
(1975) 06 CAL CK 0025

In the Calcutta High Court

Case No : Income-tax Reference No. 43 of 1972

Singho Mica Mining Co. Ltd.

APPELLANT

Vs

Commissioner of Income Tax, Central

RESPONDENT

Date of Decision : 27-06-1975

Acts Referred:

Income Tax Act, 1922 — Section 18A(3), 18A(8)
Income Tax Act, 1961 — Section 215(4), 217, 263

Citation : (1978) 111 ITR 231

Hon'ble Judges : Dipak Kumar Sen, J; Deb, J

Bench : Division Bench

Advocate : S.B. Mukherjee and P. Mullick, for the Appellant; Suhas Sen and Ajit Sengupta, for the Respondent

Judgement

Dipak Kumar Sen, J.—This reference arises in respect of the assessment year 1961-62. The facts found are that Singho Mica Mining Co. Ltd., the assessee, filed its return for the said assessment year on the 28th June, 1962, on which assessment was made on the 4th March, 1966. Subsequently, it was found that the assessee had not complied with the provisions of Section 18A(3) of the Indian Income Tax Act, 1922, and failed to file its estimate but in the original assessment the Income Tax Officer did not charge any interest u/s 18A(8) of the Indian Income Tax Act, 1922. The Commissioner considered that this omission to charge interest has resulted in prejudice to the interest of the revenue and after hearing the assessee passed an order under, Section 263 of the Income Tax Act, 1961, directing the Income Tax Officer to compute and recover such interest. Interest was levied accordingly.

2. In the meantime, the assessee had preferred an appeal from the original order of assessment before the Appellate Assistant Commissioner which was disposed of by the latter by his order dated the 12th August, 1968.

3. The assessee preferred an appeal before the Tribunal from the order of the Commissioner. It was contended before the Tribunal that the assessment order

dated the 4th March, 1966, had merged with the order of the Appellate Assistant Commissioner in appeal and consequently Section 263 of the Income Tax Act, 1961, could not apply.

4. It was also contended that the Income Tax Officer should be deemed to have exercised the discretionary power vested in him under rule 48(1) of the Income Tax Rules, 1922, and to have waived interest under the said Section 18A(8).

5. It was further contended that with effect from the 1st April, 1962, the Income Tax Act of 1922 had been repealed by the new Act of 1961 and as such Section 18A(8) of the earlier Act had ceased to exist from that date and the Commissioner's order directing the levy of interest under that section could not be sustained.

6. The department contended before the Tribunal that the appeal from the assessment was on points entirely unconnected with the question of levy of interest and that merger, if any, was only in respect of the points adjudicated upon in the appeal and not in respect of the entire order.

7. It was also contended that Section 18A(8) of the earlier Act was the appropriate section under which interest was leviable and as in any event if the power to levy interest existed the same could be made under the appropriate section of the new Act.

8. Lastly, it was contended that there was nothing in the records suggesting that the Income Tax Officer had in fact exercised his discretion to waive the interest and ex facie there was no waiver.

9. The Tribunal held that merely because there has been an appeal it would be incorrect to hold that the order of the Income Tax Officer had merged with that of the Appellate Assistant Commissioner in its entirety. Merger was only in respect of those issues which had been adjudicated upon by the appellate authority. The admitted position was that the levy or non-levy of the interest was not in issue in the appeal and, therefore, this issue could be validly revised by the Commissioner u/s 263 of the Income Tax Act, 1961.

10. On the authority of the Supreme Court in the case of Commissioner of Income Tax, Delhi (Central) Vs. Singh Engineering Works P. Ltd., , the Tribunal held that interest in this case was leviable and to be considered as having been levied u/s 217 of the Income Tax Act, 1961, and not u/s 18A(8) of the Indian Income Tax Act, 1922. Mislabelling or mentioning a wrong section did not vitiate the order as the requisite power was otherwise vested and exercise thereof was referable to a jurisdiction, which conferred validity upon it.

11. The Tribunal did not accept that the Income Tax Officer would be deemed to have waived interest and found that there was no material to establish such waiver.

12. The Tribunal upheld the order of the Commissioner but directed that the

Income Tax Officer would charge interest u/s 217 of the new Act only after considering whether there was a case for reduction or waiver as provided for in rule 40 of the Income Tax Rules, 1962.

13. The questions which have been referred u/s 256(1) of the Income Tax Act, 1961, in this reference are as follows :

"(1) Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the Income Tax Officer's order got merged with that of the Appellate Assistant Commissioner only in respect of those issues which had been adjudicated upon by the Appellate Assistant Commissioner ?

(2) Whether, on the facts and circumstances of the case, the assessment order was merged with that of the Appellate Assistant Commissioner and, if so, whether the Commissioner of Income Tax was competent to pass the order u/s 263 on 31st October, 1967 ?

(3) Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the penal interest should be charged u/s 217 of the Income Tax Act, 1961, only after considering whether there was a case for a reduction or waiver as provided for in rule 40 of the Income Tax Rules, 1962 ?

(4) Whether, on the facts and circumstances of the case, the Income-tax Officer should be deemed to have exercised the discretionary power vested in him under rule 48(1) of the Income Tax Rules, 1922 ?"

14. Mr. S.B. Mukherjee, learned counsel on behalf of the assessee, submitted that Section 250(7) of the Income Tax Act, 1961, provided for communication of the order passed in appeal by the Appellate Assistant Commissioner to the assessee and the Commissioner, and hence when the latter exercised his powers of revision he had or would be deemed to have notice of the order passed in appeal. He further submitted that Section 251 of the Act conferred wide powers on the Appellate Assistant Commissioner, who could confirm, reduce, enhance or annul the assessment which could also be set aside and referred back to the Income Tax Officer for a fresh assessment. After necessary enquiry the Appellate Assistant Commissioner could pass any order in the appeal as he thought fit and could consider and decide any matter arising out of the proceedings notwithstanding that the same was not raised before him by the appellant.

15. Mr. Mukherjee contended that, in view of the wide ambit of the section, the entire matter relating to this assessment and the order appealed from in its entirety and in all its aspects were before the Appellate Assistant Commissioner,

16. This appeal having been disposed of, the order of assessment in its entirety had merged in the order passed in appeal and the Commissioner had no power u/s 263 of the Income Tax Act, 1961, to revise this assessment. u/s 263, the power of revision by the Commissioner was confined to orders passed by the Income Tax Officer and not to the order of any other authority.

17. In support of his contentions Mr. Mukherjee cited the decision of the Bombay High Court in the case of Commissioner of Income Tax, Bombay North Vs. Tejaji Farasram, . Here, the assessee, a Hindu undivided family, was assessed to Income Tax for the year ending 12th November, 1947. In the assessment, the Income Tax Officer included capital gains on account of transfer of goodwill computed u/s 12B of the Indian Income Tax Act, 1922, The assessee appealed from the order of assessment to the Appellate Assistant Commissioner. One of the grounds in the appeal related to the computation of capital gains. The Appellate Assistant Commissioner rejected this contention in the appeal. Thereafter the Commissioner, acting u/s 33B(1) of the Indian Income Tax Act, 1922, computed the capital gain at Rs. 10 lakhs. The question which was referred to the Bombay High Court was (page 415):

"Whether the Commissioner of Income Tax is competent to pass an order u/s 33B enhancing an assessment in a matter in which appeal was preferred against the order of the Income Tax Officer and the said order was confirmed by the Appellate Assistant Commissioner of Income Tax ?"

18. The High Court held that in enhancing the computation of goodwill the Commissioner was revising the appellate order. In his judgment, Chagla C.J. observed as follows (page 420):

"The principle underlying Section 33B is that it is only the order of the Income Tax Officer that can be revised by the Commissioner. Once the assessment is confirmed by the Appellate Assistant Commissioner or any order with regard to the assessment has been made by the Appellate Assistant Commissioner, that becomes a final order of assessment, and the only right that the department has is the right to appeal to the Appellate Tribunal. The right of the Commissioner continues so long as the order of the Income Tax Officer is not merged in the order of the Appellate Assistant Commissioner, but once the order is merged, the Commissioner cannot deal with the assessment of the assessee at all."

19. Mr. Mukherjee, also cited the case of Shantilal Rawji Vs. M.C. Nair, IV Income Tax Officer, E Ward, Bombay and Another, . This case deals with the scope of rectification proceedings by the Income Tax Officer and is not of much assistance on the point in issue here.

20. Mr. Suhas Sen, learned counsel on behalf of the revenue, contended, on the other hand, that the decision of the Bombay High Court in the case of Commissioner of Income Tax, Bombay North Vs. Tejaji Farasram, has to be read in the light of the subsequent decisions of the Supreme Court on the point. He cited the case of Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., . The facts of this case before the Supreme Court were that the assessee, a firm registered u/s 26A of the Indian Income Tax Act, 1922, had preferred appeals against the assessments for the assessment years 1947-48, 1948-49 and 1949-50. The Appellate Assistant Commissioner passed orders and reduced the assessments for the years 1947-48 and 1948-49. The appeal in respect of

the assessment year 1949-50 remained pending.

21. In the meantime the Commissioner of Income Tax issued notices u/s 33B(1) of the Act and, after hearing, passed an order cancelling the registration of the firm, under, Section 26A and directed the Income Tax Officer to make fresh assessments of the assessee as an unregistered firm for all the assessment years.

22. The questions which were mooted before the Supreme Court were as follows:

"(1) Did the order passed by the Income Tax Officer granting registration to the assessee-firm continue to be an order passed, by the Income Tax Officer even after, the assessee's appeal against the assessment made by the Income Tax Officer, on the basis that the assessee was a registered firm, had been disposed by the Appellate Assistant Commissioner ?

(2) Did the order of registration along with the subsequent order of assessment merge in the appellate order?

(3) Whether the order of registration, in respect of the assessment year 1949-50 may be made the subject-matter of the exercise of the Commissioner's revisional power even though the assessee's appeal against the assessment for the said year was pending before the Appellate Assistant Commissioner at the material time ? "

23. The Supreme Court held that where an appeal was preferred the decision of the appellate authority was the subsisting, operative and enforceable decision. By affirmance or confirmation the original decision merged in the appellate decision,

24. But in the case before it the order granting registration to a firm u/s 26A was an independent and separate order.

25. No appeal could be filed by the department against an order granting registration. Therefore, an order of the Income Tax Officer granting registration to a firm could not be the subject-matter of an appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner could not cancel an order granting registration and that such an order remained outside the appellate jurisdiction and did not strictly form part of the proceedings before the appellate authority. The order of registration was not and could never become the subject-matter of an appeal before the appellate authority and could not merge in the appellate order. Such an order could be revised by the Commissioner u/s 33B whenever be considered that it was erroneously passed.

26. The next decision of the Supreme Court cited by Mr. Sen was in the case of Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria, . In this case, the Appellate Assistant Commissioner had, in an appeal preferred by the assessee, enhanced the assessment. It was held that the Appellate Assistant Commissioner had no jurisdiction u/s 31(3) of the Indian Income Tax Act, 1922, to assess a source of income which was not disclosed

either in the returns filed by the assessee or in the assessment order and that it was not open to the Appellate Assistant Commissioner to travel outside the records with a view to find out new sources of income and enhance the assessment on that basis. This decision does not appear to be of much assistance in the facts of the case before us.

27. Another decision of the Supreme Court in the case of *State of Madras Vs. Madurai Mills Co., Ltd.*, was cited by Mr. Sen. Here, the assessee had been assessed to sales tax on a certain turnover and his appeal to the Commercial Tax Officer for exclusion of certain items from the turnover was partly allowed. Thereafter, the Deputy Commercial Tax Officer made a revised assessment on the 28th November, 1952. The assessee preferred a revision therefrom to the Deputy Commissioner of Commercial Taxes objecting to the inclusion in the turnover of a certain sum collected on account of a tax. No other objection was raised. This revision petition was dismissed by the Deputy Commissioner of Commercial Taxes. Thereafter, the Board of Revenue issued a notice to the assessee proposing to revise the assessment of the Deputy Commercial Tax Officer by including in the net turnover a further sum on the ground that it was wrongly excluded in the computation of turnover.

28. The assessee objected to the proposed revision, *inter alia*, on the ground of limitation. The Board of Revenue rejected the contentions of the assessee and passed an order. The High Court on appeal set aside the order on the ground that it was barred by limitation. In the further appeal to the Supreme Court the department contended that the proceedings were not barred by limitation as the order which was sought to be revised was the order dated 21st August, 1954, of the Deputy Commissioner and not that of the Commercial Tax Officer or the Deputy Commercial Tax Officer.

29. The question arose whether the order of the Deputy Commissioner of Commercial Taxes passed in revision resulted in the merger of the earlier order of the Commercial Tax Officer. The Supreme Court observed that the doctrine of merger was not a doctrine of rigid and universal application and that 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 a fusion or merger 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. The application of the doctrine, according to the Supreme Court, depended on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. The Supreme Court found that the only point which was urged before the Deputy Commissioner was that a sum collected by way of tax should not be included in the taxable turnover. Before the Board of Revenue the question which arose was whether the Deputy Commercial Tax Officer was right in excluding from the net taxable turnover of the assessee another sum on another transaction. The Supreme Court held that the doctrine of merger could

not be invoked in those circumstances.

30. Mr. Sen referred to Section 246 of the Income Tax Act, 1961, which specified the orders of an Income Tax Officer which were appealable and from which appeal could be preferred to the Appellate Assistant Commissioner. In this section an order u/s 216 of the Act providing for payment of interest in the case of under estimation of income has been made specifically appealable but no such appeal has been provided from an order levying interest in a case where no estimate has been submitted by the assessee. In the corresponding Section 30(1) of the old Act an order levying interest u/s 18A(8) had not been made appealable.

31. Mr. Sen contended that in the instant case there was no question of merger inasmuch as under the statute the order for payment of interest u/s 18A(8) or Section 217 was not made appealable. He contended further that, in any event, the dispute regarding such interest was never mooted nor decided by the Appellate Assistant Commissioner, and, therefore, there was no question of any merger.

32. The contentions of Mr. Sen appear to be of some substance. In the case of Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., , referred to above, an order granting registration u/s 26A of the Indian Income Tax Act, 1922, was found to be non-appealable and on that basis it was held that in a dispute regarding registration an order passed could not have been made a subject-matter of the appeal and could not be said to have merged in the appellate order. Applying the same reasoning we find that in the instant case an order for payment of interest u/s 18A(8) of the 1922 Act or Section 217 of the 1961 Act is not appealable and also the dispute relating to payment of interest was never made the subject-matter of the appeal before the Appellate Assistant Commissioner. In Commissioner of Income Tax, Bombay North Vs. Tejaji Farasram, , before the Bombay High Court the assessment itself was the subject-matter of the appeal and the said appeal having been disposed of, the order of the assessment was held to be merged in the appellate order. It cannot be said that such merger has taken place or could have taken place in the instant case. It follows, therefore, that omission to levy interest for non-submission of estimate could be a subject of revision by the Commissioner of Income Tax u/s 263 of the new Act.

33. At the hearing a new point was raised whether in the absence of any order u/s 18A(8) there could be any revision. We do not propose to go into this question as the same has not been agitated earlier. The original order of assessment in any event has not been included in the paper book.

34. The other contention whether the Income Tax Officer could be deemed to have exercised his discretion under rule 48(1) of the Income Tax Rules, 1922, and had waived interest in the instant case next falls for consideration. Mr. Mukherjee for the assessee relied on the case of Shantilal Rawji Vs. M.C. Nair, IV

Income Tax Officer, E Ward, Bombay and Another, , referred to earlier also in support of this contention. In this case, the assessee had paid advance tax on his own estimate u/s 18A and after the order of assessment was passed, the Income Tax Officer discovered that the assessee had not paid the correct amount of advance tax and interest had not been charged u/s 18A(6). The Income Tax Officer thereupon issued a notice and passed an order of rectification levying penal interest. It was contended on behalf of the assessee that as the matter had not been dealt with in the assessment order at all there was no case for rectification. The Bombay High Court decided the case on the basis that under the statute it was obligatory upon the Income Tax Officer to levy such penal interest and as he had not done so the mistake or error was apparent on the face of the records.

35. In the meantime the relevant Section 18A(6) had been amended with retrospective effect and in certain circumstances conferred power on the Income Tax Officer to reduce or waive the interest payable. The High Court observed that if the amendment was in force at the relevant time and the Income Tax Officer did not impose a penalty the court would lean in favour of the view, that the Income Tax Officer had exercised his discretion. In that event, in the absence of any mention of levy of penal interest in the assessment order it could not be said that there was an error on the part of the Income Tax Officer.

36. Mr. Sen, on behalf of the revenue; cited a decision of the Kerala High-Court in the case of Commissioner of Income Tax Vs. Cochin-Malabar Estates Ltd., . In this case, the Kerala High Court construed Section 213(4) of the Income Tax Act, 1961, which enabled the Income Tax Officer to waive the interest payable by an assessee completely or to reduce it. The Kerala High Court held that the judicial exercise of discretion was necessary to find out what interest if at all should be charged. Reduction or waiver of interest was held to be a quasi-judicial act and hence an order u/s 215(4) must state the reason for it.

37. In that case, the Income Tax Officer had not charged any interest u/s 215(1) of the Act and the assessment orders were silent as to interest. The Commissioner acting suo motu u/s 263 of the Act took the view that this was clearly due to oversight and inadvertence and set aside the assessment orders to the extent that they failed to charge interest.

38. The High Court noted the observations of the Bombay High Court in Shantilal Rawji Vs. M.C. Nair, IV Income Tax Officer, E Ward, Bombay and Another, , but held that the jurisdiction of the Commissioner u/s 263 of the Act remained unaffected. If an order was prejudicial to the interest of the revenue and erroneous, the Commissioner could set aside the same. An order which did not charge interest where chargeable was, prima facie, prejudicial and whether it was erroneous or not would depend upon the grounds on the basis of which such omission might be supported. In such a case the Commissioner would be entitled to know on what grounds interest had been waived. The Kerala High Court held that the finding of the Tribunal in that case that the Income Tax Officer had

exercised his discretion and decided not to levy penal interest was erroneous.

39. It appears to us that the observations in *Shantilal Rawji Vs. M.C. Nair*, IV Income Tax Officer, E Ward, Bombay and Another, by the Bombay High Court were in the nature of obiter. The proviso on which the argument was based was found to be not in force at the relevant time. We respectfully agree with the observations of the Kerala High Court. It appears to us that in the instant case the order is absolutely silent and it is not possible to infer therefrom that the Income Tax Officer had in fact considered the matter at all or had exercised his discretion in any manner. An order u/s 217 is not appealable but the same can be revised by the Commissioner either in favour of the revenue u/s 263 or in favour of the assessee u/s 264,

40. On the preceding reasons we answer the questions as follows ;

With reference to question No. 1 we hold that only the assessment order which was the subject-matter of the appeal merged with the order of the Appellate Assistant Commissioner and there was no merger in respect of levy of penal interest u/s 18A(8) and/or Section 217 of the two Acts, We answer question No. 1 in the affirmative and in favour of the revenue.

Question No. 2 has to be answered with reference to question No. 1 and we answer the same in the affirmative and in favour of the revenue.

Question No. 3 is answered also in the affirmative and in favour of the revenue.

41. As to question No. 4 the Tribunal has found as a fact that the Income Tax Officer did not apply his mind to the question. This finding has not been challenged. Therefore, this question is answered in the negative and also in favour of the revenue. We return our answer accordingly.

42. In the facts and circumstances there will be no order as to costs.

Deb, J.

43. I agree.