

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.301 OF 2000

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| 1. Union of India, |] | |
| (Service through Ministry of Law & Justice, |] | |
| Company Affairs), |] | |
| Aayakar Bhavan, M.K.Road, Mumbai-400 020. |] | |
| | | |
| 2. Commissioner of Income Tax, |] | |
| Mumbai City V, Aayakar Bhavan, |] | |
| M.K.Road, Mumbai 0 400 020. |] | ... Petitioners |

Versus

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|--|---|-----------------|
| 1. M/s. Dodsall Ltd. |] | |
| Plot No.1, Udyog Nagar Estate, |] | |
| S.V.Road, Goregaon (West), Mumbai-400 062. |] | |
| | | |
| 2. Income Tax Settlement Commission |] | |
| Mahalaxmi Chambers, Mumbai – 400 004. |] | ... Respondents |

Mr. Sham V. Walve a/w Mr. Dinesh Kukreja & Mr. Pritish Chatterjee for
 Petitioners.

Ms. Shobha H. Jagtiani a/w Mr. Priyanshu Khatri & Ms. Anjali Jhawar i/b
 D M Harish & Co. for Respondent No.1.

CORAM :- K. R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATE :- 09 DECEMBER, 2021

ORAL JUDGMENT : (PER : AMIT B. BORKAR. J.) :-

1. By the present Petition, Petitioners challenge orders dated 05/06/1998 and 04/08/1999 passed by Respondent No.2 purporting to reduce the interest levied under Section 220(2) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The assessment year relevant for the purpose of Appeal is A.Y. 1989-90.

3. The return of income was filed by Respondent No. 1 in respect of the aforesaid assessment year on 11/10/1990, declaring a total income of Rs.1,14,75,526/-. Assessment order dated 31/03/1992 was passed under Section 143(3), assessing total income at Rs.10,31,23,618/-. Notice of demand was served upon Respondent No. 1 on 31/03/1992 together with the assessment order under Section 143(3).

4. On an application made by Respondent No.1, the assessment order under Section 154 of the Act was rectified on 27/07/1992, thereby revising the total income to Rs.5,50,53,255/- on account of allowance of set off of unabsorbed investment allowance brought forward from A.Y. 1986-87, A.Y. 1987-88 and A.Y. 1988-89 of Rs.1,17,78,817/-, Rs. 3,01,39,586/- and Rs.51,01,310/- respectively, totalling Rs.4,70,19,713/-.

5. On 6/8/1992, Respondent No. 1 made an application before the Settlement Commission for A.Y. 1989-90 and A.Y. 1990-91.

6. By an order dated 31/01/1996, Respondent No.2 determined the taxable income of Respondent No.1 for A.Y. 1989-90 at Rs.4,97,26,970/-.

7. On 16/02/1996, the Assessing Officer gave effect to the order of Respondent No.2 under Section 245D(4), determining the total income for A.Y. 1989-90 at Rs.4,97,26,970/- and calculated interest payable under Section 220(2) of the Act at Rs.1,71,93,439/-. This figure was again rectified vide order dated 30/12/1996 under Section 220(2) and Section 154 and revised to Rs.1,75,62,083/-. Since the original assessment order was served up on Respondent No. 1 on 31/03/1992, after giving one month for payment, the interest under Section 220(2) became payable w.e.f. 01/05/1992 to 31/03/1996 on demand payable on the finally determined income by the Income Tax Settlement Commission under Section 245D(4) at Rs.4,79,26,970/-.

8. By Miscellaneous Application dated 21/01/1998, Respondent No.1 sought the rectification of the order passed by Respondent No.2 under Section 245D(4) of the Act, *inter-alia*, on the ground that since the said order was silent on the point of charging interest under Section 220(2), it should be considered to have been waived.

9. By order dated 05/06/1998, Respondent No.2 *inter-alia* held that it did not consider it to be a good case for waiver of interest chargeable under Section 220(2). However, regarding the method of charging of interest u/s.220(2), Respondent No.2 directed the A.O. to

take the income as determined by him in his order dated 27/07/1992, adjust it in accordance with the order of the Commission u/s.245D(4) but without withdrawing the benefit of set off of brought forward investment allowance.

10. Petitioners, therefore, moved Miscellaneous Application on 11/06/1999 *inter-alia* stating therein that Respondent No.2 having held that it is not a good case for waiver of interest chargeable under Section 220(2) of the Act could not have granted relief to Respondent No.1 granting the benefit of set off of brought forward investment allowance.

11. By the impugned order dated 04/08/1999, Respondent No.2 rejected the application filed by Petitioners.

12. Being aggrieved by the orders dated 05/06/1998 and 04/08/1999 passed by Settlement Commission, thereby reducing the liability of Respondent No.1 to pay interest under Section 220(2) of the Act, Petitioners have filed present Petition.

13. We have heard Mr. Sham V. Walve for Petitioners and Ms.Shobha H. Jagtiani for Respondent No.1.

14. Mr. Walve submitted that the Settlement Commission had no power to modify its order as the order passed by Settlement Commission is conclusive as per Section 245(I) of the Act. He, therefore, submitted that subsequent modification of order dated 31/01/1996 by impugned order is without jurisdiction.

15. *Per contra*, Ms. Jagtiani submitted that during the pendency of present Petition, Income Tax Appellate Tribunal, Mumbai (hereinafter referred to as 'ITAT') had allowed Appeal filed by Respondent No.1 setting aside the order passed by CIT(A) directing withdrawal of investment allowance granted under Section 32A of the Act. She submitted that liability to pay the amount on which interest was payable under Section 220(2) had been extinguished with the result. Therefore, as per proviso to Section 220(2), the interest payable is required to be reduced accordingly.

16. We have considered the submissions and the documents on record, including Judgment of ITAT dated 18/07/2002 in ITA No.5416/BOM/95 to ITA No.5419/BOM/95.

17. For determination of the issue involved, it is necessary to consider Section 220(2) of the said Act, which reads thus :-

“(220)(2) If the amount specified in any notice of demand under section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at one per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid :

***Provided that,** whereas 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 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded.”*

18. Reading of Section 220(2) makes it clear that the language used in sub-Section (2) of Section 220 of the Act is that the interest is payable by Assessee for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid. Accordingly, the first proviso to sub-Section (2) of Section 220 provides that where as a result of an Appellate order, the amount on which interest was payable under this Section is reduced, the interest shall be reduced accordingly. Thus, the effect of the first proviso to sub-Section (2) to Section 220 will be that the amount on which the interest is payable under sub-Section (2) of Section 220 will get modified

according to the Appellate order. As seen from the proviso to sub-Section (2) of Section 220, there can be variation in charging interest if ultimately due to the result of Appellate order, the liability to pay the original amount on which interest is levied under Section 220 ceases, accordingly, the Assessee needs to be given the benefit of reduction in interest resulting in reduced payment of interest.

19. In the facts of the present case, CIT(A)(VI), Bombay, by order dated 30/03/1995, directed the Assessing Officer to withdraw the investment allowance granted under Section 32A of the Act. Accordingly, demand notice under Section 156 of the Act came to be issued to Respondent No.1. The said amount of interest on investment allowance under Section 32A was directed to be waived by order dated 05/06/1998 by the Settlement Commission. Petitioners therefore filed an application for recalling the order dated 05/06/1998, which by the impugned order was rejected.

20. Therefore, the issue involved in the present Petition is restricted only to the liability of Respondent No.1 to pay interest under Section 220 of the Act on the amount of set off of brought forward investment allowance.

21. In our opinion, as per proviso to sub-Section (2) of Section 220 of the Act, once the amount on which interest was charged gets extinguished, consequently the liability of Respondent No.1 to pay interest on said amount will also be extinguished.

22. Mr. Walve is right in submitting that as per Section 245(i) of the Act, the order passed by Settlement Commission is conclusive and binding on all authorities under the Act. But in our opinion, it is not necessary to go into said issue, since the result of the order passed in ITA No.5416/BOM/95 is to extinguish the liability of Respondent No.1 to pay the amount on which the interest was charged under Section 220 of the Act, interference under Article 226 which is discretionary, would result into the revival of illegality.

23. In the case of ***Chandra Singh Vs. State of Rajasthan & Ors.***¹, Their Lordships, in paragraph 43, observed as under :

*“43. Issuance of a Writ of Certiorari is a discretionary remedy (See **Champalal Binani v. CIT**). The High Court and consequently this Court while exercising their extra-ordinary jurisdiction under Article 226 or 32 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the High Court or this Court may refuse to extend the benefit of a discretionary relief to the applicant. Furthermore this court exercised its discretionary jurisdiction under Article 136 of the Constitution*

¹ 2003 (6) SCC 545

*of India which need not be exercised in a case where the impugned judgment is found to be erroneous if by reason thereof substantial justice is being done. (See **S.D.S. Shipping Pvt. Ltd. v. Jay Container Services Co. (P) Ltd.**). Such a relief can be denied, inter alia, when it would be opposed to public policy or in a case where quashing of an illegal order would revive another illegal one. This Court also in exercise of its jurisdiction under Article 142 of the Constitution of India is entitled to pass such order which will be complete justice to the parties.”*

24. It is well settled when the technicality and substantial justice are pitted against each other, later should prevail over the former. The Apex Court, in a decision in the case of **Laxmibai (Dead) Through Lrs And Another Vs. Bhagwantbuva (Dead) Through Lrs And Others**², has observed in paragraph 49 as follows :

“49. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, and the courts may in the larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best.”

25. We are therefore of the view that interference by this Court in the present Writ Petition would result in direction to Respondent No.1 to pay interest on an amount which had been extinguished due to the Judgment in ITA No.5416/BOM/95 and consequently will result into miscarriage of justice. The power under Article 226 needs to be exercised

² (2013) 4 Supreme Court Cases 97

to prevent miscarriage of justice. It will be exercised only in furtherance of interest of justice and not merely on the making out of a legal point.

26. Therefore, we refuse to interfere in the exercise of power under Article 226 of the Constitution of India in its extraordinary discretionary jurisdiction.

27. Petition, therefore, stands dismissed.

(AMIT B. BORKAR, J.)

(K. R. SHRIRAM, J.)