

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE S.V.BHATTI

&

THE HONOURABLE MR.JUSTICE BASANT BALAJI

FRIDAY, THE 1ST DAY OF JULY 2022 / 10TH ASHADHA, 1944

WA NO. 2233 OF 2016

AGAINST THE ORDER/JUDGMENT IN WPC 17664/2013 OF HIGH COURT OF
KERALA

APPELLANT/S:

PALA MARKETING CO-OPERATIVE SOCIETY LTD.
P.B NO 33, PALA, KERALA, REPRESENTED BY ITS SECRETARY, K.C.
JOSEPH.

BY ADVS.
ENOCH DAVID SIMON JOEL
S.SREEDEV
RONY JOSE
SUZANNE KURIAN
CIMIL CHERIAN KOTTALIL
LEO LUKOSE

RESPONDENT/S:

- 1 COMMISSIONER OF INCOME TAX
KOTTAYAM 686 001.
- 2 JOINT COMMISSIONER OF INCOME TAX ASSESSMENT
SPECIAL RANGE, KOTTAYAM 686 001.

BY ADVS.
SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 01.07.2022, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

S.V.Bhatti,J.

We have heard Mr. Leo Lukose for the appellant and Mr.P.K.R Menon learned Sr.Counsel for the respondents.

2. Pala Marketing Co-operative Society Ltd/petitioner in W.P.(C) No.17664/2013 is the appellant. The Commissioner of Income Tax and another are the respondents. Parties are referred to as arrayed in the writ petition. The petitioner prayed for the following reliefs:

- “i) Issue a writ of certiorari or other appropriate writ order or direction quashing Ext.P9.
- ii) Issue a writ of mandamus or other appropriate writ order or direction, directing the respondents to pay interest on refund as per Section 244(A) of the Income Tax Act in favour of the petitioner from 01.04.1997 till the date of refund.
- iii) Issue such other appropriate writ order or direction that may be deemed to be just and equitable in the facts and circumstances of the case.”

3. Through Ext.P9, the request of the petitioner for

interest on refund of advance tax paid was rejected. The petitioner prays for payment of interest in terms of Section 244 A of the Income Tax Act, 1961 (for short, 'the Act') for the period 01.04.1997 to 11.02.2008.

4. The petitioner is a Co-operative Society, registered under the Kerala Co-operative Societies Act, 1969 (for short, 'the Societies Act, 1969'). The subject matter of the litigation relates to the assessment year 1997-98. The petitioner paid advance tax of Rs.10,00,000/- during the accounting year 1996-97 and a sum of Rs.47,957/- was recovered from the petitioner's bills towards the Tax Deducted at Source (TDS). Thus, the total tax deposited or deducted on account of the petitioner amounts to Rs.10,47,957/-. On 01.02.2000, upon completion of statutory audit under the Societies Act, 1969, the petitioner filed returns beyond the period stipulated for the assessment year 1997-98. The petitioner filed an application under Section 119(2)(b) of the Act, before the Central Board of Direct Taxes (CBDT) for condoning the delay in filing the refund application. On 17.11.2006 the request of the petitioner for

condoning the delay in filing the refund application was rejected. The petitioner challenged the order dated 17.11.2006 in W.P.(C) No.21977/2007. On 26.11.2007, W.P.(C) No.21977/2007 was allowed and the operative portion of the said judgment reads as follows:

“In the circumstances, I quash Ext.P9 declaring petitioner’s entitlement for condonation of delay under Section 119(2)(b) of the Act and consequently direct the 4th respondent to process petitioner’s claim for refund under Section 237 and grant refund to the extent found eligible within a period of three months from the dates production of copy of this judgment by the petitioner.”

5. On 11.02.2008, the Assistant Commissioner of Income Tax, Circle-1, had given effect to the judgment of this Court dated 26.11.2007. The order reads thus:

On giving effect to the order of the Kerala High Court cited above in the case of M/s.Pala Marketing Coop. Society Ltd., Palai for the A.Y 1997-98, the refund payable is arrived at as under:

Advance tax paid	Rs. 10,00,000
TDS	Rs.47,957

Total pre-paid tax	Rs.10,47,957
Refund due	Rs.10,47,957

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Interest u/s. 244A is due as the assessee did not file a valid return of income.

The petitioner aggrieved by the denial of the interest under Section 244A of the Act, filed appeal before the Commissioner of Income Tax (Appeals), Kochi, which was dismissed by the order dated 11.11.2008. The petitioner filed appeal before the Income Tax Appellate Tribunal, Cochin, and on 13.01.2011 allowed the matter for statistical purposes and remitted the matter to the Assessing Officer to decide the issue afresh. The application filed before the Commissioner of Income Tax, Kottayam under Section 244A of the Act, on the denial of the interest was finally heard and disposed of by the order dated 25.03.2013. The operative portion of the order reads thus:

“(10) I am quoting from the letter dated 06-05-2008 from Shri M.A. Augusthy, Secretary of the Society: "We may submit that even if your observation is correct, the delay attributable to us can be only upto the date of filing the return i.e. 01-02-2000 and we are entitled to get interest u/s 244A (2) from 1-2-2000 till the date of issue of refund i.e. 11-02-2008). It may be noted that we having file the return on 01-02-2000 the delay in issuing the refund till 11-02-2008 was entirely due to reason attributable to the department".

(11) Here, the Secretary is talking as if both the delays - delay up to 01-02-2000 (filing of return) and delay from 01-02-2000 to 11-02-2008 (issue of refund) - are independent events. In fact, they are not. One is the cause and the other is the effect. The logic behind assessee's claim of refund from 01-02-2000 is also difficult to understand. On the said date there was no valid return available before the department and hence the refund can, by no means, be issued to the assessee. It was only on the order of the Hon. High Court (dated 26-11-2007) that the return became valid. As directed by the High Court, the refund was issued within three months of receipt of the order. Hence, there is no delay whatsoever in issuing the refund and the question of interest on refund does not arise at all.

(12) Hence, after considering the counter arguments as well as facts and based on the merits of the case I am to conclude that the assessee has already "received the refund to the extent found eligible" as directed by the High Court and within the time period mentioned by the High Court. There was no delay attributable to the department from the date the return was treated as valid and hence, the question of issuing interest u/s 244A does not arise. Hence, the petition u/s 264 stands rejected."

The petitioner filed W.P.(C) No.17664/2013 challenging the order dated 25.03.2013 (Ext.P9). Through the judgment under appeal, the writ petition was dismissed. Hence the appeal.

6. Adv.Leo Luckose appearing for the petitioner contends that an error in appreciation of circumstances resulted in denial of interest on refund of advance tax credited by the petitioner. He

separates the periods viz. between 31.10.1997 and 01.02.2000 on one hand, and on other hand, between 01.02.2000 to 01.02.2008. Assuming without admitting that the returns filed on 01.02.2000, then the former period referred to above can be attributed as delay or omission on the part of the assessee disentitling interest on refund of advance tax. The assessee moved an application under Section 119 (2) (b) of the Act, for condoning the delay in filing the application for refund of advance tax. The request for condoning the delay in filing the application for refund was considered by the Court in judgment dated 26.11.2007 in W.P.(C) No.21977/2007 and the delay once is condoned by the court, it is deemed that the omission in filing the return is also condoned and the petitioner is entitled to interest on the tax amount refunded by the Department. The petitioner cannot be blamed for the period 01.02.2000 to 01.02.2008 and the delay is on account of the disposal of the writ petition by this Court. The principle of *actus curiae neminem gravabit* and the remedy of refund are statutorily protected and the remedy is available in common law for interest.

Therefore, the appreciation of delay by the judgment in appeal is erroneous. He places reliance on **South Eastern Coalfields Ltd v. State of M.P and others**¹ and **Kerala State Electricity Board and another v. M.R.F Limited**², mainly for the proposition of restitution together with the compensation to the person who was denied the amount. He refers to the Full Bench judgment of this Court in **State Bank of India v. Chief Commissioner of Income Tax** (W.A No.1939/2018) and informs that the principle laid down by Full Bench, ought to be appreciated as considering the scope and ambit of Section 244A(2) in normal circumstances, and is not applicable to a case, where refund necessitated on account of adjudication by a writ court. The relevant paragraph in the Full Bench judgment reads thus:

“6.2 In our view, the Supreme Court has laid down, as emphasised in the preceding paragraphs, that no interest is payable on refund of excess tax received for the delayed period in finalisation of assessment on account of assessee’s fault (wholly or partially). The construction principles are well established and familiar enough that by applying the golden rule of construction, the section must receive a meaning, as

¹ (2003) 8 SCC 648

² (1996) 1 SCC 597

spelt out in the enactment. Section 244A, when construed by the golden rule of interpretation, we hold that refund of any amount firstly becomes due to the assessee upon order of assessment made by the assessing officer. In addition to a refund of excess tax received or collected, the assessee is also entitled to interest on the excess refunded by order of assessment; however, the period of interest is governed by Section 244A (2). Section 244A (2) provides that the period taken by the assessee to cure the defects in finalising the assessment is excluded for interest calculation. As it stood for the applicable assessment years, sub-Section (2) merely refers to reasons attributable to the assessee. Therefore, omission or commission in the return filed by the assessee resulting in a delay in assessment is attributable to the assessee; hence, the time taken to cure those omissions and defects is excluded for interest calculation. Having availed the time for rectifying the defects and claiming interest for the defect rectification time is unavailable. Such an interpretation does not fit into the requirement of filing a return fully compliant with the order of assessment, levy of interest, refund etc. The period taken by the assessee for curing the defects cannot be excluded while calculating interest; then, for no fault of the Department, the Department is called upon to compensate by way of interest.”

7. Learned Sr. Advocate P.K.R Menon invites our attention to the application made under Section 119(2)(b) of the Act and submits that the prayer was for condoning the delay in filing the application for refund of excess tax paid by the petitioner. Keeping the prayer in the application filed by the petitioner before CBDT and the view taken by this Court in

judgment dated 26.11.2007 in W.P.(C) No.21977/2007, the Department merely implemented what is directed by this Court in the said judgment. The excerpted portion clearly indicates the course of action to be done after the delay is condoned. Since there is no direction for payment of interest on the refunded tax amount, the claim for interest is rightly rejected by Ext.P9 order as well by the judgment under appeal.

7.1 He further contends that the Department should not also suffer for the delay that occasioned in disposing of the writ petition by this Court. The request for payment of interest independent of earlier adjudication is also unavailable. According to him, the case attracts the prohibition incorporated in Section 244A(2) of the Act, for awarding interest on refund of the tax and also the extent to which the petitioner is entitled to decide and defined by this Court. He prays for dismissing the appeal.

8. In the instant intra-court appeal, we would refrain

from revisiting the view taken by the Commissioner in Ext.P9 as well as the learned Single Judge while dismissing the writ petition. For our purpose, we would look at the claim of the petitioner from this perspective. The petitioner before us did not press for interest for the period 31.10.1997 to 01.02.2000. Now the interest claim is confined to the period 01.02.2000 and 01.02.2008 on the ground that once the refund is ordered, payment of interest follows suit.

8.1 The contention that the judgment of this Court automatically enables claim for interest for the period 2000 to 2008 is not based on proper appreciation of the relief granted by this Court and/or the entitlement of the writ petitioner. The petitioner claimed for refund by condoning the delay. The delay is condoned and held that the petitioner is entitled to refund. Now the Department is strictly implementing what has been directed by this Court in W.P.(C) No.21977/2007. Therefore, it is not a case of the petitioner that either inspite of a direction for payment of interest, the interest is not paid to the petitioner.

Therefore, any claim for interest by referring to the judgment in this appeal is unsustainable and the claim is accordingly rejected. Then coming to the explanation of the petitioner that because of limitations under Section 64 of the Societies Act, 1969 returns could not be filed in time. At best it could be said the delay between 1997 to 2000 alone could be attributed to the petitioner and the delay between 2000 to 2008 cannot be attributed to the petitioner as the delay occasioned in the adjudication of the writ petition. The argument though appears to be persuasive and fails to notice that the delay in adjudication of the petition filed for condonation of the delay for refund cannot burden the Department for payment of interest as compensation. The refund claim is complying with the direction of this Court.

8.3 According to us, the effort was to get refund, the refund was ordered by this Court and what happened in the interregnum since cannot prejudice the writ petitioner and should not also prejudice the Department by directing the payment of interest for the delay period. The claim of the

petitioner for interest on the refunded amount is rightly considered and rejected by both the Commissioner in Ext.P9 and the judgment under appeal. The judgments relied on by the petitioner, after going through the circumstances and ratio laid down therein, we are of the view that the judgments are distinguishable in all fours. No other ground is canvassed.

Hence, the appeal fails, dismissed accordingly. No order as to costs.

Sd/-
S.V.BHATTI
JUDGE

Sd/-
BASANT BALAJI
JUDGE

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