IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

FRIDAY, THE 19TH DAY OF DECEMBER 2014/28TH AGRAHAYANA, 1936

WP(C).No. 25146 of 2010 (P)

PETITIONER(S):

M/S.DELIZA RESIDENCY,
HOTEL NEW CASTLE, OTTUPARA
WADAKKANCHERRY-REP. BY ITS MANAGING PARTNER
SHRI.P.D.ANTO.

BY ADVS.SRI.T.M.SREEDHARAN
SMT.C.K.SHERIN
SRI.V.P.NARAYANAN

RESPONDENT(S):

1. THE CHIEF COMMISSIONER OF INCOME TAX,
C.R.BUILDING, I.S.PRESS ROAD, KOCHI-18.

2. THE INCOME TAX OFFICER,
WARD 2 (1), THRISSUR.

BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 19-12-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 25146 of 2010 (P)

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: TRUE COPY OF THE ASSESSMENT ORDER DATED 07.12.2007 PASSED BY THE ASSESSING OFFICER

EXT.P2: TRUE COPY OF THE REVISED ORDER DATED 14.05.2009 PASSED BY THE ASSESSING OFFICER

EXT.P3: TRUE COPY OF THE APPLICATION DATED 24.11.2009 FOR WAIVER OF INTEREST SUBMITTED BEFORE THE 1ST RESPONDENT

EXT.P4: TRUE COPY OF THE JUDGMENT DATED 10.2.2010 IN W.P.(C). NO.4312/2010 PASSED BY THIS HON'BLE COURT

EXT.P5: TRUE COPY OF THE ORDER DATED 17.5.2010 U/S 119(2)(a) OF THE ACT PASSED BY THE FIRST RESPONDENT

RESPONDENTS' EXHIBITS: NIL

//TRUE COPY//

P A TO JUDGE

A.K.JAYASANKARAN NAMBIAR, J.

....

W.P.(C).No.25146 of 2010

....

Dated this the 19th day of December, 2014

<u>J U D G M E N T</u>

The petitioner is a partnership firm doing business in running a bar attached hotel at Wadakkancherry, Thrissur district. During the previous year relevant to the assessment year 2005-2006, the petitioner had completed the construction of a hotel building. In the returns filed for the assessment year 2005-2006, however, the petitioner declared that he had no taxable income. Pursuant to the intimation that was given to him under the Income Tax Act the respondent authorities issued a notice under Section 148 of the Income Tax Act and re-opened the assessment. In the re-assessment proceedings, the Income Tax Officer made an addition of Rs.96,12,500/- towards income from other sources and completed the assessment accordingly. The additions made by the Income Tax Officer represented the difference between the declared cost of construction of the hotel building as per the petitioners books of accounts and the cost of construction estimated by the Departmental Valuation Officer. Ext.P1 is the assessment order that was passed against the petitioner. The petitioner carried the matter in appeals under the Income Tax Act and the said appellate proceedings culminated in the dismissal of the appeal filed by the petitioner before this Court vide ITA.No.11 of 2010. In the appeal preferred by the petitioner, the additions made by the Income Tax Officer were considerably reduced and, as against the amount of Rs.96,12,500/- added by the Income Tax Officer, the additions sustained on the petitioner pursuant to the appeal was only in an amount of Rs.39,72,961/-. On the reduced amount, interest under Section 234A, 234B and 220(2) of the Income Tax Act were also levied. The petitioner thereafter preferred applications before the 1st respondent for waiver of the interest under the aforementioned provisions. The 1st respondent by Ext.P5 order dismissed the petitions preferred by the petitioner. In the writ petition, Ext.P5 order of the 1st respondent is impugned, inter alia, on the ground that it does not consider the genuine hardship that was faced by the petitioner in estimating the cost of investment for the purposes of declaration of his income in the returns filed by him, and for payment of advance tax.

2. A statement has been filed on behalf of the respondents wherein Ext.P5 order is sought to be justified on the findings therein. It is, in particular, pointed out that as against the additions made by the Income Tax Officer in re-assessment

proceedings, the additions ultimately sustained against the petitioner, pursuant to the appeal preferred by him against the assessment order, was substantially lower than what was originally estimated. It is pointed out that the petitioner therefore, obtained substantial advantage through the reduction of the amounts so estimated. As regards the contentions of the petitioner with regard to waiver of the interest, it is pointed out that the interest being statutory in nature, and intended to compensate the revenue for the withholding of tax that was due to it, could not be waived at the mere request of the petitioner.

3. I have heard Sri.V.P.Narayanan, the learned counsel for the petitioner and Sri.Jose Joseph learned Standing counsel for the Income Tax Department.

4. On a consideration of the facts and circumstances of the case as also the submissions made across the Bar, I find that in Ext.P5 order, the 1st respondent, while considering the case of the petitioner for waiver, finds as follows with regard to the interest levied under section 234 A & B :

> "4. A survey u/s.133A was carried out in this case on 07-12-2005. It was found by the Assessing Officer that a hotel building was

constructed and the business of the hotel commenced during the previous year relevant to the A.Y.2005-06. The investment in hotel building disclosed in the books of accounts was found prima facie far below the actual cost of construction and that no income tax return was filed for the assessment year. Having formed a belief that income has escaped assessment within the meaning of section 147 of the Act, notice u/s.148 was issued by the Assessing Officer on 10-04-2006. The assessee filed a return in response to notice u/s.148 on 22-09-2006 declaring nil total income. The hotel building was referred for valuation and the assessment was made on 07-12-2007 determining the total income at Rs.96,12,560/- which was modified in appellate proceedings to Rs.39,72,960/- and the same has become final. As such it is undisputed that the assessee had derived total income of Rs.39,72,960/- for the A.Y. 2005-06 and tax on the total income was not paid as advance tax before 31-03-2005 and that no return was filed voluntarily before the due date for filing the return i.e. 31-07-2005. It is also an undisputed fact that no income was declared even in the return filed in response to notice u/s.148 on 22-09--2006 even though the total income of Rs.39,72,960/- was determined by the Tribunal which is the highest fact finding authority. Hence the assessee is liable to pay the tax on total income earned for the year in advance before 31-3-2005 and to file the return declaring such total income on or before 31-7-2005. Levy of interest u/s.234B is held to be compensatory in nature by the judgment of Apex Court in CIT Vs. Pranoy Roy (2009) 309 ITR 231. Same view was expressed by various High Courts including the Hon'ble Bombay High Court in CIT Vs. Kotak Mahindra Finance Ltd 265 ITR 119, which held as follows (page 124) :

“It is well settled that interest u/s.234B is compensatory in character. It is not penal in nature............It is for this reason that section 234B does not envisage grant of hearing in so far as levy of interest is concerned. The levy is automatic on it being proved that the assessee has committed a default as governed by section 234B."

In this case interest charged u/s.234B is only by way of compensation to the Exchequer for being deprived of the payment of advance tax, to which it was legitimately entitled. There are no enabling provisions to reduce the interest levied on the basis of tax on total income determined in regular assessment.

5. As regards waiver of interest sought for under Board's order u/s.119(2)(a) in F.No.400/29/2002-IT(B) dated 26-06-2006, it is to be pointed out that waiver of interest u/s.234A and u/s.234B can only be considered by the Chief CIT in respect of certain classes of cases or classes of income specified in the second paragraph of the said order. It is claimed by the assessee that its case comes under clause (d) of paragraph (2) of the Board's order. The classes of case specified in the aforesaid clause are the cases where a return of income could not be filed due to unavoidable circumstances and such return of income was filed voluntarily by the assessee or his legal heirs without detection by the assessing officer. In this case the assessing officer has found during the course of survey on 07-12-2005 that income chargeable to tax for the A.Y.2005-06 had escaped assessment for the reason of non-filing the return and disclosing the income and, as such, notice u/s.148 was issued on 10-04-2006. Return of income filed on 22-09-2006 was in response to notice u/s.148. No income was declared in the said return and no tax was paid. The assessee has not explained successfully the unavoidable circumstances for non-filing the return voluntarily despite the fact that total income of Rs.39,72,960/- was finally determined by the ITAT for the year. Since none of the conditions laid down in clause(d) of para 2 of the order is fulfilled in this case, the petition for waiver of interest u/s.234A fails.

> 6. In regard to reduction of interest u/s.234B, it is already held that there is no provision for such reduction as the levy is compensatory. Waiver of interest u/s.234B is governed by clause (b) and (c) of paragraph (2) of above said Board's order u/s.119(2)(a) of the I.T. Act. The income assessed in the assessee's case does not come under any of the class or classes of income specified in the aforesaid clauses. It is also a fact that there was no claim in the petition that the clauses (b) and (c) of paragraph 2 are applicable to the assessee for waiver of interest u/s.234B. The one and only contention is that the case is covered by clause (d). It is noticed in this context that by virtue of paragraph (3) of the above said Board's order, waiver of interest u/s.234B cannot be considered under circumstances mentioned in clause (d) of paragraph (2). Hence, the petition for waiver of interest u/s.234B fails."para 4,5,6

It is seen therefore, that while considering the case of the petitioner for waiver of the interest, the 1st respondent took note of the fact that the petitioner had not fully declared the taxable income while furnishing its returns, initially as well as pursuant to the notice issued under Section 148 of the Income Tax Act. No doubt, the petitioner would contend that, at the time of payment of advance tax, it had relied only on its books of accounts to arrive at the cost of construction of the hotel building and that it had paid advance tax by taking into account the cost of the said investment as reflected in its books of accounts. I am, however, not impressed with the said contention of the petitioner. When the additions, to the income disclosed by the petitioners in its returns, have been sustained to a particular extent by the appellate forum under the Act, then the finality of the assessment indicates that the amount sustained against the petitioner is the income on which he ought to have been paid tax at the very outset. The levy of interest is compensatory in nature and it is meant to compensate the department for the delay in getting the tax that was due to it. The conduct of the petitioner in the instant case does not call for any lenient view in the matter of levy of interest. I am convinced that the 1st respondent, while passing Ext.P5 order, has taken into account the relevant criteria prescribed in the Board orders issued on the subject, and has correctly applied the yardstick for determining whether the petitioner was entitled for a waiver of the interest. In that view of the matter, I am not inclined to interfere with Ext.P5 order passed by the 1st respondent. The writ petition fails and is accordingly dismissed.

A.K.JAYASANKARAN NAMBIAR
JUDGE

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