

(1987) 12 KL CK 0017
In the High Court Of Kerala
Case No : W.A. No. 412 of 1982

C.J. Zacharia

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 16-12-1987

Acts Referred:

Income Tax Act, 1961 — Section 139(8)
Income Tax Rules, 1962 — Rule 117A

Citation : (1988) 67 CTR 279 : (1988) 173 ITR 632

Hon'ble Judges : M. Fathima Beevi, J; K.S. Paripoornan, J

Bench : Division Bench

Advocate : P.A. Mohammed, for the Appellant; P.K. Ravindranatha Menon, for the Respondent

Judgement

K.S. Paripoornan, J.—The petitioner in O.P. No. 3198 of 1979 is the appellant in this writ appeal. The appeal is from the judgment of a learned single judge dismissing the original petition, negating the plea of the appellant that the imposition of interest u/s 139(8) of the Income Tax Act without notice to the appellant, is illegal.

2. We are concerned with the assessment years 1973-74 and 1974-75. The appellant, an assessee to Income Tax, did not file returns for the above two years, though he was served with notices u/s 148 of the Income Tax Act. The assessments were made u/s 144 of the Act. Interest u/s 139(8) of the Act was levied for both the years as per exhibits P-1 and P-2 assessment orders. A challenge against the levy of interest u/s 139(8)(a) of the Act made before the Commissioner of Income Tax was not successful. The Commissioner of Income Tax dismissed the revisions filed by the assessee as per exhibit P-6 order dated May 24, 1979. In the original petition the appellant challenged exhibit P-4 order refusing to waive the interest levied as also exhibit P-6 order passed in revision. The learned single judge dismissed the original petition. Thereafter, this writ appeal is filed.

3. We heard counsel for the appellant, Mohammed. The sole question argued before us was that before levying the interest u/s 139(8) of the Act, the appellant should have been served with a notice intimating the levy of interest and inviting objections thereto. This has not been done. So exhibit P-1 and exhibit P-2 orders levying interest as also exhibit P-6 order passed in revisions are unauthorised and illegal.

4. Counsel for the appellant placed reliance on the proviso to Section 139(8)(a) of the Act as also Rule 117A of the Income Tax Rules, 1962. We will extract Section 139(8)(a) of the Act along with the proviso, as also Rule 117A of the Income Tax Rules, 1962.

" 139. Return of income.--...(8)(a) Where the return under Sub-section (1) or Sub-section (2) or Sub-section (4) for an assessment year is furnished after the specified date, or is not furnished, then whether or not the Income Tax Officer has extended the date for furnishing the return under Sub-section (1) or Sub-section (2), the assessee shall be liable to pay simple interest at fifteen per cent, per annum, reckoned from the day immediately following the specified date to the date of the furnishing of the return, or, where no return has been furnished, the date of completion of the assessment u/s 144, on the amount of the tax payable on the total income as determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source :

Provided that the Income Tax Officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any assessee under this sub-section. "

"117A. Reduction or waiver of interest payable u/s 139.---The Income Tax Officer may reduce or waive the interest payable u/s 139 in the cases and in the circumstances mentioned below, namely :--

(i) where the return of income is furnished by a person who has been treated u/s 163 as an agent of a non-resident and is assessed in respect of the latter's income ;

(ii) where the return of income is furnished by an assessee whose only source of income during the relevant previous year is a share in the income of an unregistered firm which has been assessed on its total income in respect of that previous year under Clause (b) of Section 183 ;

(iii) where the return of income of a deceased individual is furnished by his legal representative and the legal representative satisfies the Income Tax Officer that he had sufficient cause for not furnishing such return within time ;

(iv) where the return of income has been furnished in pursuance of a notice issued u/s 148 ;

(v) any case in which the assessee produces evidence to the satisfaction of the Income Tax Officer that he was prevented by sufficient cause from furnishing the

return within time :

Provided that the previous approval of the Inspecting Assistant Commissioner has been obtained where the amount of interest reduced or waived, as the case may be, under Clause (iv) or Clause (v) exceeds one thousand rupees. "

5. The proviso to Section 139(8)(a) provides that the Income Tax Officer may, in such cases and in such circumstances as may be prescribed, reduce or waive the interest payable by an assessee. The prescription mentioned in the proviso is contained in Rule 117A of the Income Tax Rules, 1962. It should be stated that the proviso to the sub-section envisages the reduction or waiver of the interest payable by the assessee. So also Rule 117A visualises the reduction or waiver of the interest payable by the assessee. So, the arguments of the appellant's counsel that it is mandatory to serve a notice on the assessee, even before the levy of interest u/s 139(8)(a) of the Act, does not prima facie appear to be justified. Construing Section 139(8)(a) along with proviso with Rule 117A of the Income Tax Rules, we are of the view that though it may be to open the Income Tax Officer to intimate the assessee even before the "levy" is made, it is open to the assessee even after the "levy" is made, to invoke the jurisdiction of the Income Tax Officer under the proviso to Section 139(8)(a) of the Act, read with Rule 117A, to waive or reduce the interest " payable ". It cannot be stated that in the absence of a notice and hearing, the levy itself cannot be made u/s 139(8) (a) of the Act.

6. Appellant's counsel laid stress on a decision of the Karnataka High Court in S. Govindaraju Vs. Commissioner of Income Tax, Karnataka-I, . We were invited to the following observations of Chandrakantaraj Urs J. at page 499 of the report:

" ...on the well-established principles of construction of a taxing statute, while it must be construed strictly, whenever the construction offers more than one interpretation, one favourable to the assessee should be framed, it must be held that the Income Tax Officer in computing the assessment of an assessee who has filed a belated return, must necessarily first make a proposal to impose interest u/s 139(8)(a) of the Act, as, otherwise, it puts the assessee at a disadvantage as pointed out by me earlier. If that opportunity is not afforded to the assessee, then Rule 117A(v) of the Rules becomes redundant in the statute, as no occasion arises for the assessing authority to exercise the discretionary jurisdiction vested in it. "

7. With great respect to the learned judge, we are of the view that the said observations do not flow from Section 139(8)(a) read with Rule 117A of the Income Tax Rules. The assessee is certainly entitled to pray for the relief of reduction or waiver of the interest "payable". It is for him to show the reasons in support of his plea for the relief. If the Income Tax Officer intimates the proposal even before the levy is made, it is open to the assessee to avail of that opportunity, even then. But, if the interest is "levied" in the process of assessment, it is open to the assessee to move the Income Tax Officer, praying

for the relief under the proviso to Section 139(8)(a) read with Rule 117A of the Rules to waive or reduce the interest "payable". But it cannot be said that before levy of the interest u/s 139(8)(a) of the Act, there is a mandatory duty cast on the Income Tax Officer to serve a notice on the assessee and afford him an opportunity against the levy itself.

8. The recent decision of the Supreme Court in Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax, , concludes the matter against the appellant. The Supreme Court took the view that interest is levied u/s 139(8)(a) of the Act by way of "compensation" and it is "part of the process of assessment." In practice, the Income Tax Officer makes an order levying such interest while completing the assessment of the assessee's total income and tax payable by him. . At page 968 of the report, the Supreme Court further states as follows :

" Since the statute provides for the waiver or reduction of interest, it is open to the Income Tax Officer before imposing a levy under subsection (8) of Section 139 and to the Inspecting Assistant Commissioner before doing so u/s 215 to issue notice to the assessee and hear him in the matter. In cases where the jurisdictional fact attracting the levy cannot be disputed, for example, that the return has been furnished u/s 139 with delay, it will be a question merely of satisfying the relevant authority that there are circumstances calling for a reduction or waiver of the interest. If an opportunity to do so has not been made available to the assessee before the order levying interest is made, it will be open to the assessee to apply to the Income Tax Officer after such order has been made to show that a reduction or waiver of interest is justified. "

9. In the light of the above decision of the Supreme Court, we hold that it is not mandatory on the part of the Income Tax Officer to issue notice and afford an opportunity to the assessee, before " levy" of interest. It is sufficient if an opportunity is afforded to the assessee, to move for waiver or reduction of the interest payable even after the assessment is made. The decision of a learned single judge of this court in E. J. Peter & Co. v. ITO [1976] KLT 582, is also in accord with this view.

10. There is no merit in this writ appeal. It is dismissed.