

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री आर. के. पांडा, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI R.K. PANDA, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 1420/PN/2005

निर्धारण वर्ष / Assessment Year: 1997-98

Sandvik Asia Limited,
Mumbai Pune Road,
Pune - 411012

PAN : AACCS6638K

.....अपीलार्थी / Appellant

बनाम / V/s.

Commissioner of Income Tax (OSD),
Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri J.D. Mistri
Revenue by : Shri Dheeraj Kumar Jain

सुनवाई की तारीख / Date of Hearing : 13-10-2015

घोषणा की तारीख / Date of Pronouncement : 21 -10-2015

आदेश / ORDER

PER VIKAS AWASTHY, JM :

The appeal has been filed by the assessee against the order of Commissioner of Income Tax (OSD), Pune dated 24-03-2005 for the assessment year 1997-98.

2. In appeal, the assessee has raised the following grounds:

"Aggrieved by the order passed by the Commissioner of Income-tax (OSD), Pune [hereinafter referred to as 'the learned CIT(A)'], under section 250 of the Income-tax Act, 1961 ('Act') and based on the facts and circumstances of the case, Sandvik Asia Limited [hereinafter referred to as 'the Appellant'] respectfully submits that the learned CIT(A) erred in

disposing the appeal of the Appellant, on the following grounds, which are independent of and without prejudice to one another.

1. Order passed by the Assessing Officer not being an appeal-able order. The learned CIT(A) has erred in law in observing that the Order Giving Effect passed by the Assessing Officer, incorrectly computing interest under section 244A, is not an appeal-able order and thus dismissing ground numbers (2) to (6) of the impugned appeal. The Appellant prays that the Order Giving Effect passed by the Assessing Officer be considered as an appeal-able order and ground numbers (2) to (6) be disposed-off by the Hon'ble Income Tax Appellate Tribunal on their merits.

2. Excess interest collected under section 220(2)
The learned CIT(A) has erred in effectively confirming the order of the Assessing Officer wherein excess interest charged under section 220(2) amounting to Rs 1,408,646 (Rs66,253 charged vide his order dated 21 March 2000 plus Rs 1,396,095 charged vide his order dated 13 May 2001) has not been reversed. The Appellant prays that the excess interest of Rs 1,408,646 be refunded to the Appellant.

3. Interest received under section 244A withdrawn twice
The learned CIT(A) has erred in effectively confirming the order of the Assessing Officer wherein interest granted to the Appellant under section 244A of Rs 723,209 has been withdrawn, where such interest had been already withdrawn earlier vide an order under section 143(3). The Appellant prays that interest of Rs 723,209 ought not to be withdrawn and the Appellant be granted refund of Rs 723,209.

4. Short grant of interest under section 244A
The learned CIT(A) has erred in effectively confirming the order of the Assessing Officer wherein interest under section 244A amounting to Rs 2,414,502 (to be revised to Rs. 2,006,516 after considering refund of Rs 407,987 granted in August 2003) has been short granted to the Appellant. The Appellant prays that interest of Rs 2,414,502 be granted to the Appellant.

5. Interest under section 244A
The learned CIT(A) has erred in effectively confirming the order of the Assessing Officer not granting interest under section 244A on refund of Rs 2,131,855 (comprising interest of Rs 1,408,646 and Rs 723,209 discussed in Ground No. 2 and 3 above). The Appellant prays that interest under section 244A be granted on refund of Rs 2,131,855.

6. Interest under section 244A on the delayed interest
The learned CIT(A) has erred in effectively confirming the order of the Assessing Officer not granting interest on the delay in granting the additional amount of interest of Rs 2,414,502 {discussed in Ground No. 4 above}. The Appellant prays that interest under section 244A be granted on refund of Rs 2,414,502.

The Appellant craves leave to add, alter, vary, omit, amend or delete one or more of the above grounds of appeal at any time before, or at the time of, hearing of the appeal, so as to enable the Hon'ble Tribunal to decide this appeal according to law.”

3. Shri J.D. Mistri appearing on behalf of the assessee submitted, that the Commissioner of Income Tax (Appeals) has erred in holding that consequent to order giving effect passed by the Assessing Officer resulting in payment of interest u/s. 244A of the Income Tax Act, 1961 (herein after referred to as 'the Act') is not an appealable order. The ld. AR placed reliance on the decision of Hon'ble Bombay High Court in the case of Caltex Oil Refining (India) Ltd. Vs. CIT reported as 202 ITR 375 (Bom), wherein the Hon'ble High Court while dealing with the provisions of section 214 has held that it is an appealable order. The ld. AR submitted that the provisions of section 244A and the provisions of section 214 of the Act, both relate to the payment of interest to the assessee. The ld. AR further pointed out that the decision of Hon'ble Bombay High Court has been followed in the cases of Godfrey Philips India Ltd. Vs. CIT reported as 206 ITR 23, Phalton Sugar Works Limited Vs. CIT reported as 215 ITR 582 and Phalton Sugar Works Limited Vs. Commissioner of Income Tax reported as 216 ITR 479 and various other decisions.

4. On the other hand Shri Dheeraj Kumar Jain representing the Department vehemently supported the findings of the Commissioner of Income Tax (Appeals).

5. Both sides heard. In appeal, the assessee has primarily challenged the findings of Commissioner of Income Tax (Appeals) in holding that interest u/s. 244A arising out of order giving effect by the Assessing Officer is consequential, therefore, it is not an appealable order. The other grounds raised in the appeal of the assessee are either in support or consequential.

6. We find merit in the submissions of the ld. AR of the assessee. The Hon'ble Bombay High Court in the case of Caltex Oil Refining (India) Ltd. vs. CIT (*supra*) while dealing with the issue whether order relating to interest u/s 214 of the Act is appealable has held:

"We have carefully considered all these submissions. Clause (c) of section 246 is in two parts. The first part deals with an order against an assessee where the assessee denies his liability to be assessed under the Act. The second part deals with any order of assessment under sub-section (3) of section 143 or section 144. In the second case, however, there is a further restriction that an appeal against such order lies only where the assessee objects (i) to the amount of income assessed, or (ii) to the amount of tax determined, or (iii) to the amount of loss computed, or (iv) to the status under which he is assessed. The first part of this clause deals with denial of liability. The decision of the Supreme Court referred to by learned counsel in Central Provinces Manganese Ore's case [1986] 160 ITR 961, also deals with a case where interest was levied on the assessee and the assessee was aggrieved by the levy of interest on him. The controversy there was whether an appeal will lie in a case where the assessee denies his total liability or it will also lie in a case where he does not deny his total liability to be assessed to interest but is aggrieved by the quantum of the interest levied. We do not propose to go into this aspect of the matter at length because, in our opinion, the interest under section 214 does not fall under the heading "liability" of the assessee. It is in effect the liability of the Government to pay interest to the assessee on the excess amount of advance tax paid by him. Counsel for the assessee, however, placed before us another decision of the Supreme Court in CIT v. Wesman Engg. Co. P. Ltd. [1991] 188 ITR 327, where also a similar expression used in section 195(2) of the Act came up for interpretation and the Supreme Court held that denial of the liability will also include denial of partial liability or dispute in regard to the quantum. In our opinion, the controversy regarding interest under section 214 is not covered by the first part of clause (c). It may, however, fall in the second part which provides for an appeal against an order of assessment under sub-section (3) of section 143 of the Act. The only ground under which such an objection may fall is "objection to the amount of tax determined". Now, here again the question arises whether interest under section 214 is a part of assessment and even if it be so, can it be said to be tax determined in the year of assessment for the

purpose of appeal under clause (c) of section 246. So far as the first part is concerned, we do not find much difficulty in view of the decision of the Supreme Court in M. Chockalingam and M. Meyyappan v. CIT [1963] 48 ITR (SC) 34. In this case the power of rectification was the subject-matter of scrutiny by the Supreme Court. By an order of rectification penal interest under section 18A of the old Act was enhanced. No opportunity of hearing as contemplated by section 35 of the said Act was given to the assessee before making the rectification and enhancing the amount of interest. It may be observed that the proviso to section 35 of the 1922 Act provided for a hearing to be given to the assessee when the effect of rectification would be the enhancement of the "assessment". What was sought to be argued on behalf of the Revenue was that the addition of penal interest was not enhancement of assessment as stated in the said proviso. Repelling this contention the Supreme Court said (at page 41): "We do not see what else it could be. The word 'assessment' is used in the proviso not as an equivalent of the tax calculated at the rate given in the Finance Act but the total amount which the assessee is required to pay. The proviso applies whenever the effect of the order is to touch the pocket of the assessee and in our opinion this was such a case".

In view of this decision, there is no scope for doubt that an assessment under section 143(3) would include not only determination of the amount of tax calculated at the rate prescribed under the Finance Act but also interest or any other thing which has the effect of reducing or enhancing the total amount payable by the assessee under such an assessment."

The Hon'ble High Court further after considering the issue, whether the expression "tax" used in clause (c) of section 246 would include interest, finally concluded:

"In the light of the foregoing discussion, we are of the opinion that interest under section 214 is a part of assessment and is deemed to be tax for the purposes of this Act including clause (c) of section 246. An appeal by an assessee aggrieved by an order of assessment made under section 143(3) or section 144 of the Act, either original or in consequence of an appellate order with a view to giving effect to the directions contained therein, objecting to the amount of interest payable by the Government under section 214 of the Act to the assessee as determined by the Income-tax Officer, is, therefore, maintainable under clause (c) of section 246 of the Act."

7. In the recent decision, the Hon'ble Calcutta High Court in the case of CIT Vs. Biswanath Pasari reported as 364 ITR 404 (Cal) has held that the appeal is maintainable against an order refusing to grant interest u/s. 244 (IA) of the Act. The relevant extract of the findings of the Hon'ble High Court are as under:

"9. Aggrieved by the order omitting to grant interest the assessee preferred an appeal which was dismissed by an order dated 29th March, 1996 by the CIT [Appeal] holding that :

"an appeal for claiming interest u/s. 244[1A] of the Act is not entertainable in a case where the order giving the appeal effect itself is not being challenged on any ground. However, it is noted that the refund has not arisen as a result of giving of appeal effect. The refund results because of adjustment of certain earlier refunds in earlier years. In such circumstances, in my opinion, the ground of appeal is not acceptable."

10. It is against this order dated 29th March, 1996 that an appeal was preferred by the assessee before the learned tribunal which resulted in the impugned order directing the Assessing Officer to allow interest in accordance with law.

11. We are unable to see how can it be said that the appeal preferred by the assessee which was dismissed by the order dated 29th March, 1996 was not an appeal against an order passed under section 143(3) of the Act. The Assessing Officer could not have exercised jurisdiction except under section 143(3) of the Act. Reference in this regard may be made to the judgment in the case of Kooka Sidhwa & Co. vs CIT reported in [1964] 54 ITR 54 (Cal), wherein the following view was taken (page 62):

"In my judgment, the forms of the orders passed under section 23(3) of the Income-tax Act, 1922, are not exhaustive. The effect or substance of the order should be looked into to decide whether an appeal lies. The order passed by the Income-tax Officer revising the assessment, made originally under the direction of the Appellate Tribunal, would partake the character of a fresh assessment order and would be no less an order as made under section 23(3) of the Act within the ordinary acceptance of the term from which an appeal would lie to the Appellate Assistant Commissioner. A right of appeal is a creature of the statute conferred on the assessee by section 30(I) of the Act. The said right, which is substantive, cannot be taken away unless it is expressly provided."

12. The order passed by the CIT [Appeal] had virtually set aside the earlier order of assessment. Therefore, a fresh assessment was required to be made which the Assessing Officer did and directed refund but omitted to pass an order directing payment of interest. Therefore, it was an order passed under section 143[3] of the Act. It cannot be disputed that an appeal against an order passed under section 143[3] is permissible. It is altogether a different matter that the entitlement to interest arises out of section 244[1A] of the Act. A Civil Court may pass or refuse to pass an order for payment of pendente lite interest under section 34 of the Code of Civil Procedure. But it cannot be contended that the decree is one passed under section 34 of the Code of Civil Procedure. We are as such of the opinion that the learned CIT fell into a grievous error in proceeding on the basis that it was an appeal against an order refusing to grant interest under section 244 [1A] of the Act. The appeal was an appeal against the order of assessment under section 143[3] of the Act in which the Assessing Officer omitted to grant interest which he should have done under section 244[1A] of the Act. Therefore, the question which has been posed on behalf of the Revenue does not, in our opinion, arise in the facts and circumstances of the case.

13. In any event, the views taken by the Madras High Court and the Bombay High Court are, according to us, logical and reasonable. In the case of CIT vs. T. V. Sundaram Iyengar & Sons Ltd., the Madras High Court answered the question as follows page 534 of 236 ITR):

"Therefore, we are of the view that the interest on the refund is really a part of the refund and interest and refund are not two different things. When the Income-tax Officer has passed the order under section 154 of the Act without granting interest due to the assessee under section 244[1A] of the Act, he has reduced the refund due to the assessee. We are not able to accept the view of the Karnataka High Court that clause [f] of sub-section [1] of section 246 should be limited only to the case where the refund was granted earlier but was reduced by an order passed under section 154 of the Act. Since we are of the view that the interest forms part of the refund and where the interest is not granted in an order passed under section 154 of the Act, the order in substance and effect meant that the Income-tax Officer has passed an order under section 154 of the Act reducing the refund. The decision of the Madhya Pradesh High Court also proceeds on the basis that an order not granting refund is referable to section 237 of the Act and since the interest forms part of the refund the order refusing to grant interest is relatable to section 237 of the Act and it is appealable. Thirdly, where there is a total denial by the Revenue to grant interest on the refund due, on the basis of the decision of the Andhra Pradesh High Court, an appeal provisions should be construed in a reasonable manner and viewed in any manner, we are of the view that the order of the Income-tax Officer refusing to grant interest due to the assessee is an appealable order under section 246 of the Act."

14. We are in agreement with the views of the Madras High Court which also took into consideration the judgment of the Bombay High Court.”

8. Thus, in the light of the judgments discussed above, it is held that the order resulting in payment of interest u/s 244A of the Act is appealable. We are of the considered view that the Commissioner of Income Tax (Appeals) has erred in not adjudicating the appeal of the assessee on merits. We deem it appropriate to remit the file back to the Commissioner of Income Tax (Appeals) with a direction to decide the issues raised by the assessee in first appeal on merits, in accordance with law.

9. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced on Wednesday, the 21st day of October, 2015.

Sd/-	Sd/-
(आर. के. पांडा / R.K. Panda)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 21st October, 2015

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(OSD), Pune
4. आयकर आयुक्त / The CIT-V, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ए” बेंच, पुणे / DR, ITAT, “A” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune