IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 01 OF 2015

The Commissioner of Income Tax-8,]
Room No.214, Aayakar Bhavan,]
M. K. Road, Mumbai – 400 020] **Appellant**

Versus

M/s. Oryx Finance and Investment Pvt. Ltd.]
Lok Bharati Complex, Marol Maroshi Road,]
Andheri (East), Mumbai – 400 059]
PAN : AAACO0662K] **Respondent**

- Mr.Tejveer Singh for the Appellant.
- Mr.Vishnu S. Hadade for the Respondent.

CORAM : S.V. GANGAPURWALA AND
G.S. KULKARNI, JJ.

RESERVED ON : 15th JUNE, 2017.
PRONOUNCED ON : 01st JULY, 2017

JUDGDMENT (*PER S.V. GANGAPURWALA, J.*) :

1] Admit. Taken up for final hearing with the consent of the learned counsel for the parties.

2] The Revenue has assailed the judgment and order of the Tribunal thereby partly allowing the appeal filed by the Revenue against the judgment and order of the Commissioner (Appeals).

3] The Income Tax Return of the Respondent-Assessee was processed under Section 143(1) of the Income Tax Act (for sake of brevity hereinafter referred to as "the Act"), demand was raised for Rs.1,64,90,573/- and penalty of Rs.1,19,30,677/- was imposed by the Assessing Officer under Section 221(1) of the Income Tax Act for default by Assessee in the payment of demand. Aggrieved thereby the Assessee filed Appeal before the Commissioner of Income-Tax (Appeals)-17, Mumbai [for short "CIT(A)"]. The CIT(A) under its order dated 15/03/2010 deleted the penalty imposed by the Assessing Officer holding that interest component has to be excluded while levying penalty under Section 221(1) and since the penalty levied exceeded the tax component, it set-aside the order levying penalty. Aggrieved thereby the Department filed a appeal before the Income Tax Appellate Tribunal, Mumbai [for short "ITAT"]. The ITAT held that while levying penalty under Section 221(1) of the Act

interest component is not to be considered and remitted the matter to the Assessing Officer with the direction to quantify the amount of penalty in accordance with provisions of Section 221(1) of the Act. The Department has assailed the said order in the present appeal.

4] The Department has framed following questions purportedly as substantial questions of law for consideration by this Court.

1) *Whether on facts and in the circumstances of the case and in law, the ITAT is justified in holding the penalty u/s.221(1) is to be imposed in respect of only the tax excluding interest u/s.234A, 234B & 234C without appreciating that section 221(1) does not contain any such condition that the penalty imposed under the said section should be a percentage of only the tax excluding the interest.*

2) *Whether on facts and in the circumstances of the case and in law, the ITAT is justified in deleting penalty imposed in respect of arrears of interest u/s.234A, 234B & 234C without appreciating that Section 221(1), the Assessing Officer is empowered to impose any amount of penalty 'so, however that the total amount of penalty does not exceed the amount of tax in arrears and thus the term used in the said section is tax in arrears and not 'tax', as erroneously*

held by the Hon'ble Tribunal.

3) *Whether on facts and in the circumstances of the case and in law, the ITAT is justified in deleting the penalty levied u/s.221(1) in respect of arrears of interest u/s.234A, 234B & 234C, without appreciating that, as held by Hon'ble Supreme Court in the case of CIT vs. Anjum Ghaswala & Others and in the case of Karanvir Singh Gosssal vs. CIT and Another, interest u/s.234A, 234B & 234C is mandatory in nature and therefore by the ratio of the above cited decisions interest is an integral part of tax.*

5] Mr.Tejveer Singh, the learned counsel for the Appellant strenuously contends that the Commissioner (Appeals) and the Tribunal have failed to consider Section 221(1) of the Income Tax Act (herein referred to as "the Act") in its correct perspective. The terminology "tax in arrears" would include the interest component also. The payment of interest under Section 234(A), 234(B) and 234(C) is mandatory and the same would form part of the arrears of tax. The learned counsel to substantiate his contention relies on the judgment of the Apex Court in case of ***Commissioner of Income Tax vs. Anjum M.H. Ghaswala & Ors., reported in (2001) 252 ITR 0001***. No powers are given for waiver of the interest.

6] According to the learned counsel for the Appellant, since interest forms part of amount chargeable under Section 156 of the Act, the penalty under Section 221(1) is also imposable. The order of the Tribunal directing the Assessing Officer to restrict levy of penalty only to the Tax component excluding the interest under Section 234(A), 234(B) and 234(C) of the Act is *per-se* erroneous.

7] Mr.Hadade, the learned counsel for the Respondent supports the order of the Tribunal and submits that tax, interest and penalty are separate components. The term “tax” does not include penalty or interest. The learned counsel relies on the judgment of the Hon'ble Apex Court in a case of ***Harshad Shantilal Mehta vs. Custodian and others, reported in (1998) 231 ITR 871*** and another judgment of the Division Bench of this Court in case of ***Commissioner of Income Tax vs. P.B. Hathiramani, reported in (1994) 207 ITR 483***.

8] We have considered the submissions canvassed by the learned counsel for the respective parties, so also have gone through

the orders passed by the Tribunal and the authorities.

9] Before we proceed to advert to the arguments of the learned counsel, it would be appropriate to refer to the relevant provisions of Section 2(43) and 221 of the Act.

Tax is defined under Section 2(43) of the Act.

"Tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date [and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115 WA.

Penalty payable when tax in default

"221. (1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the [Assessing] Officer may direct, and in the case of a continuing default, such further amount or amounts as the [Assessing] Officer may, from time to time, direct, so, however, that the total

amount of penalty does not exceed the amount of tax in arrears:

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard:

*[**Provided further** that where the assessee proves to the satisfaction of the [Assessing] Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.]*

[Explanation—For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this sub-section merely by reason of the fact that before the levy of such penalty he has paid the tax.]

(2) Where as a result of any final order the amount of tax, with respect to the default in payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded."

10] The moot question for consideration in the present matter is whether the phraseology "amount of tax in arrears" as envisaged in Section 221 of the Act would in addition to the tax include within its fold the interest component also.

11] The definition of the "Tax" u/Sec.2(43) read in its

entirety suggests that the "tax" means income-tax, super-tax and/or the fringe benefit tax, as the case may be chargeable under the provisions of the Act. The definition of tax does not take within its fold the interest component.

12] The definition of "interest" as envisaged under Section 2(28-A) of the Act would not be relevant in the present matter. As the said definition is restricted to the interest payable in respect of any moneys borrowed or debt incurred.

13] It is the elementary rule of interpretation that when the language of a statute is clear and unambiguous, the Courts are to interpret the same in its literal sense and not to give a meaning that would cause violence to the provisions of the statute. Each word in the statute should be assign the meaning as per the context.

14] The provision imposing penalty will have to be strictly construed. The statute being fiscal and the provisions of Section 221 dealing with imposition of penalty naturally shall have to be strictly construed. Strict construction is a construction in which application

of a provision used is limited by words used, so that anything which is not clearly included within the scope of the language is treated as excluded.

15] Reading Section 221 in its entirety, it is abundantly clear that the aspect of default in payment of tax and the amount of interest payable are treated as distinct and separate components. The section categorically and specifically states that when an Assessee is in default or is deemed to be in default in making payment of tax, he shall in addition to the amount of arrears and the amount of interest payable under Sub-Section 2 of Section 220, be liable, to pay penalty, however the amount of penalty does not exceed the amount of tax in arrears. The terminology “default in making a payment of tax and amount of interest payable” are considered to be separate for imposition of penalty and penalty is to be levied on account of default in making a payment of tax. However, the total amount of penalty shall not exceed the amount of tax in arrears. The said penalty for non payment of the tax is in addition to the levy of interest under Sub-Section 2 of Section 220. Under no principle of interpretation, the arrears of tax as laid down in the said Section

would include the amount of interest payable under Sub-Section 2 of Section 220. The amount of penalty will have to be restricted on the arrears of tax, which would not include the interest component charged under Section 220(2) of the Act.

16] Reference can be had to Section 156 viz. notice of demand. In Section 156 also tax, interest, penalty, fine are separately referred to. Even a notice of demand issued under Section 156 in 'Form No.7' specifies tax and interest as separate components.

17] Second proviso to Section 221 and explanation would also be relevant. The second proviso to Section 221(1) states that, if the Assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient reason, no penalty shall be levied under the said section. Sub-Section 2 further says that, whereas result of final order, the amount of tax with respect to the default in the payment of which penalty was levied has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded. This would suggest that the payment of penalty is directly commensurate with the default in payment of

tax and not of interest. Reference can also be had to the judgment of the Apex Court in a case of ***Harshad Shantilal Mehta vs. Custodian and others*** (supra). In the said case, the Apex Court had framed question No.5 as under;

> *"Question No.5 - Whether "taxes" under Section 11(2)(a) would include interest or penalty as well?"*

18] While answering the said question, the Apex Court observed thus;

> *"We are concerned in the present case with penalty and interest under the Income Tax Act. Tax, penalty and interest are different concepts under the Income Tax Act. The definition of "tax" under Section 2(43) does not include penalty or interest. Similarly, under Section 156, it is provided that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. The provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax. The learned Special Court judge, after examining various authorities in paragraphs 51 to 70 of his judgment, has come to the conclusion that neither penalty nor interest can be considered as tax under Section 11(2)(a). We agree with the reasoning and conclusion drawn by the Special Court in this connection".*

19] The Apex Court observed that the definition of tax under Section 2(43) does not include penalty or interest. Tax, penalty and interest are different concepts under Income Tax Act. The provisions for imposition of penalty and interest are distinct from provisions for imposition of tax. The Apex Court agreed with the reasoning and the conclusion drawn by the Special Court that neither penalty nor interest can be considered as tax under Section 11(2)(a) of the Special Court (Trial of Offences relating to transactions in Securities) Act, 1992. The said section dealt with the priorities for distribution and liability specified under Clause 'A' i.e. All Revenues, Taxes, Cesses and rates due from persons notified. Even in case of ***Commissioner of Income Tax vs. P.B. Hathiramani*** (supra), the Division Bench of this Court relied on the judgment of the Calcutta High Court in case of ***Shreeniwas and Sons vs. ITO, referred in (1974) 96 ITR 562***. Wherein it is held that under Section 221, penalty can be imposed only when the Assessee is in default in making payment of the tax. Since the expression tax has been defined in Section 2(43) of the Act, there would be no scope for any argument that interest is additional tax.

20] The case of ***Commissioner of Income Tax vs. Anjum M.H. Ghaswala, referred in (2001) 252 ITR 0001*** relied by the learned counsel for the Revenue would be of no assistance to him, as it only dealt with the aspect that interest under Section 234(A), 234(B) and 234(C) is mandatory. The issue in the present case is in a different context.

21] In view of the aforesaid discussion and on reading the provisions of Section 221 conjointly with the definition of "tax" as detailed under Section 2(43), the irresistible conclusion that can be drawn is that the phraseology "tax in arrears" as envisaged in Sec.221 of the Act would not take within its realm the interest component. It would be abundantly clear that the Assessing Officer can impose penalty for default in making the payment of tax, but the same shall not exceed the amount of tax in arrears. Tax in arrears would not include the interest payable under Section 220(2) of the Act. In the result, the substantial question of law are answered against the Appellant. The Appeal stands dismissed. However, no order as to costs.

(G.S. KULKARNI, J.) **(S.V. GANGAPURWALA, J.)**