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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Mar-14-2006

Reported in : (2006)9SOT254(Mum.)

Appellant : Jamnadas Morarjee and Co.

Respondent : Dy. Cit, Central Circle-34

Judgement :

The only ground raised by the assessee in this appeal is whether the learned Commissioner (Appeals) was justified in rejecting the claim of refund of Rs. 7.50 lakhs by upholding the order of assessing officer.

The brief facts as noted by the learned Commissioner (Appeals) are, that the assessee-firm had been assessed for the block period ending 4-12-1997 vide order of DCIT, Central Circle-34, Mumbai, dated 29-2-2000. The block assessment resulted in a demand of Rs. 19.99 lakhs. There was also a demand of Rs. 1.59 lakhs against the assessee in respect of assessment year 1997-98. The assessing officer, vide letter dated 11-8-2000 required the assessee to pay 50 per cent of the demand pending disposal of first appeal. The subject of this letter was written as "Arrears of taxes for block period and for assessment year 1997-98 - reg." In partial compliance with this direction he assessee paid Rs. 1.50 lakhs per month for 5 months starting from 19-10-2000.

The aggregate amount so paid by February 2001 came to Rs. 7.50 lakhs.

However, the challans by which the said payments were made specified the assessment year as 1997-98. Thus, from these challans it is clear that the payments made pertained to assessment year 1997-98 instead of to the block period. Subsequently, the Commissioner (Appeals), C-VI, Mumbai, vide order dated 14-3-2001 set aside order of block assessment and deleted the addition of Rs. 1,48,569. The remaining addition of Rs. 27 lakhs was restored to assessing officer for fresh adjudication after verification. The assessing officer, vide order dated 18-3-2003, assessed at "NIL" income. As a result thereof, the payment of Rs. 7.50 lakhs made by the assessee presumably against the demand for the block period became refundable. The assessing officer gave effect to the order of Commissioner (Appeals) but did not give credit for Rs. 7.50 lakhs, as according to him, such payments were made for assessment year 1997-98 and not against block assessment. The assessee furnished an indemnity bond and applied to the assessing officer for refund vide letters dated 11-9-2003 and 15-9-2003. The assessee cited several decisions in support of its claim. The assessing officer vide his order No. ACIT/CC.34/JMCo/03-04, dated 14-1-2004 rejected the claim of the assessee as under: "The claim of refund is time-barred in terms of section 239(c) to the Income Tax Act. It is further seen that the payment has been made against the regular demand but there were no tax arrears outstanding for assessment year 1997-98 when the payment has been made by you. In view of the above facts, I am constrained to reject your application for issue of refund and also interest accrued thereon." Aggrieved by the order of the assessing officer, the assessee filed an appeal before the learned Commissioner (Appeals), before whom, it was contended that refund had arisen as a result of appellate order and, therefore, was required to be issued to the assessee automatically in terms of section 240 of the Income Tax Act, 1961 ('Act'). According to the assessee, the payment of Rs. 7.50 lakhs was actually made against the demand of block assessment but by mistake assessment year 1997-98 was mentioned in the challan instead of the block period. Accordingly, the refund due to the assessee could not be denied. The learned Commissioner (Appeals) agreed with the assessee that mention of assessment year 1997-98 on the challan was apparently a mistake.

Despite the same, he was of the view that payment of Rs. 7.50 lakhs was made for assessment year 1997-98. He agreed with the view of the assessing officer

that the claim of refund could not be allowed for the reasons given by him. Proceeding further, it was mentioned by him that it could not be said that amount mistakenly paid was lost to the assessee in view of the provisions of article 265 of the Constitution of India, which provides that no tax can be collected except by authority of law. However, he expressed the view that the learned Commissioner (Appeals) does not have the powers as vested in the High Court in writ jurisdiction under article 226 of the Constitution of India. He, however, observed that in a situation like this, the remedy lies under section 119(2)(b) of the Act under which assessee could apply to the Board for necessary relief. In view of the same, the appeal of the assessee was dismissed. Aggrieved by the same, the assessee has preferred the appeal before the Tribunal.

The learned counsel for the assessee has submitted before us that the payment was made under the directions of the assessing officer and, therefore, any amount of excess tax paid by the assessee is liable to be refunded. He further drew our attention to various papers in the Paper Book to point out that there was demand of tax pertaining to block assessment as well as assessment year 1997-98 and the assessing officer while granting instalments mentioned the subject as "Arrears of taxes for block period and for assessment year 1997-98 - reg.". In the order of instalments, it was not mentioned as to which instalment related to block period and which instalment related to assessment year 1997-98.

The payment was composite for block assessment as well as assessment year 1997-98 but by mistake only assessment year 1997-98 was mentioned in the challans. Since the demand under the block assessment as well as regular assessment for assessment year 1997-98 had been deleted in appeal or in the order pursuant to the finding of the learned Commissioner (Appeals), the entire payment of Rs. 7.50 lakhs became due to the assessee, which must be refunded to the assessee under section 237 or 240 of the Act. It was contended by him that the appeal provisions should be construed liberally and the Tribunal should adopt equitable construction of the appeal provisions and the technicalities, if any, should not come in the way of rendering of justice. On the other hand, the learned D.R. has strongly relied on the orders of the assessing officer as well as the learned Commissioner (Appeals) by contending that the claim under section 237

of the Act was barred by limitation by virtue of section 239(2)(c) of the Act. It was also submitted by him that the order under section 240 of the Act is not appealable, as held by the learned Commissioner (Appeals), Rival submissions of the parties have been considered carefully. At the outset, it may be mentioned that article 265 of the Constitution of India provides that no tax shall be collected except by authority of law. Therefore, where the tax has been collected or paid by the assessee which is found to be in excess, then the assessee is entitled to refund. This principle has been recognized by the Legislature while enacting the Income Tax Act, 1961 by enacting the provisions relating to refund and interest thereon in Chapter XIX section 237 of the Act which is relevant, for disposal of this appeal, provides as under: '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 " A bare reading of the above provision reveals that the assessee shall be entitled to a refund under this Chapter if the assessing officer is satisfied that the amount of tax paid by assessee exceeds the amount of tax chargeable under this Act. Even the assessing officer has not disputed the claim of the assessee, in the present case but the same has been denied merely on the ground that the claim was time-barred in view of sub-section (c) of section 239(2). On appeal the claim of the assessee was also rejected on the ground that relief could be granted only by the Board under section 119(2)(b) of the Act. That means, the right of appeal to the assessee was denied by the learned Commissioner (Appeals). In these premises, two questions arise for our consideration namely - (z) whether the claim of the assessee is time-barred under section 239(1)(c) of the Act and (it) whether the order of the assessing officer rejecting the claim of the assessee is appealable or not.

First we take up the issue regarding maintainability of the appeal before the learned Commissioner (Appeals). No doubt, there is no inherent right of appeal and the right of appeal can be exercised only where it is conferred by the statute, as held by the Hon'ble Supreme Court in the case of CIT v. Ashoka Engg. Co. (1992) 194 ITR 645(SC).

It is also the settled law that the provisions relating to appeal should be construed in a reasonable, practical and in a liberal manner, as held by the Hon'ble Supreme Court in the aforementioned case. The right of appeal against the orders of the assessing officer has been conferred upon the assessee by virtue of section 246A. Sub-section (1)(i) of this section provides that an order made under section 237 is appealable and the appeal would lie to Commissioner (Appeals). There is no fetter on such right of appeal and, therefore, if the case of assessee falls within the scope of section 237, then the order of assessing officer would be appealable before the Commissioner (Appeals). Section 239 of the Act on which reliance is placed by the revenue, does not provide any fetter on the aforesaid right of appeal of the assessee. Sub-clause (c) of section 239(2) only provides, that the claim of refund in respect of an assessment year commencing from 1-4-1969 or any other subsequent year shall not be made unless such claim is made within one year from the last date of the concerned assessment year. The fetter provided in the aforesaid clause is in respect of the claim to be made by the assessee and it has no impact on the right of appeal conferred on the assessee under section 246A(i).

Therefore, in our opinion, the learned Commissioner (Appeals) could not dismiss the appeal of the assessee on that ground.

The next question for our consideration is whether the assessing officer could deny the claim of the assessee in view of section 239(2)(c) of the Act. It would be appropriate to reproduce the relevant portion of section 239 as under: '239. (1) Every claim for refund under this Chapter shall be made in the prescribed form and verified in the prescribed manner.

(2) No such claim shall be allowed, unless it is made within the period specified hereunder, namely: (c) where the claim is in respect of income which is assessable for any other assessment year, (one) year from the last day of such assessment year." There is no dispute that assessment year under consideration falls under clause (c) of section 239(2). The bare reading of the above provisions shows that every claim for refund is required to be made in prescribed format and verified in the prescribed manner. In view of this provision, rule 41 has been enacted which provides that such claim shall be made in Form No. 30 which shall

be accompanied by a return prescribed under section 139 unless the claimant has already made such a return to the assessing officer. In Form No. 30, the assessee is required to state the total income of the previous year, the total income-tax chargeable in respect of such income and the total amount of income-tax paid or treated as paid under section 199. If the provisions of section 239 are read along with the rule 41 and Form No. 30, it is evident that the nature of the claim under section 239 related to the amount of excess tax paid which was ascertainable at the time of filing of the return and consequently it does not contemplate refund which could be ascertained thereafter. Certainly it is clear that Form No. 30 cannot be filed where the refund is ascertainable after the assessment or by virtue of appeal order passed after the expiry of one year from the end of the assessment year. Such refunds would fall under section 240 of the Act. Though section 239 refers to every claim for refund under the Chapter which includes refund under section 240 also but, in our opinion, refund under section 240 cannot be considered under section 239 for two reasons - (i) the appeal effect is practically and usually given after the expiry of one year from the end of assessment year and (ii) no claim is required to be made by assessee and it is the duty of assessing officer to allow refund to assessee. So, the limitation period provided in clause (c) of section 239(2) cannot be applied where refund is to be allowed under section 240 of the Act.

Since such provisions should be construed in a reasonable, practical and in a liberal manner, we are of the view that the limitation period in the aforesaid section can be applied only where the refund becomes due to the assessee before the expiry of one year from the end of relevant assessment year. For example, Advance Tax and amount of TDS may exceed the liability to pay tax on his total income and assessee may like to claim refund even before completion of assessment. In such cases, section 240 would not apply. However, assessee may claim the refund by filing Form No. 30 as per rule 41. It is in such cases that claim in Form No. 30 has to be made within the limitation period under section 239(2)(c). However, where the refund is to be allowed by virtue of assessment or an appellate order, the same, in our opinion, would be outside the scope of section 239(2)(c). If the contention of the revenue is accepted, then the assessing officer, on his whims and fancy, would be able to refuse refund allowable under section

240, which can never be the intention of the Legislature. Hence, it is held that limitation period under section 239(2)(c) would not apply to refunds allowable under section 240 of the Act.

At this juncture, a question arises whether refund allowable under section 240 falls within the scope of section 237, since appeal is provided only against an order under section 237. The perusal of the provisions of section 237, which have already been extracted by us, shows that assessee is entitled to refund of the excess amount if it is shown that amount of tax paid by him exceeds the amount with which he is properly chargeable to tax. The language used by the Legislature is of widest import and takes within its scope all types of refund.

Refunds falling either under section 239 or section 240 would fall within the scope of section 237. By enacting sections 239 and 240, the Legislature has made distinction between two types of refund ie., (i) where assessee is required to claim and (ii) where it is the duty of assessing officer to allow the refund irrespective of the claim of assessee. If the assessee does not make any claim in Form No. 30 and waits till the assessment, the amount paid in excess would be allowed as refund on assessment or after appeal effect. Such claim cannot be denied merely on the ground that it was not made within the limitation period prescribed under section 239. If the assessee is entitled to refund under section 240 and assessing officer refuses to grant for any reasons, the order of assessing officer shall still be within the scope of section 237 and, therefore, in our opinion, any order of assessing officer refusing to grant the refund would be applicable.

In the present case, the assessment year involved is 1997-98 and the assessment was completed on 30-3-2000, which resulted in demand of Rs. 1,59,502. This shows that the assessment order was passed after the expiry of one year from the date of assessment year. At that time, there was another demand of Rs. 19,99,689 arising from the block assessment order dated 29-2-2000. The assessee had represented before the assessing officer for stay of demand and the CIT ordered to pay 50 per cent of the demand relating to block assessment and assessment year 1997-98 by paying instalment of Rs. 2 lakhs per month from October, 2002. In partial compliance of the said order, the assessee had paid monthly instalment

of Rs. 1.50 lakhs commencing from October 2002. The total amount paid to the assessee was Rs. 7.50 lakhs by the end of February, 2001. The additions in the block assessment were deleted by virtue of appellate order dated 14-3-2001 and pursuant to the order giving effect to the appellate order which was passed by assessing officer on 18-3-2003. This has resulted in refund of Rs. 7.50 lakhs..The learned Commissioner (Appeals) has agreed in his order that assessment year 1997-98 was wrongly mentioned by mistake but the payment still related to assessment year 1997-98. Be that as it may, it is clear from the record that the payment itself was made after the expiry of one year from the assessment year and, therefore, the question of complying the provisions of section 239(2)(c) was practically impossible. As already expressed by us, such types of refunds do not fall within the scope of section 239. Even though such refund is allowable under section 240 but still it is a refund within the scope of section 237 which is a general provision encompassing all types of refund allowable under Chapter XIX. At this stage, it would be appropriate to refer the decision of the Hon'ble Calcutta High Court in the case of N. Chakravorti & Co. v. UOI(2002) 257 ITR 101(Cal), wherein it has been held that the interest claimed by the assessee payable under sections 243 and 244 of the Act is a component of refund to be made under section 237. If that is the legal position, then refund under section 240 would also be refund under section 237.

In view of the above discussion, it is held that the claim of assessee for refund falls within the scope of section 237 and is not hit by the limitation period prescribed under section 239(2)(c) of the Act and consequently the order of the assessing officer denying the claim of refund was appealable order and the learned Commissioner (Appeals) was not justified in refusing to grant the refund to the assessee. The order of the learned Commissioner (Appeals) is set aside and the assessing officer is directed to allow the refund of the assessee after verification. However, it is clarified that there is no material before us whether demand for assessment year 1997-98 was deleted or not. The assessing officer shall verify this fact and then issue refund voucher to the assessee of the excess amount of tax paid by him.