

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No.1658 of 2013

Harish Kumar Gupta

..... **Petitioner**

Versus

Chief Commissioner, Income Tax & others

..... **Respondents**

Mr. Rahul Consul, Adv. for the petitioner.

Mr. Hari Mohan Bhatia, Advocate, for the Department.

Reserved on: 28.11.2017

Delivered on: 10.01.2018

Hon'ble Rajiv Sharma , J.

On 21.12.2001, a survey u/s 133(A) of the Income Tax Act, 1961 (*hereinafter to be referred as 'the Act'*) was carried out in the business premises of petitioner's proprietorship concern. Petitioner was made to surrender an income of Rs.50.00 lakh. Petitioner filed his income tax return on 13.1.2005 declaring total income of Rs.51,10,850/-. The Assessing Authority has passed the assessment order on 7.3.2005 u/s 143(3) of the Act. However, the Assessing Authority has imposed the interest of Rs.11,02,480/- u/s 234(A) (B) and (C) of the Act on the petitioner. Petitioner had deposited a sum of Rs.15,45,000/- excluding the interest part. He was issued the demand notice on 05.12.2008 and garnishee notice on 19.12.2008. He submitted an application for rectification of the mistake u/s 154 of the Act on 18.02.2009. Thereafter, petitioner again filed an application on 2.2.2009 for waiver of interest. Thereafter, he filed yet another application seeking adjournment for four months on 21.2.2013. However, the application was rejected by the competent authority on 12.4.2013.

2. The fact of the matter is that the assessee had handed over two cheques bearing Nos.866541 and 866542 dated 30.12.2001 and 15.3.2001 for an amount of Rs.10.00 lakh and Rs.5.00 lakh respectively of his bank account no.64 with OBC, 75-Rajpur Road, Dehradun, as a token of payment of advance tax. When the cheques were presented, the same were not honoured by the bank. A notice u/s 142(1) of the Act was issued by the I.T.O. on 26.8.2002. Since no return was filed in response to the notice, a further notice u/s 142(1) of the Act was issued on 9.9.2002. This notice was also not complied with. Thereafter, another notice u/s 271(1)(b) of the Act was issued on 18.9.2002 and vide order dated 8.10.2002, the penalty of Rs.10,000/- was imposed against the petitioner. The notices were again issued on 17.10.2002 and 17.12.2002. Thereafter, on 13.1.2005, the petitioner filed the return declaring total income of Rs.51,10,850/- and agricultural income of Rs.40,000/-. The assessment was completed on the income of Rs.51,10,850/- and agricultural income of Rs.40,000/- on 7.3.2005 and the interest was imposed u/s 234A, 234B and 234C of the Act.

3. The petitioner has referred to the Circular dated 26.6.2006 issued by the Central Board of Direct Taxes. The Class of incomes or class of cases in which the reduction or waiver of interest u/s 234A, 234B and 234C can be considered are as follows: -

(a) Where during the course of proceedings for search and seizure under section 132 of the Income-tax Act, or otherwise, the books of account and other incriminating documents have been seized, and the assessee has been unable to furnish the return of income for the previous year, during which the action under section 132 has taken place, within the time specified in this behalf, and the Chief Commissioner/Director General is satisfied, having regard to the facts and circumstances of the case, that the delay in furnishing such return of income cannot reasonably be attributed to the assessee.

- (b) *Any income chargeable to income-tax under any head of income, other than Capital gains is received or accrued after due date of payment of the first or subsequent instalments of advance tax which was neither anticipated nor was in the contemplation of the assessee, and the advance tax on such income is paid in the remaining instalment or instalments, and the Chief Commissioner/Director General is satisfied on the facts and circumstances of the case that this is a fit case for reduction or waiver of the interest chargeable under section 234C of the Income-tax Act.*
- (c) *Where any income was not chargeable to income-tax in the case of an assessee on the basis of any order passed by the High Court within whose jurisdiction he is assessable to income-tax, and as result, he did not pay income-tax in relation to such income in any previous year, and subsequently, in consequence of any retrospective amendment of law or the decision of the Supreme Court of India, or as the case may be, a decision of a Larger Bench of the jurisdictional High Court (which was not challenged before the Supreme Court and has become final), in any assessment or reassessment proceedings the advance tax paid by the assessee during such financial year is found to be less than the amount of advance tax payable on his current income, and the assessee is chargeable to interest under section 234B or section 234C, and the Chief Commissioner/Director General is satisfied that this is a fit case for reduction or waiver of such interest.*
- (d) *Where a return of income could not be filed by the assessee due to unavoidable circumstances and such return of income is filed voluntarily by the assessee or his legal heirs without detection by the Assessing Officer.”*

4. The petitioner could only seek waiver of interest if any of Conditions enumerated in Paragraphs (a) or (b) of Condition no.2 of Circular dated 26.6.2006 issued by the CBDT could be satisfied.

5. According to para number (A) when during the course of proceedings for search and seizure under section 132 of the Income-tax Act, or otherwise, the books of account and other incriminating documents are seized, and the assessee is unable to furnish the return of income for the previous year, during which the action under section 132 has taken place, within the time specified in this behalf, and moreover, the Chief Commissioner/Director General must be satisfied having regard to the facts and circumstances of the case that the

delay in furnishing such return of income cannot reasonably be attributed to the assessee.

6. It is not the case of petitioner that his books of accounts and other incriminating documents were seized. Petitioner himself has declared income.

7. Now, as far as Para (B) is concerned, it would be attracted only when any income chargeable to income-tax under any head of income, other than Capital gains is received or accrued after due date of payment of the first or subsequent instalments of advance tax which was neither anticipated nor was in the contemplation of the assessee, and the advance tax on such income is paid in the remaining instalment or instalments, and the Chief Commissioner/Director General is satisfied on the facts and circumstances of the case that this is a fit case for reduction or waiver of the interest.

8. This Paragraph is also not attracted qua the petitioner.

9. Para No.(C) would apply where any income was not chargeable to income-tax in the case of an assessee on the basis of any order passed by the High Court within whose jurisdiction he was assessable to income-tax, and as a result, he did not pay income-tax in relation to such income in any previous year, and subsequently, in consequence of any retrospective amendment of law or the decision of the Supreme Court of India, or as the case may be, a decision of a Larger Bench of the jurisdictional High Court (which was not challenged before the Supreme Court and has become final), in any assessment or reassessment proceedings, the advance tax paid by the

assessee would be less than the amount of advance tax payable on his current income.

10. Para (C) covers only those cases where the income tax is not paid in relation to such income which was not chargeable to income tax on account of any judicial pronouncement and in consequence of a retrospective amendment of law.

11. Para (D) applies where a return of income could not be filed by the assessee due to unavoidable circumstances and such return of income is filed voluntarily by the assessee or his legal heirs without detection by the Assessing Officer.

12. In the present case, the notice u/s 142(1) of the Act was issued by the ITO on 19.8.2002 calling for return of income by 26.8.2002. Thereafter, again the notices were issued on 9.9.2002 and 17.10.2002. Thus, it cannot be said that the return could not be filed due to unavoidable circumstances. In totality, the petitioner's case is not covered in any of the Paragraphs of the Circular dated 26.6.2006 issued by the CBDT.

13. Moreover, the judgment relied upon by learned Counsel for the petitioner, which was rendered by the Hon. Apex Court in the matter of '*B.M. Malani v. C.I.T.*' Civil Appeal No.5950 of 2008 decided on 1.10.2008, is not applicable in view of the present facts and circumstances of the case. In that case, the appellant had requested the appellate authority to sell shares and securities seized from him and appropriate the sale proceeds towards payments of arrears of taxes.

14. In the present case, there is no mistake apparent from the record, as discussed hereinabove.

15. In ITR 1970 Vol. 78 Page 26, Their Lordships of Hon. Supreme Court in the matter of '*L. Hirday Narain v. ITO, Bareilly*' have held that if a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Their Lordships have held as under: -

"The High Court observed that under Section 35 of the Indian Income-tax Act, 1922, the jurisdiction of the Income-tax Officer is discretionary. If thereby it is intended that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify, the view is in our judgment erroneous. Section 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income-tax Officer may rectify any mistake apparent from the record. If a statute invests a public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right --public or private--of a citizen.

In Julius v. Bishop of Oxford (1880) 5 A.C. 214 it was observed by Cairns, L.C., at pp. 222-223 that the words "it shall be lawful" conferred a faculty or power, and they did not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so." Lord Blackburn observed in the same case at pp. 244-245 that the enabling words give a power which prima facie might be exercised or not, but if the object for

which the power is conferred is for the purpose of effectuating a right there may be a duty cast upon the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. Lord Penzance and Lord Selbone made similar observations at pp. 229 and 235.

Exercise of power to rectify an error apparent from the record is conferred upon the Income-tax Officer in aid of enforcement of a right. The Income-tax Officer is an officer concerned with assessment and collection of revenue, and the power to rectify the order of assessment conferred upon him to ensure that injustice to the assessee or to the Revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial functions under the Act, that exercise of the power was discretionary and the Income-tax from the record is brought to his notice by a person concerned with or interested in the proceeding.”

The High Court was, in our judgment, in error in assuming that exercise of the power was discretionary and the Income-tax Officer could, even if the conditions for its exercise were shown to exist, decline to exercise the power.”

16. In AIR 2007 S.C. 668, their Lordships of Hon. Apex Court in the matter of ‘CIT Bhopal v. Ralson Industries Ltd.’ have held that u/s 154 of the Act, the order of rectification can be passed only when there is an error apparent on the face of the record. Their Lordships have further held that there is a difference between the review and rectification. Their Lordships have held as under: -

“8. The scope and ambit of a proceeding for rectification of an order under Section 154 and a proceeding for revision under Section 263 are distinct and different. Order of rectification can be passed on certain contingencies. It does not confer a power of review. If an order of assessment is rectified by Assessing Officer in terms of Section 154 of the Act, the same itself may be a subject matter of a proceeding under Section 263 of the Act. The power of revision under Section 263 is exercised by a higher authority. It is a special provision. The revisional

jurisdiction is vested in the Commissioner. An order thereunder can be passed if it is found that the order of assessment is prejudicial to the Revenue. In such a proceeding, he may not only pass an appropriate order in exercise of the said jurisdiction but in order to enable him to do it, he may take such inquiry as he deems necessary in this behalf.

12. When different jurisdictions are conferred upon different conditions, both may not be held to be overlapping with each other. Jurisdiction under Section 154 of the Act is only to be exercised by him when there is an error apparent on the face of the record. It does not confer any power of review. An order of assessment may or may not be rectified. If an order of rectification is passed by the Assessing Authority, the rectified order shall be given effect to. However, only gone rectification at the hands of the Assessing Officer, in our opinion, the same would not mean that revisional authority shall be denuded of exercising its revisional jurisdiction. Such an interpretation, in our opinion, would run counter to the scheme of the Act.”

17. Accordingly, there is no merit in this petition and the same is hereby dismissed.

18. Pending application, if any, also stands disposed of accordingly.

(Rajiv Sharma, J.)