

IN THE HIGH COURT OF KARNATAKA AT
BENGALURU



Dated this the 20th day of April, 2015

Present

THE HON'BLE MR JUSTICE VINEET SARAN

&

THE HON'BLE MRS JUSTICE S SUJATHA

Income Tax Appeal No.683/2009

Between

Sri K Nagesh
C/o T Krishnamurthy & Sons
30/1, S P Complex
J M Road Cross, I Cross
Bangalore 560 002. ...Appellant

(By Sri A Shankar, Adv. and Sri M.Lava, Advs.)

And

The Assistant Commissioner of Income Tax
Circle 5 (1), 5th Floor
Unity Building Annexe
Bangalore. ...Respondent

(By Sri K V Aravind, Adv.)

This ITA is filed under S.260 A of the Income Tax Act, 1961 arising out of Order dated 29.05.2009, Assessment Year 1992-93 dated 10.02.1995 passed in ITA No.1472 (Bang)/2008 praying that this Hon'ble Court may be pleased to :

- i) formulate the substantial questions of law stated therein,

- ii) allow the appeal and set aside the order passed by the ITAT Bangalore in ITA No.1472/BNG/2008 dated 29.05.2009, in the interest of justice and equity.

This Appeal having been heard and reserved for judgment on 10.04.2015 coming on for pronouncement of judgment this day **S.Sujatha J.**, delivered the following:

JUDGMENT

This case has a chequered history and relates to the assessment year 1992-93. The facts relevant for the purpose of the case are that for the aforesaid assessment year the appellant assessee filed his return on 31.8.1992 declaring his total income as Rs.57,810/-. The admitted tax liability was Rs.9,216/- plus interest of Rs.302/-. As such, the total tax paid was Rs.9,518/-. The return filed by the assessee was processed under S.143(1) of the Income Tax Act, 1961 (the 'Act' for short) and the income as disclosed was accepted. Then on 30.12.1993, the appellant filed another return of income declaring an additional income of Rs.2,50,000/- under the Immunity Scheme and Rs.75,000/- as premium paid for the above amount i.e., an additional amount of Rs.3,25,000/-.

Thus, in the revised return, the appellant disclosed a total income of Rs.3,82,810/- i.e., Rs.3,25,000/, plus Rs.57,810/- as disclosed in the original return dated 31.8.1992. The assessee-appellant paid tax of Rs.2,53,761/- on the said return. It may be relevant to mention that the assessee had declared this additional income only after the Department had detected the bogus transaction. On 10.2.1995, the assessment order was passed whereby after calculating the total tax to be paid as Rs.2,75,043/-, the balance amount payable was found to be Rs.20,704/- as the assessee had deposited Rs.9,518/- as tax with the return filed on 31.8.1992 and a further amount of Rs.2,53,761/- with the revised return filed on 30.12.1993. Challenging the said order dated 10.2.1995, the assessee filed an appeal before the CIT (A) which was allowed by order dated 3.12.2001, after holding that the return filed on 30.12.1993 could not be treated as a revised return under S.139(5) of the Act as the revised return under S.139(5) is based on the discovery by the Income Tax

Department. It was further held that since the revised return was invalid under S.139(5) of the Act, notice under S.143(2) issued by the Assessing Officer was time barred, accordingly the impugned assessment order dated 10.2.1995 was annulled. However, the CIT (A) directed the Assessing Officer to issue notice under S.148 of the Act to tax the escaped income.

2. In the meantime, the Assessing Officer passed an order dated 22.2.2002 stating it to be an order giving effect to the order passed by the CIT (A). In the said order, the revised income was taken as Rs.3,82,810/- although the same was nullified by the CIT (A) and the amount of Rs.4,880/- was found to be refunded. The said amount was refunded to the assessee by another order dated 22.2.2002. The Deputy Commissioner, by order dated 20.6.2002, rectified the mistake under S.154 r/w S.240 (b) of the Act and determined that the amount refundable to the assessee as Rs.96,385/- out of which,

Rs.4,880/- had been refunded and the balance amount of Rs.91,505/- remained to be refunded. In the meantime, the assessee challenged the order dated 22.2.2002 before the CIT (A) who, by his order dated 2.9.2002, allowed the appeal and directed the Assessing Officer to reduce the total income to nil. A further direction was issued for refund of the excess tax paid over and above the tax payable on the returned income.

3. Then, in compliance of the order dated 3.12.2001 passed by the CIT (A), a notice under S.148 of the Act was issued to the assessee on 19.3.2002 which culminated in an assessment order dated 4.2.2003 passed under S.144 r/w S.147 of the Act. Challenging the said order, assessee filed an appeal before the CIT (A) who, by order dated 21.10.2003, allowed the appeal. During this period, on 7.7.2003 another order was passed by the Assistant Commissioner under S.154 of the Act wherein it was determined that an excess amount of

tax i.e., Rs.96,385/- was refunded to the assessee and the same would now be payable by him to the Department.

4. Challenging the order of the CIT (A) dated 3.12.2001, appellant filed an appeal before the Tribunal for quashing the direction issued for issuance of notice under S.148 of the Act to tax the escaped income. The Department also filed an appeal against the said order of the CIT (A) whereby the assessment was nullified as the revised return was held to be invalid under S.139(5) of the Act. By order dated 17.10.2003, the Tribunal held that the revised return was invalid in the eye of law and the natural corollary for the CIT (A) was to annul the assessment. The Tribunal further held that *'if the time for reopening of an assessment has lapsed under the provisions of law, the Assessing Officer is precluded from reopening the same. Therefore, the CIT(A), under such circumstances, by using his wide powers also cannot direct reopening of such assessment'*. The

appeal filed by the assessee was allowed and the appeal of the Revenue was disposed of.

5. Then on 6.11.2003, without considering the order passed by the Tribunal, the Assessing Officer passed an order giving effect to the order of the CIT (A) dated 21.10.2003 and provided that a net income of Rs.10,732/- was to be refunded to the assessee. Challenging this order dated 6.11.2003, assessee filed an appeal before the CIT (A). By order dated 11.10.2004, the CIT (A) allowed the appeal and remanded the matter to the Assessing Officer to give a fresh decision by a speaking order. In compliance of the aforesaid order dated 11.10.2004 of the CIT (A), the Assessing Officer passed an order dated 9.12.2004 whereby the claim of the assessee was rejected and only the interest amount of Rs.12,535/- under S.244 A of the Act was found refundable to the assessee. Challenging the said order, the assessee filed an appeal before the CIT(A) which has been dismissed by order dated 14.11.2008. Further, the

appeal filed by the assessee before the Tribunal has also been dismissed by order dated 29.5.2009. Aggrieved by the aforesaid orders, this appeal has been filed. It is in this background of such complicated facts that we are required to consider the following substantial questions of law:

1. *Whether the Tribunal was justified in law in not directing the authorities to refund the excess amount paid with interest on the facts and circumstances of the case ?*
2. *Whether the Tribunal was justified in law in appreciating the act of revenue in retaining the amount of tax without valid return amounts to unjust enrichment at the cost of the appellant, on the facts and circumstances of the case ?*
3. *Whether the Tribunal was correct in law in holding that the appellant is not eligible for any refund of the tax paid, when all authorities held that the revised return filed was void abinitio and non-est in the eye of law on the facts and circumstances of the case ?*

6. We have heard Sri A. Shankar, learned counsel appearing for the appellant and Sri K V Aravind, learned Counsel appearing for the revenue.

7. Learned counsel Sri A. Shankar contended that the revised return filed by the assessee on 30.12.1993 was an invalid return as held by the authorities and confirmed by the Tribunal, as such, the invalid return was void ab initio and non-est in the eye of law and in view of the same, the authorities were required to refund the amount of Rs.2,75,043/- paid by the assessee as per the revised return along with the interest under Proviso (b) to Section 240 of the Act. The learned counsel, in support of his contention, relied on the following judgments:

1. **Commissioner of Income-Tax Vs. Shelly Products and Another** [(2003) 261 ITR page 367]
2. **Nirmala L.Mehta Vs. A.Balasubramaniam, Commissioner of Income-Tax And Others** [(2004) ITR 269 page 1]
3. **S.R.Koshti Vs. Commissioner of Income-Tax (Gujarat)** [(2005) ITR 276 page 165]

4. **Saraya Sugar Mills Ltd., Vs. Income-Tax Officer And Others** [(1997) ITR 226 page 475]
5. **Ajit Jain Vs. Union of India And Others** [(2000) ITR 242 page 302]

8. The learned counsel Sri K V Aravind appearing for the revenue supported the order passed by the Tribunal and argued that in view of the authorities and the Tribunal having held that the revised return filed by the assessee on 30.12.1993 is an invalid return, Assessing Officer cannot process such invalid return; however, the admission of taxes made by the assessee based on such invalid returns does not cease, income admitted in a return, whether it is valid or invalid cannot be refunded if, it is chargeable under Section 4 of the Act. In support of his contention, the learned counsel also relied on the case of **Shelly Products India** (supra).

9. After considering the rival contentions of the parties and perusing the records, we have noticed that the assessee has filed the revised return on

30.12.1993 and paid a sum of Rs.2,75,043/- including interest as admitted tax subsequent to the department detecting the said transaction which was not declared in the original return. The Assessing Officer, considering the said revised return filed by the assessee, framed the assessment under Section 143 of the Act.

10. Challenging the said assessment order, the assessee had preferred an appeal before the CIT (Appeals) wherein it was held that a revised return filed by the Assessee under section 139(5) of the Act subsequent to the discovery of the said undisclosed income by the Income Tax department cannot be treated as an valid return under Section 139(5) of the Act and accordingly, allowed the appeal directing the Assessing Officer to proceed with Section 148 of the Act. This order passed by the First Appellate Authority is also confirmed by the Tribunal wherein it is held that the revised return filed by the assessee on 30.12.1993 is an invalid return, which has reached finality. The assessee is claiming refund of

tax and interest paid on the revised return under Section 240 of the Act. Section 240 and the Proviso

(b) is reproduced below for ready reference:

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.]

11. The plain reading of the said provision makes it clear that in cases where the assessment is annulled, the assessee is entitled to the refund only of the amount, if any, of the tax paid in excess of the

tax chargeable on the total income returned by the assessee.

12. The word 'return' is not defined under the Act. In general, 'return' is a declaration of income. Section 139 of the Act provides for furnishing return of income.

13. In the case of ***New-Delhi Municipal Committee Vs. Kalu Ram and another*** reported in AIR 1976 SC 1637, it is held as under :

"The word 'payable' is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs. 'Payable' generally means that which should be paid. If the person in arrears raises a dispute as to the amount, the Estate Officer in determining the amount payable cannot ignore the existing laws. If the recovery of any amount is barred by the law of limitation, it is difficult to hold that the Estate Officer could still insist that the said amount was payable. When a duty is cast on an authority to determine the arrears of rent, the determination must be in accordance with law. Section 7 only provides a special procedure for

the realisation of rent in arrears and does not constitute a source or foundation of a right to claim a debt otherwise time-barred. Construing the expression "any money due" in section 186 of the Indian Companies Act, 1913 the Privy Council held in Hans Raj Gupta and others v. Official Liquidators of the Dehradun Mussorie Electric Tramway Company Ltd. 60 Ind App 13 = (AIR 1933 PC 63) that this meant moneys due and recoverable in suit by the company, and observed:

"It is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights." We are clear that the word "payable" in section 7, in the context in which it occurs, means "legally recoverable." Admittedly a suit to recover the arrears instituted on the day the order under section 7 was made would have been barred by limitation. The amount in question was therefore irrecoverable. This being the position, the appeal fails and is dismissed with costs".

14. In the case of **PALAYI KIZHAKKKEKARA MATHAIY'S SON K M MATHEW AND ANOTHER VS. POTHYILL MOMMUTTY'S SON HAMSA HAJI AND**

OTHERS reported in AIR 1987 SC 1326, it is held at paras 3 and 5 as under:

“3. The High Court has taken the view that the benefit of the above section would apply only to persons whose occupation of the private forests or unsurveyed lands had a lawful origin and not to persons in unlawful occupation based on trespass or forcible and unlawful entry. We are of opinion that the said interpretation placed by the High Court on the section is perfectly correct.

5. On a careful scrutiny of the aforesaid provisions, it becomes abundantly clear that the intention of the legislature was to grant protection only to persons whose possession had a lawful origin in the sense that they had either bona fide believed the lands to be Government's lands of which they could later seek assignment or had taken the lands on lease from persons whom they bona fide believed to be competent to grant such leases or had come into possession with the intention of attorning to the lawful owners or on the basis of arrangements like varam etc. which were only in the nature of licences and fell short of a leasehold right. It was not within the contemplation of the legislature to confer the

benefit of protection on persons who had wilfully trespassed upon lands belonging to others and whose occupation was unlawful in its origin. The expression "in occupation" occurring in Section 7D must be construed as meaning "in lawful occupation."

15. In the case of **STATE OF KERALA & ORS. VS. V.R.KALLIYANIKUTTY & ANR.** reported in AIR 1999 SC 1305, it is held as under:

"There is no question, however, in the present case of any payment voluntarily made by a debtor being adjusted by his creditor against a time-barred debt. The provisions in the present case are statutory provisions for coercive recovery of "amounts due". Although the necessity of filing a suit by a creditor is avoided, the extent of the claim which is legally recoverable is not thereby enlarged. Under Section 70(2) of the Kerala Revenue Recovery Act the right of a debtor to file a suit for refund is expressly preserved. Instead of the bank or the financial institution filing a suit which is defended by the debtor, the creditor first recovers and then defends his recovery in a suit filed by the debtor. The rights of the parties are not thereby enlarged. The process of recovery is

different. An Act must expressly provide for such enlargement of claims which are legally recoverable, before it can be interpreted as extending to the recovery of those amounts which have ceased to be legally recoverable on the date when recovery proceedings are undertaken. Under the Kerala Revenue Recovery Act such process of recovery would start with a written requisition issued in the prescribed form by the creditor to the collector of the District as prescribed under Section 69(2) of the said Act. Therefore, all claims which are legally recoverable and are not time-barred on that date can be recovered under the Kerala Revenue Recovery Act”.

16. In the case of **Ajith Jain**, the Delhi High Court considering the case of a valid search interpreted the word “valid” in the context of the Income Tax Act, and it is held that:

“a search under Section 132 is a pre-requisite for invoking the provisions of the said chapter. It is axiomatic that search under Section 132, as contemplated in the Chapter has to be a valid search. An illegal search is no search and as a necessary corollary in such a case Chapter XIV-B

would have no application. Since, in the instant case, we have come to the conclusion that the search conducted on January 11, 1996, was without jurisdiction and was thus void ab initio, the imminent consequence would be that the provisions of Chapter XIV-B cannot be invoked against the petitioner, pursuant to the said search of his room at Chennai. Consequently, the block assessment order dated January 31, 1997, cannot be sustained. We accordingly quash the same.”

17. Considering the scheme of the Act, the word ‘return’ in Section 240 of the Act, should be understood as a ‘return’ in terms of Section 139 of the Act. If the return furnished is not in conformity with Section 139, it ceases to be a return under the Act. The word ‘return’, thus means, a legal and valid return. The understanding of the Tribunal, that the word ‘return’ employed in this provision includes both valid as well as invalid return, is not justifiable. If such an interpretation is given to the word ‘return’, it would defeat the intent of the provision itself. It is clear from the said provision that the assessee is entitled to the

tax paid in excess of the tax chargeable on the total income declared by the assessee in his return. No tax shall be levied or collected except with authority of law, as enjoined by Article 265 of Constitution of India. If the return itself is declared to be invalid by the authorities as well as by the Tribunal, such return does not exist. i.e., it is void ab initio and non est in the eye of law which has no legal sanctity. If that is so, then the invalid return has to be ignored and we have to examine the refund to be payable by the department under the proviso (b) to Section 240 of the Act on the basis of the valid return i.e, the original return filed by the assessee on 31.8.1992 declaring his total income of Rs.57,810/-. For whatever reasons, if the authorities were barred from framing the assessment/not amenable to self assessment, then the department is precluded from withholding the tax and interest paid by the assessee on the revised return which is held to be invalid in the eye of law. Even assuming, the assessee has admitted certain taxes in an invalid return, such

admitted tax cannot be retained by the department unless it is supported by law. In the absence of any such provisions, withholding of the taxes admitted in an invalid return, amounts to tax collected without authority of law, offending Article 265 of the Constitution.

18. The case of **Saraya Sugar Mills** relied on by the Tribunal was a case of refund under Section 237 of the Act. The words “properly chargeable” contemplated in Section 237 of the Act was interpreted by the Allahabad High Court and it was held that

“the words “Properly chargeable” cannot be read as properly or legally assessed and this is what the argument of learned counsel for the petitioner amounts to. There are various provisions in the Act to indicate that tax deducted at source or paid in advance or paid on self-assessment along with submission of the return are paid in discharge of legal liability and can be refunded only in accordance with the provisions of the Act.”

19. It was a case of a valid return but in the case on hand, we are considering the taxes paid on the basis of an invalid return, as held by the

authorities. If the tax and interest amount offered by the assessee is based on an invalid return, and, if that return itself is non est in the eye of law, then there is no basis for the authorities to withhold the said tax collected and the only course open to the authorities is to refund the said amount considering the original return as the return furnished and the amount whatever is paid in excess under the original return has to be refunded subsequent to the annulment of assessment by the authorities.

20. In the case of **Shelly Products** (supra) it is held that

“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 the return furnished and the rates applicable, the excess shall be refunded to the assessee, since its retention may offend article 265 of the Constitution”.

21. In the aforesaid case, the Apex Court was considering the case of a valid return. In that context it is held that 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 and if in the event of the tax paid being in excess of the tax liability duly computed on the basis of the return furnished and the rates

applicable, the excess shall be refunded to the assessee. Applying the said principles of law, if we examine the case on hand, it is clear that fresh assessment is barred. If there is no authority for the assessing Officer to proceed on the invalid return then what remains is the original return and on the basis of such valid return, if there is excess of tax paid by the assessee, it has to be refunded to the assessee otherwise, it would offend Article 265 of the Constitution.

22. In the case of **Nirmala L.Mehta** (Supra), Bombay High Court has held that *“The problem arose because the petitioner in her return for the assessment year 1988-89 filed on June 30, 1988, offered the prize money of the lottery to tax rather a fundamental error of law on the part of the assessee, but that error of law once detected by the petitioner, it was argued before the Commissioner of Income-tax that the prize money earned by the petitioner could not be taxed under the*

Income –tax Act, 1961. It is true that it was at a later stage that such contention was raised by the petitioner, but the said contention was a pure question of law and the commissioner of Income-tax ought to have considered the said contention on its merits and ought not to have declined to entertain it on the ground of delay. There cannot be any estoppel against the statute, article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.”

23. In the case of **S.R.Koshti** (Supra), it is held that :

“A word of caution. The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are

collected. This court, in an unreported decision in the case of Vinay Chandulal Satia Vs. N. O. parekh, CIT, Special Civil Application No. 622 of 1981, rendered on August 20, 1981, has laid down the approach that the authorities must adopt in such matters in the following terms:

“The Supreme Court has observed in numerous decisions, including Ramlal v. Rewa Coalfields Ltd., AIR 1962 SC 361; State of West Bengal v. Administrator, Howrah Municipality, AIR 1972 SC 749, and Babhutmal Raichand Oswal v. Laxmibal R.Tarte, AIR 1975 SC 1297, that the State authorities should not raise technical pleas if the citizens have a lawful right and the lawful right is being denied to them merely on technical grounds. The State authorities cannot adopt the attitude which private litigants might adopt.”

24. In the light of said judgments, if we examine the proviso (b) to Section 240 of the Act, it is axiomatic that the “return” contemplated in the said Section has to be a valid return, and an illegal/invalid return has no sanctity in the eye of law and would have no application.

25. Learned counsel appearing for the revenue also relied up on the judgment of **Shelly Products** (supra). He drew our attention to Section 156 of the Act to take support of **Shelly Products Case** in favour of the revenue. Section 156 of the Act deals with the notice of demand. When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under the Act, the Assessing Officer shall serve upon the assesee a notice of demand in the prescribed form specifying the sum so payable. If no order would be passed under the Act by the Assessing Officer, no notice of demand would be issued in terms of Section 156 of the Act. It is the case of the Revenue that in that context, the Apex Court has held that even if the tax paid is found to be less than payable, no further demand can be made for the recovery of the balance amount since a fresh assessment is barred. But it is the case of the Revenue that nowhere it is laid down in **Shelly Products** case, that if any admitted tax is

paid by the assessee on an invalid return, that has to be refunded to the assessee.

26. But we are unable to agree with the learned Counsel appearing for the revenue. The declaration of income furnished by the assessee under the revised return is declared to be invalid. In such circumstances, the provisions of self-assessment under Section 140-A of the Act, are not attracted. If the Assessing Officer is barred from framing a fresh assessment based on any invalid return, non-est in the eye of law, though is chargeable under Section 4 of the Act, Department, retaining that amount of tax paid on the basis of an invalid return without there being any self assessment/assessment made by the authorities under the Act, would violate Article 265 of the Constitution of India.

27. In view of the same, we are of the opinion that when the assessment is annulled by the Authorities, the Department is bound to refund the

excess amount of tax paid by the assessee on the valid return. The interpretation of the Tribunal that the return contemplated under the proviso (b) to Section 240 of the Act, includes both valid and invalid is not sustainable and has to be set aside.

28. Arguments advanced relying on Section 140A of the Act, and the **Shelly Products** case, would be of no assistance to the revenue. As already discussed, the said judgment was rendered in the context of the valid return and any admitted tax paid on the basis of the valid return amounts to admission of tax, deemed to be assessed under Section 140-A of the Act (self-assessment) but in so far as an invalid return, the provisions of Section 140A of the Act are not attracted. Since we are of the view that the tax amount paid on the invalid return has to be refunded the same analogy applies to the interest portion also.

29. Before parting, it would be appropriate to mention here that on equitable relief, we would have answered in favour of revenue but equity has no role

to play in taxation matters and that too, in a statutory appeal, where the scope is limited. It is also a well settled principle of interpretation of taxation laws that if more than one view is possible on the construction of taxing statutes, the one which leans in favour of the assessee should be accepted by the Courts.

30. Accordingly, we answer the substantial questions of law in favour of the assessee and against the revenue and set aside the judgment passed by the Tribunal. For the foregoing reasons, this appeal stands allowed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

brn/JT