

(1965) 12 KL CK 0004
In the High Court Of Kerala
Case No : O. P. No. 2730 of 1964

MOHAMMED KUNHI

APPELLANT

Vs

ADDITIONAL Income Tax OFFICER CANNANORE.

RESPONDENT

Date of Decision : 23-12-1965

Acts Referred:

Income Tax Act, 1961 — Section 154

Citation : (1967) 66 ITR 250 : (1966) 10 KLJ 795

Judgement

The writ applicant was an assessee to Income Tax for the year 1954-55. He was assessed for that year by exhibit P-2 order, dated April 27, 1962. By that order, no interest had been charges u/s 18A(6) of the Indian Income Tax Act, 1922 (hereinafter referred to as the Act). It is said that a notice dated September 3, 1964, was issued to the petitioner on September 3, 1964, asking him to show cause why interest u/s 18A(8) of the Act should not be charged. It is further averred that the petitioner did not object to the date of hearing which was fixed on September 19, 1964. So an order, exhibit P-1, dated September 19, 1964, has been passed reading as under : "I find from my records that interest is due from you u/s 217 as the rate of 4 per cent. in respect of the assessment for the year 1954-55 as follows :

Rs. nP.

Amount on which interest is chargeable

18,134 00

Period

1-1-1954 to 26-4-1962

Rate

4 per cent.

Amount of interest

This should be paid as shown in the demand notice."

It is the above order that is challenged in this writ application.

Though the order of assessment has been passed a few days after the Income Tax Act, 1961, became law and, though the order, exhibit P-1, refers to section 217 of that Act, I will be referring to the provisions in the Indian Income Tax Act, 1922, as it is admitted that there is no material difference, in regard to the matters arising for determination in this case, between the provisions in the two Acts.

Counsel on behalf of the petitioner urges that the order, exhibit P-1, apparently passed in exercise of the powers u/s 154 of the Income Tax Act, 1961, corresponding to section 35 of the Indian Income Tax Act, 1922, is without jurisdiction in that there was no error apparent on the face of the record justifying action being taken under the section. Relying on the judgment of the Bombay High Court in *Sidhramappa Andannappa Manvi v. Commissioner of Income Tax*, it is urged that the power u/s 35 of the Indian Income Tax Act, 1922, is limited; it is not a power of revision or review; it is only a power of rectification in respect of a mistake which is apparent on the face of the record and the following passage at page 340 of the report was relied on for the purpose of elucidating what is meant by "error apparent on the face of the record".

"A mistake must be patent on the record; it must not be a mistake which can be discovered by a process of elucidation, or argument, or debate. The mistake being patent on the record, rectification must be limited to correcting that mistake only without any further argument or debate."

The arguments is that there was no error apparent on the record relating to the assessment that was concluded by exhibit P-2 order. The question as to whether interest u/s 18A(6) must be charged depended on the exercise of discretion vested in the Income Tax Officer by the fifth provision to that sub-section and the further questions of fact as to whether the conditions, all or any them mentioned in rule 48 of the Indian Income Tax Rules, 1922, have been satisfied. It is necessary to read sub-section (6) of section 18A and fifth provision to that section.

"18A. (6) Where in any year an assessee has paid tax under sub-section (2) or sub-section (3) on the basis of his own estimate, and the tax so paid is less than eighty per cent. of the tax determined on the basis of the regular assessment, so far as such tax related to income to which the provisions of section 18 do not apply and so far as it is not due to variations in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made, simple interest at the rate of six per cent. per annum from the 1st day of January in the financial year in which the tax was paid up to the date of the said regular

assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty per cent.....

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

I must also refer to rule 48, which is in these terms :

"48. The Income Tax Officer may reduce or wave the interest payable u/s 18A in the cases and under the circumstances mentioned below, namely -

(1) Where 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 on any year ending near about the close of the financial year and large profits are made after the 15th of March, 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 18A(6) is justified."

From the mere fact that interest has not been charged u/s 18A(6), it is said, it cannot be inferred or concluded that the Income Tax Officer has committed a patent error. The argument is that it can quite as well be that he exercised his discretion to waive the interest conferred on him by the proviso to section 18A(6) and the question as to whether the circumstances mentioned in rule 48 referred to above have or have not been satisfied, it is said, cannot be determined without a process of education and ascertainment of facts and without debate and argument. It is, therefore, said that in such circumstances when a rectification was sought to be made by introducing a charge for interest u/s 18A(6), the process that is adopted is a process of revision or review and not the correction of an apparent error in the order of assessment.

Reference was made to the decisions of the Bombay High Court in *Shantilal Rawji v. M. C. Nair*, IV Income Tax Officer, E-Ward, Bombay and *Lata Mangeshkar v. Union of India*. Those were cases where similar alleged mistakes were corrected by exercising power u/s 35 of the Indian Income Tax Act, 1922. The orders of correction were set aside as without jurisdiction. Reliance was also placed on the Supreme Court decision in *S. A. L. Narayan Row v. Ishwarlal Bhagwandas*. The main point decided therein is about the legal effect of the amendment introduced to section 18A of the Indian Income Tax Act, 1922, by Act 25 of 1953, with effect

from 1st April, 1952, by the introduction of the fifth proviso to section 18A(6), which I have already read. It was ruled that it must be supposed that the proviso was actually in the statute book when the order was passed, though actually there was no such provision in the Act, then, and the question as to whether there was a patent error or not should be determined on the basis that the proviso existed at the time of the order of assessment. So it had to be assumed that the Income Tax Officer had a discretion in charging interest or in waiving it. It was, therefore, held that it was not possible to conclude that there was an error apparent on the face of the record from the mere fact that interest had not been charged.

It is no doubt true that the Supreme Court observed :

"The Attorney-General contended that in any event there was nothing to show that the Income Tax Officer had purported to exercise his discretion when he passed the order of assessment and did not impose any liability for payment of interest u/s 18A(6). That may be so. But the case of the assessee did fall within the terms of rule 48(1) and the Income Tax Officer must in law be bound to consider whether he was entitled to reduction or waiver of interest under the fifth proviso." Reference was also made to the passage from the decision in *Shantilal Rawji v. M. C. Nair, IV Income Tax Officer, E-Ward, Bombay*, reading as under :

".... the two relevant circumstances to which we may draw attention are :

(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.... and (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. Mr. Palkhivala has drawn our attention to the fact that in this case the assessment order was completed on the 10th March, 1953, much more than a year after the submission of the return. It is clear that there was scope on the facts of the above cases for the exercise of discretion by the Income Tax Officer for applying the fifth proviso to section 18A(6) because those were cases which clearly satisfied at least one of the conditions precedent prescribed by the rule for the applicability of the fifth proviso to section 18A(6) of the Act. It is, therefore, urged that it is only in such cases where it is clear that the assessee was a person who had satisfied one or the other of the conditions prescribed by rule 48 of the Indian Income Tax Rules, 1922, that it can be said that there was a discretion vested in the Income Tax Officer which he could have exercised in favour of the assessee. Where it is not shown that rule 48 or any part of it has been satisfied, the Income Tax Officer would have had no discretion and the order omitting to charge interest u/s 18A(6) would, therefore, be patently erroneous.

Before dealing with this argument I may also refer to the decision in *Lata Mangeshkar v. Union of India*. It is not clear from the report in that judgment that the assessee satisfied all or any of the conditions prescribed by rule 48(1).

Even so, the principle of the decision in *M. K. Venkatachalam, Income Tax Officer v. Bombay Dyeing Manufacturing Co. Ltd.* was applied and, if I may say so with respect, rightly.

Apart from the above, if it is necessary to conduct an investigation to find out whether a discretion is vested in the Income Tax Officer or not by determining whether any part of the rule (rule 48(1)), had been satisfied and if it is possible to decide whether there was an error or not only after coming to the conclusion whether rule 48(1) has been satisfied, it appears to me the error is not an error apparent on the face of the record as explained in the decision in *Sidhramappa v. Commissioner of Income Tax*.

Counsel on behalf of the revenue invited my attention to section 18A(8) of the Act reading as follows :

"18A. (8) Where, no making the regular assessment, the Income Tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment"

and urged that this section is imperative that interest should be charged in the assessment order and that from the mere fact that no interest has been charged in the assessment order it is patent that an error has been committed. I do not think this argument is sound. Interest to be added to the tax must be calculated in the manner laid down in sub-section (6). This means that there will be addition of interest to tax only when such is chargeable under sub-section (6) of section 18A of the Act. With the utmost respect I am unable to agree with the ruling in *Lata Mangeshkar v. Union of India* and the ruling in *V. N. S. Sockalingam Chettiar v. Income Tax Officer, Pudukottai* has no application.

The order, exhibit P-1, was not sought to be supported on any basis other than as an order u/s 35 of the Indian Income Tax Act, 1922. I am of the view that the Income Tax Officer had no jurisdiction to pass an order under that section of the Act. I, therefore, quash exhibit P-1 and allow this writ application. There will be no order as to costs.