THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.08.2013

+ W.P.(C) 1113/1991

M/s KELVINATOR OF INDIA LTD. ... Petitioner

versus

THE COMMISSIONER OF INCOME TAX & ORS … Respondents

Advocates who appeared in this case:
For the Appellant : Mr Ajay Vohra with Ms Kavita Jha and Mr Vaibhav Kulkarni
For the Respondent : Mr Sanjeev Sabharwal, Sr Standing Counsel

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED, (ACTING CHIEF JUSTICE)
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, ACJ

1. The only issue which arises for consideration in this writ petition is whether the petitioner is entitled to waiver of interest levied under section 215 of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act'). The petitioner had moved an application for waiver of interest under Rule 40 of the Income-tax Rules, 1962 (hereinafter referred to as 'the said Rules') which had been rejected by the Deputy Commissioner of Income-tax by an order dated Nil communicated through letter dated

07.09.1989, the relevant assessment year being 1985-86. The petitioner preferred a revision petition under section 264 against the said order before the Commissioner of Income-tax who, partly allowed the revision petition by an order dated 06.11.1990, giving relief of waiver of interest for a period of four months. The petitioner has also challenged Circular No. 492 dated 21.07.1987 issued by the Central Board of Direct Taxes on the subject of waiver of interest under rule 40 (1) of the said Rules as being ultra vires of the Act and/or of the said Rules.

2. Before we set out the submissions of the parties, it would be necessary to note the sequence of events.

3. On 29.07.1985 the petitioner filed its return of income for the assessment year 1985-86 declaring an income of Rs.3,61,87,550/- and paid the balance tax (over and above the advance tax already paid earlier) by way of self assessment tax under section 140A of the said Act. Thereafter, the petitioner filed a revised return of income on 13.01.1986 declaring an income of Rs.3,81,39,990/- on which a further payment of Rs. 11,27,534/- was made under section 140A of the said Act.

4. Thereafter, nothing happened till 09.06.1987 when the assessing officer issued the notice under section 143(2) to the petitioner with regard to the assessment for the assessment year 1985-86. It will be clear that a period of one year had elapsed from the filing of the original return on 28.07.1986. A period of one year had also elapsed from the filling of the revised return on 12.01.1987.

5. After the issuance of the notice dated 09.06.1987 under section 143(2), the petitioner applied on 18.06.1987 for fixing a date of hearing in September 1987. The assessing officer accordingly fixed 03.09.1987 as the next date of hearing in the assessment proceedings. Some details were filed on 03.09.1987 and further hearing was adjourned to 14.11.1987. On that date, at the request of the petitioner, the assessment proceedings were adjourned to 10.12.1987.

6. Thereafter, while the assessment proceedings were going on, the petitioner filed a second revised return on 18.01.1988 declaring an income of Rs. 4,47,54,650/- on which a further payment of tax of Rs.38,39,964/- was made under section 140A of the said Act. The filing of the second revised return necessitated the issuance of a fresh notice under section 143(2), which was issued by the assessing officer on 20.01.1988. This was followed by the assessment order under section 143(3) on 18.02.1988. The total income of the assessee was assessed at Rs. 6,89,44,449/- on which interest under section 215 of the said Act was charged in the amount of Rs. 52,14,136/-. However, the petitioner had taken the matter in appeal and ultimately the income of the assessee after giving appeal effect was computed at Rs. 4,83,90,480/- and the interest under section 215 had been computed at Rs. 31,85,806/-. It would be relevant to mention at this point that the interest under section 215 had been computed for the entire period from 01.04.1985, that is, from the 1st of April next following the financial year 1984-85 up to the date of the

regular assessment, i.e., 18.02.1988. This was for a full period of 35 months.

7. It is, thereafter, that the petitioner had moved the above mentioned application for waiver of interest under rule 40 of the said Rules. That application was rejected by the Deputy Commissioner of Income-tax. Thereafter, the petitioner filed the said revision application under section 264 before the Commissioner of Income-tax, who, by virtue of the impugned order dated 06.11.1990, gave part relief to the petitioner.

8. From the impugned order dated 06.11.1990 it will be apparent that the petitioner sought waiver under rule 40(1) as also under rule 40(5). Rule 40 of the said Rules, at the relevant time, read as under:-

> **"40. Waiver of interest. –** The Income-tax Officer may reduce or waive the interest payable under section 215 or section 217 in the cases and under the circumstances mentioned below, namely: —
>
> (*1*) When the relevant assessment is completed more than one year after the submission of the return, the delay in assessment not being attributable to the assessee.
>
> (*2*) Where a person is under section 163 treated as an agent of another person and is assessed upon the latter's income.
>
> (*3*) Where the assessee has income from an unregistered firm assessed under the provisions of clause (*b*) of section 183.

(*4*) Where the previous year is the financial year or any year ending about the close of the financial year and large profits are made after the 1st March (or the 15th March in cases where the proviso to section 211 applies), in circumstances which could not be foreseen.

(*5*) Any case in which the Inspecting Assistant / Deputy Commissioner considers that the circumstances are such that a reduction or waiver of the interest payable under section 215 or section 217 is justified."

9. Insofar as the claim of waiver under rule 40 (5) was concerned, the Commissioner had noted the petitioner's following reasons for the difference between the total income assessed and the income shown in the estimates, which, according to the petitioner, could not have been forseen by the petitioner:-

(i)	Sales tax payable disallowed u/s 43B	Rs. 100.18 lakhs
(ii)	Disallowance of depreciation and investment allowance on account of retrospective amendment of section 43(1) by the Finance Act, 1986.	Rs. 38.62 lakhs
(iii)	Excise Duty reconcilable account which had resulted in excess debit of Excise Duty to the profit and Loss A/c only at the time of finalisation of accounts.	Rs. 197.44 lakhs
(iv)	Excise Duty refund accrued during the year but included in the Profit & Loss A/c for subsequent year, for which adjustment was made while finalising the account	Rs.36.10. lakhs
(v)	Disallowance of depreciation and investment allowance on reinstated machinery	Rs.4.64 lakhs

10. Thereafter the Commissioner came to the conclusion that this was not a case where discretion for waiver of interest could be exercised under rule 40(5) of the said Rules. The reasoning adopted by the Commissioner was as under:-

> "At the first instance I would consider the points raised by the assessee in the petition, which are obviously in the context of clause (5) of rule 40 of the I.T. Rules. This clause gives discretion to the DCIT to reduce or waive interest in "any case" where the circumstances so justify. The expression "any case" may imply that under exceptional circumstances the DCIT has the power to allow reduction or waiver of interest even in cases not specifically covered by clauses (1) to (4). The case of the assessee is that the estimate of advance tax filed by it was a bonafide estimate and the additions to the income listed at (i) to (v) in para 3 above, which have caused a variation between the income shown in the estimate and that finally assessed, could not be foreseen by it while filing the estimate. In this connection it may be mentioned that the addition at (i) above has been a subject matter of appeal and in the order u/s 250 dated 7.11.1990, determining the total income at Rs. 4,83,90,480/-, this amount stands excluded. In this order the interest u/s 215 has been charged only at Rs. 31,85,806/- and hence this addition/disallowance can no more be the subject of consideration. It is true that explanation 8 to section 43(1) was inserted by the Finance Act, 1986 with retrospective effect from 1.4.1974 and consequently the claim for depreciation and investment allowance had to be reduced on certain machinery but then simultaneously deduction for capitalised interest has been allowed in the assessment at Rs. 11,03,582/-. The difference is too meagre to call for any specific consideration of item (ii) above. The items

> at (iii) and (iv) are admittedly the accounting mistakes of the assessee and at this stage it is not possible to give any categorical finding about the reasons for not taking into consideration these amounts at the time of filing the estimates of advance-tax. While proceeding on the assumption that as a prudent person and with due diligence the assessee should have taken into consideration these amounts in filing the estimates of advance tax, I would exclude these items from consideration. The item at Sl. No. (v) is again too meagre and, in any case, since the assessee had lost on the issue in appeals in earlier years, atleast for filing the estimate of advance tax it should have taken this amount into consideration. To conclude I hold that this is not a case where discretion for waiver of interest could be exercised under clause (5) of rule 40 of the I.T. Rules."

11. The petitioner had also urged before the Commissioner that in view of rule 40(1) of the said Rules there should have been waiver of interest at least for the period from 29.07.1986 to 18.02.1988. This argument was advanced on the premise that the original return was filed on 29.07.1985 and the period of one year specified in rule 40(1) elapsed on 28.07.1986, without the assessment being completed. In fact, no steps whatsoever had been taken by the assessing officer during this period pursuant to the filing of the return by the petitioner to complete the assessment. Therefore, according to the petitioner, as the assessment not having been completed within the period of one year after the submission of the return was not on account of any delay attributable to the petitioner, the period in excess of one year from the filing of the return ought not to be taken into account while computing interest under section 215 of the said Act.

12. The Commissioner of Income-tax gave part relief to the petitioner. It was held that the starting point of counting the period of one year would be the date on which the first revised return (i.e., 13.01.1986) was filed and not the date of the filing of the original return (i.e., 29.07.1985). Therefore, according to the Commissioner, the period of one year referred to in rule 40(1) would commence on 13.01.1986 and end on 12.01.1987. According to the Commissioner, waiver is to be given from the end of the first year to the point of time from where the delay, if any, was attributable to the assessee. In the opinion of the Commissioner, the period between 12.01.1987 and 09.06.1987, when the assessing officer issued the notice under section 143(2) of the said Act, was not attributable to the assessee and, therefore, this period had to be excluded for the purposes of computing interest under section 215 of the said Act. It is only to this extent that the Commissioner of Income-tax gave relief to the petitioner. However, for the rest of the period, that is, from 09.06.1987 to 18.02.1988, the Commissioner held it to be attributable to the petitioner on account of the adjournments and the second revised return filed by the petitioner on 18.01.1988. Therefore, the Commissioner held that in the context of the provisions of rule 40(1) of the said Rules there was a delay of four complete months in making the assessment for which the assessee could not be held responsible and that interest for this period of four months was liable to be waived straightway under rule 40(1) of the said Rules. The Commissioner of Income-tax concluded as under:-

"6. On a careful consideration of the facts and circumstances of the case in its entirety and in view of the above discussion I am of the opinion that the case is not at all covered under clause (5) of Rule 40. The delay in completion of the assessment after it was taken up by the issue of a notice u/s 143 (2) on 9.6.1987 is generally attributable to the assessee and as such it is not entitled to waiver of interest for this period. However, the case is partly covered under clause (1) of rule 40 to the extent that there was a delay of four complete months in taking up the assessment after the period of one year from the date of filing the first revised return on 13.1.1986. Accordingly, the waiver of interest for a period of four complete months from 13.1.1987 to 9.6.1987 is ordered. The DCIT is directed to give effect to this order.

7. The petition is partly allowed."

13. At this juncture, it would be relevant to notice Circular No. 492 dated 21.07.1987. The said circular reads as under:-

"Circular No. 492, dated 21st July 1987

Subject: Clarification regarding Board's Circular No. 12/66-IT(B) dated 9.6.1985- Waiver/ Reduction of interest-Section 215/217- Rule 40(1) of the Income-tax Rules, 1962.

Attention is invited to Board's Circular No. 12/66-IT(B) dated 9.6.1965 copy attached for ready reference. It has been brought to the notice of the Board that relying upon the example in the above circular, even in cases where there is no delay attributable to the assessee for completion of the assessment, waiver is limited only up to the date of taking up of the case for assessment beyond the period of the first year. Under rule 40(1) of the Income-tax Rules, 1962, first a decision has to be

arrived at as to whether and if so to what extent the delay in the completion of the assessment beyond the first year is attributable to the assessee. After deciding this, waiver should be given from the end of the first year to the period, if any, from where the delay is attributable to the assessee, and then the waiver should extend up to the date of completion of the assessment.

Sd/- B. Nagarajan,
Director,
Central Board of Direct Taxes,
F. No. 400/24/87-IT (B)"

14. It was contended on behalf of the petitioner that the entire interest amount ought to be waived on account of rule 40(5) and rule 40(1). Insofar as the arguments under rule 40(5) are concerned, we feel that no interference whatsoever is warranted, for the simple reason that the consideration by the inspecting Assistant Commissioner/ Deputy Commissioner was based upon his discretion which, of course, had to be exercised in a judicial manner. This court in its jurisdiction under Article 226 of the Constitution of India does not sit as a court of appeal and it is not so much concerned about whether the decision of the authority below is right or wrong but whether the decision is legal or illegal. As observed by this court in ***J.K. Synthetics Ltd. v. Commissioner Of Income Tax: 270 ITR 95 (Del)***, this being a petition under Article 226 of the Constitution of India, we are not sitting as a Court of appeal and we cannot substitute our views in place of those of the Deputy Commissioner/ Commissioner. As long as the discretion vested in the authorities below is exercised in a judicial manner, taking into account

the relevant factors in an objective manner, no fault can be found with the conclusions arrived by such authorities.

15. In fact the learned counsel for the petitioner did not lay much stress on the arguments under rule 40(5) but focused his arguments on rule 40(1) of the said Rules. It was contended by him that the period of one year indicated in rule 40(1) is to be considered from the date on which the original return was filed, that is, from 29.07.1985 and not from the date on which the revised return was filed (i.e. 13.01.1986). The contrary was urged on the part of the learned counsel for the respondents. We have already pointed out above that the Commissioner of Income-tax, in the impugned order dated 06.11.1990 has taken the starting point as the date of the filing of the revised return and not the date of filing of the original return. In our view, the Commissioner has correctly taken the date of the revised return as the starting point for computing the period of one year referred to in rule 40(1) of the said Rules. It is obvious that the revised return is filed by an assessee only when he discovers any omission or wrong statement made in the initial return. Therefore, the period between the filing of the original return and the filing of the revised return cannot enure to the benefit of the assessee because the filing of the revised return was necessitated on account of his omission or wrong statement made in the original return. Therefore, the starting point for computing the period of one year referred to in rule 40(1) would be the date on which the first revised return was filed, that is, 13.01.1986.

16. It was next contended by the learned counsel for the petitioner that

even if 13.01.1986 is taken as the starting point, the period of one year therefrom elapsed on 12.01.1987. And, during that period the assessing officer did nothing. In fact the assessing officer did nothing even thereafter till 09.06.1987 when the notice under section 143(2) of the said Act was issued. Thereafter, the assessment was completed within a span of a little over eight months. It is obvious that if the assessing officer had issued the notice under section 143(2) immediately or at least shortly after the filing of the revised return on 13.01.1986, the assessment would have been completed within the period of one year. According to the learned counsel for the petitioner, this in itself is indicative of the fact that there was no delay on the part of the petitioner and that the petitioner had fully co-operated with the assessing officer in completing the assessment proceedings.

17. On the other hand, the learned counsel for the revenue/respondents submitted that the Commissioner had concluded that after 09.06.1987 the delay in concluding the assessment was attributable to the petitioner and this finding ought not to be interfered with by this court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. Reliance was placed on the decision of this court in ***J.K. Synthetics Ltd. v. Commissioner Of Income Tax: 270 ITR 95 (Del),*** wherein this court observed as under:-

> "In the instant case, however, we find that, after examining the material, the Commissioner, while passing the impugned orders has specifically noted the findings that there was delay which could be attributed to the assessee. It is also required to be noted that the Commissioner while

> passing the order has also pointed out that for a particular part of the period for which delay cannot be attributed to the assessee, benefit has to be given and, therefore on the facts, Commissioner has arrived at a conclusion. This being a petition under article 226 of the Constitution of India we are not sitting as a court of appeal. We cannot substitute our views in place of those of the Commissioner. The facts of C. W. No. 2009 of 1988 are clearly distinguishable. There, the matter was remanded as there was no specific finding recorded as to whether the delay was attributable to the assessee or not. In the present case, specific findings have been recorded. That being the case, when the Commissioner has in exercise of jurisdiction vested in him come to a particular conclusion on the facts for reasons which are recorded in the impugned orders, it would not be proper for us to interfere in exercise of our writ jurisdiction."

It may be noticed that in the above extract there is a reference to CW 2009/1988 which also happens to be a case of ***J.K. Synthetics Ltd.*** and the said decision was reported in **265 ITR 411 (Del).** That case has however been distinguished in the later decision in **270 ITR 95** inasmuch as in the earlier decision (**265 ITR 411)**, the court had remanded the matter as no specific finding had been recorded with regard to the question of delay attributable to the assesseee. However, in the later decision (**270 ITR 95)** this court noted that in that case there was a specific finding that the delay was attributable to the assessee. It is for this reason that this court, in **270 ITR 95,** refrained from interfering with the order passed by the authority below. We may point out that the principle of law laid down in ***J.K. Synthetics Ltd v. CIT*****: 265 ITR 411 (Del)** was however not disturbed, as it could not be by a Bench of co-

equal strength. In **265 ITR 411** this court after examining the provisions of rule 40 observed as under:-

> "From a bare reading of sub-rule (1) of rule 40, it is clear that the twin conditions necessary for reduction or waiver of interest under section 215 are: (i) that the assessment should have been completed more than one year after the submission of the return, and (ii) the delay in the assessment is not attributable to the assessee. The discretion vested in the Assessing Officer, under section 215(4) of the Act, read with rule 40 is undoubtedly quasi judicial and is coupled with a duty to consider whether the circumstances of the case warrant waiver or reduction of interest. He is under an obligation to objectively consider the circumstances and find out whether the applicant is entitled to the waiver or reduction. A mechanical consideration of the application defeats the very purpose and object of the legislation to grant relief to an assessee against the rigour of the provisions for charging interest under section 215, in the circumstances prescribed in rule 40. The language of rule 40(5), which is couched in wide terms, leaves little doubt that the provisions contained in sub-section (4) of section 215 are benevolent. Therefore, when an assessment is completed after the expiry of one year from the date of filing of the return and an assessee applies for waiver/reduction of interest charged under section 215 of the Act, what is required to be seen is as to whether the assessee is responsible for causing delay in completion of the assessment. <u>If it is found that it was on account of his conduct that the assessment could not be completed within the said period of one year, the interest charged under section 215 may not be waived.</u>"
>
> <u>(Underlining added)</u>

The court also held as under:-

> "Thus, the short question which arises for our consideration is as to whether in the instant case, the Income-tax Officer exercised the discretion vested in him under rule 40, keeping in view the aforementioned principles, by taking into consideration all the relevant facts. Having given our serious consideration to the facts in hand, we find that both the authorities have failed to consider the assessee's application in its correct perspective. In both the orders, we do not find even a whisper indicating that the delay in completion of the assessment within a period of one year was attributable to the assessee."
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> (Underlining added)

From the above extracts it is apparent that the question of delay attributable to the assessee has to be considered in the context of an assessment not being completed within the period of one year from the date of filing of the return. In the facts of the present case it would mean that the question to be addressed would be whether the petitioner/assessee was responsible for any delay in completing the assessment within the period of one year with effect from 13.01.1986 (i.e. the date on which the first revised return was filed). We find that up to 12.01.1987, and, in fact, up to 09.06.1987 the assessing officer did nothing. It is only on 09.06.1987 which is much beyond one year after 13.01.1986 that the assessing officer issued the notice under section 143(2) of the said Act. Therefore, within the period of one year with effect from 13.01.1986, no delay could be attributable to the petitioner. That being the case, the waiver of interest, in our opinion, would be in respect of not just the period from 12.01.1987 to 09.06.1987 but for the period from 12.01.1987

to 18.01.1988. In other words, for the period commencing at the end of one year from the date of filing the first revised return upto the date of filing of the second revised return. We stop at the latter date because we presume that the filing of the second revised return caused a delay in the assessment and that is clearly attributable to the petitioner. To be clear, the period 19.01.1988 to 18.02.1988 is taken as attributable to the petitioner.

18. In the facts of the present case we find that after the issuance of the notice under section 143(2) the assessment has been completed within a little over eight months. Therefore, we are in agreement with the submissions made by the learned counsel for the petitioner that had the assessing officer been diligent enough and issued the notice under section 143(2) immediately or shortly after 13.01.1986, when the petitioner filed the first revised return, the assessment could have been completed by 12.01.1987 i.e., within one year. It is obvious that under the provisions, the assessing officer is granted a normal period of one year to complete the assessment and, if he does so, there can be no waiver of interest during that period. However, if the assessing officer is not diligent enough and does not complete the assessment within the said period of one year, any interest liability for the period beyond that one year cannot be foisted on the assessee unless the delay in not completing the assessment within the period of one year is clearly attributable to the assessee. In the present case, the period of one year which is available to the assessing officer for completing the assessment ended on 12.01.1987.

For the delay beyond that date, there has to be waiver of interest unless part of that delay is attributable to the assessee. Here, the delay from 18.01.1988 to 18.02.1988 is clearly attributable to the assessee as it chose to file the second revised return on 18.01.1988.

19. In view of the foregoing discussion, the writ petition is partly allowed. There shall be waiver of interest under section 215 of the said Act in favour of the petitioner for the period 12.01.1987 to 18.01.1988.

20. The writ petition is partly allowed as above. There shall be no order as to costs.

BADAR DURREZ AHMED, ACJ

R.V.EASWAR, J

AUGUST 23, 2013
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