

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 936 of 2011
WITH
TAX APPEAL NO. 897 of 2010
WITH
TAX APPEAL NO. 1941 of 2010
WITH
TAX APPEAL NO. 1675 of 2010
WITH
TAX APPEAL NO. 2297 of 2010
WITH
TAX APPEAL NO. 246 of 2011

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS JUSTICE SONIA GOKANI

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- 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 ?

COMMISSIONER OF INCOME TAX-II....Appellant(s)

Versus

GUJARAT STATE FINANCIAL SERVICES LTD....Opponent(s)

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Appearance:

MR MR BHATT, LD.SENIOR COUNSEL WITH MRS MAUNA M BHATT,
ADVOCATE for the Appellant(s) No. 1

MR MANISH J SHAH, ADVOCATE for the Opponent(s) No. 1
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**CORAM: HONOURABLE MR.JUSTICE AKIL
KURESHI
and
HONOURABLE MS JUSTICE SONIA
GOKANI**

Date : 17/02/2014

COMMON ORAL JUDGMENT

(PER : HONOURABLE MS JUSTICE SONIA GOKANI)

1. Since all the Tax Appeals raise common question of law and facts, by a common judgment, they are being decided. However, for the purpose of adjudication, the facts contained in Tax Appeal No.1048 of 2010, wherever necessary shall be referred.
2. These Tax Appeals arise out of the order of the Income-tax Appellate Tribunal dated January 21, 2011 for the assessment year 2002-2003.

3. The sole substantial question of law which arises in the present Tax Appeal and admitted is as follows :

“Whether the Appellate Tribunal is right in law and on facts in cancelling the interest charged under section 234D of the Act ?”

4. The question arises in the following factual background :

4.1 The assessee-company is a non-banking financial company, which is engaged in the business of providing loans and advances to industrial units, leasing and hiring transactions and also providing financial services.

4.2 The respondent-assessee for the assessment year under question filed its return of income on October 29, 2002, disclosing total income at Rs.21.11 lakh (rounded off). On processing such return under section 143(1) of the Act, on January 10, 2003, the refund order was passed

on January 10, 2003, for an amount of Rs.32.84 lakh (rounded off), inclusive of interest under section 244A of the Act.

4.3 The assessee filed revised return on August 13, 2003, on the ground that the claim under section 36(1)(viiia) of the Act in respect of bad debts was erroneously claimed and declared the income at the rate of Rs.22.16 lakh (rounded off). The assessment case was taken under scrutiny and statutory notice was issued under section 143(2) of the Act, availing fresh opportunity of hearing to the assessee.

4.4 The Assessing Officer on finalising the assessment under section 143(3) of the Act issued demand notice as also charged interest under section 234D of the Act.

4.5 This was carried by the assessee to the Commissioner Income-tax (Appeals). Following the decision of the Supreme Court in the case of *CIT v. Anjum, reported in 252 ITR 1 (SC)*.

The CIT (Appeals) confirmed the same on the ground that such levy of interest is mandatory.

4.6 When the matter travelled to the Tribunal, it cancelled the interest following its own decision of earlier years. Hence, the present appeals.

5. We have heard the learned Senior Counsel Mr.M.R. Bhatt, who has strenuously argued in favour of the Revenue and Mr.M.J. Shah, learned counsel for the respondent-assessee.

5.1 We notice that section 234(D) of the Act provides for interest for excess refund, where any refund is granted to the assessee under sub-section (1) of section 143 of the Act, the assessee is made liable to pay simple interest at the rate of $\frac{1}{2}\%$ from the date of grant of refund to the date of such regular assessment.

5.2 Profitable it would be to reproduce the provision of section 234D at this stage :

"234D : Interest on excess refund – (1)
Subject to the other provisions of this Act, where any refund is granted to the assessee under sub-section (1) of section 143, and-

*(a) no refund is due on regular assessment;
or*

(b) the amount refunded under sub-section (1) of section 143 exceeds the amount refundable on regular assessment, the assessee shall be liable to pay simple interest at the rate of one-half per cent, on the whole or the excess amount so refunded, for every month or part of a month comprised in the period from the date of grant of refund to the date of such regular assessment.

(2) Where, as a result of an order under s.154 or s.155 or s.250 or s.254 or s.260 or s.262 or s.263 or s.264 or an order of the Settlement Commission under sub-s.(4) of s.245D, the amount of refund granted under sub-s.(1) of s.143 is held to be correctly allowed, either in whole or in part, as the case may be, then, the interest chargeable, if any, under sub-s.(1) shall be reduced accordingly.

Explanation 1 – Where, in relation to an assessment year, an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 2 - For the removal of doubts, it is hereby declared that the provisions of this section shall also apply to an assessment year commencing before the 1st day of June, 2003 if the proceedings in respect of such assessment year is completed after the said date.”

5.3 Explanation (2) which has been added with effect from June 01, 2003, is declaratory and clarificatory in nature which states that the provision of this section shall also apply to the assessment year commencing before June 01, 2003, if the proceeding in respect of such assessment year is completed after the said date. In other words, any assessment completed after the 1st day of June, 2003, regardless of the year of assessment, this provision shall be made applicable to such assessment year.

5.4 Decision of the Kerala High Court in the case of **Commissioner of Income-tax v. Kerala Chemicals and Proteins Ltd., reported in (2010) 323 ITR 584**, considered the scope of section 234D of the Act in respect of its introduction by Finance Act, 2003 with effect from June 01, 2003 and has taken a view that demand or levy of interest has to be from 1st June, 2003 only. Kerala High Court has held that *"this provision on interest is not introduced with reference to any assessment year which is obvious from the fact that it is not effective from the beginning of the financial year. On the other hand, this provision on interest will apply to all cases of refund granted under section 143(1) of the Act, but interest could be levied only with effect from June 01, 2003. Even though refund in the said case was granted under section 143(1) on June 28, 2000, and regular assessment under section 143(3) was completed converting the refund to demand of tax on January 22, 2004, interest could be demanded*

only for the period from June 01, 2003 till January 22, 2004, which is what is done by the Assessing Officer. We do not find any justification for the Commissioner to give any retrospectivity to section 234D which is what he has done by directing the Assessing Officer to revise the assessment levying interest from the date of refund. In fact, the Commissioner has no authority to give retrospective operation to a substantive provision of law providing for interest. The Revenue has no answer to our query as to whether interest under section 234D could be levied in cases of regular assessment completed under section 143(3) of the Act prior to June 01, 2003, leading to demand of refunded amount as tax determined on regular assessment. We are, therefore, of the view that the Commissioner's order under section 263 was rightly found to be untenable by the Tribunal. However, we vacate the finding of the Tribunal that section 234D is applicable only from the assessment year 2004-05 onwards. The view

taken by the Assessing Officer that section applies from June 01, 2003 is the correct position. The appeal is dismissed, but by restoring the assessment with demand of interest levied under section 234D with effect from June 01, 2003."

Thus, Kerala High Court has held that the provision of interest will apply to all cases of refund granted under section 143(1) of the Act, but interest could be levied only with effect from June 01, 2003.

5.5 Karnataka High Court in the case of ***Commissioner of Income-tax and another v. Fanuc India Ltd., reported in (2011) 244 CTR (Kar.) 529,*** was considering the scope of section 234D of the Act and the Court held that the provision of section 234D of the Act is applicable only from June 01, 2003 and, therefore, no interest under that provision could be levied from earlier date and merely because the order of assessment was passed subsequent to the insertion of the said

provision in the Act, would not make the said provision retrospective. In the matter before Karnataka High Court, the assessment was completed under section 143(3) for the assessment year 1999-2000 on December 20, 2004. It held that the interest under section 234D could be calculated only from June 01, 2003 onwards and not from the date of issuance of refund which was in March, 2002. In the words of Karnataka High Court :

"There is no indication in the language employed in the entire s.234D that the Parliament intended to make this levy of tax on excess refund retrospectively. On the contrary after inserting this provision in the Act, it is specifically stated that it comes into effect from 1st June, 2003. Though the amendment is by insertion, the Parliament has expressly stated that the amendment comes into effect from 1st June, 2003. The Parliament has made its intention clear and unambiguous. In other words, it is not retrospective. It comes into effect from only 1st June, 2003. The liability to pay interest on such a refund arises from the date of refund and not from the date of the

assessment order. When the assessment order quantifies the tax payable and if at such a time, it is found that the assessee has been paid a refund, which he is not entitled to in law, he is liable to refund the said amount. Therefore, merely because the order of assessment was passed subsequent to the insertion of the said provision in the Act, would not make the said provision retrospective. The provision providing for imposition of interest is a substantive provision. In the absence of a contract or a usage providing for a payment of interest, interest can be levied only under law and it cannot be recovered by way of a wrong deduction of the amount. Therefore, the liability to pay interest emanates from the statutory provision. It is also equally well settled that unless a substantive provision is made retrospectively either by express words or by implication, it has to be considered as prospective only. A liability, which was not in law earlier, is sought to be foisted on a taxpayer. In those circumstances, when the Courts were called upon to interpret those provisions, it is not open to the Courts to interpret them as retrospectively and foist liability on the taxpayer which he is not liable on the date of such refund."

5.6 This very issue came up for scrutiny before the Bombay High Court in the case of ***Commissioner of Income-tax v. Indian Oil Corporation Ltd., reported in 2010 TAXMAN 466*** and the Bombay High Court has held that addition of explanation (2) to section 234D of the Act by Finance Act, 2012, with retrospective effect from June 01, 2003, is made applicable even to the period under assessment year 2004-2005. In respect of excess refund granted to the assessee under section 143(1) of the Act, the interest was payable by the assessee even if it was received prior to June 01, 2003, so long as the proceedings of the concerned assessment year for which the refund was granted was completed after June 01, 2003. The Bombay High Court held the explanation 2 to section 234D of the Act as declaratory/ clarificatory in nature. The same being declaratory/ clarificatory, the same was held to be applied with retrospective effect. In the words of the Bombay High Court :

"21) The question therefore is whether the word "is" in section 234D has a past signification. We think it does. Explanation 2 in fact supports this view. In view of the declaratory amendment to Section 234D of the Act by the addition of Explanation 2 thereto any doubt with regard to the word "is" having a past signification has been set at rest. In fact the context in which the word "is" has been used also supports the view that it has a past signification. The Legislature was obviously aware that refunds must have been made in respect of previous assessment years. Despite this, the amendment did not exclude such cases from the operation of the section. A grant of refund under section 143(1) is in the nature of a provisional refund and is subject to the final determination under section 143(3). This grant of refund is pending the conclusion of the final assessment under section 143(3) in respect of the year for which the refund is granted. The classification done in section 234D is on the basis of the date of the completion of assessment proceedings prior to 1/06/2003 on the one hand and post 1/06/2003 on the other. The classification is not on the basis of the date of grant of refund under section 143(1) of the Act. The classification on the basis of the

completion of assessment proceedings is not a subject matter of challenge before us. Therefore, the date of grant of refund is immaterial to determine the applicability of section-234D of the Act. In the circumstances the submission of the respondent that section 234D of the Act only applies to refunds granted prior to 1/06/2003 is not acceptable.

22) It must be borne in mind that refund which is granted under section 143(1) of the Act to an assessee is qua an assessment proceeding for a particular assessment year. The refund granted is qua an assessment year. The refund emanates from assessment proceedings for a particular assessment year. The refund granted cannot be divorced from the assessment year or the assessment proceeding. Consequently to hold that interest on such refund would only run from 1/06/2003 would be to curtail the plain meaning of Explanation 2 to Section 234D.

23) Section 143(4) also supports our view.

It reads as under :-

"Section 143 – Assessment -

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(4) Where a regular assessment under sub section (3) of this section or section 144 is made,-

a) any tax or interest paid by the assessee under sub-section (1) shall be deemed to have been paid towards such regular assessment;

b) if no refund is due on regular assessment or the amount refunded under sub section (1) exceeds the amount refundable on regular assessment, the whole or the excess amount so refunded shall be deemed to be tax payable by the assessee and the provisions of this Act shall apply accordingly".

It is clear therefore, that excess refund determined under section 143(3) of the Act is deemed to be tax payable by the assessee. However, as there was no provision of interest on the grant of refund under Section 143(1) of the Act it became necessary to provide for the same by having a charging provision. This was done by section 234D of the Act in respect of all pending assessments in which refund was given. Thus even if, a refund has already been granted, the same would be subject to the provisions of section 234D of the Act. Under section 234D(1) where the refund under section 143(1) is in excess of the amounts refundable on regular assessment, interest on the excess amount would be payable. In any case after the introduction of Explanation 2 there can be no doubt that even where refund is granted prior to 1/06/2003 the same would carry interest provided the proceedings for assessment are completed after 1/06/2003. The respondent has not contended that the Explanation 2 to section 234D of the Act is not

retrospective. Their only contention is that it would not apply to refunds granted prior to 1/06/2003 even in respect of assessments completed after the cut-off date of 1/06/2003. This submission ignores the fact that Explanation 2 which is declaratory in nature clarifies that the section would apply to an assessment year even before 1/06/2003 provided the proceedings in respect of such assessment years are not completed by the cut off date i.e. 1/06/2003.

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26) A statute could be retrospective in operation being expressly stated or by necessary implication. The case of the revenue is that section 234D as introduced on 1st June, 2003 was retrospective in operation by necessary implication. However, as doubts were raised about its retrospectivity, the same was clarified by adding an explanation to section 234D by Finance Act, 2012. Under the Act what is brought to tax is not the income of the assessee in the assessment year but the income of the assessee in the previous year. The liability to tax arises on account of the Finance Act which fixes the rate at which the tax is to be paid. The law to be applied is as existing on the 1st day of April of the previous year. In support the Counsel for the respondent relied upon the decision of the Supreme Court in *Karimthuravi Tea Estate ltd. v. State of Kerala* 60 ITR 262, *Maharajah of Pithapuram v. CIT* 13 ITR 221 (PC) and *CIT v. Scindia Steam Navigation Co. Ltd.* 42 ITR 539. The aforesaid decisions are not relevant for our purpose particularly, in view of the fact that Explanation 2 to section 234D of the Act as introduced by the Finance Act, 2012 being declaratory in nature would be retrospective. This amendment make it clear that it shall apply assessment years even prior to 1/06/2003."

5.7 It can also be noted that the Bombay High Court has in terms held that the decision of the Tribunal in ***ITO v. Ekta Promoters (P.) Ltd., reported in (2008) 113 ITD 719 (Delhi)*** (SB) was not correct, by holding that till such time, the assessment proceedings are completed in respect of relevant assessment year, the Amended Act would be applicable to the pending proceedings. For all the pending proceedings in regard to which the refund has been provided under section 143(1) of the Act, which are not concluded and finalized, the refunds are held to be granted under section 143(1) of the Act as finally determined when final assessment is passed under section 143(3) of the Act. Explanation 2 to section 234D of the Act applies thus to the pending proceedings, where the assessment in respect of assessment year is not completed on June 01, 2003. The Court held that the provision for charging interest in every case was a part of substantive law and not an arbitrary provision and though in those cases where the refunds have been granted prior

to June 01, 2003, section 234D was not applied for not having any retrospective operation, however, in all pending proceedings, where the assessment had not been completed on June 01, 2003, the same has been made applicable. In other words, explanation (2) to section 234D of the Act has been made applicable to even the assessment year commencing before June 01, 2003. The only requirement in such a case would be that the assessment has to be completed after June 01, 2003. Therefore, after insertion of Explanation 2, the operation of section 234D of charging interest on the excess refund paid to the assessee is not restricted, making operation of such section effective from June 01, 2003. In other words, the refund granted under section 143(1) of the Act in respect of a particular assessment year, is subject to the final determination under sub-section (3) of section 143 of the Act. Addition of Explanation 2 to section 234D of the Act when is being held declaratory amendment, what would be relevant for the purpose of charging interest on the

refund granted under section 143(1) of the Act is the date of completion of assessment. If the assessment is framed after June 01, 2003, the said provision shall have applicability.

5.8 The Bombay High Court has extensively dealt with the explanation 2 and has interpreted the provisions keeping in mind the principles of interpretation of statutes. We have respectfully chosen to follow the aforesaid decision of the Bombay High Court and, therefore, the order of the Tribunal in the instant case following the decision the case of ***Ekta Promoters (P.) Ltd.*** (supra) holding the provision of section 234D of the Act applicable only with effect from 2004-2005 and further holding that the interest under this section is not chargeable for earlier assessment years, even though the assessment has been framed after June 01, 2003, is not held to be a correct law and, accordingly, the Revenue's appeal deserves to be allowed.

6. In view of the discussion held hereinabove, the Tax Appeals are allowed. The order dated January 21, 2011 passed by the Tribunal is quashed and set aside. Answering the substantial question of law in favour of the Revenue that in all those matters where excess refund has been granted by the Revenue, the provision of section 234D of the Act will apply and even in the case of earlier assessment years where the assessments were framed after June 01, 2003, the interest will be chargeable in accordance with law. There shall be, however, no order as to costs.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

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