
(1996) 05 PAT CK 0036
In the Patna High Court
Case No : Tax Case No. 124 of 1984

Commissioner of Income Tax

APPELLANT

Vs

Quality

RESPONDENT

Date of Decision : 15-05-1996

Acts Referred:

Citation : (1996) 05 PAT CK 0036

Judgement

1. This reference u/s 256(1) of the Income Tax Act, 1961, is at the instance of the Revenue. The questions of law referred to this court for its opinion are as follows :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the amount of interest charged u/s 139(8) ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the interest u/s 139(8) could not have been charged without any specific order for payment of interest in the assessment order ? ..

3. Whether, on the facts and in the circumstances of the case, is the Income Tax Officer statutorily required to afford an opportunity to the assessee before levy of interest u/s 139(8) ?"

2. The material facts are as follows :

The assessee filed a return for the assessment year 1978-79 on April 23, 1980, i.e., beyond time. Earlier, at his request, time for filing return had been extended to September 30, 1978. After completing the assessment a notice of demand for Rs. 6,160 which included the sum of Rs. 3,060 as interest u/s 139(8) of the Act for late filing of the return was issued. The assessee preferred an appeal before the Appellate Assistant Commissioner contesting the levy of interest on the ground that the interest could not be levied without passing a speaking order in that regard and giving an opportunity of hearing. The Appellate Assistant Commissioner did not accept the contentions and rejected the appeal. The income tax Appellate Tribunal, however, thought otherwise. It took the view that

the order levying interest was bad as it did not mention the amount (of interest) charged u/s 139(8) nor the same had been shown separately in the demand notice. The Tribunal, accordingly, deleted the demand. In coming to the aforesaid conclusion it followed a decision of the Calcutta High Court reported in *Monohar Gidwany and Others and Smt. Bhagwanti Gidwany and Another Vs. Commissioner of Income Tax and Others*, .

3. Mr. L. N. Rastogi, learned counsel for the Revenue, submitted that for late filing of the return the assessee is liable to penalty as well as interest. And so far as the interest is concerned, regard being had to the nature of the levy, it cannot be said to be penal in nature, like an order imposing penalty, and, therefore, the assessee cannot claim a prior opportunity of hearing. In support of the contention he placed reliance on *Commissioner of Income Tax Vs. Prayaglal Agarwala and Co.*, and *Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax*, . On behalf of the assessee our attention was drawn by Mr. Vikash Jain to rule 117A of the Income Tax Rules, 1962, particularly Clause (v) thereof which enables the assessee to produce evidence to satisfy the Assessing Officer that he was prevented by sufficient cause from furnishing the return within time. The submission of counsel was that if the law gives an opportunity to the assessee to produce evidence and satisfy the Assessing Officer regarding sufficiency of cause, such opportunity would be rendered nugatory if the same is not afforded at the initial stage. It was contended that the effect of omission to give opportunity of hearing at the initial stage cannot be remedied by giving the same at the later stage.

4. In *Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax*, , which is a decision of the Supreme Court, the apex court has held that interest is levied u/s 139(8) or section 215 of the Income Tax Act to compensate the Revenue for the loss which it suffers by reason of the omission or default in the submission of the return/payment of tax within the prescribed period and, therefore, the levy is compensatory in nature. On the question as to whether prior opportunity of hearing in the matter of levy of interest is a must, it would be useful to notice the following observations occurring at page 968 of the report :

" 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."

5. Mr. Vikash Jain submitted that in Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax, , the point for consideration was different -- whether appeal u/s 246 of the Act was maintainable before the Commissioner without the assessee having filed the application for waiver/reduction of interest. That may be so, but the observations referred to above, in our opinion, hardly leave any room for doubt that the omission to give the opportunity before making the levy cannot be said to be fatal. If in terms of what the apex court has said, an application for reduction/waiver can be filed afterwards also it cannot be said to be a pre-condition of the levy. In fact, if the assessee has not made such an application before the Assessing Officer, his appeal/revision against such levy would not be maintainable. Had such opportunity been a pre-condition or pre-requisite of the levy, the order levying interest would be liable to be struck down by the appellate/revisonal authorities merely on that ground and in that case there was no question of the appeal/revision being not maintainable. It appears to us that an appeal/revision against the order levying interest is to be decided on the merits rather than on a technical ground that opportunity of hearing was not given. In fact, it was precisely for that reason that the Supreme Court permitted the assessee to make an application for reduction/waiver of the interest because as otherwise the grievance of the assessee on the merits could not have been considered by the Commissioner in revision. The conclusion that would irresistibly follow is that the assessee cannot claim an opportunity of hearing as of right before the interest is levied. In these premises, the answer to question No. 3 has to be in the negative and it has to be held that non-affording of opportunity of hearing per se would not make the order levying interest bad.

6. In fairness to Mr. Vikash Jain, we may mention that in the course -of his submissions he had placed reliance on [1991] 187 ITR 162 containing the reference of the order passed by the Supreme Court rejecting the SLP preferred against the judgment of the Andhra Pradesh High Court. From the short note as appearing in the Report, it appears that the writ petitions were filed before the Andhra Pradesh High Court challenging the notices levying interest u/s 139(8) of the Income Tax Act. The High Court had held that the provisions of rule 117A of the Income Tax Rules imply that opportunity should be given to the assessee to show cause why no interest should be levied and as in the case under reference there was no opportunity given, the notices were liable to be quashed.

7. The full text of the judgment of the Andhra Pradesh High Court is not before us. We do not, thus, know as to what were the facts of that case and the rationale in coming to that conclusion. Even if it be assumed that the Andhra Pradesh High Court had held that such an opportunity was a pre-condition or pre-requisite of levy of interest, merely because SLP challenging the said decision was rejected by the Supreme Court it cannot be said that the decision of the Andhra Pradesh High Court was approved by the Supreme Court on the merits. As the Supreme Court has clarified, the summary rejection of the SLP without any speaking order merely means that the Supreme Court was not inclined to interfere with the order of the High Court and nothing more than that. In this

view of the matter, it is not possible for us to accept the judgment of the Andhra Pradesh High Court as having been approved by the Supreme Court on the merits and follow the same.

8. As regards the second question, as noticed above, the Tribunal in coming to a conclusion favourable to the assessee followed the decision of the Calcutta High Court in *Monohar Gidwany and Others and Smt. Bhagwanti Gidwany and Another Vs. Commissioner of Income Tax and Others*, . We do not think, in the facts of the case, that the decision of the Calcutta High Court has any relevance. The relevant part of the order of the Income Tax Officer in the present case reads as follows :

" Penalty proceeding u/s 271(1)(a) has been initiated. Charge interest as per rules."

9. The argument of Mr. Vikash Jain on behalf of the assessee was that the Income Tax Officer should have indicated in the order as to under what provision the interest was being levied because interest is chargeable u/s 139(8) as well as other provisions of the Income Tax Act. We do not find any substance in this contention. It is well-settled, following the decision of the Supreme Court referred to above, that levy of interest is a part of the assessment process. The Income Tax Officer in the present case while determining the tax liability of the assessee had passed a separate order regarding levy of interest. We do not think that mere non-mention of the specific provision under which the interest is charged goes to the root of the matter and makes the order bad. We, accordingly, do not think that in the facts and circumstances of the case, the Tribunal was justified in holding that the interest could not have been charged as no specific order to that effect has been passed in the assessment order. The answer to the said question also, therefore, has to be in the negative.

10. Questions Nos. 2 and 3 having, thus, been answered in the negative, question No. 1 has necessarily to be answered in the negative. In other words, it has to be held that the Tribunal was not justified in deleting the amount of interest. The reference is answered accordingly. There will be no order as to costs.

11. Before we part with this case, we would also like to mention that during the course of hearing it transpired that the assessee had filed an application for reduction/waiver of the amount of interest. Counsel for neither the Revenue nor the assessee was in a position to inform the court as to whether the same has been disposed of by the Income Tax Officer. We would, in the circumstances, clarify that our observations recorded hereinabove would not stand in the way of the Income Tax Officer and/ or the appellate/revisional authorities under the Act to go into the merits of the claim and pass appropriate order in accordance with law, if not already done.

12. Let a copy of this order be sent to the Income Tax Appellate Tribunal, Patna.