
(2016) 08 MAD CK 0041
In the Madras High Court
Case No : Tax Case (Appeal) No. 234 of 2016

M/s. MRF Ltd.

APPELLANT

Vs

Deputy Commissioner of Income-Tax

RESPONDENT

Date of Decision : 04-08-2016

Acts Referred:

Income Tax Act, 1961 — Section 234C

Citation : (2017) 293 CurTR 151 : (2017) 390 ITR 18

Hon'ble Judges : Mr. S. Manikumar and Mr. D. Krishna Kumar, JJ.

Bench : Division Bench

Advocate : Mrs. Hema Muralikrishnan, Advocate, for the Respondent; Mr. N. Vijayaraghavan, Senior Counsel for M/s. Subbraya Aiyar Padmanabhan, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

S. Manikumar, J. - Instant Tax Case Appeal is filed, challenging the order in ITA.No.1377/Mds/2010, dated 06.11.2015, passed by the Income Tax Appellate Tribunal, "A" Bench, Chennai.

2. Short facts leading to the appeal are as follows:

For the assessment year 2007-08, the appellant-Company filed return of income on 29.10.2007, admitting a total income of Rs. 138,47,34,567/-. The Deputy Commissioner of Income Tax, Large Tax Payer Unit, Chennai, respondent herein, made the following additions/dis-allowances and completed the assessment on 21.12.2009, determining the total income at Rs. 142,58,72,271/- :

"(1) The amortization of amount paid in respect of leasehold land of Rs. 947,146 was disallowed.

(2) Amount of Rs. 1,92,63,136 was disallowed under section 14A r/w. Rule 8D as the expenditure incurred for earning income exempt under the Act and same was added to the total income.

(3) Expenditure incurred of Rs. 2,45,00,000/- in promoting the MRF Pace Foundation as advertisement expenditure for promotion of company brand image was disallowed as not for purpose of business and being of charitable nature.

(4) Deduction under Chapter VIA, Rs. 19,19,096 under section 80JJAA and Rs. 1,17,500 under section 80G, was denied to the appellant as it did not appear in the e-return even though the tax is computed on the total income after considering the Chapter VIA deduction.

(5) Additional TDS claim of Rs. 4,20,981/- for TDS certificates filed during the course of assessment was denied to the appellant.

(6) Interest under section 234C was determined at Rs. 86,31,067 in the Assessment Order as against Rs. 68,87,057 in the Return."

3. While completing the assessment, the Deputy Commissioner of Income Tax, Large Tax Payer Unit, Chennai, respondent herein, disallowed the expenses on amortization of amount paid in respect of leasehold land, disallowance under Section 14A and advertisement expenditure, amounting to Rs. 4,47,10,282/-. The assessing officer also charged interest, under Section 234C of the Income Tax Act, 1961, amounting to Rs. 86,31,067/-, as against Rs. 68,87,057/-, calculated in the return of income.

4. Being aggrieved by the additions/disallowances and interest charged under the above provision, an appeal has been preferred to the Commissioner of Income-Tax (Appeals), wherein, it has been contended that the assessee is entitled to the exceptional income of Rs. 36.41 Crores, during the year, as a result of a favourable decision rendered by the Hon'ble Supreme Court, relating to purchase tax benefits of Kottayam Factory, that was disputed by the Kerala Sales Tax Department. The judgment of the Hon'ble Supreme Court was rendered on 21.09.2006, by which time, 1st and 2nd instalments of advance tax were already paid by the assessee and that the appellant had no knowledge of this income, while arriving at the first two advance tax instalments, payable. The Commissioner of Income-Tax (Appeals), in his order in ITA.No.52/09-10, dated 28.07.2010, held that levy of interest, under Section 234C is mandatory.

5. Aggrieved by the order of the Commissioner of Income-Tax (Appeals), dated 28.07.2010, the assessee preferred an appeal to the Income Tax Appellate Tribunal, which also held that levy of interest under Section 234C as mandatory. As against the above said order of the Tribunal, instant Tax Case Appeal is filed on the following substantial question of law, "Whether the Tribunal was right in law, in holding that the levy of interest under Section 234C of the Act is mandatory without appreciating that the deferment in payment of advance tax was beyond the control of the assessee?"

6. Mr. N. Vijayaraghavan, learned counsel for the appellant submitted that Sections 234B and 234C operate on different fields. Interest u/s 234B is levied, if advance tax payment is less than 90% of the assessed tax. There are two

aspects, for this shortfall: (a) advance tax paid is less than that payable on the returned income and (b) advance tax paid being less than 90% of the assessed income. He further submitted that due to an unexpected event, ie., the judgment of the Hon''ble Supreme Court rendered on 21.09.2006, there is no question of shortfall in payment of advance tax, on the unanticipated income, during the previous year.

7. Referring to Section 234C of the Income-Tax Act, learned counsel for the appellant further submitted that advance tax was paid by the Company, on its current income, on or before the dates specified in Section 234(C) of the Act. He further submitted that the first two instalments of advance tax have already been made on the income. On 21.09.2006, the Hon''ble Supreme Court rendered a decision, in favour of the assessee and that the said income earned could not be included, for the purpose of computation and payment of advance tax.

8. Placing reliance on a decision in Prime Securities Ltd. v. Assistant Commissioner of Income Tax (Investigation) reported in 2011 (333) ITR 464, learned counsel for the appellant further submitted that when there was no possibility for the appellant to anticipate the events that would take place, in the next financial year, and when advance tax was paid by the Company, on its current income, levy of interest under Section 234C is liable to be set aside, which according to him, the authorities, including the ITAT, have failed to do so.

9. According to the learned counsel for the appellant, Section 234(C) cannot be blindly applied, but it should be interpreted and applied to the case on hand, on the same reasons and logic, as held by a Hon''ble Division Bench in Commissioner of Income-Tax v. Revathi Equipment Ltd., reported in 2008 (298) ITR 67. In the said reported case, the Hon''ble Division Bench held that, "the assessee was not liable to pay advance tax and therefore levy of interest under Sections 234B and 234C is not justified."

10. Placing reliance on a decision of this Court in Commissioner of Income-Tax v. REPCO Home Finance Ltd., reported in 2014 (90) CCH 195 (MAD), learned counsel for the appellant further submitted that computation of advance tax is certainly a matter, which is appealable, and hence, there is a substantial question of law, involved in this appeal.

11. Placing reliance on a decision of the Hon''ble Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income-Tax reported in 1986 (160) ITR 961, learned counsel for the appellant further submitted that in the context Section 139(8) and 215, similar to Section 234A/234B of the Income Tax Act, 1961, the Hon''ble Supreme Court held that even though there is a provision for waiver, under Rule 117A and Rule 40 of the IT Rules, still, if the assessee objects to the very levy or its computation, an appeal would lie. Thus, according to the learned counsel for the appellant, right of appeal against levy of interest, cannot be taken away by the circular of CBDT, on the grounds that the Commissioner can consider waiver of interest.

12. Inviting the attention of this Court to a decision in *Shriram Chits (Bangalore) Ltd. v. Joint Commissioner of Income-Tax* reported in 2010 (325) ITR 219, learned counsel for the appellant submitted that in the above reported judgment, while considering the retrospective effect of an amended provision, a Hon'ble Division Bench of the Karnataka High Court held that the assessee cannot be held liable to pay interest, under Section 234(C). In the light of the above contentions, learned counsel for the appellant sought for an answer on the substantial questions of law, raised in this appeal, in favour of the appellant and to set aside the order impugned in this instant appeal.

13. Per contra, Mrs. Hema Muralikrishnan, learned counsel for the respondent submitted that *Shriram Chit's* case (cited supra) was decided, on the facts and circumstances of the case therein, when exemption was withdrawn retrospectively, and therefore, she contended that the said decision is not applicable to the instant case. She further submitted that the logic and reasoning in *Prime Securities Ltd.'s* case (cited supra), cannot be made applicable to cases, arising under Section 234(B) or 234(C) of the Income-Tax Act, 1961, for the reason that payment of advance tax, on the current income of the financial year, has to be made and if there is any failure to pay advance tax on such current year income, then the assessee is liable to pay interest for deferment. She also submitted that in a recent decision in *Commissioner of Income-Tax, Delhi v. Bhagat Construction Co. (P) Ltd.*, reported in 2015 (60) TAXMANN 334 (SC), the Hon'ble Supreme Court held that levy of interest, is automatic and therefore, the decisions relied on by the learned counsel for the appellant, would not lend any support.

14. Placing reliance on the order of the CBDT, dated 26.06.2006, learned counsel for the respondent further submitted that the assessee could have approached the Chief Commissioner of Income-Tax or the Director General of Income-Tax either for reduction or waiver and in the instant case, it was not done.

15. Learned counsel for the respondent further submitted that interest for deferment of advance tax, can be saved only under two exceptions, provided under Section 234(C)(1)(b), which states that, "nothing contained in this sub-section shall apply to the shortfall in the payment of tax due on the returned income, where such shortfall is on account of underestimate or failure to estimate, (a) the amount of capital gains, or (b) income of the nature referred to in sub-clause (ix) of clause (24) of section 2. Clause (ix) of Section 2(24) states that any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever. She therefore submitted that in all other cases, interest for deferment for payment of advance tax is mandatory.

According to her, there is no substantial question of law involved in this appeal and for the reasons stated, prayed for dismissal of the appeal.

16. By way of reply, Mr. N. Vijayaraghavan, learned counsel for the appellant

submitted that the decision of the Hon''ble Supreme Court in the case of CIT v. Bhagat Construction Co. Pvt. Limited [235 Taxman 0135], relied on by the revenue has been rendered on a completely different issue in respect of charging interest under section 234B of the Act. The issue on appeal in the present case, according to him, is whether interest under section 234C can be levied, when the order of assessment did not contain any direction for payment of interest under Section 234B of the Act. While deciding this issue, according to him, the Hon''ble Supreme Court held that Section 234B is leviable inasmuch as Form ITNS 150, contained calculation of interest, payable on tax assessed and this Form, is a part of the assessment order, and therefore, interest under Section 234B is leviable. It is his further submission that in such circumstances, while coming to the conclusion, the Hon''ble Supreme Court has held that Section 234B is mandatory, whether levied in the assessment order or not.

17. According to the learned counsel for the appellant, Bhagat Construction''s (cited supra), was a case, dealing with shortfall of advance tax, payable on the assessed income and actually paid. Referring to Bhagat Construction''s case, he further submitted that the High Court relied on the decisions in the case of Ranchi Club Ltd. (217 ITR 72 Patna) confirmed by the Hon''ble Apex Court in 247 ITR 209, as well as J.K. Synthetics 119 CTR 222. These decisions deal only with shortfall in advance tax on the assessed income and not on returned income. The argument that the assessee cannot anticipate the acceptance of return, was only in the context in assessment. According to him, the Hon''ble Apex Court merely reiterated the provisions of section 234B, that interest should be calculated on shortfall and this should be viewed in the context of issue under appeal before the Hon''ble Apex Court. He further submitted that there is no dispute Section 234C is also mandatory, but the dispute is only on computation.

18. Learned counsel for the appellant further submitted that the decisions relied upon by revenue were rendered in the context of Section 234B of the Act and in these decisions, the Courts were not called upon to decide, as to whether the unexpected income during the year can be excluded. According to him, there cannot be shortfall in payment of advance tax, due to unanticipated income, in so far as Section 234B is concerned, as payment of advance tax upto the last day of previous year, is taken into account for section 234B. Hence the receipt of unexpected income during the year is not relevant for deciding the shortfall u/s 234B and it was not the subject matter of consideration in the cases relied by the Revenue.

19. Placing reliance on a decision of the Hon''ble Apex Court in CIT v. Sun Engineering Works P. Ltd. (198 ITR 297 at page 320), learned counsel for the appellant further submitted that the judgment of the Hon''ble Apex Court must be read as a whole, and observations made in a judgment have to be considered, in the light of the questions, raised. He also submitted that a decision of the court takes its colour from the questions involved in the case, in which it is rendered and, while applying the decision to a later case, courts must carefully

try to ascertain the true principle laid down by the decision and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the court, to support their reasoning. He also submitted that the Hon"ble Apex Court has cautioned that it is not proper to regard a word, clause or sentence occurring in the judgment of the Hon"ble Supreme Court, divorced from its context as containing a full exposition of the law on a question, when the question did not even fall to be answered in that judgment. Thus the decision of the Hon"ble Supreme Court cited is not authority for deciding the issue in appeal before us, as it deals with another section under different circumstance and the question raised in this appeal was considered by the Hon"ble Apex Court, in that decision.

Heard the learned counsel for the parties and perused the materials available on record.

20. Section 234(C) of the Income Tax, deals with Interest for deferment of advance tax and the same is reproduced hereunder:

"Where in any financial year,-

(a) the company which is liable to pay advance tax under section 208 has failed to pay such tax or-

(i) the advance tax paid by the company on its current income on or before the 15th day of June is less than fifteen per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of September is less than forty-five per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of December is less than seventy-five per cent of the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of one per cent per month for a period of three months on the amount of the shortfall from fifteen per cent or forty-five per cent or seventy-five per cent, as the case may be, of the tax due on the returned income;

(ii) the advance tax paid by the company on its current income on or before the 15th day of March is less than the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of one per cent on the amount of the shortfall from the tax due on the returned income:

Provided that if the advance tax paid by the company on its current income on or before the 15th day of June or the 15th day of September, is not less than twelve per cent or, as the case may be, thirty-six per cent of the tax due on the returned income, then, it shall not be liable to pay any interest on the amount of the shortfall on those dates;

(b) the assessee, other than a company, who is liable to pay advance tax under section 208 has failed to pay such tax or,-

(i) the advance tax paid by the assessee on his current income on or before the

15th day of September is less than thirty per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of December is less than sixty per cent of the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of one per cent per month for a period of three months on the amount of the shortfall from thirty per cent or, as the case may be, sixty per cent of the tax due on the returned income;

(ii) the advance tax paid by the assessee on his current income on or before the 15th day of March is less than the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of one per cent on the amount of the shortfall from the tax due on the returned income :

Provided that nothing contained in this sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of under-estimate or failure to estimate-

(a) the amount of capital gains; or

(b) income of the nature referred to in sub-clause (ix) of clause (24) of section 2,

and the assessee has paid the whole of the amount of tax payable in respect of income referred to in clause (a) or clause (b), as the case may be, had such income been a part of the total income, as part of the remaining instalments of advance tax which are due or where no such instalments are due, by the 31st day of March of the financial year:

Provided further that nothing contained in this subsection shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of increase in the rate of surcharge under section 2 of the Finance Act, 2000 (10 of 2000), as amended by the Taxation Laws (Amendment) Act, 2000 (1 of 2001), and the assessee has paid the amount of shortfall, on or before the 15th day of March, 2001 in respect of the instalment of advance tax due on the 15th day of June, 2000, the 15th day of September, 2000 and the 15th day of December, 2000 :

Provided also that nothing contained in this sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of increase in the rate of surcharge under section 2 of the Finance Act, 2000 (10 of 2000) as amended by the Taxation Laws (Amendment) Act, 2001 (4 of 2001) and the assessee has paid the amount of shortfall on or before the 15th day of March, 2001 in respect of the instalment of advance tax due on the 15th day of June, 2000, the 15th day of September, 2000 and 15th day of December, 2000.

Explanation. - In this section, "tax due on the returned income" means the tax chargeable on the total income declared in the return of income furnished by the assessee for the assessment year commencing on the 1st day of April immediately following the financial year in which the advance tax is paid or

payable, as reduced by the amount of,-

(i) any tax deductible or collectible at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income;

(ii) any relief of tax allowed under section 90 on account of tax paid in a country outside India;

(iii) any relief of tax allowed under section 90A on account of tax paid in a specified territory outside India referred to in that section;

(iv) any deduction, from the Indian income-tax payable, allowed under section 91, on account of tax paid in a country outside India; and (v) any tax credit allowed to be set off in accordance with the provisions of section 115JAA.

(2) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years."

21. In Commissioner of Income-Tax v. Revathi Equipment Ltd. reported in 2008 (298) ITR 67, the assessment year, subject matter of consideration, was 2001-02. Accounting year ended on 31st March" 2001. Assessee therein filed return of income on 31th October, 2001, admitting a total income of Rs. 16,67,51,520/-. Return was processed under Section 143(1) of the Income-Tax Act and completed under Section 143(3), determining the total income of Rs. 17,31,76,488/-. The case of the assessee was that it was under the impression that payments made under Voluntary Retirement Scheme are allowable deductions. A new provision under Section 35DDA was introduced, for the first time, in the Finance Act, 2001, with effect from 1st April, 2001. The Assessee has failed to pay the advance tax. Hence, the Assessing Officer levied interest, under Sections 234B and 234C of the Income-Tax Act and completed the assessment. Appeal filed before the Commissioner of Income-Tax (Appeals), was dismissed. Income-Tax Appellate Tribunal allowed the assessee's appeal and hence, the Revenue preferred a Tax Case Appeal, in this Court. At the time, when deduction was made, there were two binding decisions of this Court, viz., CIT v. George Oakes Ltd., [(1992) 197 ITR 288 (Mad.)] and CIT v. Simpson & Company Ltd., [(1998) 230 ITR 794 (Mad.)]. Thus, he deducted expenditure incurred, by way of payments made for Voluntary Retirement Scheme. Sections 207 and 208 of the Income-Tax Act, pressed into service are extracted hereunder:

"207. Tax shall be payable in advance during any financial year, in accordance with the provisions of Section 208 to 219 (both inclusive), in respect of the total income of the assessee which would be chargeable to tax for the assessment year immediately following that financial year, such income being hereafter in this Chapter referred to as "current income".

208. Advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year, as computed in

accordance with the provisions of this Chapter, is five thousand rupees or more."

On the facts and circumstances of the case, a Hon"ble Division Bench of this Court, at Paragraph 7, held as follows:

"7. A combined reading of the above provisions makes it clear that the assessee has to pay taxes in advance in respect of the total income of the assessee, which would be chargeable in a particular assessment year. Now before the introduction of Section 35DDA, the legal dictum was very clear that the assessee could claim expenditure incurred on account of payment made for VRS by the assessee in view of the binding decisions of the Hon"ble jurisdictional High Court in the case of CIT v. George Oakes Ltd., [(1992) 197 ITR 288 (Mad.)] and CIT v. Simpson & Company Ltd., [(1998) 230 ITR 794 (Mad.)]. In both the decisions, it was clearly laid down by the Hon"ble jurisdictional High Court that payments to employees under VRS were in the nature of business expenditure and was deductible under Section 37. Therefore, till the introduction of new provisions under Section 35DDA, the assessee could have estimated the income legitimately after reducing the expenditure incurred on VRS. It is a common knowledge that Finance Bill is introduced on 28th February and the same is made into the Act after passing the bills in both the Houses of Parliament and receiving the consent of Hon"ble President of India some where in May or June, which means till that date no assessee can visualize that a new liability would be fastened to him. Normally, new provisions are introduced with effect from next assessment year, but this provision under Section 35DDA was introduced by the Parliament in its wisdom with effect from 01.04.2001 i.e. the same year and that is why difficult has arisen for visualizing the liability and the assessee could not deduct such expenditure. In fact in almost identical circumstances in the 3rd Member decision by the Delhi Bench in the case of Haryana Warehousing Corporation v. DCIT (75 ITD 155) it was held that in such situations the legal dictum "LEX NON COGIT AD IMPOSSIBILIA" would be attracted. The simple meaning of this dictum is that "law cannot compel you to do the impossible". In the case before us also, the assessee could not have visualize till the last instalment of advance tax i.e. 15.03.2001 that he would not be entitled to deduct VRS payments. Therefore, the assessee could not have done anything other than to estimate the liability to pay advance tax on the basis of existing provisions. We are of the considered opinion that in such situation, it cannot be said that the assessee was liable to pay advance tax. Once we come to the conclusion that the assessee was not liable to pay advance tax, there is no question of charging tax under Section 234B and 234C. In similar circumstances in the case of Priyanka Overseas Ltd. v. DCIT, where the assessee had treated the receipt of cash assistance as capital receipts, which was subsequently amended to be business receipt by the Finance Act, 1990, it was held that in such cases interest under Sections 234B and 234C was not chargeable. In these circumstances, we think that the assessee was not liable to pay advance tax and therefore levy of interest under Sections 234B and 234C is not justified. Further, it is pertinent to note that the assessee by way of abundant caution deposited a sum of Rs. 90,00,000/- on 06.08.2001 i.e. much

before the due date of filing of return, which also prove the bona fide credentials of the assessee. In these circumstances, we set aside the order of the Id. CIT(A) and delete the levy of interest under Sections 234B and 234C."

22. Legal dictum "lex non cogit ad impossibilia" means, "law cannot compel you to do the impossible". In the instant case, it is the contention that, the assessee could not visualize the decision rendered by the Hon'ble Supreme Court, in favour of the assessee and thus, computed the income, for payment of advance tax, in the quarterly instalments, upto 2nd instalments and therefore, levy of interest under Sections 234(B) and 234(C), has to be set aside. Whereas, it is the case of the Revenue that retrospective operation of the Act, from 01.04.2001, in the reported judgment, for the assessment year 2001-02, was the consideration and therefore, the said decision is not applicable. Question in the reported case was, whether, assessee therein has to pay advance tax or not. Whereas, in the case on hand, assessee has paid the advance tax, upto 2nd instalment, and the contention is that assessee could not anticipate the event of a judgment, rendered in its favour and thus, there is no fault, in computation of income and consequently payment of advance tax.

23. In *Prime Securities Ltd. v. Assistant Commissioner of Income-Tax (Investigation)* reported in 2011 (333) ITR 464, the assessee filed a return of income for the year 1991-92, declaring the total income of Rs. 16,62,730/- on 31st December, 1991. There were certain defects in submitting the returns, which were rectified. But there was no default in payment of advance tax. After considering a decision of the Hon'ble Apex Court in *CIT v. Anjum M.H. Ghaswala* reported in (2001) 252 ITR 1 (SC), on the aspect of charging interest, under Section 234(B) of the Income-Tax Act, a Hon'ble Division Bench of the Bombay High Court held as follows:

"In our opinion, as in the present case, it is nobody's case that the appellant has committed a default in payment of advance tax; when it actually paid it, the appellant cannot be held liable to pay interest under section 234B. Insofar as the observations in the order of the Tribunal, that the appellant should have anticipated the events that took place in March, 1992 are concerned, in our opinion, they have no substance. In our opinion, it is rightly submitted that it was not possible for the appellant to anticipate the events that were to take place in the next financial year and pay advance tax on the basis of those anticipated events."

24. In *Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income-Tax* reported in 1986 (160) ITR 961, the court at Paragraph 7, held that,

"7. Now the question is whether orders levying interest under sub-section (8) of section 139 and under section 215 are appealable under section 246 of the Income-tax Act. Clause (c) of section 246 provides an appeal against an order where the assessee denies his liability to be assessed under the Act or against any assessment order 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.

In as much as the levy of interest is a part of the process of assessment, it is open to an assessee to dispute the levy in appeal provided he limits himself to the ground that he is not liable to the levy at all. In this connection we may usefully refer to the decision of the Karnataka High Court where in a judgment in *National Products v. Commissioner of Income tax, Mysore*, [1977] 108 ITR 935. Govind Bhat, C.J., explained the position in regard to the levy of interest under section 139 and under section 215. After referring to the earlier cases on the point he observed:

"All decided cases except one have uniformly taken the view that levy of interests under section 18A(6) or section 18A(8) of the 1922 Act or levy of interest under section 215 of the Act is not appealable but in the appeal against a regular assessment, it is open to the assessee to take every contention which, if accepted, must result in the Income-tax Officer holding that there was no liability to pay advance tax and, therefore, there was no liability to pay penal interest. In other words, it is open to an assessee to contend in the appeal against an order of assessment that he is not liable to pay any advance tax at all or the amount of advance tax determined as payable by the Income-tax Officer is not correct; but if the assessee does not dispute the amount of advance tax determined as payable by the Income-tax Officer, he merely cannot object to the levy of penal interest or question its quantum.

The levy of penal interest under section 139 or section 215 is made in the regular assessment order; the demand issued pursuant to the assessment order is for the total amount of liability imposed inclusive of tax and interest. While levy of penal interest under section 18A of the 1922 Act up to 1st April 1952, was automatic as was noticed by Chagla, C.J. in *Ramnath's case* [1955] 27 ITR 192 (Bom.), under the Act such levy is not automatic; discretion is vested in the Income-tax Officer to waive or reduce penal interest in the cases and circumstances mentioned in rule 117A and rule 40 of the Income-tax Rules, 1962. If the case of the assessee falls within the scope of the said Rules, the Income tax Officer is bound in law to consider whether the assessee was entitled to waiver or reduction of interest. It is, therefore, clear that levy of penal interest under sections 139 and 215 is part of assessment. When such penal interest is levied the assessee is "assessed", meaning thereby, he is subjected to the procedure for ascertaining and imposing liability on him. If the assessee denies his liability to be assessed under the Act, he has a right of appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied under section 215 by the order or assessment, 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 the Income-tax Officer as payable ought to be reduced. In either case he

denies his liability, wholly or partially, to be assessed. Similarly, where interest is levied under section 139 of the Act, the assessee may deny his liability to pay such interest on the ground that the return was not belated or that the penal provision was not attracted at all to his case. In such a case also he denies his liability to be assessed to interest."

8. The decision was noted with approval by the Gujarat High Court in *Bhikhoobhai N. Shah v. Commissioner of Income-tax, Gujarat-V*, [1978] 114 ITR 197. The only dissent expressed in the matter by the Gujarat High Court arose on the question whether the assessee could challenge in appeal his partial liability to be assessed to interest. In this area of dissent we need not enter. But we have no hesitation in endorsing the legal position which has commonly found favour with the two High Courts. We hold that the question whether a case is made out for waiver or reduction of the interest levied under sub-section (8) of section 139 or under section 215 cannot be the subject of an appeal under clause (c) of section 246 of the Income-tax Act. That is a matter which can more appropriately be dealt with by the Commissioner of Income tax in the exercise of his revisional jurisdiction.

But before the revisional jurisdiction of the Commissioner of Income-tax can be invoked in such a case, it is obviously necessary for the assessee to demonstrate before the Income-tax Officer that there is a case for waiving or reducing the levy of interest. We do not find from the record before us that any such attempt was made by the assessee. Since the statute provides for the waiver or reduction of interest it is open to the Income-tax Officer before imposing a levy under sub-section (8) of section 139 and to the Inspecting Assistant Commissioner before doing so under section 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 under section 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. We have been referred to the judgment by one of us (Sabyasachi Mukharji, J.) in *Premchand Sitanath Roy v. Addl. Commissioner of Income-tax, West Bengal-III*, [1977] 109 ITR 751. In that case the question was a very different one. The question was whether a right of appeal was available in regard to the improper exercise of discretion under sub-section (8) of section 139. We think that in holding that no right of appeal lay in such a case the High Court was plainly right.

As the assessee has made no application to the Income tax Officer for reduction or waiver of the interest under sub-section (8) of section 139 or under section 215 no question arises of the relevant authority having denied improperly a reduction or waiver of the interest and that being so, no revision petition can be

maintained in that regard by the assessee before the Commissioner of Income-tax.

9. In the result we affirm the orders of the Commissioner of Income-tax rejecting the revision petitions but on grounds different from those adopted by the Commissioner. We leave it open to the assessee to apply to the Income-tax Officer for waiver or reduction of interest under sub-section (8) of section 139 and under section 215 of the Income Tax Act. If the assessee does so within six weeks from today, the Income-tax Officer will dispose of the applications on the merits expeditiously. Subject to the aforesaid observations the appeals are dismissed. In the circumstances there is no order as to costs."

25. In Commissioner of Income-Tax, Delhi v. Bhagat Construction Co. (P) Ltd., reported in 2015 (60) TAXMANN 334 (SC), the Hon'ble Supreme Court considered, an issue, as to whether, Section 234B applies the moment, an assessee, liable to pay advance tax, has failed to pay such tax or there is any shortfall in payment of tax, and after referring to Explanation 1 to Section 234B of the Act, held as follows:

"It will be seen that under the provisions of Section 234B, the moment an assessee who is liable to pay advance tax has failed to pay such tax or where the advance tax paid by such an assessee is less than 90 per cent of the assessed tax, the assessee becomes liable to pay simple interest at the rate of one per cent for every month or part of the month. The levy of such interest is automatic when the conditions of Section 234B are met. [Para 8]

The facts of the present case are squarely covered by the decision contained in Kalyankumar Ray v. CIT [(1991) 191 ITR 634 (SC)] inasmuch as it is undisputed that Form I.T.N.S. 150 contained a calculation of interest payable on the tax assessed. This being the case, it is clear that as per the said judgment, this Form must be treated as part of the assessment order in the wider sense in which the expression has to be understood in the context of Section 143, which is referred to in Explanation 1 to Section 234B. [Para 9]"

26. As per the provisions of the Income Tax Act, 1961, advance tax has to be paid in instalments, on the specified dates, and during the financial year. As per the provisions, in the case of deferment, in payment of instalment of advance tax i.e. failure to pay the amount of advance tax or shortfall, as stipulated in Section 211 of the Income Tax Act, 1961, interest, is attracted under Section 234C of the Act. Going through the provisions, it could be seen Sections 234A, 234B and 234C have been inserted in the Act to provide for a mandatory charging of interest. If there is default or deferment of payment of advance tax as required under Sections 208 to 211, interest under Section 234C is chargeable. Interest under Section 234C of the Act is required to be calculated and mentioned in the return of income, and the assessee has to pay the same, along with the self assessment. Constitutional validity of the above sections have been upheld on the ground that the provisions relating to interest, are not penal, but,

compensatory in character. Courts have also held interest is payable, because the Revenue, should not be deprived of tax, if proper amount of advance tax, is not paid.

27. In CIT v. Anjum Mohd. Hussain Ghaswala reported in (2001) 252 ITR 1, considering the facts and circumstances of the case, the High Court held that the assessee is not supposed to pay interest, on the payment of tax, which may be assessed in regular assessment under Section 143(3) or best judgment under Section 144, as he is not supposed to know or anticipate his return of income. The High Court further held that interest is payable, in future only, after the dues are finally determined. When the matter was taken on appeal, on the above facts and circumstances of the case, the Hon"ble Supreme Court observed as under:-

"Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression "shall" used in the said section cannot by any stretch of imagination be construed as "may". There are sufficient indications in the scheme of the Act to show that the expression "shall" used in sections 234A, 234B and 234C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as "may". This is clear from the fact that prior to the Amendment brought about by the Finance Act, 1987, the Legislature in the corresponding section pertaining to imposition of interest used the expression "may" thereby giving a discretion to the authorities concerned to either reduce or waive the interest. The change brought about by the Amending Act (Finance Act, 1987) is a clear indication of the fact that the intention of the Legislature was to make the collection of statutory interest mandatory."

28. Thus, from the above, it could be deduced that once it is held that interest under Section 234C of the Act, is mandatory and automatic, then the reason, or the cause for the delay and justification for deferment of payment of advance tax, is immaterial. Reading of the above judgment makes it clear whatever be the reason, when there is deferment in payment of advance tax, and if the stipulated amount has not been paid on the required date, as per Section 211 of the Act, then the consequences follow automatically and compensatory interest under Section 234C becomes payable. Section 234C is a complete code in itself and proviso to sub-section (1) to Section 234C only provides has two exceptions, when deferment or shortfall in the payment of instalment of advance tax can be condoned, where there is under estimate or failure to estimate on account of capital gains or income by way of winnings from lottery, cross word, puzzles etc. Section 234(C) provides no other exception.

29. As stated supra, the assessee has to pay tax in advance, in respect of total income which would be chargeable to tax for the assessment year immediately following the financial year. The assessee has to estimate the income and pay the tax in three instalments, as stated above. The fact that an unanticipated income accrued in the last financial year, cannot be a ground not to pay advance tax with regard to the returned income, which includes the total income, on which tax is

chargeable and on the failure to pay the advance tax, in instalments as provided for, under the Act or when the less amount is paid, the assessee is liable to pay interest. Line of judgments indicate that Section 234C of the Act is mandatory, unlike earlier provisions. No discretion is left to the authority, except in those cases, for which, provision has been made under Section 234(C) of the Act. Section 234C of the Act is applicable to cases, where there is shortfall in the making of payment, by the assessee, on the returned income, whether it be on account of underestimate or failure to estimate the amount of capital income or the income of the nature referred to in sub-clause (ix) of clause (24) of Section 2 of the Act; except in the case of income from any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from any gambling or betting of any form or nature whatsoever.

30. In view of the above discussion and decisions, substantial question of law raised by the appellant is answered in the negative, against the appellant. In the result, the Tax Case Appeal is dismissed. No costs.