CHAPTER XIX – REFUNDS

Arjun Gupta

Introduction

Chapter XIX of the Income Tax Act, 1961 deals with Refunds as contained in Sections 237-245. The Chapter is a self-contained code but is not exhaustive on the issue of refunds as other provisions(for eg. Section 143) are to be referred to for a complete analysis. I have tried to bring out clarity on the issue of Refunds through an analysis of various case-laws and I have given my opinion in parts of this Article as well. I have dealt with case-laws and section-section analysis hereinbelow.

Discussion

Section 237 states that if any person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for a particular assessment year exceeds his income tax liability for that year, he shall be provided a refund of the excess.

At the initial stage, any tax paid in excess of tax liability for a particular assessment year will be refundable if an application is made in the manner provided in Section 239.

'At the initial stage of any proceedings under the Act any refund will depend on whether any tax has been paid by an assessee in excess of tax actually payable to(sic: by) him and it is for this reason that Section 237 of the Act is phrased in terms of tax paid in excess of amounts properly chargeable. It is, however, of importance to appreciate that Section 240 of the Act, which provides for refund by the Revenue on appeal etc., deals

with all subsequent stages of proceedings and therefore is phrased in terms of 'any amount' becoming due to an assessee.'[1]

Section 240 of the Act provides for refund of any amount that becomes due to an assessee as a result of an order in appeal or any other proceedings under the Act without his having to make any claim. Thus, for instance when the assessee has paid tax pursuant to an order of assessment(maybe on a without prejudice basis) and the Commissioner(Appeals) or any appellate authority overturns or nullifies the assessment order, there will be a refund due to the assessee as a result of an order in appeal. However, only the excess tax paid over and above the tax paid pursuant to the return of income will be refundable(proviso(b)). The phrase "other proceedings under the Act" is of wide amplitude. The Supreme Court has observed that other proceedings under the Act would include orders passed under Section 154 (rectification proceedings), orders passed by the High Court or Supreme Court under Section 260 (in reference), or orders passed by the Commissioner in revision applications under Section 263 or in an application Under Section 273A[2]. Refund due to an assessee as a result of an order passed under Section 245(D)(4) of the Act would also be an order passed in 'other proceedings'[3]

In *CIT vs. Shelly Products and Ors.*[4] the Supreme Court was faced with the question whether refund of the self assessment tax and advance tax was valid on the ground that there was no fresh assessment order after the assessment order had been annulled. The Supreme Court held as follows:

1. Proviso (a) and proviso(b) to Section 240 are declaratory and hence retrospective in nature.

---

[1] [2006] 280 ITR 643(SC)
[2] Union of India vs. Tata Chemicals Ltd. [2014] 363 ITR 658(SC): MANU/SC/0213/2014(para 36)
[3] K. Lakshmanya and Company vs. CIT [2017] 399 ITR 657(SC)
[4] [2003] 261 ITR 367(SC)

2. An assessee is entitled to refund of the tax paid by him in excess of his tax liability consequent to a failure of the Revenue to frame a fresh assessment after the first assessment is nullified.
3. The provisos to Section 240 make what is otherwise implicit, explicit.
4. CBDT Circular dated 23rd January, 1990 is only clarificatory in nature.
5. The liability to pay income tax does not depend upon the assessment being made but arises as soon as the Finance Act prescribes the rate or rates for payment of income tax and Article 265 of the Constitution of India is not violated.
6. If the assessing authority cannot make an assessment, it amounts to deemed acceptance of the return of income. The assessee cannot be placed in a more disadvantageous position and if it has paid excess tax, it can communicate the fact to the Assessing Officer who may grant him a refund. Thus, for example where the assessee has wrongly paid tax while misinterpreting an exemption provision or pays excess tax by way of abundant caution, these amounts are liable to be refunded.
7. Importantly, only the excess of the tax paid by the assessee over and above the tax chargeable and paid on the total income is liable to be refunded and not the taxes paid voluntarily and mandatorily such as advance tax and self-assessment tax.
8. If the Revenue has failed to make a fresh assessment, or has not made an assessment within the period of limitation, even if the assessee has underpaid its taxes, no claim can be put forth by the Revenue.

Shelly Products has been applied by the Supreme Court in *CIT vs. M/s. Micro Nova Pharmaceutical Pvt. Ltd.*[5]. In *Micro Nova*, the Supreme Court held that taxes paid mandatorily pursuant to the return of income filed for the block period(Chapter XIV-B) are not liable to be refunded and the decision in Shelly Products is squarely applicable.

The filing of an appeal(against an order of the Tribunal deleting disallowance) will not be per se sufficient to ignore paying refundable amounts to the assessee even though an appeal is filed before the High Court unless a stay on payment of refund has been

[5] Civil Appeal No. 1945 of 2014 decided on 7.2.2014

obtained from the High Court. If the Revenue has granted refund for a particular assessment year then it ought to grant refund for the other assessment year also if there are orders of the Tribunal in favour and the issues are the same and settled *albeit* not finally and notwithstanding that appeals have been filed.[6] In the author's view, this cannot be the correct position in law. The judgment is in the face of the decision of the Supreme Court in *CIT vs. Chittor Electric Supply*[7] where the Supreme Court has stated as follows:

'When the assessment proceedings are still pending, it is idle to talk of any amount or any refund becoming due to the assessee in respect of that assessment year, particularly in the light of Section 237'

The above statement is not an *obiter dictum.* It is essential that the refundable amount if finally due before any payment of the amount can be made.

In *Chittor Electric Supply*, on an appeal filed to the Commissioner(Appeals), the matter was restored to the Assessing Officer to frame a fresh assessment. The Assessing Officer determined a refund due to the assessee. The question was whether interest could be allowed from the date of the Appellate Commissioner's order to the date of grant of refund. The assessee claimed interest on the amount under Section 244 of the Act. A writ petition was filed before the Andhra Pradesh High Court which was allowed and interest was granted. The Supreme Court on appeal held that the amount of refund must be 'due' for interest to be granted and obviously pursuant to the Appellate Commissioner's order no refund was due. That the Assessing Officer had still to compute the refund due. That the assessment was still pending and had not been completed in light of the fact that a fresh assessment had been directed to be made. Thus, taking into account proviso (a) to Section 240, no amount was due to the assessee on the date of the Appellate Commissioner's order and consequentially, no interest could be granted to the assessee.

[6] Glaxo Smith Kline Asia P. Ltd. vs. CIT [2007] 290 ITR 35(Delhi)
[7] [1995] 212 ITR 404(SC); Civil Appeal 1413 of 1977 decided on 13.1.1995

In the author's view, there can be no doubt that this decision is good law. Refund is to be necessarily due for interest to kick-in. The refund was admittedly due only from the date of the fresh order of assessment in the above case and hence interest would be due if any only from that date.

Section 241A is only to apply for AY 2017-2018 and for subsequent assessment years. The section was introduced as a special measure to address the concern of recovery of revenue in doubtful cases(Explanatory Notes to Finance Bill). Prior to its introduction, the law of withholding of refund was governed by Section 143(1)(D) of the Act which was introduced by the Finance Act, 2012 and amended by the Finance Act, 2016, and Finance Act, 2017. Section 241A was introduced by the Finance Act, 2017 and simultaneously, Section 143(1)(D) was made inapplicable.

The amendments carried out and their effect over the years are highlighted in Vodafone Idea Ltd. vs. ACIT[8] as follows:

'Sub-section (1D) was inserted vide Finance Act, 2012 as under:-

(1D) Notwithstanding anything contained in sub-section (1), the processing of a return shall not be necessary, where a notice has been issued to the assessee under sub-section (2)"

Finance Act, 2016 contemplated substitution of sub-section (1D) and insertion of a proviso with effect from 01.04.2017 as follows:

"(1D) Notwithstanding anything contained in subsection (1), the processing of a return shall not be necessary before the expiry of the period specified in the second proviso to sub-section (1), where a notice has been issued to the assessee under sub-section (2):

Provided that such return shall not be processed before the issuance of an order under sub-section (3)."

The aforementioned substitution of sub-section (1D), however, never came into effect, as by Finance Act, 2017 said sub-section in the earlier form was retained and the text of the proviso was also modified. Effectively, on and with effect from 01.04.2017, sub-section (1D) and the proviso are:-

[8] Civil Appeal No. 2377 of 2020 decided on April 29, 2020

"(1D) Notwithstanding anything contained in subsection (1), the processing of a return shall not be necessary, where a notice has been issued to the assessee under sub-section (2): Provided that the provisions of this sub-section shall not apply to any return furnished for the assessment year commencing on or after the day of April 2017."'

Section 241A was introduced w.e.f 1-4-2017. In Vodafone Idea(supra), the Supreme Court was faced with the question of whether refund can be granted to the assessee if the time limit under proviso 2 to Section 143(1) had expired and whether the Revenue could delay processing refunds if a notice under Section 143(2) had been issued. Also, whether there must be grounds for exercise of jurisdiction under Section 241A of the Act.

The Court held that for the assessment years prior to AY 2017-2018, Section 143(1D) governed the field and it was enough if a notice under Section 143(2) of the Act was issued to the assessee and no refund could be given once the notice had been issued. The Court explained that sub-section 1 to Section 143 provided for adjustments to be made to the return which could be carried out by the Assessing Officer as permitted by the sub-section, but once a notice under Section 143(2) has been issued, the return is examined threadbare and the return is then taken up for actual scrutiny. Thus, once a notice under Section 143(2) had been issued to the assessee, no refund can be granted till completion of the assessment. Also, there is no requirement of issuing a separate intimation to the assessee once the notice under Section 143(2) had been issued since the notice under that section was itself sufficient to apprise the assessee that his return is under scrutiny. Lastly, Section 143(1D) is a non-obstante clause and would have overriding effect over the provisions of Section 143(1).

However, for AY 2017-2018 and subsequent assessment years (which were under consideration in the present case) Section 143(1D) was not applicable. The Court held that for such assessment years, if the intimation has been issued within the time allowed by the second proviso to Section 143(1), then that will constitute sufficient compliance

if in the same intimation a case is made out under Section 241A for withholding of refunds. Further, if there is compliance with the statutory requirements of Section 241A of the Act then reasons are to be inferred by observing, whether facially there is compliance with the said section.

Thus, once a scrutiny notice has been issued under Section 143(2), and approval has been obtained as required under Section 241A, then it would be open for the Department to withhold the refunds if the exercise of power is facially in consonance with the objective and requirement of the said section and other statutory requirements.

If a Section 143(2) notice has been issued, an order under Section 241A has been passed within the time-limit allowed by the second proviso, and the order passed under Section 241A contains atleast some prima facie reasons why the refund is being withheld having regard also to the fact that a scrutiny notice has been issued within limitation, then the writ court cannot grant the refund due to the assessee even though the Assessing Officer has passed given intimation under Section 143(1) of the Act. The writ court will not interfere in assessment proceedings. If it does interfere, every litigant will approach the writ court for relief and that will set a bad precedent[9]. In *GE Capital*, the Assessing Officer noted in the Section 241A order that the assessee company was mainly a conduit set up in Mauritius for avoiding the payment of capital gains tax by the parent company located in the UK. That, the DTAA between India and UK would normally be applicable and tax would be payable. This, the Hon'ble Court held could be in the teeth of the judgment in *UOI vs. Azadi Bacchao Andolan*[10]. But nevertheless, it decided not to interfere in assessment proceedings if statutory requirements were satisfied and prima facie reasons did exist why refund was being withheld.

The rationale for inserting **Section 244A** as a new provision to deal with interest was explained by the CBDT in Circular no. 549 dated 31st October, 1989 as follows:

[9] GE Capital Mauritius Overseas Investments vs. DCIT (WP(C)/3617/2020(Del) decided on 26.3.2021)
[10] (2004) 10 SCC 1

‘Insertion of a new Section 244A in lieu of Sections 214, 243 and 244. Under the provisions of Section 214, interest was payable to the assessee on any excess advance tax paid by him in a financial year from the 1st day of April next following the said financial year to the date of regular assessment. In case the refund was not granted within three months from the end of the month in which the regular assessment was completed, Section 243 provided for further payment of interest. Under Section 244, interest was payable to the assessee for delay in payment of refund as a result of an order passed in appeal, etc., from the date following after the expiry of three months from the end of the month in which such order was passed to the date on which refund was granted. The rate of interest under all the three sections was 15 per cent per annum. These provisions, apart from being complicated, left certain gaps for which interest was not paid by the Department to the assessee for money remaining with the Government. To remove this inequity, as also to simplify the provisions in this regard, the Amending Act, 1987, has inserted a new Section 244A in the Income Tax Act, applicable from the assessment year 1989-90 and onwards which contains all the provisions for payment of interest by the Department for delay in the grant of refunds. The rate of interest has been increased from the earlier 15 per cent per annum to 1.5% per month or part of a month comprised in the period of delay in the grant of refund. The Amending Act, 1987, has also amended Sections 214, 243 and 244 to provide that the provisions of these sections shall not apply to the assessment year 1989-90 or any subsequent assessment years.’

Section 244A is a self-contained and consolidated code which provides for interest on refunds in different circumstances which are dealt with hereinbelow.

1. The assessee is entitled to interest on the refund of excess payment of tax by way of TDS.

   The assessee is to be granted a refund for any excess payment of tax by way of TDS deposited with the government along with interest under Section 244A of the Act for delayed payment of the refund. The interest partakes the character of ‘amount due’ used in Section 244A, the interest being an integral part of the principal which

constitutes 'amount due'[11]. In other words, once the refund is due, interest will simultaneously be due for delayed payment of the refund.

2. The assessee is entitled to interest on pre-paid taxes including taxes paid on self-assessment under Section 140A of the Act.

The assessee is entitled to interest on monies(including self-assessment tax) illegally held by the Government. When the income assessed is greater than the income declared in the return of income, a notice of demand is issued for the excess and interest is charged under Section 234B of the Act. Conversely, applying the same logic, where taxes are paid pursuant to say a high pitched assessment/notice of demand and that assessment is modified in appeal resulting in lesser tax payable, the assessee is entitled not only to the excess of tax paid but also to interest for monies unauthorizedly retained by the government[12].

Similarly, if pre-paid taxes are in excess of the assessed tax, the assessee is entitled to a refund alongwith interest. Refund of self-assessment tax carries interest under Section 244A(1)(b) of the Act[13][14][15]. The period for calculation of the interest begins from the date of payment of the tax till the date of refund.[16] A different view has been taken by a co-ordinate bench of the Delhi High Court in *CIT v. Engineers India Limited*[17] in favour of the Revenue after differing with *CIT vs. Sutlej Industries Ltd.*[18](also of the Delhi High Court) and other decisions, and subsequently, in *Sutlej Industries Ltd. vs. CIT*[19], the conflicting decisions of the Delhi High Court in Engineers India and Sutlej Industries were referred to a Full Bench. In an SLP[20] against the decision of Engineers India, after granting leave, the Supreme Court

[11] CIT vs. H.E.G. Ltd. (2010) 15 SCC 349 : [2010] 189 TAXMAN 335(SC)
[12] Prayag Udyog Pvt. Ltd. vs. Union of India and Ors. [2012]348ITR217(All)
[13] CIT vs. Sutlej Industries Ltd. [2010] 325 ITR 331(Delhi)
[14] Stock Holding Corporation of India Limited vs. NC Tewari [2015]373ITR282(Bom): followed in M/s. Grasim Industries vs. DCIT [ITXA 1/2004 decided on 13.6.2018], DCIT vs. Savita Oil Technologies Ltd. I.T.A. No. 7620/Mum/2016(ITAT,Mumbai) decided on 24.4.2019
[15] CIT vs. Cholamandalam Investment and Finance Co. Ltd.[2007] 294 ITR 438(Mad)
[16] CIT vs. Vijaya Bank[2011]338 ITR 489(KAR)
[17] (2015) 373 ITR 377(Delhi)
[18] *ibid*
[19] ITA 493/2003(Del) & ITA 120/2004(Del) decided on 6.1.2016
[20] Engineers India Ltd. vs. CIT(2017) 397 ITR 16(SC)

restored the matter to be decided by the Full Bench constituted vide order dated 6.1.2016 in *Sutlej Industries vs. CIT*(supra). The issue is pending consideration of the Full Bench.

Interestingly, in Stock Holding Corporation, there was refund of self-assessment tax granted when there was a liability for the assessment year pursuant to an order of assessment. It is not clear as to how interest on self assessment tax or even self assessment tax paid for a particular assessment year can be refunded to the assessee when there is a demand for that assessment year by the Assessing Officer which has been satisfied by a set off with a refund of another assessment year. This is for the reason that refund of tax and interest thereon is payable only when tax is paid in excess of what is chargeable under the Act for a particular assessment year. Thus, if admittedly there was tax payable for the assessment year 1994-1995 (in the *Stock Holding Corporation* case) pursuant to a demand by the assessing officer(which was set off against refund for 1995-1996), it is inconceivable how the self-assessment tax for that year(1994-1995) can be refunded, that too with interest.
The question that begs an answer is:

If additional tax is payable(in addition to the tax paid on income declared) pursuant to a demand for a particular assessment year, how can there be refunds of self-assessment tax for that year?

Therefore, not in all cases of payment of self-assessment tax refund of the same alongwith interest is to be granted. The decision in Stock Holding Corporation in the author's view is not good law. In other words, if there is a demand of tax for a particular assessment year, then no refund of self-assessment tax can be granted even if the demand for that assessment year is sought to be set off against refund due for another assessment year.

3. The assessee is entitled to interest on refund of excess tax deposited by way of tax deducted at source under Section 195 of the Act.[21]

[21] Union of India vs. Tata Chemicals Ltd. [2014] 363 ITR 658(SC)

In *Union of India vs. Tata Chemicals*[22], the Supreme Court held that whenever money is retained unauthorizedly by the Department, it is liable to refund that money with interest. The case was one under Section 195 of the Act where the assessee had to make certain remittances to a non-resident on which amounts TDS was liable to be deducted. The assessee applied to the AO for his opinion and the AO directed the assessee to deduct and deposit 20% as tax whose decision was modified by the CIT(A) on the ground that reimbursement of expense would not be income deductible under S.195, resulting in a refund to the assessee-deductor of the amount deducted on the amount of re-imbursement of expenses(not being income of the non-resident) and deposited with the government. The assessee claimed that the amount refundable(amount deducted from reimbursement of expenses) must also carry interest. The Supreme Court upheld the assessee's claim under S.244A(1)(b) of the Act on the ground that firstly the refund became due under Section 240 of the Act and secondly, the interest was payable on the refundable amount under Section 244A(1)(b) of the Act for monies unauthorizedly retained by the government. The Court held that interest must be granted on monies retained unauthorizedly as a matter of course. This judgment has subsequently been followed by the Supreme Court in *M/s. Universal Cables Ltd. vs. CIT*[23]

In a given case(such as Tata Chemicals) where the income is not found to be that of the non-resident, but it has been remitted, the assessee-deductor would only be entitled to refund from the government of the amount of tax deducted and deposited with the government(which would have to be calculated proportionately on the amount which was not the income of the non-resident) and obviously not to the full amount remitted to the non-resident.

For example:

Assessee 'A' deducts 20% on an amount of Rs. 100 i.e Rs. 20 and deposits this amount with the government as TDS towards remittance of Rs. 100 to the non-

[22] *ibid*

[23] Civil Appeal 3826 of 2012 decided on December 12, 2019

resident. Now, subsequently it is found that Rs. 20 was not the non-resident's income. Thus, the amount of tax of Rs. 4(20% of Rs. 20) will be liable to be refunded by the Department as excess tax deposited with it. Only the excess TDS deposited with the government is liable to be refunded by the government with interest and the excess TDS is calculated proportionately as shown hereinabove.

4. The assessee is entitled to compensation under Section 244(1A) read with section 240 of the Act for delayed payment of interest accrued on the amount of refund. The rate of interest is to be the same as the rate of the regular interest charged as per the provisions of the Act.(*Sandvik Asia Ltd. vs. CIT*[24]). However, a Full Bench of the Supreme Court has held that under the new Section 244A of the Act, only statutory interest is leviable, and the ruling in Sandvik Asia is to be construed as only granting compensation for delay in granting interest on refund. Sandivk Asia thus stands overruled.[25] The facts in Sandvik Asia case for one of the years(AY 1977-1978) were as follows:

'*Assessment Year 1977-78:*
Notice of demand was issued to the appellant by respondent No. 2 for advance tax payable of Rs. 2,74,31,250/-. The appellant paid a sum of Rs. 1,86,04,450/-. Assessment order was passed by respondent No. 2 determining income of Rs.3,88,37,630/-. Respondent No. 2, after rectifying his assessment order, determined the income of Rs. 3,45,91,830/- and tax thereon at Rs. 1,99,76,781/- and raised a demand for further tax payable of Rs. 13,72,331/-. The appellant paid the said sum. Commissioner of Income tax (Appeals) disposed of the appellant's appeal substantially allowing the same. Respondent No. 2 gave effect to the appellate order determining income at Rs. 2,68,88,220/- and tax thereon at Rs. 1,47,88,521. The appellant on 30.04.1986 received a refund of Rs. 42,38,260/- and became entitled to receive interest on the refund and requested respondent No. 2 to grant interest on refund under Sections 214 and 244 of the Act for the period from 01.4.1977 to 31.03.1986.'

The refund was granted on 31.3.1986. The regular interest payable(till refund was granted) was paid on 27.3.1998. The Supreme Court held that the appellant-assessee is entitled to interest from 31.3.1986 - 27.3.1998 being interest payable on regular interest. The contention of the Department that there is no provision in law allowing

[24] [2006] 280 ITR 643(SC)
[25] CIT vs. Gujarat Fluro Chemicals[2013] 358 ITR 291(SC)

such interest on interest was negated- interest on interest was payable under Section 240 of the Act. Such interest is payable since Section 240 uses the words 'any amount'. The regular interest takes the colour of tax upon which further interest is payable.

Section 244A(1A) was introduced by the Finance Act, 2016 w.e.f. 1-6-2016.

The ruling in Sandvik Asia can be illustrated with an example:

Assessee 'A' has paid advance tax in FY 2013-2014 in excess of his tax liability for AY 2014-2015. Ordinarily, regular interest will accumulate from 1.4.2014 till the date refund is granted under S.244(A)(1)(a)(where return is filed within time). Now, an order giving effect is passed pursuant to a decision of an appellate authority. If the order giving effect is not passed within the limitation period, interest @3% p.a in addition to the interest under S.244(A)(1)(a) will be granted from the date of expiry of limitation for passing the order giving effect till the refund is granted, i.e the rate of 3% on the amount of refund will apply till the amount of refund is credited in the bank account of the assessee. Let us assume that the refund is granted after the appeal is disposed in favour of the assessee on say 20.3.2017. On this date when the refund is granted, interest will have become definite and ascertainable under S.244(A)(1)(a). This interest is calculated @0.5% on the amount of refund from 1.4.2014-20.3.2017 under S.244(A)(1)(a). When this amount of interest(say Rs. 100) is paid on say 20.3.2024, interest will be calculated from 20.3.2017-20.3.2024 on the amount of regular interest i.e Rs. 100 at the same rate as the regular interest i.e @0.5%.

If the order giving effect is not passed within three months(time stipulated) then additional interest @3% will be granted, but only on the refundable amount.

In *Gujrat Fluro*[26], a Full Bench of the Supreme Court has overruled Sandvik Asia and it was held that there will be no interest on interest under newly inserted Section 244A of the Act. The judgment makes it clear that the assessee cannot be

[26] *ibid*

compensated by way of interest on interest under newly inserted Section 244A of the Act. It was held in the context of Section 244A of the Act as follows:

'We clarify that it is only that interest provided for under the statute which may be claimed by an Assessee from the Revenue and no other interest on such statutory interest.'

Thus, if the assessee is not paid interest on the refund(under Section 244A) after it becomes due for a particular period of time, it may take recourse to law under Article 226 of the Constitution of India to enforce its claim but the Department is not obligated to pay interest on interest in addition to the statutory interest.

5. Is the assessee liable to tax on the refund received alongwith interest under Section 244A, in the year of receipt or until the assessment is framed under Section 143(3) of the Act, or upon the expiry of limitation for serving a notice under Section 143(2) of the Act?

   A Special Bench of the ITAT has held that the assessee would have to pay tax on the interest received under Section 244A in the year of receipt and not until the order of assessment under Section 143(3) of the Act is framed[27]. That, if interest is received alongwith the refund, the charging provisions(Section 4 and Section 5) are completely satisfied. That, the grant of refund or interest is not *per se* contingent and not dependent upon any event. It has accrued in favour of the assessee.

   The issue is one of accrual of income. However, not only has income accrued in such a situation but it has also been received. Therefore, it can hardly be said that the receipt is not taxable only because it is contingent upon framing the assessment order under Section 143(3) of the Act. In fact, it is a case of a contingency within a contingency(contingent upon whether or not assessment order will be framed and contingent upon liability as per assessment order) which cannot be a bar to tax the receipt especially if it has not only accrued to, but received by the assessee. Under Section 244A(3), if the interest is reduced on appeal, a notice of demand is to be sent

[27] Avada Trading Co. Pvt. Ltd. vs. ACIT[2006] 100 ITD 131(Mum) followed in: DCIT vs. Seshasayee Paper and Boards Limited [2010] (2) ITR (Trib) 417 (Chennai)

and the assessee must pay the excess amount which has been retained by it as interest, to the Department. In such a scenario, the proportionate amount of tax paid by the assessee on the excess i.e the amount paid to the department pursuant to the notice of demand is to be refunded by the Department as excess tax would have been paid by the assessee on that amount. If a greater amount of interest is determined on appeal, the assessee would have already paid tax on the amount of interest received and would pay further tax on the additional amount as and when it is received or accrued.

However, in *Avada Trading*, it was held that the proceedings can be made the subject matter of Section 154 which deals with rectification of mistakes and errors apparent on the face of the record.

6. Can the interest paid (under Section 234B or Section 234C and other allied sections) be set off against the interest receivable under Section 244A on receipt of refund by the assessee?

   Interest paid as income-tax cannot be set off against interest receivable/received by the assessee under Section 244A of the Act. Interest paid is not an allowable deduction under Section 37, and unless there is a provision by which income can be subject to a deduction, no deduction is permissible from such income. Thus, interest receivable under Section 244A which is to be treated as income under the head 'Income from other sources', cannot be subject to deduction[28].

   In the author's view, no deduction is permissible since none of the deductions stipulated under Section 57 can be made applicable to such income. Even otherwise, there can be no expenditure, revenue or capital attributable to such income.

7. Statutory interest under Section 244A of the Act is payable on the refund of excess interest paid under Sections 234A-C of the Act.

[28] Indian Oil Corporation Ltd. vs. DCIT (ITA NO. 813/Mum/2011(ITAT, Mumbai)) decided on 30.4.2014

In *K. Lakshmanya and Company vs. CIT*[29], the Supreme Court firstly held that in such a case, Section 240(Refund on appeal) is attracted since an order passed under Section 245(D)(4) would be an order passed in 'other proceedings'. Further, after referring to the Madras High Court decision of *CIT vs. Needle Industries Pvt. Ltd.*[30] held that on a reading of Section 240 of the Act, the words 'refund of any amount' may be construed as refund of any amount of 'whatsoever character'(including interest). Therefore, the assessee was admittedly entitled to a refund, being the excess interest paid under Section 234A-C of the Act. Having held that the assessee is entitled to refund, the Supreme Court then held that waiver of interest under Section 234(A)-(C) by the Settlement Commission resulting in refund to the assessee would attract Section 244A as well i.e refund alongwith interest would be due to the assessee, the interest being in the nature of something 'parasitical'. That, Section 244A is wider than Section 244 and it is sufficient if any amount of refund becomes due to the assessee, unlike Section 244 where the interest is refundable only pursuant to an order under Section 240 of the Act.

Thus, in *K. Lakshmanya and Company*, the Supreme Court was not concerned with a case of interest on interest(which has been held to be impermissible) but was concerned with refund of interest paid under Section 234A-C, and statutory interest(Section 244A) on the refundable amount. The interest, the Court held would fall under clause (b) to Section 244A(1) of the Act.

The issue has also been dealt with in favour of the assessee in the case of *ACIT vs. Alembic Glass Industries Limited*[31] as well.

Section 245 enables the Revenue to adjust demands raised for a particular assessment year(s) against refunds due to the assessee for another assessment year(s).

[29] [2017] 399 ITR 657(SC)
[30] 233 ITR 370
[31] [2008]111ITD320(Ahd)

The exercise of the power is discretionary as is evident by the use of the word 'may' used therein. The requirement of giving notice/intimation of the proposed action of adjustment out of the refund due is also an indication of discretionary nature of power not mandatory. This notice/intimation is required to be given so as to enable a party to point out not only factual errors but also point out why such a power should not be exercised in the facts of the case, such as the demand sought to be adjusted is still a subject matter of appeal and the issue is covered by decisions of higher forums etc. On consideration of the same, it is open to the officer of the revenue concerned to exercise its discretion, to adjust or not. Thus, when a party does raise such issues in response to a prior intimation, the officer of the revenue exercising powers under Section 245 of the Act must apply his mind to it and must record reason why the objection is not sustainable and also communicate it to the party. This before or at the time of adjusting the refund. This alone would ensure that that the power of adjustment under Section 245 of the Act is not exercised arbitrarily. Such a procedure would cause no prejudice to the revenue as the occasion to grant the refund would not arise till the objection to the intimation is disposed of. Ofcourse the objections should be disposed of expeditiously as undue delay in granting of refund would cause prejudice to the party entitled to the refund.[32] [33]

A prior intimation is mandatory as held by the Central Board of Direct Taxes vide Circular no. 1989 dated 20.10.2000 as follows:

'The Central Board of Direct Taxes have issued Instruction Nos.1952, dated 14-8-1998 and 1969, dated 20-8-1999, stating that written intimation must invariably be sent to assessee before adjusting his refund with outstanding demand in compliance to provisions of section 245 of the Income-tax Act, 1961.

2. However, it is noticed that in some cases, the prescribed procedure and the requirement of law are not being complied with. It is once again reiterated that in

[32] Hindustan Unilever Limited vs. DCIT[2015] 377 ITR 281(Bom)
[33] CIT vs. State Bank of India[2016] 384 ITR 227(Uttaranchal)

accordance with the provision of section 245 of the Income-tax Act, 1961, a written intimation must be sent to assessee before adjusting his refund with outstanding demand. Any lapse in this regard shall be viewed seriously. This point should be checked up specifically during the inspection work by Chief Commissioners / Directors General / Commissioners.'

A prior intimation proposing to adjust tax against refund must be issued and not a simultaneous proposal and adjustment, for example direction in the assessment order of adjustment of taxes against refund.[34] A prior intimation is mandatory; the assessee must be given an opportunity of being heard.[35]

In *Hindustan Unilever*, the Bombay High Court was faced with the issue as to whether tax demands stayed by the AO for two assessment years can be set off against refund due for another assessment year under Section 245 of the Act. The Court ruled that when demands have been stayed by the Assessing Officer, or even his administrative superior being the Commissioner of Income Tax under Section 220(6) of the Act, no adjustment of the amounts of tax stayed by such officer can be set off against the refund due for another assessment year. This is for the reason, that no tax is 'remaining payable' as contemplated under Section 245 of the Act to permit adjustment of tax towards refund. There being no demand or tax payable in view of the fact that the same has been stayed, there can be no question of setting off the stayed demand against refund due. The refund having already been partially granted, the Court ordered the full amount of refund due for the assessment year i.e including the amounts of set off for two assessment years against the refund(being the stayed demand), to also be refunded to the assessee.

[34] A.N. Shaikh and Ors. vs. Suresh B. Jain [1987]165 ITR 86(Bom)
[35] CIT vs. JK Industries Ltd. [2000] 245 ITR 457(Cal)

In *Tata Communications Limited vs. DCIT*[36], the Revenue proposed adjustment of demand due for AY 2013-2014 against refund due for AY 2016-2017. Interestingly, the assessee itself had acknowledged that the demand for AY 2013-2014 may be set off against refund due for AY 2016-2017 by letter dated 19.2.2018. An intimation was sent to the assessee dated 31.7.2019 proposing to adjust the demand and another intimation dated 2.8.2019 was sent with set off of the said demand. The assessee received both these intimations on 5.8.2019. In such peculiar facts, the Court held that there was no intimation and therefore, the adjustment was not permissible. In the author's view, this judgment is erroneous for the following reasons:

(i) It cannot be said that no intimation was issued to the assessee. Both the intimations were admittedly received by the assessee on 5.8.2019 and at best it can be said that no opportunity for responding to the intimations was provided to the assessee.

(ii) It was not really necessary in the special facts of the case for the Department to await the reply of the assessee to the intimation sent considering that the assessee itself had acknowledged that the demand can be set off under Section 245 of the Act.

(iii) Once it is accepted that a valid intimation is sent to the assessee and only no opportunity to point out factual errors/other reasons was provided, it cannot be said that the set off cannot take place when the assessee itself has unequivocally sent a letter on his own volition that the set off is permissible. The object behind issuing an intimation was completely satisfied in the present case as nothing further was necessarily to be pointed out by the assessee once it had itself acknowledged the set off of amount due.

(iv) No further letter/communication was sent by the assessee withdrawing its earlier letter, or even remotely stating that it is not liable to adjustment of refund.

An intimation sent under Section 143(1) proposing to adjust refunds due against tax payable is not permissible. The intimation must be sent under Section 245 of the Act and the assessee must be provided an opportunity to file objections and the Revenue

[36] WP/1900/2019(Bombay HC) decided on 27.9.2019

must then pass an order considering the objections of the assessee. That, the extension of interim orders by the Bombay High Court till 31.1.2021 will apply to refunds also. Therefore, adjustment of demands stayed(which are to be deemed extended till 31.1.2021) against refunds are not permissible.[37]

If the Assessing Officer has himself issued an intimation under Section 245 and set off demands of tax against refund due and determined the net amount of refund payable for the particular assessment year, the refund has to be granted more so when the provision(Section 143(1D)) is not satisfied to withhold refunds due[38]. An interesting question arises, that if the order under Section 143(3) is framed determining refund due and pursuant to rectification proceedings under Section 154 a refund is still due, and the Assessing Officer has through inadvertence or otherwise committed a manifest error or has improperly determined the excess refund, is the Revenue bound to grant the refund? Or has the limitation under Section 263 to expire before any refund is granted? Take a case where there are thousands of crores at stake or the Assessing Officer has for any reason granted huge amounts of refund through inadvertence. It seems possible that assessee's be required to wait till limitation under Section 263 has elapsed for the reason that the Revenue has no remedy of appeal and even otherwise has no alternative remedy. It will be severely prejudicial to the interests of the Revenue if the refunds are granted before the expiry of the limitation period provided under Section 263(2) of the Act.

Thus, from a holistic reading of the above principles as enunciated from the various case-laws, the following may be delineated:

(i) A prior and not a simultaneous intimation is mandatory. The assessee must be given an opportunity to point out to the Assessing Officer any factual errors or other reasons why the set off must not be carried out.

[37] Tata Communications Ltd. vs. UOI(WP/732/2021 decided on 6.4.21)
[38] Vodafone Idea Limited vs. ACIT(WP-LD-VC/81/2020 decided on 26.6.2020)

(ii) If the tax demands sought to be set off against refunds due are stayed by any authority, tribunal, or court, the adjustment is plainly impermissible. This is for the reason that no tax is remaining payable or is required to be paid.

(iii) It seems just that the powers of set off are exercised in rare cases where tax is 'remaining payable' pursuant to the assessment attaining finality and which has not been paid and at the same time refund for another assessment year is pending.

(iv) It is not appropriate to set off tax dues even if the demands have not been stayed against refund due to the assessee for the simple reason that the tax due to be deposited with the Revenue on account of partial stay/no stay has not attained finality and there is no real necessity to set off this amount which is to be deposited with the Revenue. It can be independently collected and various measures of coercive recovery have been provided under the Act.

(v) At the same time, the refund due may not be immediately granted on account of various other factors such as withholding of refund under Section 241A, or non-expiry of the time-limit for revision of the refund order which is prejudicial to the Revenue under Section 263. In such cases, if till then the total income and the tax payable thereon has been finally assessed for another assessment year for example on account of the assessee not filing an appeal within limitation, the adjustment then is permissible.

Miscellaneous

1. Whether excess tax paid under protest pursuant to the Kar Vivad Samadhan Scheme is liable to be refunded with interest?

   The Punjab and Haryana High Court in *Marigold Engineers vs. UOI*[39] has held that the amounts paid under protest being excess tax is liable to be refunded to the assessee since what is not eligible to be refunded under the scheme is only tax paid pursuant to the declaration filed which is 'due' under the scheme. Only the tax due is payable and unless such tax is due, the Department cannot retain any such excess

[39] [2005]274 ITR 17(P&H)

amounts. The amount of tax may be determined with reference to the amount as mentioned in the certificate issued under the Act, which in this case was lower than the amount due and paid under the scheme. Thus, the excess was liable to be refunded alongwith interest.

2. Is the tax which is paid beyond the period stipulated for filing a declaration liable to be refunded alongwith interest?

   The tax paid beyond the period for filing a declaration under the Voluntary Disclosure Scheme, 1997 which is 90 days is liable to be refunded since the amount of such tax paid is not pursuant to the scheme.[40] The ratio of this judgment can be applied to allied legislation as well.

3. CBDT Circular 9/2015 dated 9-6-2015 makes the timelines clear for refund/carry foreward of losses claims to be entertained; the circular *inter alia* provides for condonation of delay in filing returns claiming refunds/losses. No claim is to be accepted beyond a period of 6 years from the end of the relevant assessment year from which the claim is to be made. The Circular lays down the classes of authorities entitled to entertain delayed returns claiming refunds/losses.

--xx--

[40] [2006] 282 ITR 636(Bom)