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In the Delhi High Court

Case No : Income-tax Reference No. 350 of 1980

Commissioner of Income Tax — APPELLANT

Vs

Jay Engineering Works Ltd. — RESPONDENT

Date of Decision : 01-03-2001

Acts Referred:
Income Tax Act, 1961 — Section 139(8), 143(3), 144B, 147, 148

Citation : (2001) 249 ITR 584 : (2001) 117 TAXMAN 213

Hon'ble Judges : Dr. Arijit Pasayat, C.J;D.K. Jain, J

Bench : Division Bench

Advocate : Sanjiv Khanna and Prem Lata Bansal, for the Appellant; S.K. Aggarwal, for the Respondent

Judgement

Arijit Pasayat, C.J.—At the instance of the Revenue, the following question has been referred u/s 256(1) of the Income Tax Act, 1961 (in short, "the Act"), by the Income Tax Appellate Tribunal, Delhi Bench-A (in short, "the Tribunal") :

"Whether, on the facts and in the circumstances of the case, the Tribunal is legally correct in holding that the assessed had a right to appeal against the charging of interest u/s 216 in the course of the reassessment u/s 147 ?"

2. The dispute relates to 1971-72.

3. The factual position is almost undisputed and is as follows :

Originally, the assessment was completed on January 21, 1975, and the Income Tax Officer had charged interest u/s 216 of the Act. The same was not challenged by the assessed, though an appeal had been filed on other grounds. Thereafter, the assessment was reopened by the Income Tax Officer u/s 147, as according to him income chargeable to tax had escaped assessment. A draft assessment order was prepared by him and sent to the Inspecting Assistant Commissioner u/s 144B of the Act. A copy of the draft assessment was also sent to the assessed. The assessed filed objections to certain variations in the income. The Inspecting Assistant Commissioner also gave an opportunity to the assessed of being heard and the reassessment was completed by the Income Tax Officer on September 20, 1987. In the order of reassessment, the Income Tax Officer noted about charging of interest under Sections 215 and 216 of the Act. The assessed filed an appeal before the Appellate Assistant Com-? missioner (in short "the AAC"), where it was alleged that the Income Tax Officer was wrong in charging interest u/s 216. The assessed pleaded before the Appellate Assistant Commissioner that the Income Tax Officer had not specified the circumstances under which the assessed was held liable u/s 216. It was also pleaded that there was sufficient justification for filing a nil estimate. The Appellate Assistant Commissioner observed that in the original proceedings the assessed had not raised any objection against the levy of interest u/s 216 of the Act. It was observed that even the estimate filed by the assessed in March, 1971, was found to be an underestimate. She referred to certain factual aspects in this regard. It was held that interest u/s 216 which was in the nature of compensatory charge for the loss incurred by the Revenue for late payment of advance tax. The matter was carried in appeal by the assessed before the Tribunal. The assessed''s stand was that two grounds indicated by the Appellate Assistant Commissioner, i.e., non-challenge of interest in the first instance and absence of proper reasons for filing nil estimate have not been considered in the proper perspective. The Tribunal held that without establishing that the estimate of advance tax was not bona fide, interest u/s 216 could not be charged. With reference to Section 147 of the Act it was held that the assessed cannot reagitate questions which have been decided in the original assessment and in case income has escaped assessment, the same can be subsequently charged and it is not open to an assessed when charged in that way to reopen the whole assessment. It is, however, open to the assessed to plead that there was bona fide belief so far as the estimate filed is concerned and merely because at the time of original assessment, levy was not challenged that cannot be a ground to close the door on the assessed so far as challenge is concerned during the reassessment proceedings. It was also held that merely because at the time of original assessment, a certain view had been entertained by the Income Tax Officer regarding charging of interest, it does not necessarily follow that he should not apply his mind again to the question at the time of reassessment and an opportunity should be given to the assessed as to why such an interest should not be levied. Accordingly, the levy of interest u/s 216 was cancelled.

4. On being moved for a reference, the question set out above has been referred for the opinion of this court.

5. We have heard learned counsel for the parties. According to learned counsel for the Revenue, the assessed cannot be at better footing than that which existed at the time of the original assessment. The Tribunal has erred in holding that no opportunity was granted to the assessed when reassessment proceedings were done as regards charging of interest and in fact it was given. Learned counsel for the assessed, on the other hand, contended that merely because challenge had not been made originally, that cannot be a ground to deny the

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right of appeal against levy during the reassessment.

6. As the factual scenario would go to show, when the original assessment was done, there was no challenge to the levy of interest. In fact, an appeal had been preferred wherein there was no challenge to the levy of interest. The scope of proceedings u/s 147 of the Act relates to underassessment or escaped assessment of income. As has been rightly submitted by learned counsel for the Revenue, the assessed cannot be put in a better position than what existed at the time of original assessment, because he has not chosen to challenge the levy at the first stage. Additionally, from the documents filed before us, we find that in the order passed u/s 143(3) read with Section 144B, the Income Tax Officer has noted as follows :

"In the draft assessment order 1 had proposed to charge interest under Sections 216 and 215, the assessed has raised an objection before the Inspecting Assistant Commissioner that interest u/s 215 is chargeable only up to the date of regular assessment and not up In the date of reassessment u/s 147. It was my intention and also it is the position of law that interest can be charged only up to the date of regular assessment and interest will be charged accordingly."

7. The quoted portion would go to show that there was no challenge by the assesses) to the charging of interest u/s 216 even when a draft assessment order u/s 144B was served on him and accordingly interest was charged. Levy of interest u/s 216 of the Act was appealable in terms of Section 246(m). At the relevant point of time, the assessed did not avail of that remedy and accepted the levy, thereby making it final. It is settled that reassessment proceedings are for the benefit of the Revenue and do not result in wiping out the first order ; as it is only the underassessment which is set aside and not the whole order of assessment. The assessment concluded earlier against the assessed does not get reopened. A somewhat similar situation arose in Commissioner of Income Tax Vs. Khodey Brewing and Distilling Industries Ltd., . In that case the Assessing Officer had directed levy of interest u/s 139(8) and 215 but in reality interest was computed for the first time when reassessment order under Sections 147 and 148 of the Act was passed. The High Court held that levy of interest could not be questioned in appeal against the order in the reassessment proceedings. If the assessed wanted to question the levy of interest, appeal should have been filed against the regular assessment.

8. In our view, the legal position has been laid down in the proper perspective in the said case. The case of the Revenue stands on a better footing in the case at hand, since no appeal was filed earlier in terms of Section 246(m) challenging the levy of interest u/s 216 of the Act, though an appeal had been filed on some other grounds. These aspects have not been taken note of by the Tribunal. The answer to the question referred is in the negative in favor of the Revenue and against the assessed.

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