





: SHIV NARAYAN DHINGRA, J

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1. This writ petition has been filed by the petitioner challenging the three orders of the Assessing Officer all dated 12.12.2005 whereby Assessing Officer rejected the application of petitioner and refused to waive interest under Rule 40 (1) of I. T. Rules 1962 and under Rule 117 A of I. T. Rules 1962 and praying for quashing of these orders. Writ petition made a prayer that interest charged for assessment year 1985-86 and assessment year 1986-87 be ordered to be waived.

2. The brief facts giving rise to the application made by petitioner for waiving interest are as under:-

i) The petitioner was working as Cost Accountant with a Private Firm. A search had taken place of the premises of the employer of the petitioner and the premises of the petitioner was also searched on 24.12.1985. FDRs worth Rs. 1,05,000/- in the name of wife of petitioner apart from jewellery belonging to his wife were found in search. Department seized FDRs and jewellery. Petitioner negotiated with the department and agreed to surrender



an income of Rs.70,000/- out of the FDRs that were in the name of his wife.

He wrote a letter to the department to the following effect:

“You have been very kind to me in giving that assurance and the I.A.C also that if I surrender Rs.70,000/- on account of investment in FDRs purchased by my wife from her Stridhan, as my income for assessment year 1985-86 and 1986-87, the cases will be completed on the basis of the declared income and no penalty, interest, prosecution, matters will follow. It was also assured that you would be kind enough to accept the valuation of jewellery as belong to my wife.”

3. In response to this letter the department also wrote letter which reads as under:

This is in response to your letter No. Nil dated 10.04.1987 received on the same date, regarding settlement and waiver of penalty proceedings. Your application for the same has been accepted and you are hereby directed to file return showing your income from salary and Income from other sources (undisclosed sources hitherto) at the earliest possible, so that necessary action can be taken at the same time.



4. The petitioner had initially assessed his income for assessment year 1984-85 at Rs.12,030/- and for assessment year 1985-86 at Rs. 17,780/-, for assessment year 1986-87 at Rs. 15,500/-. However, after the search had taken place, petitioner filed return and assessed his income for assessment year 1985-86 at Rs. 17,780/- and for assessment year 1986-87 at Rs. 85,500/- (adding Rs. 70,000/- as agreed by him as per above settlement). The department however, did not abide by the settlement and assessed the income of petitioner for assessment year 1985-86 at Rs. 42,780/- and for assessment year 1986-87 at Rs. 1,32,370/-. Petitioner preferred appeal before CIT and then before ITAT. The appeals were decided in favour of the petitioner and it was held that only income of Rs. 70,000/- could be added and this would be spread over two financial years. It was directed that income of Rs. 25,000/- be added in the year 1985-86 and Rs. 45,000/- in the assessment year 1986-87.

5. The petitioner contended that no interest was leviable for the



assessment year 1985-86 or assessment year 1986-87 for late filing of return or non payment of advance tax as the income of Rs. 70,000/- was surrendered / added after the search of his premises despite the fact that FDRs were in the name of his wife. He had agreed to surrender the income of Rs.70,000/- only on the assurance given by the department / respondent that no penalty would be levied and no interest would be charged. He also submitted that he was caught within the clutches of Section 217, and 139 (8) only due to the settlement and in such cases interest was liable to be waived, under Rule 40 (v) and Rule 117A (v) of Income Tax Act Rules 1962 since the petitioner would be deemed to have been prevented from filing advance tax . He submitted that on this account only the petitioner was not levied penalty for non-payment of advance tax and while disposing the appeal the Learned ITAT had specifically observed:

The ITO was also entitled to waive interest chargeable under various provisions of I.T. Act in view of specific Rules 40 and 117-A of I.T. Rules. The question relating to initiation and levy of penalty or dropping the same, is also covered within the



scope of powers of the Assessing Officer. Hence, the acceptance of the offer by the A. O. was fully within the legislative competence. Neither the assessee nor the Assessing Officer could retract from the said offer duly accepted by the A. O. by exchange of above referred letter dated 10th April, 1987.'

6. The counsel for the petitioner submitted that the Assessing Officer was liable to consider the waiver of interest even without making an application by him in view of the observations of Tribunal. However, interest was not waived by Assessing Officer and the petitioner made an application for waiving of interest on 25.03.2004. No action was taken on this application. Petitioner sent repeated reminders and the impugned orders dated 12.12.2005 were passed which are reproduced as under:

**ORDER – 1**

**INCOME TAX DEPARTMENT**

Name of the assessee : Shri R. C. Gupta  
Asstt. Year : 1985-86

**Order under Rule 40 of the I. T. Rules 1962**

The assessee filed the application under rule 40 of the I. T. Rules 1962 on 5.4.2004. The assessee filed the return on 16.4.1987 and paid the tax u/s 140A Rs.



23450/- on 20.4.1987. Assessed tax u/s 143 (3)/254 comes to Rs. 17450/-. interest u/s 217 amounting to Rs. 2609/- was charged from 1.4.1986 to 31.3.1987. Although the assessment was made u/s 143(3) on 31.3.1989 after on year from the date of filing the return.

As the interest u/s 217 was charged less as per Rule 40 (1) of the I.T. Rules, 1962 the application filed under Rule 40 of the I.T. Rules, 1962 is hereby rejected.

Dated: 12.12.2005

(H. C. PANT)

ITO Ward 47(2)

New Delhi

copy to the assessee.

**ORDER - II**

**INCOME TAX DEPARTMENT**

Name of the assessee : Shri R. C. Gupta  
Asstt. Year : 1986-87

**Order under Rule 117A of the I. T. Rules 1962**

The assessee filed application under Rule 117A of the I. T. Rules 1962 on 5.4.2004. The assessee does not fulfill the conditions laid down under Rule 117A(i) to (iv) of I. T. Rules, 1962. the application filed by the assessee for waiver of interest levied u/s 139 (8) under rule 117A of I. T. Rules, 1962 is hereby rejected.



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CWP No 4

Dated: 12.12.2005

(H. C. PANT)  
ITO Ward 47(2)  
New Delhi

copy to the assessee.

**ORDER - III****INCOME TAX DEPARTMENT**

Name of the assessee : Shri R. C. Gupta  
Asstt. Year : 1985-86

**Order under Rule 40 of the I. T. Rules 1962**

The assessee filed application under Rule 40 of the Income Tax Rules 1962 on 5.4.2004.

The original assessment was made u/s 143 (3) on 12.9.1986. The assessee filed the return on 21.4.1986. assessment made on 12.9.1986 before one year from the date of filing the return.

As per rule 40 (i) the assessment was made before one year from the date of filing the return. Hence the application filed by the assessee is rejected.

Dated: 12.12.2005

(H. C. PANT)  
ITO Ward 47(2)  
New Delhi

copy to the assessee.



7. It is argued by the petitioner's counsel that the petitioner's application for waiver was rejected without assigning any reason, much less good and sufficient reason. The grounds given by the petitioner in the written arguments were not at all considered and the respondent in a mechanical manner, rejected the application. The respondent was liable to allow the waiver of interest in view of the letter written by the department to petitioner at the time of petitioner conditionally agreeing to surrender income of Rs. 70,000/- out of the FDRs of his wife. The respondent was bound by the promise made to petitioner and principle of promissory estoppel would apply.

8. It is contented by the department that the orders passed by Assessing Officer give sufficient reasons. The interest of Rs. 2,609/- only was charged from 01.04.1986 to 31.03.1987. Although the assessment was made after one year from the date of filing of return. The interest was charged less as per Rule 40 (1) and the application was therefore rejected.



The case of the appellant was not covered under any of the five sub rules of Rule 40 or 117 of I.T. Rules.

9. It is submitted by the respondent that this Court should not exercise its power under the writ, since the waiver of interest was discretion given to the respondent. Considering the facts of the case, the respondent had exercised his discretion reasonably & justly.

10. The orders of the Assessing Officer, on the face of it, show that the Assessing Officer has not given any reason for rejecting the application. One order states that the interest was charged less without showing what was the interest which were leviable and how the interest was charged less. The A. O. has not considered the letter written by the Department assuring the petitioner of non levying of penalty and interest. All the three orders do not give any reason and simply state that assessee do not fulfill the conditions laid down under Rule 117 A (i) to (iv) of I. T. Rules 1962.

11. We find that A. O. had not passed reasoned order and had not



considered the material before it. A reasoned order would have at least discussed the assurance given by the department while asking the surrender of income of Rs. 70,000/- and would have shown why department backed out from fulfilling promise of not charging interest made by it.

12. In *P. M. Manuel Vs. I.T.O & Ors* 226 ITR Page 616 a

Division Bench of Karnataka High Court observed as under :

“The question that arises is whether the authorities have exercised their power in accordance with the above rules.

If the discretion given to the authorities is not exercised properly on the facts of the case, this court is entitled to interfere under article 226 of the constitution. A similar question arose before the Supreme Court with respect to non-waiver of interest and penalty in exercising the powers under section 273A of the Act. In *Apex Finance and Leasing Ltd. V. CIT* (1994) 207 ITR 781 the Supreme Court held as follows (headnote)

“The question whether the commissioner was justified on the facts and in the circumstances of the case, in refusing to exercise his power under section 273A of the Income tax Act, 1961 to waive interest and penalty where the assessee has disclosed income voluntarily in a revised return, is a question



to be examined on the merits and the High court, on a writ petition challenging such a refusal, ought not to dismiss the petition on the ground that the order was not liable to interference in exercise of its extraordinary jurisdiction”

13. This court in *Dalmia Dairy Industries V. Union of India* 255 ITR 476 observed as under:-

*“Although the Commissioner is a high dignitary but it is trite that he must exercise his discretion judicially. Discretion cannot be exercised in a whimsical or fanciful manner. The commissioner while exercising his jurisdiction under section 264 of the Income Tax Act exercises a judicial function and assignment of reasons is one of the basic ingredients of natural justice.*

14. In *Chaitnya Charan Das V. State of West Bengal*, AIR

1995 Cal 336 Calcutta High Court held:

*“50. The submission of learned counsel appearing on behalf of the respondents to the effect that the Central Government has an unfettered discretion in the matter of grant of pension and thus, these writ applications should not be entertained cannot again be accepted.*

*51. Discretion as is well known must be exercised by the*



*state in a reasonable manner.*

*52. In Ramji Dayawala and Sons (P). Ltd. V. Invest Import, AIR 1981 SC 2085, the Supreme Court while considering the exercise of discretion by a court observed:-*

*'Discretion, said Lord Mansfield in R v. Wikes (1770) 98 ER 327, "when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful, but legal and regular" (see Craies on statute law, 6th edition, page 273).'*

*53. In Shri Sitaram Sugar Co. Ltd. v. Union of India, AIR 1990 SC 1277 the Supreme Court observed:*

*'A repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or when he abuses power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness.*

*The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.'*

15. In *Gupta Builders Pvt. Ltd. V. commissioner of Income Tax*



and Others reported in 191 ITR 114 Bombay High Court observed as under:

*“Undoubtedly, the Income Tax Officer has discretion both under rule 40 (8) and or interest under sections 215 and 217. However, when the circumstances in which he can exercise discretion are enumerated in the rules, the Income Tax Officer will not have merely a discretion but a duty to waive or reduce interest in a case that squarely falls within the circumstances enumerated. The discretion may, thus, be limited to whether, in a given case, depending upon several other factors such as the gravity of the default, the loss occasioned to the Revenue, etc. he would like to waive the interest altogether or would reduce it and if so to what extent.*

*Under these sub-rules, the discretion to exercise the power of waiver or reduction is conditional, in case of interest under section 139 (8) upon whether the assessee produces evidence to his satisfaction that he was prevented by sufficient cause from furnishing the return within time and in the case of interest under section 217, upon whether the circumstances are such that a reduction or waiver of interest is justified.*

*Thus the exercise of discretion under rules 40 (5) and 117 A (v) is conditional upon the satisfaction of the authority concerned as to the existence of appropriate circumstances. The conclusion whether appropriate circumstances exist or do not exist will ordinarily be a finding of fact. But even a finding of fact can be reviewed by this court in writ jurisdiction in exceptional circumstances such as where the finding is not supported by any evidence or is perverse or based upon a view of facts which could never be reasonably entertained. However, the High Court cannot re-appreciate the evidence itself as an appellate court or correct the error of fact (not going to jurisdiction) even if apparent on*



*the ground that the evidence on which it was based was not satisfactory or sufficient. In other words, the court in writ jurisdiction is not to interfere with or reverse the conclusion of the Tribunal, if the conclusion is a possible conclusion. It cannot substitute its decision for that of the Tribunal. It can, of course, interfere only if the conclusion arrived at by the Tribunal is unreasonable not in the sense that the court considers it to be unreasonable but that it is what the court considers is a conclusion which no reasonable person could have come to".*

16. We consider that the orders in question do not state any reasons for non waiver of the interest. The respondent has not exercised its discretion in a judicious manner and has not considered the facts and circumstances of this case. The respondent has also not considered that the income of Rs. 70,000/- was agreed to be surrendered by the petitioner in view of the assurance given by the respondent. The revised returns were filed by the petitioner only after respondent had written a letter to the petitioner accepting his offer. We consider that the respondent ought to have considered all facts and circumstances while considering the application for waiver of the interest.

17. In the result, we allow the writ petition, quash the orders dated



12.12.2005 impugned in the writ and direct that the respondent shall consider and decide the petitioner's application for waiver afresh in accordance with law keeping <sup>in view</sup> the observations made in the body of this order. No costs.

  
SHIV NARAYAN DHINGRA, J

  
T.S. THAKUR, J

June 02, 2006

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