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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 428/2022

PR. COMMISSIONER OF INCOME TAX-1 ..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing Counsel for the Revenue with Ms. Easha Kadian, Advocate.

versus

M/S AT AND T COMMUNICATION SERVICES (INDIA) PVT. LTD. ..... Respondent

Through: Mr. Sachit Jolly with Ms. Disha Jham, Advocates.

% Reserved on: 01st November, 2022
Date of Decision: 17th November, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

1. Present appeal has been filed by the Revenue under Section 260A of the Income Tax Act ('Act') challenging the order dated 10th November, 2021 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 5781/Del/2017 for the Assessment Year ('AY') 2004-05.

2. Briefly stated, the pertinent facts are that, the Assessee is engaged in the business of network design, management, communication, connectivity services and related products. The Assessee filed its return of income for the relevant year on 30th October, 2004 declaring an income of

Rs.29,30,15,180/-, however, the income of the Assessee was assessed at Rs. 32,15,72,740/- by the Assessing Officer ('AO') vide original assessment order dated 28th December, 2006.

2.1. Aggrieved by the said order, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals), ['CIT(A)'], which upheld the order of the AO and confirmed the additions. Thereafter, an appeal arose before the ITAT and the Tribunal vide its order dated 30th September, 2014, set aside the original assessment order dated 28th December, 2006, and restored the matter to the file of the AO for determining the issue of taxability of the amounts received as brand building fund, the allowability of brand building expenses as well as a separate claim for other expenses.

2.2. On remand, the AO on the 29th March, 2016 reframed the assessment and passed a fresh assessment order under Section 143(3) of the Act read with Section 254 of the Act. The AO reconfirmed the disallowance of brand expenses for a sum of Rs.2,66,42,537/- and the total income was determined as Rs. 31,96,57,720/-.

2.3. In the Income Tax Computation Form (ITNS 50) issued pursuant to the aforesaid assessment order, the AO levied interest under Section 220(2) of the Act and raised a demand of Rs. 1,75,74,756/- computed on the basis of the original assessment order dated 28th December 2006.

2.4. It is the levy of interest under Section 220(2) of the Act, which is the subject matter of controversy in the present appeal.

2.5. Aggrieved by the aforesaid levy of interest and the assessment order dated 29th March, 2016, the Assessee challenged the same before the CIT(A). The CIT(A) vide order dated 12th June, 2017 allowed the appeal of

the Assessee and deleted the levy of interest under Section 220(2) of the Act.

2.6. Aggrieved by the order of the CIT(A), deleting the levy of interest, the Revenue filed an appeal before the ITAT. The ITAT vide the impugned order dated 10th November, 2021 dismissed the appeal and held that the interest under Section 220(2) of the Act can be charged only after expiry of the period of 30 days from the date of service of demand notice issued pursuant to the fresh assessment order dated 29th March, 2016.

3. Learned counsel for the Revenue states that the ITAT erred in holding that the interest under Section 220(2) is chargeable only from the date falling 30 days after service of the notice of demand as a result of fresh assessment order under 254/143(3) of the Act, ignoring the proviso to Section 220(2) that mandates that the interest is only required to be reduced as a result of reduction in the income under Section 254. Further, he states that the ITAT failed to note that the original assessment dated 28th December, 2006 in the present case, was neither cancelled nor fully set aside. He states that the interest under Section 220(2) of the Act is attracted from the expiry of the period of 30 days from the issuance of the income tax computation form, even after the matter was remanded by the tribunal to the AO for fresh consideration, inasmuch as the tax liability of the Assessee on remand remained the same and addition remained under the same head, the Assessee is liable to pay interest in relation to the demand issued pursuant to the original assessment order dated 28th December, 2006. He relied on the judgment of the Supreme Court in the matter of ***Vikrant Tyres Ltd. v. First Income Tax Officer, Mysore, (2001) 3 SCC 76***.

4. In reply, the learned counsel for the Respondent, Assessee, states that the AO erred in charging interest of Rs. 1,75,74,756/- under Section 220(2) of the Act without acknowledging the settled position of law that where an issue arising out of the original assessment is restored to the file of AO by the higher appellate authorities, there is an extinguishment of the original demand i.e., the demand raised vide the first assessment order dated 28th December, 2006. He states that the fresh assessment was framed on 29th March 2016 under Section 143(3) read with Section 254 of the Act and demand notice was issued pursuant thereto, therefore, interest cannot be charged for the period prior to the issue of the fresh demand notice. The learned counsel for the Respondent, Assessee, placed reliance on the CBDT Circular No. 334, dated 3rd April, 1982 and the judgment of the Rajasthan High Court in the case of ***Commissioner of Income Tax v. Rajesh Kumar Dinesh Kumar, [2010] 325 ITR 346*** and stated that since the assessment order was reframed, interest under Section 220(2) of the Act can only be charged after the expiry of 30 days from the date of service of demand notice pursuant to the fresh assessment order.

5. We have heard the learned counsel for the parties. The issue arising in the present appeal is, whether interest can be charged under Section 220(2) of the Act from the date of the original assessment order, if the original additions are reiterated by the AO on remand in the reframed assessment order?

5.1. The facts in the present case are not disputed. In the appeal filed by the Assessee before the ITAT [in the first round], the ITAT by its order dated 30th September, 2014 allowed the appeal and remanded the matter to

the file of the AO to determine the taxability of the funds received by the Assessee and allowability of expenses claimed, in effect on allowing the said appeal, the ITAT set aside the original assessment order dated 28th December, 2006.

5.2. Pursuant to the said remand, the AO on 29th March, 2016, reframed the assessment order and re-confirmed the said two additions. The AO, therefore, passed a fresh assessment order dated 29th March, 2016, under Section 143(3) read with Section 254 of the Act. However, the AO while preparing the consequent Income Tax Computation Form i.e., I.T.N.S.-150 included therein a demand for interest under Section 220(2) of the Act, which relates back to the original assessment order dated 28th December, 2006.

5.3. The Revenue's basis for raising the said demand for interest in I.T.N.S.-150 on the basis of the original assessment order is that, since the tax liability of the Assessee remained the same even after the matter was remanded by the ITAT to AO for fresh consideration and the addition remained under the same head, the Assessee is liable to pay interest in relation to the demand issued pursuant to the original assessment order.

5.4. On appeal, the CIT(A) deleted the demand of interest, placing reliance in the order of the ITAT Mumbai in the case of ***Addl. CIT v. Hindalco Industries Ltd. 4 SOT 757*** and the CBDT Circular No. 334, dated 3rd April, 1982 and observed that, the original assessment order was set aside by the ITAT Delhi Bench with the direction to reframe the same, thereafter, a fresh assessment order was passed on 29th March, 2016, therefore, interest under Section 220(2) can be levied only after expiry of the time limit prescribed in

the fresh demand notice issued by the AO on 29th March 2016. Aggrieved the revenue filed an appeal before the ITAT and the ITAT upheld the deletion by the CIT(A).

6. We are of the considered view that the aforesaid submission of the Revenue has no basis in law and the CIT(A) as well as the ITAT were right in deleting the addition under Section 220(2). The Revenue has relied upon the Section 220(2) of the Act for raising the demand for interest on the basis of the original assessment order dated 29th December, 2006. However, the said original assessment order was admittedly set aside by the ITAT vide order dated 30th September, 2014 and upon such setting aside, the said assessment order ceased to exist. The ITAT had remanded back the taxability of the said additions to the file of the AO; and the AO reframed his assessment and passed a fresh order on 29th March, 2016.

7. The relevant date for charging interest under Section 220(2) of the Act, in the facts of this case, is to be determined as per the date of demand notice raised pursuant to the fresh assessment order i.e. 29th March, 2016.

8. The liability of Assessee to pay interest under Section 220(2) of the Act can be levied only after expiry of the time limit prescribed in the fresh demand notice issued by the AO in pursuance to the fresh reframed assessment order dated 29th March, 2016. The reframed order is the subsisting assessment order in the facts of this case.

9. The contention of the Revenue that the Assessee is liable to pay interest in relation to the demand issued pursuant to the original assessment order, if on a remand, the addition remained under the same head has no basis in law. Section 220(2) of the Act does not contemplate a levy of

interest which relates back to the date of the passing of original order (which was subsequently set aside by appellate authorities) or applies to pendency of proceedings. Therefore, the AO was not justified in levying the interest of Rs. 1,75,74,756/- under Section 220(2) of the Act.

10. This also becomes clear from the Circular No. 334 dated 03rd April, 1982, which reads as under:-

> "**1211. Levy of interest under sub-section (2) when original assessment is set aside/cancelled**
>
> **1**. Doubts have been raised as to the *quantum of interest chargeable under section 220(2) when the original assessment order passed* by the Income-tax Officer is-
>
> (a) Cancelled by him under section 146;
> (b) *set aside/cancelled by an appellate/revisional authority* and such appellate/revisional order has become final; or
> (c) *set aside by one appellate authority but*, on further appeal, *the order setting aside the assessment is varied by the second appellate authority* and the demand gets finally determined.
>
> **2**. *These issues were comprehensively examined* in consultation with the Ministry of Law *and the Board has been advised*:
>
> 1. **Where an assessment order is** cancelled under section 146 or cancelled/**set aside by an appellate**/revisional **authority and the cancellation/setting aside becomes final** (i.e.. it is not varied as a result of further appeals/revisions), **no interest under section 220(2) can be charged pursuant to the original demand notice**. **The necessary corollary of this position will be that even when the assessment is reframed, interest can be charged only after the expiry of 35 days from the date of service of demand notice pursuant to such fresh assessment order.**
> 2. Where the assessment made originally by the Income-tax Officer is either varied or even set aside by one appellate authority but on further appeal, the original order of the Income-tax Officer is restored either in part or wholly, the interest payable under section 220(2) will be computed with reference to the due date reckoned from the original demand notice and with reference to the tax finally determined. The fact that during an intervening period, there was no tax payable by the

assessee under any operative order would make no difference to this position.

3. The foregoing legal position will apply *mutatis mutandis* to the proceedings under other direct taxes also.

Circular: *No. 334 (F. No. 400/3/81-ITCC), dated 3-4-1982*."

(Emphasis Supplied)

Para 2.1 of the said Circular expressly states that if the assessment order is 'set aside' by the appellate authority, no interest under Section 220(2) of the Act can be charged pursuant to the original demand notice. The judgment of the Rajasthan High Court in ***Commissioner of Income tax v. Rajesh Kumar Dinesh Kumar, [2009] 221 CTR 78 (Rajasthan)*** relied upon by the learned counsel for the Assessee also refers to the said Circular to hold that no interest is payable on the demand raised by the original order when the original order of the AO is set aside by the appellate authority and a fresh assessment order is passed. Similarly, the Bombay High Court in the case of ***Commissioner of Income-tax-1, Mumbai v. Chika Overseas (P.) Ltd., [2012] 23 taxmann.com 315 (Bom.)*** held that an Assessee is liable to pay interest under Section 220(2) of the Act from the end of the period mentioned under Section 220(1) of the Act i.e., thirty (30) days after service of the notice of the fresh assessment order.

11. Learned counsel for the Revenue has relied upon the judgment of the Supreme Court in ***Vikrant Tyres Ltd.*** (supra.) However, the issue arising for consideration before the Supreme Court was distinct. The question framed for the consideration before the apex Court in the said judgment was as follows:

"…

8. *… The question, therefore, is: whether the Revenue is entitled to demand interest in regard to the amount which was refunded to the assessee by virtue of the judgment of the Appellate Authority and which was repaid to the Revenue after decision in the reference by the High Court on fresh demand notices being issued to the assessee…*

…"

In the aforementioned case, the demand notices issued under Section 156(1) of the Act had been satisfied by the Assessee and nothing was due pursuant to the said demand notice. However, after the judgment of the appellate authority, which went in favour of the Assessee, the Revenue refunded the amount due as per the said order of the authority. Thereafter, when the matter was taken up in a reference by the Revenue to the High Court and the Assessee lost the case, the fresh demand notices were issued and in pursuance to the fresh notices the Assessee paid the amount demanded within the time stipulated therein. However, it was in these facts, that the Revenue demanded interest on the amount refunded to the Assessee and the Supreme Court held that no such demand could be raised under Section 220(2) of the Act. The Supreme Court held that Section 220 of the Act cannot be invoked to demand any interest from the Assessee therein. The relevant extract is reproduced hereunder:

"....

A Constitution Bench of this Court speaking through one of us (Hon. Bharucha, J.) in the case of V.V.S. Sugars v. Government of A.P. 1999 (4) SCC 192 reiterated the proposition laid down in the India Carbon Ltd.'s case (supra) in the following words : 'The Act in question is a taxing statute and, therefore, must be interpreted as it reads, with no additions and no subtractions, on the ground of legislative intendment or otherwise'. <u>If we apply this principle in interpreting section 220, we find that the condition precedent for invoking the said section is only if there is a default in payment of amount demanded under a notice by the revenue within the</u>

time stipulated therein and if such a demand is not satisfied, then section 220(2) can be invoked.

...."

(Emphasis Supplied)

We fail to see how the said judgment advances the case of the Revenue or is applicable in the facts of the present case. In the present case as well, there was no default by the Assessee as the assessment order dated 28th December, 2006, was set aside by the ITAT and therefore no liability to pay interest can arise under Section 220 (2) of the Act.

12. We thus, find that the demand for interest raised by the AO is contrary to the Circular issued by CBDT as well as the mandate of Section 220(2). The Section 220(2) does not empower the revenue to demand interest relating back to a set aside order, when a fresh assessment order has been passed thereafter. The facts of the present case are clearly covered by para 2.1 of the said CBDT circular which anticipates the situation that has arisen in the present proceedings and therefore, the CIT(A) and the ITAT have correctly held that the levy of interest by the AO relating back to the set aside assessment order, was incorrect and have correctly ordered the same to be deleted. Thus, this Court sees no merit in the appeal and accordingly, the same is dismissed.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

NOVEMBER 17, 2022/msh