

The Commissioner of Income Tax- Central II, Mumbai Vs Divine Holdings Pvt. Ltd.

Court: Bombay High Court

Date of Decision: March 7, 2012

Acts Referred: Income Tax Act, 1961 " Section 119(2), 132, 143(3), 2(43), 234(A)

Sick Industrial Companies (Special Provisions) Act, 1985 " Section 32

Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 " Section 11, 11(1), 11(2), 13, 3

Citation: (2012) 114 BOMLR 1341 : (2012) 209 TAXMAN 467

Hon'ble Judges: M.S. Sanklecha, J; D.Y. Chandrachud, J

Bench: Division Bench

Advocate: A.R. Malhotra with Ms. Padma Divakar, for the Appellant; R.A. Shaikh, for the Respondent

Final Decision: Disposed Off

Judgement

Dr. D.Y. Chandrachud, J.

This Appeal arises from a decision of the Income Tax Appellate Tribunal dated 3 November 2009; the

Assessment Year in question being Assessment Year 2005-06. The Appeal raises the following substantial questions of law :

1. Whether on the facts and in the circumstances of the case, the Tribunal, in law, was right in holding that the assessee being a notified person

under the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 is not liable to pay to pay interest u/s. 234A, 234B, &

234C of the IT Act, 1961;

2. Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that interest under Sections 234A, 234B

& 234C is not chargeable in the assessee's case being notified person under Special Court (Trial of Offences relating to Transactions in Securities)

Act, 1992 without appreciating that the said Act has not ruled that the provisions of Sections 234A, 234B, and 234C are not applicable to the

notified persons or they are exempted from the liability of payment of interest under these sections of Income Tax Act, 1961.

2. The Appeal is admitted on the aforesaid questions and is taken up for hearing and final disposal by consent.

3. The assessee is a notified person under the Special Court (Trial of Offences relating to Transactions in Securities) Act 1992. The assets of the

assessee including its bank accounts were attached and vested in the Custodian under the Act. The return of income for Assessment Year 2005-

06 which was due on 31 October 2005 was filed on 26 February 2007 declaring a total income of Rs. 37.54 lacs. The assessment was completed

u/s 143(3) on 13 December 2007, determining a total income of Rs. 45.73 lacs. The Commissioner (Appeals) disposed of the appeal by an order

dated 29 August 2008. The Commissioner held that the provisions of Sections 234A, 234B and 234C of the Income Tax Act, 1961 were

mandatory. In appeal, the Tribunal relied upon its decision in the case of Orion Travels Private Limited rendered on 9 October 2009, in coming to

the conclusion that interest under Sections 234A, 234B and 234C should not be levied on the assessee for the Assessment Year under reference.

The appeal filed by the Revenue from the decision of the Income Tax Appellate Tribunal in the case of Orion Travels Private Limited (supra) is

also before the Court in this batch of appeals which has been heard together.

4. Counsel appearing on behalf of the Revenue urges that

(i) The provisions of Sections 234A, 234B and 234C are mandatory in nature;

(ii) The decision of the Tribunal in Orion Travels relied on the view taken by the Special Court to the effect that no interest could be imposed on a

notified party for the non-fulfillment of an act which a notified party is prevented from doing by reason of the Special Court Act. This would include

the liability to pay interest u/s 234B;

(iii) The Tribunal, however, it was urged, did not consider the judgment of the Supreme Court in Harshad Shantilal Mehta Vs. Custodian and Ors,

which specifically took the view that interest or penalty for any action or default after the date of the notification would not be covered by the

Special Court Act. The Special Court, according to the judgment of the Supreme Court, is required to consider this question only from the point of

view of distribution of any part of the surplus assets in the hands of the custodian after the discharge of liabilities u/s 11(2) (a) and 11(2)(b) of the

Special Court Act. That, however, would have no bearing on the principal question as regards the liability to pay interest under Sections 234A,

234B and 234C as the case may be, which does not fall within the domain of the Special Court;

(iv) The Central Board of Direct Taxes has issued a direction on 26 June 2006 in pursuance of the provisions of Section 119(2)(a) of the Income

Tax Act, 1961, regarding the waiver of interest under Sections 234A, 234B and 234C by which the Chief Commissioner of Income Tax has been

vested with the power to reduce or waive interest charged under those provisions in certain specified cases. Consequently, a remedy would still be

open to the notified party to apply to the Chief Commissioner for a waiver or reduction of interest in terms of the directions issued on 26 June

2006.

5. On the other hand, it has been urged on behalf of the Respondent that

(i) The provisions of the Special Court Act would override the provisions of the Income Tax Act, 1961;

(ii) A notified person by virtue of the notification u/s 3 of the Special Court Act loses right and control over his assets and is unable to discharge his

statutory obligations as a result of a legal disability cast upon him;

(iii) Interest under Sections 234A, 234B and 234C enjoys the last priority in payment u/s 11(2)(c). Reliance was sought to be placed on the

decisions of the Supreme Court in Tax Recovery Officer, Central Range-1 Vs. Custodian the Special Court (T.O.R.T.S) Act, 1992 and Others,

and in *Solidaire India Limited v. Fairgrowth Financial Services Ltd.* (2001) 3 SCC 71.

6. In *Harshad Shantilal Mehta* (supra) the decision of the Supreme Court dwelt on six questions of which two, questions 5 and 6, have a bearing

on the issues which arise in this appeal. Those questions were :

i) Whether the expression "tax" in Section 11(2)(a) of the Special Court (Trial of Offences relating to Transactions and Securities) Act 1992

includes penalty or interest; and

ii) Whether the Special Court has the power to absolve a notified person from the payment of penalty or interest from the period subsequent to the

date of the notification u/s 3. In the alternative, is the notified person liable to pay interest or penalty arising from his inability to pay tax after his

notification.

7. As regards the first of the aforesaid two questions, the Supreme Court held that the expression "tax" u/s 2(43) of the Income Tax Act, 1961 is a

concept which is distinct from penalty and interest since tax within the definition does not include penalty or interest. The provisions for the

imposition of penalty and interest are distinct from those for the imposition of tax. The Supreme Court therefore held that neither penalty nor

interest can be considered as tax within the meaning of Section 11(2)(a) of the Special Court Act. On the second question, the Supreme Court

held that interest or penalty for any action or default after the date of the notification, are not covered by the Special Court Act. The Supreme

Court held that a taxing statute is a code in itself for the imposition of tax, penalty or interest. Hence, the remedy of a notified person who is

assessed to penalty or interest after the notified period would be to move the appropriate authority under the taxing statute in that connection. In

that context the Supreme Court held as follows :

If it is open to him under the relevant taxing statute to contend that he was unable to pay his taxes on account of the attachment of all his properties

under the Special Court Act, and that there is a valid reason why penalty or interest should not be imposed upon him after the date of notification,

then concerned authorities under the Taxing Statute can take notice of these circumstances in accordance with law for the purpose of deciding

whether penalty or interest can be imposed on the notified person. The Special Court is required to consider this question only from the point of

view of distributing any part of the surplus assets in the hands of the Custodian after the discharge of liabilities u/s 11(2)(a) and 11(2)(b). The

Special Court has full discretion u/s 11(2)(c) to decide whether such claim for penalty or interest should be paid out of any surplus funds in the

hands of the Custodian.

8. After the decision of the Supreme Court, a direction has been issued by the Central Board of Direct Taxes u/s 119(2)(a) of the Income Tax

Act, 1961 on 26 June 2006 directing that the Chief Commissioner of Income Tax and the Director General may reduce or waive interest charged

under Sections 234A, 234B or 234C in the classes of cases or of income specified in paragraph 2 or the order for the period and to the extent

that the Chief Commissioner / Director General may deem fit. However, it has been directed that no reduction or waiver of interest shall be

ordered unless the assessee files a return of income for the relevant Assessment Year and pays the entire income tax due on the income as

assessed. Both the authorities may impose any other conditions as deemed fit for reduction or waiver of interest. Paragraph 2 of the direction

contains classes of income or classes of cases in which reduction or waiver of interest u/s 234A, 234B or 234C can be considered and which are

as follows :

(a) Where during the course of proceedings for search and seizure u/s 132 of the income tax Act, or otherwise, the books of account and other

incriminating documents have been seized, and the assessee has been unable to furnish the return of income of the previous year, during which the

action u/s 132 has taken place, within the time specified in this behalf, and the Chief Commissioner / Director-General is satisfied, having regard to

the facts and circumstances of the case, that the delay in furnishing such return of income cannot reasonably be attributed to the assessee.

(b) Any income chargeable to income tax under any head of income other than ""Capital gains"" is received or accrued after due date of payment of

the first or subsequent installments of advance tax which was neither anticipated nor was in the contemplation of the assessee, and the advance tax

on such income is paid in the remaining installment or installments, and the Chief Commissioner/ Director-General is satisfied on the facts and

circumstances of the case that this is a fit case for reduction or waiver of the interest chargeable u/s 234C of the income tax Act.

(c) Where any income was not chargeable to income tax in the case of an assessee on the basis of any order passed by the High Court within

whose jurisdiction he is assessable to income tax, 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 the decision of the Supreme Court of India, or as the case may be, a

decision of a larger Bench of the jurisdictional High Court (which was not challenged before the Supreme Court and has become final), in any

assessment or reassessment proceedings the advance tax paid by the assessee during such financial year is found to be less than the amount of

advance tax payable on his current income, and the assessee is chargeable to interest u/s 234B or section 234C, and the Chief Commissioner/

Director-General is satisfied that this is a fit case for reduction or waiver of such interest.

(d) Where a return of income could not be filed by the assessee due to unavoidable circumstances and such return of income is filed voluntarily by

the assessee or his legal heirs without detection by the Assessing Officer.

The circular clarifies further that the cases referred to in paragraphs 2(a) and 2(d) are specified only for the purposes of waiver of interest u/s

234A. The circular was issued in supersession of earlier orders dated 23 May 1996 and 30 January 1997.

9. The levy of interest under the provisions of Sections 234A, 234B and 234C is mandatory in nature. The Constitution Bench of the Supreme

Court in Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, . held that the provision for the levy of interest

contemplated under Sections 234A, 234B and 234C is mandatory in nature and a power of waiver or reduction has not been expressly conferred

upon the Settlement Commission under Chapter XIX A of the Income Tax Act, 1961. The Supreme Court held that the Settlement Commission

does not have the power to reduce or waive interest statutorily payable under those provisions except to the extent of granting relief under the

circulars issued by the Board u/s 119. Section 119 statutorily confers a power upon the Board to issue general or special orders inter alia in

respect of any class of income or class of cases, where it considers it is necessary or expedient to do so for the proper and efficient management of

assessment and collection of revenue, on the guidelines, principles or procedures to be followed by other income tax authorities whether by way of

realisation of the provisions of Sections 234A, 234B, 234C or otherwise. It is in pursuance of this power that the Central Board of Direct Taxes

has issued its direction dated 23 June 2006 in which power has been specifically conferred upon the Chief Commissioner / Director General in the

circumstances set out in paragraph 2 of the direction.

10. The submission which has been urged on behalf of the Respondent, however, is that the provisions of the Special Court Act, would override

those of the Income Tax Act, 1961 and that consequently the provisions of Sections 234A, 234B and 234C would not be attracted.

11. In order to consider this submission, a brief reference to the provisions of the Special Court Act would be in order. u/s 3(2) the Custodian is

empowered, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after 1

April 1991 and on or before 6 June 1992, to notify the name of such person in the official gazette. Under sub section (3) of Section 3 with effect

from the notification under sub section (2) any property belonging to a person notified shall stand attached simultaneously with the issuance of the

notification. The property attached is thereafter required to be dealt with by the Custodian in such manner as the Special Court may direct. u/s 9A,

the Special Court can exercise all the jurisdiction, power and authority as were exercisable by a Civil Court in relation to any matter or claim

relating to any property standing attached u/s 3(3). u/s 11(1) the Special Court is entrusted with the jurisdiction to make such orders as it may

deem fit directing the Custodian in regard to the disposal of property under attachment. Section 11(2) provides as follows :

11(2) The following liabilities shall be paid or discharged in full, as far as may be, in the order as under

(a) All revenues, taxes, cesses and rates due from the persons notified by the Custodian under sub-section (2) of section 3 to the Central

Government or any State Government or any local authority;

(b) All amounts due from the person so notified by the Custodian to any bank or financial institution or mutual fund;

(c) Any other liability as may be specified by the Special Court from time to time.

Under Section 13 the provisions of the Act are to have effect notwithstanding anything inconsistent therewith contained in any other law for the

time being in force or in any instrument having effect by virtue of any law, other than the Act, or in any decree or order of any Court, tribunal or

other authority.

12. In Assistant Commissioner of Income Tax Vs. A.K. Menon and Others, the Supreme Court held that the Special Court has no power to sit in

appeal over or overrule the orders of the tax authorities, the Income Tax Appellate Tribunal or the Courts in regard to the tax liabilities of notified

persons. The only power of the Special Court is to determine the priorities in which claims upon the property under attachment shall be paid. There

is no provision in the Special Court Act which governs the determination of tax liabilities. The determination of tax liabilities under the Income Tax

Act, 1961 is not governed by the provisions of the Special Court Act. Section 11 of the Special Court Act provides for the discharge of liabilities

and empowers the Special Court to make such order as it may deem fit directing the custodian in regard to the disposal of the property under

attachment. Sub-section (2) of Section 11 provides for the liabilities which shall be paid or discharged in full. The Supreme Court has held that the

expression "tax" in clause (a) of sub-section (2) of Section 11 would not include penalty or interest. The expression ""any other liability as may be

specified by the Special Court from time to time"" in clause (c) of sub-section (2) has been dealt with by the Supreme Court in Harshad Shantilal

Mehta (supra) where the Court held that the Special Court would have the full discretion to decide as to whether such claim for penalty or interest

should be paid out of any surplus in the hands of the Custodian. In other words, it is evident that the jurisdiction of the Special Court u/s 11(2)(c) is

to determine if and if so, the extent of which the liability on account of penalty or interest should be paid out of any surplus funds in the hands of the

Custodian. The determination of the liability to pay penalty or interest under the Income Tax Act, 1961 does not fall within the domain of the

Special Court.

13. In the judgment of the Supreme Court in Solidaire India Limited (supra), the Supreme Court held that both the Special Court Act and the Sick

Industrial Companies (Special Provisions) Act 1985 are special Acts and in the event of a conflict, the later Act namely the Special Court Act

would prevail. In the Tax Recovery Officer v. Custodian (supra) the Custodian in exercise of powers u/s 3(2) notified Dhanraj Mills Private

Limited as a notified person. The assets of the notified person stood attached. Killick Nixon Private Limited together with its group companies

owed money to the notified person and the custodian filed suits for recovery. The suits were decreed by the Special Court. In execution, the

Special Court appointed a Receiver for taking charge of the assets of Killick Nixon and its group companies and thereafter certain properties were

put to auction and money was realised. The Tax Recovery Officer filed an application for intervention before the Special Court with a prayer that

the Custodian be directed to consider a claim for the recovery of arrears of income tax from Killick Nixon on a priority basis before the

distribution of the sale proceeds to any other creditor. The intervention applications were dismissed by the Special Court. The Supreme Court

observed that under clause (a) of sub-section (1) of Section 9A, on and from the commencement of the Special Court (Trial of offences relating to

Transactions in Securities) Amendment Act 1994, the Special Court shall exercise all such jurisdiction, powers and authority as were exercisable

immediately before such commencement by any Civil Court in relation to any matter or claim relating to any property standing attached under sub-

section (3) of Section 3. The Supreme Court held that the jurisdiction of the Special Court is confined to the property of the notified person which

stands attached u/s 3(3). In paragraph 14 of the judgment, the Supreme Court observed as follows :

In *Solidaire India Ltd.* (2001) 3 SCC 71 the provisions of Section 13 of the Special Court (Trial of Offences Relating to Transactions in

Securities) Act, 1992 and Section 32 of the Sick Industrial Companies (Special Provisions) Act 1985 were examined and it was held that both

these Acts are special Acts and in such an event it is the later Act, namely, the Special Courts (Trial of Offences Relating to Transactions in

Securities) Act, 1992 which must prevail. Thus there can be no manner of doubt that the provisions of the Special Courts Act, wherever they are

applicable, shall prevail over the provisions of the Income Tax Act.

The Supreme Court held that the Special Court could not have entertained the application moved by the Income Tax Department u/s 26(4) of the

Income Tax Act, 1961 for the realisation of its income tax dues from *Killick Nixon Private Limited* which was not a notified party.

14. In paragraph 14 of the judgment, extracted above, the Supreme Court has held that the provisions of the Special Court Act, wherever they are

applicable shall prevail over the provisions of the Income Tax Act, 1961. The words "wherever they are applicable" are crucial. The Special Court

Act makes no provision in regard to the determination of the liability to pay interest under the Income Tax Act, 1961. That liability is clearly

referable to the provisions embodied in Sections 234A, 234B and 234C. In the circumstances, the Tribunal, in our view, was in error in coming to

the conclusion that interest under Sections 234A, 234B and 234C cannot be levied on an assessee who is a notified party under the Special Court

Act. By the circular which has been issued by the Board, the power to grant such a waiver or remission has been vested with the Chief

Commissioner. In terms of the judgment of the Supreme Court in *Harshad Shantilal Mehta* (supra) the notified person, the assessee in the present

case, is not without remedy since it is open to the assessee to take recourse to the remedy available under the direction dated 26 June 2006. We

accordingly answer the questions of law as framed in the negative. However, we clarify that it would be open to the notified person to seek a

waiver or reduction by making an application to the Chief Commissioner of Income Tax in terms of the order dated 26 June 2006 of the Central

Board of Direct Taxes. The appeal is accordingly disposed of.

There shall be no order as to costs.