* **IN THE HIGH COURT OF DELHI AT NEW DE**

\+ **Writ Petition (Civil) No. 3540/2010**

Reserved on: 26th August, 2011
% Date of Decision: 9th September, 2011

M/s Jewellers Om Prakash & Anr. ....Petitioners
Through Mr. Bharat Beriwal, Adv.

VERSUS

The Chief Commissioner of Income Tax,
Delhi VIII & Ors. ....Respondents
Through Mr. Sanjeev Rajpal, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not ? Yes.
3. Whether the judgment should be reported in the Digest ? Yes.

SANJIV KHANNA, J.

Petitioner No. 1, M/s Jewellers Om Prakash is a partnership firm, of which the petitioner No. 2 Mr. Om Prakash Bhola is a partner. By this writ petition, they have impugned orders dated 6th May, 2009 and 24th August, 2009, passed by the Chief Commissioner of Income Tax, Delhi VIII, respondent No. 1 herein, rejecting their request for waiver of interest under Section 220(2A) of the Income Tax Act, 1961 (Act, for

short). They have also prayed for return of jewellery which was valued at Rs. 4,49,255/- at the time of seizure on 28th October, 1992. As far as second prayer is concerned, the respondents along with the counter affidavit have filed the order dated 30th September, 2010, passed by respondent No. 1, directing the Additional CIT, Range-20 to take steps for release of jewellery seized on 28/29th October, 1992, valued at Rs.4,49,255/-. To this extent, the writ petition is rendered infructuous. Keeping in view the delay and laches and to ensure immediate and timely return of jewellery suitable directions have been issued.

2. The petitioner No.1's residential and business premises were subjected to search and seizure operation under Section 132 of the Act on 28th October, 1992 and jewellery worth Rs. 14,79,052/- was seized vide panchnama of the same date. On 22nd February, 1993, an order under Section 132(5) of the Act was passed, prima facie determining the undeclared income of the petitioner No. 1 at Rs. 26,31,597/-. Accordingly an order was passed for retaining and not returning the aforesaid jewellery.

3. Petitioner No. 1 filed their return of income for the assessment year 1993-1994 on 14th January, 1994, declaring total income of Rs. 11,73,390/-. The Assessing Officer assessed the total income at Rs.19,31,819/-, which on appeal was reduced by the Commissioner of Income Tax (Appeals) [CIT (Appeals) , for short] to Rs. 13,01,389/- vide order dated 31st March, 1997. The said order has attained finality.

4. Penalty of Rs.10,00,000/- under Section 271(1)(c) vide order dated 30th September, 1997 was imposed, but was reduced to Rs. 85,538/- by an order passed by the CIT (Appeals) on 22nd October, 2002 and then further reduced to Rs. 38,000/- by the Income Tax Appellate Tribunal vide order dated 29th July, 2005.

5. The petitioner No. 1, did not pay the requisite advance tax and self-assessment tax for the assessment year 1993-94. The stand taken by them was that they had surrendered Rs. 19,00,000/- at the time of search, in their statement under Section 132(4) of the Act, which included surrender of unaccounted stock of jewellery of Rs. 14,00,000/- and unexplained investment in the construction of a bungalow at Bungalow Road, New Delhi. The petitioner vide letter of

request along with the return of income filed on 14th January, 1994, had asked the department that the jewellery seized should be sold and the tax demand be set off against the sale proceeds thereof. There is no dispute that the said letter was written and a request was made by the petitioner No. 1. It is also not disputed that the jewellery was not sold but thereafter the petitioner No. 1 did not write or correspond calling upon the respondents to sell the jewellery. Facts as noticed below would indicate that the petitioner No. 1 had made part payments from time to time towards tax demands. This aspect has been kept in mind, while issuing the final directions.

6. Pursuant to the order passed by the CIT (Appeals), assessing the total income of the petitioner No. 1 at Rs. 13,01,389/-, an order under Section 143(3)/250 was passed by the Assessing Officer on 28th July, 1997. The computation sheet shows that the total tax payable on the aforesaid income was Rs.5,83,023/- and in addition the petitioner was liable to pay interest under Section 234A, 234B & 234C of Rs.3,16,986/- and interest under Section 220(2) w.e.f. May, 1996 to July, 1997 of Rs. 84,224/-. The said computation sheet further records that the tax

demand of Rs.5,25,679/- had already been paid, leaving a balance of Rs. 57,344/- (Rs.5,83,023 less Rs.5,25,679). Interest of Rs.3,16,986/- under Sections 234A, B and C and interest of Rs.84,224/- under Section 220(2) was payable. As on 28th July, 1997, an amount of Rs.4,58,554/- was payable after adjusting payment of Rs.5,25,679/- which was already paid.

7. As per the petitioner No.1 and it is accepted by the Revenue that the following payments have been made by the petitioner No. 1 for the assessment year 1993-94.

S.No.	Date of Payment	Amount
1.	20/08/1996	Rs.10,00,000/-
2.	10/09/1996	Rs.10,00,000/-
3.	17/03/1997	Rs.10,00,000/-
4.	05/03/1997	Rs.5,000/-
5.	06/03/1997	Rs. 19,550/-
6.	12/05/1998	Rs.25,000/-
7.	28/05/1998	Rs.25,000/-
8.	03/08/1998	Rs.30,000/-
9.	12/10/1998	Rs.70,000/-

10.	14/10/1998	Rs.8,512/-
	Total	Rs.4,83,062/-

8. In additional to the aforesaid amount, as per the Revenue, the following amounts have also been paid as per the dates mentioned below:-

S.No.	Date of Payment	Amount
1.	5/12/1994	Rs.50,000/-
2.	24/12/1994	Rs.50,000/-
3.	18/02/1995	Rs.1,00,000/-
4.	18/12/1995	Rs.25,000/-

9. Thus in all, the petitioner had made payment of Rs.7,08,062/- as on 14th October, 1998. Another amount of Rs. 3,74,330/- was paid on 7th August, 2003.

10. It appears that after the aforesaid payments were made, there was a long hiatus with the Revenue not taking any further steps to

recover the arrears after accounting for the payments. The petitioner No. 1 also did not pay any further amount.

11. On 22nd August, 2003, the petitioner No. 1, moved an application to the Chief Commissioner-VII for waiver of interest under Section 220(2), 234A, 234B and 234C of the Act. This was followed by letters/petitions claiming waiver of interest under the aforesaid Sections.

12. By written communication dated 12th April, 2004, the petitioner No. 1 informed the Chief Commissioner-VII, that they were not pressing for waiver of interest under Section 234A, 234B and 234C of the Act but press their petition for waiver of interest under Section 220(2A) of the Act and various facts in support of their contentions were raised. The Chief Commissioner – VII, by an undated order disposed of the petition as infructuous on the ground that in the written submission, the petitioner No. 1 had not prayed for waiver of interest. This order is obviously and patently wrong and factually incorrect as the petitioner No. 1 had only given up the prayer for waiver of interest under Section 234A, 234B & 234C and not under Section 220(2) of the Act. The

petitioner No. 1 rightly, thereafter, moved applications dated __ February, 2006, 13th March, 2006, 15th October, 2008 and 28th April, 2009, calling upon the Revenue to decide the petition under Section 220(2) of the Act, as the same had not been considered and decided. Reference was also made to Section 154 of the Act which entitles income tax authorities to rectify an order in case there is an error or mistake which is apparent.

13. Respondent No. 1 vide order dated 6th May, 2009, dismissed the application under Section 220(2) for waiver of interest, inter-alia, recording as under:-

> "It may be mentioned that the amount of Rs.7,04,175/- was determined as interest payable u/s 220(2) and was paid by the assessee on 28.3.2007.
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> In this regard, as per the provisions of section 220(2A) of Income Tax Act, 1961, the Chief Commissioner or Commissioner may reduce or waive the amount of interest paid or payable by an assessee u/s 220(2) if he is satisfied that –
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> i) payment of such amount has caused or would cause genuine hardship to the assessee;
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> ii) default in the payment of the amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and

iii) the assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

Thus, all the above three conditions need to be satisfied in order to waive the said interest. As regards the condition mentioned at (i) above, the term 'genuine' as per the New Collins Concise English Dictionary is defined as under:-

"Genuine" means not fake or counterfeit, real, not pretending (not bogus or merely a ruse)".

The facts mentioned by the assessee in its submission are considered carefully. It has not mentioned anywhere the nature of hardship suffered by it so as to satisfy the conditions laid down in section 220(2A) for waiver of interest u/s 220(2) of the I.T. Act. On the other hand, it is clear that the assessee had already paid the said interest of Rs.7,04,175/- on 28.3.2007. Moreover, vide its submissions dated 28.4.2009, the assessee has no where mentioned that it had to face any genuine hardship while making the payment of interest u/s 220(2) of the IT Act.

In view of the above, since the assessee firm does not satisfy the conditions laid down in section 220(2A) of the IT Act, 1961, its prayer for waiver of interest u/s 220(2) is rejected."

14. This order is impugned before us along with the order dated 24th August, 2009, passed under Section 154 of the Act by the respondent No. 1. The petitioner No. 1 by an application dated 15th June, 2009, had drawn attention of respondent No. 1 to the decision of the Supreme Court in ***B.M. Milani vs. CIT & Anr***, (2008) 306 ITR 196 (SC) and submitted that the earlier order dated 6th May, 2009 was required to be

rectified. In the order dated 24th August, 2009, it has been held that the merits of the case were not required to be examined as there was no mistake apparent in the order passed under Section 220(2A) dated 6th May, 2009.

15. Order dated 6th May, 2009, cannot be sustained and suffers from errors and mistakes in the decision making process. It is a cryptic order, without reasons and it has not dealt with contentions and grounds raised by the petitioner No. 1. In the petition and the letters seeking waiver of interest under Section 220(2), the petitioner No. 1 had highlighted several aspects and grounds which for the sake of convenience can be summarized below:-

(a) The petitioner No. 1 had made a request for sale of jewellery for payment of tax dues in 1994 but the department did not proceed.

(b) The aforesaid factor was appreciated and accepted by the CIT (Appeals) in his order dated 22nd October, 2002, reducing the penalty under Section 271(1)(c) and accepting the case of petitioner No. 1 for voluntary surrender under Explanation 5 to Section 271(1).

(c) The CIT (Appeals) has held that the assessee had cooperated in the assessment proceedings.

(d) The assessee did not have funds and as per declared/returned incomes for the subsequent assessment years; there was loss or marginal income which was not sufficient to clear the tax demand.

(e) There was delay and fault on the part of the department in returning jewellery which was retained by them for a period of 14 years.

(f) The department had remained quiet after payments were made in 1996, 1997 and 1998 till 2002, and after the petition for waiver was made under Section 220(2). The petition for waiver of interest was not decided, for long; wrongly treated as withdrawn by an undated order; and thereafter the petitioner No. 1 was compelled to file repeated applications from 2006 till 2009 when the order dated 6th May, 2009 was passed. There has been delay and inaction on the part of the Revenue.

(g) The total tax liability for the year in question was about Rs. 5,83,023/-. The petitioner was liable to pay interest of Rs.3,16,986/-

under Section 234A, 234B & 234C as on 28th July, 1997. The petitioner No. 1 had paid substantial amount of Rs.5,25,679/- by 28th July, 1997 and further amount of Rs.1,82,383/- (total Rs.7,08,062/-) by October, 1998. The total interest now being demanded and which has been paid under Section 220(2) is Rs.7,04,175/-. Thus in all the petitioner has paid tax and interest of more than Rs.14,10,000/- for the assessment year 1993-94.

16. The petitioner has also rightly drawn our attention to the decision in the case of ***B.M. Milani*** (supra) wherein it has been held as under:-

> "**13.** Section 220(2-A) of the Act contains a non obstante clause. It confers a jurisdiction upon the Chief Commissioner or Commissioner to reduce or waive the amount of interest paid or payable by an assessee thereunder, if he is satisfied that:
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> > "220. (2-A)(*i*) payment of such amount has caused or would cause genuine hardship to the assessee;
> >
> > (*ii*) default in the payment of the amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and
> >
> > (*iii*) the assessee has cooperated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him."

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16. The term "genuine" as per the *New Collins Concise English Dictionary* is defined as under:

" 'Genuine' means not fake or counterfeit, real, not pretending (not bogus or merely a ruse)".

17. For interpretation of the aforementioned provision, the principle of purposive construction should be resorted to. Levy of interest is statutory in nature, inter alia, for recompensating the Revenue from loss suffered by non-deposit of tax by the assessee within the time specified therefor. The said principle should also be applied for the purpose of determining as to whether any hardship had been caused or not. A genuine hardship would, inter alia, mean a genuine difficulty. That per se would not lead to a conclusion that a person having large assets would never be in difficulty as he can sell those assets and pay the amount of interest levied.

18. The ingredients of genuine hardship must be determined keeping in view the dictionary meaning thereof and the legal conspectus attending thereto. For the said purpose, another well-known principle, namely, a person cannot take advantage of his own wrong, may also have to be borne in mind. The said principle, it is conceded, has not been applied by the courts below in this case, but we may take note of a few precedents operating in the field to highlight the aforementioned proposition of law. [See *Priyanka Overseas (P) Ltd.* v. *Union of India* (SCC at pp. 122-23, para 39); *Union of India* v. *Major General Madan Lal Yadav (Retd.)* (SCC at p. 142, paras 28-29); *Ashok Kapil* v. *Sana Ullah*(SCC at p. 345, para 7); *Sushil Kumar* v. *Rakesh Kumar* (SCC at p. 692, para 65, first sentence); *Kusheshwar Prasad Singh* v. *State of Bihar* (SCC at pp. 451-52, paras 13-14 and 16).]

> **19.** Thus, the said principle, in our opinion, should be applied even in a case of this nature. A statutory authority despite receipt of such a request could not have kept mum. It should have taken some action. It should have responded to the prayer of the appellant. However, another principle should also be borne in mind, namely, that a statutory authority must act within the four corners of the statute. Indisputably, the Commissioner has the discretion not to accede to the request of the assessee, but that discretion must be judiciously exercised. He has to arrive at a satisfaction that the three conditions laid down therein have been fulfilled before passing an order waiving interest.
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> **20.** Compulsion to pay any unjust dues per se would cause hardship. But a question, however, would further arise as to whether the default in payment of the amount was due to circumstances beyond the control of the assessee."

17. The Chief Commissioner-VII, is also incorrect in rejecting the petition for waiver of interest under Section 220(2) on the ground that the petitioner No. 1 had nowhere mentioned that it was facing genuine hardship, whereas this was specifically claimed, highlighted and stated. The Chief Commissioner- VII is not right in rejecting the application for waiver of interest on the ground that interest of Rs.7,04,175/- was paid on 28th March, 2007, and therefore, the assessee's claim that it was

facing hardship does not arise. Interest under Section 220 (2) was imposed because of the delay in payment. Genuineness of the hardship during the period of delay was required to be examined. Section 220(2A) is applicable and the petition for waiver can be filed even after interest has been paid. Further the interest was paid after the petitioner No. 1 had filed the petition for waiver of interest.

18. In these circumstances, normally we would have after quashing the impugned order, directed the respondent No. 1 to decide afresh the petition for waiver of interest under Section 220(2) of the Act. However, the matter is very old and relates to the assessment year 1993-94. Learned counsel for the Revenue has pointed out that the records of the case are not traceable. We have also heard the learned counsel for the parties at length on the question of waiver of interest and all other aspects and examined the grounds and reasons given by the petitioner No. 1 including the findings recorded in various proceedings. In view of the above circumstances and to avoid any fresh round of litigation, it is directed that the petitioner No. 1 is entitled to waiver of interest to the extent of about one-third of the interest

paid/payable under Section 220 (2). We quantify the said amount at Rs. 2,25,000/- In other words, interest of Rs.2,25,000/- is waived. While computing and allowing the said reduction we have taken into consideration the period for which the jewellery of petitioner No. 1 was retained and kept by the Revenue. The provisions of Section 132B were not followed. The aforesaid quantum/amount also takes into account the inconvenience and harassment suffered by the petitioner No. 1 on account of wrongful retention of jewellery by the Revenue and failure to pass any order under the said Section. No damages or compensation is being separately awarded. It may be noticed here that the CIT (Appeals) in his order dated 22nd October, 2002, had clearly stated that the assessee had agreed to sale of the jewellery for recovery of the arrears and, therefore, the department should have sold the jewellery to recover the tax. We have also kept in mind that the value of the jewellery has gone up due to passage of time and due to increase of value of gold.

19. The aforesaid amount of Rs.2,25,000/- should be waived or refunded to petitioner No. 1 within a period of six weeks from the date

a copy of this order is communicated/received in their office. In [illegible] the payment is not made within six weeks, the petitioner No. 1 will be entitled to interest @ 10% on the said amount till the payment is made from the date of this order. Similarly, jewellery if not already returned, should be returned within one month of the receipt of the order, failing which the Revenue will be liable to pay damages of Rs.10,000/- per month till the jewellery is returned.

20. The writ petition is accordingly disposed of.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

September 9th , 2011
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