IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SRI P.K. BANSAL, VP AND SRI MAHAVIR SINGH, JM

ITA No. 99/Mum/2016

(A.Y:2008-09)

The Deputy Commissioner of Income Tax, Circle-2(2)(1), Mumbai Office of the DCIT-2(2)(1)	Vs.	**State Bank of Saurashtra** (Now merged with SBI) Financial Reporting & Taxation Department 3rd Floor, Corporate Centre, State Bank Bhavan Madam Cama Road, Nariman Point, Mumbai-400 021
Appellant	..	**Respondent**
PAN No.AACCS9880R		

Revenue by	:	MN Swamy, DR
Assessee by	:	C Naresh, AR

Date of hearing: 23-10-2017 **Date of pronouncement :** 27 -10-2017

O R D E R

PER MAHAVIR SINGH, JM:

This appeal by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-5, Mumbai, [in short CIT(A)] in appeal No. IT-133/14-15, dated 09-11-2015. The Assessments were framed by the Deputy Commissioner of Income Tax, Circle 2(2), Mumbai (in short DCIT or AO) for the assessment year 2008-09 vide order dated 26.03.2010 under section 143(3) of the Income Tax Act, 1961(hereinafter 'the Act'). Under dispute is the order of the AO rectifying the assessment order under section 154 of the Act dated 28-05-2014.

2. The only issue in this appeal of Revenue is against the order of CIT(A) directing the AO to adjust the refund granted first towards interest and consider the balance against tax amount refundable. According to the Revenue, this will lead to excess amount of interest. For this Revenue has raised following ground: -

> *"2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the Assessing Officer to adjust the refund granted, first towards interest amount refundable and thereafter consider the balance against tax amount refundable which will lead to excess grant of interest, contrary to the practice followed by the department and the intention of the legislation."*

3. Briefly stated facts are the original assessment was completed under section 143(3) of the Act vide order dated 26-03-2010 for the relevant AY 2008-09. Subsequently, the assessee moved rectification application dated 10-04-2014 and requested for allowing rebate under section 88E of the Act and for grant of balance amount of refund. The AO rectified the mistake vide order under section 154 of the Act dated 28-05-2014 but refund granted to the assessee was not adjusted first against interest and hence, assessee carried the matter before CIT(A), who allowed the claim of the assessee vide Para 6 as under: -

> *"6. The appellant in his submissions stated that refund granted to the appellant should be first adjusted against the interest refund due and thereafter against the tax refund due. This as on account of the reason that when there tax and interest due from the appellant, the Department always adjusts the payments made first against the interest and thereafter against the tax due. On the*

> *same principle, refund granted should also be adjusted. In support of its claim, the applicant relied on the decision of Delhi High Court in the case of India Trade Promotion Organization v/s CIT (361 ITR 646). Following the order of the Delhi High Court, AC is directed to compute part of the refund granted first against the refund due and then tax due. Hence, ground of appeal is allowed."*

Aggrieved, now Revenue is in second appeal before Tribunal.

4. Before us, the learned Counsel for the assessee stated that the issue is squarely covered in favour of assessee and against Revenue by the decision of Hon'ble Supreme Court in the case of Union of India Vs. Tata Chemicals Ltd. (2014) 363 ITR 658 (SC) and also by Delhi High court decision in the case of India Trade Promotion Organization vs. CIT (2014) 361 ITR 646 (Del.) and the same was followed by the Co-ordinate Bench decision in the case of Union Bank of India Vs. ACIT (2016) 72 taxmann.com 348 (Mumbai-Trib.) wherein it is held that while granting refund in pursuance to appeal effect order, the amount of refund granted earlier should be adjusted first against interest on earlier refund and thereafter balance amount should be adjusted against principal component of tax in refund granted earlier, on which assessee is entitled to get interest under section 244A of the Act. The Tribunal has considered the issue vide paras 3.4 to 3.10 as under: -

> *"**3.4** We have gone through the facts of this case and submissions made by both sides, provisions of law as well as judgments placed before us. It is noted that the only issue to be decided by us is that while granting the refund in pursuance to the appeal effect order, whether the amount of refund granted earlier should be adjusted first against the interest*

component of the earlier refund and thereafter the balance amount should be adjusted against the principal component of tax in the refund granted earlier order OR vice-versa as has been done by the AO. It is noted that this issue is not coming for the first time before the Tribunal as the same has arisen for A.Ys. 1988-89, 2001-02 & 2005-06. Copies of the orders were placed before us and it was contended by the Ld. Counsel that the Tribunal had already decided this issue in favour of the Tribunal therefore, before proceeding further we find it appropriate to first reproduce and discuss the reasoning given by the Tribunal in earlier years. The relevant part of order dated 23.06.2014 is reproduced hereunder for the sake of ready reference:

"4. Undisputedly for A.Y. 1988-89 the assessee is entitled to refund of Rs. 14.07 crores as per assessment order and interest payable thereon works out to Rs. 1.58 crores; thus total refund due is Rs. 15.65 crores. The Assessing Officer granted refund of Rs. 12.03 crores. The dispute between the Assessing Officer and the assessee is with regard to adjustment of refund; according to the assessee refund should first be adjusted against interest payable and only the balance amount shall be adjusted against tax refundable and in this process the balance refund due would work out to Rs. 3,52,28.442/- on which the assessee is entitled to interest u/s. 244A of the Act whereas the Assessing Officer calculated the balance refund clue at Rs. 2,03,99,541/-(tax component) and Rs. 1,58,28,901/-(interest component). Reason for such calculation

was that according to the Assessing Officer no interest is payable on interest due in which event, even if there is substantial delay in interest payable, the assessee can be made to wait unendingly without payment of interest. Though, before the Assessing Officer as well learned CIT (A), the assessee's claim of interest u/s. 244A is not properly focused but sum and substance of the assessee's case before us is that in the event of adjustment of refund against interest due to the assessee tax refund due shall work out to Rs. 3.62 crores on which the assessee would be entitled to get interest u/s. 244A of the Act. In this regard the assessee relied upon the order of Hon'ble Delhi High Court in the case of India Trade Promotion Organisation v. CIT (361 ITR 646) wherein the Court observed that under Explanation to section 140A(1) of the Act, when an assessee is duty bound to pay the outstanding tax, amount paid by the assessee shall first be adjusted against interest payable and the balance shall be adjusted against tax payable, the same procedure needs to be followed in respect of refund due to the assessee i.e., the amount shall first be adjusted towards interest payable and balance, if any, shall be adjusted towards lax payable (in the instant case tax refundable to the assessee).

5. Learned counsel, appearing on behalf of the assessee, pleaded accordingly. On the other hand learned Departmental Representative submitted that the assessee is not entitled to interest on interest. However with regard to the plea of the assessee that ii does not amount to payment of interest on

interest but only adjustment of the refund from the Revenue against interest component first and thereafter against tax component, in which event u/s. 244A assessee is entitled to interest on the tax component, learned Departmental Representative could not place any decision contrary to the decision of Hon'ble Delhi High Court cited by learned counsel for the assessee.

6. We have carefully considered the rival submissions. As rightly pointed out by the assessee Hon'ble Delhi High Court rightly explained that the amount refunded by the Revenue has to be adjusted towards interest payable to the assessee and the balance, if any, shall be adjusted towards tax. On this principle there is no contrary decision placed before us, we therefore agree, with the plea of the assessee and direct the Assessing Officer accordingly."

***3.5** From the perusal of the above, it is noted by us that the Tribunal has relied upon the judgment of Hon'ble Delhi High Court in the case of India Trade Promotion Organisation (supra), wherein it was inter-alia held that in a situation where only part amount is refunded by the department, then payment of interest on the balance amount due from the department to the assessee, on a particular date, does not amount to payment of interest on interest. Their lordships, taking support from the judgment of Hon'ble Supreme Court in the case of CIT v. HEG Ltd. [2010] 324 ITR 331/189 Taxman 335, observed as under:*

'14. Matter was taken by the Revenue before the Supreme Court in the case of HEG Limited and the SLP was granted and civil appeal was registered. The Supreme Court thereupon answered the question against the Revenue in the following words:-

Therefore, this is not a case where the assessee is claiming compound interest or interest on interest as is sought to be made out in the civil appeals filed by the Department.

The next question which we are required to answer is - what is the meaning of the words "refund of any amount becomes due to the assessee" in Section 244A? In the present case, as stated above, there are two components of the tax paid by the assessee for which the assessee was granted refund, namely TDS of Rs. 45,73,528 and tax paid after original assessment of Rs. 1,71,00,320. The Department contends that the words "any amount" will not include the interest which accrued to the respondent for not refunding Rs. 45,73,528 for 57 months. We see no merit in this argument. The interest component will partake of the character of the "amount due" under Section 244A. It becomes an integral part of Rs. 45,73,528 which is not paid for 57 months after the said amount became due and payable. As can be seen from the facts narrated above, this is the case of short payment by the Department and it is in this way that the assessee claims interest under Section 244A of the Income-Tax Act. Therefore, on both the afore-stated grounds, we are of the view that the assessee was

entitled to interest for 57 months on Rs. 45,73,528/-. The principal amount of Rs. 45,73,528 has been paid on December 31, 1997 but net of interest which, as stated above, partook of the character of "amount due" under Section 244A."

15. A reading of the aforesaid passage from the decision of the Supreme Court in HEG Limited (supra) indicates that it would be incorrect and improper to regard payment of interest when part payment is made as interest on interest. What has been elucidated and clarified by the Supreme Court is that when refund order is issued, the same should include the interest payable on the amount, which is refunded. If the refund does not include interest due and payable on the amount refunded, the Revenue would be liable to pay interest on the shortfall. This does not amount to payment of interest on interest. An example will clarify the situation and help us to understand what is due and payable under Section 244A of the Act. Suppose Revenue is liable to refund Rs. 1 lac to an assessee with effect from 1st April, 2010, the said amount is refunded along with interest due and payable under Section 244A on 31st March, 2013, then no further interest is payable.

However, if only Rs. 1 lac is refunded by the Revenue on 31st March, 2013 and the interest accrued on Rs. 1 lac under Section 244A is not refunded, the Revenue would be liable to pay interest on the amount due and payable but not refunded. Interest will not be due and payable on the amount refunded but only on the amount which

remains unpaid, i.e, the interest element, which should have been refunded but is not paid. In another situation where part payment is made, Section 244A would be still applicable in the same manner. For example, if Rs. 60,000/- was paid on 31st March, 2013, Revenue would be liable to pay interest on Rs. 1 lac from 1st April, 2010 till 31st March, 2013 and thereafter on Rs. 40,000/-. Further, interest payable on Rs. 60,000/-, which stands paid, will be quantified on 31st March, 2013 and on this amount, i.e., interest amount quantified, Revenue would be liable to pay interest under Section 244A till payment is made. . . . . '

3.6 *The facts of the case before us are similar in the sense that here also only part amount was refunded in the first phase by the department and when the balance amount was paid by the department in the second phase, the assessee was entitled for interest on the balance amount of refund due. Thus, from the aforesaid observations of Hon'ble Delhi High Court, we can say that it is not a case of payment of interest on interest. Thus, in view of these facts and aforesaid judgments, Ld Counsel contended that Ld. CIT (A) had wrongly applied the judgment of Hon'ble Supreme Court in the case of Gujarat Fluoro Chemicals (supra), since it was not applicable on the facts of this case.*

3.7 *Further, it was also held by Hon'ble High Court that the department ought to follow the same procedure and rules while collecting tax and while issued refunds. We have gone through the*

provisions of section 140A(1); explanation to the aforesaid section provides as under:

"Explanation - Where the amount paid by the assessee under this sub-section falls short of the aggregate of the tax and interest as aforesaid, the amount so paid shall first be adjusted towards the interest payable as aforesaid and the balance, if any, shall be adjusted towards the tax payable."

3.8 *Thus, from the perusal of the above, it is clear that where the amount of tax demanded is paid by the assessee then it shall first be adjusted towards interest payable and balance if any whatever tax payable. Now, if we go through section 244A, we find that no specific provision has been brought on the statute with respect to adjustment of refund issued earlier for computing the amount of interest payable by the revenue to the assessee on the amount of refund due to the assessee. Thus, the law is silent on this issue. Under these circumstances, fairness and justice remands that same principle should be applied while granting the refund as has been applied while collecting amount of tax. The revenue is not expected to follow double standards while dealing with the tax payers. The fundamental principle of fiscal legislation in any civilized society should be that the state should treat its citizens (i.e. tax payers in this case) with the same respect, honesty and fairness as it expects from its citizens. It is further noted by us that Hon'ble Delhi High Court has already decided this issue in clear words which has been followed by the Tribunal in assessee's own case in the earlier years. It is*

further noted by us that assessee is not asking for payment for interest on interest. It is simply requesting for proper method of adjustment of refund and for following the same method which was followed by the department while making collection of taxes. Under these circumstances, we find that judgment of Hon'ble Supreme Court in the case of Gujarat Fluoro Chemicals (supra) is not applicable on the facts of the case before us and thus Ld. CIT (A) committed an error in not following the decisions of the Tribunal of earlier years in assessee's own case as well as judgment of Hon'ble High Court in the case of India Trade Promotion Organisation (supra).

***3.9** Before parting with, we are reminded of a recent judgment of Hon'ble Supreme Court in the case of Union of India v. Tata Chemicals Ltd. [2014] 363 ITR 658/822 Taxman 225/43 taxmann.com 240 wherein Hon'ble Supreme Court has discussed at length about moral and legal obligation of the department to refund the amount of tax collected from the tax payers which was more than the amount actually due as per law, along with interest. Some of the useful observations are reproduced hereunder for the sake of better clarity in deciding the issue before us:*

'37. A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. As per the old section an assessee was entitled for payment of interest on the amount of taxes refunded pursuant to an order passed under the Act, including the order passed in an appeal. In the present fact scenario,

the deductor/assessee had paid taxes pursuant to a special order passed by the assessing officer/Income Tax Officer. In the appeal filed against the said order the assessee has succeeded and a direction is issued by the appellate authority to refund the tax paid. The amount paid by the resident/deductor was retained by the Government till a direction was issued by the appellate authority to refund the same. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorizedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest in as much as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/foreign company.

38. Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing Statute.

Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which ex aequo et bono ought to be refunded, the right to interest follows, as a matter of course.'

3.10 *It is noted from the observations of the Hon'ble Supreme Court that it has been observed that whatever money has been received by the department, it ought to be refunded ex aequo et bono. It is a Latin phrase which means 'what is just and fair' or 'according to equity and good conscience'. Something to be decided ex aequo et bono is something that is to be decided by principles of what is fair and just. A decision-maker who is authorized to decide ex aequo et bono is not bound by legal rules but may take account of what is just and fair. Thus, if we decide the issue before us ex aequo et bono, then it would be decided by the principles of what is fair and just and not necessarily as per strict rule of law. Thus, since the statute itself has already prescribed a particular method of*

adjustment in explanation to section 140A(1), then justice, fairness, equity and good conscience demands that same method should be followed while making adjustment for refund of taxes, especially when no contrary provision has been provided. Under these circumstances and aforesaid discussion, we find that the judicial proprietary demands that order of the Tribunal of earlier years must be followed and therefore we direct the AO to re-compute the amount of interest u/s. 244A by first adjusting the amount of refund already granted towards the interest component and balance left if any shall be adjusted towards the tax component. Thus, with these directions, the appeal of the assessee is allowed."

5. As the issue is squarely covered in favour of assessee, we confirm the order of CIT(A) allowing the claim of the assessee and dismiss the issue of Revenue's appeal.

6. **In the result, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 27-10-2017.

Sd/-	Sd/-
(P.K. BANSAL)	(MAHAVIR SINGH)
VICE PRESIDENT	JUDICIAL MEMBER

Mumbai, Dated: 27-10-2017
Sudip Sarkar /Sr.PS

<u>Copy of the Order forwarded to</u>:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI