

(1980) 12 DEL CK 0036

In the Delhi High Court

Case No : IT Reference No. 69 of 1969

Commissioner of Income Tax

APPELLANT

Vs

Caxton Press (P.) Ltd.

RESPONDENT

Date of Decision : 18-12-1980

Acts Referred:

Income Tax Act, 1922 — Section 23, 43, 66(1)

Citation : (1981) 6 TAXMAN 78

Hon'ble Judges : N.N. Goswamy, J; D.K. Kapur, J

Bench : Division Bench

Advocate : S. Mukherjee, for the Appellant; C.S. Aggarwal, Mrs. Meera Bhatia Jaggi and A. Dass Gupta, for the Respondent

Judgement

D.K. Kapur, J.—The following question was referred to this court u/s 66(1) of the Indian income tax Act, 1922: Whether, on the facts and circumstances of the case, the Appellate Tribunal was right in holding that the income tax Officer must be deemed to have exercised his discretion and waived levy of penal interest and that the Commissioner had no jurisdiction u/s 33B of the Indian income tax Act, 1922, to revise the order of the income tax Officer?

The question referred to us relates to the assessment year 1961-62, when the assessee was assessed on a total income of Rs. 86,308 and a tax demand of Rs. 38,93960 was raised. The Commissioner, on examining the records of the case, was of the view that as the assessee had omitted to pay advance tax he was liable to pay the same u/s 18A(8) of the Act, and accordingly a notice u/s 33B of the Act was issued on account of the fact that the ITO had omitted to levy penal interest u/s 18A(8). 2. The assessee's claim was that the returns had been filed for the earlier years and if the assessments had been made in proper time, the assessee would have filed an estimate of income for the purpose of advance tax without any notice in this behalf from the ITO. It was also claimed that the ITO must be deemed to have exercised his discretion under rule 48 of the Indian income tax Rules, 1922, and waived the levy of interest and, therefore, it was

not open to the Commissioner to revise the order. The Commissioner, however, overruled these contentions and also came to the conclusion that there was nothing to show that the ITO had waived the interest. The assessment was set aside and a direction given to the ITO to make a fresh assessment after charging the interest aforementioned.

3. The assessee appealed to the Appellate Tribunal raising the contention that this was a case in which it must be deemed that the ITO had waived the penal interest. The Tribunal accepted this view-point. It was held that there was no necessity for the ITO to specifically state that he had waived the interest. This was a case which fell under rule 48, clause (1), and so the ITO was authorised to exercise his discretion in favour of the assessee. Accordingly, the Tribunal set aside the order and this has resulted in the present reference.

4. The provisions of the income tax Act on the question of advance tax under the Indian income tax Act, 1922, required that any assessee who has not been previously assessed must file an estimate of the tax payable by him before 15th March, in each financial year, in case his taxable income is likely to exceed the maximum amount by Rs. 2,500 and he is required to pay instalments of tax on the said estimate. This is provided in sub-section (3) of section 18A. Sub-section (8) provides that when a regular assessment is made and the ITO finds that no payment of tax has been made, then interest in accordance with sub-section (6) is to be added to the tax as determined for the payment of the regular assessment.

5. In the present case, the assessee had not previously been assessed, but returns of income had been filed for some earlier years which were awaiting assessment. No doubt, the assessee was a person who had not been hitherto assessed within the meaning of sub-section (3) of section 18A. Therefore, the assessee was bound to file an estimate and failure to file the same would make the assessee liable to the payment of penal interest u/s 18A(8) read with sub-section (6) of the same section.

6. The only way in which the assessee could avoid the payment of penal interest was on account of the provisions of rule 48 of the Indian income tax Rules, 1922. This rule gives various grounds on which the ITO may "reduce" or "waive" the interest payable u/s 18A. There are several cases set out in the rule which are as follows:

48. The income tax Officer may reduce or waive the interest payable u/s 18A in the cases and under the circumstances mentioned below, namely--

(1) When the relevant assessment is completed more than one year after the submission of the return, the delay in assessment not being attributable to the assessee.

(2) Where a person is u/s 43 deemed to be an agent of another person and is assessed upon the latter's income.

(3) Where the assessee has income from an unregistered firm to which the provisions of clause (b) of sub-section (5) of section 23 are applied.

(4) Where the "previous year" is the financial year or any year ending about the close of the financial year and large profits are made after the 15th March, in the circumstances which could not be foreseen.

(5) Any case in which the Inspecting Assistant Commissioner considers that the circumstances are such that a reduction or waiver of the interest payable u/s 18A(6) is justified.

7. Plainly, in the present case, the assessment order shows that the assessment was made on 26th March, 1966, the assessment year in question was 1961-62. The return was filed on 22nd December, 1961. It, therefore, took the ITO four and a half years to make the assessment order. If the penal interest clause applies, the interest is payable from the date of the default up to the date of the assessment. Hence, interest for four and a half years would have to be included if penal interest had been charged. It would not be attributable to the assessee. It is nobody's case that the delay in making the assessment was on account of any default by the assessee. The other part of the rule which might apply to the assessee is the 5th case where the IAC can reduce or waive the interest if it is a justified case. As would appear from the facts, this was a case which might justifiably fall under the first example given in rule 48 or the 5th example. So, the Tribunal was not wrong in coming to the conclusion that it did come to. Moreover, the Supreme Court had decided in *M. Chockalingam and M. Chockalingam and Another Vs. Commissioner of Income Tax, Madras and Another*, that even in a case where advance tax had not been paid, rule 48 was applicable. In that case, as it happened, no penal interest had been added by the ITO when he made the original assessment. He purported to rectify the error which was challenged by a writ petition in the Madras High Court unsuccessfully. On appeal to the Supreme Court, the writ was granted and the order of the ITO was quashed. We see no difference between that case and the present case.

8. It was also urged before us on behalf of the assessee that the power of the Commissioner to revise the ITO's order arose only if he considers any order passed to be erroneous in so far as it is prejudicial to the interests" of the revenue. It was urged that the ITO's order was not prejudicial to the revenue because it did not say anything about penal interest. This is a technical argument. An order may be prejudicial to the revenue even if it does not say anything on a particular question. If rule 48 requires a specific order regarding the waiving or reduction of the penal interest, then the order would be prejudicial to the revenue. The question we have to consider is whether it can be said that the order of the ITO is deemed to waive the penal interest. In other words, is a specific order necessary, or can the waiving of the penalty be done without saying anything.

9. It appears to us that this was a very clear case indeed. The assessment took

place long after the return was filed. If the penal interest was to be imposed, it would also be imposed for the period during which the income tax assessment remained pending before the ITO. In such circumstances, even if the ITO had said that he does not waive the penal interest, or did not waive the same, the assessee would have a good cause to challenge the order. In fact, this is a case in which the interest could have been imposed only if the delay in the assessment proceedings was attributable to the assessee. It, therefore, plainly appears that the Tribunal's order is the proper order in law. The answer to the question posed before us can, however, not be given in quite simple terms.

10. The question referred is repeated here for convenience and is as follows:

Whether, on the facts and circumstances of the case, the Appellate Tribunal was right in holding that the income tax Officer must be deemed to have exercised his discretion and waived levy of penal interest and that the Commissioner had no jurisdiction u/s 33B of the Indian income tax Act, 1922, or revise the order of the income tax Officer?

11. There are two possibilities. Either the Appellate Tribunal was right in holding that the ITO must be deemed to have exercised his discretion and waived penal interest, or it must be held that he had omitted to say anything on this question. If it was an order waiving the penal interest then the Commissioner clearly had no jurisdiction u/s 33B. If it was an omission, then the only ground on which the interest could have been imposed under rule 48(1) of the Indian income tax Rules, 1922, was on the ground that the delay in the assessment was attributable to the assessee. This is not the finding of the Commissioner in his order u/s 33B. The foundation of the Commissioner's jurisdiction, therefore, did not exist and he could not have set aside the order of the ITO.

12. In the circumstances, the answer to the question referred to us is in the affirmative, because on any reading of the ITO's order, the Commissioner had no jurisdiction u/s 33B of the Indian income tax Act, 1922, to set aside the order except if he had found that the delay in the assessment proceedings was attributable to the assessee.

13. We may here say that the learned counsel for the Commissioner did urge that this question would be open on remand by the ITO, but we find that this is not so because the order of the Commissioner is as follows:

The said order is, therefore, set aside and the income tax Officer is directed to make a fresh assessment after charging interest u/s 18A(8) of the Indian income tax Act, 1922, in accordance with law.

14. The order, therefore, left no discretion with the ITO. The assessee will get costs of this reference. Counsel's fee Rs. 250.