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

\+ **WP(C) NO.5750/2010**

Reserved on : 19th December, 2011.
% **Date of Decision** 5th January, 2012.

GIRNAR INVESTMENT LTD ..... Petitioner
Through Mr. Anoop Sharma and Mr. Manu K. Giri, Adv.

versus

THE COMMISSIONER OF INCOME TAX 4
& ANR ..... Respondents
Through Mr. Sanjeev Sabharwal, sr. standing counsel

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

This is a petition filed by M/s Girnar Investment Ltd. seeking issue of a writ or order or direction quashing the order dated 10th June, 2010 passed by the Commissioner of Income Tax under Section 220(2A) of the Income Tax Act (Act, for short). A prayer is also made seeking direction

to the CIT not to levy interest under Section 220(2) of the Act for the period from 20.5.1998 to 23.8.2004 for which period allegedly there was no demand outstanding and payable by the petitioner. A further prayer is made for issuance of a direction to the respondents to refund the tax along with interest already recovered by them as interest under Section 220(2). A direction is also prayed for, for waiver of the interest charged under the above Section.

2. The brief facts which gave rise to the filing of the writ petition may be noticed.

3. The petitioner is a public limited company having its registered office in Delhi. It was carrying on finance and investment business at the relevant time and in respect of this business, it was assessed to income tax in Delhi. In respect of the assessment year 1995-96, the petitioner was assessed to income tax by order dated 7.10.1997 on net taxable income of Rs.1,26,34,604/-. The tax calculated on the taxable income amounted to Rs.21,44,521/-. The calculation was made in Form No.ITNS-150. A demand notice for the aforesaid amount was issued under Section 156 of the Act along with the assessment order. The assessment order and the demand notice were served on the petitioner on 10.12.1997.

4. The assessee filed an appeal against the assessment order before the CIT(Appeals) and requested for stay of the disputed demand pending appeal by an application submitted to the CIT(Appeals) on 9.1.1998.

While the appeal was pending, the petitioner paid an amount of Rs.5,50,000/- on 15.1.1998 and another amount of Rs.5,00,000/- on 27.3.1998. These amounts were paid in part discharge of the demand raised in the notice issued under Section 156. On payment of the aforesaid amounts, the balance demand of Rs.10,94,521/- was stayed.

5. On 20.5.1998, the CIT(Appeals) passed an order disposing of the petitioner's appeal against the assessment. In the said order, the assessed income of the petitioner was reduced to Rs.64,18,504/- as against Rs.1,26,34,604/- assessed by the Assessing Officer. It is stated by the petitioner that by reason of the order passed by the CIT(Appeals), no demand remained payable by the assessee to the Income Tax Department. In fact, while giving appeal effect by order dated 28.8.1998, the Assessing Officer granted a refund of Rs.10,50,000/- along with interest of Rs.58,500/- to the petitioner.

6. The Revenue preferred an appeal to the Income Tax Appellate Tribunal against the relief granted to the petitioner by the CIT(Appeals). The Appellate Tribunal by order dated 17.7.2003 accepted the Revenue's appeal in full. The result was that the assessment order passed by the Assessing Officer on 7.10.1997 got restored. The Assessing Officer gave appeal effect to the order of the Tribunal by passing an order on 30.7.2004 in which he determined the assessee's income at the same figure as in the assessment order passed on 7.10.1997 and also calculated the tax thereon at the same figure of Rs.21,44,521/-. In the computation Form No.ITNS-

150 also dated 30.7.2004, which accompanied the appeal effect order passed by the Assessing Officer on the same date, the Assessing Officer charged interest under Section 220(2) of the Act for the period from November, 1997 to July, 2004 at Rs.26,30,915/-.

7. The petitioner thereupon filed an application under Section 220(2A) to the CIT-IV, New Delhi seeking waiver/reduction of the interest. It was submitted by the petitioner in its application dated 30.10.2004 filed before the CIT that all the conditions laid down for waiver of the interest stood satisfied in its case, that the charge of interest of the huge amount had caused genuine hardship to the petitioner, that the petitioner had fully cooperated with the Income Tax Department in the matter of assessment and payment of tax, that the petitioner had paid 50% of the tax demanded by the Assessing Officer and had obtained a stay for the balance amount pending decision by the CIT(Appeals), that it was under the bonafide and genuine belief that capital gains on bonus shares were not chargeable to tax and that in these circumstances, the CIT should exercise his discretion to waive the interest in favour of the petitioner. In the petition before the CIT, the petitioner also raised an alternative prayer to the effect that interest can be charged only for the period starting after the lapse of 35 days from the date of the service of the demand notices up to 14.1.1998 when tax of Rs.5,50,000/- was paid and further that the demand created on 30.7.2004, pursuant to the order of the Tribunal, was immediately paid and thus the maximum amount of interest that could be

charged from the petitioner was only Rs.1,04,589/-. A calculation sheet was attached to the application filed before the CIT explaining how the petitioner was liable to pay interest of only Rs.1,04,589/-. In support of this alternative prayer the petitioner cited the judgment of the Jharkhand High Court in ***New United Construction Co. Vs. Commissioner of Income Tax and Others*** (2004) 270 ITR 224.

8. It appears that the petitioner's application before the CIT for waiver/reduction of interest was not being taken up for disposal despite repeated reminders. Therefore, the petitioner filed WP(C) No.2740/2010 before this court seeking a direction to the CIT to dispose of the waiver/reduction application. The Court passed an order on 10.5.2010 directing the CIT to dispose of the petitioner's application within 4 weeks. In obedience to the directions of this Court, the CIT took up the proceedings within the time set by the Court and passed an order on 10.6.2010 rejecting the assessee's application for waiver/reduction of the interest charged under Section 220(2) in toto.

9. It is against the order passed by the CIT on 10.6.2010 that the petitioner has filed the present writ petition. The main contention of Mr. Anoop Sharma, the ld. counsel for the petitioner, is that since interest represents compensation for being deprived of the use of the money, it is payable only when lawful dues to the Income Tax Department are not paid. It is submitted that by virtue of the order passed by the CIT(Appeals), there was a drastic reduction in the demand raised by the

Assessing Officer pursuant to the assessment order as a result of which the petitioner was granted refund of the tax along with interest. It was only when the Tribunal passed an order on 17.07.2003 in the appeal filed by the Revenue that the assessment order and the demand raised pursuant thereto had been revived and therefore for the period commencing from the date of the order of the CIT(Appeals) till 23.08.2004 the date on which the Assessing Officer gave effect to the order of the Tribunal, no demand was payable by the petitioner. It is accordingly, contended that for this period no interest was lawfully due from the petitioner under Section 220(2) of the Act. These contentions have been vehemently opposed by the ld. standing counsel.

10. Section 220 provides for a situation "when tax payable and when assessee deemed in default". It is placed in Chapter XVII which is titled "Collection and recovery of tax" and is the first section placed under sub-head "D-Collection and recovery". Sub-section (1) in brief provides that any tax that is demanded by a notice of demand issued under section 156 shall be paid within thirty days (earlier 35 days) from the date on which the notice is received by the assessee. Sub-section (2), which is of concern to us in the present case, provides for the levy of interest at the prescribed percentage on the amount of the tax demanded by the notice of demand, if it is not paid within the period of thirty days, from the expiry of the period of thirty days till the tax is actually paid. The first proviso to the sub-section inserted by the Finance Act, 1963 with retrospective effect from 1-

4-1962 provides that where as a result of an order of rectification/amendment or an appellate or revisional order or an order of the High Court or Supreme Court the amount on which interest is payable as per sub-section (1) is reduced, the interest payable shall also stand reduced accordingly and if the assessee has paid any excess interest it shall be refunded.

11. A question arose under the Indian Income Tax Act, 1922 ("the old Act", for short) under the provision corresponding to section 156 of the 1961 Act as to whether it was necessary for the Income Tax Officer ("ITO") to issue fresh notices of demand as and when the amount of tax payable by the assessee undergoes a change due to appellate or revisional orders. The question arose in the context of tax recovery provisions of the old Act under which the ITO was obliged to issue a certificate to the Tax Recovery Officer ("TRO") specifying the amount that fell for recovery from the assessee. The matter ultimately reached the Supreme Court in ***ITO v Segu Bechiah Setty*** (1964) 52 ITR 538. By a majority the Supreme Court held that it was necessary for the ITO to issue fresh notices of demand and fresh certificates for recovery of the tax as and when the amount of tax payable by the assessee undergoes a change by virtue of appellate orders. This judgment as per the revenue created difficulties in the matter of recovering taxes where fresh demand notices or certificates of recovery had not been issued by the ITO. The government therefore passed an Act called "Taxation Laws (Continuation

and Validation of Recovery Proceedings) Act, 1964 ("the validating Act", for short). According to section 3 of the said Act, where any notice of demand in respect of any government dues had been served upon an assessee by a taxing authority under the Income Tax Act and on appeal or other proceedings the demand is enhanced or reduced it shall not be necessary for the ITO to serve a fresh demand notice on the assessee, except to the extent of the increase in the demand as a result of the enhancement. In the case of a reduction, it shall be sufficient if the taxing authority gives intimation of the reduction to the assessee. Sub-clause (iii) of clause (b) of the section further provides that "any proceeding initiated on the basis of the notice or notices of demand served upon the assessee before the disposal of such appeal or proceeding may be continued in relation to that amount so reduced from the stage at which such proceedings stood immediately before such disposal". Thus the situation arising out of non-issue of fresh demand notices or recovery certificates was redeemed and the validity of the notices already issued by the ITO on completion of the assessment was continued by a validating legislation.

12. Prima facie, it would appear that the validating Act has nothing to do with the controversy which has been brought before us by the petitioner, the reason being that the validating Act does not concern itself with the question of interest chargeable under sec.220(2). But on deeper consideration, it would be clear, as the following discussion would show,

that the controversy before us has to be resolved inter alia, by appreciating the effect of the validating Act.

13. Mr. Anoop Sharma's main contention as clarified by him in the course of his submissions before us is that no interest under section 220(2) is chargeable for the period from 15-5-1998, which is the date of the order of the CIT(A) giving relief, till 23-8-2004, which is the date of the order of the AO passed to give effect to the order of the Tribunal restoring the assessment order by withdrawing the relief granted by the CIT(A). This covers a period of 6 years and 3 months. The argument is that during this period the assessee was not liable to pay tax on the amount of relief granted by the CIT(A) because such tax was not due to be paid, and consequently he was not liable to pay interest thereon. Interest being compensation for being deprived of the use of the money, where the revenue was not entitled to the money at all during the said period it cannot charge interest as compensation. In support of the contention Mr. Sharma cited a judgment of the Jharkhand High Court in ***New United Construction Co.*** (supra). The validating Act, according to him, is of no assistance to the revenue as the dispute in the present case is only about the period for which interest was chargeable.

14. The dates and events in the present case as given to us in the course of the hearing are as follows:

"S.No.	Date of Service	Particulars
1.	30.11.1995	Return filed – Total income - Rs.64,18,600/- Tax liability - Rs.24,39,252/- Tax Paid - Rs.45,97.711/- Refund Due - Rs.21,58,459/-
2.	25.05.1996	Intimation u/s 143(1)(a) dt.29/3/96 received Returned income accepted Refund of Rs.24,17,330/- Granted Tax refund Rs.21,58,337/- Interest U/s 244A Rs.2,58,993/- Total Rs.24,17,330/-
3.	10.12.1997	Assessment Order u/s 143(3) dt.07.10.1997 received Total income assessed Rs.1,26,34,604/- Demand Raised Rs.21,44,521/- Due date for payment of demand : 14.1.98 (35 days of service of notice) Demand Paid 15.01.1998 Rs.5,50,000/- 27.03.1998 Rs.5,00,000/- Rs.10,50,000/-
4.	22.05.1998	CIT(A)'S order dt.15.05.1998 received Addition of Rs.62,16,000/- made in order u/s 143(3) deleted.
5.	11.09.1998	Received order u/s 250 dt.28/8/1998 passed by A.O. giving Appeal effect alongwith the following Refund Tax refund - Rs.10,50,000/- Interest Rs. 58,500/- Total Rs.11,08,500/- ITAT – department went in appeal

S.No.	Date of Service	Particulars	
6.	23.08.2004	Received Order dt.31/07/2004 of A.O. giving effect of Order of ITAT, New Delhi dt.17/7/2003 in which the addition of Rs.62,16,000/- made in order u/s 143(3), dt.7/10/97 was confirmed. Revised income assessed: Rs.1,26,34,604/- Demand Raised : Tax demand Interest provided Intimation dt.29.3.96 Withdrawn Intt. Provided vide order dt.11.9.98 withdrawn intt. Provided vide order dt. 20.10.1999 withdrawn Add : Intt. U/s 220(2) November 97 to July 2004 Total	Rs.21,44,521/- Rs.2,58,993/- Rs. 58,500/- Rs. 26,000/- Rs.24,88,014/- Rs.26,30,915/- Rs.51,18,929/-
7.	09.09.2004	Rs.24,88,014/- paid against outstanding demand.	

15. At our instance the learned standing counsel filed a sheet showing the calculation of the interest charged u/s.220(2) which shows a revised figure of interest of Rs.25,51,976 worked out as under:

Nov 1997 to 31-5-1999, 19 months @ 2% pm on Rs.21,44,521: Rs. 8.14.917

1-6-199 to 31-5-2001, 24 months @ 1.5% pm on " " " Rs. 7,72,027

1-6-2001 to 8-9-2003, 28 months @ 1.25% pm on " " " Rs. 7,50,587

1-10-2003 to July 2004, 10 months @ 1% pm on " " " Rs. 2,14,452

Total interest u/s.220(2): Rs. 25,52,976

16. The contention of Mr. Anoop Sharma is that interest was not chargeable on the full amount of Rs.21,44,521 for the period from 15-5-1998 till 23-8-2004 and it can be lawfully charged, for the said period, only on the amount of Rs.21,44,521 minus (Rs.10,50,000 + interest of Rs.58,500 granted on the refund of Rs.10,50,000) = Rs.11,53,021.

17. In ***Vikrant Tyres Ltd. Vs First ITO*** (2001) 247 ITR 821(SC) the Supreme Court was considering the correctness of charging interest u/s.220(2) in the following facts. There, the assessee had paid the entire demand of tax pursuant to the assessment. He however preferred an appeal to the first appellate authority who decided the appeal in his favour. The AO refunded the tax to the assessee. The revenue carried the matter further appeal and ultimately the matter reached the High Court on a reference. The High Court ruled in favour of the revenue and the assessment was restored. The assessee paid the taxes as demanded by the AO after the judgment of the High Court. The question before the Supreme Court was whether the revenue is entitled to demand interest in regard to the amount which was refunded to the assessee by virtue of the orders of the appellate authority and which was repaid to the department by the assessee after the judgment of the High Court. It was observed by

the Supreme Court that on a literal interpretation of the section 220(2) no interest can be charged on the assessee and that the High Court erred in interpreting section 3 of the validating Act liberally and in holding that the revenue was entitled to charge interest. It was held that where the assessee promptly satisfied the demand as originally assessed it was not open to the AO to charge interest u/s.220(2). It was pointed out that section 3 of the validating Act would apply only to a case where the original notice of demand was not satisfied and where the notice got quashed at some stage of the appellate proceedings but got revived by an order of a higher forum. It may be noticed that in this case before the Supreme Court the assessee had paid the entire tax demanded of him originally and even when it was restored by an order of the appellate authority, after being quashed by a lower appellate authority, since the tax demands were fully satisfied by the assessee even at the initial stage, the assessee was held not liable to pay interest. This case is distinguishable from the case before us in as much as the assessee before us did not pay the tax demanded of him by the AO fully. He only paid Rs.5,50,000 on 15-1-1998 and Rs.5,00,000 on 27-3-1998 as against the tax of Rs.21,44,521 demanded of him pursuant to the assessment.

18. ***S.M.S. Schloemann Siemag, A.G. Vs. Dy.CIT & Anr.*** (2001) 250 ITR 97 (AP)(FB) is a case decided by the Full Bench of the Andhra Pradesh High Court falling in the same category. In that case also the assessee paid the entire tax demanded from him pursuant to the

assessment made on him by an assessment order passed on 27-3-1987 for the assessment year 1984-85. The assessee, having paid the entire tax, filed an appeal to the first appellate authority which was allowed by order dated 31-3-1989. Thereupon the tax paid by the assessee was refunded to him with interest under sec.244 on or about 28-7-1989. The department preferred an appeal to the Tribunal against the order of the first appellate authority which was allowed by the Tribunal by order dated 6-9-1995. A consequential demand of the tax was made by the AO along with interest u/s.220(2) from the date of the original demand, i.e., 27-3-1987. On these facts it was held by the Full Bench (S.B. Sinha, C.J., as he then was, speaking for the court) that the ruling of the Supreme Court in ***Vikrant Tyres*** (supra) was attracted to the case and the levy of interest was illegal. It was observed as under:

> *"Interest is payable if a sum is due. Where the assessee is in default in making payment of the assessed amount demanded from him he is liable to pay interest. Although interest is payable to the revenue by an assessee in terms of section 220 of the Income Tax Act by way of compensation, the same would not mean that, although there does not exist any demand, interest would become payable".*

19. The quoted observations are relied upon by Mr. Anoop Sharma, learned counsel for the assessee, to contend that since in the instant case the assessee was not due to pay any tax on the addition deleted by the CIT(A) till his order was reversed by the Tribunal after a period of more than 6 years, no interest can be charged on that tax u/s.220(2) for that

period during which the order of the CIT(A) was operative. What he however overlooks is that in the Full Bench case (supra) the assessee had paid the full tax demanded of him pursuant to the assessment order. The fact that some part of it was refunded to him cannot be held against the assessee because the refund was the result of an appellate order passed under the provisions of the Income Tax Act. An assessment order is subject to appeal and all incident vicissitudes. The point to be noticed is that the full tax had been discharged by the assessee immediately on a demand being raised on him by the AO consequent to the order of assessment, whereas in the present case the petitioner has failed to do so. That takes the present case out of the ratio of the Full Bench of the Andhra Pradesh High Court (supra).

20. In ***Bharat Commerce & Industries Ltd. V Union of India*** (2004) 137 Taxman 405 (Delhi), a decision cited by the learned counsel for the assessee, the assessee paid the entire tax demanded of him pursuant to the appeal effect order passed by the AO. Both the assessee and the department preferred appeals to the Tribunal against the order of the CIT(A). The Tribunal withdrew some of the reliefs granted by the CIT(A). Fresh demand was raised by the AO after giving effect to the Tribunal's decision, which consisted of tax and interest u/s.220(2) from 3-7-1982 to 1-8-1987, the period during which the order of the CIT(A) was operative. The contention of the assessee before the division bench of this court was that no interest should have been charged since during the

afore-mentioned period no tax was outstanding. The court observed that the point was covered by the judgment of the Supreme Court in ***Vikrant Tyres*** (supra) and that of the Full Bench of the Andhra Pradesh High Court in ***S.M.S. Schloemann Siemag, AG*** (supra), but in the last paragraph held as follows:

> *"In that view of the matter, the writ petition is allowed subject to orders of payment so far as interest under charge under section 220(2) of the IT Act is concerned".*

Since the court ultimately directed the assessee to pay the interest, we do not see how the judgment can be applied in favour of the assessee before us.

21. Before we proceed to refer to the other judgments of this court touching upon the issue arising in the present writ petition, it would be pertinent to refer to the judgments of some of the other High Courts.

22. In ***A.V. Thomas and Co. Ltd. V ITO*** (1982) 138 ITR 275, it was held by a learned single judge of the Kerala High Court that if the assessee had paid the full tax at the right time (when demand was raised pursuant to the assessment order) and a portion of the tax was refunded to him as per the order of the first appellate authority, he had no liability to pay interest to the department u/s.220(2) until the notice of demand was served upon him consequent to the reversal of the order of the first appellate authority by the Tribunal. This judgment was affirmed by the

division bench of the Kerala High Court in ***ITO v A.V. Thomas and Co. Ltd.*** (1986) 160 ITR 818.

23. In ***K.P. Abdul Kareem Hajee v ITO*** (1983) 141 ITR 120, it was again held by a learned single judge of the Kerala High Court that an order of a judicial or quasi-judicial authority was not final for the purpose of res judicata during the time allowed for filing the appeal or during the pendency of the appeal. The order, it was held, although not final, is provisionally executable subject to restoration. Where the order of assessment was taken up in appeal and the first appellate authority gave relief which was however reversed by the Tribunal on appeal by the revenue, and the assessment order was restored, the assessment order *"is deemed to have operated in full vigour to make the petitioner liable in law by reason of the Tribunal's affirmative order"*. The single judge accordingly held that the assessee was liable to pay interest u/s.220(2) right from the date of the assessment order.

24. In a matter which arose under section 32(2) of the Gift Tax Act, 1958, which is similar to the provisions of section 220(2) of the IT Act, a division bench of the Kerala High Court in ***Mohammed Essa Moosa Sait v GTO*** (1987) 167 ITR 338 held, applying ***K.P. Abdul Kareem Hajee*** (supra), that the assessee was liable to pay interest on the unpaid amount of installments of gift-tax right from the date of the gift-tax assessment order.

25. In ***ITO v Ghanshyamdas Jatia*** (1976) 105 ITR 693, the Calcutta High Court held that the combined effect of the Income Tax Act and the validating Act is that in the case of an order of the appellate authority reducing wholly the demand forming the basis of the certificate of tax recovery, the certificate proceedings shall be kept in abeyance until such order becomes final and conclusive. There is no question of extinction of the demand in such cases. It was further held that if the original assessment order is restored, there is no need to issue a fresh demand notice in view of section 3 of the validating Act.

26. In ***Birla Cotton Spg. & Wvg. Mills Ltd. V ITO*** (1995) 211 ITR 610 a learned single judge of the Calcutta High Court held that the liability to pay interest would arise u/s.220(2) only in cases where the amount specified in the notice of demand is not paid within the period specified in sub-section (1) of the section. It was further observed that interest was not payable if the amount is already paid or was no longer payable. This observation can be interpreted to convey that if the tax was not payable by reason of a favourable appellate order there was no liability to pay interest. But a perusal of the decision shows that the observation was made only as a passing observation. Moreover, the controversy in that case was whether the mistake in charging interest u/s.220(2) can be rectified.

27. The Karnataka High Court had occasion to consider the question in relation to a demand of penalty u/s.271(1)(c) of the Act in ***M.N. Jadhav v***

Fourth ITO (1986) 161 ITR 275. In that case the Inspecting Asst. Commissioner imposed the penalty on the assessee, which was cancelled by the Tribunal on appeal. A reference was made to the High Court at the instance of the department and the High Court held that the penalty was rightly imposed. The Tribunal passed a consequential order to give effect to the opinion of the High Court. Pursuant to the order of the Tribunal, the AO passed consequential orders calling upon the assessee to pay up the penalty with interest accrued thereon u/s.220(2). The assessee challenged the order before the High Court by filing writ petition on the ground that fresh demand notices were not issued by the AO for recovery of the penalty and interest. The High Court dismissed the petition holding (a) that the legal effect of the later order of the Tribunal (to give effect to the opinion expressed by the High Court on a reference) was that the earlier notice of demand stood revived and became valid, legal and enforceable against the assessee and there was no need to issue fresh demand notices and (b) that in view of the validating Act the original notice of demand issued by the AO continued to be valid and operative against the assessee. It was noted by the High Court that the assessee had not paid the penalty till 15-2-1979.

28. We will now refer to the judgment of the Division Bench of the Gujarat High Court in ***Roopali Dyeing and Printing Works vs Asst.CIT*** (1995) 212 ITR 573. In that case the facts in brief are as follows. An assessment order was passed for the assessment year 1984-85 determining

the total income of the assessee at Rs. 21,54,740 by order dated 30-3-1987. On appeal, the CIT(A) passed an order on 22-5-1987 reducing the income to Rs.4,09,589. The department filed an appeal to the Tribunal which passed an order on 23-7-1992 increasing the income to Rs.12,94,380. The AO passed a consequential order to give effect to the Tribunal's order and in addition to the tax demand, also charged interest of Rs.3,21,471 u/s.220(2). The assessee in the meantime had paid the entire tax immediately after the Tribunal passed the order without even waiting for the demand. After several representations to the CIT, the interest was reduced to Rs.3,00,000. The assessee thereupon filed a writ petition before the Gujarat High Court questioning the levy of interest on the ground that interest can be charged only when the tax remained unpaid beyond the period of 30 days stipulated in the notice of demand issued after the passing of the order by the Tribunal and not otherwise, that even without waiting for the demand he had paid the tax and that in these circumstances the levy of interest was illegal. In the course of the arguments before the High Court the main contention of the assessee, as recorded by the High Court, was that "regard being had to the facts of the present case and in case of reduction being made the Commissioner of Income Tax and the order subsequently being made by the Tribunal by enhancing the amount and in this interregnum period the petitioner has no liability and both the orders should be taken as fresh orders and/or orders afresh and unless the demand is followed by notice under section 156 of the Act, the claim of interest is fallacious".

29. The Gujarat High Court, after a survey of several judgments on the point, including those of the Kerala and Karnataka judgments noted supra, held as follows:

> *"In the present case, the notice of demand under section 156 was issued in pursuance of the order passed under section 143(3) of the Act. The said demand finally stood reduced to the extent order passed under section 254 by the Tribunal, though in between the Commissioner of Income Tax (Appeals) had granted greater relief in its order under section 250 of the Act. Considering the provisions of section 220(2), proviso thereto and section 156, and keeping in view the fact that tax on income is a debt due on the closing date of the previous year, though quantified later on in accordance with the provisions of the Act, the interest which was payable on the amount demanded, vide notice under section 156 as per the assessment order has to be reduced only to the extent it stood reduced finally by the order of the Tribunal under section 254 of the Act. Regard being had to the scope of the facts of the present case, we hold that in view of the scope of the proviso to section 220(2) of the Act, the notice of demand must relate back to the original notice of demand. At no stage while the appeals were pending before the different forums, had the same lost its force. The moment there is finality of proceedings, the original notice of demand comes to the surface and for any default on the part of the assessee the claim of interest can be levied and the contention raised by the assessee in the instant case does not have any merit. On the basis of the original notice of demand on finality of the proceedings, the claim of interest can be claimed. We, however, do not consider the calculation of the interest on the basis of the principal. We find that the stand taken by the Revenue authority is neither contrary to nor inconsistent with the provisions of law and the interference by the writ court in the facts and circumstances of this case is not necessary".*

30. It will be appreciated from the quoted observations that the Gujarat High Court not only considered the provisions of sub-section (2) of section 220 but also examined the effect of the proviso to the sub-section. According to the proviso, if as a result of any order in appeal or revision or an order of the Settlement Commission the amount on which the tax is payable has been reduced, the interest on the amount of tax payable shall also stand reduced. The High Court opined that the proviso applies to the case of a final order passed by the appellate or revisional authority and not to orders passed by several intermediary appellate/revisional authorities whose orders were not final but were made the subject of further appeal. The proviso was inserted by the Finance Act, 1963 with retrospective effect from 1-4-1962, the date of commencement of the Income Tax Act, 1961.

31. In ***Shri Ambica Mills Ltd. V ITO*** (1993) 203 ITR 84, a Division Bench of the Gujarat High Court held that where the entire tax demand had been paid by the assessee as per the notice u/s.156 there was no question of applying section 220(2) of the Act.

32. We may now notice a judgment of the learned single judge (P. Sathasivam, J., as he then was) of the Madras High Court in ***Super Spinning Mills Ltd. V CIT & Anr.*** (2000) 244 ITR 814. In that case the assessee did not pay the full tax demanded of him by the AO for the assessment years 1979-80 and 1980-81. In the assessments made for these years, the AO disallowed the claims of depreciation and investment

allowance on the interest on loans capitalised by the assessee and added to the cost of the assets. On appeal, the claims were allowed by the CIT(A). The revenue preferred appeals for both the years before the Tribunal. While the appeals were pending, the Act was amended retrospectively to provide that depreciation and investment allowance cannot be claimed on interest on loans capitalised and added to the cost of the assets. The Tribunal disposed of the appeals of the revenue in accordance with the amendment, and thus restored the disallowances. The AO passed consequential orders and demanded both the tax and the interest u/s.220(2). The assessee paid the tax but filed applications to the CIT u/s.264 of the Act contending that the additional tax became payable only as a result of the retrospective amendment made to the Act, that such tax was paid by the assessee within time after receipt of the demand notices issued by the AO consequent to the passing of orders giving effect to the Tribunal's orders and therefore no interest u/s.220(2) was payable. The CIT rejected the applications following a circular No.334 dated 3-4-1982 issued by the CBDT [reported in (1982) 135 ITR St. 10] rejected the applications filed by the assessee. In this circular, the CBDT expressed the view that where the assessment made originally was varied or set aside by one appellate authority, but on further appeal the original order of assessment was restored either wholly or partly, the interest payable u/s.220(2) "should be computed with reference to the due date reckoned from the original notice of demand and with reference to the tax finally determined", and "the fact that during an intervening period, there was no

tax payable by the assessee under any operative order would make no difference to the position".

33. The assessee filed writ petitions before the Madras High Court challenging the orders of the CIT dismissing the applications filed u/s.264 and contended that the entire tax having been paid by it on both occasions – both when the original demand notices were issued and when the AO issued demand notices pursuant to the orders of the Tribunal – there was no legal justification for charging interest. In the course of the hearing before the High Court, the learned standing counsel for the department was able to show from the record that the petitioner-assessee had not paid the entire tax as claimed and was in arrears of the tax payments for both the assessment years and this position was not controverted by the petitioner. Thus the factual position before the High Court was that the full tax had not been paid by the assessee at the time when the original demand notices were issued.

34. In the above circumstances, it was held by the Madras High Court after elaborately noticing several authorities cited before it, including the two judgments of this court in ***Bharat Commerce and Industries Ltd. V CIT*** (1994) 210 ITR 13 and ***Bharat Commerce and Industries Ltd V Union of India*** (1991) 188 ITR 277, as follows:

> *"As stated earlier, the correct legal effect of the final order passed by the Income Tax Appellate Tribunal is that the earlier notice of demand stood revived and became legal, valid and*

enforceable against the assessee. In such circumstances, there *is no question of issuing fresh notice of demand as claimed. Further, in view of Section 3 of the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964, the original notice of demand issued by the Income Tax Officer continued to be valid and operative against the assessee. I am of the view that from a combined reading of Sections 156 and 220(2) of the Act, the assessee could not escape from his liability of payment of interest and more particularly, in the light of the legal position, as per the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964. In other words, the 1964 Act comes to the rescue of the Revenue to hold that the original notice of demand issued by the Income Tax Officer continued to be valid and operative against the petitioner. As rightly observed by the Division Bench in Bharat Commerce and Industries Ltd. V. Union of India (1991) 188 ITR 277 (Delhi), the demand of interest cannot be termed as a penal provision, as the rationate behind the said provision is not to penalise a party but to make a provision for compensation to the Department on the failure of the assessee to make payment on the first notice of demand. I have already concluded that as per the order of the Appellate Tribunal, the original demands stood revived, if that is so, in the absence of payment of entire amount demanded, the respondents are justified in claiming interest under Section 220(2) of the Act. To make it clear even if a part of the amount of tax is outstanding, interest is chargeable from the expiry of 35 days. Even though learned senior counsel for the petitioner very much relied on some of the decisions of the various High Courts as mentioned above, after carefully scrutinising the factual position therein, I am of the view that those cases are either distinguishable or not applicable to the facts of the present case. As a matter of fact, I have already concluded that in most of the cases referred to by learned senior counsel for the petitioner, the assessee in those cases has paid the entire tax demanded, and in some cases, demand arose under*

rectification orders. In such circumstances, with respect, I am not in a position to follow those decisions".

35. As regards the circular issued by the CBDT (supra) the Madras High Court held that though it was not binding on appellate authorities under the Act or on the court, even without the circular the levy of interest was in conformity with the legal position and therefore the CIT cannot be faulted for upholding the same. The writ petitions were therefore dismissed.

36. The judgment of the Madhya Pradesh High Court in ***Pitambardas Dulichand and Ors. Vs Union of India and others*** (1999) 239 ITR 69 rested on the principle of merger. In that case the petitioner-assessee claimed that the interest u/s.220(2) was payable only if the amount of tax was not paid in accordance with section 220(1) and in the absence of any demand, no interest could be charged. The contention was rejected by the court, and in doing so the court applied the doctrine of merger and on that basis held that *"when the original demand is affirmed by the last court then that amounts to affirming the original demand and the amount becomes due to the Revenue; therefore, the interest being compensatory in nature, the Revenue is entitled to charge interest from the date of the original order. In this view of the matter, we are the opinion that the circular issued by the Central Board of Direct Taxes appears to be well-founded".*

37. To sum up, the following principles can be gleaned from the decisions noticed above: (a) fresh notices of demand need not be issued every time the total income undergoes a change due to appellate or revisional orders since section 3(b)(iii) of the validating Act provides that any proceeding initiated on the basis of the notice of demand served upon the assessee before the disposal of the appeal or other proceeding may be continued in relation to that amount so reduced from the stage at which such proceedings stood immediately before such disposal; (b) a case where the assessee has paid the full amount of tax demanded by the AO pursuant to the assessment order stands on a different footing from a case where such demand was not satisfied in full and different considerations shall apply to such a case; (c) the original demand made by the AO on the basis of the assessment order is merely kept in abeyance or suspension during the entire proceedings by way of appeal or revision taken against the assessment and gets revived from inception once the assessment gets finally confirmed in those proceedings; (d) when the assessment order is finally affirmed, the doctrine of merger also applies and interest being compensatory in nature, the revenue is entitled to charge the same from the date of the original order which merged with the final appellate order; (e) as a corollary to the above, it follows that where an assessment is restored and the original demand gets revived from inception, the assessee is liable to pay interest u/s.220(2) of the Act from that date on the unpaid amount and any variation in the amount of the demand favourable to the assessee which was directed by any of the appellate authorities in

the interregnum has no effect on the liability of the assessee to pay the interest.

38. It will now be appropriate to refer to the judgments of this court dealing with the issue.

39. In ***Bharat Commerce and Industries Ltd. Vs UOI*** (1991) 188 ITR 277, while considering the scope of section 220(2) of the Act, a Division Bench of this court held as follows:

> "(24) The logical consequence of the view, enunciated by the High Courts of Kerala and Calcutta, in so far it has a bearing on the present case, would be that the first notice of demand, issued after original assessment order passed by the Income Tax Officer cannot be deemed to have extinguished by virtue of the appeal having been filed before the CIT(A) or conditional stay of the operation of the assessment having been allowed by the CIT(A) pending disposal of the appeal before him or by virtue of subsequent reduction of the taxable income, for the reason that under the order of the Tribunal which has attained finality between the parties, the original assessment has been restored with the result the first demand notice which at the most lay in abeyance or suspension would stand revived and it would be apposite to hold that there was non-compliance with this notice of demand apparently beyond 35 days so as to attract the provisions of section 220(2) of the Act. To accept the arguments advanced by Mr. Syali that by virtue of the order passed by the CIT(A) that demand cannot be said to have been in operation till the Tribunals final order, would be indulging in over simplification. which is not warranted by the relevant provisions of the Act."

40. This judgment was one of the many judgments relied upon by the learned single judge of the Madras High Court in ***Super Spinning Mills Ltd.*** (supra).

41. The second ***Bharat Commerce and Industries Ltd. Vs CIT*** (1994) 210 ITR 13, which is again a judgment of a Division Bench of this court was concerned with the notice of demand issued u/s.156 of the Act pursuant to the order of rectification passed by the AO u/s.154 and it was held that the assessee would be liable to pay interest u/s.220(2) only if he failed to pay the demand within the period stipulated in the notice and that the rectification order itself cannot include interest u/s.220(2). This judgment, though not directly relevant to the controversy before us, may be understood as reiterating the principle that interest begins to run only if the demand raised against the assessee is not paid. That principle does not in any manner run counter to the earlier judgment of this court in ***Bharat Commerce and Industries Ltd. Vs UOI*** (supra). Obviously, the rectification order which created an additional demand of tax has to be followed up by a notice of demand u/s.156. The failure of the assessee to pay that demand within the time stipulated in the notice will attract the levy of interest u/s.220(2). There can be no two views on the question.

42. The result of the discussion is this. The petitioner before us is liable to pay interest u/s.220(2) of the Act on the amount of tax due from him on the basis of the assessment order passed u/s.143(3) on 7-10-1997. The interest is payable for the entire period on the amount of tax as

computed in the assessment order, from November 1997 till the date on which it was actually paid. In computing the interest, no notice shall be taken of the fact that by virtue of the order of the CIT(A) there was a reduction of the tax liability from the date of the said order till the date on which the Tribunal restored the assessment order. However, no interest shall be charged from the assessee on the interest of Rs.2,58,993, Rs.58,500 and Rs.26,000 allowed to the assessee under section 244A of the Act on the refunds granted to the assessee. The AO is directed to recalculate the interest in the light of our directions and recover the same from the assessee. The writ petition is disposed of in the above terms. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

January 5, 2012
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