed to be passed for rectifying the aforesaid mistake apparent from records which resulted in excess grant of interest u/s 244A of the IT Act on refunds issued.

5. You are requested to furnish your submission on rectification of aforesaid mistakes apparent from records u/s.154 of the I.T.Act, within 7 days of the receipt of this letter."

6. The petitioner replied to such letter dated 31.7.2015 under a communication dated 12.8.2015 and contended that interest on refund can be withheld as provided under subsection (2) of Section 244A of the Act if there is a delay on the part of assessee in any proceedings which resulted into refund. Delay in making the claim would not amount to delay in the proceedings. In any case, this was not an issue which can be examined under the rectification proceedings since the order giving the effect to the order of the Appellate Commissioner did not suffer from any error apparent on the face of the record.

7. The Assessing Officer referred the issue to the Commissioner, who, by the impugned order dated 18.2.2016, held that the petitioner was not entitled to interest on the refund for the entire period from 1.4.2008 till the date of order giving effect to the appellate order. Likewise, for the Assessment Year 2007-08, he denied interest to the petitioner for the period from 1.4.2007 till the date of the order giving effect to the appellate order.

8. While giving effect to this order of the Commissioner, the Assessing Officer modified his earlier order granting refund by withdrawing the interest of Rs.2,15,73,710/-. Consequently, he issued the notice dated 16.3.2016 directing the petitioner to pay up the said sum.

9. These orders the petitioner has challenged in these petitions. Learned counsel, Mr.J.P.Shah, appearing for the petitioner raised following contentions;

(i) The Commissioner had no authority to pass the said order advising Assessing Officer to withdraw the interest since the reference in a rectification proceedings would not be maintainable;

(ii) In any case, this was not an issue which could have been examined in the rectification proceedings since no error apparent on the records was committed by the Assessing Officer while giving effect to the order of the Appellate Commissioner;

(iii) On merits also, the revenue authorities have committed serious error. The interest on refund can be withheld only in terms of sub-section (2) of Section 244A of the Act, if it is found that the assessee was responsible for causing any delay in the proceedings which resulted into refund. In the present case, no delay was caused by the petitioner.

10. On the other hand, learned counsel, Mr.P.G.Desai for the department opposed these petitions contending that the Commissioner had the authority to pass the said order in a reference made by the Assessing Officer. He has given cogent reasons why the petitioner was not entitled to interest on delayed refund. The petitioner had raised the claim before the Assessing Officer contrary to the return filed. It was only that the Appellate Commissioner accepted such a claim and therefore, the entire period till the Assessing Officer passed the order giving effect to the appellate order, would, therefore, fall under sub-section (2) of Section 244A of the Act.

11. Facts are not in dispute. As noted, the petitioner had filed the return of income in which the Kutch Area Incentive Scheme subsidy was initially shown as revenue receipt and offered to tax. During the course of assessment proceedings itself, the assessee wrote a letter to the Assessing Officer pointing out that there was an error. The subsidy was in the nature of capital receipt and therefore, not exigible to tax. Though the Assessing Officer did not accept such stand of the assessee, the Commissioner (Appeals) granted the relief and directed that such receipts be deleted from the total income of the assessee. This resulted into assessee's claim for refund.

12. Section 244A of the Act pertains to interest of refund. Relevant portion of which reads as under :

“244A. (1) [Where refund of any amount becomes due to the assessee under this Act], he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest thereon calculated in the following manner, namely :—

(a) where the refund is out of any tax collected at source under section 206C or paid by way of advance tax or treated as paid under section 199, during the financial year immediately preceding the assessment year, such interest shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period,-

(i) from the 1st day of April of the assessment year to the date on which the refund is granted, if the return of income has been furnished on or before the due date specified under sub-section(1) of Section 139;

(ii) from the date of furnishing of return in income to the date on which the refund is granted, in a case not covered under sub-clause (i) ;

(aa) where the refund is out of any tax paid under section 140A, such interest shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period, from the date of furnishing of return of income or payment of tax, whichever ever is later, to the date on which the refund is granted.

Provided that no interest under clause (a) or clause (aa) shall be payable, if the amount of refund is less than 10 per cent of the tax as determined under sub-section (1) of section 143 or on regular assessment’]

(b) in any other case, such interest shall be calculated at the rate of [onehalf per cent] for every month or part of a month comprised in the period or periods from the date or, as the case may be, dates of payment of the tax or penalty to the date on which the refund is granted.

Explanation.—For the purposes of this clause, “date of payment of tax or penalty” means the date on and from which the amount of tax or penalty specified in the notice of demand issued under section 156 is paid in excess of such demand.

(1A) xxx xxx xxx

(2) If the proceedings resulting in the refund are delayed for reasons attributable to the assessee, whether wholly or in part, the period of the delay so attributable to him shall be excluded from the period for which interest is payable [under sub-sections (1) or (1A)], and where any question arises as to the period to be excluded, it shall be decided by the (Principal Chief Commissioner or) Chief Commissioner or (Principal Commissioner or) Commissioner whose decision thereon shall be final.

(3) xxx xxx xxx

(4) xxx xxx xxx”

13. It can thus be seen that in the cases covered under sub-section (1), the assessee would be entitled to interest on the refund at the specified rate. Under sub-section (2) of Section 244A, however, such interest would not be payable to the petitioner if the proceedings which resulted into refund are delayed by reasons attributable to the assessee, whether wholly or in part. In such a case, the period of delay so attributable to the assessee would be excluded from the period for which interest is payable. This sub-section also provides that where any question arises as to the period to be excluded, it shall be decided by the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner, whose decision shall be final.

14. In the context of the power of the Commissioner to decide this issue in a reference made by the Assessing Officer, we see no error. There is nothing in sub-section (2) of Section 244A of the Act to limit the scope of such a reference only in the original proceedings. In other words, if such a question as is referred to in sub-section (2) of Section 244A arises even in rectification proceedings, such a question would have to be referred to the authority mentioned therein, whose decision shall be final. The Assessing Officer was, therefore, correct in making the reference to the Commissioner. The Commissioner was competent to decide the question.

15. However, we do not find that such a question could have been examined in the rectification application in the first place. The issue was not one where it can be stated that there was an error apparent on the record which can be corrected in exercise of limited powers of rectification. As is well settled, power of rectification under Section 154 of the Act cannot be equated with the power of review. It necessarily vests Assessing Officer with limited power of correcting errors apparent on the record. When detailed consideration and examination of facts and law is necessary, the issue would not fall within the scope of rectification proceedings.

16. We would also examine the order of the Commissioner on merits. As noted, according to the Commissioner the assessee had raised a belated claim during the course of the assessment proceedings which resulted into delay in granting of refund and therefore, the assessee was not entitled to interest for the entire period from the first date of assessment year till the order giving effect to the appellate order was

passed. We cannot uphold the view of the Commissioner. First and foremost requirement of sub-section (2) of Section 244A is that the proceedings resulting into refund should have been delayed for the reasons attributable to the assessee, whether wholly or in part. If such requirement is satisfied, to the extent of the period of delay so attributable to the assessee, he would be disentitled to claim interest on refund. The act of revising a return or raising a claim during the course of the assessment proceedings cannot be said to be the reasons for delaying the proceedings which can be attributable to the assessee. Mere fact that the claim came to be granted by the Appellate Commissioner, would not change this position. In essence, what the Commissioner (Appeals) did was to allow a claim which in law, in his opinion, was allowable by the Assessing Officer. In other words, by passing order in appeal, he merely recognized a legal position whereby, the assessee was entitled to claim certain benefits of reduced tax. Surely, the fact that the assessee had filed the appeal which ultimately came to be allowed by the Commissioner, cannot be a reason for delaying the proceedings which can be attributed to the assessee.

17. The Department does not contend that the assessee had needlessly or frivolously delayed the assessment proceedings at the original or appellate stage. In absence of any such foundation, mere fact that the assessee made a claim during the course of the assessment proceedings which was allowed at the appellate stage would not ipso facto imply that the assessee was responsible for causing the delay in the proceedings resulting into refund. We may refer the decision of the Kerala High Court in case of **Commissioner of**

Income-Tax V/s. South Indian Bank Ltd., reported in **(2012) 340 ITR (Ker)** in which the assessee had raised a belated claim for deduction which was allowed by the Commissioner (Appeals). The Revenue, therefore, contended that for such delay, interest should be declined under Section 244A of the Act. In the said case also, the assessee had not made any claim for deduction of provision of bad debts in the original return. But before completion of the assessment, the assessee had made such a claim which was rejected by the Assessing Officer. The Commissioner allowed the claim and remanded the matter to the Assessing Officer. Pursuant to which, the assessee became entitled to refund. Revenue argued that the assessee would not be entitled to interest in view of Section 244A(2). In this context, the Court held in Para.6 as under :

“6. Sub-section (2) of section 244A provides that the assessee shall not be entitled to interest for the period of delay in issuing the proceedings leading to the refund that is attributable to the assessee. In other words, if the issue of the refund order is delayed for any period attributable to the assessee, then the assessee shall not be entitled to interest for such period. This is of course an exception to clauses (a) and (b) of section 244A(1) of the Act. In other words, if the issue of the proceedings, that is, refund order, is delayed for any period attributable to the assessee, then the assessee is not entitled to interest of such period. Further, what is clear from sub-section (2) is that, if the officer feels that delay in refund for any period is attributable to the assessee, the matter should be referred to the Commissioner or Chief Commissioner or any other notified person for deciding the issue and ordering exclusion of such periods for the purpose of granting interest to the assessee under section 244a(1) of the Act. In this case, there was no decision by the Commissioner or Chief Commissioner on this issue and so much so, we do not think the Assessing Officer made out the case of delay in

refund for any period attributable to the assessee disentitling for interest. So much so, in our view, the officer has no escape from granting interest to the assessee in terms of section 244A(1)(a) of the Act.”

18. Under the circumstances, impugned orders dated 18.2.2016 and 16.3.2016 passed by the Commissioner of Income-Tax and Assessing Officer respectively and the demand notice dated 16.3.2016 are quashed. Petitions are disposed of accordingly.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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