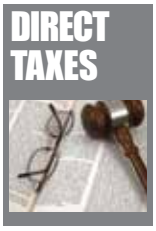
Legal Decisions[1]



Income Tax Act

LD/63/48

Rashmikant Kundalia and another
vs.
Union of India and others
9th February, 2015 (BOM)

Section 234E of the Income-tax Act, 1961 read with the Article 14 of the Constitution of India–Fee for default in furnishing statements-Constitutional validity.

Section 234E of the Income-tax Act does not violate any provision of the Constitution of India and is therefore constitutionally valid.

The Petitioner, a practicing Chartered Accountant, served by several notices under Section 200A. Challenging the constitutional validity of Section 234E, the Petitioner argued that, a "fee" is known in the commercial and legal world to be a recompense of some service or some special service performed, and it cannot be collected for any dis-service or default and hence the "fee" under Section 234E of the Act could be levied only in the event the Government was providing any service or any special service. Further, the said section seeks to collect tax in the guise of a fee, which was impermissible either in common law or under the taxing statute, and encroached on the rights of life and liberty of the citizens. According to the Petitioner, assessees who are deducting tax at source are discharging an administrative function of the department and that they are an "honorary agent" of the department. The obligation is onerous in nature as the Assessing Officer was not vested with any power to condone the delay in filing the TDS return and there was also no provision of Appeal against any arbitrary order passed by the Assessing Officer under Section 234E of the Act.

The Legislature took note of the fact that a substantial number of deductors were not furnishing

[1] *Contributed by CA. Sahil Garud and ICAI's Editorial Board Secretariat, Direct Tax Committee, International Taxation Committee and Corporate Laws & Corporate Governance Committee.*
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their TDS return/statements within the prescribed time frame which was absolutely essential. This led to an additional work burden upon the Department due to the fault of the deductor by not furnishing the information in time and which he was statutorily bound to furnish. It is in this light, and to compensate for the additional work burden forced upon the Department, that a fee was sought to be levied under Section 234E of the Act. Looking at this perspective, it can be viewed that Section 234E of the Act is not punitive in nature but a fee which is a fixed charge for the extra service which the Department has to provide due to the late filing of the TDS statements. Further, the late filing of the TDS return/statements is regularised upon payment of the fee as set out in Section 234E. This is nothing but a privilege and a special service to the deductor allowing him to file the TDS return/statements beyond the time prescribed by the Act and/or the Rules.

Therefore, the fee sought to be levied under Section 234E of the Act is not in the guise of a tax that is sought to be levied on the deductor. It could not be found the provisions of Section 234E as being onerous on the ground that the section does not empower the Assessing Officer to condone the delay in late filing of the TDS return/statements, or that no appeal is provided for from an arbitrary order passed under Section 234E. It must be noted that a right of appeal is not a matter of right but is a creation of the statute, and if the Legislature deems it fit not to provide a remedy of appeal, so be it. Even in such a scenario it is not as if the aggrieved party is without remedy. Such aggrieved person can always approach this Court in its extra ordinary equitable jurisdiction under Article 226/227 of the Constitution of India, as the case may be. Therefore it cannot be agreed with the argument of the Petitioners that simply because no remedy of appeal is provided for, the provisions of Section 234E are onerous. Similarly, on the same parity of reasoning, the argument regarding condonation of delay was also held to be wholly without any merit.

Before declaring a statute to be unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates the provisions of the Constitution of India. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. The Court must therefore make every effort to uphold the constitutional validity of a statute, even if it requires giving the statutory provision a strained meaning, or a narrower or wider meaning, than what appears on the face of it. It is only when all efforts to do so fail should the Court declares a statute to be unconstitutional.

The Court held as follows:

Section 234E of the Act does not violate any provision of the Constitution and is therefore, *intra vires*, Constitution of India.

LD/63/49

The Commissioner of Income-Tax
vs.
Smt. Leonie M. Almeida
24th January, 2015 (Bom)

Section 220(2) of the Income Tax Act, 1961– Interest leviable when an application is made before the Settlement Commission.

Where an application is made before the Settlement Commission, interest under Section 220(2) should be charged pursuant to the proceedings in normal course up to the date of decision of the Settlement Commission under Section 245D(1) to proceed with the application.

The assessment order of the assessee was passed on 30.1.2002, determining undisclosed income of ₹1,40,02,500. The assessee filed application before Settlement Commission on 11.5.2001. The application was admitted by the Settlement Commission under Section 245D (1) on 16.09.2002 and the final order was passed by the Settlement Commission on 30.09.2002. In the order of the Settlement Commission, the undisclosed income was decreased to ₹32,20,000.

The assessing officer issued a demand purporting to give effect to the order of the Settlement Commission charging and levying interest under Section 220 (2) from the date of assessment order (30.01.2002) to the date of order passed by the Settlement Commission (30.09.2002).

The assessee contended that the order of the assessing officer does not survive after application under Section 245D(1) is admitted and therefore, the interest should not be levied till the date of final order passed by the Settlement Commission. The assessee relied on the decision of the Hon'ble Supreme Court in the case of *CIT vs. Damani Brothers*.

The Tribunal held that interest under Section 220(2) would be legally leviable from the date of demand raised in assessment till the admission of

application for settlement under Section 245D(1). However, according to the Tribunal, it would not be proper to say that the order of the assessing officer would not survive after application under Section 245D(1) is decided to be proceeded with by the Settlement Commission.

The High Court held as follows:

Considering the decision in the case of *Damani Brothers (supra)* and *Brij Lal and Ors vs. Commissioner of Income-tax*, interest can be charged pursuant to proceedings in normal course up to the date of decision under Section 245D(1) of the Income-tax Act to proceed with the application appears to be prevailing and accordingly, the appeal is dismissed.

LD/63/50

Joint Investments Pvt. Ltd.

vs.

Commissioner of Income Tax

25th February, 2015 (New Delhi)

Assessment year 2009-10

Section 14A of the Income Tax Act, 1961 read with rule 8D of the Income Tax Rules, 1962–Expenditure disallowance incurred for earning exempt income

In relation to disallowance under 14A read with Rule 8D, by no stretch of imagination can section 14A or Rule 8D be interpreted so as to mean the entire tax exempt income is to be disallowed

For AY 2009-10, the assessee had declared tax exempt dividend income amounting to ₹48,90,000 and had suo-moto disallowed ₹2,97,440 as attributable under Section 14A. The assessing officer invoked Section 14A(2) and disallowed ₹52,56,197 under Rule 8D read with Section 14A of the Act.

The assessee urged in the present case that since ₹2,97,440 was volunteered as disallowance, the assessing officer was under a duty to first consider the merits of that claim and thereafter for valid grounds, if any, reject the contention before proceeding under Section 14A(3) read with Rule 8D(2). The assessee relied upon the decision of the Hon'ble Delhi High Court in the case of *Commissioner of Income Tax VI vs. Taikisha Engineering India Ltd.*

The Commissioner of Income Tax (Appeal) and Tribunal both held that the disallowance under

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Section 14A made by the assessing officer was correct.

The High court held as under:

The assessing officer did not mention any reason why the assessee's claim for attributing ₹2,97,440 as a disallowance under Section 14A had to be rejected and also, the assessing officer failed to scrutinise the accounts. Further, the High Court observed an important anomaly that the disallowance ultimately directed by the assessing officer worked out to nearly 110% of the entire exempt income. By no stretch of imagination can Section 14A or Rule 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed.

Note: Order of the Tribunal was set-aside.

LD/63/51

Commissioner of Income Tax III, Nagpur

vs.

Amravati District Central Cooperative Bank Ltd.

24th February, 2015 (BOM).

Section 80P(2)(a) of the Income-tax Act, 1961–Commission from Cotton Hundi Business and Electricity bill-whether constitutes Banking Business

The facilities made available to the State Electricity Board or to the Cotton Growers Federation under Cotton Monopoly Scheme cannot be said to be the activities in addition to normal banking business but all such activities which an assessee can legally undertake are covered thereunder and hence qualify for deduction U/s 80(P)(2)(a) as held by Apex court in the case of Commissioner of Income Tax, Jalandhar vs. Nawanshahar Central Coop. Bank Ltd.

LD/63/52

Somerset Place Co-operative Housing Society Ltd.

vs.

Income Tax Officer 16(2)(1)

13th February, 2015 (Bom)

Section 260A of the Income-tax Act, 1961–Section 5 of the Limitation Act, 1963-Subsequent favourable decision of Court on a similar case is not sufficient cause to condone delay of 1825 days in filing appeal.

Sufficient cause was absent since assessee had chosen not to proceed further since there was no decision of any jurisdictional High Court on that issue. Subsequently new decisions are rendered cannot be a reason to assail an already accepted judicial decision.

For AY 2003-04, the lower authorities decided the issue against the assessee. The assessee stated since assessee's claim was rejected by three authorities viz. Assessing Officer, Commissioner of Income Tax (Appeals) and also the Tribunal and there was no judgment of the jurisdictional High Court favoring the assessee, the Officer bearers of the assessee decided not to carry the matter further. Only when Bombay High Court decided a similar issue in the case of *Sind Co-operative Housing Society Ltd., [317 ITR 47] and Mittal Premises Cooperative Society Ltd., [320 ITR 414]* in favour of assessee did assessee file a Miscellaneous Application before the Tribunal. The said petition was dismissed by ITAT and being aggrieved, the assessee preferred an appeal against the original order dated October 31, 2008 before Bombay HC. The last date to file appeal against the said order was April 24, 2009 and the appeal was preferred by the assessee on April 29, 2014 after a delay of 1825 days. The assessee sought condonation of delay.

Ruling in favour of Revenue, the High Court held that reasons as shown by the applicant cannot fall within the parameters of sufficient cause so as to confer a benefit of condonation to the applicant. This is for the reason that the applicant had taken a well considered decision not to move further proceedings against the order dated 31.10.2008. Applying the test of a prudent litigant it cannot be held that once the applicant by his own volition had decided to accept a judicial order, the applicant can at any time assail the same may be for the reason that subsequently new decisions are rendered on that issue. Section 5 of the Limitation Act cannot be stretched to bring about a situation of unsettling judicial decisions which stood accepted by the parties. If the contention of the applicant is accepted, it would create a situation of chaos and unsettling various orders passed from time to time by the Tribunal as accepted by the parties. The legislative mandate in stipulating a limitation to file an appeal within the prescribed limitation cannot be permitted to be defeated when a litigant has taken a decision not to pursue further proceedings. A new ruling is no ground for reviewing a previous judgment. If this is permitted, the inevitable consequence is confusion, chaos, uncertainty and inconvenience as then no orders can ever attain finality though accepted by parties.

The High Court rejected assessee's reliance on Delhi High Court rulings in the case of *CIT vs. Sothia Mining and Manufacturing Corporation Ltd.* [186 ITR 182] and *Gujarat High Court ruling in Karamchand Premchand Pvt. Ltd. vs. CIT[*101 ITR 46]. The High Court rejected assessee's reliance on SC ruling in *Collector, Land Acquisition vs. MST. Katiji & Ors.*, [167 ITR 471) (SC)] and *N. Balakrishnan vs. M. Krishnamurthy* [(1998)7 SCC 123] on the ground that in present case decision not to appeal was voluntary.

The High Court held as follows:

Only because the assessee has succeeded on the same issue for the Assessment Year 2008-09, the same cannot be said to be a sufficient cause so as to condone the delay of 1825 days to approach this Court in filing the appeal.

LD/63/53

S. B. Civil WRIT Petition in the case of M/s Dhadda Exports

09th February, 2015 (Raj)

Section 148 read with 151(1) of the Income-tax Act, 1961 and Section 292B of the Act – issue of notice for reassessment

High Court quashed issue of notice of reassessment under Section 148 without sanction of CCIT/CIT, as required by proviso to Section 151(1); as notice was issued by breach of a mandatory condition, mistake was not curable under Section 292B

Notice under Section 148 was issued to assessee firm for reassessment of income beyond expiry of 4 years from the end of the relevant assessment year. The assessee contented that notice issued under section 148 was to be preceded by a sanction duly obtained from Chief Commissioner of Income Tax/ Commissioner of Income Tax as per provisions of Section 151(1), and since, in assessee's case, no such sanction had been obtained from JCIT, entire proceedings stood vitiated for want of competence.

The Revenue contended that required sanction from CIT was not taken due to oversight because assessment of the assessee had already been completed under Section 143(3) and mistake was committed inadvertently and was curable by virtue of Section 292B.

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The High Court held as follows:

The entire exercise of reopening of assessment under Section 148 had failed to meet the basic jurisdictional requirement under the *proviso* to Section 151(1) since under the *proviso*, no notice could be issued except on the satisfaction of the CIT or as the case may be, the CCIT and admittedly there was no such satisfaction in the case of the assessee. It was also noted that by virtue of amendment *vide* Finance Act, 2014, Principle CCIT and Principal CIT, apart from CCIT/CIT, had been inserted as competent authorities to grant such sanction.

The Revenue's plea was rejected and it was concluded that resort to Section 292B could not be made to validate an action, which had been rendered illegal due to breach of mandatory condition of the sanction on satisfaction of CCIT or CIT under proviso to sub-Section (1) of Section 151. This was an inherent *lacunae* affecting the very correctness of the notice under Section 148 and was such which was not curable by recourse to Section 292B.

Note: This case will not apply to cases opened after 1st June, 2015

LD/63/54

M/s Panasonic India Pvt. Ltd.

vs.

The Chief Commissioner of Income Tax

12th February, 2015 (Mad)

Article 226 of the Constitution of India– Coercive recovery of demand

The High Court set aside the recovery of 100 percent of the demand when the assessee had made its intention of preferring a WRIT before the High Court clear

After completion of assessment, an Assessment Order (AO) was passed making a demand of 10.74 crore on the assessee. Assessee's stay petition was rejected by CIT(A). On assessee's appeal, HC remanded the matter back to CIT(A) to determine the stay application on merits. Pursuant to this, DCIT passed an order directing assessee to pay 50% of the demand.

On receipt of the said order, assessee made its intention of preferring a WRIT against it clear. Inspite of this, the Revenue authorities attached the entire amount of ₹10 crore. Aggrieved assessee preferred a WRIT before High Court contending that Revenue authorities should have waited for the hearing of the matter and should not have attached the entire amount of over ₹10 crore and further, no opportunity was given to the petitioner before attaching the entire amount.

The High Court held as follows:

The Revenue authorities should have considered the legal submissions raised by the assessee before passing the impugned order. In any event since the matter was sub judice before the appellate forum, the authority should have considered whether 50% of the demand could be ordered, taking into account the totality of circumstances. Even though the Court feels that the revenue to the Government had to be protected, due to the act of the Authorities in neither allowing the parties to raise objection nor considering the same, the amounts were being ordered to be attached and on that technical ground, the entire efforts taken by the Authorities had to fall to ground.

Note: Order of attachment passed by Revenue was set aside.

LD/63/55

SREI Infrastructure Finance Ltd.

vs.

Additional Commissioner of Income-tax

13th FEBRUARY, 2015 (DEL)

Section 115JB of the Income-tax Act, 1961: For the purpose of section 115JB of the Act, statutory reserves (such as reserve required to be created by NBFC under Section 45-IC of the RBI Act, 1934) are to be treated alike and in a similar manner as other reserves.

Two appeals were filed under Section 260A of the Income-tax Act, 1961 by the assessee SREI Infrastructure Finance Ltd. pertaining to assessment years 2006-07 and 2007-08. The aforesaid appeals require adjudication on two separate aspects.

The first aspect, which is common to both the assessment years, relates to rate of depreciation in respect of motor vehicles given on lease. The substantial question of law framed on the said aspect reads as under:-

"Whether Income Tax Appellate Tribunal has erred in law in reminding the issue of claim of depreciation at the higher rate of 30% to the Assessing Officer in respect of motor vehicles given on lease?"

The Tribunal in the impugned order has referred to the decision of the Delhi High Court in *CIT vs. MGF (India) Ltd.* [2006] 285 ITR 142 (Delhi) and *CIT vs. Bansal Credits Ltd.* (2003) 259 ITR 69 (Del).

Tribunal in the impugned order reproduced the following judgment in the case of Bansal Credit Ltd. *(supra)*, which reads as follows:-

"As a matter of fact, wherever there is a doubt it must be examined whether the leased out vehicles are actually being used in the business of hiring. Only in such a situation depreciation at the higher rate of 40 per cent or 50 per cent as the case may be, is to be allowed under the relevant entry in Appendix I to the Rules."

Further, the Central Board of Direct Taxes, *vide* Circular No. 652, dated June 14, 1993, has clarified that the higher rate of 40 per cent in case of lorries, *etc.*, plying on hire shall not apply if the vehicle is used in a non-hiring business of the assessee. This circular cannot be read out of its context to deny higher appreciation in case of leased vehicles when the actual use is in hiring business. Perhaps, it was meant that when the actual use of the vehicle is in hire business, it is entitled for depreciation at a higher rate."

The substantial question of law is accordingly answered in favour of the appellant-assessee and against the respondent-Revenue.

The second aspect relates to computation of book profits under Section 115JB of the Act. The substantial question of law framed in the two appeals on the said aspect read as under:-

"(1) Whether on the facts and in the circumstances of the case the Tribunal in computing book profit under Section 115JB was justified in confirming the addition of ₹9,80,00,000/- transferred to the special reserve pursuant to the provisions of Section 45-IC of the Reserve Bank of India Act, 1934 under Clause (b) of the Explanation to Section 115JB?" (Assessment year 2006-07)

(Assessment year 2007-08)

"(2) Whether on the facts and in the circumstances of the case the Tribunal in computing book profit under Section 115JB was justified in confirming the additions of :-

(a) ₹16,00,00,000/- transferred to the special reserve pursuant to the provisions of Section 45-IC of the Reserve Bank of India Act, 1934; and

(b) ₹18,66,00,000/- transferred to the debt redemption reserve, both under Clause (b) of the Explanation to Section 115JB?"

The contention of the appellant-assessee is two-fold. Firstly, the reserve created as per the mandate of Section 45-IC of the Reserve Bank of India Act, 1934, is in fact a liability and not a reserve. The appellant-assessee does not have any title over the reserve and, therefore, it is a case of diversion of income at source.

In the present case, the legislature in express, lucid and categorical terms has stipulated that the book profit shall be increased by the amounts carried to any reserve. The word "any" refers to all kinds of reserves and encompasses all types and categories without exception. The legislature did not stop and has thereafter used the expression "reserve by whatever name called". Only reserves specified in section 33AC of the Act have to be excluded. The reserve, which is required to be created under section 45-IC of the Reserve Bank of India Act, 1934 , is out of the profits earned by a non-banking financial institution. It is not an amount diverted at source by overriding title.

Further, the Supreme Court observed: "The application of the doctrine of diversion of income by reason of an overriding title is quite inapposite. The doctrine applies when, by reason of an overriding title or obligation, income is diverted and never reaches the person in whose hands it is sought to be assessed."

Applying the above facts in the present case, the special reserve under Section 40IC of the Reserve Bank of India Act, 1934 of Rs.9,80,00,000/- and Rs.16,00,000/- relating to Assessment Years 2006-07 and 2007-09, respectively was not on account of specific or known liability to repay. It is not the case of charge on profits. It was only appropriation of profits after they had been earned. It is not an expense.

In view of the aforesaid reasoning, the said substantial question of law was answered against the appellant-assessee and in favour of the respondent-Revenue and to that extent, the appeal was dismissed.

LD/63/56

Commissioner of Income-tax

vs.

Engineers India Ltd.

FEBRUARY 26, 2015 (DEL)

Refund of excess self-assessment paid by assessee would not be eligible for interest under Section 244A as the provisions of Section 244A would not apply thereto

The Income Tax Appellate Tribunal had passed an order dated 30.09.2011 in respect of the respondent (assessee) for assessment year 2006-2007, holding the assessee to be entitled to interest under Section 244A on the excess self-assessment tax paid under Section 140A, thereby upholding the order dated 20.09.2010 to such effect passed by Commissioner of Income Tax (Appeals) that had been preferred by the assessee against the order dated 31.12.2008 of the Assessing Officer (AO) under Section 143(3).

In this case, the following substantial question of law was formulated:-

> "Whether on the facts and circumstances of case, the Income Tax Appellate Tribunal was correct in law in confirming the order of the CIT(A) that the assessee shall be entitled to interest under Section 244A of the Income Tax Act, 1961 in respect of excess self assessment tax paid? "

As per the intimation processed u/s 143(1) of the Act, the appellant was eligible to claim a refund of ₹78,123,227/- and such refund was on account of excess self assessment tax paid by the appellant. As per the provisions of Section 244A of the Act, where tax is paid by way of tax collected at source or by way of advance tax or treated as paid u/s 199 of the Act, no interest shall be payable if the amount of refund is less than ten per cent on the regular assessment. Further, the provisions of Section 244A(1)(b) of the Act provides that the interest shall be payable even if the amount is less than 10 per cent as the *proviso* only applied to Section 244A(1)(a)of the Act. Accordingly, the law is well settled for the refund on account of excess payment of self assessment tax that the assessee is entitled to interest.

The plea of the assessee was upheld by CIT (Appeals) with observations to the following effect:-

> "On perusal of the aforesaid *proviso* of Section 244A(1)(a), it is evident that, in case the amount of refund is less than ten per cent of tax determined in the regular assessment, interest is not payable if the refund is on account of TDS, TCS or advance tax. However, in case refund is due to the excess payment of self assessment tax, such restriction is not

applicable. Accordingly, CIT (Appeals) allowed interest u/s 244A of the IT Act to the appellant on refund due on account of payment of excess self assessment tax."

The revenue took out appeal before the ITAT. ITAT has filed to appreciate that from a bare perusal of Section 244A of the Income-tax Act, it becomes clear that assessee is not entitled for interest on excess self assessment tax. Unlike other Sections *i.e.* 115WJ (fringe benefit tax), 206C (tax collected at source), 199 (advance tax), Section 140A (self assessment tax) does not find any mention in Section 244A. The assessee is thus not entitled for any interest on self assessment tax."

The Revenue relies on decisions of Supreme Court in *Sandvik Asia Limited vs. Commissioner of Income Tax & Ors.*- the issue for consideration and determination by the Supreme Court was as to whether the assessee is entitled to be compensated by the Revenue for delay in payment of the amount due to the assessee. Since there was an inordinate delay in that case on the part of the Revenue in refunding the amount, the court held that the assessee was entitled to be adequately compensated by way of interest for the delay in payment of the amount "lawfully due to the assessee which are withheld wrongly and contrary to the law".

Per contra, the respondent-assessee refers to *Commissioner of Income Tax vs. Sutlej Industries Ltd.*, (2010) 325 ITR 331 (Delhi) to argue that the interest on self-assessment tax paid under Section 140A, to the extent it has been found to be excess is admissible since such payment would fall within the expression "refund of any amount". Finance Act, 2005 amended Section 244A(1) to provide that "Where refund of any amount becomes due to the assessee under this Act, he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest thereon calculated."

In Commissioner of *Income Tax vs. Sutlej Industries Ltd.*, the question of law related to interpretation

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