

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15457 of 2010

WITH

SPECIAL CIVIL APPLICATION No. 15458 of 2010

For Approval and Signature:

**HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS JUSTICE SONIA GOKANI**

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
- =====

MANHARBHAI MULJIBHAI KAKADIA - Petitioner(s)

Versus

UNION OF INDIA & 1 - Respondent(s)

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Appearance :

MR SN SOPARKAR, SR. ADV. with MR DILIP L KANOJIYA for Petitioner(s) : 1,
NOTICE UNSERVED for Respondent(s) : 1,
MR PS CHAMPANERI for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 2,
MRS MAUNA M BHATT for Respondent(s) : 2,

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**CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS JUSTICE SONIA GOKANI**

Date : 04/05/2011

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These petitions, arising in similar factual background, have been heard together and are being disposed of by this common judgment.
2. Briefly stated facts are as follows:-

2.1 Search and seizure operations were carried out in the premises of the petitioner on 30.6.2004. During the operation, total cash of Rs.2,81,0,5000/- was recovered and seized by the Income-Tax Department. The petitioner addressed letters dated 28.9.2004 and 26.7.2005 requesting the Commissioner of Income-Tax to release the seized cash and adjust the same against the self-assessment tax and advance tax liability of the petitioner for the assessment year 2004-05 and 2005-06. It is, however, the case of the petitioner that the authorities adjusted the amount of Rs.1,05,64,679/- and Rs.8,34,034/- against tax liabilities on 12.12.2005 and 17.10.2006. While framing the assessment the department demanded interest of Rs.17,66,954/- and Rs.6,29,577/- under Sections 234B and 234C of the Income Tax Act, 1961 ("the Act" for short). The department thus demanded an aggregate interest of Rs.23,96,531/- under the said Sections.

2.2 The petitioner, therefore, filed an application dated 3.11.2007 seeking waiver of interest under Sections 234A, 234B and 234C of the Act. The petitioner relied on the notification of the Central Board of Direct Taxes dated 23.5.1996, which envisaged waiver of interest under certain circumstances. By impugned order dated 29.6.2010, however, the petitioner's application was rejected. The authorities relied on the subsequent notification of the Board dated 26.6.2006.

3. The petitioner has, therefore, approached this Court filing the present petitions challenging the said order on various grounds. Initially, the challenge was confined to the impugned order itself. However, by way of amendment prayed and granted, the petitioner also canvassed a case that the circular dated 26.6.2006 cannot be made applicable to the case of the petitioner since any such application, according to the petitioner, would be giving retrospective effect to the notification. It is the contention of the petitioner that any other view would render the notification itself

arbitrary and invalid. The petitioner has, therefore, by way of amendment, added a prayer that if the notification dated 26.6.2006 is held applicable to the present case, the same may be quashed and set aside as being discriminatory, arbitrary and violative of the petitioner's fundamental rights.

4. In response to notice issued by the Court, respondents have appeared and filed replies. In an affidavit dated 20.1.2011 they have stated inter alia that in view of the notification dated 26.6.2006, the petitioner is not entitled to claim waiver of interest. The notification superseded previous notifications. The claim of the petitioner was considered but found not covered and hence application was dismissed. Further affidavit dated 1.4.2011 was also filed to highlight certain factual aspects regarding search and seizure operations and adjustment of the cash seized from the petitioner's premises towards his tax liabilities.

5. On the basis of the above pleadings, counsel appearing for both the sides have made detailed submissions before us. Learned Senior Advocate Shri S.N. Soparkar for the petitioner submitted that the petitioner had requested the tax authorities well in time to adjust the seized cash towards petitioner's tax liabilities for the years 2004-05 and 2006-07. No timely steps were taken. Adjustment was granted much later. When the assessment was finally framed, substantial interest liabilities were raised under Sections 234B and 234C of the Act. When the petitioner applied for waiver of interest relying on the notification dated 23.5.1996, the same was rejected relying on subsequent notification. It was, thus, the contention of the counsel for the petitioner that on one hand the authorities delayed the consideration of petitioner's request for adjustment of the seized cash towards his tax liability and on the other hand rejected his request for waiver of interest relying on the subsequent notification. He submitted that when the interest liability arose, it was notification dated 23.5.1996, which was in

operation.

6. On the other hand, counsel for the Revenue submitted that when the petitioner made the application for waiver, notification dated 26.6.2006 was already in operation superseding the previous notification. He submitted that charging of interest under Section 234B and 234C of the Act is mandatory. In absence of any authority to waive the interest, the petitioner has no right to insist on the same.

7. Having thus heard learned counsel for the parties, we may recorded, at the outset, that counsel for the petitioner did not pursue the prayer for declaring notification dated 26.6.2006 invalid. He, however, stressed that applying such a notification in the present case, would amount to giving retrospective operation to the notification.

8. Facts are not seriously in dispute. The petitioner desired that his seized cash of Rs.2,81,05,000/- be adjusted towards his tax liabilities. Such adjustment was not granted for considerable period of time. Eventually, when the adjustment was granted and the assessment was framed, to the extent of delay, interest totaling to Rs.23,96,531/- was demanded under Section 234B and 234C of the Act. The petitioner filed application on 3.11.2007 and prayed that such interest be waived. The petitioner relied on notification dated 23.5.1996 issued by the Board under Section 119(2)(a) of the Act, which according to him was prevailing at the time. The department, however, treated the application of the petitioner on the basis of a subsequent notification dated 26.6.2006.

9. We may notice that in the previous notification dated 23.5.1996, the Board authorized waiver of interest on several grounds. One of them was where in the course of search and seizure operation under section 132 of the Act any cash is seized,

which is not allowed to be utilized for payment of advance tax installment or installments as fall due after seizure of the cash. The exact language of Clause(b) of paragraph 2 of the said notification, which permitted such waiver is as follows:

"(b) Where during the course of search and seizure operation under Section 132 of the Income-Tax Act, cash is seized which is not allowed to be utilized for payment of advance tax installment or installments as they fall due after seizure of cash and the assessee has not paid fully or partly advance tax on the current income and the Chief Commissioner or the Director General is satisfied that the assessee is unable to pay the advance tax."

10. It is not in dispute that in the subsequent notification dated 26.6.2006, this category has been omitted. The notification dated 26.6.2006, in terms, superseded earlier orders/ notifications under Section 119(2)(a) issued by the Board and in particular notification dated 23.5.1996. It, thus, is an inescapable situation that by virtue of the Board's order dated 26.6.2006, previous category of cases where waiver of interest was permitted on account of non-adjustment of seized cash, during search and seizure operations towards advance tax installments or installments which fall due after the seizure, came to be deleted.

11. It is not in dispute that charging of interest under section 234B and 234C of the Act is mandatory. Such interest can be waived only under some authority of law. Board's order/ notification, under Section 119(2)(a) of the Act, would certainly be one such source. However, in absence of any such order or notification, waiver of interest would be unauthorized and therefore cannot be demanded. When we find that in the notification dated 26.6.2006, such category was omitted, it emerges indisputably that with effect from the operation of the said order, waiver of interest, for the reasons previously available, would not be permitted.

12. The question whether the petitioner's request ought to have

been considered under the previous notification, however, needs to be tackled. We find that the petitioner made the application for waiver of interest only on 3.11.2007 by which time the previous notification was already rescinded in view of order dated 26.6.2006 of the Board governing cases for waiver of interest under Sections 234A, 234B and 234C of the Act. The petitioner's case would have to be decided on the basis of the prevailing circular/notification/order and cannot be decided on the basis of the guidelines previously prevailing but currently superseded. It is unfortunate that the petitioner's assessment was finalized later on. It was only thereafter that the petitioner applied for waiver of interest. However, this cannot be a ground for us to hold that the respondents wrongly applied the order dated 26.6.2006 issued by the Board under Section 119(2)(a) of the Act. We reiterate that the petitioner's application dated 3.11.2007 had to be decided in terms of prevailing guidelines and policy and when such application was made, directive issued by the Board under Section 119(2)(a) of the act was one contained in order dated 26.6.2006.

13. We do not find that applying such parameters to the application, which was filed after issuance of the Board's order would amount to giving retrospective operation to the guidelines.

14. In the result, both the petitions are dismissed.

(Akil Kureshi, J.)

(Ms. Sonia Gokani, J.)