(1990) 03 CAL CK 0003

In the Calcutta High Court

Case No : IT Reference No. 140 of 1985

P.P. Dinwala APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 19-03-1990

Acts Referred:
Income Tax Act, 1961 — Section 139, 139(8), 140A, 143, 143(2)

Citation : (1995) 78 TAXMAN 421

Hon'ble Judges : Suhas Chandra Sen, J;Bhagabatiprasad Banerjee, J

Bench : Division Bench

Advocate : Avijit Chowdhury and J.P. Seal, for the Appellant; S.K. Mitra and R.C. Prasad, for the Respondent

Judgement

Sen, J.—The Tribunal has referred the following two questions of law to this Court u/s 256(1) of the income tax Act, 1961 (''the Act''):

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in law in upholding the order passed by the Commissioner of income tax u/s 263 of the Act?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that section 215 of the Act is applicable to the instant case?"

The assessment year involved in this reference is the assessment year 1979-80, for which the period of account is the financial year ending 1977-78.

2. The facts found by the Tribunal, as narrated in the statement of case, are as under:

"The income tax Officer issued notice of demand u/s 210 demanding advance tax of Rs. 3,74,948. The assessee sent to the income tax Officer on 8-9-1978 an estimate of the current income of Rs. 4,25,000 and the advance tax payable by him thereon was calculated at Rs. 2,69,380. However, he actually paid the advance tax in the sum of Rs. 1,04,777. Thereafter revised estimate was filed by him on 17-3-1979 estimating the total income at Rs. 4,10,000 and calculating the tax payable thereon at Rs. 2,58,980. Thus, after deducting Rs. 1,04,077 paid earlier the balance payable according to the revised estimate was shown at Rs. 1,54,203. Apparently, the assessee landed himself for the liability to pay interest u/s 215. However, the income tax Officer was silent on the point in the assessment order. The Commissioner of income tax took the said assessment order to be erroneous insofar as it was prejudicial to the interests of the revenue. He, therefore, issued a notice to the assessee u/s 263 to show cause as to why the assessment order should not be revised."

The assessee raised the following objections to the said notice:

(1) The assessment order proposed to be revised was appealed against and as such, it merged in the order of the Commissioner of income tax (Appeals) dated 17-10-1981 and did not remain the order of the income tax Officer. The Commissioner of income tax had, therefore, no jurisdiction u/s 263 to revise the said order.

(2) The income tax Officer was since silent as to charging u/s 215, he was deemed to have had waived the interest payable by the assessee u/s 215(4) of the Act, read with rule 40, of the income tax Rules, 1962.

(3) The income tax Officer also initiated proceedings u/s 154 for rectification of the alleged mistake which too was objected to by the assessee. The said objection was not disposed of by the income tax Officer to the knowledge of the assessee. During the pendency of the said proceedings the Commissioner of income tax could not invoke jurisdiction u/s 263.

(4) No interest was payable by the assessee u/s 215 since the said section was not applicable to the facts of the case of the assessee. Interest was payable by the assessee only when he had paid the advance tax on the basis of his own estimate whereas in the instant case the advance tax was not paid on the basis of estimate.

(5) Rs. 25,000 paid on 21-2-1981 u/s 140A was required to be taken into consideration for computation of interest.

(6) The assessee did not have sufficient funds to pay advance tax.

None of the objections taken by the assessee to the proceedings u/s 263 found favour with the Commissioner and as such, he passed the impugned order.

On further appeal, the Tribunal held that the doctrine of merger of the original order into the appellate order did not apply in the instant case. The Tribunal held further that an order u/s 215(1) or 215(4) could not have been the subject-matter of appeal before the Commissioner of income tax (Appeals) in view of the provisions of section 246 of the Act and it was open to the income tax Officer to reduce or waive the interest payable u/s 215, namely, that the assessment was not completed more than one year after submission of the return. The Tribunal observed that no inference of waiver could be drawn in absence of specific order to that effect. Simply because the ITO did not initiate penalty proceedings u/s 221, it could not be said that he intended to waive interest payable u/s 215. The Tribunal also observed that it was worth-noting that non-charging of interest u/s 215 was taken by the ITO as a mistake apparent from the record and he initiated proceeding u/s 154 and it must be borne in mind that liability to pay interest u/s 215 was automatic and unqualified. It was, therefore, necessary that waiver of such liability by a public officer should not be construed by mere inference from his silence. Waiver of interest u/s 215 required application of judicial mind and stating reasons showing as to how the judicial discretion had been exercised. Pendency of proceedings u/s 154 was no bar to invoke jurisdiction u/s 263 of the Act.

The Tribunal also observed:

"...when an estimate has been validly filed and amount of tax has been paid less than calculated on the basis of that estimate it cannot be said that the advance tax is not paid on the basis of the estimate. Payment of tax on the basis of estimate does not mean payment of exactly the same amount calculated on the basis of the said estimate. It was the short payment which is made liable for payment of interest. If short payment of advance tax on the basis of assessee''s own estimate would not fall within the ambit of section 215, the said provision would become unworkable. The assessee in the instant case, did file a valid estimate of his income. He paid advance tax. It further appears that he was conscious of his liability to pay the entire advance tax on the basis of the estimate and, therefore, he prayed for time in payment by instalments. In this view of the matter, we hold that section 215 is applicable to the instant case.

Since liability to pay interest u/s 215 is automatic and absolute, it cannot be considered that the assessee''s financial position was not as good as to enable him to make the payment in time."

3. The Tribunal dismissed the appeal on the aforesaid grounds.

4. In the instant case, the assessee filed the return of his income for the assessment year 1979-80 on 19-1-1980 and the assessment order was completed on 24-3-1981. The assessment order was passed u/s 143(3) of the Act and the total income was computed at Rs. 4,18,740. The ITO thereafter gave the following directions:

"Allow credit for advance tax payment of Rs. 1,59,777. Charge interest u/s 139(8). Assessed u/s 143(3) as above. Issue demand notice, Challan and copy of assessment order." The Commissioner was of the view that the ITO had failed to apply the provisions of section 215 and charge interest under that section. The Commissioner came to the conclusion:

"On an examination of the assessment records it was felt that the assessment for the assessment year 1979-80 made by the ITO was erroneous and prejudicial to the interests of the revenue...."

The Commissioner finally passed the following order:

"The assessment order is clearly erroneous and prejudicial to the interests of revenue. The order is set aside with a direction that the ITO would apply his mind regarding the applicability of section 215 of the I.T. Act and take action according to law."

5. The first contention of Mr. Chaudhuri appearing on behalf of the assessee is that section 263 can only apply to a case where an order has been passed by the ITO. If the ITO fails to pass any order, the Commissioner is not empowered by the provisions of section 263 of the Act to compel the ITO to pass an appropriate order.

Section 263, at the material time, stood as under:

"263. Revision of orders prejudicial to revenue. - (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the income tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

6. It has been argued that the Commissioner has power to cancel any order passed by the ITO if he considers the order to be erroneous insofar as it is prejudicial to the interests of the revenue but the pre-condition for passing any order u/s 263 is existence of an erroneous order passed by the ITO. In the instant case no order has been passed by the ITO charging interest u/s 215 of the Act. Under such circumstances, the Commissioner was powerless to pass any order of revision u/s 263 in respect of the ITO''s failure to charge interest.

7. In our view, there is considerable force in this argument advanced on behalf of the assessee. The assessment order was passed u/s 143(3), which, at the material time, stood as follows:

"143(3). On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the income tax Officer may require on specified points, and after taking into account all relevant material which he has gathered,-

(a) in a case where no assessment has been made under sub-section (1), the income tax Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refundable to him on the basis of such assessment;

(b) in a case where an assessment has been made under sub-section (1), if either such assessment has been objected to by the assessee by an application under clause (a) of sub-section (2) or the income tax Officer is of opinion that such assessment is incorrect, inadequate or incomplete in any material respect, the income tax Officer shall, by an order in writing, make a fresh assessment of the total income or loss of the assessee, and determine the sum payable by him or refundable to him on the basis of such assessment.

Explanation : For the purposes of this section-

(1) an assessment under sub-section (1) shall be deemed to be incorrect, inadequate or incomplete in a material respect, if-

(a) the amount of the total income as determined under sub-section (1) is greater or smaller than the amount of the total income on which the assessee is properly chargeable under this Act to tax; or

(b) the amount of the tax payable as determined under sub-section (1) is greater or smaller than the amount of the tax properly payable under this Act by the assessee; or

(c) the amount of any loss as determined under sub-section (1) is greater or smaller than the amount of the loss, if any, determinable under this Act on a proper computation; or

(d) the amount of any depreciation allowance, development rebate or any other allowance or deduction as determined under sub-section (1) is greater or smaller than the amount of the depreciation allowance, development rebate or, as the case may be, other allowance or deduction properly allowable under this Act; or

(e) the amount of the refund as determined under sub-section (1) is greater or smaller than the amount of the refund, if any, due under this Act on a proper computation; or

(f) the status in which the assessee has been assessed under sub-section (1) is different from the status in which the assessee is properly assessable under this Act;"

8. The jurisdiction of the ITO u/s 143(3) of the Act is only to compute the total income or loss of the assessee and determine the sum payable by him or refundable to him on the basis of such assessment. The Explanation to section 143(3) makes it clear that the assessment shall be incorrect or inadequate or incomplete in material respect in the circumstances specified in clause (a), contained therein. This clause does not mention non-levy of interest as a ground for considering an assessment to be incorrect or inadequate or incomplete in material respect.

9. In the instant case, the ITO has computed the total income and determined the amount of tax payable by the assessee. Thereafter he charged interest u/s 139(8).

Assuming that he had failed to pass an order and charge interest u/s 215, the assessment order cannot be regarded as incorrect or inadequate or incomplete for that reason. The contention made on behalf of the Commissioner that the Commissioner was seeking to revise an erroneous assessment order cannot be upheld. Levy of interest u/s 215 is not part of the assessment order. The question of levy of interest u/s 215 arises only after the assessment is completed and tax payable has been finally determined. The interest u/s 215 becomes payable only when it is found that the advance tax paid was less than 25 per cent of the assessed tax.

10. Chapter XVII of the Act (sections 207 to 219) deals with ''Advance payment of tax''. Section 207 lays down that the tax shall be payable in advance in accordance with the provisions of sections 208 to 219, in the cases mentioned therein. Section 208 lays down the condition of liability to pay advance tax. Section 209 deals with the computation of advance tax. Section 210 authorises the ITO to pass an order requiring the assessee to pay advance tax determined in accordance with the provisions of sections 207, 208 and 209. This order can be passed only in a case where the assessee has been previously assessed by way of regular assessment under the Act. Section 211 lays down that the advance tax may be paid in three instalments. Section 212 enables the assessee, who has been served with an order for payment of advance tax u/s 210 to estimate the likely income and pay advance tax accordingly. Section 212 lays down that the assessee, if he makes an estimate of his current income calculated in the manner laid down in section 209, ''he shall pay such amount of advance tax as accords with his estimate in equal instalments on such of the dates applicable in his case u/s 211 as have not expired, or in one sum if only the last of such dates has not expired''. Section 214 provides for payment of interest by the Government if advance tax payable under sections 207 to 213 of the Act exceeded the amount of tax determined on regular assessment. Section 215 lays down:

"215. Interest payable by assessee. - (1) Where, in any financial year, an assessed has paid advance tax u/s 209A or section 212 on the basis of his own estimate including revised estimate, and the advance tax so paid is less than seventy five per cent of the assessed tax, simple interest at the rate of fifteen per cent per annum from the 1st day of April next following the said financial year up to the date of the regular assessment shall be payable by the assessee upon the amount by which the advance tax so paid falls short of the assessed tax:

Provided that in the case of an assessee, being a company, the provisions of this sub-section shall have effect as if for the words ''seventy five per cent'' the words ''eighty-three and one-third per cent'' had been substituted.

(2) Where before the date of completion of a regular assessment, tax is paid by the assessee u/s 140A or otherwise,-

(i) interest shall be calculated in accordance with the foregoing provision up to the date on which the tax is so paid; and

(ii) thereafter, interest shall be calculated at the rate aforesaid on the amount by which the tax as so paid insofar as it relates to income subject to advance tax falls short of the assessed tax.

(3) Where as a result of an order u/s 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 264, the amount on which interest was payable under this section has been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded.

(4) 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 under this section.

(5) In this section and sections 217 and 273 ''assessed tax'' means the tax determined on the basis of the regular assessment (reduced by the amount of tax deductible in accordance with the provisions of sections 192 to 194, section 194A, section 194C, section 194D and section 195) so far as such tax relates to income subject to advance tax 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."

Section 216 provides as follows:

"216. Interest payable by assessee in case of under-estimate, etc. -Where, on making the regular assessment, the income tax Officer finds that any assessee has-

(a) under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) of section 212 under-estimated the advance tax payable by him and thereby reduced the amount payable in either of the first two instalments; or

(b) u/s 213 wrongly deferred the payment of advance tax on a part of his income, he may direct that the assessee shall pay simple interest at twelve per cent per annum-

(i) in the case referred to in clause (a) for the period during which the payment was deficient, on the difference between the amount paid in each such instalment and the amount which should have been paid, having regard to the aggregate advance tax actually paid during the year; and

(ii) in the case referred to in clause (b), for the period during which the payment of advance tax was so deferred."

11. Section 217 lays down that where the income tax Officer finds that a person who was previously assessed by way of regular assessment has not sent the statement or the estimate as is referred to in sub-section (3A) of section 212, then he shall be liable to pay interest at the rate prescribed in that section.

Section 218 provides as follows:

"218. When assessee deemed to be in default. -(1) If any assessee has sent,-

(a) under sub-section (1) of section 209A, a statement, or

(b) u/s 209A or section 212, an estimate or a revised estimate, of the advance tax payable by him, but does not pay any instalment in accordance therewith on the date or dates specified in section 211, he shall be deemed to be an assessee in default in respect of such instalment or instalments.

(2) If any assessee does not pay on the specified date any instalment of advance tax that he is required to pay u/s 210 and does not, on or before the date on which any such instalment as is not paid becomes due, send under sub-section (1) or sub-section (2) of section 212 an estimate or a revised estimate of the advance tax payable by him, he shall be deemed to be an assessee in default in respect of such instalment or instalments."

12. Section 221 provides that when an assessee is in default in making payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the ITO may direct.

13. The question that has arisen in the instant case is whether an order levying interest is an order independent of and distinct from an assessment order. Section 143(2) does not provide for levying of interest.

Rule 40 provides as under:

"40. 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."

14. Rule 119A lays down the provisions for calculating the interest, which are as under:

"119A. Procedure to be followed in calculating interest. -In calculating the interest payable by the assessee or the interest payable by the Central Government to the assessee under any provision of the Act,-

(a) the period for which such interest is to be calculated shall be rounded off to a whole month or months and for this purpose any fraction of a month shall be ignored; and the period so rounded off shall be deemed to be the period in respect of which the interest is to be calculated;

(b) the amount of tax, penalty or other sum in respect of which such interest is to be calculated shall be rounded off to the nearest multiple of one hundred rupees, and for this purpose any fraction of one hundred rupees shall be ignored; and the amount so rounded off shall be deemed to be the amount in respect of which the interest is to be calculated."

15. Even u/s 143 it has not been specifically laid down that interest has to be charged by the ITO in course of assessment proceeding nor is there any provision that interest must be calculated and levied in the assessment order itself. The position is made clear by section 246 of the Act, which provides for appeal against an order passed by the ITO. Section 246 lays down that any assessee aggrieved by any of the orders passed by the ITO may appeal to the AAC against such order. The orders against which appeals will lie have been enumerated in clauses (a) to (o) of section 246. Clauses (c), (d), (e) and (m) are relevant for this purpose and are as under:

"246. Appealable orders. - (a) and (b) ****

(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;

(d) an order u/s 146 refusing to reopen an assessment made u/s 144;

(e) an order of assessment, reassessment or recomputation u/s 147 or section 150;"

It will be seen from sub-clause (c) of section 246 that an assessee has a right of appeal (1) where he denies his liability to be assessed under the Act; or (2) any order of assessment under sub-section (3) of section 143 or section 144 where (i) the assessee objects to the amount of income assessed; (ii) to the amount of tax determined; or (iii) to the amount of loss computed; or (iv) to the status under which he is assessed. The levy of interest u/s 216 has been made specifically appealable under clause (m) of section 246. However, there is no specific provision for appeal against levy of interest u/s 215. The assessee cannot prefer an appeal against an order charging interest u/s 215 on the ground that this charge forms part of the order of assessment of income u/s 143 or on the plea that this levy of interest is in the nature of penalty. The Supreme Court in the case of Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax, has categorically laid down the following propositions:

(1) It is not correct to refer to the levy of such interest as a penalty. But it is part of the process of assessment.

(2) Although sections 143 and 144, do not specifically provide for the levy of interest, it is nevertheless a part of the process of assessing the tax liability of the assessee.

(3) Where the ITO considers that there is a case for levy of interest under sub-section (8) of section 139 or section 215, what he does in practice, is to make an order levying such interest after completing the assessment of the assessee''s total income and the tax payable by him.

(4) Inasmuch as the levy of interest is a part of the process of the 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.

(5) When such penal interest is levied, the assessee is "assessed" meaning thereby, is subject to the procedure for ascertaining and imposing liability on him.

(6) Where penal interest is levied u/s 215 by the order of 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 ITO as payable or to be reduced.

(7) A case for waiver or reduction of interest levied under sub-section (8) of section 139 or section 215 cannot be subject of an appeal under clause (c) of section 246. That is a matter which can appropriately be dealt with by the Commissioner in the exercise of his revisional jurisdiction.

16. Therefore, the view of the Supreme Court is that the assessee has no right of appeal on the question of reduction of interest, but the assessee can deny his liability to pay any interest at all u/s 215 in an appeal. In order to arrive at this conclusion the Supreme Court has drawn a fine distinction between ''Assessment'' and an assessment order under sub-section (3) of section 143 or section 144. The assessee has a right of appeal against an order where he denies ''his liability to be assessed under this Act'' u/s 246(c). Therefore, he can prefer an appeal denying his liability to pay any interest at all u/s 215. This right of appeal is not to be equated with the right of appeal that the assessee has to prefer an appeal against any order of assessment under sub-section (3) of section 143 or section 144 in which case he can take all the points including the point reduction of the liability to pay tax or the quantum of the income assessed.

17. In order to appreciate the fine distinction made by the Supreme Court one

has to bear in mind the meaning of the word ''Assessment'' as explained in the case of C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, and also in the case of Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others, it was observed in the case of C.A. Abraham (supra) as follows:

"...The section which deals with assessment merely as computation of income is section 23; but several sections deal not with computation of income, but determination of liability, machinery for imposing liability and the procedure in that behalf. Section 18A deals with advance payment of tax and imposition of penalties for failure to carry out the provisions therein. Section 23A deals with power to assess individual members of certain companies on the income deemed to have been distributed as dividend, section 23B deals with assessment in case of departure from taxable territories, section 24B deals with collection of tax out of the estate of deceased persons, section 25 deals with assessment in case of discontinued business, section 25A with assessment after partition of Hindu undivided families and sections 29,31,33 and 35 deal with the issue of demand notices and the filing of appeals and for reviewing assessment and section 34 deals with assessment of incomes which have escaped assessment. The expression ''assessment'' used in these sections is not used merely in the sense of computation of income and there is in our judgment no ground for holding that when by section 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income u/s 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof...." (p. 429)

18. The Supreme Court has referred the word ''assessment'' in the first part of section 246(c) in a wide sense, which includes an order charging interest u/s 215. But the second part of section 246(c) refers to assessment in the narrower sense. It has been specifically provided in the second part of section 246(c) that the assessee has a right of appeal against sub-section (3) of section 143 or section 144. This obviously cannot include an order charging interest u/s 215. Therefore, the Supreme Court has drawn a clear distinction between an order u/s 215 and an order u/s 143(3). Although an order u/s 215 may be treated as part of the assessment process, taking the word ''assessment'' in its widest sense, it will not form part of assessment order u/s 143(3). That is the reason why against the order charging interest u/s 215 the assessee can prefer an appeal denying his liability to be assessed and on no other ground whereas all the points included in an assessment order u/s 143(3) may be agitated in appeal before the appellate authority.

19. That a separate order will have to be passed for charging interest u/s 215 has clearly been stated by the Supreme Court in the case of Central Provinces Manganese Ore Co. Ltd. (supra) :

...Although section 143 and section 144 do not specifically provide for the levy of interest and the levy is, in fact, attributable to sub-section (8) of section 139 or section 215, it is nevertheless a part of the process of assessing the tax liability of the assessee. Where the income tax Officer considers that there is a case for levying interest under sub-section (8) of section 139 or u/s 215, what he does in practice, is to make an order levying such interest after completing the assessment of the assessee''s total income and the tax payable by him." (p. 966)

[Emphasis supplied]

The position is also made clear by the period of limitation provided by section 263(2), which lays down that no order shall be passed under sub-section (1) of section 263 after expiry of two years ''from the date of the order sought to be revised''. This can only mean that there will have to be an order in existence which the Commissioner can revise within a period of two years from the date of that order. If no order at all is passed, there cannot be any question of computation of two years from the date of that order.

20. In this connection it is also pertinent to note the provisions of section 156 which are as under:

" Notice of demand. - When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the income tax Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable."

This section recognises four types of orders which may be passed by the ITO giving rise to a demand against an assessee. There may be an order in consequence of which tax may be payable. There may also be orders in consequence of which interest, penalty or fine may be payable. In every such case the ITO is entitled to serve a notice of demand upon the assessee in the prescribed form for realisation of the demand raised by the order.

If in consequence of any order passed u/s 215 any interest is payable, a notice of demand may be issued in respect of levy of such interest. Merely because the amount of interest is included along with the demand for tax in a composite notice of demand that will not make charging of interest a part of the assessment order.

Therefore, it clearly appears from the scheme of the Act that an order levying interest u/s 215 is a separate and distinct order from the assessment order. The assessment order culminates in raising a demand of tax. Section 215 makes an assessee liable to pay interest when there is a shortfall in payment of advance tax. This is a liability quite distinct and separate from the liability to pay income tax which is created by charging section 4. In fact rule 119A makes it clear that interest may be payable in respect of the amount of tax, penalty or any other sum. The procedure and method of calculation of interest has been provided in Rule 119A.

21. Strong reliance was placed on a decision of this Court in the case of

Premchand Sitanath Roy Vs. Addl. Commissioner of Income Tax and Others, In that case the ITO failed to charge any interest while passing the assessment order for the assessment year 1968-69. According to the assessee, the ITO was satisfied with the explanation giving by the assessee that the delay in filing the return was due to the death of the partners of the assessee-firm. The ITO had, therefore, waived the interest. The assessment order was, however, totally silent on the question of interest. On appeal, the AAC confirmed the order of assessment. Therefore, the Additional Commissioner issued a notice u/s 263 to show cause why the order of assessment should not be revised as it did not disclose any reason for waiver of interest. The assessee filed a writ petition challenging the said notice. It was contended for the petitioner that (a) the order of the ITO having merged in the appellate order of the AAC, the Additional Commissioner had no jurisdiction to issue the notice u/s 263, and (b) an order u/s 139(8) was a discretionary order of the ITO and the exercise of such discretion in one way or another could not be the subject-matter of interference by the revisional power of the Commissioner u/s 263.

22. It was held by Sabyasachi Mukherji, J. (as His Lordship then was) that the Commissioner had no power u/s 263 to interfere with or revise the order passed by the AAC. The application of the doctrine of merger depended upon the nature of the appellate order in each case and on the scope of the statutory provisions conferring the appellate or revisional jurisdiction. It could not be said that wherever there were two orders, one by an inferior Tribunal and the other by a superior Tribunal passed in an appeal or revision there was merger or fusion of the two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. Whether interest should be waived or not was not one of the matters on which the assessee had a right of appeal u/s 246. The exercise of discretion u/s 139(8), articulate or inarticulate, could not have been the subject-matter of an appeal before the AAC in view of the provisions of section 246. As the question whether the interest had been properly waived or not was not the subject-matter of appeal before the Appellate Commissioner, there could not be any question of merger of the order of the ITO in the appellate order on this aspect of the matter and it could not be said that the Commissioner had lost his jurisdiction of revision in that case after the order of the AAC. It was, therefore, held that in the facts of that case there was no merger of the order passed by the ITO in the appellate order. Therefore, the Commissioner could revise the order passed by the ITO.

23. The important point to note is that in the case of Premchand Sitanath Roy (supra) the question that has been raised in this case was not mooted at all. Can the Commissioner exercise revisional power u/s 263 in a case where the ITO had failed to pass an order altogether? If the ITO fails to pass an assessment order on the basis of a return filed, the Commissioner cannot assume jurisdiction u/s 263 and direct the ITO to pass an order. If such an order is passed by the Commissioner, it will not be revision of any order passed. Revision of an order presupposes existence of an order. There cannot be any revision of a non-

existing order. Once it is accepted that the order passed by the ITO for levy of interest u/s 215 is not a part of the assessment order u/s 143(3), then the Commissioner cannot direct the ITO to pass an order u/s 215 on the ground of the failure of the ITO to pass such an order. In the case of Premchand Sitanath Roy (supra) the Court was not called upon to decide and did not decide in any way the question whether the Commissioner had jurisdiction u/s 263 to direct an ITO to pass an order levying interest when such an order had not at all been passed by the ITO at any stage of his proceeding. Therefore, in our opinion, question No. 1 must be answered in the negative and in favour of the assessee. Although many interesting arguments were advanced on the scope of section 215 raised in question No. 2, in view of the answer given to question No. 1, we decline to answer question No. 2. There will be no order as to costs.

