

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1230 OF 2016

The Pr. Commissioner of Income Tax-29 .. Appellant.
v/s.
Kumagai Skanska HCC ITOCHU Group .. Respondent.

Mr. Arvind Pinto, for the Appellant.
Mr. Sanjiv M. Shah, for the Respondent.

**CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.**
DATE : 29th JANUARY, 2019.

P.C:-

This Appeal is filed by the Revenue to challenge the judgment of the Income Tax Appellate Tribunal (in short “the Tribunal”). Following question was pressed before us at the time of arguments:-

“ Whether on the facts and in the circumstances of the case and in law the Tribunal was right in deciding the issue of interest payable to the assessee on the basis of the Hon'ble Supreme Court decision in the case of Tata Chemicals Ltd., (363 ITR 658) without considering the fact that the facts of this case is not identical to that of the assessee's”

2 Brief facts are as under:-

- (i) Respondent-Assessee is Association of Persons (for short "AoP") and is engaged in the business of Civil Construction. The Assessee

follows the project completion method of accounting to offer its income to tax. For the Assessment Years 2003-04, 2004-05 and 2005-06, the Assessee had received certain payments as a Contractor, on which the payer had deducted at tax source. In the return of income filed by the assessee for Assessment Year 2005-06, it had declared loss of Rs.81.3 Crores (rounded of). In said return, the Assessee had claimed the income relatable to the payments made during the said year as well as during earlier two Assessment Years, referred to above. Assessment order passed by the Assessing Officer, gave rise to refund. The Assessee contends that, on such refund, interest in terms of Section 244A of the Income Tax Act, 1961 (for short "the Act"), would be payable as provided in said provision from the respective Assessment Years. The revenue, however, contends that, the income in relation to the payments on which tax was deducted at source, was returned by the Assessee in the Assessment Year 2005-06 and that, therefore, interest cannot be paid on the refund for any period prior to the said Assessment Year.

- (ii) The issue eventually reached the Tribunal. The Tribunal by the impugned judgment, relied upon the judgment of the Supreme Court in case of *Union of India v/s. Tata Chemicals Ltd., 363 ITR 658*, and held in favour of the Assessee. Revenue has, therefore, filed this Appeal.

3 Facts as noted are not in dispute. In relation to such facts, we may refer to the applicable statutory provisions. Section 199C of the Act

pertains to payment to deductors. Sub-section 1 of Section 194C of the Act requires a person making payment of any sums to a person carrying out any works in pursuance to the contract to deduct tax at source at prescribed rates. Section 199 of the Act pertains to credit for tax deducted. Sub-section 2 of Section 199 provides that any sum referred to in sub-section (1A) of Section 192 of the Act and paid to the Central Government, shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made.

4 Section 244A of the Act pertains to income on refunds. Relevant portion of the said Section reads as under:-

244A(1):- *Where refund of any amount becomes due to the assessee under this Act, he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest thereon calculated in the following manner, namely-*

(a) where the refund is out of any tax collected at source under section 206C or paid by way of advance tax or treated as paid under section 199, during the financial year immediately preceding the assessment year, such interest shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period-,

(i) from the 1st day of April of the assessment year to the date on which the refund is granted, if the return of income has been furnished on or before the due date specified under sub-section (1) of section 139; or

(ii) from the date of furnishing of return of income to the date on which the refund is granted, in a case not covered under sub-clause (i);

(aa) where the refund is out of any tax paid under section 140A, such interest shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period, from the date of furnishing of return of income or payment of tax, whichever is later, to the date on which the refund is granted;

Provided that no interest under clause (a) or clause (aa) shall be

payable, if the amount of refund is less than ten per cent of the tax as determined under sub-section (1) of section 143 or on regular assessment;]

(b) in any other case, such interest shall be calculated at the rate of [one half per cent] for every month or part of a month comprised in the period or periods from the date or, as the case may be, dates of payment of the tax or penalty to the date on which the refund is granted.

Explanation - For the purposes of this clause, "date of payment of tax or penalty means the date on and from which the amount of tax or penalty specified in the notice of demand issued under section 156 is paid in excess of such demand."

5 Sub-section 1 of Section 244A of the Act provides for interest on refund in three separate clauses, covering different situations. Clause (a) pertains to cases where the refund is out of any tax collected at source under Section 206C of the Act or paid by way of advance tax or treated as paid under Section 199 of the Act. Clause (aa) refers to the refund arising out of any tax paid under Section 140A of the Act. Clause (b) essentially provides that in case the refund becomes due in any other case i.e. cases not covered under clause (a) or (aa), such interest shall be calculated at the rate of $\frac{1}{2}$ % for every month or part of the month comprised in the period from the date of payment of the tax or penalty to the date on which the refund is granted. This clause (b) contains an explanation which provides that for the purpose of said clause, the date of payment of tax or penalty would mean the date on and from which the amount of tax or penalty specified in notice of demand issued under Section 156 is paid in excess of such demand. If the case of a person were to fall under clause (b), the question of applicability of the explanation would certainly arise. In the present case, however, for the reasons to follow, we are of the opinion that the Assesses case falls under clause (a).

6 We may re-call, clause (a) covers situation where the refund is out of any tax collected at source or paid by way of advance tax or treated as paid under Section 199 of the Act. This reference to treat tax as paid under Section 199 of the Act, would clearly cover the tax deducted at source. In the present case, the Assessee had suffered deduction of tax at source at the time of payments. In that view of the matter, the case of the Assessee would clearly be covered under clause (a) to sub-section (1) of Section 244 of the Act. In such a situation, this clause provide that, interest shall be calculated at the rate of $\frac{1}{2}$ % for every month or part thereof, comprising a period from the 1st day of April of the Assessment Year to the date on which the refund is granted, provided the return is filed before the due date, specified in sub-section 1 of Section 139 of the Act. Here, the reference “*from the 1st day of April of the Assessment Year*” which is the starting point for computing the interest payable, must be to the Assessment Year, in which, the tax was deducted at source. Since this expression has to be read along with the main body of clause (a) which refers to the refund arising out of, *inter alia*, of the tax treated to have been paid as per Section 199 of the Act. Any other view, would be holding untenable since, the Revenue which has received the tax deducted at source from the payments to be made to the Assessee and appropriate the same, would refund the same but the interest would be accounted much later when the return giving rise to the refund, is filed.

7 In slightly different back-ground, the provisions of Section 244A of the said Act came up for consideration before the Supreme Case in case of Tata Chemicals Ltd., (supra). It was a case in which, the payee while paying an amount to a non-resident, had deducted tax at source at

certain rate. Payee disputed deduction at such rate and succeed in Appeal. This gave rise to refund of excess collection of tax. In this context, the question of passing interest on refund arose. The Supreme Court while granting interest from in caption made certain observation. Relevant portion of the said judgment read as under:-

“ The refund becomes due when tax deducted at source, advance tax paid, self-assessment tax paid and tax paid on regular assessment exceeds tax chargeable for the year as a result of an order passed in appeal or other proceedings under the Act. When refund is of any advance tax (including tax deducted/collected at source), interest is payable for the period starting from the first day of the assessment year to the date of grant of refund. No interest is, however, payable if the excess payment is less than 10 per cent of tax determined under section 143(1) or on regular assessment. No interest is payable for the period for which the proceedings resulting in the refund are delayed for the reasons attributable to the assessee (wholly or partly). The rate of interest and entitlement to interest on excess tax are determined by the statutory provisions of the Act. Interest payment is a statutory obligation and non-discretionary in nature to the assessee. In tune with the aforesaid general principle, section 244A is drafted and enacted. The language employed in section 244A of the Act is clear and plain. It grants substantive right of interest and is not procedural. The principles for grant of interest are the same as under the provisions of section 244 applicable to assessments before April 1, 1989, albeit with clarity of application as contained in section 244A.

The Department has also issued Circular clarifying the purpose and object of introducing section 244A of the Act to replace sections 214, 243 and 244 of the Act. It is clarified therein, that, since there was some lacunae in the earlier provisions with regard to non-payment of interest by the Revenue to the assessee for the money remaining with the Government, the said section is introduced for payment of interest by the Department for delay in grant of refunds. A general right exists in the State to refund any tax collected for its purpose, and a

corresponding right exists to refund to individuals any sum paid by them as taxes which are found to have been wrongfully exacted or are believed to be, for any reason, inequitable. The statutory obligation to refund carried with it the right to interest also. This is true in the case of assessee under the Act.

Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Refund due and payable to the assessee is debt owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/ tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carried with it the right to interest. Whenever money has been received by a party which ex aequo et bono ought to be refunded, the right to interest follows, as a matter of course.

In the present case, it is not in doubt that the payment of tax made by resident/ depositor is in excess and the Department chooses to refund the excess payment of tax to the depositor. We have held the interest requires to be paid on such refunds. The catechize is from what date interest is payable, since the present case does not fall either under clause (a) or clause (b) of section 244A of the Act. In the absence of an express provision as contained in clause (a), it cannot be said that the interest is payable from the 1st of April of the assessment year. Simultaneously, since the said payment is not made pursuant to a notice issued under section 156 of the Act, the Explanation to clause (b) has no application. In such cases, as the opening words of clause (b) specifically referred to "as in any other case", the interest is payable from the date of payment of tax. The sequel of our discussion is the resident/ deductor is entitled not only the refund of tax deposited under section 195(2) of the Act,

but has to be refunded with interest from the date of payment of such tax.”

8 In the result, we do not find that the Tribunal has committed any error .

9 **Tax Appeal** is, therefore, **dismissed**.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)