(1985) 09 RAJ CK 0010

In the Rajasthan High Court

Case No : IT Reference No. 16 of 1979

Commissioner of Income Tax APPELLANT

Vs

Devichand Pan Mal RESPONDENT

Date of Decision : 23-09-1985

Acts Referred:

Income Tax Act, 1961 — Section 139, 139(8), 143, 143(3), 144

Citation : (1986) 24 TAXMAN 663

Hon'ble Judges : S.K. Mal Lodha, J;Farooq Hassan, J

Bench : Division Bench

Advocate : B.R. Arora, for the Appellant; Vineet Kothari, for the Respondent

Judgement

S.K. Mal Lodha, J.—At the instance of the Commissioner, the Tribunal has referred the following questions for our opinion, which arise out of its order dated 30-6-1978, passed in IT Appeal No. 375 (Jp.) of 1976-77:

1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified to hold that the AAC rightly entertained the appeal on the point of levy of penal interest u/s 215 of the income tax Act, 1961?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified to hold that the learned AAC had not traveled outside his jurisdiction in this case?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in sustaining the order passed by the learned AAC waiving interest for the period from April 1973 to the date of assessment?

The assessee is a partnership concern. The assessment year under consideration is 1971-72. For this assessment year, the return of income was filed initially on 23-3-1972. In this return, the income declared was Rs. 1,12,370. The revised return was filed on 19-1-1974, claiming deduction u/s 80J of the income tax Act, 1961 ("the Act"). The assessee had claimed the registration. The ITO, however, refused the registration by a separate order passed u/s 185 of the Act. He made reassessment of the assessee in the status of unregistered firm, by assessment order dated 9-1-1975. The income determined was Rs. 94,535. In the appeal, the AAC assessed the income at Rs. 81,020. The tax payable in this amount as a registered firm was Rs. 7,685. The assessee-firm had already paid the advance tax of Rs. 10,000 on 9-10-1970, being a person not hitherto assessed in terms of section 212(3) of the Act. The ITO, however, stated in the assessment order ''charge interest as per the rules''. The interest to the tune of Rs. 16,970 was charged. An appeal was lodged by the assessee against the assessment order passed u/s 143(3) of the Act. One of the grounds taken was that the ITO erred in levying interest amounting to Rs. 16,970 u/s 215 of the Act. The AAC in his order dated 18-3-1976, held that the interest was correctly charged; however, the amount of interest chargeable may be recalculated on the basis of the reduced income, while dealing with the question of interest, the AAC observed as under:

Therefore, it is a case where the interest u/s 215 should be waived for the period beginning from April 1973 to the date of the assessment.

Repelling the contention that the appeal did not lay before him on the question of interest, the AAC has expressed himself in the following words:

Though this ground is not separately appealable, I derive the power to decide the issue because the entire assessment has been challenged in appeal.

Being dissatisfied, the department went in appeal. Two contentions were raised before the Tribunal:

1. That the Act does not provide specifically for appeal against the levy of penal interest u/s 215 and, therefore, the AAC should not have entertained the appeal.

2. That the AAC had erred in directing that the interest charged u/s 215 should be waived. The Tribunal, after noticing the authorities that were cited before it, in which diverse views have been expressed, dismissed the appeal.

3. The Commissioner submitted an application u/s 256(1) of the Act. The Tribunal has referred the aforesaid questions of law reproduced hereinabove to this Court for its opinion.

4. We take up question No. 1 first.

Section 246 of the Act deals with the appeals to the AAC. It enumerates various orders against which the appeal lies to the AAC. We may notice section 246(c) which is as under:

(c) an order against the assessee, where the assessee denies his liability to be assessed under this Act or any order of assessment under sub-section (3) of section 143 or section 144, where the assessee objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed;

Section 215 lays down as to when the interest is payable by the assessee. Section 217 of the Act deals with interest payable by the assessee when no estimate is made. Thus, a reading of sections 215 and 217 makes it clear that they provide that in the circumstances set out therein, the interest shall be payable by the assessee. This is, however, mitigated by a discretion given to the ITO to reduce or waive the interest payable by the assessee under sections 215 and 217. Reference in this connection may be made to sections 215(4) and 217(2). The discretion to reduce or waive the interest is regulated by rule 40 of the income tax Rules, 1962 (''the Rules''). Rule 40 is as under:

Waiver of interest. -The income tax Officer may reduce or waive the interest payable u/s 215 or section 217 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 163 treated as an agent of another person and is assessed upon the latter''s income.

(3) Where the assessee has income from an unregistered firm assessed under the provisions of clause (b) of section 183.

(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 1st March (or the 15th March in cases where the proviso to section 211 applies), in 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 215 or section 217 is justified.

2. The Learned Counsel for the revenue contends that right of appeal is a creature of statute and in this case appeal lies to the AAC against the orders specified in section 246 and not in other cases and that section 246 does not provide for any appeal against the order levying penal interest u/s 215. In support of his contention, he has invited our attention to K.B. Stores Vs. Commissioner of Income Tax, , Vidyapat Singhania Vs. Commissioner of Income Tax, , Addl. Commissioner of Income Tax Vs. Allahabad Milling Co., , U.P. Hotel & Restaurants Ltd. v. CIT [1981] 127 ITR 660 (All.), Commissioner of Income Tax Vs. P.S. Jain Motors (P.) Ltd., , Commissioner of Income Tax Vs. Associated Stone Industries (Kotah) Ltd., and Commissioner of Income Tax, Bombay City-II Vs. Shantilal J. Mehta,

3. Mr. Vineet Kothari, appearing for the assessee stoutly opposed the contention raised by Mr. B.R. Arora, had submitted that the AAC has rightly entertained the appeal against the order of the ITO levying penal interest u/s 215 when the assessee has filed the appeal denying the liability to be assessed. In other words,

the submission of the Learned Counsel for the assessee is that the expression used in section 246 ''where the assessee denies his liability to be assessed under this Act'' comprehends in itself, the challenge to the penal interest, for, he denies the liability to be assessed under the Act. He urged that in an appeal against the assessment order, it is permissible in law to examine the finding relating to the levy of penal interest. It was submitted that what is not permissible in regard to the interest is that the quantum cannot be challenged. He derived support from Commissioner of Income Tax, Gujarat Vs. Sharma Construction Co., National Products Vs. Commissioner of Income Tax, Mysore, , Commissioner of Income Tax, Bombay City-I Vs. Daimler Benz A.G., , Addl. Commissioner of Income Tax, Gujarat Vs. Mustakhusein Gulamhusein Ghia, and Bihar State Road Transport Corporation Vs. Commissioner of Income Tax, .

4. In view of the sharp cleavage of judicial opinion, we must candidly state that the task before us is not free from difficulty. For the reasons, which we will state hereafter, we have reached the conclusion that the view taken by the Tribunal in this regard is correct. It is true that an order u/s 215 does not find mention in section 246 which enumerates various kinds of orders passed by the ITO against which the assessee can appeal, nevertheless, section 246(c) gives that right to the assessee, who ''denies his liability to be assessed'' under the Act. The expression ''denies his liability to be assessed'' covers not only the total denial of liability but also the denial of liability under particular circumstances. Whether, the expression ''denies his liability to be assessed'' includes denial of liability to pay penal interest is the precised question. This has necessitated to examine the authorities cited by the Learned Counsels for the parties. It will be proper to take note of the authorities that have been cited by the Learned Counsel for the assessee.

5. The question referred for opinion in Sharma Construction Co.''s case (supra), was whether an appeal lies to the AAC from any order passed by the ITO levying interest under sections 139 and 217 of the Act. The Division Bench of the Gujarat High Court opined that when an appeal is filed against the regular assessment, it would be open to the assessee to take all points which may legitimately not only reduce the taxable income or the tax to be paid or with regard to the proper head under which the income should fall, but also reduce the quantum of penal interest.

6. Before the Karnataka High Court in National Products'' case (supra), the question that dropped up was, whether appeal lies against the levy of interest u/s 139 or section 215? It was held by the learned Judges as under:

... u/s 246(c) of the Act, if an assessee denies his liability to be assessed under the Act, he has the right of appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest has been levied u/s 215, the assessee may altogether deny his liability to pay such interest on the ground that he was not liable to pay advance tax at all or that the amount of advance tax determined by income tax Officer as payable ought to be reduced.... (p. 236)

It was, however, clarified that the scope of the appeal against an order of assessment levying interest is limited; the assessee can be allowed only to urge that he is not liable, wholly or partially, to be assessed to interest; he cannot question the interest assessed if he does not deny his liability to be assessed to such interest.

7. In Daimler Bens A.G.''s case (supra) for non-payment of advance tax, penal interest was levied. The question arose whether the appeal lay or not? After considering sections 18A and 30 of the Indian income tax Act, 1922, Tulzapurkar, Actg. CJ., as he then was, speaking for the Court, held that the appeal to the AAC was maintainable and directed the AAC to dispose of the appeal on the merits. In coming to the conclusion, National Products'' case (supra) and Sharma Construction Co.''s case (supra) were referred.

8. In Commissioner of Income Tax Vs. Lalit Prasad Rohini Kumar, an argument was raised regarding competency of the appeal by the asses see to the AAC from the order of the ITO against levy of interest u/s 215/217. The learned Judges examined the word ''denies'' and the word ''assessee'' as used in section 246(c), and held that the question of interest in the appeal could be agitated though no specific provision has been made in section 246.

9. In Commissioner of Income Tax Vs. Karam Chand Thapar and Bros. (P.) Ltd., the question of competency of appeal against levy of penal interest arose. It was held by the Division Bench that the appeal lies only when the assessee denies his liability to be assessed or liability to pay interest and the appeal would be incompetent where the assessee denies only partially his liability to be assessed and/or to pay interest.

10. In Mustakhusein Gulamhusein Ghia''s case (supra), the question arose whether the assessee could challenge the levy of penal interest under sections 139 and 217 in the appeal, if it is filed against the order of assessment. Following Daimler Benz A.G.''s case (supra), it was held that it was permissible to challenge the levy of penal interest under sections 139 and 217 in appeal filed against the order of assessment.

11. In Bihar State Road Transport Corpn.''s case (supra) penal interest was levied u/s 217. There was an appeal against the regular assessment. In that appeal, there was challenge to the levy of penal interest. The question mooted was whether, the levy of penal interest could be challenged in the appeal against the regular assessment. It was held that the challenge to levy of penal interest is permissible in an appeal against the regular assessment order.

12. In this case, the ITO, while making the assessment order dated 3-1-1975, has mentioned ''charge interest as per the rules''.

13. A somewhat similar order ''charge interest, if leviable'', came up for consideration in Commissioner of Income Tax Vs. New Swadeshi Mills of Ahmedabad Ltd., It was held by the learned Judges that the order, which we

have referred to above, indicated that the ITO was assigning the responsibility for levying of interest to somebody else. The contention on behalf of the assessee in that case was that interest should not have been charged at all and not that the interest should be reduced for which the ITO had not passed any order. It was held that the order was appealable - Lalit Prasad Rohini Kumar''s case (supra) was followed.

14. From the conspectus of the aforesaid authorities, it is abundantly clear that in an appeal against the assessment, where the assessee denies his liability to be assessed under the Act, it is open to the asses see to attack the finding of levy of penal interest u/s 215 in an appeal against the assessment order.

15. We may notice Associated Stone Industries (Kotah) Ltd.''s case (supra). Both the Learned Counsels want to derive support from it. We may use fully excerpt the following:

The right of appeal is a creature of statute and unless an appeal is provided for specifically or by necessary intendment such a right cannot be availed of by any party. As there is no specific provision in section 30 of the Act of 1922 giving a right of appeal in respect of an order imposing penal interest u/s 18A(6) or section 18A(8) of the Act, no appeal would be maintainable against the penal interest charged if the same is claimed to be excessive or erroneously imposed. However, if the assessee denies his liability to be assessed in respect of advance tax and thereby denies altogether his liability to pay tax, then, in an appeal filed against the order of assessment, the assessee could also challenge the imposition of penal interest, because, in that event, the assessee would be ''denying his liability to be assessed under this Act'' u/s 30. In substance, penal interest calculated and charged under sub-section (6) or sub-section (8) of section 18A can be challenged only in an appeal filed against the order of assessment to tax and the assessee would be entitled to deny his liability to pay penal interest also while denying his liability to be assessed to tax u/s 18A. (P. 871)

The important principle that emerges from this decision is that if the assessee denies his liability to be assessed in regard to advance tax and thereby denies altogether his liability to pay tax, then, in appeal against the order of assessment, the assessee can also challenge the imposition of penal interest because in that event the assessee would be denying his liability to be assessed under the Act. The principle laid down in Associated Stone Industries (Kotah) Ltd.''s case (supra) to this extent supports the Learned Counsel for the revenue that where an assessee denies his liability to be assessed in respect of advance tax and thereby denies his liability to pay tax then in the appeal against the order of assessment, the imposition of penal interest can be assailed. K.B. Stores'' case (supra) was noticed by the Tribunal. In that case, interest was charged for delayed filing of return u/s 139(8). This was considered by the Tribunal, Gauhati. It was held therein that no appeal lies to the AAC from an order of the ITO u/s 139(8), charging interest for delayed filing of the return, as section 246(c) does not provide for such an appeal. In that case, there was no question of denial of liability to be. assessed under the Act as envisaged by section 246(c).

16. It was held in Vidyapat Singhania''s case (supra) that the levy of interest under sections 18A(6)/18A(8) for too low an estimate of income for purposes of advance tax which is popularly called penal interest, is not one of the matters mentioned in section 30. The expression ''denying his liability to be assessed under the Act'' occurring in section 30 was considered. This was considered to be a total denial and it was held that a person who objects, to a part of the assessment order cannot be said to deny his liability to be assessed. The learned Judges did not agree with the view take a by the Bombay High Court. In view of the law laid down by the High Court in Commissioner of Income Tax, U.P.,Lucknow Vs. Kanpur Coal Syndicate, we do not find any justification to construe the expression ''denying his liability to be assessed'' as denial of the total liability, for the Supreme Court has observed:

... What is the substance of the objection of the assessee? The assessee denies his liability to be assessed under the Act in the circumstances of the case and pleads that the members of the association shall be assessed only individually. The expression ''denial of liability'' is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances...." [Emphasis supplied] (p. 229)

In view of these observations, it could not be held that the expression ''denies the liability to be assessed under the Act'' refers to total denial of liability. The denial may be total as well as partial and the liability to pay penal interest, in our opinion, would certainly be a partial denial to be assessed under the Act, as envisaged by section 246(c).

17. In Allahabad Milling Co.''s case (supra), the question was whether the appeal can be filed before the AAC u/s 246(c). The reasoning given in P.S. Jain Motors (P.) Ltd.''s case (supra) is that section 246makes provision for appeals to the AAC regarding the orders passed under the various sections mentioned therein, and as an order regarding interest passed u/s 213 of the Act is not appealable, it was inferred that the Legislature in its wisdom did not make any provision for filing an appeal against an order passed u/s 215(1). We have already held on the basis of the interpretation of section 246(c) that the expression ''denies his liability'' includes a partial liability to be assessed under the Act and that partial liability to be assessed under the Act includes the question that no penal interest is leviable on the assessee.

18. After examining the pros and cons of the proposition canvassed before us in the light of the provisions of sections 215 and 246, we find ourselves in full agreement with the view taken by the Bombay, Delhi, Gujarat and Karnataka High Courts. The conclusion of our stands fortified from the view taken by the Division Bench of this Court in Associated Stone Industries (Kotah) Ltd.''s case

(supra). We regret, we have not been able to persuade ourselves to subscribe to the view taken by the Allahabad High Court in the decisions referred to hereinabove and the other High Courts, which have adopted the same view.

19. In an appeal against the order of assessment, contending that the assessee is not liable to be taxed, in our opinion, it was permissible for him to question the levy of penal interest u/s 215 and the Tribunal was, therefore, right and justified in holding that the AAC did not err when he entertained the appeal on the question of levying of penal interest. Question No. 1 referred to us, is, therefore, answered in the affirmative, i.e., in favour of the assessee and against the revenue.

Question No. 3:

20. It will be convenient to take up question No. 3 first. We have already reproduced the directions given by the AAC in his order dated 18-3-1976 in regard to the waiving of interest. Section 215(4) provides that in cases which warrant levy of penal interest, the ITO may reduce or waive the interest payable by the assessee. Rule 40 which occurs in Part VII relating to payment of advance tax, provides for waiver of interest. According to it, the ITO may reduce or waive the interest payable u/s 215 or 217 in cases under the circumstances mentioned therein. Section 251 of the Act contains the powers of the AAC in disposing of the appeal. Relevant part of section 251 is as under:

(1) In disposing of an appeal, the Appellate Assistant Commissioner shall have the following powers-

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment; or he may set aside the assessment and refer the case back to the income tax Officer for making a fresh assessment in accordance with the directions given by the Appellate Assistant Commissioner or, as the case may be, the Commissioner (Appeals) and after making such further enquiry as may be necessary, and the ITO shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment.

(b)******

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

A perusal of section 251(1) shows that the powers of the AAC are wider than those of the ordinary appellate court under the Code of Civil Procedure, 1908. His competence is not restricted to dealing with the subject-matter of appeal: he may examine all matters covered by the assessment order and correct the assessment in respect of all such matters even to the prejudice of the assessee, and may remand the case to the ITO for inquiring into items which were not the subject-matter of appeal. The Tribunal, in its order, dated 30-6-1978, has observed that the AAC chose to decide the issue relating to waiver or reduction of penal interest himself as an appellate authority, the ITO failed to consider the question of waiver or reduction of penal interest in accordance with section 215(4) or for that matter under rule 40. In these circumstances, the two courses were open to the AAO (i) to send the case back to the ITO for considering the question of waiver; or (ii) to determine it himself. He thought it proper to adopt the second course. He took into consideration the facts of the case and also rule 40. He came to the conclusion that from the records it cannot be said that the assessee delayed the assessment proceedings at any time. He, therefore, stated in his order that it is a case where interest u/s 215 should be waived for the period beginning from April 1973 to the date of assessment. It is not in dispute that the ITO was competent to make this order, at the time of passing the assessment order, which he had not done. The AAO while hearing the appeal u/s 251 exercised the very same powers in this respect, when he ordered the interest should be waived for the period beginning from April 1973 to the date of assessment, which, according to him should have been made by the ITO. Mr. Vineet Kothari in this connection has referred to Kanpur Coal Syndicate''s case (supra) wherein their Lordships of the Supreme Court have observed as under:

The Appellate Assistant Commissioner has plenary powers in disposing of an appeal. The scope of his powers is coterminous with that of the income tax Officer. He can do what the income tax Officer can do and can also direct him to do what he has failed to do. (p. 225)

Kanpur Coal Syndicate''s case (supra) was considered in Lalit Prasad Rohini Kumar''s case (supra) by the Division Bench of the Calcutta High Court. Sabyasachi Mukharji, J., as he then was, with whom Sudhindra Mohan Guha, J. agreed, ruled as under:

... Therefore, if the assessee was allowed to agitate the question of his liability to pay interest at all, in such a case, the AAC could give any direction which the ITO could give. Therefore, the contention which was raised in the appeal about the quantum or waiver of interest could also form a part of the subject-matter of the direction by the AAC. In the facts and circumstances of the case, in the appeal which the assessee had filed from the order of the ITO, the AAC was competent to give the direction regarding interest under sections 215 and 217 of the Act." (p. 604)

It may be stated here that a SLP filed against the judgment in Kanpur Coal Syndicate''s case (supra), which it was held that that an appeal lay to the AAC against an order of the ITO levying interest u/s 215 or section 217. SLP (Civil) No. 4 of 1981 was dismissed by the Supreme Court on 9-8-1983, as appears from [1983] 143 ITR (St.) 64. This shows that the view taken in Lalit Prasad Rohini Kumar''s case (supra) being proper and sound, their Lordships did not think it proper to grant special leave against that decision.

21. The upshot of the above discussion is that the AAC was competent and had jurisdiction to give a direction in appeal that was filed against the assessment order dated 9-1-1975 for waiving interest for the period from April 1973 to the

date of assessment, as, it is rightly not contended that the ITO could give the direction in the assessment order, which he had passed u/s 215(4), read with rule 40. The view taken by the Tribunal in this respect is quite justified when it sustained the order passed by the AAC in regard, to waiving of interest for the period beginning from April 1973 to the date of assessment. This question is also answered in the affirmative.

Question No. 2:

22. In view of the answers given by us to question Nos. 1 and 3, it follows that the Tribunal was justified in holding that the AAC had not exceeded his jurisdiction when he entertained the appeal on the question of levy of penal interest and further gave a direction for waiving of interest from April 1973 to the date of assessment. The order passed in appeal by the AAC cannot be said to be in excess of his jurisdiction. This question is, therefore, answered in the affirmative.

23. Question Nos. 1 to 3 are, therefore, answered in the affirmative, i.e., in favour of the assessee and against the revenue.

24. There will be no order as to costs of this reference. Let the Tribunal be informed of this order as required by section 260(1) of the Act.