KERALA HIGH COURT

New Woodlands

Vs

Commissioner of Income-Tax

(T Kochu Thommen, J.)

27.11.1981

JUDGMENT

Kochu Thommen, J.

1. The question is whether the petitioner-firm ("the assessee") is entitled to interest on the income-tax paid by it as per the notices of demand when the orders of assessment were set aside by the AAC, who remanded the matter for fresh consideration, and the ITO has not refunded the amounts paid as per the notices of demand within three months from the end of the month in which the order of the appellate authority was passed. The assessee paid tax on the basis of Exs. P-1, dated March 16, 1972, P-2, dated March 16, 1972, and P-3, dated March 19, 1973, which, respectively, are the original orders of assessment for the years 1968-69, 1969-70 and 1970-71. The assessee filed appeals against the orders of assessment. By Exs. P-4 and P-5, dated September 15, 1972, and October 24, 1975, respectively, the AAC accepted the assessee's contention that no proper enquiry had been conducted by the ITO. The appellate authority accordingly quashed Exs. P-1 to P-3 orders of assessment and remanded the matter to the ITO for fresh consideration of the various contentions of the assessee and for fresh computation of the tax due. Thereupon, the ITO passed fresh orders of assessments, Exs. P-6 to P-8 dated November 12, 1976, for the three years in question. Considerable reduction was made in the tax originally determined as a result of which the excess tax paid was refunded to the assessee. The assessee is no longer aggrieved on that count.

2. The question now is, as I stated earlier, whether the assessee is entitled to interest on the total amount paid by it as per the notices of demand based upon Exs. P-1 to P-3 for the period commencing on the expiry of three months after the end of the month in which the orders of the appellate authority were passed and ending on the date of the fresh assessment orders. The answer depends upon whether the assessee was entitled to a refund of the tax paid when the original orders of assessment were quashed and the matter was remanded for fresh consideration. If the assessee was entitled to a refund in such circumstances, then, of course, the assessee is also entitled to interest for the amount not refunded within three months from the date prescribed

under Section 244.

3. Section 240 of the I.T. Act reads :

> "Refund on appeal, etc.---Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Income-tax Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf." (emphasis*supplied)

4. Section 244(1) of the Act reads :

> "Interest on refund where no claim is needed.--(1) Where a refund is due to the assessee in pursuance of an order referred to in Section 240 and the Income-tax Officer does not grant the refund within a period of three months from the end of the month in which such order is passed, the Central Government shall pay to the assessee simple interest at twelve per cent. per annum on the amount of refund due from the date immediately following the expiry of the period of three months aforesaid to the date on which the refund is granted." (emphasis* supplied)

5. Section 240 postulates a refund consequent upon an order passed in appeal or other proceeding under the Act. If, as a result of an order passed in appeal, refund becomes due, then, Section 240 says, such refund shall be made without the assessee having to make a claim for it. Where Section 240 applies, Section 244 is automatically attracted. In such a case where refund is not made within the time prescribed, interest accrues in favour of the assessee. The question is whether any amount has been ordered to be refunded to the assessee.

6. The petitioner's counsel, Shri Paripoornan, submits that with the orders of the appellate authority the original orders of assessment disappeared and lost their identity. They had been merged in the final orders of the appellate authority. The appellate orders having superseded the original orders of assessment, notices of demand fell to the ground. Consequently, any amount paid pn the basis of such demand was immediately refundable. Where such refund is not made within the time prescribed, interest accrues in favour qf the assessee, so runs the argument. In support of this contention counsel relies upon the decision of the Supreme Court in ITO v. Seghu Buchiah Setty [1964] 52 ITR 538. That was a case where, as a result of the order in appeal, the tax liability was reduced. The question was whether in such a case a fresh demand notice was called for. The majority of the learned judges held that the amount of tax assessed having been reduced as a result of the orders of the AAC, a: fresh demand notice had to be served on the assessee before he could be treated as a defaulter and recovery proceedings initiated against him. Speaking for the majority, Sarkar J. said that the original assessment order stood annulled when the appellate authority allowed a part of the claim of the assessee and reduced the tax. This is what he said (p. 544) :

"In fact Section 31(3)(a) contemplates an anulment of the original assessment order itself; the demand under Section 29 or Section 45 is not annulled directly by :it."

7. The Supreme Court held that although the demand as such was not annulled, the assessment stood annulled. Relying on this principle, counsel contends that where there is an annulment of the assessment, the demand also becomes totally ineffective as a result of which whatever is collected on the basis of the demand becomes a sum repayable to the assessee. That is an amount, counsel says, which is refundable as per Section 240. If that argument is correct, then Section 244 is automatically attracted. Counsel also relied upon the principle stated by the Allahabad High Court in *Purshottam Dayal Varshney v. CIT*[1] which wasa case almost identical to the facts of this case. There also an order of remand was made by the appellate authority with a direction to make a fresh assessment. The court held that Sections 240 and 244 were attracted.

8. Consequent upon the decision of the Supreme Court in the decision cited above stating that a fresh demand was required whenever a reduction was allowed in appeal, the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964, was enacted. Sections of this Act reads :

"3. Continuation and validation of certain proceedings.--(1) Where any notice of demand in respect of any Government dues is served upon an assessee by a Taxing Authority under any Scheduled Act, and any appeal or other proceeding is filed or taken in respect of such Government dues, then,--.....
(b) where such Government dues are reduced in such appeal or proceeding,--
(i) it shall not be necessary for the Taxing Authority to serve upon the assessee a fresh notice of demand ;
(ii) the Taxing Authority shall give intimation of the fact of such reduction to the assessee, and where a certificate has been issued to the Tax Recovery Officer for the recovery of such amount, also to that officer ;
(iii) any proceedings initiated on the basis of the notice or notices of demand served upon the assessee before the disposal of such appeal or proceeding may be continued in relation to the amount so reduced from the stage at which such proceedings stood immediately before such disposal ;
(c) no proceedings in relation to such Government dues (including the imposition of penalty or charging of interest) shall be invalid by reason only that no fresh notice of demand was served upon the assessee after the disposal of such appeal or proceeding or that such Government dues have been enhanced or reduced in such appeal or proceeding..... "

9. By this amendment the need for a fresh notice of demand where the tax has been reduced in appeal is dispensed with. The legislative intent is that a reduction of tax by an appellate authority shall not affect the original demand, but the original demand is enforceable to the extent that tax

is finally determined to be due as per the order of the appellate authority. This amendment has thus negatived the finding of the Supreme Court to the contrary in the decision cited above.

10. The Validation Act of 1964 has made it clear that the notice of demand remains unaffected by the fact of the appeal to the extent of the amount that is finally determined to be due. If this is the effect of a reduction of tax by the appellate authority, what is the position where the appellate authority has not reduced the tax but has annulled the order of assessment with a direction to the assessing authority to make a fresh determination of the tax ? Is the notice of demand annulled thereby as a result of which the amount paid thereunder no longer was legally retained by the Department ?

11. Counsel contends rightly that the orders of assessment have merged in the appellate orders. But that does not mean, as provided in the Validation Act, that the notices of demand have likewise merged. A notice of demand is a consequential order made on the basis of the original order of assessment. If a fresh notice of demand is not required under the Act where the original order of assessment was superseded by an appellate order reducing the amount of tax, I see no reason why a fresh notice is required where the appellate authority has set aside the original order of assessment and remanded the case for fresh consideration. The fate of the demand is the same in both cases. The notice of demand remains valid and effective to the extent that the tax is finally determined to be due and payable by the assessee. This, I think, is the natural and logical result of the amendment introduced by the Validation Act. Just as in the case of reduction, so in the case of a remand, the enforceability of the notice of demand is qualified by and subject to the fresh determination of the liability.

12. If this is the correct interpretation of the law, which, as far as I can see, it is, then no amount is refundable upon remand. What is required by an order of remand is not to refund the money collected as per the original orders, but to recompute the amount of tax that is payable by the assessee. The original assessment is annulled, not with a view to refund, but with a view to the correct determination of the liability. Refund is only the consequence of that determination. The object of remand is, therefore, not to refund, but to recalculate, and then to refund the excess, if any. That being the position, the question of interest as per Section 244 does not arise until a fresh computation of the tax is made by fresh assessment. With great respect, I do not accept as correct law the views expressed to the contrary by the Allahabad High Court in *Purshottam Dayal Varshney v. CIT*[2]

13. In the circumstances, Exs. P-9 and P-15, which respectively are orders of the ITO and the Commissioner refusing the assessee's claim for interest as aforesaid, are impeccable. The challenge against them fails. The O.P. is dismissed. I make no order as to costs.

Cases Referred.

1[1974] 94 ITR 187
2[1974] 94 ITR 187