ANDHRA PRADESH HIGH COURT

Meka Venkatappayya

Vs.

Additional Income-Tax Officer

Writ Appeal No. 103 of 1956

(K. Subba Rao, C.J. and Jaganmohan Reddy, J.)

01.08.1956. 28.02.1957

JUDGMENT

K. Subba Rao, C.J.

1. This is an appeal against the order of our learned brother Satyanarayana Raju. J. dismissing the application filed by the appellant under Art, 226 of the Constitution of India. The appellant is a partner of the firm of Messrs. Gopala Krishna Manure Depot and Turmeric Co., Tenali. Before 1947, the firm was assessed to income-tax as an unregistered firm. Admittedly, the appellant was not assessed to income-tax at any time before 1947-48 as an individual. The Additional Income-tax Officer, Tenali Circle, for the first time assessed the appellant to income-tax as an individual for the assessment year 1947-1948 on a taxable income of Rs. 39,080/- and determined the tax payable at Rs. 12,385-1-0. Against the said order, the appellant preferred an appeal to the appellate Assistant Commissioner, Madras. In the appeal, the appellate Assistant Commissioner gave him some relief. On further appeal to the Tribunal, the tax payable was reduced to Rs. 2479-11-0. Pending the appeal to the Appellate Assistant Commissioner, the Additional Income-tax Officer, Tenali, issued a notice to the appellant on 25-6-1952 under Section 18-A (8) of the Income-tax Act (hereinafter referred to as the Act) alleging that he had not paid the advance tax payable under Section 18-A (8) and, therefore, he was liable to pay penal interest under the said section in a sum of Rs. 3632-10-0 being the amount of interest payable from 1-4-47 to 13-3-1952 at 6 per cent, per annum on Rs. 12,227-8-0, and directing the said amount to be paid before 25-7-1952. The appellant filed objections denying his liability to pay the said amount. On 31-10-1953, the appellant again received a notice under Section 35 of the Act proposing to rectify the assessment under that section on the ground that, while computing the assessment for 1947-1948, the penal interest under Section 18-A (8) was not charged by mistake. The appellant filed his objections contending that the omission to charge penal interest was not due to any mistake apparent on the face of the record and, therefore, the provisions of Section 35 of the Act were not applicable. His contention was negatived both by the Income-tax Officer and, on revision, by the Commissioner of Income-tax, Hyderabad. The appellant filed the aforesaid application under Article 226 of the Constitution of India for issuing a Writ of certiorari to quash the proceedings of the Income-tax Officer dated 31-10-1053. Satyanarayana Raju, J. rejected the contentions of the appellant and held that the rectification of the order of assessment was made in due

compliance with Section 35 of the Act, and, on that finding, dismissed the application. Hence, the appeal

2. Learned counsel for the appellant contends that he was not liable to pay penal interest under Section 18-A (3) of the Act and, therefore there was no mistake apparent on the face of the record to be rectified under Section 35 of the Act. Section 18-A of the Act provides for the advance payment of tax, in respect of income whereof deduction of income-tax is not provided for at the time of payment. Under Section 18-A (3) any person, who has not hitherto been assessed, shall before 15th day of March in each financial year, if his total income of the period which would be the previous year for an assessment for the financial year next following is likely to exceed the prescribed amount, send to the Income-tax Officer an estimate of the tax payable by him and pay the amount on such of the dates specified in Sub-Section (1).
Sub-section (8) enjoins on the Income-tax Officer, if on making the regular assessment he finds that no payment of tax has been made in accordance with the provisions of the section, to add the interest calculated in the manner laid down in Sub-Section (6), to the tax assessed by him. Section 35 of the Act enables the Income-tax Officer at any time within four years from the date of any assessment order passed by him on his own motion to rectify any mistake apparent from the record of the assessment. Section 35, therefore, enabled the Income-tax Officer, in the present case, to rectify the omission to add the interest to the original assessment if such omission was a mistake apparent from the record. Under Sub-Section (3) of Section 18-A, if no payment of tax had been made in accordance with the provisions of Section 18-A, a duty was cast on the Income-tax Officer to add the interest in the manner laid down in Sub-Section (6) to the regular assessment. If such an addition was not made by mistake we have no doubt that the omission was a clear mistake apparent from the record of assessment and, therefore, liable to be rectified under Section 35 of the Act. It is, therefore, contended by the learned counsel for the assessee that no interest was payable by the assessee under Sub-Section (6) of Section 18-A as no duty was cast upon the assessee to send to the Income-tax Officer an estimate of the tax payable by him within the meaning of Sub-Section (3). The material portion of Sub-Section (3) reads :

> "Any person who has not hitherto been assessed shall before 15th day of March in each financial year ..... send to the Income-tax Officer an estimate of the tax payable by him on that part of the income to which the provisions of Sub-Section 18 do not apply."

3. The contention is that the provisions of the sub-section apply only to a person, who has not hitherto been assessed but, as the appellant's unregistered firm was assessed before the financial year 1947-48, he was not bound to send his estimate of the income and, therefore, he was not liable to pay interest calculated under the Act. The short question is whether the assessment of the income of an unregistered firm, of which the assessee was a partner, could be relied upon by the appellant to escape his liability under Sub-Section (3). To put it differently, on the basis of such an assessment, can it be said that the appellant "has not hitherto been assessed" within the meaning of Sub-Section (3).
4. The answer to the question raised depends upon whether an unregistered firm is a distinct assessable entity as distinguished from the individual partners of the said firm. To ascertain the legal characteristics of a firm, it will be convenient to collect the sections of the Act pertaining to an unregistered firm.

Section 2 (2) : "Assessee" means a person by whom Income-tax is payable.
Section 2 (9) : "Person" includes a Hindu undivided family and a local authority
Section 3 : "Where any Act of the Central Legislature enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority and of every firm and other association of persons or the partners of the firm or the members of the association individually.
Section 14 (2) : The tax shall not be payable by an assessee (a) if a partner of an unregistered firm, in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in Clause (b) of Sub-Section (1) of Section 16 on which the tax has already been paid by the firm.
Section 16 (1) : In computing the total income of an assessee (a) any sums exempted under ..... Section 14.....shall be included.
(b) when the assessee is a partner of a firm then, whether the firm has made a profit or a loss, his share (whether a net profit or a net loss) shall be taken to be of any salary, interest, commission or other remuneration payable to him by the firm in respect of the previous year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction of any interest, salary, commission, or other remuneration payable to any partner in respect of the previous year.
Section 23 : (3) On the day specified in the notice issued under Sub-Section (2) or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall by an order in writing assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.
4. If any person fails to make the return required by any notice given ... the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment and in the case of a firm may refuse to register it or may cancel its registration if it is already registered.
5. (a) : In the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined.
(b) In the case of an unregistered firm, the Income-tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in Clause (a) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including super tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm.
Section 24(1) : Third proviso added by Section 27 of the Income-tax (Amendment) Act, 1939 (Act 7 of 1939) :

Provided further that where the assessee is an unregistered firm which has not been assessed under the provisions of Clause (b) Sub-Section (5) of Section 23 in the manner applicable to a registered firm any such loss shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm and where the assessee is a registered firm any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set off under this section.

Section 44 : Where any business, profession or vocation carried on by a firm or association of persons had been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment.

Section 48 (1) : If any individual, Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or member of an association individually satisfies the Income-tax Officer or other authority appointed by the Central Government in this behalf that the amount of tax paid by him or on his behalf or treated as paid on his behalf for any year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of any such excess.

Section 55 : In addition to the income-tax charged for any year, there shall be charged, levied

and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, local authority, unregistered firm or other association of person, not being a registered firm, or the partners of the firm or members of the association individually an additional duty of income-tax in this Act referred to as super tax at the rate or rates laid down for that year by Act of the Central Legislature.

Provided that where under the provisions of Clause (b) of Sub-Section (5) of Section 23 an unregistered firm has been assessed in the manner applicable to a registered firm, super tax shall be payable by each partner of the firm individually on his share in the income, profits and gains of the firm and not by the firm itself.

5. The aforesaid fasciculus of sections clearly indicates that, for the purpose of the Income-tax Act, an unregistered firm is a distinct assessable unit or assessable entity though, for the purpose of the Indian Partnership Act, it is not a legal entity but only consists of individual partners for the time being. A clear distinction is maintained between a firm and its partners. Section 3 charges the income of every firm and the partners of that firm in accordance with or subject to the provisions of the Act. While in the case of a registered firm, the total income of the firm is computed but the tax is made payable only by the individual partners; in the case of an unregistered firm, not only the total income of the firm is computed but both income-tax and super tax are payable only by the firm. Any loss incurred by an assessee, which is an

unregistered firm, shall be set off against the income, profits and gains of that firm and not against the income, profits and gains of any of the partners of that firm. The Act does not adopt the legal concept of a firm being a separate juristic entity for all purposes of the Act and makes some exceptions. Section 23 (5) (b) gives an option to the Income-tax Officer in the case of an unregistered firm. Instead of determining the sum payable by the firm itself, he may proceed in the manner laid down in Clause (a) as applicable to a registered firm, if in his opinon, the aggregate amount of the tax including super tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm. But till this option is exercised in the interests of the Slate, the separate entity of the firm is not disrupted. Section 44, specially provides for the assessment of the partners of a disrupted firm for, without that provision, with the disappearance of that entity, the tax becomes not exigible. While Section 16 (1) includes in the total income of a partner of an unregistered firm the income pertaining to his share of the unregistered firm, Section 14 (2) (a) exempts that income from tax. Though the Act engrafts some exceptions in the interests of revenue on the doctrine of an unregistered firm being a distinct assessable unit and though the said legal concept is not pursued in all its ramifications, the Act generally maintains its distinct legal existence for all material purposes of the Act. An unregistered firm is an assessee under the Act. The procedure prescribed, the computation of the income, the liability to pay income-tax and super tax, and the adjustment of the losses are all on the basis that an unregistered firm is a distinct juristic entity different from that of the partners. It is not necessary in this case to consider the legal position of a registered firm for it is admitted that the firm was not registered before 1947-1948.

6. The question of the legal status of firm in Income-tax law has been considered by Courts in different contexts. The words "assessee" and "assessment" have been defined with clarity by Lord Reid in *Seth Badridas Daga v. Commissioner of Central and United Provinces*[1], Lord Reid says :

> "It will be convenient to begin with Section 23 which deals with assessment. The section requires the Income-tax Officer to do two things first to compute or assess a person's total income and then to determine the sum payable as tax. Subsections (1) to (4) set out alternative methods of computation or, assessment. In the normal case, the person whose income is being computed, is the person who pays the tax and for that case these sub-sections also provide for the income-tax Officer taking the second step and determining the sum payable as tax.

But the case of a firm is specially dealt with by Sub-Section (5). This sub-section only comes into operation after the total income of the firm has been computed or assessed

[1]1949-17 ITR 209 . At page 211 (of ITR) : (at pp. 159-160 of AIR)

under one of the earlier sub-sections. It draws a distinction between registered and unregistered firm. In the case of a registered firm, the firm does not itself pay income-tax and, therefore, the sub-section directs that the sum payable by the firm shall not be determined, but that each partner's share of the firm's income shall be included in the assessment or computation of the total income of that partner. Thereupon the sum payable by that partner as tax is to be determined on the basis of that assessment which includes his share of the firm's income." As we have pointed out earlier, in the case of unregistered firms just like in the normal case, the firm, whose

income is being computed, is also the person who pays the tax. For the purpose of income-tax, with a few deviations, it is equated to that of any other person in that it is assessed both for purpose of computation of income as well as for the purpose of recovering the tax.

7. A Division Bench of the Madras High Court in *Talipatigala Estate v. Commissioner of Income-tax, Madras*[2], considered the question whether proceedings under Section 34 of the Act could be initiated against a firm, which was not assessed previously but one of the partners of the firm only had been assessed on his share in the firm. The learned Judges, in rejecting the applicability of Section 34 to such a case, observed at page 327 (of ITR) , thus :

> "A partnership firm is different from the members composing it for income-tax purposes and is recognized as a separate assessable unit under Section 3 of the Income-tax Act. Though according to the partnership Act a partnership firm is not a single legal person, still for purposes of income-tax the firm is regarded as having a separate status and existence and as a distinct entity apart from the individual partners who carry on the business of the firm. It is true that this principle is not carried to its logical conclusion in every respect and that there are a few exceptions recognized in the Act itself. But it cannot be said that the assessment of an individual partner in a particular year is a bar to the assessment of the firm for that Year".

That was a converse case but still the principle equally applies to the present case.
8. The Supreme Court of India in The Commissioner of *Income-tax, West Bengal v. Figgies and Co*[4]*.,* were dealing with the question whether a change in the constitution of a partnership brings necessarily into existence a new assessable unit or a distinct assessable entity. In that case, Mahajau, J., as he then was, after bringing out the distinction between the status of a firm in the partnership Law and that in the Income-tax Law, made the following useful remarks at page 409 (of ITR) :

> "The partners of the firm are distinct assessable entities, while the firm as such is a separate and distinct unit for purposes of assessment. Sections 26, 48 and 55 of the Act fully bear out this position. These provisions of the Act go to show that the technical view of the nature of a partnership, under English Law or Indian Law, cannot be taken in applying the law of income-tax". The above observations, though made in a different context, being that of the Supreme Court must be given due weight. They indicate without any ambiguity that, for

[3]1950-18 ITR 320
[4]1953-24 ITR 405

> income-tax purposes, a partner and a firm are separate and distinct units.

9. Another Division Bench of the Madras High Court in *Narayana Chetty v. Income-tax Officer*[5]*,* dealt with the applicability of Section 34 to the case of a firm, which was originally registered but whose registration was subsequently cancelled. The learned Judges held that the firm is an assessee under the Act and that there is no distinction between a registered firm and an unregistered firm in that respect. They pointed out that the firm does not cease to be an assessee,

though under Section 23 (5) of the Act tax on the assessed income is apportioned between the several partners of the registered firm.

10. As we have pointed out already, it is not necessary in this case to express our view on the legal status of a registered firm but this case also affirms the view that an unregistered firm is an assessee and is a separate legal entity under the Act.

11. On behalf of the assessee, reliance is placed by the learned counsel on the judgment of a Special Bench of the Madras High Court in Commissioner of *Income-tax v. Arunachalam Chettiar*[6], wherein it was held that where a person carries on two different trades, one individually and the other as a member of an unregistered firm, he is, under the Income-tax Act 11 of 1922 entitled to set off for purposes of income-tax, the loss incurred by him in respect of the partnership trade against the profit made by him in his individual trade. Schwabe, C. J. observed at page 663 (of ITR) : (at pp. 474-475 of AIR) :

> "If our decision is not in accordance with the real intention of the legislature, it is for the legislature to make that intention clear hereafter .....

The tax is payable by an assessee under the head business in respect of the profits or gains of any business carried on by him. "Assessee" is defined in Section 2 as a person by whom income-tax is payable. No mention is made in Section 10 of partnerships registered or unregistered, and, although it is the practice to assess firms as such, I can find nothing to justify the argument that each partner in a firm is not an assessee for he is a person by whom the income-tax is payable nor can I find anything to justify the argument that this assessee, being a partner is not a person carrying on the business in question. I am therefore prepared to hold that the present assessee is an assessee in respect of the profits and gains of the business which he carries on in partnership."

12. The observations of the Special Bench are contrary to those of the Supreme Court. That apart, the Legislature, as the learned Chief Justice anticipated, added by Section 27 of the Indian Income-tax (Amendment) Act, 1939 a new proviso to Section 24, whereunder, if the assessee is an unregistered firm, any loss of that firm shall be set off only against the income, profits and gains of that firm and not against the income, profits and gains of any of the partners of the firm. In view of the Supreme Court decision and the amendment introduced in 1939, this judgment no longer holds the field.

[5]1954-26 ITR 310

[6] ILR 47 Mad 660

13. Strong reliance is placed upon the judgment of the Judicial Committee in *Arunachelam Chettiar v. Commissioner of Income-tax, Madras*[7], The question in that case was whether a partner can claim to deduct against other profits or gains a sum which he has become liable to bear or pay by reason that he has paid or will have to pay on account of the firm more than his share so as to give him a right of contribution from the other partner who is insolvent. The Judicial Committee held that he could not claim the said item as a deduction against the profits or gains shown by him in his return. In that context, the Judicial Committee made the following observations at page 178 (of ITR) :

> "In particular they are of opinion that the learned Chief Justice rightly rejected the contention but forward in that case that an unregistered firm was for income-tax purposes

> an entity or that the same person as an individual and as a partner of a firm is two separate entities merely, because the business of the firm is a separate business and the firm is treated as an assessee.

In their Lordships' opinion whether a firm is registered or unregistered, partnership does not obstruct or defeat the right of a partner to an adjustment on account of his share of loss in the firm whether the set-off be against other profits under the same head of income within the meaning of Section 6 of the Act or under a different head in which case only need recourse be had to Section 24(1). So long as the set off is of his share of the loss made by the firm in the year of account, the adjustment does not involve the taking of any general or other account between the partners or indeed any examination of the accounts of the individual partners in the books of the firm.

14. Though the observations are general, they must be confined only to the right of a partner of an unregistered firm to claim a set off for the share of the loss incurred in the business of the firm. The general observations must give way to those made by the Supreme Court in 1953-24 ITR 405 , for, under the Constitution, the law made by the Supreme Court is binding on High Courts. The remarks made by the Privy Council in regard to the right of a partner of an unregistered firm to set-off his share of the loss against the profits of a new business are no longer good law in view of the second proviso to Section 24 added by Section 27 of the Income-tax (Amendment) Act, 1939 whereunder the loss incurred by an unregistered firm could only be set-off against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm.

15. The decision of a Division Bench of the Madras High Court in *Venkatadri Somappa v. Venkataswami Chetti*[8], is not of much relevance as it turned upon the interpretations of the provisions of the Madras Agriculturists' Relief Act. The appellant there was a partner in a ginning factory having 1/4 share in the profits and the factory was assessed to income-tax for the year 1937-38. The appellant sought relief under the provisions of the Madras Agriculturists' Relief Act. He was not entitled to do so under the Act if he was considered to have been assessed to income-tax by reason of the assessment of the firm. In holding that he must be deemed to have been assessed to income-tax within the meaning of that Act, the learned Judges

[7]1936-4 ITR 173

[8]1941-9 ITR 284

made the following observations at page 285 (of ITR) :

> "It seems to us impossible to read the expression "assessed to income-tax" in the present case in so narrow a sense. It cannot be denied that when the income of a partnership is assessed to tax under the Act what is really assessed is nothing less than the income of the individual partners; and we think that to say that a person has been assessed to income-tax may properly be paraphrased by saying that he has paid income-tax or that his income has been subject to income-tax or has been reduced by the amount of the income-tax. He was entitled to one fourth share of the profits of the factory and he must have received those profits less the amount of tax paid by the partnership upon them."

The judgment must be confined to the interpretation of the Madras Agriculturists' Relief Act having regard to the object sought to be achieved by that Act. The learned Judges did not purport to decide that for income-tax purposes an unregistered firm is not a legal entity as distinguished from the partners of that firm. Following the observations of the Supreme Court, we hold that an unregistered firm is a distinct assessable entity and is different from the partner or partners of that firm. If so, the assessee is a person 'who has not hitherto been assessed' within the meaning of Section 18-A (3) of the Act. The reason behind the provisions of the Section applies equally to a person who has not hitherto been assessed or to a person who was a component part of a legal entity which was assessed at an earlier stage. In either case, the Income-tax Officer would not be in a position to issue notice to him for the purpose of advance tax as his name would not be on his files. It may be that in the case of a firm a scrutiny of the records might disclose the name of a partner. But the section obviously has taken into consideration only the persons or entities assessed and not the persons whose names can be discovered by enquiry or scrutiny. We, therefore, hold that the assessee should have sent to the Income-tax Officer an estimate of the tax payable by him on that part of the income to which the provisions of Section 18 did not apply and, not having done it, the Income-tax Officer was entitled to add the interest payable under Sub-Section (6) of Section 18-A to the regular assessment made by him. Even so, it is contended that, as no demand was made for the payment of the interest due under Section 18-A (3) of the Act, the Income-tax Officer was not competent to add the interest to the regular assessment. Section 29 reads :

> "When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

16. After the insertion of Section 18-A by the Indian Income-tax (Amendment) Act, 1944, Rule 20-A was added to the rules framed under Section 29 prescribing the form of notice to be issued to an assessee under Section 18-A (2) and (3) of the Act. But, for obvious reasons, no form was prescribed for the issue of a notice of demand under Sub-Section (3) of the said section. The essential condition for the application of Section 29 is that there should have been an order passed under or in pursuance of the Act. The learned Counsel's argument that, under the section notice of demand is necessary if any interest is due in pursuance of the Act irrespective of the fact whether there was an order or not, does violence to the language and the well-recognised rules of grammar, If that was the intention, the section should have run "whether any interest is due in consequence of an order passed under the Act or in pursuance of this Act". This disjunctive between 'under' and 'in' clearly indicates that the order should have been passed under or in pursuance of this Act.

17. That apart, the construction sought to be put upon the section effaces the distinction made by the statute between a person who has not hitherto been assessed and one who is sought to be assessed for the first time. Under Sub-Section (3), an obligation is cast upon a person, who has not hitherto been assessed, to send an estimate of the tax payable by him and to pay the amount on such of the dates specified in Sub-Section (1) of the said section. If Section 29 is interpreted in the manner suggested by the learned Counsel, the initiation is shifted to the Income-tax Officer, which is contrary to the express intendment of Sub-Section (3) of Section 18-A. We would,

therefore, hold that a person, who has not hitherto been assessed, is not entitled to have a notice under Section 29 of the Act as he is under a statutory obligation to send the return and pay the amount as prescribed under Sub-Section (3).

18. The next argument of the learned counsel is that, in the circumstances of the case, the respondent must be deemed to have waived his right to collect the interest from the appellant. To appreciate this argument, the relevant facts may be recapitulated. The assessment for the year 1947-48 was completed on 13-3-1952. The respondent commenced proceedings under Section 18-A (8) of the Act on 25-6-1952. On receipt of the notice, the appellant filed objections wherein he submitted that the order directing payment of penal interest for the assessment year 1947-48 without any demand notice under Section 29 of the Act was illegal and that the proceedings were time barred. The appeal filed by the appellant against the assessment was finally disposed of by the Income-tax Appellate Tribunal and the appellant paid the amount due by him only on 23-3-1953. On 31-10-1953, the appellant received a notice under Section 35 of the Act in which it was stated that, while computing the assessment for the year 1947-48 on 13-3-1952, penal interest under Section 18-A (8) was not charged by mistake in computing the total tax payable by him. The following new proviso was added to Sub-Section (6) of Section 18-A on 24-5-1953 to come into effect from 1-4-1952 :

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

19. Therefore, the Income-tax Officer has no power to waive interest on 25-6-1952 though such power to waive was conferred on him on 24-5-1953 retrospectively. When the Income-tax Officer had no power to waive the interest, no waiver can be implied on the basis of his inaction in pursuing the proceedings taken by him under Section 18-A (8) of the Act. We, therefore, hold that the respondent did not waive his right to claim interest from the assessee under Section 18-A (6) of the Act.

20. Lastly, it is argued that the provisions of Section 35 did not apply to facts of this case. Under Section 35, the Income-tax Officer may, at any time within four years from the date of any assessment order, rectify any mistake apparent from the record of assessment. The assessment in this case was made on 13-3-1952 and, under the said section, the Income-tax Officer could rectify any mistake apparent from the record of assessment within four years from that date. The alleged mistake was corrected in the present case within the prescribed time. The only question is whether there is a mistake apparent from the record of assessment. We have held that a statutory obligation is cast on the Income-tax Officer under Section 18-A (8) to add interest payable under Sub-Section (6) to the tax as determined on the basis of the regular assessment. The Income-tax Officer by mistake did not add the interest payable by the assessee to the tax determined by him on the basis of the regular assessment. He, therefore, committed a clear mistake which is apparent from the record of assessment. In this view, the provisions of Section 35 are directly attracted and the Income-tax Officer was within his rights in rectifying the mistake.

21. In the result, the appeal fails and is dismissed with costs. Advocate's fee Rs. 100/-.

Appeal dismissed.