Commissioner Of Income-Tax vs Chittor Electric Supply Corporation ... on 13 January, 1995

Equivalent citations: AIR 1995 SUPREME COURT 700, 1995 AIR SCW 486, 1995 TAX. L. R. 324, 1995 (2) SCC 430, (1995) 212 ITR 404, (1995) 124 TAXATION 486, (1995) 123 CURTAXREP 583, (1995) 1 SCR 231 (SC), (1995) 1 JT 355 (SC)

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Bench: B.P. Jeevan Reddy, N.P. Singh, Suhas C. Sen

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           CASE NO.:
Appeal (civil)  1413 of 1977

PETITIONER:
COMMISSIONER OF INCOME-TAX

RESPONDENT:
CHITTOR ELECTRIC SUPPLY CORPORATION AND ANR.

DATE OF JUDGMENT: 13/01/1995

BENCH:
B.P. JEEVAN REDDY & N.P. SINGH & SUHAS C. SEN

JUDGMENT:
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JUDGMENT 1995 (1) SCR 231 The Judgment of the Court was delivered by B.P. JEEVAN REDDY, J. This appeal is preferred against the decision of the Andhra Pradesh High Court allowing the writ petition filed by the respondent-assessee and directing the Revenue to pay to the respon-dent interest on the amount of Rs. 84,562 from September 7, 1969 to August 14,1973 at the rate of 6 per cent per annum under Section 244 (1) of the Income-tax Act, as prayed for by the respondent. The respondent is a limited company in liquidation and is represented by its Liquidators. On November 24, 1960, the respondent-company was taken over by the Government. The respondent received compensation therefore which amount was brought to tax by the Revenue. Original assessment was completed on January 31, 1966. The appeal preferred by the respondent was allowed by the Appellate Assistant Commissioner on 6th March, 1969. He set aside the assessment and directed the Income Tax Officer to complete the assessment afresh in the light of the directions given by him. In short, the Appellate Assistant Commissioner directed that the income of the respondent-assessee must be determined under Section 12-B of the Indian Income-tax Act, 1922 and not under Section 10(2) (vii) of the said Act. The respondent filed an appeal before the Tribunal questioning the correctness of the Appellate Assistant Commissioner's Order but it was dismissed on 20th September, 1971. The Income Tax Officer then took up the assessment proceeding and called upon the respondent to furnish certain particulars. The respondent furnished the particulars finally on

13th April, 1973 and the Income Tax Officer completed the assessment on 14th August, 1973. As a result of this assessment, a sum of Rs. 84,562 was found refundable to the respondent. It was refunded in the same month. The respondent laid a claim for interest under Section 244(1) of the Income-tax Act, 1961 for the period commencing on 6th March, 1969 (the date of the Appellate Assistant Commissioner's order) to August, 1973 (the month in which the assessment was finalised pursuant to the remand order and the refund made). The claim was rejected by the Income Tax Officer, against which order the respondent filed a revision before the Commissioner under Section 264 which too was rejected. The Commissioner opined inter alia that the respondent having delayed furnishing the particulars called for, was not justified in asking for interest from the date of the Appellate Assistant Commissioner's order. The assessee then approached the High Court of Andhra Pradesh by way of a Writ Petition No, 5167 of 1975 which has been allowed as aforestated.

Mr. Murthy, learned senior advocate for the Revenue, assailed the correctness of the view taken by the High Court on the ground that it is in the teeth of the express provision of Sections 240, 244(1), 237 and 243(1). He invited our attention to the proviso to Section 240 added by Direct Tax Laws (Amendment) Act, 1987 with effect from April 1, 1989, submitting that it was merely clarificatory of the pre-existing position. Counsel placed strong reliance upon the Full Bench decision of the Gujarat High Court in Saurashtra Cement and Chemical Industries Ltd. v. Income-Tax Officer, (194) I.T.R. 659 which inter alia held that the aforesaid proviso is merely clarificatory. He also disputed the correctness of the decision of the Allahabad High Court in Purshottam Dayal Varshney and Another v. Com- missioner of Income-Tax, U.P. and Others, (94) I.T.R. 187 which was relied upon by the assessee before the High Court as well as before us. Learned counsel also brought to our notice that the Orissa High Court has followed the Allahabad view in Grantha Mandir v. Commissioner of Income-Tax, (172) LT.R. 287 which, he submitted, is equally unsustainable.

For a proper appreciation of the contention raised herein, it is appropriate to notice a few provisions of the Act. Sections 237, 240 and 244(1) read as follows :

> "Refunds.
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> 237. If any person satisfies the (Assessing) Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess.
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> Refund on appeal, etc,
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> 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 :
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> [Provided that where, by the order 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.] (The proviso was added by Direct Tax Laws (Amendment) Act, 1987 w.e.f.

April 1, 1989).

Interest on refund where no claim is needed.

244, (1) Where a refund is due to the assessee in pursuance of an order referred to in section 240 and the [Assessing] 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 [fifteen] 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."

(Prior to April 1, 1971 the period was six months. There has been a change in the rate of interest also.) Section 240 says that where as a result of any appellate or other order passed under the Act any amount becomes due to the assessee the Assess-ing Officer shall have to refund if even without the assessee making a claim therefore. Section 244(1), which carries forward the idea contained in Section 240, says that where a refund is due to the assessee pursuant to an order referred to in Section 240 and the Assessing Officer does not grant the refund within a period of three months from the end of the month in which said order is passed, the Central Government shall pay to the assessee interest on the amount of refund from the date immediately following the expiry of the period of three months till the date on which refund is granted at the prescribed rate Section 237, which is a general provision relating to refunds, says that if any person satisfies the Assessing Officer that the tax paid by him for any assessment year exceeds the amount properly chargeable under the Act, he shall be entitled to a refund of the excess. What is significant is that Section 240 speaks of an amount becoming due as a result of any order passed in appeal or other proceeding under the Act, Section 244(1) is also to the same effect. It says, where a refund is due to the assessee pursuant to an order referred to in Section 240, The question to be answered is whether any amount became due to the assessee in this case when the Appellate Assistant Commissioner passed his order. Obviously not. According to Section 237, a refund be- comes due when the amount paid by the assessee is in excess of "the amount with which he is properly chargeable under this Act for that year". Unless a fresh assessment is made, it would not be possible to say what amount is properly chargeable and until that is determined, question of refund may nut arise. In this case, Appellate Assistant Commissioner merely directed a fresh assessment on a different basis. In cases where the assessment is set aside and a fresh assessment is directed to be made, the tax determined on such assessment may be either more or less than the tax determined in the original (set aside) assessment. Therefore, no one can say on the date of such appellate order that any amount has become due to the assessee - or for that matter, to the Revenue. Take a case where the tax

determined as payable under the fresh assessment is found to be more than the tax paid under the original assessment, is the Revenue entitled to interest on such amount from the date of the appellate order? Certainly not. According to Section 220(2), interest is payable by the assessee on the amount due only after the service of the notice of demand pursuant to such fresh assessment. It is true that language of Section 220(2) and Section 244(1) is different, but a consideration of both the concepts helps in placing a proper interpretation on Section 240 and Section 244(1). Be that as it may, the question has yet to be answered, whether refund of any amount has become due to the assessee as a result of the appellate order in this case? One answer, given by the Allahabad High Court in Purshottam Dayal Varshney and Another v. Commissioner of Income-Tax, U.P. and Others, (94) I.T.R. 187 and followed by some other High Courts is that once the assessment is set aside, the entire tax paid becomes refundable (and that on a fresh assessment being made and a demand notice served, it again becomes due to the Revenue). We find this answer inconsistent with the language of Section 240, Section 237 and the scheme of the enactment. To illustrate what we say, take a case where as a result of fresh assessment, tax determined payable is more than the tax determined tinder the original assessment; this tax becomes due only when a notice of demand is served on the assessee under Section 220 but meanwhile, the assessee has been paid back the tax and the interest thereon; after the fresh assessment and service of demand notice, he only pays back the amount (along with the extra tax determined under the fresh assessment) but keeps the interest -a situation both illogical and incongruous. The other probable answer may be that in such an eventuality, tax paid over and above the tax payable as per the return becomes refundable and not the whole amount of tax paid - a situation assumed in the Board Circular No, 551 dated 23.1,1990 issued explaining the purpose of inserting the proviso to Section 240. We are unable to appreciate the basis of this supposition as well which does not take into account the general principle of refund embodied in Section 237, viz., a person is entitled to refund of only that amount which is in excess of the amount with which he is properly chargeable under the Act for that year. Another argument urged was that it is the appellate order that gives rise to the right to refund and that the assessment order to be made pursuant thereto is merely a matter of calculation, a ministerial act. This argument is ex facie unacceptable where a fresh assessment is directed to be made, it is an assessment - not a mere calculation or a ministerial act. Now take this very case. An assessment was originally made on 31.1.1966 and certain tax was determined as payable by the respondent-assessee. Evidently, the respondent paid it up. On appeal, the Appellate Assistant Commissioner set aside the order of the Income Tax Officer altogether on the ground that the very basis adopted by the Income Tax Officer is wrong and that the taxable income should be determined not under Section 10(2)(vii) but raider Section 12-B of the 1922 Act. It is the respondent who filed an appeal to the Tribunal against the orders of the Appellate Assistant Commissioner and after the dismissal of that appeal*, the Income Tax Officer completed the assessment on 14th August, 1973 and promptly refunded the excess amount in the same month. In the circumstances of this case, it cannot be said that any amount, became due as a result of the Appellate Assistant Commissioner's order. To repeat, the Appellate Assistant Commissioner's order did not determine the tax payable by the assessee. It merely directed the Income Tax Officer to make a fresh assessment in accordance with its directions. The amount due or the amount refundable to the assessee, as it may be called, was ascertained only on the making of a fresh assessment on 14.8.73. It may also be noticed that the Appellate Assistant Commissioner's order had the effect of reviving the assessment proceedings which had yet to be completed and which proceedings were in fact completed on 14.8.73. When the assessment

proceedings are still pending, it is idle to talk of any amount or any refund becoming due to the assessee in respect of that assessment year, particular-ly in the light of Section 237. In this sense, clause (a) of the Proviso to Section 240, added with effect from 1.4.89, is merely clarificatory. The said clause says that where 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.

Indeed, in such a case, a further question may arises - according to the interpretation contended for by the assessee. If the date of the appellate order is the relevant date, which appellate order it should be? In this case, assessee-respondent himself filed an appeal before the Tribunal and because of the said appeal, it is obvious. The fresh assessment could not be taken up soon after the AAC's order.

In Purshottam Dayal Varshney (94) I.T.R. 187, the Allahabad High Court has taken the view that "if an assessment order is set aside, the notice of demand becomes ineffective and the tax already paid under such a notice of demand becomes refundable. If a fresh assessment is made, the tax determined as a result of the fresh assessment order again becomes due and payable only after a fresh notice of demand is served upon the assessee." With respect to the learned Judges, we are unable to agree with the said reasoning, which does not notice or take into account the principle of Section 237. As stated above, where an assessment is set aside and a fresh assessment is directed to be made, the assessment must be deemed to be still pending, which has to be completed. In such a case, therefore, question of amount becoming refundable does not arise. It arises only when a fresh assessment is made and the amount properly chargeable under the Act is ascertained.

We find that Thornmen, J. (as he then was of the Kerala High Court) took the same view as we have in New Woodlands v. Commissioner of Income-Tax (Central), Madras, (138) I.T.R. 796. the learned Judge dissented from the view of the Allahabad High Court, But it appears that on appeal, Thornmen, J's. decision was reversed by a Bench in New Woodlands Hotel v. Commissioner of Income-Tax and Others, (188) I.T.R. 137 following the decision of Allahabad High Court and the decision of the Bombay High Court in Commissioner of Income-Tax, Bombay City-II v. S.C Shah, (137) I.T.R.

287. For the reasons given by us hereinabove, we cannot agree with the decision of the Division Bench of Kerala High Court in New Woodlands Hotel.

We must make it clear that what we have held herein 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 the subsequently inserted proviso (clause (a)) to Section

240. We do not propose to express any opinion as to what would be the position where the situation is different. We may also mention that we have not referred to or taken into account sub-Section (1-A) of Section 244 - or, for that matter, to the second proviso thereto upon which an argument can possibly be built up - for the reason that here the tax amount was paid prior to October 1, 1975 and also because the applicability of that sub- Section turns upon the language employed therein, viz., "such amount or any part thereof having been found in appeal or other proceed-ing under this Act to

be in excess of the amount which the assessee is liable to pay as tax.....".

Lastly, Mr. Javali submitted that having regard to the fact that the amount concerned herein is very small and also because the company is already under liquidation for a number of years, this Court may not interfere with the orders of the High Court even though it may declare the law correctly. But this is a case where as a result of our order, the assessee is not being asked to refund any amount which has already been received by it; it would only be disabled from claiming any further amount from the Revenue. In such a case, we see no reason to adopt the course suggested by learned counsel, assuming that such a course is permissible in law, upon which aspect we express no opinion.

For the above reasons the appeal is allowed, the Judgment of the High Court is set aside and the order of the Commissioner of Income-tax is restored. No costs.