Commissioner Of Income Tax, Bhopal vs M/S. Shelly Products And Another on 8 May, 2003

Equivalent citations: AIR 2003 SUPREME COURT 2532, 2003 AIR SCW 2719, 2003 TAX. L. R. 777, (2003) 129 TAXMAN 271, (2003) 8 ALLINDCAS 871 (SC), 2003 (4) SCALE 674, 2003 (2) LRI 327, 2003 (5) ACE 489, 2003 (5) SCC 461, 2003 (3) SLT 698, 2003 (8) ALLINDCAS 871, (2003) 4 JT 528 (SC), (2003) 4 SUPREME 192, (2003) 4 SCALE 674, (2003) 5 INDLD 889, (2003) 261 ITR 367, (2003) 175 TAXATION 434, (2003) 181 CURTAXREP 564

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Bench: N. Santosh Hegde, B.P. Singh

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           CASE NO.:
Writ Petition (civil)  7501-7504 of 1997

PETITIONER:
Commissioner of Income Tax,  Bhopal

RESPONDENT:
M/s. Shelly Products and another

DATE OF JUDGMENT: 08/05/2003

BENCH:
N. SANTOSH HEGDE & B.P. SINGH

JUDGMENT:
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J U D G M E N T B.P. SINGH, J.

These four appeals by special leave have been preferred by the revenue impugning the common judgment and order of the High Court of Madhya Pradesh at Jabalpur dated July 9, 1996 in M.C.C. Nos. 368 - 369 of 1993 and Misc. Petition Nos. 2750 of 1984 and 3773 of 1987.

The question that arises for consideration in these appeals is whether on the facts and in the circumstances of the case the respondents are entitled to the refund of income-tax paid by them by way of advance tax and self-assessment tax in the event of assessment framed being nullified by the Tribunal on the ground of jurisdiction and there being no possibility of framing a fresh assessment. The High Court by its common judgment and order has answered the question in the affirmative rejecting the submission of the department that the refund must be limited to income-tax paid pursuant to order of assessment, other than income tax paid by way of advance tax and self-assessment tax.

The facts of the case, in so far as they are relevant for the disposal of these appeals, are not in dispute. The respondents herein are the assessees and the assessment year in question is 1976-1977. The assessments were framed by the Income Tax Officer on August 23, 1980 under section 143(3) read with section 144B of the Income-Tax Act (hereinafter referred to as 'the Act') against which the assessees went in appeal to the Commissioner (Appeals). The appellate Commissioner by his order dated February 3, 1981 partly allowed the appeal on other points but rejected the contention urged on behalf of the assessees that the assessments made by the Income Tax Officer Indore were without jurisdiction. The assessees went up in appeal before the Income Tax Appellate Tribunal. Their appeals were allowed by the Tribunal by its order dated January 14, 1984 which held that the assessment orders passed by the I.T.O. (SIC)-1, Indore on August 23, 1980 were ab initio void on the ground that I.A.C. Assessment Indore had no jurisdiction to deal with the pending reference under section 144(N)(i) of the Act and to issue directions to the Income Tax Officer (SIC)-1, Indore under section 144B of the Act.

The revenue sought a reference to the High Court which was refused, but by order dated April 21, 1989 the High Court directed the Tribunal to refer the questions of law in both references for its decision. Accordingly the Tribunal framed the questions of law and referred the matter to the High Court for its opinion. The said reference is still pending before the High Court.

In the meantime the assessees filed applications before the Assessing Officer for refund of the tax paid pursuant to the Tribunal's order dated January 14, 1984. The Income Tax Officer by his letter dated August 13, 1984 informed the assessees that the refund may be given for taxes paid on regular assessments which have since been annulled excluding tax paid in advance and on self assessments. The second application for refund of tax was also not granted and the Income Tax Officer by his order dated August 21,1987 informed the assessees that the refund has been withheld till the reference application filed in the case of M/s. Shelly Products Bhopal is decided by the High Court. Appeals were preferred to the Appellate Commissioner, which were allowed by orders dated February 3, 1981 and the Income Tax Officer was directed to refund to the assessees the advance tax and self assessment tax also. The Tribunal on appeal affirmed the order of the Appellate Commissioner, but at the instance of the revenue framed the following question of law for decision of the High Court :-

> "Whether on the facts and in the circumstances of the case the ITAT was justified in directing the Assessing Officer to refund the tax with interest paid by the assessees on the income returned."

The two references were numbered as M.C.C. Nos. 368-369 of 1993 which were heard by the High Court alongwith Misc. Petition Nos. 2750 of 1984 and 3773 of 1987 challenging the orders passed by the Income Tax Officer refusing to refund the tax as prayed for by orders dated August 13, 1984 and August 21, 1987. All these four matters were disposed of by the High Court by a common judgment which is impugned in these appeals.

The High Court has answered the reference in the affirmative and in favour of the assessees. The revenue has, therefore, challenged the correctness of the decision of the High Court.

Two main submissions have been advanced before us on behalf of the revenue. Firstly it was contended that when an order of assessment is set aside or annulled and no further assessment can be made, the assessee would be entitled only to the amount of tax paid consequent to final assessment, and not the tax paid by him by way of advance tax or self-assessment tax. This is on the premise that the tax paid by the assessee under these two heads are paid by the assessee admitting his liability in law to pay the tax. Secondly it was contended, the amendment of section 240 with effect from April 1, 1989 by addition of proviso (b) is declaratory of the law, and will apply to the assessments in question. The assessees are, therefore, not justified in contending that only with effect from the date on which the law was amended, the department is entitled to retain the tax paid by way of self assessment or advance tax. On the other hand the assessees supported the judgment of the High Court and contended that even the tax paid by way of advance tax or self-assessment tax become refundable if the revenue authorities failed to pass an order of assessment as required by law. On the failure of the authorities to pass an assessment order no income is chargeable to tax in the year in question. The revenue has, therefore, no right to retain even the tax deposited by the assessee by way of advance tax or self- assessment tax. Such retention or collection of income-tax is unauthorized and in the teeth of Article 265 of the Constitution.

In the impugned judgment the High Court has taken the view that under the scheme of the Income Tax Act the amount of tax is recoverable under section 156 by way of demand only when the liability of tax has been assessed by the competent authority. If the assessment has been made and any amount has been found to be due from the assessee, then alone the law confers a power on the assessing authority to recover the same. It is only after the assessment has been made in accordance with the provisions laid down in the Act, then and then alone, the liability to recover tax arises. Thus once the order of assessment is quashed, there remains no alternative for the assessing authority but to return the amount of tax or any self assessment tax paid by the assessee because the first and foremost condition for recovery of the amount is that there should be an assessment and an amount of tax due against the assessee under the provisions of the Act. The recovery of tax or retention of any amount of tax paid by the assessee becomes unauthorized in the absence of an order of assessment. The mere fact that the assessee is obliged under the law to file return and pay advance tax or self-assessment tax, makes no difference, and only after a proper assessment is framed, he may be assessed to the liability of tax. The High Court did not agree with the view expressed by a Full Bench of the Gujarat High Court in Saurashtra Cement and Chemical Industries Ltd. Vs. Income Tax Officer : [1992] 194 ITR 659 which held that there was no warrant for holding that the entire amount of income-tax which is properly chargeable under the Act and is collected by the department in accordance with the provisions of the Act should be refunded on the failure to make a regular assessment. The High Court agreed with the view expressed by the Madhya Pradesh High Court in Gulabchand Motilal vs. C.I.T. : [1994] 205 ITR 62 and R. Gopal Ramnarayan vs. Third Income Tax Officer : [1980] 126 ITR 369 in which a Single Judge of the Karnataka High Court took the contrary view. The High Court also agreed with the principle laid down by the Punjab and Haryana High Court in Deep Chand Jain vs. I.T.O. : [1984] 145 ITR 676.

The High Court was further of the view that the amendment to section 240 by the Direct Tax Laws (Amendment) Act, 1987 with effect from April 1, 1989 which introduced the proviso, has brought about a change in the legal position, but the proviso is applicable only with effect from April 1, 1989

and would not apply to the assessments in question.

We may at the threshold observe that in the reported decisions the assessees have laid considerable emphasis on Article 265 of the Constitution of India which provides that no tax shall be levied or collected except by authority of law. The arguments advanced before the High Courts proceed on the premise that the tax paid by way of advance tax or self-assessment tax acquires the character of income tax only after an order of assessment is made in accordance with the provisions of the Income Tax Act. As a corollary, if no order of assessment is made in accordance with the provisions of the Act, the retention of the tax paid shall be in breach of the provisions of Article 265 of the Constitution of India.

Before considering the authorities cited at the Bar it may be useful to notice the relevant provisions of the Income Tax Act which have a bearing on the question which falls for consideration. Section 4 of the Act, as it stood during the relevant period, provided as follows :-

> "4. (1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year or previous years, as the case may be, of every person :
>
> Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.
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> (2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act."

Sub-section (2) of section 4 in terms provides for payment of tax in advance or deduction of tax at source as provided under the Act. For the deduction of tax at source and payment of tax in advance, the relevant provision is section 190. It provides that notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction at source or by advance payment, as the case may be, in accordance with the provisions of Chapter XVII. This is without prejudice to the charge of tax on such income under the provisions of sub-section (1) of section 4. Section 192 enjoins on any person responsible for paying any income chargeable under the head "Salaries" to deduct income tax on the amount payable at the average rate of income tax at the time of making payment. Section 199 provides that any deduction made in accordance with the provisions of sections 192 to 194 and other sections mentioned therein and paid to the Central Government shall be treated as payment of tax on behalf of the person from whose income the deduction was made and credit shall be given to him for the amount so deducted. Section 202 clarifies that the power to levy tax under the aforesaid sections is without prejudice to any other mode of recovery. Under section 205 where tax is deductible at the source, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from his

income.

Under section 207 tax is payable in advance in accordance with the provisions of section 208 to 219 except in the cases of incomes specified therein. Such advance tax is payable during the financial year in accordance with the provisions of section 208. Section 209 and 210 provide for computation of advance tax and for payment of advance tax by the assessee. Section 211 prescribes the instalments of advance tax and the due dates.

The aforesaid provisions, therefore, clearly spell out the scheme of the Act which provides for deduction of tax at source and advance payment of tax. On such deduction or deposit of tax credit is given to the assessee for the amount so deducted or paid as advance tax.

Section 139 of the Act mandates every person to furnish a return of the total income during the previous year if the income is chargeable to tax. Section 140A provides for self-assessment and lays down that any tax payable on the basis of any return required to be furnished under section 139 or section 148, after taking into account the amount of tax, if any, already paid, shall be paid by the assessee together with interest payable under any provision of the Act for any delay in furnishing return or for any default or delay in payment of advance tax. Thus an assessee who has defaulted or delayed payment of advance tax or the instalment of advance tax, is liable to pay interest. The provisions of the Act, therefore, cast an obligation on the assessee to pay the advance tax by making the deposits in instalments as required by the provisions of the Act, and after taking into account the tax paid in advance, to pay the balance of the tax and interest, if any payable, while filing the return of income. Similar is the provision with regard to the income tax deducted at source. It cannot, therefore, be contended that the deposit of advance tax or deduction of income tax at soruce is not authorised by law in view of the clear mandatory provisions of the Act. The question is whether the charge itself fails if there is no computation of total income by the assessing officer and whether as a consequence thereof the tax paid as advance tax or self-assessment tax or tax deducted at source, cannot be retained by the department without violating the provisions of Article 265 of the Constitution of India.

We shall first refer to the judgment of the Full Bench of Gujarat High Court in Saurashtra Cement and Chemical Industries Ltd. (supra). In that case also it was argued on behalf of the assessee that the liability to pay the tax did not crystallize nor was it quantified unless a regular assessment was made under the Act. Payment by way of advance tax, tax deducted at source and tax paid by way of self-assessment were ad hoc payments to be adjusted ultimately when the regular assessment was made under section 143. Even though a liability to tax arises under section 4 of the Act, no liability to pay the tax arises until the regular assessment is made. If regular assessment is not possible for any reason, the charge itself would fail since the tax payable cannot be quantified or determined and consequently no recovery can be made. Any retention of such amount collected towards the tax, which could not be ultimately determined, would violate the provisions of Article 265 of the Constitution of India since such a recovery would become a levy and collection of tax without the authority of law. On this reasoning, it was argued that the entire amount so collected must be refunded.

The Full Bench of the Gujarat High Court after a detailed consideration of the provisions of the Act held that in view of the elaborate provisions made in the Act for deduction of tax at source and advance payment of tax, it could not be said that the tax has been levied and collected without authority of law and in violation of Article 265 of the Constitution of India whether it is deducted or paid in accordance with the provisions of the Act. These provisions eloquently indicate that the liability to pay tax is not dependent on the regular assessment being made by the assessing officer, and where returns are filed under section 139 on the basis of which tax is payable, the assessee is made liable to pay such tax together with interest payable for any delay in furnishing the return or any default or delay in payment of advance tax. After referring to section 234B pertaining to interest for default in payment of advance tax and more particularly to Explanation 1, it observed :-

> "It would, thus, be clear that, not only the liability to be subjected to tax arises under the charging section 4, but the liability to pay tax also arises immediately on determination of the rates of taxes with effect from the date on which such rates are made applicable and the liability to pay crystallizes in the context of such rates when the total income is computed in accordance with the provisions of the Act. On filing of the return under section 139, wherein such total income is indicated, section 140A, providing for self-assessment, comes into operation and it becomes obligatory on the part of the assessee to discharge his liability which has arisen to pay the tax together with the interest that may be payable for late furnishing of returns. The tax payable on the basis of the returns filed by the assessee is treated as "assessed tax". It is not at all made dependent on any regular assessment being made though, in the event of regular assessment, the amount paid under sub-section (1) of section 140A is deemed to have been paid towards the regular assessment. Therefore, by no stretch of imagination, can the tax paid and collected under section 140A be described as a mere ad hoc or interim payment which can be said to fail in the absence of a regular assessment, as was sought to be contended on behalf of the petitioners".

It further held that when the assessee files his return under section 139 and pays tax under section 140A by way of self- assessment claiming allowance of the advance tax or tax deducted at source in the amount of tax payable according to him, there is clear admission of the liability that has arisen under the Act to pay the tax on the total income as is computed by the assessee and duly quantified in the return. The procedure of assessment by the Income-tax Officer is essentially to check the computation of total income done by the assessee. Therefore the acceptance of the proposition canvassed by the assessee would produce a startling result where though, according to the assessee, he is liable to pay the tax as per the return filed by him and has in fact paid the tax in accordance with the provisions of section 140A of the Act and the Assessing Officer did not find it necessary to assess the total income since he may have accepted the return on expiry of the period during which the regular assessment is required to be made, the entire tax amount, admittedly payable under the Act would be required to be refunded. The scheme of the Act clearly indicates that the liability to pay income tax chargeable under section 4(1) of the Act does not depend upon the assessment being made by the Income-tax Officer but depends on the enactment by any Central Act prescribing rate or rates for any assessment year. Thus, as soon as the rates are prescribed by the appropriate legislation, the liability to pay tax arises on the total income which is to be computed by the assessee

in accordance with the provisions of the Act. By the process of self-assessment, the assessee is required to pay tax on the basis of his return and such tax is treated as assessed tax. Therefore, until it is disturbed by any further regular assessment, it remains as tax levied and collected in accordance with law. Having considered all aspects of the matter the Full Bench concluded :-

> "We are, therefore, of the view that, on failure of a regular assessment being made within the time prescribed or in the event of annulment of the assessment order pursuant to which any further demand is required to be made under section 156, no consequence of refund of the entire tax collected according to the total income shown in the returns filed by the assessee can ensue and such tax which is collected on the basis of the return filed by the assessee remains a valid and legal recovery in accordance with the provisions of the said Act and there is no question of any violation of Article 265 of the Constitution of India in respect of the tax so recovered on the basis of the total income shown by the assessee in his return."

So far as the amendment to section 240 is concerned, the Full Bench of Gujarat High Court rejected the contention of the assessee that the proviso to section 240 brought in by way of amendment could not be given retrospective effect. It was held that section 240 even as it stood before the addition of the proviso, made the refund of any amount becoming due as a result of an order passed in appeal or other proceeding under the Act subject to other provisions in the Act. There is no indication in section 240 as it stood prior to the addition of the proviso that the entire amount of tax which was properly chargeable under the Act was required to be refunded. Clearly, therefore, the provision contained in clause (b) of the proviso to section 240 only makes explicit what was always implicit, namely, to refund the amount which exceeded the tax which was properly chargeable under the Act. In sum and effect it was held that clause (b) of the proviso to section 240 which was brought in by amendment with effect from April 1, 1989 was only clarificatory of the law.

We may at this stage observe that clause (a) of the aforesaid proviso has been held to be clarificatory by this Court in Commissioner of Income-Tax vs. Chittoor Electric Supply Corporation and another : [1995] 212 ITR 404 (S.C.).

A learned Judge of the Madhya Pradesh High Court in Chandra Mohan vs. Union of India and others: [2000] 241 ITR 484 followed the principle laid down by the Full Bench of Gujarat High Court in Saurashtra Cement and Chemical Industries Ltd. (supra) and held that the assessee having filed his return and paid the taxes, even if no order of assessment was passd within the time provided under the Act, the taxable income shown in the return filed by the petitioner shall be binding on him unless he files a revised return claiming some non-taxable income and on that basis refusing the liability of tax payment. The assessee was, therefore, not entitled to refund of the tax paid. The learned Judge distinguished the decisions in R. Gopal Ramnarayan (supra) of Karnataka High Court and Deep Chand Jain (supra) of Punjab and Haryana High Court on the ground that the principles laid down therein were not applicable to the facts of the case.

A learned Judge of the Kerala High Court in E. Philip Joseph vs. Income-Tax Officer and another : [1998] 234 ITR 846 followed the Full Bench of the Gujarat High Court. In that case there was no

dispute as to the refund of tax which was levied on the income added by the Income-tax Officer at the time of regular assessment. The dispute was only with regard to the refund of tax on the income returned as per the self-assesment. It also appears from the report that the assessment framed by the Assessing Officer was set aside in appeal by the Commissioner of Income-tax who set aside the additions made by the Income-tax Officer and thereafter no fresh assessment was made pursuant to the appellate order. The assessee made a representation before the Commissioner whereafter the Income-tax Officer passed an order on the basis of the directions issued by the Commissioner of Income-tax. As against the said order the assessee filed a revision petition before the Commissioner and the Commissioner finally passed an order under section 264 of the Act which was impugned by the assessee before the High Court. The learned Judge held that the setting aside of the regular assessment did not mean that the self-assessment made under section 140A had been set aside. Even if the regular assessment is declared to be void, it has no effect on the self-assessment made under section 140A. The direction to refund the tax paid on regular assessment does not mean that the tax paid along with the return under section 140A shall be refunded, because the payment of tax under self- assessment is on the admitted income returned by the assessee. When tax has been paid on the admitted income, even if the income added by the Income-tax Officer by way of addition in the regular assessment has been set aside in appeal or revision, the assessee has no legal right to claim refund of the tax so paid because what has been set aside is not the self-assessment but the regular assessment.

Counsel For the revenue drew our attention to certain observations made by this Court in Commissioner of Income-Tax vs. Chittoor Electric Supply Corporation and another (supra). In that case the question which arose for consideration by this Court was whether a claim for refund arose where an assessment order was set aside and a fresh assessment which was directed to be made was pending when the application for refund was made. This Court held that refund became due only upon making the fresh assessment and refund could not be claimed after the earlier assessment was set aside and proceedings for fresh assessment were taken pursuant to the direction of the appellate authority. In such a case it must be held that during the pendency of the proceedings for fresh assessment it could not be said that any amount of refund had become due to the assessee in respect of that assessment year because the proceeding was still pending and, therefore, it was idle to talk of any amount or any refund becoming due to the assessee in respect of that assessment year. The judgment of the Full Bench of Gujarat High Court in Saurashtra Cement and Chemical Industries Ltd. (supra) has been referred to in the judgment of this Court but this Court was primarily concerned with proviso (a) to section 240 which was brought in by amendment with effect from April 1, 1989. This Court held inter alia that the said proviso was merely clarificatory of the law. Counsel for the respondent sought to rely upon certain observations made in the judgment but we cannot give any benefit of those observations to the revenue because this Court has itself made it clear that what has been held in that judgment is confined to a case where an appellate or other authority under the Act sets aside or cancels the assessment and directs a fresh assessment to be made i.e. a situation contemplated by clause (a) of proviso to section 240. It has been clearly stated that this Court did not propose to express any view as to what would be the position where the situation is different.

In R. Gopal Ramnarayan (supra) a learned Judge of the Karnataka High Court dealt with a case where the order of assessment framed by the Income-tax Officer was annulled by the Income Tax Appellate Tribunal, whereafter the assessee made a demand for refund of the tax paid. The demand was rejected by the Income-tax officer compelling him to file a writ petition under Article 226 of the Constitution of India for direction to the Income- tax Officer to refund the tax paid by the petitioner for the relevant assessment year on the ground that there being no assessment order made in accordance with law the tax retained by the Income-tax officer was without the authority of law and was liable to be refunded under section 240 of the Act. It was held that the payment of advance tax was a mere convenience of collection which was liable to be adjusted against the actual tax due when the final assessment order was made. It is well settled that no tax can be levied except with the authority of law as enjoined by Article 265 of the Constitution of India. After noticing section 240 of the Act the learned Judge held :-

> "As is apparent from the language of the section, it is very wide in its scope and application. There is a mandate on the revenue to make the refund even without a demand. That, in turn, leads me to the irresistible conclusion that if a demand is properly made then it certainly cannot be refused. Section 240 of the Act provides for refund of any amount that becomes due to the assessee. It cannot be restricted to excess payment only. It is possible in many instances that for a good number of reasons the whole of the advance tax paid may become refundable, if the assessee is ultimately found not liable to pay tax after the assessment proceedings are completed. Such a possibility cannot be ruled out. If that be the position, the mere fact of the compulsion of payment under section 210 of the Act, as contended by Shri Rajasekhara Murthy, cannot be accepted to mean that, by the operation of that section, that tax had been levied, assessed and collected. Assessment is the final process which completes the levy of tax under section 4 of the Act."

The learned Judge went on to hold that the effect of annulment of assessment order is that there is no assessment at all in the eye of law and in such a case the revenue could not take a stance that even without an assessment order in existence, the assessee for the relevant assessment year, was liable to tax under section 4 of the Act. Until and unless the quantum of tax is determined in accordance with the procedure laid down by law, the revenue has no right to collect the tax and if tax by way of advance tax or on self-assessment or tax deducted at source has been paid by the assessee, the same cannot be retained contrary to the requirements of Article 265 of the Constitution.

A learned Judge of Punjab and Haryana High Court in Deep Chand Jain's case (supra) agreed with the view taken by the Karnataka High Court in R. Gopal Ramnarayan's case (supra) and observed :-

> " Computation of total income and tax thereon envisages the final determination by the assessing authority in terms of sections 143 or 144 of the Act. The assessee, who, for instance, had paid tax on the basis of self- assessment under a wrong assumption that the entire income shown therein was liable to tax, is entitled to assert before the assessing authority when the case is taken up for assessment that either whole or part thereof was not liable to form part of the taxable income and that the tax paid on the

> basis of self- assessment was not liable to be paid, and the assessing authority, if it finds that either the whole income or part thereof was not liable to be included in the taxable income, is bound to give effect to the claim of the assessee and compute the total income of the assessee in accordance with law and not accept self- assessment regarding his total income."

It was further observed that advance tax collected from the assessee had to be related to a final assessment order and since no final assessment order could be passed, the same having become barred by limitation, the collection of the advance tax itself became illegal and so also its retention.

Counsel for the respondents placed reliance on Smt. Shantibai vs. Commissioner of Income-Tax : [1984] 148 ITR 49. We find that this judgment is of no assistance to the respondents since that judgment relates to the appellability of an order refusing to refund the tax paid on the basis of provisional assessment. Such a question does not arise in these appeals.

Reliance placed on Gulabchand Motilal vs. Commissioner of Income-tax and others : [1994] 205 ITR 62 is also not of much assistance to the respondents since no reasons have been given in that judgment. Moreover the question which arises for consideration in these appeals was not urged or considered in that case.

The decision of a Division Bench of the Delhi High Court in Aroon K. Basak vs. Union of India and others : [1999] 236 ITR 931 is in respect of a claim where the assessee himself did not claim refund of the tax which was legitimately payable by him and which he had paid. Refund was claimed only of that amount which was disputed by the assessee and which amount had been deducted at source by his employer. That was also a case where no fresh assessment could be made as it was barred by limitation.

In the cases in hand the question is only with regard to the refund of tax paid by way of advance tax or self-assessment tax which was paid by the assessees themselves admitting their liability to pay such tax. The asseessees do not contend that the tax of which refund is claimed was not chargeable or payable, but claim refund on the sole ground of the failure of the authorities to pass an order of assessment.

Having considered the authorities on the subject, we find ourselves in agreement with the view of the Gujarat High Court in Saurashtra Cement and Chemical Industries Ltd. (supra). The question that falls for our consideration in these appeals is whether on the failure or inability of the authorities to frame a regular assessment after the earlier assessment is set aside or nullified, the tax deposited by an assessee by way of advance tax or self assessment tax, or tax deducted at source is liable to be refunded to the assessee, since its retention by the revenue would result in breach of Article 265 of the Constitution which prohibits the levy or collection of any tax except by authority of law. The revenue does not dispute the position that if an assessment is framed, which is later nullified in appeal or revision or other proceedings, any amount paid by way of income tax pursuant to the order of assessment, over and above the advance tax and self-assessment tax is undoubtedly refundable under section 240 of the Act. The only dispute is with regard to the refund of the advance

tax and self-assessment tax which is paid by the assessee on his own assessment of his liability and is based on the return of income filed by him. According to the revenue, the tax so paid represents the admitted liability of the assessee, and failure or inability to frame another assessment after the earlier assessment is set aside or nullified in appropriate proceedings, does not entitle the assessee to claim refund because to this extent the assessee has admitted his liability to pay tax in accordance with law. The tax liability is computed on the basis of the relevant Fiance Act laying down the rate or rates at which the tax is payable and provides for other matters relevant to the computation of tax. Thus the tax is required to be paid in advance by the assessee, even before assessment is made, and he himself is required to compute his liability having regard to the rates and exemptions applicable. Thus, both the levy and collection of tax is in accordance with law.

We find considerable force in the submission of the revenue and it must be upheld. We have earlier noticed the scheme of the Act. Section 4 of the Act creates the charge and provides inter alia for payment of tax in advance or deduction of tax at source. The Act provides for the manner in which advance tax is to be paid and penalises any assessee who makes a default or delays payment thereof. Similarly the deduction of tax at source is also provided for in the Act and failure to comply with the provisions attracts the penal provisions against the person responsible for making the payment. It is, therefore, quite apparent that the Act itself provides for payment of tax in this manner by the assessee. The Act also enjoins upon the assessee the duty to file a return of income disclosing his true income. On the basis of the income so disclosed, the assessee is required to make a self-assessment and to compute the tax payable on such income and to pay the same in the manner provided by the Act. Thus the filing of return and the payment of tax thereon computed at the prescribed rates amounts to an admission of tax liability which the assessee admits to have incurred in accordance with the provisions of the Finance Act and the Income Tax Act. Both the quantum of tax payable and its mode of recovery are authorized by law. The liability to pay income tax chargeable under section 4(1) of the Act thus, does not depend on the assessment being made. As soon as the Finance Act prescribes the rate or rates for any assessment year, the liability to pay the tax arises. The assessee is himself required to compute his total income and pay the income tax thereon which involves a process of self-assessment. Since all this is done under authority of law, there is no scope for contending that Article 265 is violated.

What then is the effect of the failure to make an order of assessment after the earlier assessment made is set aside or nullified in appropriate proceedings ? If the assessing authority cannot make a fresh assessment in accordance with the provisions of the Act it amounts to deemed acceptance of the return of income furnished by the assessee. In such a case the assessing authority is denuded of its authority to verify the correctness and completeness of the return, which authority it has while framing a regular assessment. It must accept the return as furnished and shall not in any event raise a demand for payment of further taxes. Accepting the income as disclosed in the return of income furnished by the assessee, it must refund to the assessee any tax paid in excess of the liability incurred by him on the basis of income disclosed. Even if the tax paid is found to be less than that payable, no further demand can be made for recovery of the balance amount since a fresh assessment is barred. In other words, the tax paid by the assessee must be accepted as it is, and in the event of the tax paid being in excess of the tax liability duly computed on the basis of return furnished and the rates applicable, the excess shall be refunded to the assessee, since its retention

may offend Article 265 of the Constitution.

We cannot lose sight of the fact that the failure or inability of the revenue to frame a fresh assessment should not place the assessee in a more disadvantageous position than in what he would have been if a fresh assessment was made. In a case where an assessee chooses to deposit by way of abundant caution advance tax or self- assessment tax which is in excess of his liability on the basis of return furnished or there is any arithmetical error or inaccuracy, it is open to him to claim refund of the excess tax paid in the course of assessment proceeding. He can certainly make such a claim also before the concerned authority calculating the refund. Similarly, if he has by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of income-tax, or is not income within the contemplation of law, he may likewise bring this to the notice of the assessing authority, which if satisfied, may grant him relief and refund the tax paid in excess, if any. Such matters can be brought to the notice of the concerned authority in a case when refund is due and payable, and the authority concerned, on being satisfied, shall grant appropriate relief. In cases governed by section 240 of the Act, an obligation is cast upon the revenue to refund the amount to the assessee without his having to make any claim in that behalf. In appropriate cases therefore, it is open to the assessee to bring facts to the notice of the concerned authority on the basis of the return furnished, which may have a bearing on the quantum of the refund, such as those the assessee could have urged under section 237 of the Act. The concerned authority, for the limited purpose of calculating the amount to be refunded under section 240 of the Act, may take all such facts into consideration and calculate the amount to be refunded. So viewed, an assessee will not be placed in a more disadvantages position than what he would have been, had an assessment been made in accordance with law.

It was contended before us that proviso to section 240 was inserted by an amendment which came into effect from April, 1 1989. Proviso (b) is applicable to the facts of the case under consideration. Section 240 reads as under :-

> "240. 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 Assessing 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 :
>
> Provided that where, by the order of aforesaid, -
>
> (a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment ;
>
> (b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee."

It was submitted that after April 1, 1989, in case the assessment is annulled the assessee is entitled to refund only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee. But before the amendment came into effect the position in law was quite different and that is why the legislature thought it proper to amend the section and insert the proviso. On the other hand learned counsel for the revenue submitted that the proviso is merely declaratory and does not change the legal position as it existed before the amendment. It was submitted that this Court in Commissioner of Income-Tax vs. Chittoor Electric Supply Corporation and another : (supra) has held that proviso (a) to section 240 is declaratory and, therefore, proviso (b) should also be held to be declaratory. In our view that is not the correct position in law. Where the proviso consists of two parts, one part may be declaratory but the other part may not be so. Therefore, merely because one part of the proviso has been held to be declaratory it does not follow that the second part of the proviso is also declaratory. However, the view that we have taken supports the stand of the revenue that proviso (b) to section 240 is also declaratory. We have held that even under the unamended section 240 of the Act, the assessee was only entitled to the refund of tax paid in excess of the tax chargeable on the total income returned by the assessee. We have held so without taking the aid of the amended provision. It, therefore, follows that proviso (b) to section 240 is also declaratory. It seeks to clarify the law so as to remove doubts leading to the courts giving conflicting decisions, and in several cases directing the revenue to refund the entire amount of income-tax paid by the assessee where the revenue was not in a position to frame a fresh assssment. Being clarificatory in nature it must be held to be retrospective, in the facts and circumstances of the case. It is well settled that the legislature may pass a declaratory Act to set aside what the legislature deems to have been a judicial error in the interpretation of statute. It only seeks to clear a meaning of a provision of the principal Act and make explicit that which was already implicit.

Learned counsel for the respondents then relied upon the Circular issued by the Central Board of Direct Taxes dated 23rd January, 1990. The relevant part of Circular contained in paragraph 13.2 thereof is as follows :-

> "13.2 Further, where the assessment had been annulled in appeal, say for want of jurisdiction or for any other technical reason, and such annulment became final, the judicial pronouncement did not permit retention of even the tax due on the basis of the returned income. Several High Courts had held that in such a case even the tax paid by way of tax deducted at source or advance tax and the tax which was due on the basis of the returned income had to be refunded to the assessee. Equity demanded that even where an assessment was annulled for any reason, the liability of the assessee, at least to the extent of tax payable on the basis of the income declared in the return, should remain. To overcome this difficulty and to make the position clear, the proviso to section 240, inserted by the Amending Act, 1987, provides that where the assessment is annulled, the refund shall become due only in respect of the amount, if any, paid in excess of the tax chargeable on the total income returned by the assessee."

(emphasis supplied) The respondents contend that the Circular of the Board is binding upon the authorities of the Income-tax department and, therefore, so far as the income-tax authorities are concerned, they must give to the amendment brought about in section 240 only prospective operation.

We find that paragraph 13.2 of the Circular does not advance the case of the respondents. The Circular only states that some of the judicial pronouncements did not permit a retention of even the tax due on the basis of the returned income and directed the refund of tax deducted at source or advance tax. To overcome this difficulty and to make the position clear, the proviso to section 240 was inserted. A plain reading of the circular also indicates that the Board also took the view that the amendment was clarificatory and that it had become necessary to get over the difficulties posed by the judicial pronouncements directing refund of the entire tax including the advance tax and tax deducted at source, which were payable on the basis of income declared in the return by the aseessee himself. It is, therefore, not necessary for us to consider the larger question as to the extent to which such circulars are binding upon the department. In any event, as submitted by counsel for the appellant, the relevant part of the Circular contains only a statement of fact. There is no instruction, direction or order to the authorities to act in a particular manner. As rightly submitted by him, the statutory provision has to be examined for its true effect and the Circular, in the instant case, is not relevant.

In the result these appeals are allowed. The judgment and order of the High Court is set aside and the question referred in M.C.C. Nos. 368-369 of 1993 is answered in the negative and in favour of the revenue. Misc. Petition Nos. 2750 of 1984 and 3773 of 1987 are dismissed. There shall be no order as to costs.

New Delhi