

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

JUDGMENT

DB Income Tax Reference No.32/1995
The Commissioner of Income-Tax, Jaipur
Vs.

M/s. Udaipur Mineral Development Syndicate (P) Ltd.

Judgment reserved on ::: 17th October, 2014

Judgment pronounced on ::: 12th November, 2014

PRESENT

HON'BLE MR. JUSTICE AJAY RASTOGI.

HON'BLE MR. JUSTICE J.K. RANKA.

Mr. Anuroop Singhi, for the petitioner.

Mr. TC Jain, for the respondent.

Reportable

By the Court : (Per Hon'ble Ranka, J.)

1. This reference u/s 256(2) of the Income Tax Act, 1961 (for short, 'IT Act') is directed against the order of the Income Tax Appellate Tribunal, Jaipur Bench, Jaipur (for short 'ITAT') is relevant for the assessment year 1973-74.

2. Following question of law is required to be answered by this Court:-

“Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the interest u/s 139(8), 215 and 220(2) of the IT Act, 1961 could not be levied upon the assessee from the date of assessment order i.e. 23.9.1976 ?”

3. Brief facts, which can be noticed, are that the respondent-assessee furnished its return of income on 27/04/1974 declaring total income at Rs.1,58,484/- which was revised on 05/11/1974 to Rs.2,57,680/- but an assessment was made on a total income of Rs.9,14,115/- on 23/09/1976. The Assessing Authority (for short, "AO") issued demand notice as also other forms and charged interest u/s 139(8) and interest u/s 215 after specifically observing in the order as to levy of interest. The assessee preferred appeal and after the order of the Appellate Assistant Commissioner, the income was reduced to Rs.2,41,120/-

4. The revenue preferred an appeal before the ITAT, and after the order of ITAT the total income finally determined came to Rs.4,29,120/-. The AO gave effect to the order of the ITAT and by order dt.16/09/1980 enhanced tax ,based on the order of the ITAT so also charged interest u/s 139(8), 215 and u/s 220(2) of IT Act. The assessee moved an application u/s 154 by agitating levy of interest, u/s 139(8), 215 and 220(2) of the IT Act, which was rejected by the AO so also appeal by the Commissioner of Income Tax (Appeal) (for short, 'CIT(A)'). However, the ITAT vide its order dt. 15/01/1988 allowed the appeal of the assessee by holding that interest, in so far as Sec. 220(2) is concerned, was not leviable. However, the ITAT,

in the impugned order, though referred to levy of interest u/s 215, 139(8) and 220(2) but the finding of the ITAT is with reference to interest u/s 220(2) of the IT Act only. No reason for deletion of the interest was assigned by ITAT.

5. Ld. counsel for the assessee raised a preliminary objection that the reference involves minimal tax/interest effect and need not be answered or rejected on account of various circulars of the Central Board of Direct Taxes (CBDT) which had laid down monetary limits in filing references/appeals and the present case falls in such parameters as the effect in the instant case is less than Rs.One Lac and thus the reference application at the instance of the revenue deserves to be dismissed.

6. He also contended that u/s 268A which was inserted by the Finance Act, 2008 with retrospective effect from 01/04/1999 specifically lays down that the CBDT can fix such monetary limits as it may deem fit for the purpose of regulating in filing appeal or application for reference by the Revenue and in support relied on the judgment rendered of the Bombay High Court in the case of CIT vs Pithwa Engg. Works: (2005) 276 ITR 519 (Bom); CIT vs Smt. Vijaya V. Kavekar: (2013) 350 ITR 237 (Bom) and CIT Vs Digvijay Singh:(2007) 292 ITR 314 (MP) and contended that the courts have repeatedly held that even

in the case of reference applications, which are pending at the time of disposal of the reference are covered by the circulars of the CBDT and on account of minimal tax effect, references does not deserve consideration on merits.

7. Per-contra, Id. counsel for the revenue contended that when reference application was filed and at the instance of this Court on 27/08/1992 reference application was allowed, no such circulars were invogue and that cannot be retrospectively made applicable in the pending matters. He further contended that Sec. 268A may have been brought in the statute but it cannot be said that it is applicable for the references filed before 01/04/1999 and thus it has no application and since a substantial question of law has been framed by this court it need to be answered.

8. Ld. Counsel for the revenue on the levy of interest contended that provision is very clear and unambiguous and the purpose of the levy of interest u/s 139(8), 215 and 220(2) of the Act is compensatory. He contended that once the demand notice has been issued and after orders by the first appellate/second appellate authority, the order would be revisable only by reduction/enhancement of tax and once there is reduction/ enhancement of the tax, interest under the aforesaid provision would be consequential. In support of his

submission relied upon judgment of the Delhi High Court in the case of Girnar Investment Ltd. Vs. Commissioner of Income-Tax and another, reported in (2012) 340 ITR 529 (Delhi) which has correctly dealt with this issue.

9. Per-contra, Id. counsel for the assessee contended that the sections. 139(8), 215 and Sec. 220(2) clearly specify that, if there is reduction, then the interest can be reduced but if there is enhancement of tax, the provision does not empower to revise the interest detrimental to its interest. He further contended that u/s 156, a demand notice is required to be issued after every order is passed and in the instant case, the demand notice u/s 156 has been issued at the time of the original assessment only and not subsequently at the time of modification of the order and submits that the levy itself is bad and unjustified. He further contended that plain and simple language of the Act is required to be considered rather than the reasoning based on hypothetical consideration and proviso to Sec. 220(2) was inserted on 01/04/2014 which is prospective in nature and does not apply to the assessment year 1973-74.

10. Thus he contended that the ITAT has correctly decided the issue and the judgment of the Apex Court in Vikrant Tyres Ltd. Vs. First Income Tax Officer, reported in (2001) 247 ITR 821 (SC) is applicable where the Apex Court had clearly laid

down that in such case interest u/s 220(2) is not leviable. He also relied upon judgment rendered by Kerala High Court in the case of K. Nachimuthu Vs. Sales Tax Officer, II Circle, Trivandrum, reported in 95 STC 539 (Kerala), placing reliance on a judgment of the Apex Court, held that once the demand of tax has been set aside in appeal but restored in subsequent proceedings, penal interest is not payable during interregnum period. He also relied upon judgment rendered by the Andhra Pradesh High Court in the case of SMS Schloemann Siemag, A.G vs DCIT:(2001) 250 ITR 97 (AP).

11. We have considered the arguments advanced by Id. counsel for the parties and have gone through the judgments relied upon by counsel for the parties.

12. We would first deal with the preliminary objection of the Id. counsel for the assessee as to whether the tax effect being minimal the reference at the instance of this Court deserve consideration. Although the judgments cited by counsel for the assessee has observed that it is applicable not only to the appeals but the old pending references as well, but the other view is that the position has to be seen and has to be governed at the time when the reference application was moved/filed and is thus in-applicable for the old pending references/reference applications. This Court, in the case of Commissioner of

Income-Tax Vs. Rajasthan Patrika Ltd.: (2002) 258 ITR 300, came to the following:-

“It is true that in the case of the Supreme Court, which has been referred to by Mr. Ranka, learned counsel for the assessee, their Lordships held that a circular, which interprets the statute for the uniformity of the decisions in the Department. But the circular before us is as to whether the appeal is to be filed or not ? These are administrative instructions and in spite of these administrative instructions if the department prefers to file an appeal or make a reference to this Court, in our view, on such administrative instructions the appeal of the Department should not be dismissed or the reference should not be rejected. We do not find any infirmity in disposing of the appeal on the merits.”

13. This Court again, in the case of Commissioner of Income Tax. Vs. Rajasthan (P) Ltd. (2003)185 CTR 283, also came to the said conclusion of disposal on merits.

14. This Court, in the case of Commissioner of Income Tax Vs. Rajasthan (P) Ltd.: (2004) 186 CTR 260, again held that if the department wants to file reference application, this Court should entertain despite tax amount involved being minimal and directed the Tribunal to refer the question at the instance

of this Court.

15. Punjab and Haryana High Court (Full Bench) also, in the case of Commissioner of Income-Tax Vs. Varindera Construction Co.: (2011) 331 ITR 449 (P&H), after analyzing the judgments and the circular of the CBDT, came to the conclusion that the circular, laying down monetary limit, controls filing of the appeals but not their hearing. The appeals, filed as per the applicable limit, at the time of filing, cannot be governed by the circular applicable at the time of hearing and Punjab and Haryana High Court dissented from the view of the Bombay High Court and observed that the object of section 268A is to govern monetary limit for filing of the appeals and there is no scope of reaching the circular as being applicable to pending appeals. It further expressed that even Bombay High Court held that the circular was not retrospective and it only observed that having regard to the falling money value and chocking court docket, policy of monetary limit was needed to be adopted for pending matters.

16. The Hon'ble Apex Court, in the case of Commissioner of Income-Tax Vs. Surya Herbal Ltd.: (2013) 350 ITR 300 (SC) has expressed that the circular dt. 09/02/2011 issued by the Board should not be applied ipso-facto, though it also observed that when the matter has a cascading effect in which a

common principle may be involved in a subsequent group of matters or a large number of matters. In such cases if the attention of the High Court is drawn, the High Court will not apply the circular ipso-facto for the purpose.

17. Thus, we are of the view that once reference has been admitted by this Court u/s256(1) or 256(2), then the matter cannot be disposed off merely because the tax effect is minimal. We dissent with the view expressed by the Bombay High Court and M.P. High Court, relied upon by counsel for the assessee as the judgment rendered by this Court in *Rajasthan Patrika Ltd. (supra)* and *Registhan (P) Ltd. (supra)* is binding on us on the self same issue and we would choose to follow the view rendered by this court. In our view, once a reference application of the Revenue had been allowed by this Court and reference was called at the instance of this Court, the question of law framed has to be answered on merits, thus the preliminary objection of the counsel for the assessee is rejected.

18. In our view, once the order has been revised or modified after passing of the assessment order it relates back to the assessment order as it is extension of the assessment order. Where the assessment is restored, may be partially/fully and the original demand gets revived then the assessee is liable to

pay interest u/s 139(8), 215 and 220(2) of the IT Act, as the case may be.

19. In the instant case, admittedly, the AO had duly charged interest u/s 139(8) and 215 of the IT Act and indisputedly the assessee neither paid tax nor the interest and after the first appellate order at the instance of the assessee, the tax got modified and at the instance of the revenue, the income was further modified at a higher figure of income by ITAT.

20. Therefore, in our view, the subsequent orders are integrated and extension of the original proceedings and fresh notice u/s 156, as contended by Id. counsel for the assessee, need not be issued every time when the total income undergoes a change due to appeal or revisional orders. Sec. 3 (b)(iii) of the Validating Act provides that any proceeding initiated on the basis of the notice of demand served upon the assessee before disposal of the appeal or other proceedings may be continued in relation to the amount so reduced from the stage at which such proceedings stood immediately before such disposal.

21. In our view, the moment there is finality of the proceedings, the original notice of demand comes to the surface and for any default on the part of the assessee, the

claim of interest can be revived from inception. In our view the scope of proviso to Sec. 220(2) of the Act, the notice of demand, relates back to the original notice of demand. The Tribunal was at error while coming to the aforesaid conclusion that interest in such a case is not leviable. The revenue was well justified in charging interest u/s 220(2) of the IT Act.

22. The Hon'ble Apex Court, in the case of Vikrant Tyres Ltd. (supra), was considering a situation where the assessee had paid the entire demand, which was created at the time of passing of the assessment order and thus when the entire tax was paid, it was held that interest u/s 220(2) of the IT Act is not leviable later on. But in our view, the judgment of the Hon'ble Apex Court is distinguishable on the facts of the instant case. In the case of SMS Schloemann Siemag, A.G. Vs. Dy. Commissioner of Income Tax & Anr.: (2001) 250 ITR 97 (AP), the assessee also paid entire tax demanded from him pursuant to the assessment order, thus is also distinguishable. The other judgment is also distinguishable. However, as we have noticed herein above, in the instant case, admittedly, the assessee did not deposit any amount.

23. It would also be appropriate to deal with the submission of counsel for the assessee that the second proviso, which was inserted by the Finance No.2 Act, 2014 w.e.f. 01/10/2014

clarifies the situation envisaged in the present case and is not applicable earlier but in our view, it is curative and clarificatory. Therefore, we hold that the intention of the legislature, in our view, contemplated a situation, which we have envisaged in the instant case that the interest, being compensatory in nature, though tax having become due, still if the assessee does not pay, then the revenue has to be compensated by charging interest as prescribed u/s 220(2) of the IT Act.

24. Accordingly, the question is answered in favour of the revenue and against the assessee and in negative. The result of the aforesaid discussion is that the assessee is liable for interest u/s 220(2) as also interest u/s 139(8) and 215 of the IT Act. We answer accordingly. No order as to costs.

[J.K. RANKA],J.

[AJAY RASTOGI],J.

Raghu/p.12/

Certificate:All corrections made in the judgment/order have been incorporated in the judgment/order being e-mailed.

Raghu, Sr. PA.