

CALCUTTA HIGH COURT

Premchand Sitanath Roy

Vs

Addl. Commissioner of Income-Tax

(Sabyasachi Mukharji , J.)

19.12.1975

JUDGMENT

Sabyasachi Mukharji, J.

1. In this application under Article 226 of the Constitution, the petitioner challenges the notice under Section 263 of the Income-tax Act, 1961, issued by the Additional Commissioner of Income-tax, West Bengal-III, for the assessment year 1968-69. The assessee submitted his return for the assessment year 1968-69 on the 14th of May, 1969. Therefore, under proviso (iii) of Sub-section (1) of Section 139, the petitioner was liable to pay penal interest for the period 1st of January, 1969, to 14th of May, 1969, at the rate of 9% per annum on the amount of tax payable in the status of unregistered firm for the said assessment year. Under Sub-section (8) of Section 139, the Income-tax Officer had discretion to reduce or waive the interest payable in accordance with law and under conditions mentioned under Rule 117A of the Income-tax Rules, 1962. The Income-tax Officer did not charge any interest in terms of Section 139(1) of the said Act. According to the petitioner interest was not charged because of the demise of the two senior partners of the petitioner-firm. According to the petitioner the representation of the petitioner was duly submitted before the assessing Income-tax Officer that the delay of four and a half months for filing the return was only because of the situation created by the death of its partners. The Income-tax Officer, according to the petitioner, was satisfied with the explanation and, therefore, waived the said interest. From the order passed by the Income-tax Officer it is not manifest whether he at all considered this aspect of the matter or whether there was conscious or deliberate waiver on the part of the Income-tax Officer of the liability of the petitioner to pay interest. The petitioner preferred an appeal before the Appellate Assistant Commissioner and the Appellate Assistant Commissioner passed an order on the 31st of January, 1973, confirming the assessment. On the 22nd of February, 1974, the impugned notice was issued by the Additional Commissioner of Income-tax, West Bengal-III. In the said notice the Additional Commissioner of Income-tax, West Bengal-III, stated as follows:

"It appears from the assessment records of Messrs. Premchand Sita-nath Roy (URF) that the assessee submitted its return of income for the assessment year 1968-69 on May 14, 1969. It was, therefore, liable to pay penal interest under Section 139(1) of the Income-tax Act, 1961, for the period January 1, 1969, to May 14, 1969, at the rate of 9% per annum on the amount of tax payable in the status of unregistered firm for the said assessment year. The Income-tax Officer who made the assessment under Section 143(3) of the Income-tax Act, 1961, on March 3, 1972 for the said assessment year failed to charge the said interest. The records do not show any reason for waiver of the said interest by the Income-tax Officer in accordance with the provisions of Section 139(8) read with Rule 117A of the Income-tax Rules, 1962. The order of assessment as passed by the Income-tax Officer without charging the said interest thus appears to be erroneous and prejudicial to the interest of revenue.

I, therefore, propose to pass such orders thereon under Section 263 of the Income-tax Act, 1961, as the circumstances of the case may justify, including an order enhancing or modifying the said assessment or cancelling the said assessment and directing the Income-tax Officer to make a fresh assessment according to law.

Before, however, I do so I hereby give you an opportunity to appear before me on February 28, 1974, at 11 a.m. at my office at P-7, Chowringhee Sq., Calcutta-1, and show cause why the proposed order under Section 263 of the Income-tax Act, 1961, should not be made. If you do not wish to avail yourself of this opportunity of being heard in person or through your authorised representative you may show cause in writing on or before the said date which will be considered before any such order is made under Section 263 ".

2. In support of this application two contentions were urged. It was urged, firstly, that there being an appeal from the said assessment order and the said assessment order having been confirmed by the Appellate Assistant Commissioner, the Additional Commissioner of Income-tax, West Bengal III was not competent or had no jurisdiction to issue any notice or pass any order under Section 263 of the Income-tax Act, 1961. It was contended that once an assessment order had been confirmed by the order of the Appellate Assistant Commissioner, the order of the Income-tax Officer merged with the order of the Appellate Assistant Commissioner and such Commissioner had no power or jurisdiction to revise the order passed by the Appellate Assistant Commissioner, he was, therefore, incompetent, in the facts and circumstances of the case, to interfere with the action of the Income-tax Officer in not charging any interest. It is not necessary to set out the provisions of Section 263 of the Income-tax Act, 1961. It is indisputable that the Commissioner has no power to interfere or revise the order of the Appellate Assistant Commissioner. The only question is whether by the impugned notice the Commissioner was

seeking to revise an order of the Income-tax Officer which had been merged in the order of the Appellate Assistant Commissioner. It is true that the assessment order was the subject-matter of appeal. But the appeal was from the assessment order. Under Clause (c) of Section 246 of the Income-tax Act, 1961, the assessee has a right of appeal if the assessee denies his liability to be assessed under the Act or against an order of assessment under Sub-section (3) of Section 143 or Section 144 only where he--(i) objected to the amount of income assessed or (ii) objected to the amount of tax determined, or (iii) objected to the amount of loss computed, or (iv) objected to the status under which he was assessed. It is only in the above-mentioned situations the right of appeal has been given to the assessee under Clause (c) of Section 246 of the Income-tax Act, 1961. Whether the interest should be charged or not is not one of the orders in which the assessee has a right of appeal under Section 246 of the Act. Indeed, under the Act, the liability was imposed by the proviso (iii) to Sub-section (1) of Section 139 of the Act. Only a discretion has been given under Sub-section (8) of section 139 of the Act to waive the charge of the interest, the legislature must have thought that the exercise of such discretion should not be a subject-matter of appeal. Therefore, it seems that no right of appeal on the proper or improper exercise of discretion under Sub-section (8) of Section 139 has been provided for in the Act. It is in this background that the question of merger of the order of the Income-tax Officer with the order of the Appellate Assistant Commissioner has to be judged in the facts and circumstances of this case. Counsel for the petitioner drew my attention to the observations of the Chief Justice, Chagla of the Bombay High Court in the case of *Commissioner of Income-tax v. Tejaji Farasram Kharawala*¹ There the Division Bench of the Bombay High Court observed that whereas the power of revision was conferred upon the Commissioner under Section 33A of the Indian Income-tax Act, 1922, against the order passed by any authority subordinate to him, the power of revision conferred upon the Commissioner under Section 33B was restricted to any order passed by the Income-tax Officer. Section 33B did not confer upon the Commissioner the power to revise either the orders of the Appellate Assistant Commissioner or the Appellate Tribunal. When an appeal was provided from a decision of a Tribunal and the appeal court after hearing the appeal passed an order, the order of the original court ceased to exist and was merged in the order of the appeal court, and although the appeal court might merely confirm the order of the trial court, the order that stood and was Operative was not the order of the trial court but the order of the appeal court. Consequently, it was held that the Commissioner of Income-tax was not competent to pass any order under Section 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. The aforesaid observations still hold good, with respect, so far as these go. But the observations will have to be viewed in the light of the theory of merger now developed by the Supreme Court. In the case of *Commissioner of Income-tax v. Amritlal Bhogilal & Co. Ltd.*, the Supreme Court had to consider whether an

order granting registration to a firm under Section 26A of the Indian Income-tax Act, 1922, merely affected or governed the procedure in collecting or recovering the tax found due from a firm and was separate from and independent of the order of assessment. There the Supreme Court observed that, however wide the power of the Appellate Assistant Commissioner might be in an appeal from an order of assessment, these could be exercised only in respect of matters which were specifically made appealable under Section 31, and if any order had been deliberately left out from the jurisdiction of the Appellate Assistant Commissioner it was not open to him to entertain a plea about the correctness, propriety or validity of such an order. The Supreme Court further found that under Section 31 as there was no appeal from an order granting registration to a firm under Section 26A, the Appellate Assistant Commissioner could not cancel, in exercise of his appellate jurisdiction under Section 31, an order granting registration to a firm. The order granting registration to a firm stood outside the jurisdiction of the Appellate Assistant Commissioner and did not directly form part of the proceedings before him. After an appeal from an order of assessment was decided by the Appellate Assistant Commissioner, what merged in the appellate order was the Income-tax Officer's order under appeal, and not his order of registration, which was not and could never become the subject-matter of an appeal before the appellate authority. Therefore, an order of the Income-tax Officer registering a firm could be revised by the Commissioner under Section 33B whenever he considered that it had been erroneously passed and was prejudicial to the revenue, even while an appeal was pending from the order of assessment and even after the appeal was disposed of by the Appellate Assistant Commissioner. The Supreme Court further observed that whether or not the revisional power of the Commissioner could be exercised in a given case must be determined solely by reference to the terms of Section 33B itself, and the courts were not justified in imposing additional limitations on the exercise of the said power on hypothetical considerations of policy or the extraordinary nature of the power.

3. In the case of *State of Madras v. Madurai Mills Co. Ltd.* the Supreme Court had considered this aspect of the matter. At page 736 of the Supreme Court Reports the court observed that the doctrine of merger was not a doctrine of rigid and universal application and it could not be said that wherever there were two orders, one by the inferior tribunal and the other by a superior tribunal, passed in an appeal or revision, there was fusion or merger of 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. There, in the case before the Supreme Court, for the assessment year 1950-51 the dealer had submitted a return under the Madras General Sales Tax Act, 1939, showing its net turnover to the Deputy

Commercial. Tax Officer, who was the assessing authority. As he had determined the net turnover at a higher amount the dealer appealed to the Commercial Tax Officer who allowed the appeal with respect to one item. On the 28th of November, 1951, the assessing authority issued a revised assessment order as per the order of the Commercial Tax Officer. On the 27th of December, 1952, the dealer presented a revision petition before the Deputy Commissioner of Commercial Taxes raising the only objection as a new contention that it should not have been assessed to tax on amounts collected by it by way of tax. On the 21st of August, 1954, the Deputy Commissioner dismissed the petition on the ground that the dealer was not entitled to raise a new contention for the first time. On the 4th of August, 1958, the Board of Revenue issued a notice to the respondent stating that it proposed to revise the assessment by including in the net turnover a sum representing the value of cotton purchased by the respondent from outside the State and which was excluded by the assessing authority. After considering the respondent's objections the Board fixed the net taxable turnover by including that amount. The respondent's appeal to the High Court was allowed. It was held by the Supreme Court that the order of the Board of Revenue was invalid, because under section 12(4)(b) of the Madras General Sales Tax Act, 1939, the Board of Revenue could invoke its revisional jurisdiction only within four years from date on which the order of the assessing authority was communicated to the assessee or the dealer. The subject-matter of the revision proceedings before the Board of Revenue was only the revised assessment order of the assessing authority. It was further held that it could not be said that the order of the Deputy Commissioner of Commercial Taxes, in revision, was the only operative decision in law on the basis that the order of the inferior tribunal (order of the assessing authority) had merged in that of the superior tribunal, and the application of the doctrine of merger depended on the nature of the appellate or revisional order in each case. In the circumstances of that case it could not be said, according to the Supreme Court, that there was a merger of the order of assessment dated November 28, 1952, with the order in revision dated 21st August, 1954, because the question of exclusion of the value of yarn purchased from outside the State was not the subject-matter of revision before the Deputy Commissioner of Commercial Taxes.

4. Therefore, in the instant case, in order to apply the theory or concept of merger it is necessary to find out whether the fact that the interest was not charged in terms of Clause (iii) of the proviso to Sub-section (1) of Section 139 of the Act could have been the subject-matter of appeal before the Appellate Assistant Commissioner. The exercise of discretion under Subsection (8) of Section 139, articulate or inarticulate, cannot, in my view, be the subject-matter of an appeal in view of the provisions of Section 246 of the Act as indicated before. The question whether the interest that was liable to be charged had been properly waived or not, is a question which was not the subject-matter of appeal before the Appellate Assistant Commissioner. Therefore, there

cannot be any question of merger of the order of the Income-tax Officer on this aspect of the matter and on the theory of merger it cannot be said that the Commissioner lost his jurisdiction in this case after the order of the Appellate Assistant Commissioner. In the aforesaid view of the matter I am unable to accept the first contention urged in support of this application.

5. The second contention urged in support of this application was that Sub-section (8) of Section 139 gave a discretion to the Income-tax Officer. The exercise of such discretion one way or the other could not be the subject-matter of interference by the revisional power of the Commissioner under Section 263 of the Act. In aid of this submission reliance was placed on the observations of the Division Bench of the Allahabad High Court in the case of *Lalloomal Dalai v. Income-tax Officer, District II(i), Kanpur*² There the Division Bench observed that it was a matter of discretion with the Income-tax Officer to reduce or waive the interest payable by the assessee, where the tax actually paid by the assessee in advance was less than 80 per cent. of the tax assessed, for the fifth proviso to Section 18A(6) of the Indian Income-tax Act, 1922, only contained an enabling provision giving the Income-tax Officer that power; there was no mandatory direction that he should always do so. In those circumstances the court expressed the view that no question could arise for interference by the court in respect of the exercise of the discretion by the Income-tax Officer. The proposition in the facts of that case cannot, in my view, with respect, be disputed. It cannot also be disputed that where a discretion has been given to an officer concerned, the exercise of that discretion one way or the other, unless it is contrary to the settled principles of law or exercised mala fide or on improper materials, cannot be the subject-matter of interference by any revisional or an appellate authority. The question, however, in this case, is, that under proviso (iii) of Sub-section (1) of Section 139 of the Income-tax Act there is an obligation to charge interest from the assessee for late filing of the return. That liability can only be exonerated in terms of Sub-section (8) of Section 139 of the Act and that exercise of discretion must also be in accordance with the provision of Rule 117A of the Rules. In this case there is no evidence that the Income-tax Officer concerned had exercised discretion or applied his mind to the facts of this case. Counsel for the petitioner contended that where the contention or the submission of the assessee was accepted it was not necessary that that order should be a speaking order. It was only where the contention or submission of the assessee was rejected that the principles of natural justice required that the order should be a speaking order. But where the order was in favour of the contention urged by the assessee, in that case it was not obligatory nor usual that the order should be a speaking order. The fact that there is no mention about this, counsel for the petitioner urged, indicated that the assessee's contention and/or submission was accepted on this point. I am unable to accept this contention. Where the statute gave an authority or jurisdiction for exercise of a discretion on certain objective factors, the exercise of such discretion must be manifest so that whether the discretion has been properly exercised or not

could be gathered by all concerned. It is true that if the Income-tax Officer had exercised his discretion under Sub-section (8) of Section 139 of the Income-tax Act, 1961, then unless the Commissioner was of the view that such exercise of discretion was on improper or irrelevant materials or done mala fide, the Commissioner would not have jurisdiction to interfere with such exercise of the discretion. But in this case as apparent from the facts narrated it is not a question of the validity of the exercise of the discretion but it is a question of non-application of law to the facts of this case. If the interest that was liable to be charged under Clause (iii) of the proviso to Sub-section (1) of Section 139 of the Act has not been charged then the order of the Income-tax Officer would be certainly prejudicial to the interest of the revenue and as such the Commissioner has jurisdiction. In aid of the aforesaid view reliance may be placed on the observations of the Kerala High Court in the case of Commissioner of Income-tax v. Cochin Malabar Estates Ltd. . In the aforesaid view of the matter the second contention cannot be accepted. .

6. In the aforesaid view of the matter the application fails and is dismissed.

7. The rule nisi is discharged.

8. Interim order is vacated.

9. There will be no order as to costs.

10. Let the operation of this order be stayed for a period of six weeks from the date.

Cases Referred.

1[1953] 23 ITR 412 (Bom)

2[1959] 36 ITR 397 (All)