

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Income-tax Appeal No. 76 of 2006

Reserved on: 3.9.2012.

Date of decision: 19.09.2012

Commissioner of Income-tax, Shimla

...Appellant.

Versus

M/s Ruchira Papers Ltd., Kala Amb, Distt. Sirmour

...Respondent.

Coram

The Hon'ble Mr. Justice Deepak Gupta, J.

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting? Yes.

For the appellant:

Mr. Vinay Kuthiala, Sr. Advocate with Ms. Vandana Kuthiala, Advocate.

For the respondent:

Mr. K.D.Sood, Senior Advocate with Mr. Abhishek Jhamba and Mr. Abhimanyu Jhamba, Advocates.

Per Deepak Gupta, J.

1. This appeal was admitted on the following questions of law:-

1. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was correct in holding that interest under Sections 234A and 234B of the Income-tax Act cannot be charged in an order of rectification under Section 154 in a case where no such interest was charged in the original assessment order, inspite of the law laid down by the Constitution Bench of the Hon'ble Supreme Court in the case of Anjum M.H.Ghaswala and Others Vs. CIT (252 ITR 1)?

2. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was justified in holding that no interest under Sections 234A and 234B of the Act could be charged for the first time in the order passed under Section 154, even though such charging of interest was mandated by the specific provisions contained in Sections 234A(4) and 234B(4) of the Act?
3. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was justified in not following the decision of its own Special Bench in the case of Motorola Inc. Vs. DCIT (95 ITD 269), on the ground that the said decision was distinguishable on fact, when the said fact was of no relevance in the said decision of the Special Bench?

2. Though as many as three questions have been framed, after hearing the parties we are of the considered opinion that the real question of law which arises in this case is as follows:-

“Whether interest under Section 234B of the Act could be charged in the notice of demand issued under Section 156 in the absence of any specific order demanding interest in the assessment or rectification orders?”

3. The facts, briefly stated, are that for the assessment year 1996-97 i.e. accounting period 1.4.1995 to 31.3.1996 the assessee filed its return of income declaring income of Rs.1,31,40,450/-. This return was accepted by the revenue on 17.12.1996. Thereafter, a revised return of income was

filed by the assessee on 17.2.1997 showing income of Rs.1,29,43,000/-. The reason for filing the revised claim was that some depreciation, which had not been claimed earlier, was claimed. On 28.02.1997 the Assessing Officer passed assessment order accepting the income at Rs.1,29,94,000/-. Thereafter, a notice was issued to the assessee under Section 154 asking why the deduction granted to it under Section 80I in respect of the second unit of the assessee be not withdrawn. On 14.12.1998 an order under Section 154 was passed and thereafter matter was taken in appeal and the Commissioner (Appeals) set-aside the order issued under Section 154. An appeal was filed by the revenue before the Tribunal, which was also rejected. In the meantime on 29.10.2001 an order under Section 143(3) read with Section 147 was passed which also did not levy any interest under Sections 234B or 234C. On 12.11.2003 fresh order under Section 154 read with Section 254 was passed wherein the income was assessed at Rs.1,50,89,090. Again there was no mention that any interest would be charged. Thereafter, the assessee filed an application for rectification and claimed further depreciation and this application was allowed on 31.12.2003 and the

Income for the assessment year 1996-97 was now assessed at Rs.1,49,33,180. It is not disputed that this is the final assessment order. The order dated 31.12.2003 is also completely silent with regard to the payment of interest. However, the department while raising the demand directed that interest be also paid under Sections 234A and 234B. Application for rectification filed under Section 154 by the assessee praying that the interest could not be charged since in none of the assessment orders, whether original or on reassessment, there was any order of payment of interest, was rejected. Thereafter, the assessee filed an appeal before the Commissioner of Income-tax, who allowed the same. The Tribunal has rejected the appeal of the revenue and hence this appeal.

4. Sh. Vinay Kuthiala, learned senior counsel appearing for the revenue has placed reliance on the judgement of the Apex Court in Commissioner of Income-tax vs. Anjum M.H.Ghaswala and others (2001) 252 ITR 1, which has clearly laid down that the levy of interest is mandatory.

The Constitution Bench of the Apex Court held as follows:-

“If the scheme of levy of interest is thus to be analysed on the anvil of the provisions referred to hereinabove, it shows that the interest contemplated under Section 234A, 234B and 234C is mandatory in nature and the

power of waiver or reduction having not been expressly conferred on the Commission, the same indicates that so far as the payment of statutory interest is concerned, the same is outside the purview of the settlement contemplated in Chapter XIX-A of the Act.”

5. The Court finally went on to hold as follows:-

“For the reasons stated above, we hold that the Commission in exercise of its power under section 245D(4) and (6) does not have the power to reduce or waive interest statutorily payable under Sections 234A, 234B and 234C except to the extent of granting relief under the circulars issued by the Board under Section 119 of the Act.”

6. In the present case an order passed in a rectification petition whereby the income was enhanced and the Assessing Officer while rectifying the income did not issue any direction to pay interest under the requisite provisions of law.

7. A learned Single Judge of the Karnataka High Court in *Union Home Products Ltd. vs. Union of India* and another *(1995) 215 ITR 758* had clearly held that the levy of interest under Sections 234A, 234B and 234C is compensatory and therefore, mandatory in nature and no notice was required to be issued before levy of certain interest.

8. The Patna High Court in *Ranchi Club Ltd. vs. Commissioner of Income-tax and others (1996) 217 ITR 72* had also held that interest payable under Sections 234A and 234B is compensatory in character. It, however, went on to hold that mere issue of notice under Section 142 does not give jurisdiction to levy interest under Section 254.

The relevant portion of the judgement reads as follows:-

“The assessment has been made under Section 144 of the Act after the petitioner failed to file the revised return under Section 139(4). Earlier there was a notice under Section 147 read with Section 148 pursuant to which the petitioner had appeared and taken the stand that since the return for the assessment year in question, i.e., 1991-92 had already been filed and the assessment was still pending, the question of filing a fresh return did not arise.

As stated above, the assessment order does not mention about the levy of interest. The demand notice also does not mention as to under which provision of the Act the interest has been levied.”

9. The Patna High Court finally went on to hold as follows:-

“Where the assessee fails to file the return of income either under section 139(1) or (4) or section 142(1), pursuant to the notice issued thereunder, or files the same after the due date, in terms of section 234A he is no doubt liable to pay interest. He is also liable to pay interest if he commits any default in payment of advance tax under the provisions of section 234B. Where, however, return is filed within time but a particular item

of income is in dispute as being includible within taxable income or not, the mere issue of notice under section 142 will not confer jurisdiction upon the authority to levy interest. Section 234A no doubt also mentions about non-compliance with notice under Section 142(1). But it would appear that section 142(1), which refers to the stage of enquiry before assessment, envisages two types of notice. It provides for notice to those who have already submitted the return under section 139 to produce such accounts or documents as the Assessing Officer may require or to furnish information on such points or matters as the Assessing Officer may require. It also provides for notice to persons who have not filed the return within the time allowed under Section 139(1) to furnish the return of income. It is thus obvious that section 142(1) envisages two types of notices. When section 234A refers to the notice under section 142(1) it obviously means notice to file the return of income in case of non-filing. The object underlying section 234A is to create additional liability to pay interest for the default in furnishing the return of income, the object is not to penalize an assessee, who has already filed the return under Section 139 for not producing accounts or documents and so on under clause (ii) or (iii) of section 142(1). In my considered opinion, therefore, the necessary conditions as required under section 234A are not made out in the instant case and, therefore, the levy of interest is not justified.”

10. The judgement of the Patna High Court was upheld by the Apex Court in Commissioner of Income-tax and others vs. Ranchi Club Ltd. (2001) 247 ITR 209.
11. In Commissioner of Income-tax vs. R.Ramalingair (2000) 241 ITR 753 the Kerala High Court also held that

the payment of interest under Sections 234A, 234B and 234C is mandatory.

12. Shri Vinay Kuthiala, learned senior counsel for the revenue contends that his case is squarely covered by the judgement of the Supreme Court in Ghaswala's case. However, according to Shri K.D.Sood, learned senior counsel for the assessee, the question whether interest can be charged by the revenue, if the reassessment/rectification order is silent qua payment of interest, is not covered by Ghaswala's case but is much closer to the judgement of the Apex Court in Ranchi Club's case.

13. A similar question arose before the Apex Court in Commissioner of Income-tax vs. Insilco Ltd. (2005) 278 ITR 1 where there was an order to charge interest but no specific directions to charge interest under Section 234B was given. The Appellate Tribunal held, following the judgement in Ranchi Club's case, that interest could not be charged in the notice of demand. The Apex Court remanded the case to the Calcutta High Court to consider whether the law laid down in Ranchi Club's case has been changed by virtue of the decision in Ghaswala's case.

14. A Division Bench of the Bombay High Court in *Prime Securities Ltd. vs. Assistant Commissioner of Income tax (Investigation) (2011) 333 ITR 464* after discussing the judgement in *Ghaswala's* case held as follows:-

“9. The Division Bench of this court in its judgement in the case of the appellant, referred to above, has held that the return filed by the appellant was in consonance with law and there was only a formal defect and the moment that defect was cured, the return related back to the original date. In our opinion, when the Supreme Court in *Ghaswala's* case says that charging of interest under section 234B is mandatory, what it really means is that once the assessee is found liable to pay interest, then recovery of interest is mandatory and recovery of that interest cannot be waived for any reason. But for charging interest under that section, it has to be established that the assessee has committed default in payment of advance tax.....”

15. Our attention has been drawn to the judgement of the High Court of Uttarakhand in Income-tax Appeal No. 15 of 2006 titled as *Commissioner of Income-tax, Dehradun vs. M/s Dehradun Club Ltd.* decided on 14th October, 2011, wherein the issue involved was identical to the present case. In that case the Assessing Officer had not issued any direction in respect of charging of interest under Section 234B of the Act. Pursuant to the assessment order a

notice of demand was issued demanding interest. The question which arose before the Uttarakhand High Court was whether interest under Section 234B of the Act could be charged in the notice of demand issued under Section 156 in the absence of any specific order demanding interest in the assessment order. After analyzing the legal provisions and discussing various judgements the Uttarakhand High Court held as follows:-

“11. A perusal of the aforesaid provision clearly indicates that the tax, interest, penalty, or fine is payable in consequence of an order passed under the Act, namely, the assessment order. There has to be a specific order passed by the assessing officer charging interest and, only thereafter, a notice of demand levying interest could be issued.

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16. The learned counsel for the appellant submitted that the provision of charging interest under Section 234A, 234B & 234C of the Act is mandatory as held by the Supreme Court in Commissioner of Income Tax Vs. Anjum M. H. Ghaswala & others 252 I.T.R. 1. There is no quarrel with the aforesaid proposition laid down by the Supreme Court, but, at the same time, the assessment order must contain the imposition of interest and, only thereafter, a notice of demand could be issued under Section 156 of the Act. To elucidate the matter, a notice of demand is somewhat like a decree in a civil suit, which must follow the order. When the judgment in a civil suit does not specify any amount to be recovered, the decree could not contain such amount. Similarly, when the assessment order under Section 143 (3) of the

Act does not indicate that interest would be leviable, the notice of demand under Section 156 of the Act levying interest would be wholly illegal since interest is payable in consequence of an order passed as is clear from Section 156 of the Act. Consequently, the notice of demand cannot go beyond the assessment order and the assessee cannot be served with any such notice demanding interest. There is another aspect of the matter. The assessee must know that he has been charged with interest under a particular section of the Act. That must be specified in the assessment order and, only thereafter, a notice of demand under Section 156 of the Act could be issued.”

16. A Division Bench of the Allahabad High Court in Income-tax Appeals No. 81 of 2002 titled as Commissioner of Income-tax-II, Kanpur vs. M/s Deep Awadh Hotels (P.) Ltd. Kanpur, decided on 3.8.2011 held as follows:-

“We do not find that the judgement in Ranchi Club Ltd. has either been expressly overruled or any different view has been taken in Anjum M.H.Ghaswala’s case. We also do not find force in the argument advanced by Sh. Mahajan that even if assessment order or computation sheets do not provide for interest, since interest is mandatory, it can be charged in the demand notice, which according to Sh. Mahajan is signed by the Assessing Officer.

Even if any provision of law is mandatory and provides for charging of tax or interest, the view taken in Ranchi Club Ltd. is that such charge by the assessing officer should be specific and clear and assessee must be made to know that the assessing officer has applied its mind and has ordered charging of interest. The mandatory nature of charging of interest and the actual

charging of interest by application of mind and the mention of the proviso of law under which such interest is charged are two different things.”

17. We are in respectful agreement with the judgement rendered by the Uttarakhand and Allahabad High Courts. No doubt, payment of interest under Sections 234A, 234B and 234C is mandatory but it is for the Assessing Authority while passing the original assessment order or while passing the reassessment or rectification order to direct payment of interest. Even if he orders that interest be paid in accordance with law without specifying a particular provision the revenue may be able to take benefit of the judgement in Ghaswala's case since payment of interest is mandatory. However, in case the assessment order is silent with regard to the payment of interest then without challenging the assessment order the revenue cannot, while issuing notice of demand, claim interest under the aforesaid sections.

18. There can be no dispute that if the return is not filed within time or if advance tax is not paid within time then the assessee is liable to pay interest and the payment of interest is mandatory. However, if the assessing officer or the appellate authority does not order the payment of interest, the assessee in our opinion cannot be directed to pay

interest by the demand notice. The Assessing Officer virtually acts like a judicial officer. If he passes a wrong order not to levy the interest then the revenue must challenge the said order get the same set-aside and an order must be passed directing interest should be paid. If no such order is there, the revenue cannot claim interest.

19. In view of the above discussion, we answer the question framed by us against the revenue and in favour of the assessee. The appeal is accordingly dismissed.

(Deepak Gupta), J.

19th September, 2012

(Rajiv Sharma), J.

High Court