

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 9820 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI

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- 1 Whether Reporters of Local Papers may be allowed
to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy
of the judgment ?
- 4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?
- 5 Whether it is to be circulated to the civil judge
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BHARATBHAI B SHAH - Petitioner(s)
Versus
INCOME TAX OFFICER & 2 - Respondent(s)

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Appearance :

MR JP SHAH for Petitioner
MR MR BHATT, SR. ADV. WITH MRS MAUNA M BHATT for Respondent(s) : 1 -
3.

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 18/06/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. In this petition, the petitioner has challenged the action of the revenue authorities in demanding interest under section 234A and 234C of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The petition arises in following factual background.

2.1 Petitioner is an individual and is assessed to tax regularly. For the assessment year 1996-97, the petitioner filed his return of income on 27th March 1998. It is not in dispute that the assessee had to file such return latest by 31.8.96. He, therefore, filed such return well after the due date. On 30.8.96, the assessee had paid tax of Rs.10 lacs under section 140A of the Act.

2.2 The assessee's return was assessed under section 143(1)(a) of the Act. The Assessing Officer assessed tax at Rs.15,08,474/-. Since the assessee had already suffered tax deduction at source of Rs.25,533/-, his remaining tax liability came to Rs.14,82,941/-. We may recall that out of such amount, he had already paid a sum of Rs.10 lacs towards tax before due date of filing of return.

2.3 The revenue demanded interest under section 234A of the Act for the entire amount of Rs.14,82,941/-. The case of the assessee, however, is

that he having already deposited a sum of Rs.10 lacs before the due date of filing of return, interest under section 234A can be charged only on the remaining amount of Rs.4,82,941/- and not on the total sum of Rs.14,82,941/-. This in nutshell is the controversy between the petitioner and the respondent.

3. We may record that in the petition, the petitioner had also questioned the liability to pay interest of Rs.82,303/- under section 234C of the Act. However, while pursuing this petition, the petitioner had also parallely appealed to the Commissioner seeking waiver of interest. The Commissioner, during the pendency of this petition, passed an order on 25.7.2003, a copy of which is produced along the the affidavit of the respondent dated 31st July 2003, in which the Commissioner gave substantial relief to the petitioner on the interest demanded under section 234C of the Act. The Commissioner ordered waiver of interest amount of Rs.60,059/- from a total of Rs.82,303/-. The net interest demanded under section 234C, that now survives is Rs.22,244/-. Counsel for the petitioner stated that looking to this small amount, he would not press the relief claimed in the petition qua such interest under section 234C of the Act. Under the circumstances, we have focussed our attention only to a single controversy between the parties, viz. liability of the petitioner to pay interest under section 234A of the Act.

4. Learned counsel Shri J.P.Shah for the

petitioner submitted that the Revenue grossly erred in raising demand of interest under section 234A of the Act for the entire amount of Rs.14,82,941/- when substantial amount out of such tax liability of the petitioner i.e. Rs.10 lacs was already paid before the due date of filing of the return. Counsel submitted that the language used in section 234A of the Act would not permit such charging of interest. Interest, if recovered for the entire amount would make the provisions of section 234A penal in nature. Placing heavy reliance on the decision of the Delhi High Court in the case of **Dr.Prannoy Roy v. C.I.T. (Delhi)**, 254 ITR 755, counsel submitted that such an interpretation is not permissible.

4.1 Counsel pointed out that decision of the Delhi High Court in the case of Dr.Prannoy Roy (supra) was carried in appeal before the Apex Court by the Revenue. The Apex Court in the case of **CIT v. Pranoy Roy (SC)**, (2009) 309 ITR 231 (SC) by a speaking order, upheld the decision of the Delhi High Court and approved the interpretation given to section 234A of the Act by the High Court.

4.2 Placing reliance on a decision in the case of **R.B.Jodha Mal Kuthiala v. CIT (SC)**, 82 ITR 570 (SC), counsel submitted that though equitable consideration may not apply to taxing statute, tax law like all other laws, should be interpreted reasonably and in consonance with justice.

5. On the other hand, learned counsel Shri

M.R.Bhatt for the Revenue opposed the petition contending that the statutory provisions contained in section 234A of the Act are very clear and permit no ambiguity. The assessee did not file return within the due date and had not even paid the full tax, as eventually assessed before the last date for filing return. Case of the assessee was therefore covered under section 234A of the Act. The assessee, therefore, cannot escape the liability to pay interest under the said section. Counsel pointed out that the decision of the Delhi High Court in the Case of Dr.Prannoy Roy (supra) was brought to the notice of this Court in the case of **Roshanlal S. Jain v. Deputy CIT (Guj)**, (2009) 309 ITR 174 (Guj). This Court, however, found itself unable to adopt the view of the Delhi High Court and upheld the interest liability under section 234A of the Act.

5.1 Counsel relied on a decision of Five Judge Bench of the Apex Court in the case of **C.I.T. v. Anjum M.H.Ghaswala**, 252 ITR 1 (SC) to contend that charging of interest under section 234A is mandatory. Counsel pointed out that the decision in the case of Anjum M.H.Ghaswala (supra) was referred to and relied upon in a subsequent decision of Three Judge Bench of the Apex Court in the case of **C.I.T. v. Damani Brothers**, 259 ITR 475 (SC) for rejecting the assessee's contention that charging of interest under section 234A, B and C would amount to double levy of interest.

5.2 Relying on a decision in the case of **State of**

U.P. v. Synthetics and Chemicals Ltd, (1991) 4 SCC 139, counsel submitted that the decision of the Delhi High Court in the case of Dr.Prannoy Roy (supra) having been rendered *per incuriam* of the earlier decisions of the Apex Court in the case of Anjum M.H.Ghaswala (supra) and Damani Brothers (supra), ratio laid down by this Court in the case of Roshanlal S. Jain (supra) should be followed. He submitted that at any rate, the decision of the Delhi High Court in the case of Dr.Prannoy Roy (supra) can be stated to be rendered *sub-silentio*. Lastly, counsel relied on the circular No.549 dated 31st October 1989 of CBDT available at 182 ITR (Statutes) 37 wherein while explaining the provisions contained in section 234A, B and C, various examples have been cited to explain the working of the said provisions.

6. Having thus heard the learned counsel for the parties and having perused the documents on record, as already noted, the sole controversy between the parties is with respect to charging of interest on residue of tax short assessed and tax paid and not on the entire sum of the tax assessed. The Revenue contends that since infraction referred to in section 234A of the Act of not having filed return within the due date complete and since none of the exclusionary clauses provided in sub-section (1) of section 234A applies in the present case, such charging of interest for the entire amount is not only permissible but is mandatory.

7. Section 234A of the Act as it stood at the

relevant time, read as under:

"234A.(1) Where the return of income for any assessment year under sub-section (1) or sub-section (4) of section 139, or in response to a notice under sub-section (1) of section 142, is furnished after the due date, or is not furnished, the assessee shall be liable to pay simple interest at the rate of two percent for every month or part of a month comprised in the period commencing on the date immediately following the due date, and, -

(a) where the return is furnished after the due date, ending on the date of furnishing of the return; or

(b) where no return has been furnished, ending on the date of completion of the assessment under section 144,

on the amount of [the tax on the total income as determined under sub-section (1) of section 143 or on regular assessment as reduced by the advance tax, if any, paid and any tax deducted or collected at source]"

Explanation -1. In this section, "due date" means the date specified in sub-section (1) of section 139 as applicable in the case of the assessee.

Explanation 2. In this sub-section, "tax on the total income as determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.

Explanation 3. Where, in relation to an assessment year, an assessment is made for the first time under section 147, the assessment so made shall be regarded as a regular assessment for the purpose of this section.

Explanation 4. In this sub-section, "tax on the total income as determined under sub-section (1) of section 143 or on regular assessment" shall, for the purposes of computing the interest payable under section 140A, be deemed to be tax on total income as declared in the return.

(2) The interest payable under sub-section (1) shall be reduced by the interest, if any, paid under section 140A towards the interest chargeable under this section.

(3) Where the return of income for any assessment year, required by a notice under section 148 issued (after the determination of income under sub-section (1) of section 143 or after the completion of an assessment under sub-section (3) of section 143 or section 144 or section 147, is furnished after the expiry of the time allowed under such notice, or is not furnished, the assessee shall be liable to pay simple interest at the rate of two per cent for every month or part of a month comprised in the period commencing on the day immediately following the expiry of the time allowed as aforesaid, and

(a) where the return is furnished after the expiry of the time aforesaid ending on the date of furnishing the return, or

(b) where no return has been furnished, ending on the date of completion of the re-assessment or re-computation under section 147,

on the amount by which the tax on the total income determined on the basis of such re-assessment or re-computation exceeds the tax on the total income determined under sub-section (1) of

section 143 or on the basis of the earlier assessment aforesaid.

(4) Where as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount of tax on which interest was payable under sub-section (1) or sub-section (3) of this section has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly.

(ii) In a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

(5) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April 1989 and subsequent assessment years."

It is not in dispute that the assessee did not file return of income within the due date.

8. The issue, however, is no longer *res integra*. A very similar issue came up for consideration before the Delhi High Court in the case of Dr. Prannoy Roy (*supra*). In the said case, the assessee had made the

entire payment of tax before the due date. However, he had failed to file return within the time prescribed. The Revenue demanded interest under section 234A of the Act for non-filing of return within the due date. Ultimately, when the issue reached the Delhi High Court, the High Court upheld the contention of the assessee and rescinded the interest demand, inter alia, observing that tax had been paid although no return was filed. The Revenue, therefore, had not suffered any monetary loss. The High Court further observed as under :

"We, therefore, are of the opinion that in this case if the doctrine of purposive construction is not taken recourse to, the same would betray the purport and object of the Act.

If the aforementioned construction is not resorted to, we will have to read a penal provision in section 234A, which was not and could not have been the object of the law for the reasons stated hereinabove."

The said decision of the Delhi High Court in the case of Dr.Prannoy Roy (supra) was questioned before the Apex Court by the Revenue. The Apex Court, by a short, but speaking order upheld the decision of the Delhi High Court. In the said decision in the case of CIT v. Pranoy Roy (supra), the Apex Court after noticing the facts giving rise to the appeal upheld the Delhi High Court decision and rejected the appeal of the Revenue making following observations:

"Having heard counsel on both sides, we entirely agree with the finding recorded by the High Court as also the interpretation of section 234A of

the Act as it stood at the relevant time.

Since the tax due had already been paid which was not less than the tax payable on the returned income, which was accepted, the question of levy of interest does not arise. Thus, we find no merit in this appeal and the same is dismissed."

To our mind, the issue is thus squarely covered on all material aspects by the decision of the Delhi High Court in the case of Dr.Prannoy Roy (supra) which came to be confirmed by the Apex Court in the manner noted above. The Delhi High Court, as we have noted, held that if the Revenue is allowed to recover interest on the tax which is already paid within the due date, merely because the return was not filed in time, would make the provision penal in nature and exposes it to challenge of its vires. In the present case, the assessee had already deposited tax of Rs.10 lacs before the due date of filing return. The return, of course, was filed belatedly. While framing the assessment of such belated return, the Assessing Officer held that the assessee should pay further tax of Rs.4,82,941/- (after giving credit of Rs.25,533 which was paid by way of tax deducted at source). Thus, the Revenue's demand for interest for the entire amount of Rs.14,82,941/- under section 234A would fall foul to the ratio of the decision of the Delhi High Court in the case of Dr.Prannoy Roy (supra). The Revenue can collect interest under section 234A only on the additional sum of Rs.4,82,941/- and not on the entire amount. Permitting the Revenue to collect interest on the entire amount, though admittedly tax of Rs.10 lacs

was already paid before the due date of filing of return, would render the provisions of section 234A penal in nature which was frowned upon by the Delhi High Court and on that basis, the decision was upheld by the Apex Court. It is undoubtedly true that the Gujarat High Court, when showed the decision of the Delhi High Court in the case of Dr.Prannoy Roy (supra), took a different view in the case of Roshanlal Jain (supra). It is also true that this Court in the case of Roshanlal Jain (supra) had given detailed reasons for coming to such conclusion. The Court was of the opinion that the provisions contained in section 234A and B are not only valid, but they operate in different fields. By a conscious decision, giving detailed reasons, this Court differed from the view expressed by the Delhi High Court in the case of Dr.Prannoy Roy (supra). We may, however, notice that unfortunately, the decision of the Apex Court in the case of CIT v. Pranoy Roy (supra) confirming the view of the Delhi High Court was not brought to the notice of the Gujarat High Court when the decision in the case of Roshanlal Jain was rendered. We may record that the Apex Court rendered its decision in the case of CIT v. Pranoy Roy (supra) on 17th September 2008 while this Court in the case of Roshanlal Jain (supra) decided the petition of the assessee on 23rd September 2008. Thus, because of close proximity of the two decisions, decision in the case of Roshanlal Jain was rendered without reference to the decision of the Apex Court in the case of CIT v. Pranoy Roy (supra). Under the circumstances, we have based our conclusion on the

decision of the Delhi in the case of Dr.Prannoy Roy (supra) as approved by the Apex Court.

9. In the case of State of UP v. Synthetics and Chemicals Ltd (supra), the Apex Court after noticing the trend of English Courts with respect to decision rendered *per incuriam* in the context of the principle of *sub-silentio* observed as under:

"41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to the attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. The bench held that, 'precedents sub-silentio and without argument are of no moment'. The court thus have taken recourse to this recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Sharma Rao v. Union Territory of Pondicherry it was observed, "it is trite to

say that a decision is binding not because of its conclusion but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

In the present case, however, we do not find that the Delhi High Court while rendering the decision in the case of Dr.Prannoy Roy (supra) ignored any of the earlier binding decisions of the same or superior court. The decision in the case of Anjum M.H.Ghaswala (supra) rendered by the Apex Court laid down that charging of interest under section 234A, B and C, etc. is mandatory in nature. However, the question which the Delhi High Court was considering in the case of Dr.Prannoy Roy (supra) did not arise before the Apex Court in the case of Anjum M.H.Ghaswala (supra). Similarly, in the case of Damani Brothers (supra) the Apex Court did not have the occasion to consider the chargeability of interest for late filing of return under section 234A of the Act though, the entire tax may have been paid up by the assessee before the due date. The Apex Court in the case of Damani Brothers (supra) was considering the contention of the assessee that charging interest under section 234A, B and C would amount to permitting double interest on the same amount. The Apex Court, however, drew a distinction between charging of double interest and charging of interest, may be on the same amount but for two

different infractions. In this respect, the Apex Court held and observed as under:

"At this juncture, assessee's plea that there is no scope for double levy of interest; (i) for non payment of advance tax for which interest is chargeable under Section 234B of the Act and (ii) for delay in payment of the amount of interest, if any, payable in terms of Section 245D(2C) or Section 246D(6A) needs to be considered. There can be no dispute that double levy of interest is not permissible. But this principle is applicable only when the interest is chargeable more than once for same set of infractions. If the provisions under which interests are charged operate in different fields, there is no statutory bar on levying the interest, because in essence it does not amount to double levy of interest but levy of interest separately for different infractions. Section 234B, Section 245D(2C) and Section 245D(6A) operate in different fields. Section 234B comes into operation when there is default in payment of advance tax. Liability to pay interest under Section 245D(2C) arises when additional amount of income-tax is not paid within time specified under sub-section (2A). Section 245D(6A) fastens liability to pay interest when tax payable in pursuance of an order under sub-section (4) is not paid within the specified time. Therefore, when interest is charged in respect of the said provisions it does not amount to double levy of interest, as the infractions are different."

Thus, neither the decision in the case Anjum M.H.Ghaswala nor the case of Damani Brothers involve directly the question with respect to charging of interest under section 234A of the Act even when tax was already paid before the due date. We, therefore, cannot uphold the contention of the counsel for the Revenue that the decision of the Delhi High Court in the case of Dr.Prannoy Roy (supra) should be held to

have been decided *per incuriam* or *sub-silentio*.

10. It is, of course, true that there is minor difference between the case of Dr.Prannoy Roy (supra) and the case of the present assessee on hand. In the case of Dr.Prannoy Roy (supra), the assessee had paid up the entire tax before the due date. In the present case, the assessee deposited a sum of Rs.10 lacs under section 140A of the Act. In addition thereto, the assessee had also suffered tax deduction at source to the tune of Rs.25,533/-. Eventually, the Assessing Officer, assessed the tax liability of the assessee at total of Rs.15,08,474/-. Thus the assessee had short-paid tax to the tune of Rs.4,82,941/-. To our mind, however, when we look at the ratio of the decision of the Delhi High Court in the case of Dr.Prannoy Roy (supra), such distinction would not be material. What was held by the Delhi High Court was that charging of interest from an assessee for late filing of return though the tax was already paid, would render the provision penal in nature, which the statute did not provide. If we apply the same ratio in the present case, the only modification we need to adopt is that the assessee must be held to be liable to pay interest under section 234A of the Act on the difference of amount between the tax assessed and the amount which he had paid before the due date to which even the assessee has not raised any serious objection.

11. In the result, the petition is allowed. Payment of interest on the entire amount of

Rs.14,82,941/- is set aside. Revenue, however, shall be entitled to collect such interest under section 234A of the Act on a sum of Rs.4,82,941/- for the entire period i.e. 1.9.96 (after due date of filing of return) till 27th March 1998 (date on which the return was filed). The petition is accordingly allowed with consequential effect. Rule is made absolute accordingly.

(Akil Kureshi J.)

(Harsha Devani, J.)

(vjn)

