

Judgment reserved on 24.5.2012

Judgment delivered on 06.7.2012

CIVIL MISC. WRIT PETITION (TAX) NO. 676 OF 2000

M/s Lohia Starlinger Limited

vs.

Commissioner of Income Tax & others

Hon'ble Sunil Ambwani, J.

Hon'ble Het Singh Yadav, J.

1. M/s Lohia Starlinger Limited (the petitioner) is a public limited company, incorporated under the Companies Act, 1956. On 1.3.1993 M/s Lohia Machinery Manufacturers Limited, a loss making company, amalgamated with the petitioner-company, carrying a total loss of Rs. 3, 53, 99, 401/-. The original assessment under Section 143 (3) of the Income Tax Act, 1961 (the Act) for the assessment year 1993-94, was completed by Assistant Commissioner of Income Tax, Central Circle-5, Kanpur on a total income of Rs. 3, 70, 29, 530/- as against the returned income at Nil. The claim of set-off of loss of M/s Lohia Machinery Manufacturers Limited (the amalgamated company), was not allowed for want of requisite certificate under Section 72A (2) (ii) of the Act by the specified authority, during the pendency of the assessment.

2. The petitioner-company filed an appeal before the Commissioner of Income Tax (Appeals). The Appellate Authority allowed some of the reliefs. The petitioner further filed an appeal in the Income Tax Appellate Tribunal, which was pending, when this writ petition was filed.

3. The petitioner-company preferred an application under Section 119 (2) (b) of the Act to the Central Board of Direct Taxes (CBDT),

New Delhi for condonation of delay in filing the certificate under Section 72-A (2) (ii). The CBDT, by its order dated 31.3.1998, condoned the delay in filing the certificate.

4. The Commissioner of Income Tax, Central Circle-5, Kanpur passed an order on 22.7.1998, giving effect to the order of CBDT dated 31.3.1998, and made computation of income as follows:-

“Consequently to give effect C.B.D.T's New Delhi order dated 31.3.98 the income of the assessee is computed as under:-

Income assessed as per order dated 2.12.1996	:	Rs. 3, 67, 51, 518/-
	:	
Loss: Unabsorbed business loss of M/s Lohia Machinery Manufacturers Ltd. as per latest order of DCIT (Spl. Range)-25 Bombay	:	Rs. 2, 39, 52, 881/-
	:	
Loss: Unabsorbed depreciation of M/s Lohia Machinery Manufacturers Ltd as per latest order of DCIT (Spl. Range)-25, Bombay (From A.Y. 89-90 to 93-94)	:	<u>Rs. 1, 10, 32, 892/-</u>
	:	Rs. 3, 49, 85, 774/-
Loss: Unabsorbed investment allowance of M/s Lohia Machinery Manufacturers Ltd as per latest order claimed for Rs. 34, 69, 526/- and out of which unabsorbed investment allowance is allowed for		
Rs. 17, 65, 744/-		<u>Rs. 17, 65, 744/-</u>
		<u>Rs. 3, 67, 51, 518/-</u>
		Rs. Nil

The balance unabsorbed investment allowance of Rs. 17, 08, 782/- is allowed to be carried forward in the subsequent assessment years.

Hence, rectification is made accordingly and the total income of the assessee is computed as NIL. Issue notice of demand and refund voucher.

(R.C. PANT)
Asstt. Commissioner of Income-Tax
Cen. Circle-IV, Kanpur”

5. In pursuance to the above referred order dated 22.7.1998 passed by the Assistant Commissioner of Income Tax, Central Circle-V, Kanpur under Section 143 (3)/119 (2) (b)/154 of the Act, a refund of Rs. 1, 95, 76, 025/-, including interest of Rs. 22, 57, 869/- was allowed under Section 244-A of the Act.

6. By an order dated 12.8.1998 passed under Section 154 of the Act, (providing for rectification of mistakes), the Assessing Authority has withdrawn the interest allowed at Rs. 22, 57, 869/- under Section 244-A of the Act. The petitioner filed a revision against the order of the Commissioner of Income Tax (Central), Kanpur under Section 264 of the Act, which was rejected on 29.3.2000, giving rise to this writ petition.

7. The Assessing Authority, in the order dated 12.8.1998 under Section 154 of the Act, has observed that on the total payment made by the assessee-company being less than the total interest payment by the assessee, it should be assumed that the entire payment to the assessee was towards the interest payable by it. Under the provisions of Section 244 (the correct number of the Section is Section 244-A), no interest is payable on the interest paid by the assessee and therefore, since the assessee has not made any payment of either of the tax or the additional tax, no interest under Section 144 is allowable to the assessee. The interest amounting to Rs. 22, 57, 869/- was thus withdrawn.

8. The Revisional Authority dismissed the application under Section 264 of the Act, for withdrawal of interest of Rs. 22, 57, 869/- vide order dated 12.8.1998, on the ground that he did not find any justification to intervene on the facts. He did not agree that there was any change of opinion by the AO at the time of passing of order

under Section 154 dated 12.8.1998, and that the AO's interpretation of Section 244-A (i) was not correct. The Revisional Authority did not agree that any interest was payable on refund under Section 154 dated 22.7.1998, and the notice of demand dated 12.8.1998.

9. Shri Shakeel Ahmad, appearing for the petitioner-company submits that the petitioner is entitled to interest on the refund under Section 244-A (a) (b) of the Act. The amount, on which the interest was claimed and paid, was the amount of tax, which was deposited or adjusted with the refund of the earlier assessment year. He submits that under Section 244 of the Act the interest is also included in the word 'tax' and therefore, the interest is also payable on the amount of interest.

10. Shri Shakeel Ahmad submits that the payment of interest under Section 244-A of the Act was a debatable issue and was, therefore, outside the purview of Section 154 of the Act, which admits only rectification of mistake. There was no mistake apparent on the face on record. The order dated 22.7.1998, by which the set off of the loss of M/s Lohia Machinery Manufacturers Limited was allowed, has become final and was not subject matter of dispute in the revision petition. The observations of the revisional authority were without jurisdiction.

11. It is further submitted by Shri Shakeel Ahmad that earlier the interest on refund was not permissible. Section 244-A was added to the Act, providing for interest on refund by Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1.4.1989. Section 240 (1) and 244-A (1) and (2) are quoted as below:-

“244. (1) Where a refund is due to the assessee in pursuance of an order referred to in section 240 and the [Assessing] Officer does not grant the refund within a period of [three months from the end of the month in which such order is passed], the Central Government shall pay to the assessee simple interest at [fifteen] per cent per annum on

the amount of refund due from the date immediately following the expiry of the period of [three] months aforesaid to the date on which the refund is granted.

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) where the refund is out of any tax [paid under section 115WJ or] [collected at source under section 206C or] paid by way of advance tax or treated as paid under section 199, during the financial year immediately preceding the assessment year, 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 from the 1st day of April of the assessment year to the date on which the refund is granted:

Provided that no interest shall be payable if the amount of refund is less than ten per cent of the tax as determined under sub-section (1) of section 115WE or] sub-section (1) of section 143 or] on regular assessment;

(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.

(2) If the proceedings resulting in the refund are delayed for reasons attributable to the assessee, whether wholly or in part, the period of the delay so attributable to him shall be excluded from the period for which interest is payable, and where any question arises as to the period to be excluded, it shall be decided by the Chief Commissioner or Commissioner whose decision thereon shall be final.”

12. Shri Govind Krishna, appearing for the department, submits that the petitioner was liable to pay Rs. 3, 61, 46, 374/- as per ITNS-150 dated 3.3.1997, which included the interest of Rs. 1, 83, 53, 133/- under Section 220 (2) and 234-B of the Act; against this the petitioner made the payment of Rs. 1, 74, 10, 640/-, which is less than the interest payable by the petitioner. Thus it is assumed, that

the entire payment made is towards the interest payable by the petitioner. As per Section 244-A, no interest is payable to the petitioner on the interest paid by it. The observation of the AO to this effect in the order dated 12.8.1998 is correct.

13. Shri Govind Krishna submits that the prescribed certificate for carrying forward business losses of the amalgamated company was not filed along with the return. The claim of the assessee for deduction was thus disallowed by order dated 29.3.1996 under Section 143 (3) of the Act. The CBDT, by order dated 31.3.1998 under Section 119 (2) (b), condoned the delay and consequently the order under Section 154 was passed on 27.7.1998, giving effect to the directions of the CBDT and a refund of Rs. 1, 95, 76, 025/- including the interest under Section 244A of Rs. 22, 57, 869/- was worked out. The petitioner was liable to pay Rs. 3, 61, 46, 374/- including the interest of Rs. 1, 83, 53, 133/- under Section 220 (2) and 234-B of the Act as per order dated 3.3.1997. Against this demand, the petitioner made a payment of Rs. 1, 74, 10, 640/-. The total payment made by the assessee was less than the total interest payable. It is thus assumed that the payment made by the assessee was towards the demand of interest and as per provisions of Section 244-A, no interest is payable by the department on the interest paid by the assessee. Consequently an order under Section 154 of the Act was passed on 12.8.1998, rectifying the mistake and the interest allowed to the assessee under Section 244-A of the Act was withdrawn.

14. Shri Govind Krishna submits that the Assessing Authority made a mistake in allowing refund of interest of Rs. 22, 57, 869/-. He has a right given under Section 154 of the Act to correct the mistake.

15. The question that arises for consideration of the Court in this case is, whether the payment made by the petitioner of Rs. 1, 74, 10,

640/- against the total amount of Rs. 3, 61, 46, 374/- (as per ITNS-150 dated 3.3.1997), which included the interest of Rs. 1, 83, 53, 133/- under Section 220 (2) and 234-B, was paid as tax or interest. If it was paid towards the tax, the petitioner is entitled for interest under Section 244-A of the Act on the amount of refund. If, however, the amount of deposit is treated as interest, no interest is allowed under the Act on the refund of interest.

16. Shri Shakeel Ahmad has filed a supplementary affidavit, annexing therewith the treasury challans on deposit of corporate tax on Form-0020. The company deposited Rs. 75 lacs on 31.3.1997 as income tax; Rs. 57, 15, 922/- on 5.2.1997 as income tax, and thereafter Rs. 41, 94, 718/- on 30.3.1998 as income tax for the assessment year 1993-1994 (Assessing Officer, KNP/AC-CC-V-12 (PAN No.20-028-CY-5940). It is stated in paragraphs-3 and 4 of the supplementary affidavit of Shri Sudhir Singh, Deputy Manager (Taxation) of the petitioner-company, that these amounts were paid as income tax and not towards the interest.

17. In **Delhi Development Authority v. Income Tax Officer 230 ITR 9** the Delhi High Court, in the fact situation in which the DDA had not deducted tax at source from payment of interest made to the buyers of flats, on a finding recorded by the Income Tax Appellate Tribunal that the DDA was not obliged to deduct tax at source and the ITO refunding the amount recovered from the DDA along with interest, allowed the interest under Section 244 (1A) for the year 1988-89 and under Section 244-A for 1989-90 and 1990-91, treating the order under which the petitioner's liability was determined and recovery was made from the petitioner as assessee as the order of assessment. It was held by the Delhi High Court, that the order, under which the liability was determined to make payment and the recovery was made from the petitioner, was an order of assessment.

The petitioner was an assessee and thus the order having been set aside in Appeal, Section 244 and Section 244-A was clearly attracted.

18. Section 244 (1) of the Act is attracted, where a refund is due to the assessee in pursuance to the order referred to under Section 240 (refund due on an order passed in appeal) and where the AO does not grant the refund within three months. In such case, a simple interest is to be paid by the Central Government at 15% per annum on the amount of refund due. Section 244 (1A) is attracted as interest on refund, where the refund of any amount becomes due to the assessee under the Act. In such case, he is entitled to receive in addition to the said amount simple interest calculated in the manner provided in clause (a) and (b) of Section 244 (1) of the Act.

19. It is significant to note that Section 244A (1) (a) refers to the refund out of any tax paid by way of advance tax or paid under Section 199 during the financial year immediately preceding the assessment year. Clause (b) talks of tax or penalty. It does not refer to interest. Both under Sections 244 and 244-A of the Act the interest on refund is on the amount of tax, or tax or penalty and not on the refund of interest.

20. In **Delhi Development Authority v. Income Tax Officer** (supra) the refund was of tax deposited, which was to be deducted at source from payment of interest made to the buyers of flats and not interest deposited by the Delhi Development Authority.

21. In Section 244A, the words 'refund of any amount due to the assessee', under this Act are included in the section itself. In **CIT v. Goodyear India Ltd (2001) 249 ITR 527 (Delhi)** it was held as under (page 532):-

“Section 244 deals with interest on refund where no claim is needed. Sub-section (2), inter alia, provides that where a refund is due to the assessee, in pursuance of an order referred to in section

240' and the Assessing Officer does not grant the refund within the stipulated time, the Central Government is required to pay simple interest at the stipulated rate. Section 240 deals with refund on appeal, etc. This provision clearly lays down that where as a result of any order passed in appeal or other proceedings 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. The crucial expressions in section 240 are 'any amount which becomes due to the assessee as a result of any order passed in any appeal or other proceedings under the Act and the 'amount becomes due to the assessee'. Section 244 refers to the liability fastened on the Central Government in case of failure to grant refund within the stipulated time in a case where refund is due to the assessee in pursuance of an order referred to in Section 240. A combined reading of both the provisions makes the position crystal clear that it is any amount which becomes due to the assessee and not necessarily the tax component. Undisputedly, a sum of Rs. 1, 90, 499 which qualifies for interest became payable to the assessee on the basis of an order passed under section 240 of the Act. Merely because this was inclusive of an amount which was payable under section 214 of the Act, that would not make the position any different. It is an amount which became due to the assessee on the basis of the appellate order. Therefore, the assessee was entitled to interest in terms of section 244 of the Act. A similar view has been taken by the Gujarat High Court in **D.J. Works v. Deputy CIT (1992) 195 ITR 227** and **Chimanlal S. Patel v. CIT (1994) 210 ITR 419** though with different conclusions.”

22. In **CIT v. Narendra Doshi (2002) 254 ITR 606 (SC)**, a three-judge Bench of the apex court affirmed the decision of the High Court where interest on interest was granted.

23. In **Sandvik Asia Ltd v. CIT (2006) 280 ITR 643 (SC)**, it was held:-

“In our view, the Act recognizes the principle that a person should only be taxed in accordance with law and hence where excess amounts of tax are collected from an assessee or any amounts are wrongfully withheld from an assessee without authority of law the Revenue must compensate the assessee.

At the initial stage of any proceedings under the Act any refund will depend on where any tax has been paid by an assessee in excess of tax actually payable by him and it is for this reason that section 237 of the Act is phrased in terms of tax paid in excess of amounts properly chargeable. It is, however, of importance to appreciate that section 240 of the

Act, which provides for refund by the Revenue on appeal, etc., deals with all subsequent stages of proceedings and, therefore, is phrased in terms of 'any amount' becoming due to an assessee.

The Delhi High Court in **Goodyear India Ltd's** case (2001) 249 ITR 527 held that an assessee is entitled to further interest under section 244 of the Act on interest under section 214 of the Act which had been withheld by the Revenue. The case of the Revenue was that interest payable to an assessee under section 214 of the Act was not a refund as defined in section 237 of the Act and hence no interest could be granted to the assessee under section 244 of the Act. The court held that for this purpose section 240 of the Act was relevant which referred to refund of any amount becoming due to an assessee' and that the said phrase would include interest and hence the assessee was entitled to further interest on interest wrongfully withheld. It is also important to appreciate that the Delhi High Court also referred to the Gujarat High Court decision in **D.J. Works'** case (1992) 195 ITR 227 and read it as taking the same view. This supports the view of the appellant on the correct reading of the Gujarat decision.

As already noticed in paragraph supra, the Madras High Court in **Needle Industries Private Ltd's** case (1998) 233 ITR 370, has also interpreted the phrase 'any amount' in the same manner when considering the provisions of section 244 (1A) of the Act, which also uses the same phrase in the context of interest payable by the Revenue. In express terms the Court held that the expression referred not only to the tax but also to interest. The Court agreed with a similar view taken by the Kerala High Court in the case of **Ambat Echukutty Menon** (1988) 173 ITR 581. Both these were cases where the Court was called upon to decide whether further interest was payable by the Revenue on interest which had to be repaid to the assessee.

In our opinion, the appellant is entitled to interest under section 244 and/or section 244A of the Act in accordance with the terms and provisions of the said sections.”

24. The Supreme Court in **Sandvik Asia Ltd. v. CIT** (Supra) has approved the opinions of Delhi High Court in **Goodyear India Ltd.** (Supra); **D.J. Works'** (Supra); **Needle Industries Pvt. Ltd.** (Supra) and **Ambeat Echukutty Menon** (Supra) in holding that for the purposes of Section 244, an assessee is entitled to further interest, on

interest under Section 214 of the Act, which is withheld by the revenue. Section 240 of the Act referred to refund on any amount becoming due to the assessee and the said phrase would include interest and hence assessee was entitled to further interest on interest the wrongfully withheld.

25. The petitioner was liable to pay Rs. 3, 61, 46, 374/- as per ITNS-150 dated 3.3.1997, which included interest of Rs. 1, 83, 53, 133/- under Section 220 (2) and 234-B of the Act against which the petitioner made payment of Rs. 1, 74, 10, 640/-. The AO's assumption in the order under Section 154, that since the amount deposited was less than interest payable, it should be treated as interest and not as tax, is based upon conjectures. He did not verify whether the amount was actually paid as tax or interest.

26. The treasury challans filed along with the supplementary affidavit clearly demonstrate, that the petitioner had deposited Rs. 75 lacs on 31.3.1997, Rs. 57, 15, 922/- on 5.2.1997, and Rs. 41, 94, 718/- on 30.3.1998 as income tax, and not towards interest. The deposit is mentioned in the first column on the top as income and not as interest under Section 201 (1A) in the third column. The department was thus not entitled to draw any inference or presumption that the amount was not deposited as tax, but as interest. The amount deposited as tax could not be treated as interest.

27. Where valuable rights of refund and interest is involved, the Income Tax Authorities are not required to draw assumption on the quantum of the amounts. In this case there is no other material placed by the respondents to justify the inference other than the quantum of the amount being less than the interest payable, to support the assumption that the deposit was of interest and not of tax. To test the assumption, if we deduct the interest of Rs.1, 83, 53, 133/- out of the total amount of Rs. 3, 61, 46, 374/- liable to be paid by the petitioner,

the amount of tax comes to Rs. 1, 77, 93, 241/-, which is more than the amount deposited by the petitioner.

28. We also find that the revisional order did not give any reason other than supporting the same reasons given by the AO in the order under Section 154 of the Act and also does not refer to any reasons other than those given by the AO that since the amount deposited was less than the interest to be paid, there will be an assumption that the petitioner had deposited the amount as interest and not the tax.

29. On the aforesaid discussion, we hold that the amount in question was deposited as tax and not as interest, and also that even if a presumption could be drawn that the amount was deposited as interest, the interest under Section 244A (1) of the Act, was payable on interest.

30. For the aforesaid reasons, the writ petition is **allowed**. The orders passed by the AO dated 12.8.1998 under Section 154 of the Act, and the order in revision dated 17.7.2000 for the assessment year 1993-94 are set aside in so far as they deny the refund of Rs.22, 57, 869/-. The petitioner-company will also be entitled to interest on this amount from the date of deposits.

Dt.06.7.2012

RKP/