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BOMBAY HIGH COURT

Case No: Writ Petition No. 3184 of 2004

Humayun Suleman Merchant	APPELLANT
Vs	
Chief Commissioner of Income Tax (X), Mumbai	RESPONDENT

Date of Decision: Oct. 25, 2016

Acts Referred:

- Income Tax Act, 1961 - Section 119(2)

Citation: (2016) 290 CurTR 511 : (2017) 244 Taxman 230

Hon'ble Judges: M.S. Sanklecha and A.K. Menon, JJ.

Bench: Division Bench

Advocate: Mr. B.M. Chatterjee, Senior Advocate with Ms. Shilpa Goel i/b M/s. S.V. Pikale and Co, for the Petitioner; Mr. A.R. Malhotra with Mr. N.A. Kazi, Advocates, for the Respondents

Final Decision: Dismissed

Judgement

A.K. Menon, J. - By the present petition, the petitioner challenges the order dated 5th October, 2004 of respondent no.1 passed under Section 119(2) of the Income Tax Act, 1961 (the "Act"). By the impugned order the application for waiver of interest levied under Sections 234A, 234B, and 234C of the Act in respect of assessment year 199697 is rejected.

2. In a related development Income Tax Appeal No.545 of 2002 was filed in this Court pertaining to the same assessee and the same assessment year. Two substantial questions of law formed the subject matter of the Income Tax Appeal. These are as follows :

"(a) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in applying the provisions of Section 54(F) (4) of the

Income Tax Act, 1961?

(b) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the Assessing Officer has rightly computed the deduction under section 54F of the Income Tax Act, 1961, restricting the investment in the new asset at Rs.35,00,000/and thus restricting the exemption under section 54F of the Act proportionately to the amount invested ?"

3. The Appeal has since been decided. Both Question Nos. 1 and 2 have been answered in the affirmative i.e. in favour of the respondent-revenue and against the appellant-assessee.

4. In this Petition it is the petitioner''s case that for the assessment year 1996-97 the petitioner has filed return of income declaring total income of Rs.44,84,820/.

The Assessing Officer levied interest as under :

Under Section 234A	Rs. 53,580/Under
Section 234B	Rs.9,73,370/Under
Section 234C	Rs. 700/-

In the return filed, the petitioner had claimed exemption from capital gains under Section 54F in respect of sale of the land for a consideration of Rs.85,33,250/- .

Despite agreeing to purchase a flat for a consideration of Rs.69,60,000/- part payments of only Rs.35,00,000/- were made till the date of filing return. The balance of Rs.34,60,000/- ought to have been deposited by the petitioner in a specified account, however, he failed to do so. Upon the return being filed after the due date and the Petitioner not having paid Advance tax the assessing officer levied interest under Sections 234A, 234B and 234C vide order dated 13.3.2001.

5. Under Section 234A, if the return of income for any assessment year under section 139(1) is furnished after the due date then at the relevant time the assessee is liable to pay simple interest at the rate of 2% for every month or part of a month comprising the period commencing on the date immediately following due date and ending on the date when it is furnished and in case no return is furnished, interest will be computed till date of completion of the assessment under Section 144. Such interest is computed on the amount of the tax on the total income as determined under Section 143 (1) provided that such tax determined shall be reduced by the amount of advance tax, if any, paid.

6. Under Section 234B if in any financial year, an assessee fails to pay advance tax under Section 208 or if the advance tax paid by such assessee under Section 210 is less than 90% of the assessed tax, the assessee at the relevant time is liable to pay simple interest at the rate of 2% for every month or part of the month from 1st April

of the following financial year upto the date of Assessment. Under Section 234C if advance tax payable under Section 208 has not been so paid before the scheduled dates of 15th June, or 15th December or 15th March as provided in the section, the assessee is liable to pay simple interest at the rate of 1 % is less than 30% (15th June) or 60% (15th December) or less than the tax due (15th March) on the amount of shortfall of the tax due on the returned income.

7. In the present case the petitioner having received the consideration of Rs.85,33,250/- the levy of interest as aforesaid came to be made on account of his failure to pay taxes as scheduled. The petitioner assessee omitted to pay advance tax in anticipation of obtaining exemption under Section 54F(4) while dealing with the tax liability. The petitioner however failed to obtain such exemption at all levels viz before the Assessing Officer, the Commissioner of Income Tax (Appeals) and the Tribunal. Being aggrieved the appellant filed Income Tax Appeal which we have decided on 18th August, 2016. In view of dismissal of the appeal, the denial of exemption under Section 54F stands confirmed.

8. Mr. Chatterjee, learned Senior Counsel appearing on behalf of the petitioner submitted that the petitioner was entitled to waiver or reduction of interest in terms of the order [F. No. 400/234/95IT(B)] dated 23.5.1996 issued under Section 119(2)(a) of the Act by the CBDT.

9. Mr. Chatterjee, in particular placed reliance upon clause 2(d) of the order [F.No.400/234/95IT(B)] dated 23.5.1996 of the CBDT. For ease of reference the relevant extract of the said circular is produced below :

"(2) (a) ....

(b) ....

(c) ....

(d) Where any income which was not chargeable to income tax on the basis of any order passed in the case of an assessee by the High Court within whose jurisdiction he is assessable to income and as a result he did not pay income tax in relation to such income in any previous year and subsequently, in consequence of any retrospective amendment of law or as the case may be, the decision of Supreme Court in his own case, which event has taken place after the end of year of any such previous year, in any assessment or reassessment proceedings the advance tax paid by the assessee during the financial year immediately preceding the relevant assessment year is found to be less than the amount of advance tax payable on his current income, the assessee is chargeable to interest under Section 234B or section 234C and the Chief Commissioner of Director General is satisfied that this is a fit case for reduction or waiver of such interest."

(Emphasis supplied)

10. Paragraph (d) of the said notification was later revised by CBDT order under Section 119 (2)(a) dated 30.1.1997 as under :-

"2. In partial modification of this para of the order, the Central Board of Direct Taxes has decided that there shall be no condition that the decision of the High Court or the Supreme Court, as referred to therein, must be given in the assessee''s own case. Also the condition that any retrospective amendment of law or the decision of the Supreme Court or the jurisdictional High Court must have been made after the end of the relevant year stands withdrawn."

11. In the light of above circular Mr. Chatterjee submitted that use of the words "as the case may be" in clause 2(d) would entitle the petitioner for the relief. He submitted that under clause 2(d) if any income which was not chargeable to Income Tax on the basis of any order passed by the High Court in case of an assessee which resulted in the assessee not paying tax in relation to such income in any previous year and subsequently as a consequence of any retrospective amendment of law or as the case may be the decision of the Supreme Court in the assessee''s own case, which event has taken place after the end of any such previous year, in any assessment or reassessment proceeding, if the advance tax paid by the assessee is found to be less than what was payable, the assessee could be entitled for reduction or waiver of interest on the shortfall or omission to pay advance tax. He submitted that the facts of the petitioner''s case clearly fell within the discretionary provisions of said clause 2(d) inasmuch as the assessee''s appeal was pending in this Court and was awaiting adjudication, the petitioner should be spared of interest liability especially in view of the facts of present case.

12. According to Mr. Chatterjee, the petitioner had received possession of the premises which had been purchased from out of the sale proceeds of the land. The sale of capital asset took place on 29th April 1995 and the agreement of purchasing the flat was dated 16th July, 1996 and amount of Rs. 35,00,000/- was paid towards purchase of the flat and the balance of Rs.34,60,000/- was to be paid and the return of income was filed on 4th November, 1996 under Section 139 of the Act. Section 54F provides that the amount not utilised wholly or partly for the purchase towards residential accommodation shall be deposited by him under Section 139(1) in a specified bank account. In the facts of the present case Rs.34,60,000/was not so deposited nor was it paid towards purchase price.

13. In support of his contentions Mr. Chatterjee relied upon the meaning of the words "as the case may be " in P. Ramanatha Aiyar''s Advanced Law Lexicon and The Major Law Lexicon and submitted that the definitions would encompass his client''s case and that the benefit of reduction and/or waiver may be given to the Petitioner. Mr. Chatterjee also relied upon the decision of Prime Securities Ltd v. Assistant Commissioner of Income Tax (Investigation) [2011]333 ITR 464 and submitted that this court had held that there was no interest liability in cases where the assessee could not anticipate events of the next financial year and hence no default in paying

advance tax.

14. Mr. Chatterjee also relied upon a judgment of the Kerala High Court in CIT v. Jimichan M. Varicatt [2011] 330 ITR 338 (Ker) and the decision of the Gujarat High Court in Smt. Bhanuben Panchal and Chandrikaben Panchal v. CCIT and others 269 ITR 27 in which the High Court had reduced the interest levied. He therefore submitted that the Petitioner''s case be favourably considered.

15. On behalf of the revenue Mr. Malhotra resisted the petition inter alia contending that the facts of the present case did not call for exercise of any discretion in favour of the assessee. The Assessee had clearly fallen foul of the law in not having deposited the monies retained by him in the specified account and by not offering the amounts not paid for purchase of the flat to tax and finally in having failed to pay advance tax. Mr. Malhotra relied upon CIT v. Anjum Ghaswala & Ors [2001] 252 ITR 1 and submitted that in Prime Securities (supra) this court had followed Anjum Ghaswala (supra) while holding in the facts of that case that advance tax was not due owing to an unanticipated event and therefore the assessee was entitled to relief. In Ghaswala (supra) Mr. Malhotra pointed out the Supreme Court had reiterated that as in the normal rule of construction where a statute vests certain powers in an authority to be exercised in a particular manner, it must be so exercised for proper administration of the Act. He differentiated the decisions of Prime Securities (supra) and Varicatt (supra) on facts. Apropos Bhanuben Panchal''s case (supra) Mr. Malhotra pointed that apart from the fact that the SLP filed by the revenue against the judgement in Bhanuben had been dismissed, the facts in Bhanuben made for circumstances beyond the control of the assessee and Bhanuben cannot be applied in the present set of facts. He submitted that no case for interference was made out.

16. We find that the entire case of the petitioner as urged before us for waiver of interest is based on the interpretation of clause 2(d) of the order [F. No. 400/234/95IT(B)] dated 23rd May, 1996 read after its modification dated 30th January, 1997. Therefore the scope of examination before us is the only correct and true interpretation of the above order in the facts of this case.

17. Having considered the facts, hearing counsel at length and having considered the decisions cited, we find that Mr. Malhotra is right. Mr. Chatterjee''s contention is that the Petitioner received possession and therefore entire price was "deemed to be appropriated" towards purchase price of the residential flat does not commend itself to us as already negatived in our order dated 18th August, 2016 in the petitioner''s appeal. Furthermore, the phrase "as the case may be" does not carry the Petitioner''s case any further.

18. In our opinion, in the facts of the present case the petitioner is not entitled to benefit of order [F. No. 400/234/95IT(B)] dated 23.5.1996 and we are unable to appreciate Mr. Chatterjee''s contention that the expression "as the case may be"

used in paragraph 2(d) of the order issued by the CBDT can come to the petitioner''s rescue. This on the basis of his submission that it would cover any other case. The phrase "or as the case may be" has been used in the order dated 23rd May 1996 to cover the alternative to an assessee not paying tax in view of the High Court decision which is now payable as a consequence of a retrospective amendment of law "or as the case may be" by the decision of the Supreme Court, which event takes place subsequent to the previous year relevant to Assessment Year. Therefore, it has been used in the sense of "as the situation may be". In fact, this phrase "as the case may be" was subject of consideration by the Supreme Court in Union of India v. Ashok Kumar, 2005(8) SCC 760. The Court held that the phrase "as the case may be" would mean either of the alternatives as listed out along with the phrase "as the case may be". The Court held it would mean "whichever the case may be" or "as the situation may be". It would mean one of the various alternatives. The order dated 23.5.1996 of the CBDT grants relief of waiver and/or reduction of interest on the ground that the nonpayment of tax was on the basis of the decision of the jurisdictional High Court which was subsequently nullified by either retrospective amendment of the law or by a Supreme Court decision. It does not deal with the submission the petitioner is urging before us. In any case, without prejudice to the above, it may be mentioned that after the partial modification of para (d) of the order dated 23rd May 1996 by a further order dated 30th January, 1997, the phrase "or as the case may be" becomes redundant and impliedly stands deleted on account of the modification. This being so there are now no alternatives available under para (d) of the order dated 23rd May 1996 as modified. The only submission made before us for nonpayment of taxes was hardship to the petitioner and for that purpose reliance was placed on the phrase "as the case may be", to submit it would cover all other cases. We must point out that no decision of this Court on the interpretation of Section 54F(4) of the Act (as in force at the relevant time) was brought to our notice which took a view that no tax is payable on the amounts of gain made on sale of land, if not invested and also not deposited in the specified bank account as mandated by Section 54F(4) of the Act.

19. Further, the waiver or reduction is entirely discretionary and the provisions that the circular merely indicate the conditions precedent to exercise of such discretion. The Chief Commissioner of Income Tax while considering the application dated 7th August, 2002 for waiver or reduction of tax has observed that discretion must be exercised strictly within the parameters laid down in the order. The parameters are binding upon the authorities and the petitioner was not entitled to such benefit, in case it does not fall within it.

20. Reliance by Mr. Chatterjee upon the decision of this Court in Prime Services Ltd. (supra) is of no assistance in the present case as it does not deal with relief as claimed before us on the basis of CBDT the order dated 23rd May, 1996. Similarly, the decision of Kerala High Court in CIT v. Jimichan M. Varicatt (supra) was a decision wherein the benefit was not granted to the assessee under the order of the CBDT

dated 23rd May, 1996. In fact, the Division Bench after upholding the order of the Single Judge on its interpretation of the order dated 23rd May, 1996 yet granted partial relief to the petitioner by waiving interest in excess of Rs.1 lakh under Sections 234B and 234C of the Act de hors the interpretation of the order dated 23rd December, 1996.

21. Mr. Chatterjee had relied upon the judgment of Gujarat High Court in the matter of Smt. Bhanuben Panchal (supra) . In the above case, the Gujarat High Court observed in the context of the facts before it that under clauses (a) to (d) of paragraph 2 of the order dated 23rd May, 1996, the nonpayment of tax was for circumstances beyond the control of the assessee and the same could be considered as a specie of unavoidable circumstances. Clauses (a) to (e) merely illustrate the different facets of the underlying principle that waiver of interest is to be considered when the delay on the part of the assessee is due to unavoidable circumstances or on account of the circumstances beyond his control. When such circumstances, if they exist, lead to delay in filing return of income and results in delay in payment of taxes, they would qualify for consideration as unavoidable and therefore a case to be considered for reduction or waiver of interest.

It is true that the Gujarat High Court in Smt. Bhanuben Panchal (supra) does state that various clause (a) to (e) of the order dated 23rd May, 1996 issued by the CBDT are merely illustrative of the principle where delay on the part of assessee is due to unavoidable circumstances or on account of circumstances beyond his control. In the present facts, the petitioners have not been able to establish that non payment of the tax and/or non investment in the specified bank account in terms of Section 54F of the Act was on account of unavoidable circumstances or circumstances beyond control of the petitioner.

22. In the present set of facts and on the basis of the submission made before us, we do not find fault with the impugned order. This is so as the petitioner has not established that nonpayment of taxes were for reasons beyond his control. For the above reasons, the impugned order on the interpretation of the order dated 23rd May, 1996 cannot be said to be perverse.

23. The petitioner has not established that he is entitled to benefit of the order dated 23rd May, 1996 for waiver of interest.

24. For the aforesaid reasons we pass the following order :

(i) Rule is discharged.

(ii) The writ petition is dismissed.

(iii) No order as to the costs.