

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 22ND DAY OF JUNE 2017/1ST ASHADHA, 1939

WA.No. 1269 of 2014 () IN WP(C).21314/2011

AGAINST THE JUDGMENT IN WP(C) 21314/2011 of HIGH COURT OF KERALA DATED
31-07-2014

APPELLANT/PETITIONER:

ARUN SUNNY,
CHIRAKKAL HOUSE, XL/676, CHITTUR ROAD,
KOCHI - 682 011.

BY ADVS.SRI.S.VIJAYAN NAYAR
SRI.MAT.PAI

RESPONDENTS/RESPONDENTS:

1. CHIEF COMMISSIONER OF INCOME TAX
C.R.BUILDING, I.S.PRESS ROAD, KOCHI - 682 018.
2. DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE 2(1), CENTRAL REVENUE BUILDING,
I.S.PRESS ROAD, KOCHI - 682 018.

R-R BY ADV. SRI.P.K.R.MENON, SR.COUNSEL, GOI (TAXES)
R-R BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 22-05-2017,
THE COURT ON 22.6.2017 DELIVERED THE FOLLOWING:

W.A.No.1269 of 2014

APPENDIX

APPELLANT'S EXHIBITS:

ANNEXURE A TRUE COPY OF THE JUDGMENT DATED 16.8.2011 IN W.A.No.
1053 of 2010 OF THIS COURT.

TRUE COPY

CSS/

P.S.TO JUDGE

Antony Dominic & Dama Seshadri Naidu, JJ.

W.A.No.1269 of 2014

Dated this the 22nd day of June, 2017

JUDGMENT

Dama Seshadri Naidu, J.

Introduction:

An assessee sold a piece of property and attracted capital gains tax. The Assessing Officer charged interest on the transaction under Section 234B of the Income Tax Act. The assessee unsuccessfully asked the authority to waive the interest in terms of a notification issued under Section 119(2) of the Act by CTBT. The question is whether the assessee has fulfilled the eligibility criteria fixed under the notification to earn the waiver. Our answer: No.

Facts:

2. An assessee, appellant Arun filed his return of income for the assessment year 2006-07, admitting certain income. After processing the return under section 143(1) of the Income Tax Act ("the Act"), the Assessing Officer took it up for scrutiny; he issued notice to Arun

under Section 142(1)/143(2) and received his explanation, too.

3. As noticed by the Assessing Officer, Arun showed all his income under the head 'other sources'—mainly interest from bank deposits. But the return also contained details about a piece of property he sold in January 2006. Arun took a stand that the sale transaction would not attract capital gains because he had invested enough amount in bonds and, thus, earned exemption. He also asserted that he had purchased a residential property within the time allowed for getting exemption from capital gains.

4. In the assessment proceedings initiated under Section 143 (3) of the Act, the Assessing Officer found the property's value as given by Arun excessive. Instead, the Officer determined the long-term capital gains by adopting a different value and levied tax accordingly. This assessment has led to, among other things, a consequential levy of interest under Section 243B of the Act. Through notice, dt.26.11.2008, Arun was demanded to pay tax of Rs.2,17,73,630/-, inclusive of interest Rs.52,78,240/-.

5. Alarmed, Arun applied through the Ext.P2 before the Chief

Commissioner of Income Tax to have the interest waived, but the request was turned down. Ext.P6 is the order.

Procedural Background:

(a) Leading to this Appeal:

6. Assailing the Ext.P6 order, Arun filed WPC No.21314 of 2011, which a learned Single Judge dismissed on 31st July 2014. Aggrieved, he filed this Writ Appeal: W. A. No.1269 of 2014. A Division Bench of this Court dismissed the appeal, too, on 14th January 2016. Later, Arun filed R.P.No.143 of 2016, which was allowed on 6th February 2017. Thus, this Writ Appeal got resurrected—a second lease of life.

(b) On a Collateral Issue:

7. Because of the assessment and the notice of demand issued, the tax fell due by January 2009. The Department initiated Garnishee proceedings and issued notice to the Bank under Section 226 (3) of the Act. At this stage, Arun obtained a stay. He eventually paid the demanded tax in instalments: between March and June 2009.

8. Given the delay in Arun's paying the tax, the Department

invoked Section 220 (2)¹ of the Act. Arun applied under Section 220 (A) of the Act before the Commissioner for waiver of interest—Rs.9,48,640. Unsuccessful in his efforts, Arun filed W.P. (C) No.17449 of 2011, which this Court dismissed on 12.07.2011. But in W.A. No.1053 of 2011, disposed of on 16.08.2011, Arun obtained a partial relief: the Division Bench reduced the interest from 12% to 9% and so directed the Assessing Officer to reduce interest “by 25% and recover 75% interest.”

Submissions:

Appellant’s:

9. Before us, Sri S. Vijayan Nair, the learned counsel for the appellant, has submitted that the assessment year was 2006-2007, and the accounting period ended on 31st March 2006. His cardinal contention is that the law holding the field when the accounting year came to an end shall alone govern the tax liability of an assessee.

10. Sri Nair has drawn our attention to CTBT’s Ext.P3(a) and Ext.P3(b) circulars, dated 23rd May 1996 and dated 20th June 2006, respectively. According to him, since Ext.P3(b) circular was issued

¹ Interest on belated payment.

after the accounting period ended; that is, 31st March 2006, it has no application.

11. Curious was Mr. Nair's next submission: that Ext.P3(b) circular originally had three paragraphs, and the fourth paragraph, perceived to be adverse to Arun, was added later by the officials with no legislative mandate. Despite our repeated queries to substantiate that allegation, Sri Nair could produce no proof in that regard. Nor has Arun, as we have noticed, pleaded to that effect.

12. Sri Nair has, in the alternative, submitted that the learned Single Judge has relied on Ext.P3(b) instead of Ext.P3(a), which alone applies to the facts of the case. This Court's judgment in Chief Commissioner of Income Tax v Jimmichan M.Varicatt², followed by the learned Single Judge to dismiss the writ petition, is, according to Sri Nair, in Arun's favour. He has also submitted the Gujarat High Court's judgment in Commissioner of Income Tax v. Sarabhai Sons Pvt., Ltd.³, squarely applies to the facts on hand.

13. According to Sri Nair, one must read the circular along with Section 192 of the Income Tax Act to understand its true import and

² [2011] 330 ITR 338 (Ker)

³ [1993] 204 ITR 728 (Guj)

impact. Summing up his submissions, Sri Nair has submitted that the impugned judgment is perverse and calls for immediate interference.

The Department's:

14. Mr. Jose Varghese, the learned Standing Counsel for the Revenue, has submitted that Ext.P3(b) circular has superseded all other circulars holding the field till then. Drawing our attention to Ext.P6, the primary order passed by the Assessing Authority, Sri Varghese has submitted that the authority has rightly rejected Arun's applications for waiving the capital gains tax.

15. Referring to Commissioner of Income Tax v Anjum M.H.Ghaswala and others⁴, a judgment rendered by the Supreme Court, Sri Varghese has conceded that as to the tax liability, indisputably, the law prevailing on the date of account-closing should govern. But about exemptions, waivers, or other benefits, the law in force by the time the relief or exemption is sought, submits Sri Varghese, should alone govern. So he contends that only the Ext.P3 (b) circular would apply.

16. In the alternative, Sri Varghese has submitted that be it

4 (2005) 2 SCC 22

Ext.P3(a) or Ext.P3(b), the exemption could be granted only under Section 234A of the Act, but not any other provisions, such as 234B or 234C. Because the exemption claimed by Arun falls under Section 234B, contends Sri Varghese, neither circular applies. So he urges this Court to dismiss the writ appeal, once again.

Issue:

17. As set out in the "Introduction" above.

Discussion:

Statutory Scheme:

18. Admittedly, Arun claimed exemption or waiver under Section 234-B of the Act. Ext.P3(a) is the notification issued on 23rd May 1996 by the Central Board of Direct Taxes (CBDT) under clause (a) of sub-section (2) of Section 119 of the Act. It empowers the Chief Commissioner of Income-tax and the Director-General of Income-tax to reduce or waive interest charged under Section 234A, or Section 234B or section 234C of the Act. Explicitly stated, Section 234A deals with interest on defaults in furnishing return of income; Section 234B, with interest on defaults in payment of advance tax;

and Section 234C, with interest on deferment of advance tax.

An Analysis of Ext.P3 (a):

19. It is a notification to reduce or waive penal interest against late filing of return of income, etc. The notification, in fact, authorizes the Chief Commissioners and Directors-General (Investigation) to act in this regard.

20. To claim the reduction or waiver, the assessee must "file the return of income for the relevant assessment year and pay the entire tax due on the income as assessed" except interest for which reduction or waiver has been requested for. The Chief Commissioner of Income Tax or the Director General of Income Tax may also impose any other conditions deemed fit to reduce or waive interest.

21. Para 2 of the Ext.P3(a) lists out the classes of incomes or the classes of cases in which the reduction or waiver of interest under section 234A, section 234B, or section 234C can be considered. Para 2(d), among other things, deals with the interest chargeable under section 234B or section 234C. The concession must be granted only on the Chief Commissioner's or Director-General's

satisfaction that the request represents a fit case for reduction or waiver of the interest.

22. As per Para 2(e), on the other hand, if an assessee could not file a return of income owing to "unavoidable circumstances, and if the assessee files the return of income voluntarily without detection by the Assessing Officer." Para (3) also mandates that if the authorities have rejected any petition because the Board did not issue this direction earlier, the authorities may consider that petition and "decide in accordance with this order."

An Analysis of Ext.P3(b):

23. The Ext.P3(b), issued on 26th June 2006, runs substantially on the same lines as Ext.P3(a) does. Para 2(d) provides that benefit applies if an assessee could not file a return of income owing to unavoidable circumstances but, later, files the return of income voluntarily without the assessing officer's detection.

24. Para 3, on the other hand, clarifies that "the class of cases referred to in paragraph 2(a) and 2(d) are specified only for the purposes of waiver of interest charged under section 234A of the

Income Tax Act.” Here, Arun himself claims that he falls under Section 234B of the Act.

25. Further pertinent to note is that para 4 emphasizes that the earlier orders—including the Ext.P3(a)—on the subject stand superseded by Ext.P3(b). Analogous to para 4 of Ext.P3(a), this notification, too, clarifies that “if the authorities have earlier rejected any petition because the Board had not issued this direction earlier,” the authorities may consider that petition and “decide in accordance with this order.” Further, it mandates that those petitions allowed earlier under the circulars, dt.23.5.1996 and dt.30.1.1997, should not be reopened/revised.

How Were These Circulars Judicially Interpreted:

26. To begin with, in CIT v. Anjum M. H. Ghaswala⁵ a Three-Judge Bench of the Supreme Court considered the issue whether the Settlement Commissioner, constituted under Section 245B of the Act, has the jurisdiction to reduce or waive the interest chargeable under Sections 234A, 234B and 234C of the Act, while passing orders of settlement under Section 245D(4) of the Act. The answer was ‘no.’

⁵ [2002]1 SCC 633

27. In para 27 of the judgment their Lordships hold that the Act requires the Board (CDBT) to exercise the power under Section 119 in a particular manner, i.e. by issuing orders, instructions, and directions. These orders, instructions, and directions are meant to be issued to other income tax authorities for proper administration of the Act. The Commission while exercising its quasi-judicial power of arriving at a settlement under Section 245-D cannot have the administrative power of issuing directions to other income tax authorities. It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner, then the said authority must exercise it only in the manner provided in the statute itself. Anjum concludes that the Commission cannot exercise the power of relaxation found in Section 119(2)(a) of the Act.

28. In CIT v. Jimmichan M. Varicatt⁶ the assessee was granted waiver of interest under Section 234A of the Act but was denied that benefit under Sections 234B and 234C. The notification under consideration was Ext.P3(a). A learned Single Judge ruled in

⁶ [2001] 330 ITR 338 (Ker.)

assessee's favour: that Clause (e) is a condition the satisfaction of which entitles the Assessee to claim waiver of interest under Sections 234B and 234C of the Act. So the assessee was entitled to the benefit of waiver. As a matter of fact, the assessee has voluntarily filed returns and paid tax. The Department took the matter in appeal.

29. A Division Bench of this Court, allowing the appeal, has held:

"[i]n our view, Clauses (a) and (e) of the notification deal with the same subject, that is circumstances for waiver of interest under Section 234A. However, for waiver of interest payable under Sections 234B and 234C, application has to be considered with specific reference to Clauses (b), (c) and (d) of the notification. While Clause (a) refers to disability of an Assessee from filing return on account of search and seizure and retention of books of account, Clause (e) deals with other cases where parties were disabled from filing of returns for unavoidable reasons, may be party happens to be out of India, happens to be sick and laid up, etc."

30. In *Bhanuben Panchal and Chandrikaben Panchal v. CIT*⁷, the Gujarat High Court has taken a contrary stand. Like *Jimmichan*, in *Bhanuben*, too, the assessee was granted the partial waiver of interest under Section 234A. His request for having the interest

⁷ [2004] 269 ITR 27(Guj)

waived under Sections 234B and 234C was rejected. On challenge, the Division Bench of Gujarat High Court has observed that the assessee has paid the entire tax due on income as assessed, except the interest. The delay in the assessee's filing returns and paying the taxes was said to be due to unavoidable circumstances. According to the Gujarat High Court, interest can be waived only after the assessee has filed the return of income for the relevant assessment year and paid the entire tax due on the income as assessed, except interest for which the waiver has been requested.

31. Given the decisional cleavage between Jimmichen and Bhanuben, we respectfully concur with the view taken by Jimmichen, a judgment rendered by a coordinate Bench of this Court. Even the rationale of Jimmichen, in our view, squarely accords with the interpretative standards to be followed in applying the CDBT circulars to the facts of a given case. We see no unavoidable or insurmountable circumstances disabling the assessee from filing the returns and paying the taxes on time—save his own interpretative spin put on the provisions.

32. Admittedly, Arun's claim for waiver is under Section 234B of the Act. As seen from para 3 of Ext.P3(b), paras 2(a) and (d) apply to claims only under Section 234A of the Act. Para 2(b) excludes capital gains and covers interest chargeable under Section 234C of the Act. Para 2(c), on the other hand, deals with the judicial intervention and the resultant non-remittance of tax.

To sum up, we fail to see any illegality or arbitrariness in the acts of the taxing authorities, nor do we find any legal infirmity in the impugned judgment. So, we dismiss the writ appeal as devoid of any merit. No order on costs.

sd/- Antony Dominic, Judge

sd/- Dama Seshadri Naidu, Judge

CSS/

true copy

P.S.TO JUDGE