

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 3827 OF 1998

M/s. Sunflag Iron & Steel Co. Ltd.,
a Company registered and
incorporated under the Indian
Companies Act, 1956, having its
Registered office at 33- Mount
Road, Sadar, Nagpur-440 001,
through Shri E.M. Poonavala,
Director (Finance).

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PETITIONER.

// VERSUS //

- 1] The Central Board of Direct
Taxes, Ministry of Finance,
Govt. of India, North Block,
New Delhi.
- 2] The Dy. Commissioner of
Income Tax, Special Range-2,
Nagpur.

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RESPONDENTS

Mr. V.R. Thakur, Advocate for petitioner,

Mr. Anand Parchure, Advocate for respondents.

CORAM : B.R. GAVAI & P.N. DESHMUKH, JJ.

DATED : JANUARY 19, 2016.

ORAL JUDGMENT (PER B.R. GAVAI, J.).

1] The petitioner which is a public limited company has approached this Court, in effect for a writ of mandamus directing the respondents to pay interest on the amount of Rs.49,40,923/- as provided under Section 244-A of the Income Tax Act (hereinafter referred to as "the Act"). The petitioner has also prayed for quashing and setting aside the communication dated 18.7.1995 issued by the Central Board of Direct Taxes to the Chief Commissioner of Income Tax, Pune.

2] The facts in the present case are not in dispute. The petitioner is a steel manufacturing company. The petitioner when it was in the process of establishing an integrated steel plant at Bhandara entered into an agreement with M/s. Mannesmann Demag (MDH) Germany (hereinafter referred to as "the German company") on 8.11.1985 for transfer of technical knowhow. As per the said agreement, the petitioner company was required to make the payment of technical knowhow fee in three instalments of Rs.25,48,333/- DM, totalling to Rs.76,45,000/-.

3] That the petitioner Company in pursuance to the said agreement deducted tax at source (TDS) and paid/deposited the

same with respondent as detailed below :-

Amount paid to MDH (Germany) in D.M.	TDS in Rs.	Date of payment Of TDS.
2548333	27,72,600.00	29.03.1986.
-----	1,48,126.00	22.05.1986
2548333	36,56,000.00	16.12.1987
-----	10,666.00	11.08.1988
	53,70,567.00	26.05.1990

That the petitioner Company on 26.5.1990 deducted tax at source of Rs.53,70,567/- for the third and final instalment and deposited the same in advance with the Assistant Commissioner of Income Tax, Survey Circle-II, Permanent Account No. S-14/Special Range-2 in accordance with the provisions of Section 195 of the Act.

4] Subsequently, since the German company was not able to fulfil its obligations, an agreement was entered into on 1.7.1992 between the petitioner company and the German company vide which the German company agreed to waive the payment of third instalment of technical knowhow fee, amounting to Rs.25,48,334/- DM and treat the payment of first and second instalments as full and

final payment against the contract. The petitioners subsequently on 31.1.1994 filed an application claiming refund of the amount of Rs.53,70,567/- which was deposited as advance TDS towards the third instalment of the payment which was to be made to the German company and in fact which payment was not made to the German company. The petitioners as directed by the Department executed an indemnity bond for the said amount of Rs.53,70,567/- on 18.2.1994. On 24.3.1994 the Deputy Commissioner of Income Tax, Special Range-2, Nagpur addressed a communication to the Commissioner of Income Tax, Vidarbha, Nagpur stating that since in the present case there was no excess tax liability, he was of the opinion that the excess tax deducted at source should be refunded to the assessee company. However, since going through note of his predecessor on the order-sheet, it was noticed that in similar situation the Chief Commissioner of Income Tax had referred the matter to the Central Board of Direct Taxes, he requested the Chief Commissioner of Income Tax to give necessary clarification.

5] The Central Board of Direct Taxes vide the communication dated 18.7.1995 informed the Chief Commissioner of Income Tax, thereby conveying the authorization of the Board for grant of refund

of Rs.53,70,567/- independent of the provisions of the said Act to the petitioner. However, it was made subject to certain administrative safeguards. Needless to state that the conditions stipulated in the said communication were complied with by the petitioner and accordingly, on 28.2.1996 the aforesaid amount of Rs.53,70,567/- was refunded to the petitioner. After the said amount was refunded, the petitioners on 19.3.1996 made an application for interest in view of the provisions of Section 244-A of the Act. The said request was rejected by communication dated 20.4.1996 by the Deputy Commissioner of Income Tax, Nagpur. Since the request of the petitioner was not considered, several reminders were sent to the respondent. However, since the respondents did not consider the request for grant of interest, the petitioner moved Delhi High Court seeking a direction to the respondents to pay the interest. However, the Division Bench of Delhi High Court was of the view that it did not have territorial jurisdiction to entertain the petition and it is the Nagpur Bench of the Bombay High Court which had a territorial jurisdiction and, as such, dismissed the petition for want of territorial jurisdiction, reserving the right of the petitioner to approach this Court. After the orders were passed by the Delhi High Court on 2.7.1998, the present petition has been filed. Rule was granted in the matter on

22.12.1998. Thereafter the respondents have also filed on record their submission on affidavit.

6] Shri V.R. Thakur, learned Counsel for the petitioner, submits that in view of the provisions of Clause (7) of Section 2 read with provisions of Sections 195, 200, 201 of the Income Tax Act, petitioner would be “assessee” as provided under the said Act. The learned Counsel in any case submits that in view of provisions of Sections 160 & 163 of the said Act, the petitioner would be a representative assessee of the German company and as such, the application for refund as well as the interest thereon would be very much tenable at the instance of the present petitioner. Shri Thakur submits that the perusal of Section 244-A(1) Clause (b) would reveal that the said clause has a wide scope and the liability to pay interest would accrue on the respondents, if the payment which was made to the Department was in excess of the entitlement or the payment was made which was not due. The learned Counsel submits that the respondents would have been entitled to appropriate the third instalment of the TDS only in the event the third instalment was in fact paid to the German company. He submits that since undisputedly the third instalment has been agreed to be waived by

the German company and as such, no payment was made, the respondents had no authority to retain the TDS for the said amount of Rs.53,70,567/-. The learned Counsel submits that the respondents correctly understanding the position have rightly decided to refund the amount of Rs.53,70,567/- which was deducted. Shri V.R. Thakur, learned Counsel for the petitioner, further submitted that as such, the petitioner would be entitled to the interest for the entire period between the date of deposit and the date of refund. The learned Counsel, however, submits that on an untenable ground, the respondents are denying to pay interest under the provisions of Section 244-A for the amount which was erroneously withheld by them. The learned Counsel relies on the judgment of the Apex Court in the case of Union of India through Director of Income Tax .vs. Tata Chemicals Limited reported in (2014) 6 SCC 335, Commissioner of Income Tax, Bhopal .vs. H.E.G. Limited reported in (2010) 15 SCC 349, Kerala Financial Corporation v. Commissioner of Income Tax reported in AIR 1994 SC 2416 and of the Division Bench of Delhi High Court in the case of Delhi Development Authority .vs. Income Tax Officer reported in 1998 Vol. 230 ITR 9.

7] Per contra, Shri Anand Parchure, leaned Counsel appearing on behalf of respondents/Revenue, submits that the TDS which was credited by the petitioner was credited on behalf of the German company. The learned Counsel, therefore, submits that it is only the German company which can be construed to be an assessee for the purposes of the said Act. The learned Counsel, therefore, submits that it is only the German company which was entitled to make an application for refund. He submits that though the German company had not made an application for refund and it was made by the petitioner, the CBDT gratuitously granted the prayer for refund. He submits that the same was done independent of the provisions of the Act. The learned Counsel submits that the provisions of Section 244-A shall be applicable only when the refund was made under the provisions of the Act and not independent of the provisions of the Act. The learned Counsel, therefore, submits that the respondents have rightly rejected the claim of the petitioner for interest. The learned Counsel relies on the judgment of the Apex Court in the case of **Commissioner of Income Tax, Gujarat .vs. Gujarat Fluoro Chemicals reported in 2013(12) SCALE 281.**

8] For appreciating the rival submissions, it will be relevant to refer to certain provisions of the Income Tax Act. Clause (7) of Section 2 which is a definition clause reads thus :-

“(7) "assessee" means a person by whom any tax or any other sum of money is payable under this Act, and includes —

- (a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or assessment of fringe benefits or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person ;
- (b) every person who is deemed to be an assessee under any provision of this Act ;
- (c) every person who is deemed to be an assessee in default under any provision of this Act.”

The relevant part of Section 195 reads thus :-

“**195.** (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest not being interest referred to in section 194LB or section 194LC or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or

at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force.”

The relevant portion of Section 200 reads thus :-

“**200.** (1) Any person deducting any sum in accordance with the fore-going provisions of this Chapter shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.”

The relevant portion of Section 201 reads thus :-

“**201.** (1) Where any person, including the principal officer of a company,—

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer,

does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax.”

The relevant portion of Section 160 which deals with representative assessee reads thus :-

“**160.** (1) For the purposes of this Act, "representative assessee" means—

(i) in respect of the income of a non-resident specified in sub-section (1) of section 9, the agent of the non-resident, including a person who is treated as an agent under section 163.”

The relevant part of Section 163(1) reads thus :-

“**Who may be regarded as agent.**

163. (1) For the purposes of this Act, "agent", in relation to a non-resident, includes any person in India—

(a); or

(b) who has any business connection with the non-resident;

or

(c) from or through whom the non-resident is in receipt of any income, whether directly or indirectly; or

(d);

and includes also any other person who, whether a resident or non-resident, has acquired by means of a transfer, a capital asset in India :

It will also be relevant to refer to the provisions of Section 244-A which reads thus :-

Interest on refunds.

“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)

(b) in any other case, 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 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.”

9] The perusal of the aforesaid provisions would thus reveal that the assessee would mean a person, by whom any tax or any other sum of money is payable under the said Act. Clause 7 of Section 2 also includes certain categories in sub-clauses (a), (b) & (c). However, sub-clause (a) would not be relevant for the purpose of the present matter. Sub-clause (b) includes every person who is deemed to be an assessee under the provisions of the said Act,

whereas sub-clause (c) also includes every person who is deemed to be an assessee in default under any provisions of the Act. It could thus clearly be seen that an assessee would also include every person who is deemed to be an assessee under any provisions of the Act and also every person who is deemed to be an assessee in default under any provisions of the Act.

10] In the light of the aforesaid import of sub-section (7) of Section 2, it will be relevant to refer to the provisions of Sections 163 & 160 of the said Act. The perusal of clause (b) of sub-section (1) of Section 163 would reveal that for the purposes of the said Act, in relation to an non-resident, any person in India who has any business connection with the non-resident would be an agent. Similarly, any person in India from or through whom the non-resident has received directly or indirectly any income would be an agent for the purposes of the said Act in relation to such a non-resident. The perusal of Section 160 would reveal that clause (i) provides that in respect of non-resident specified in sub-section (1) of Section 9, an agent of the non-resident including a person who is treated as an agent under Section 163 would be a representative assessee for the purposes of the said Act. It is not in dispute that the income with which we are

concerned in the present matter, is squarely covered by sub-section (1) of Section 9 of the said Act. It is also not in dispute that the petitioners had a business connection with the said non-resident German company. It is also not in dispute that the income which the German non-resident company had received or was entitled to receive was directly through the present petitioners. In that view of the matter, we find that the present petitioner would squarely fall within sub-clause (b) of Section 2(7) of the said Act.

11] The perusal of Section 195 would reveal that any person responsible for paying to a foreign company any sum chargeable under the provisions of the said Act, shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of cheque or draft or by any other mode, whichever is earlier, is required to deduct income tax thereon at the rate in force. Sub-section (1) of Section 200 would further reveal that any person deducting any sum in accordance with the foregoing provisions of the said Chapter is required to pay within the prescribed time the sum so deducted to the credit of the Central Government as the Board directs. Sub-section (1) of Section 201 would show that where any person including the Principal Officer of a company, who

is required to deduct any sum in accordance with the provisions of the said Act, does not deduct or after so deducting fails to pay the whole or any part of the tax as required under the said Act, then such a person without prejudice to any other consequences which he may incur would be deemed to be an “assessee in default” in respect of such tax.

12] It could thus be seen that the scheme of the said Chapter is very clear. When any person is responsible for making a payment to foreign company, such a person at the time of crediting the said amount by any modes is required to deduct income tax thereon at the rates in force. After deducting such sum, the said person is required to pay within a prescribed limit the sum so deducted to the credit of Central Government or as the Board directs. The scheme further provides that any person who is responsible for deducting and paying, either does not deduct or deducts but does not pay any part of the tax, he would be deemed to be an “assessee in default” in respect of such a tax.

13] In the background of the aforesaid legal provisions, let us examine the factual position as is appearing in the present matter.

The position that would emerge is that the petitioner had entered into an agreement with the German non-resident company for supply of technical knowhow. It had agreed to pay the amount to the said company in three instalments. Out of the three instalments, the first two instalments were paid to the German company. The German company failed to supply further technical knowhow and as such, agreed to waive the third instalment and as such, the said amount was not paid to the German company. The petitioner had deducted TDS as was required under Section 195 for all three instalments and also deposited the said TDS on account of all the three instalments with the Revenue as required under Section 201. If the petitioner had failed to deduct the amount or after deducting failed to deposit the same with the Revenue, he would have squarely fallen in the term of “assessee in default” as is provided in Section 201. We are, therefore, also of the considered view that the petitioner would also be covered by sub-clause (c) of Clause 7 of Section 2 of the said Act.

14] As such, the petitioner would fall in both the clauses (b) & (c) of Clause 7 of Section 2 and would be an assessee within the meaning of the said Act. In that view of the matter, we find that the view taken by the respondent Department that the petitioner was not

an assessee and as such, not entitled to apply for refund or interest is not a correct view in law.

15] It will be relevant to refer to the judgment of Their Lordships of the Apex Court in the case of **Union of India .vs. Tata Chemicals** (cited supra). The facts in the present case are almost similar to the facts which fell for consideration before Their Lordships of the Apex Court. In the said case, during the assessment year 1997-98, Tata Chemicals Limited (hereinafter to be referred to as “the resident/deductor”) had commissioned its naphtha desulphurisation plant and to oversee the operation of the said plant it had sought assistance of two technicians from a Denmark company. The said company had raised invoice partly towards service charges of the technicians and partly for reimbursement of the expenses. The resident/deductor had approached Income Tax Officer under Section 195(2) of the Act requesting him to provide information/determination as to what percentage of tax should be withdrawn from the amount payable from the foreign company. On request so made the Assessing Officer determined and passed special order under Section 195(2) of the Act directing certain

amount to be deducted and credited the same in favour of Revenue.

16] The resident/deductor deposited the amount as directed; however, preferred an appeal before the Commissioner of Income Tax. The Appellate Authority while allowing the appeal felt that the reimbursement of expenses is not part of the income, for deduction of tax at source and accordingly directed the refund of the tax that was deducted and paid to the Revenue towards reimbursement of expenses. Subsequently, the resident/deductor preferred a claim for interest under Section 244-A of the said Act. The Assessing Officer held that Section 244-A provided for interest only on refunds due to the assesseees under the Act and not to the deductor and since the refund in the case was in view of the Circulars of the CBDT and not under the statutory provisions of the Act, no interest would accrue on the refunds. The Assessing Officer, therefore, though granted refund of the tax, refused to entertain the claim of interest on the amount so refunded. The resident/deductor carried the matter in appeal before the Commissioner of Income-Tax, Appeals. The appeal was dismissed by the first Appellate Authority. The deductor aggrieved by the appellate order went before the Income Tax Appellate Tribunal. The learned Tribunal reversed the order passed by the Appellate

Authority and held that the tax was paid by the resident/deductor pursuant to the order passed under Section 195(2) of the Act and ordered the refund under Section 244, holding that provisions of Section 244-A(1)(b) are clearly attracted and that the revenue was accountable for payment of interest. Their Lordships of the Apex Court while considering the scope of Section 240 of the said Act observed thus :-

“15. Section 240 of the Act provides for refund on appeal etc. The Section envisages that if an amount becomes due to the assessee by virtue of an order passed in appeal, reference, revision, rectification or amendment proceedings, the assessing officer is bound to refund the amount to the assessee without the assessee being required to make any claim in that behalf. The expression ‘other proceedings under the Act’ used in Section 240 of the Act, are wide enough to include any order passed in proceedings other than the appeals under the Act”.

17] It would also be relevant to refer to paragraph no. 33 of the said judgment wherein an argument similar to the one which was made before us, was advanced before Their Lordships on the basis of the Circular dated 20.4.2000.

“33. We would begin our discussion by referring to Circular No. 790, dated 20.04.2000, issued by the Board. Omitting what is not necessary, the material portion of the circular is extracted :

“

6. Refund to the person making payment under Section 195 is being allowed as income does not accrue to the non-resident. The amount paid into the Government account in such cases, is no longer ‘tax’. In view of this, no interest under section 244-A is admissible on refunds to be granted in accordance with this Circular or on the refunds already granted in accordance with Circular No. 769.”

18] It will be appropriate to refer to following observations of Their Lordships in paragraph nos. 36, 37, 38 and 39, which read as under :-

“36. Section 240 of the Act provides for refund of any amount that becomes due to an assessee as a result of an order in appeal or any other proceedings under the Act. The phrase “other proceedings under the Act” is of wide amplitude. This Court has observed that, the other proceedings under the Act would include orders passed under Section 154 (rectification proceedings), orders passed by the High Court or Supreme Court under Section

260 (in reference), or order passed by the Commissioner in revision applications under Section 263 or in an application under Section 273A.”

“37. A “tax refund” is a refund of taxes when the tax liability is less than the tax paid. As per the old section an assessee was entitled for payment of interest on the amount of taxes refunded pursuant to an order passed under the Act, including the order passed in an appeal. In the present fact scenario, the deductor/assessee had paid taxes pursuant to a special order passed by the assessing officer/Income Tax Officer. In the appeal filed against the said order the assessee has succeeded and a direction is issued by the appellate authority to refund the tax paid. The amount paid by the resident/deductor was retained by the Government till a direction was issued by the appellate authority to refund the same. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorizedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest inasmuch as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244-A, as that, an assessee is entitled to payment of interest for money remaining with the Government which

would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/foreign company.”

38. Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which *ex ae quo et bono* ought to be refunded, the right to interest follows, as a matter of course.”

“39. In the present case, it is not in doubt that the payment of tax made by resident/depositor is in excess and the department chooses to refund the excess payment of tax to the depositor. We have held that the interest requires to be paid on such refunds. The catechise is from what date interest is payable, since the present case does not fall either under clause (a) or (b) of Section 244-A of the Act. In the absence of an express provision as contained in clause (a), it cannot be said that the interest is payable from the 1st of April of the assessment year. Simultaneously, since the said payment is not made pursuant to a notice issued under Section 156 of the Act, Explanation to clause (b) has no application. In such cases, as the opening words of clause (b) specifically referred to “as in any other case”, the interest is payable from the date of payment of tax. The sequel of our discussion is the resident/deductor is entitled not only to the refund of tax deposited under Section 195(2) of the Act, but has to be refunded with interest from the date of payment of such tax.”

19] It could thus clearly be seen that the Hon'ble Apex Court in unequivocal terms held that the expression “other proceedings under the Act” used in Section 240 of the Act is wide enough to include any order passed in proceedings other than the appeals under the Act. Their Lordships further hold that the other proceedings under the Act would include orders passed under Section 154, orders passed by

the High Court or Supreme Court under Section 260 or orders passed by the Commissioner in revision applications under Section 263 or in an application under Section 273-A of the Act.

20] It has further been observed that the tax refund is a refund of taxes when the tax liability is less than the tax paid. It has further been held that the payment of interest is a kind of compensation of use and retention of money collected unauthorizedly by the Department. It has further been held that when the collection is illegal, there is corresponding obligation on the Revenue to refund said amount with interest, inasmuch as they have enjoyed the money deposited. Their Lordships held that there is no reason to restrict the same to an assessee only without extending the similar benefit to the resident/deductor, who has deducted the tax at source and deposited the same before remitting the amount payable to a non-resident foreign company. It could thus be clearly seen that the contention of the Revenue that an application at the behest of resident/deductor like the present petitioner is not tenable, has been specifically rejected by Their Lordships.

21] It has further been held that providing for payment of

interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Their Lordships further held that even if there is no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, the Government cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The Hon'ble Apex Court further holds that the State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be in the like circumstances. It has further been held that the obligation to refund money received and retained without right implies and carries with it the right to interest.

22] It can thus clearly be seen that the contention of the Revenue that the petitioner is not an assessee, in view of what has been discussed by us hereinabove, is not sustainable in law. In any case, the contention of the Revenue that the resident/deductor was not entitled to apply for refund of the TDS deposited by it, in excess

of the liability on the basis of circular dated 20.4.2000 is specifically negated by Their Lordships of the Apex Court.

23] We further find that the contention of the Revenue that the CBDT had gratuitously granted refund and, therefore, the petitioners are not entitled to interest thereon is without substance.

24] By now, it is a settled principle of law that the circulars cannot override the provisions of statute or deviate from the statute. We may gainfully refer to the observations of Apex Court in the case of **Kerala Financial Corporation v. Commissioner of Income Tax reported in AIR 1994 SC 2416 (cited supra)**, which read as under :

“13. Shri Salve would however, urge that a little different view of the matter had been taken by two-Judge Bench of this Court in K.P. Varghese v. Income Tax Officer, 131 ITR 597 : (AIR 1981 SC 1922) in which it was observed at page 613 that circulars issued under the aforesaid provisions are binding on all officers "even if they deviate from the provisions of the Act". As to what was sought to be conveyed by the word 'deviate' is not clear to us. This much, however, is apparent that this Court did not mean, while saying as above, that circulars

can override any provision of the Act or to put in the language of Mukharji, J. detract from the Act. Though Shri Salve has urged that the decision in Varghese has been affirmed by a Constitution Bench in C.B. Gautam v. Union of India, (1993) 1 SCC 78, reference to that case shows that Varghese's case was mentioned in para 22 while stating that the conclusion arrived at, namely, that the provisions of Chapter XX-C of the Act are to be resorted to only where there is significant undervaluation of the immovable property with a view to evading tax, finds support from the decision in Varghese. This shows that what was stated about permissibility of circulars to 'deviate' from the provisions of the Act was not one which was affirmed by the Constitution Bench."

No doubt that it is an equally settled that the circulars issued by the Board in exercise of its powers under Section 119 of the Act would be binding on the Taxing authorities, even if they deviate from the provisions of the Act, so long as they seek to mitigate the rigor of the particular Section for the benefit of the assessee. The reference in this respect be made to the decision in **Uco Bank, Calcutta .vs. Commissioner of Income Tax, W.B. reported in (1999) 4 SCC 599.** However, in the present case, the respondents are not relying on any circular which can be said to mitigate the hardships of

assessee. On the contrary, the reliance is sought to be placed on a communication by CBDT to the Commissioner of Income Tax, Pune in support of the contention that the refund is only made gratuitously and independent of the provisions of the Act.

25] At the cost of repetition, we have no hesitation in holding that the refund made by the respondents would squarely fall within the ambit of Section 240 of the said Act, inasmuch as Their Lordships in the case of Tata Chemicals (cited supra) have clearly held that the provisions of Section 240 are wide enough and they include all sorts of proceedings. Undisputedly, the tax which was deducted and paid by the assessee was under the provisions of Sections 195 and 201 of the said Act. Undisputedly, the advance tax which was paid was more than the liability to pay the tax. The tax was deducted and paid on an anticipation that the third instalment was to be paid to the non-resident German company. However, after the agreement with the non-resident German company, whereby it had waived the third instalment, the TDS on account of the payment of the third instalment was required to be refunded by the respondent Revenue.

26] If the contention as raised by the Revenue is to be

accepted, it would result in causing great hardship to the honest taxpayers. If an honest taxpayer on account of anticipated liability deducts more amount of tax and deposits the same and ultimately if it is revealed that there was no liability to pay the tax, then in such a case permitting the Revenue to retain that tax and not to permit refund to the person who has honestly deposited the said amount, would be permitting unjust enrichment of the State and depriving the honest taxpayer of his legitimate due. We find that such an interpretation would not also be permissible in view of public policy.

27] In the result, we find that the petitioner's case is squarely covered by the provisions of Section 244-A(1)(b) of the Act. However, the only question is as to from what date the respondents should be directed to pay the interest. Undisputedly, though the TDS was deducted and deposited at earlier point of time, the agreement between the petitioner and the German company was executed only on 1.7.1992 wherein the German company waived the instalment. However, even after that date, the petitioner waited till 31.1.1994 to make an application for refund. It is only when the petitioner brought to the notice of the respondent authorities that the German company had agreed to waive the third instalment and as

such, the petitioner was entitled to refund of the TDS deducted and deposited on account of third instalment, the respondent Revenue would come to know about the same.

28] In so far as the submission of Shri Thakur is concerned, we find that in the peculiar facts and circumstances of the case the petitioner would be entitled to refund only from the date on which the petitioner had applied for refund and brought the factual aspect to the notice of the respondent authorities. It is well-settled that the law comes to the assistance of the vigilant and diligent. If the petitioners have chosen to be in slumber for long years, the respondents cannot be fastened with the liability for a period earlier to the date on which the petitioners have woken and brought this factual position to the notice of the respondents.

29] In that view of the matter, we find that in the interest of justice, it would be appropriate to restrict the claim of the petitioner for interest in accordance with the provisions of Section 244-A from 31.1.1994 till the date on which the actual amount was paid to the petitioners.

30] The petition is, therefore, allowed. The respondents are directed to pay the interest in accordance with the provisions of Section 244-A of the Income Tax Act from 31.1.1994 till the date on which the actual amount which was found to be refundable was paid to the petitioner.

Rule is made absolute in the above terms with no order as to costs.

J. **JUDGE**

JUDGE.