



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

+ **WRIT PETITION (CIVIL) NO. 1931 OF 2010**

% **Reserved on : 11th August, 2011.**
Date of Decision : 9th September, 2011.

RAJU BHOJWANI Petitioner
 Through Mr. K.R. Manjani, Advocate.

VERSUS

CHIEF COMMISSIONER OF INCOME TAX-XI ..Respondent
 Through Mr. Deepak Anand, Advocate.

CORAM:

HON'BLE MR. JUSTICE DIPAK MISRA, 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.:

The petitioner-Raju Bhojwani is the sole proprietor of Reshmica Exports. For the assessment year 2002-03, the petitioner filed his return on 4th October, 2002 declaring total taxable income of Rs. 6,76,660/- after claiming deduction of Rs.6,34,503/- under Section 80 HHC of the Income-Tax Act, 1961 (Act, for short).

2. Proceedings under Section 147 of the Act were initiated by issue of notice dated 5th July, 2004 as it was noticed that the



petitioner had claimed excessive deduction under Section 80 HHC.

The petitioner in fact had business loss in exports of Rs.7,16,189/- but this was ignored for computation of deduction under Section 80 HHC.

3. By this time, the Supreme Court had decided ***IPCA Laboratory Limited versus Deputy Commissioner of Income Tax***, [2004] 266 ITR 521 (SC) holding, inter alia, that on a plain reading of Section 80 HHC it is clear that in arriving at the profits earned from exports, profits and losses of both manufactured goods and trading goods have to be taken into consideration. If after such adjustment, there is positive profit, the assessee would be entitled to deduction under Section 80 HHC. If there is a loss, he will not be entitled to any deduction.

4. The petitioner filed a return of income in response to the notice under Section 147 of the Act again declaring total income to Rs.6,76,660/- as declared in the original return. The Assessing Officer held that the assessee had suffered loss in export business and, therefore, not entitled to deduction under Section 80 HHC. Deduction under Section 80 HHC was also denied on the ground of interest received and rental income had been included for



computing the said deduction. The total income was assessed at Rs.13,72,974/-. Interest under Section 234B of the Act was directed to be levied as per law.

5. The petitioner filed an appeal, which was partly allowed by the Commissioner of Income-Tax (Appeals). The first appellate authority noticed that Section 80 HHC had been retrospectively amended by the Taxation Laws (Amendment) Act, 2005 and the assessee was entitled to benefit of the proviso added with retrospective effect from 1st April 1998 on account of profits from sale of export incentives. Commissioner of Income-Tax (Appeals) also directed to treat 90% of interest income as income qualifying for deduction under Section 80HHC. Direction of the Assessing Officer to charge interest under section 234B was not interfered with.

6. The Revenue and the assessee both approached Income-Tax Appellate Tribunal but without success. The petitioner had filed cross-objection challenging levy of interest under Section 234B of the Act but the appeal was dismissed, inter alia, recording as under:

“4.1 Learned counsel for the assessee Shri Manjani submitted that the assessee



claimed deduction u/s. 80 HHC based on the decision of Special Bench of the Tribunal in the case of Lalsons Enterprises, 80 ITD 25.

Subsequently, due to judgment of Hon'ble Supreme Court in the case of IPCA Laboratories (supra), the assessee was denied deduction u/s. 80HHC. However, due to retrospective amendment, the assessee was entitled to partial deduction u/s. 80HHC. The assessee on the basis of his own estimate has paid the advance tax. To that extent, there is no default and hence, no interest u/s. 234B was payable. The interest u/s. 234B became payable due to the decision rendered by the Hon'ble Supreme Court. Since the assessee could not foresee such decision of Hon'ble Supreme Court, deduction u/s. 80HHC was denied and higher income as charged to tax. Accordingly, default in payment of advance tax was an unforeseen one. Thus, interest u/s. 234B in such cases is not leviable....

4.2 Learned DR, on the other hand, submitted that the assessee is not denying his liability to pay advance tax. Once the advance tax was payable the computation is to be made on the basis of assessed income and not returned income. This may be a case of genuine hardship due to subsequent decision of the Hon'ble Supreme Court, the same cannot be a ground not to charge the interest. Interest u/s. 234B is mandatory and compensatory in nature. However, for reduction or waiver of interest, appropriate petition may be filed before appropriate authorities.



5. We have considered rival submissions. As per the income declared in return of income, the assessee was required to pay advance tax. Thus, liability to pay advance tax is not denied. Though the assessee has paid advance tax is not denied. Though the assessee has paid advance tax as per his own estimate, interest is chargeable on the advance tax payable on the basis of assessed income and not income declared in return of income. Charging of interest being mandatory in nature in view of the decision of the Hon'ble Supreme Court in the case of Anjum Ghaswala, 252 ITR 1, the levy has to upheld. However, the assess, if so advised, may approach appropriate authority for reduction or waiver of the interest charged.”

7. The petitioner thereafter filed an application under Section 234B and 234C for waiver of interest before the Commissioner of Income-Tax, which has been rejected by the impugned order dated 22nd February, 2010. The Commissioner of Income-Tax has held that the request for waiver of interest is not covered either under CBDT circulars dated 23rd May, 1996, 30th January, 1997 or under the Circular No. 2/2006 dated 17th January 2006.

8. The contention raised by the petitioner is that the findings recorded by the Commissioner that the petitioner's case is not covered by CBDT circulars dated 23rd May, 1996, 30th January,



1997 or the Circular No. 2/2006 is incorrect and, therefore, the
an error in the decision making process.

9. Sections 234A, 234B and 234C of the Act were introduced by Direct Tax Laws (Amendment) Act, 1987 with effect from 1st April 1989, with a view to simplify the existing provisions relating to interest, penalty, etc. and remove discretion of the assessing authorities, which had led to litigation and consequential delay. The provisions provide for mandatory interest in respect of late filing of returns and delay, non-payment or short payment of advance tax. Constitutional validity of these provisions were challenged before the High Courts but was upheld on the ground that the provisions are not penal in nature but compensatory in character [see ***Union Home Products Limited versus UOI***, (1995) 215 ITR 758 (Kar), ***Ranchi Club Limited versus CIT***, (1996) 217 ITR 72 (Pat) and ***Dr. S. Reddappa versus UOI***, (1998) 232 ITR 62 (Kar). Also see ***Dr. Prannoy Roy versus Commissioner of Income Tax***, (2002) 254 ITR 0755 (Del)].

10. Levy of interest is on such amount, which the assessee withholds and does not pay to the Revenue and makes use of the said amount and, therefore, is liable to pay compensatory interest.



It is meant to off set the loss or prejudice caused to the Revenue on account of non-payment of the taxable amount. The levy in question is automatic and is attracted the moment there is a default. The automatic and mandatory nature of the said levy has been elucidated and explained by the Supreme Court in the case of **Commissioner of Income Tax versus Anjum M.H. Ghaswala and Others**, (2001) 252 ITR 1 (SC). In the said case, the Supreme Court has examined whether the Settlement Commission has the power to waive interest under the said Sections. It was held that the Settlement Commission has not been given any express power of waiver and reduction of interest against the levy of interest under Section 234A, 234B and 234C and the Settlement Commission also does not have any power to do so under Chapter XIX-A of the Act. It was accordingly opined:-

“We do not find any such problem in the provisions of the Act to which we have already referred. Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression “shall” used in the said section cannot by any stretch of imagination be construed as “may”. There are sufficient indications in the scheme of the Act to show that the expression “shall” used in sections 234A, 234B and 234C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression



as “may”. This is clear from the fact that prior to the Amendment brought about by the Finance Act, 1987, the Legislature in the corresponding section pertaining to imposition of interest used the expression “may” thereby giving discretion to the authorities concerned to either reduce or waive the interest. The change brought about by the Amending Act (Finance Act, 1987) is a clear indication of the fact that the intention of the Legislature was to make the collection of statutory interest mandatory. In this connection, we may usefully refer to the judgment of this court in *Jaywant S. Kulkarni v. Minochar Dosabhai Shroff*, AIR 1988 SC 1817, wherein this court held that when the Legislature changes the expression “may” to “shall” by amendment of the statute, it is clear that it intended to make the provision mandatory from the existing directory provision. Therefore, the question of the Commission relying upon external aids, for the purpose of interpretation like the Wanchoo Committee Report, Discussions of the Select Committee of Parliament and introduction of Chapter XIX-A in the Act, Press Release of the Board dated May 21, 1996, etc., are purpose-less because of the clear and unambiguous language used in sections 234A, 234B and 234C and section 245D(4) and (6). We notice if only the Commission were to follow the golden rule of interpretation by giving the words of the statute their natural and ordinary meaning without unnecessarily going into a forensic exercise of trying to find out the object of the introduction of Chapter XIX-A or Part F of Chapter XVII, the Commission would not have fallen in error.



11. In **Anjum M.H. Ghaswala** (supra), the Supreme Court examined the circulars issued by the CBDT under Section 119(2)(a) of the Act. These circulars have been issued pursuant to the observations of various High Courts while examining the constitutional validity of the said Sections. The High Courts had observed that in case of extreme difficulty or peculiar cases like retrospective amendment etc., it was open to the assessee to move the concerned authority for appropriate relief. Accordingly, CBDT had issued the said circulars authorizing the Commissioner to reduce or waive interest, if the conditions stipulated therein are satisfied. The Supreme Court also observed that these circulars are binding on the Revenue [see **UCO Bank versus CIT**, (1999) 237 ITR 889 (SC)] and can be taken into consideration by the Settlement Commission to grant relief.

12. The question, therefore, is whether the case of the petitioner is covered by the circular dated 23rd May, 1996 as clarified by another circular dated 30th January, 1997 or by the circular No. 2/2006 dated 17th January, 2006. The relevant portion of the circular dated 23rd May, 1996 relied upon by the petitioner reads as under:



“In exercise of the powers conferred under clause (a) of sub-section (2) of section 119 of the Income-tax Act, 1961, the Central Board of Direct Taxes hereby direct that the Chief Commissioner of Income-tax and Director-General of Income-tax may reduce or waive interest charged under section 234A or section 234B or section 234C of the Act in the classes of cases or classes of income specified in paragraph 2 of this order for the period and to the extent the Chief Commissioner of Income-tax /Director General of Income-tax deem fit. However, no reduction or waiver of such interest shall be ordered unless the assessee has filed the return of income for the relevant assessment year and paid the entire tax due on the income as assessed except the amount of interest for which reduction or waiver has been requested for. The Chief Commissioner of Income-tax or the Director-General of Income-tax may also impose any other conditions deemed fit for the said reduction or waiver of interest.

2. The class of incomes or class of cases in which the reduction or waiver of interest under section 234A or section 234B or, as the case may be, section 234C can be considered, are as follows:

xxx

(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-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 as the case may be, the decision of the Supreme Court in his own case, which event has taken place after the end 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 or Director-General is satisfied that this is a fit case for reduction or waiver of such interest.”

13. In the subsequent circular dated 30th January, 1997, on which reliance is placed, it has been clarified and the scope of the earlier circular has been expanded to include, decisions of the High Courts in cases of third party assesseees. The relevant portion of the said circular reads 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.”



14. In the present case, the petitioner has not relied upon the decision of the Delhi High Court which was holding the field when he filed the return claiming deduction under Section 80 HHC without taking into consideration the business losses. The petitioner, on the other hand, has stated that there was a decision of a Full Bench of the tribunal in his favour, namely, ***Lalsons Enterprises versus DCIT*** [2004] 89 ITD 25 (Del).

15. There was a dispute about interpretation of Section 80 HHC but there was no decision of the jurisdictional High Court, i.e., the High Court of Delhi, in favour of the interpretation placed by the petitioner. Thus, clause (d) of the circular dated 23rd May, 1996 is not applicable and does not entitle the petitioner to claim waiver or reduction of interest.

16. The second circular dated 30th January, 1997 expanded the scope of clause (d) and deleted the condition that there should be a decision of the High Court or the Supreme Court in the assessee's own case. Decision of the High Court or the Supreme Court could be in case of a third party, but it should have interpreted the Section. Another condition, that the retrospective amendment or the decision of the High Court or jurisdictional High



Court must be after the end of the relevant previous year, was withdrawn. As noticed above, there is no decision of the jurisdictional High Court of Delhi on the issue in question. The petitioner was aware that the interpretation placed by him was being contested by the Department/Revenue. The manner or mode of claiming deduction was therefore debatable and was being contested by both sides. The issue was open. The second circular dated 23rd May, 1996 is, therefore, not applicable.

17. Reliance placed by the petitioner on the circular No. 2/2006 dated 17th January, 2006 is also misconceived. As a result of Taxation Law (Amendment) Act, 2005, profits on sale of Duty Entitlement Pass Book Scheme, DEPB credit or Duty Free Replenishment Certificate, DFRC are treated at par with duty draw back for the purposes of proportionate increase of profits derived from exports, subject to conditions/ restrictions as stipulated. This amendment was made with retrospective effect. In view of the retrospective amendment, circular 2/2006 was issued stipulating as under:

“ xxx

2. The amendments relating to Duty Entitlement Pass Book Scheme and Duty



Replenishment certificate have been brought into the statute with retrospective effect. Therefore, it has been decided that no penalty shall be levied or interest shall be charged in respect of any fresh demand raised consequent to the enactment of Taxation Laws (Amendment) Act, 2005, on account of variation in the returned/assessed income attributable to profits on sale of DEPB credits or DFRC. Further, in such cases where assessments have already been completed and,-

- (i) Interest has been charged, the Chief Commissioner of Income-tax shall waive the interest relating to claim of profit on sale of DEPB credits or DFRC for deduction u/s 80-HHC;
- (ii) Penalty has been levied, the Chief Commissioner of Income-tax shall waive the penalty relating to claim of profit on sale of DEPB credits or DFRC for deduction u/s 80-HHC; or
- (iii) Penalty relating to claim of profit on sale of DEPB credits or DFRC for deduction u/s 80-HHC, has been initiated but not levied, the penalty proceedings shall be dropped.

3. Further, it is also directed that such demand shall be recovered over a period of 5 years. For this purpose, every Assessing Officer raising such a demand will maintain the details of such demand in a separate register so that the information can be furnished to the Board as and when required. These registers shall be kept in the custody of the Assessing Officers who will hand it over to their successors at the time of their transfer.”



18. In the present case, the assessee had income from sale of export incentives. 90% of the said amount was computed at Rs.9,06,433/- and deduction under Section 80 HHC was calculated at 70% of the said amount, i.e., Rs.6,34,503/- and was claimed as a deduction in the original return. This claim was reiterated in the return filed on 5th July, 2004 pursuant to the notice under Section 147. As noticed above, this second return was after the decision of the Supreme Court in **IPCA Laboratories** (supra) dated 11th March, 2004, wherein it has been held that deduction under Section 80 HHC is to be arrived at and claimed on profits earned from both export of self-manufactured goods and trading goods and profit and loss of both trades have to be taken into consideration. If after the adjustment there is positive profit, then only deduction under Section 80 HHC can be claimed. If there is loss, there cannot be any entitlement. As per the computation made in Form No. 10CCAC, which has been enclosed as annexure B to the petition, the petitioner had business loss of Rs.7,16,188/-, after excluding the income from the export incentives. In these circumstances, it is not possible to accept the contention of the petitioner that the retrospective amendment by Taxation Law



(Amendment) Act, 2005 was detrimental and had reduced claim for deduction made by him under Section 80 HHC as originally claimed. In fact, this aspect has been dealt with and explained vide response given by the Revenue in their reply dated 10th February, 2010 to the application for waiver of interest filed by the petitioner. In the said response, it has been stated as under:-

“ With retrospective amendment to section 80HHC (5th proviso) you rather stand benefited as you become entitled for deduction of Rs.1,27,292/-* instead of Nil deduction before the said amendment. In the light of the 5th provision inserted to section 80HHC through the retrospective amendment to section 80HHC by IT Amendment Act, 2005 and the decisions of Ld. CIT(A) & Hon’ble ITAT in your case, deduction u/s. 80 HHC is recomputed as follows:

Net profit as per P&L a/c	13,72,974/-
Less: 90% of Interest Income of Rs.12,29,056/- (to be considered under the head Income from Other Sources)	11,06,150/-
Rent received (to be considered under the head Income from House Property)	<u>84,000/-</u>
Business profits	1,82,824/-
Less: Under clause (baa) of explanation to section 80HHC	



• 90% of export incentives of Rs.10,07,148/-	9,06,433/-
• 90% of others (Rs.1,088/-)	979/-
Profits of the business(as per explanation (baa) to section 80HHC	(-) 7,24,588/-
Adjusted profits of business	<u>(-)7,24,588/-</u>

Profits derived from Exports=Profits of business x $\frac{\text{Export turnover}}{\text{Total turnover}}$
u/s 80HHC(3)(a)

$$= (-)7,24,588/- \times \frac{14,73,016/-}{14,73,016/-}$$

$$= (-)7,24,588/-$$

Add: 90% of export incentives
(as per newly inserted 5th proviso
To sec. 80HHC)

Profits eligible for deduction u/s.80HHC	<u>9,06,433/-</u>
	1,81,845

Allowable deduction u/s 80HHC= 70% of Rs.1,81,845/-=1,27,292*

Hence, your contention that interest u/s 234B & 234C became chargeable due to unforeseen retrospective amendments to section 80HHC is not acceptable. Further, there is no issue of profits on sale of Duty Entitlement Pass Book credits or Duty Free Replenishment Certificate in your case to which the circular No. 2/2006 refers.”

15. The aforesaid factual position is not disputed. It is clear that as a result of the insertion of the proviso, the petitioner became



entitled to deduction under Section 80 HHC of Rs.1,27,292/-.

proviso did not act as a detriment or negate or reduce the claim of deduction.

16. In view of the aforesaid discussion, we do not find any merit in the present writ petition and the same is accordingly dismissed.

No costs.

**(SANJIV KHANNA)
JUDGE**

**(DIPAK MISRA)
CHIEF JUSTICE**

**SEPTEMBER 9th, 2011
VKR**