

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

[Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member]

I.T.A. No. 1427/Kol/2017
Assessment Year: 1990-91

The Peerless Gen. Fin. & Inv. Co. Ltd.....Appellant
3, Esplanade East
Kolkata - 700 069
[PAN: AABCT 3043 L]

Deputy Commissioner of Income Tax , Circle-3(1), Kolkata..... Respondent

Appearances by:

Shri S.K. Tulsyan, Advocate & Sri S.De, FCA, appeared on behalf of the assessee.
Shri Robin Choudhury, Addl. CIT, DR appearing on behalf of the Revenue.

Date of concluding the hearing : August 23rd, 2018

Date of pronouncing the order : September 28th, 2018

ORDER

Per J. Sudhakar Reddy :-

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals)-17, Kolkata, (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), for the Assessment Year 1990-91.

2. The only issue that arises for consideration is whether the assessee is entitled to claim of interest on the outstanding refund, due to the assessee, which included interest on refund. The case of the assessee is that it is entitled to claim of interest, on the interest which is part of the outstanding refund as it also constitute "amount to be refunded" to the assessee as on 20/03/1993, on which date the demand relevant to the Assessment Year 1992-93, was set off by the Id. Assessing Officer. For this proposition, the assessee relies on the judgment of the Hon'ble Supreme Court in the case of *K. Lakshmanya & Co. v. Commissioner of Income Tax [2017] 399 ITR 657 (SC)* and on the decision of the co-ordinate bench of the Tribunal in the assessee's own case in *DCIT vs. Ms. Peerless General Finance & Investment Co. Ltd. ITA No.50/Kol/2009, order dt. 30/05/2017*. He submitted a paper book running into 54 pages as well as written submissions in support of these contentions. At Annexure-2, to the written submissions,

he provided a revised computation of interest u/s 244A of the Act and refund payable to the assessee as per the ld. Assessing Officer's order.

2.1. The ld. D/R, on the other hand, relied on the order of the ld. CIT(A). He submitted that the ld. CIT(A) has relied on the decision of the Hon'ble Apex Court in the case of *CIT vs. Gujarat Fluoro Chemicals* [2013] 358 ITR 291 and the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Indian Farmer Fertilizer Co-operative*, [2015] 56 taxmann.com 453 (Delhi) and submitted that interest on unpaid interest cannot be granted u/s 244A of the Act.

In reply, the ld. Counsel for the assessee, pointed out that the decision of the Hon'ble Apex Court in the case of *CIT vs. Gujarat Fluoro Chemicals (supra)*, was considered by the Co-ordinate Bench of the Tribunal in the assessee's own case for the Assessment Year 2002-03, cited above. He further submitted that the Hon'ble Jurisdictional High Court has in the assessee's own case in the *Commissioner of Income-tax, Kolkata-I v. Peerless General Finance & Investment Co. Ltd* [2015] 59 taxmann.com 37 (Calcutta), adjudicated the issue in favour of the assessee.

3. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

The Hon'ble Supreme Court in the case of *K. Lakshmanya & Co. v. Commissioner of Income Tax (supra)* has analyzed Section 244A of the Act and held as follows:-

"10. *The present case would fall outside sub-clauses a and aa of this provision and, therefore, fall within the residuary clause, namely sub-clause (b) of Section 244(A).*

The Madras High Court in Needle Industries Pvt. Ltd. case (supra) concerned itself with the position prior to the advent of Section 244A. It found that the expression "refund of any amount" used by Sections 240 and 244 would include not only tax and penalty but interest also. It was, therefore, held that the clear intention of Parliament is that the right to interest will compensate the assessee for the excess payment during the intervening period when the assessee did not have the benefit of use of such money paid in whatsoever character.

11. *The Court held that the result would be that the assessee would be entitled to interest on refund also.*

12. This Court in *Sandvik Asia Ltd.'s case (supra)* set out several questions of law which arose on the facts of that case. We are concerned with questions C and E which read as follows:

"(C). Whether on a proper interpretation of the various provisions of the Act an assessee was entitled to be compensated for the delay in paying to it any 'amount' due to it even if such 'amount' comprised of interest, as had been held by the Delhi and Madras High Courts and hence the impugned judgment was erroneous and ought to be reversed ?

E. Whether the High Court ought to have held that sections 240 and 244 of the Act refer to 'refund of any amount', which phrase clearly includes any amount (including interest) due by the Income Tax department to the assessee, and hence the appellant was entitled to interest on the delay in the payment of amounts due from the Income-tax Department ?"

13. After setting out the relevant statutory provisions, which at that time covered Section 244 and not Section 244(A), and after referring to a number of decisions, the Court ultimately referred to *Needle Industries (P.) Ltd.'s case (supra)* and expressly approved the same. It concluded the aforesaid questions in favour of the assessee as follows:

"In the present appeal, the respondents have argued that the compensation claimed by the appellant is for delay by the Revenue in paying of interest, and this does fall within the meaning of refund as set out in Section 237 of the Act. The relevant provision is Section 240 of the Act which clearly lays down that what is relevant is whether any amount has become due to an assessee, and further the phrase any amount will also encompass interest. This view has been accepted by various High Courts such as the Delhi, Madras, Kerala High Courts etc."

14. In *CIT v. H.E.G. Ltd.* [\[2010\] 189 Taxman 335 \(SC\)](#), this Court was squarely confronted with the meaning of the expression "where refund of any amount become due to the assessee" in Section 244(A)(1). This question was answered as follows:

'5. 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 244-A. 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 244-A of the Income Tax Act. Therefore, on both the aforesaid 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 31.12.1997 but not of interest which, as stated above, partook the character of "amount due" under Section 244-A.'

15. In *Union of India v. Tata Chemicals Ltd.* [\[2014\] 363 ITR 658/222 Taxman 225/43 taxmann.com 240 \(SC\)](#), this Court after going into the object for the enactment of Section 244(A), held:

"Interest payment is a statutory obligation and non- discretionary in nature to the assessee. In tune with the aforesaid general principle, Section 244A is drafted and enacted. The language employed in Section 244A of the Act is clear and plain. It grants substantive right of interest and is not procedural. The principles for grant of interest are the same as under the provisions of Section 244 applicable to assessments before 01.04.1989, albeit with clarity of application as contained in Section 244A.

31. The Department has also issued a Circular clarifying the purpose and object of introducing Section 244A of the Act to replace Sections 214, 243 and 244 of the Act. It is clarified therein, that, since there was some lacunae in the earlier provisions with regard to non-payment of interest by the Revenue to the assessee for the money remaining with the Government, the said section is introduced for payment of interest by the Department for delay in grant of refunds. A general right exists in the State to refund any tax collected for its purpose, and a corresponding right exists to refund to individuals any sum paid by them as taxes which are found to have been wrongfully exacted or are believed to be, for any reason, inequitable. The statutory obligation to refund carries with it the right to interest also. This is true in the case of assessee under the Act."

16. *The above extract would clearly show that a corresponding right exists, to refund to individuals any sum paid by them as taxes which are found to have been wrongfully exacted or believed to be, for any reason, inequitable. The statutory obligation to refund, being non discretionary, carries with it the right to interest, also making it clear that the right to interest is parasitical. The right to claim refund is automatic once the statutory provisions have been complied with.*

However, Mr. K.Radhakrishnan, learned senior counsel appearing for the respondent-Revenue, has strongly relied upon the decision of this Court in Anjum M.H. Ghaswala's case (supra). In this judgment, this Court held that the Settlement Commission was introduced into the Income-tax Act for the purpose of quick settlement of cases before it, so that the tax due to the Revenue gets collected at the earliest. The object of this exercise is not to assist tax evaders. In so holding, this Court held that Section 245(D)(6) being procedural in nature, cannot be used to locate any power to waive interest, if it is not otherwise waived under some other substantive provision in the Income-Tax Act.

17. *Ultimately, this Court arrived at the conclusion that the Commission cannot either waive or reduce interest which is statutorily payable unless there is express power to do so in that behalf. However, while so saying, the Court went on to clarify that the circulars issued pursuant to the powers under Section 119 of the Act, which empower the authorities under the Act to waive or reduce interest, may be availed by the Settlement Commission to waive interest.*

18. *We are of the view that the expression "due" only means that a refund becomes due if there is an order under the Act which either reduces or waives tax or interest. It is of no matter that the interest that is waived is discretionary in nature, for the moment that discretion is exercised, a concomitant right springs into being in favour of the assessee. We are, therefore of view that the C.I.T. (Appeals) and the ITAT were correct in their view and that consequently, the High Court was incorrect in its view that since a discretionary power has been exercised, no concomitant right was found for refund of interest to the assessee.*

19. *The appeals are accordingly allowed and the impugned judgment is set aside."*

3.1. This Bench of the Tribunal in the assessee's own case, in ITA No. 50/Kol/2009, for the Assessment Year 2002-03, order dt. 02/06/2017, had considered a plethora of judgments and held as follows:-

"6. We find that the case laws relied upon hereinabove are very well founded and supports the case of the assessee. We find that the impugned dispute before us is squarely addressed by the co-ordinate bench of Mumbai Tribunal in the case of Union Bank of India vs ACIT reported in (2016) 72 taxmann.com 348 (Mumbai Trib) dated 11.8.2016 which had duly considered the aforesaid decisions and had held 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 assessee 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.....
5.....
6."*

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 demands 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 propriety 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.

4. In the result, the appeal filed by the assessee is allowed.

6.1. Respectfully following the aforesaid co-ordinate bench decision of Mumbai Tribunal which had duly considered the various decisions on the impugned issue, we hold that the assessee indeed is entitled for interest on unpaid interest and accordingly dismiss the grounds raised by the revenue in this regard.

6.2. We also find that the Hon'ble Calcutta High Court vide its order dated 16.1.2015 in assessee's own case for the very same asst year i.e AY 2002-03 had upheld the order of the Id AO dated 22.4.2008 granting interest u/s 244A of the Act . The subsequent rectification proceedings and the consequent appellate orders thereon have been reversed by the Hon'ble Calcutta High Court in assessee's own case. Hence the revenue should not have any grievance in the impugned appeal before us as the Id CITA had addressed the entire issue in the same lines in which the Hon'ble High Court had addressed the issue. In our considered opinion, if at all the revenue is aggrieved against the order of the Hon'ble Calcutta High Court dated 16.1.2015 , they should have preferred Special Leave Petition before the Hon'ble Supreme Court. We feel that the revenue should not be aggrieved by preferring an appeal before us against the order of the Id CITA dated 30.9.2008. Hence the revenue appeal deserve to be dismissed on that count also.

6.3. Hence we hold that the grounds raised by the revenue vide Grounds 1 to 4 deserve to be dismissed for more than reason as stated above.

7. The next issue to be decided in this appeal is as to whether the Id CITA was justified in directing the Id AO to exclude the provision for diminution in value of investments amounting to Rs 29,81,59,433/- and provision for Non-Performing Assets amounting to Rs 19,57,60,485/- while computing the book profits u/s 115JB of the Act, in the facts and circumstances of the case.

7.1. During the course of hearing, the Id AR fairly admitted that the assessee had challenged the retrospective amendment in this regard brought in section 115JB of the Act by way of a Writ Petition before the Hon'ble Calcutta High Court in W.P. No. 1069 of 2010 and the same was dismissed by the Hon'ble Court vide its order dated 3.5.2017. Accordingly, he fairly agreed with the decision of the Id AO in this regard. Hence the Ground Nos. 5 to 7 raised by the revenue are allowed.

8. The Ground Nos. 8 & 9 raised by the revenue are general in nature and does not require any specific adjudication.

9. In the result, the appeal of the revenue is partly allowed."

3.2. Respectfully following the same, we allow these grounds of the assessee. The assessee has given a computation of refund in the Annexure to his written submissions. The Assessing Officer is directed to verify the same and grant refund of the amount, in

accordance with law. No other grounds were argued before us. Hence, though additional grounds were taken, we do not adjudicate the same.

4. In the result, appeal of the assessee is allowed in part.

Kolkata, the 28th day of September, 2018.

Sd/-
[S.S. Godara]
Judicial Member

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 28.09.2018
{SC SPS}

Copy of the order forwarded to:

***1. The Peerless Gen. Fin. & Inv. Co. Ltd
3, Esplanade East
Kolkata - 700 069***

2. Deputy Commissioner of Income Tax , Circle-3(1), Kolkata

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches