

**(2010) 10 CAL CK 0042**

**Calcutta High Court**

**Case No:** Writ Petition No. 21523 (W) of 2007

Tapan Kumar Mitra and Others

APPELLANT

Vs

Commissioner of Income Tax  
and Others

RESPONDENT

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**Date of Decision:** Oct. 6, 2010

**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 10(10C), 147, 264, 264(6), 264(7)

**Hon'ble Judges:** Patherya, J

**Bench:** Single Bench

**Advocate:** Rupen Mitra and Aniket Mitra, for the Appellant; D.K. Shome and Asha G. Gutgutia, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

Patherya, J.

This is an application filed under Article 226 of the Constitution of India challenging the order dated 29th March, 2007 passed by the respondent No. 1.

**2. Petitioners' Case**

2.1 The case of the petitioner is that all the writ petitioners opted for the Voluntary Retirement Scheme (VRS). While filing the returns, the petitioners claimed exemption u/s 10(10C) of the Income Tax Act, 1961 (1961 Act). The said benefit was given to the petitioners but thereafter the case was reopened u/s 147 of the 1961 Act and the exemption granted was withdrawn. The petitioners aggrieved by the said assessment u/s 147 of the 1961 Act filed an application u/s 264 of the 1961 Act and by order dated 29th March, 2007 the application was rejected, hence the instant application has been filed.

2.2 Counsel for the petitioners has contended that Section 10(10C) of the 1961 Act provides for exemption upto Rs. 5,00,000/-(five lacs) on sums received under a Scheme including Voluntary Retirement Scheme. Initially the Reserve Bank of India, the petitioners' employer, refused to grant exemption and several applications were filed before the Income Tax Appellate Tribunals in different parts of India. The said Income Tax Appellate Tribunals including the Income Tax Appellate Tribunal, Kolkata has allowed the said exemption. Therefore, the petitioners are entitled to exemption of Rs. 5,00,000/-(five lacs). In fact, the orders passed by the Tribunals have been accepted by the authorities as no appeal has been filed therefrom. Reliance has been placed on [Commissioner of Income Tax Vs. Nagesh Devidas Kulkarni](#), and [SAIL DSP VR Employees Association 1998 Vs. Union of India \(UOI\) and Others](#), wherefrom a SLP though filed was dismissed. Therefore, the exemption as per Section 10(10C) of the 1961 Act be granted.

### 3. Respondent's Case

3.1 Counsel for the Respondent authorities submits that the said amount had been deducted as tax at source and no exemption was allowed u/s 10 (10C) of the 1961 Act. From the assessment order it will appear that the petitioners had claimed exemption u/s 10(10C) of the 1961 Act.

4. Case of the Reserve Bank of India 4.1 The case of the employer, Reserve Bank of India, is that the said sum should be deducted and that the order under challenge is one passed u/s 264 of the 1961 Act and no appeal has been filed as the time to file the appeal has expired. From an order passed u/s 264 of the 1961 Act, no writ lies. Section 264 empowers the Commissioner to pass an order "not being an order prejudicial to the assessee". According to Explanation-1 to Section 264 an order of rejection is not an order prejudicial to the assessee. "Prejudicial Order" came up for consideration in 16 ITR 214 and [JACOB Vs. ADDITIONAL DEPUTY COMMISSIONER OF AGRICULTURAL Income Tax AND ANOTHER.](#). The order passed by the Commissioner is not prejudicial to the petitioners as the assessment order has not been challenged by which the exemption-claim u/s 10(10C) was disallowed. Therefore, even if the revisional order is set aside, the assessment order cannot be set aside.

4.2 The writ petition is bad for non-joinder of the employer, Reserve Bank of India. The Voluntary Retirement Scheme was floated by the Reserve Bank of India and the same is not in conformity with Rule 2BA of the Income Tax Rules, 1962. There is no pleading with regard to the said order being prejudicial to the petitioners.

4.3 The Reserve Bank of India's Scheme was before the authority but has not been annexed to the writ petition. The Writ Court is not to sit in appeal over the order passed u/s 264. There has been no violation of the principles of natural justice. No allegation of bias or arbitrariness has been pleaded, therefore, no prejudice suffered. The decision reported in [SAIL DSP VR Employees Association 1998 Vs.](#)

[Union of India \(UOI\) and Others,](#) is distinguishable as the Scheme of the Reserve Bank of India differs from the Scheme under consideration by the Court in the said decision. The decisions reported in [SAIL-DSP VR Employees" Association Vs. Union of India and Others,](#) and [Commissioner of Income Tax Vs. Nagesh Devidas Kulkarni,](#) are distinguishable on facts. One writ petition has been filed by the petitioners although separate revisional applications were filed and separate orders passed. Therefore, for mis-joinder of parties the writ petition is also liable to be dismissed. For all the said reasons no order be passed on this application.

## 5. Petitioner-in-Reply

5.1 Counsel for the petitioner-in-reply submits that there is no provision for an appeal from an order passed u/s 264 of the 1961 Act and therefore a writ petition is maintainable. For the said proposition reliance is placed on [Ramswarup Bhawsinka Vs. Commissioner of Income Tax and Another,](#) and [Ultramarine and Pigments Ltd. Vs. O.P. Srivastava, Commissioner of Income Tax,](#)

5.2 Explanation-I is applicable to Section 264(7) and not to Section 264. No affidavit-in-opposition has been filed, and the allegations are admitted by the respondents. The Reserve Bank of India need not be made a party as no relief is being claimed against the Reserve Bank of India and the money is to be repaid by the Income Tax Department. In Ground-"C" the petitioner has challenged the arbitrariness of the order dated 29th March, 2007. The word "agreed" mentioned in the assessment order cannot be taken as admission by the petitioner and admission of law is no admission as held in (1998) 6 SCC 538. The decision reported in 161 ITR 214 and [JACOB Vs. ADDITIONAL DEPUTY COMMISSIONER OF AGRICULTURAL Income Tax AND ANOTHER.,](#) were considered in (2005) 2 CLJ 80 and are distinguishable. The decision reported in [SAIL DSP VR Employees Association 1998 Vs. Union of India \(UOI\) and Others,](#) came after [SAIL-DSP VR Employees" Association Vs. Union of India and Others,](#) . Pursuant to orders of Court the requisite Court fees have been deposited. Similar orders have been passed on revisional applications by the Commissioner and therefore the cause of action is common and there is no impediment in filing the instant writ petition.

## 6. Respondents in reply

6.1 Counsel for the authorities submits that to restrict the explanation in Section 264 only to 264(7) is to misconstrue the Section itself. Explanation-1 uses the words "purposes of this Section" and in fiscal statute each word should be strictly construed. Explanation-1 is not only restricted to Sub-Section 7 but is applicable to Section 264. There has been a concession by the assessee on facts and at the time of hearing before the Assessing Officer the employer, Reserve Bank of India was present. This application should be restricted to the petitioner No. 1 as the order passed on the revisional application of the writ petitioner No. 1 has been annexed. Therefore, there has been mis-joinder of parties. The voucher has been returned by

the petitioner and not by his counsel. The decision reported in [Uptron India Limited Vs. Shammi Bhan and Another,](#) and [Ultramarine and Pigments Ltd. Vs. O.P. Srivastava, Commissioner of Income Tax,](#) are distinguishable and not applicable to the facts of this case.

## 7. Conclusion

7.1 Having considered the submissions of the parties for the Assessment Year 2004-2005 an exemption was claimed by the petitioner u/s 10 (10C) of the 1961 Act. Such exemption was initially allowed and a refund voucher issued. Subsequently, it was found that the petitioner's employer RBI had deducted tax at source and disallowed the exemption on the ground that its scheme was not as per the provisions of Rule 2BA of the Income Tax Rules, 1962. On the said basis proceedings u/s 147 of the 1961 Act was initiated and an order passed on 30th February, 2005. A revision was filed by the assessee u/s 264 and the same was rejected by the Commissioner on 29th March, 2007. The said order dated 29th March, 2007 has been challenged in this writ petitioner. One of the grounds taken is non-recording of reasons. On a perusal of the said order it appears that reasons have been given and nowhere has it been pleaded that the said order is prejudicial to the petitioner. This assumes some importance in fiscal law as Section 264 reads as follows:

264. (1) In the case of any order other than an order to which Section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

(2) ....

(3) ....

(4) ....

(5) ....

(6) ....

Explanation 1.- An order by the Commissioner declining to interfere shall, for the purposes of this section, be deemed not to be an order prejudicial to the assessee.

Explanation-I makes it clear that rejection of an application u/s 264 be not deemed as a prejudicial order.

6.2 From the pleadings it is not known why the order dated 29th March, 2007 is prejudicial to the writ petitioners. In fact by the said order the position of the petitioner has not worsened.

6.3 No copy of the scheme has also been annexed to appreciate the purport of Clause 6 of the scheme which finds mention in the order dated 29th March, 2007.

6.4 The writ petition is maintainable in view of [Ramswarup Bhawsinka Vs. Commissioner of Income Tax and Another](#), but for no pleading of prejudice this application cannot be entertained.

6.5 (2005) 2 CLJ 80 is distinguishable on facts as therein on the principles of violation of natural justice the Court had interfered. In the instant case there is no violation of natural justice.

6.6 There is no dispute with the principles laid down in [SAIL DSP VR Employees Association 1998 Vs. Union of India \(UOI\) and Others](#), and [Commissioner of Income Tax Vs. Nagesh Devidas Kulkarni](#), but as the order dated 29th March, 2007 is one u/s 264 and in the absence of pleadings of prejudice will not apply to the facts of the case.

6.7 With no copy of the scheme annexed to the petition or placed before Court the terms of the scheme could not be considered or a finding reached in respect thereof as was done in [SAIL-DSP VR Employees" Association Vs. Union of India and Others](#),

6.8 Explanation-I is to apply to Section 264 and not to Sub-Section 7 of Section 264 of the 1961 Act. The explanation refers to "for purposes of this Section" and does not read "for purposes of this Sub-section" as the explanation to Sub-Section 6 of Section 264 of the 1961 Act reads.

6.9 The grounds of challenge are more in the nature of grounds of appeal and therefore cannot be considered.

6.9 For all the said reasons this application fails and no order is passed thereon. Interim order, if any, shall stand vacated.