

KARNATAKA HIGH COURT

National Products

Vs.

Commissioner of Income-Tax

I.T.R.C. 35 of 1974

(Govinda Bhat, C.J. and Venkatachallah, J.)

18.03.1976

ORDER

Govinda Bhat, C.J.

1. The Income-tax Appellate Tribunal, Bangalore Bench, has stated a case and referred under section 256(1) of the Income-tax Act, 1961, the following question of law for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, it was, for the Tribunal, an error in law to hold that the order levying interest either under section 139(4) or under section 215(1), Income-tax Act, was not appealable to the Appellate Assistant Commissioner of Income-tax ?"

2. The assessee is a registered firm. Its previous year relevant to the assessment year 1970-71 ended on March 31, 1970. Its income-tax return was due by September 30, 1970, but the same was filed only on February 25, 1971. The assessment was completed by an order of assessment made on March 19, 1971, determining the total income at Rs. 1,42,090 on which a sum of Rs. 21,084 was assessed as the amount of tax. A sum of Rs. 1,146 was charged as interest under sub-section 4(a) read with clause (iii)(a) of the proviso to sub-section (1) of section 139, Income-tax Act, 1961 (which will be hereinafter referred to as the "Act"), and a further sum of Rs. 848 was charged as penal interest under section 215(1) of the Act. Against the assessment order, the assessee preferred an appeal (I.T.A. No. 205 of 1971-72), before the Appellate Assistant Commissioner of Income-tax objecting to the disallowance of one-fourth of the car expenses and the levy of interest under section 139 and section 215. The Appellate Assistant Commissioner upheld the disallowance of car expenses made by the Income-tax Officer; in regard to the objection to the levy of interest, he held that the appeal was incompetent because section 246 of the Act does not provide for such an appeal. In the result, the assessment was confirmed and the

appeal was dismissed.

3. The assessee took up the matter in appeal before the Income-tax Appellate Tribunal, Bangalore Bench, urging that penal interest ought not to have been charged. The Tribunal agreed with the view of the Appellate Assistant Commissioner that against the levy of interest under section 139 or section 215, appeal was not maintainable under section 246 of the Act.

4. The submission of Sri K. Srinivasan, learned counsel for the assessee, was that a charge of penal interest under section 139 or section 215 is appealable to the Appellate Assistant Commissioner or Income-tax under the first part of clause (c) of section 246. The learned counsel argued that the word "assessment" has a comprehensive meaning comprehending the whole procedure for ascertaining and imposing liability on taxpayers and that the levy of penal interest in the assessment order is comprehended within the meaning of the word "assessment"; that when the assessee challenges in appeal the levy of interest, he denies his liability to be assessed under the Act.

5. Sri Rajasekhara Murthy, learned counsel for the department, contended that the first part of clause (c) of section 246 applies only where the assessee denies his liability to be assessed under the Act, as in the case of a person treated as a partner in the assessment of a firm denying his liability to be assessed as a partner. He invited our attention to the fact that an order made under section 216 levying interest has been made expressly appealable under clause (m) of section 246 while no such right of appeal against levy of interest under section 139, section 215 and section 217 has been provided in the section.

6. The question as formulated by the Tribunal is not happily worded. With the consent of the learned counsel on both sides, we recast the question as follows :

"Whether, on the facts and circumstances of the case, the Appellate Assistant Commissioner was right in declining to consider the objections of the assessee to the levy of penal interest under sub-section (4)(a) read with clause (iii)(a) of the proviso to sub-section (1) of section 139 and to the levy of penal interest under section 215(1) of the Income-tax Act, 1961 ?"

7. The right to prefer an appeal depends upon the provisions of the particular statute under which the right to appeal is claimed. Right to appeal from an order of the Income-tax Officer to the Appellate Assistant Commissioner having been conferred by section 246 of the Act, the question whether an order of the Income-tax Officer is appealable or not depends upon the construction of the said section. Learned counsel for the assessee contended that the right of appeal against the levy of penal interest under section 139 and section 215 of the Act is conferred by the first part of clause (c) of section 246. Therefore, it is necessary to set out the relevant portion of section 246, which reads thus :

"Any assessee aggrieved by any of the following orders of an Income-tax Officer may appeal to the Appellate Assistant Commissioner against such order - ...

(a) * * *

(b) * * *

(c) an order against the assessee, whether 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."

(Rest of the section omitted as unnecessary)

(Underlining is ours).

8. Section 246 corresponds to section 30(1) of the 1922 Act, which reads thus :

"Any assessee objecting to the amount of income assessed under section 23 or section 27, or the amount of loss computed under section 24 or the amount of tax determined under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to the cancellation by an Income-tax Officer of the registration of a firm under sub-section (4) of section 23 or to a refusal to register a firm under sub-section (4) of section 23 or section 26A or to make a fresh assessment under section 27, or objecting to any order under sub-section (2) of section 25 or section 25A or sub-section (2) of section 26 or section 28 made by an Income-tax Officer, or objecting to any penalty imposed by an Income-tax Officer under sub-section (6) of section 44E or sub-section (5) of section 44F or sub-section (1) of section 46, or objecting to a refusal of an Income-tax Officer to allow a claim to a refund under sections 48, 49 or 49F, or to the amount of the refund allowed by the Income-tax Officer under any of those sections, and any assessee, being a company, objecting to an order made by an Income-tax Officer under sub-section (1) of section 23A, may appeal to the Appellate Assistant Commissioner against the assessment or against such refusal or order." (Provisos omitted as unnecessary). (Underlining is ours).

9. The 1922 Act provided for levy of penal interest where the assessee committed default in paying advance tax due [vide section 18A(6) or 18A(8) of the 1922 Act]. Charge of penal interest under section 18A(6) or 18A(8) was automatic; the said provision was amended with effect from 1st April, 1952. After the said amendment, the imposition of penal interest was not wholly automatic, as discretion was allowed to the Income-tax Officer either to reduce or waive the interest payable by the assessee. Section 215 of the Act corresponds to section 18A(6) of the 1922 Act. Sub-section (4) of section 215 allows discretion to the Income-tax Officer to reduce or waive the interest payable by the assessee under the said section.

10. Clause (iii)(a) of the proviso to sub-section (1) of section 139 of the Act imposes penal interest where the assessee does not file his return within the time allowed by law. Sub-section (8) of section 139 allows discretion to the Income-tax Officer to reduce or waive the interest under the said section. Rule 117A of the Income-tax Rules, 1962, prescribes cases and circumstances in which the Income-tax Officer may reduce or waive the interest payable under section 139. Similarly, rule 40 prescribes cases and circumstances in which the Income-tax Officer may reduce or waive the interest payable under section 215.

11. Under the Act, levy of penal interest either under section 139 or section 215 is not automatic but vests in the discretion of the Income-tax Officer and the discretion to waive or reduce the interest has to be exercised in accordance with the Rules referred to above.

12. Under the 1922 Act, question arose whether an order by the Income-tax Officer levying penal interest under section 18A(6) or 18A(8) of the said Act was open to appeal before the Appellate Assistant Commissioner. The leading case on that question is *Commissioner of Income-tax v. Jagdish Prasad Ramnath*¹. The judgment of the court was delivered by Chagla C.J. In the said case, the assessee who was a partner of a firm not having paid advance tax, penal interest was charged on the amount of advance tax payable. The assessee appealed against the levy of penal interest to the Appellate Assistant Commissioner, who rejected the appeal holding that the appeal from the order of the Income-tax Officer was incompetent. The Tribunal set aside the order of the Appellate Assistant Commissioner and remanded the matter to the Appellate Assistant Commissioner for fresh disposal. At the instance of the department, question was referred to the High Court of Bombay whether an appeal lies to the Appellate Assistant Commissioner from an order passed by the Income-tax Officer levying penal interest under section 18A(8) of the 1922 Act. It was contended by the learned counsel for the assessee in the said case that the order was appealable under sub-section (1) of section 30 of the 1922 Act. Reliance was placed on the clause "an assessee denying his liability to be assessed under this Act" in section 30(1). It was urged that where the assessee objects to the levy of penal interest on the ground which amounts to denial of his liability under the Act, then the appeal would be competent. The court held that penal interest is not "tax" and the charge of interest being automatic, the quantum of penal interest depends upon the amount of advance tax payable and no appeal lay against an order levying penal interest; but where the assessee appeals against any assessment, it is open to him to urge every ground which, if accepted, must result in the Income-tax Officer holding that there was no liability to pay advance tax and, therefore, there was no liability to pay penal interest. This is what the learned Chief Justice has stated (page 200, 201) :

"We should have hesitated a great deal before coming to the conclusion that the assessee had no right of appeal if we felt that we were denying to him the right of contending that he was not liable to pay advance tax at all and, therefore, he was not liable to pay a penalty. But in our opinion that right is not really denied to him, and as we have already pointed out when the assessee appeals against his regular assessment it is open to him to take up every contention which, if accepted, must result in the Income-tax Officer holding

that there was no liability to pay advance tax, and, therefore, there was no liability to penal interest. In this very case he has appealed against his assessment. To the extent that this appeal merely raises the question of his liability to pay penal interest, his appeal is clearly not maintainable, but if in this appeal he wants to urge that the income in respect of which tax is imposed and in respect of which interest is calculated for the purpose of section 18A(8) was not income which fell under the head covered by section 18A, then certainly it would be open to him to argue this in this very appeal. It would be equally open to him to argue that the income calculated by the Income-tax Officer as the income of the assessee for the relevant year was not the proper income and that there was either no income at all or the income was less than calculated. If the income is reduced by the Income-tax Officer then the tax would be reduced, and if the tax is reduced, obviously the penal interest would also be reduced. Therefore, in a substantial sense it would always be open to an assessee even under section 18A(3) to contest his liability to pay advance tax. He cannot directly challenge the penal interest imposed upon him because in doing so he would really be challenging the quantum which he cannot do, because the quantum is arrived at merely by automatic computation, but it seems to us that he can challenge the

¹[1955] 27 ITR 192 (Bom)

regular assessment on all the important points which establish his liability to pay advance tax under section 18A and in this view of the case we feel that by coming to the conclusion that the assessee is not entitled to a right of appeal merely against the order imposing a penal interest we are not depriving the assessee of any substantial right."

13. The next case in which the same question came up for decision is *Keshardeo Shrinivas Morarka v. Commissioner of Income-tax*² In the said case, Sri N. A. Palkhivala, who appeared for the assessee, had urged that the law as laid down in *Jagdish Prasad Ramnath's case*³ was no longer valid in view of two subsequent decisions of the Supreme Court in *C. A. Abraham v. Income-tax Officer Kottayam*⁴, and *Commissioner of Income-tax v. Bhikaji Dadabhai & Co*⁵., Sri Palkhivala had urged that the levy of penal interest under sections 18A(6) and 18A(8) was made a part of the computation of tax in the assessment proceedings and is made a part of the assessment order; since such an order is made part of the assessment and is made at the time of making the assessment order and, since a right of appeal is given to the assessee "denying his liability to be assessed under the Act" which expression is capable of having a wide connotation including liability to pay penalty, the legislature may not have provided a specific right of appeal against the order imposing penal interest, but all the same, since the assessee was denying his liability to be assessed to penal interest, he was entitled to appeal. That argument was rejected and the earlier view of the court in *Jagdish Prasad Ramnath's case*⁶ was affirmed.

14. The question came up again for consideration before the Bombay High Court in *Mathuradas B. Mohta v. Commissioner of Income-tax*⁷ Penal interest had been levied on the assessee under section 18A(8) of the 1922 Act and that was challenged in appeal before the Appellate Assistant Commissioner. The fourth question referred to the High Court of Bombay was : Whether an

appeal to the Appellate Assistant Commissioner against the charge of penal interest was competent? Sri Thakkar, who appeared for the assessee, urged the very contentions that had been urged by *Sri Palkhivala in Morarka's case [1963] 48 ITR 404 (Bom)*. Tambe J., who delivered the said judgment of the court, was one of the learned judges who constituted the Bench in *Morarka's case [1963] 48 ITR 404 (Bom)*. There is no reference to that case in the judgment in *Mohta's case [1965] 56 ITR 269 (Bom)*. The earlier Bench decision was ignored and a contrary view was taken by the subsequent Bench. In *Mohta's case [1965] 56 ITR 269 (Bom)*, the Bombay High Court has taken the view that the amount of interest charged under section 18A(8) is a "tax" and the assessee had a right to prefer an appeal to the Appellate Assistant Commissioner against such an order by virtue of the clause "denying his liability to be assessed under this Act" occurring in section 30.

15. We may observe at this stage that, if penal interest levied under section 18A(6) or section 18A(8) could be regarded as "tax" within the meaning of the 1922 Act, there was no need to rely on the clause "An assessee..... denying his liability to be assessed under this Act" occurring in section 30, since the said section conferred a right of appeal where the assessee objected to the amount of tax. The ratio of the decision rests on the view that

²[1963] 48 ITR 404 (Bom)

⁴41 ITR 425 (SC)

⁶[1955] 27 ITR 192 (Bom)

³[1955] 27 ITR 192 (Bom)

⁵42 ITR 123 (SC)

⁷[1965] 56 ITR 269 (Bom)

penal interest levied under section 18A was in addition to the tax and that addition to the tax had been made by reason of the provisions of the section which formed part of the general machinery for assessment of tax liability created by the Income-tax Act.

16. In *South India Flour Mills P. Ltd. v. Central Board of Direct Taxes*⁸ the High Court of Madras has taken the view that section 30 of the 1922 Act, which regulated the rights of appeal conferred under the said Act, did not provide for an appeal to the Appellate Assistant Commissioner against an order imposing penal interest under section 18A(6). Reliance was placed on the decision of the Andhra Pradesh High Court in *Boddu Seetharamaswamy v. Commissioner of Income-tax*⁹ There is not much discussion in the judgment.

17. The question whether an appeal lies to the Appellate Assistant Commissioner from any order passed by the Income-tax Officer levying interest under section 139 and 217 of the Act, came up for decision before the Gujarat High Court in *Commissioner of Income-tax v. Sharma Construction Co*¹⁰, Counsel for the assessee in the said case had urged that a right of appeal was conferred by the clause "where the assessee denies his liability to be assessed under this Act" occurring in clause (c) of section 246. Divan C.J., who delivered the judgment of the Bench, referred to the three decisions of the Bombay High Court to which we have made reference already and came to the conclusion that there has been no change in the legal position under the 1961 Act so far as an appeal against the liability to pay penal interest is concerned or any appeal against the order of penal interest by itself is concerned. He agreed with the view of law stated by Chagla C.J. in *Jagdish Prasad Ramnath's case*¹¹

18. The meaning of the words "denying his liability to be assessed under this Act" occurring in section 30(1) of the 1922 Act has been considered by Bhagwati C.J. (as he then was) in *Mandal Ginning and Pressing Co. Ltd. v. Commissioner of Income-tax*¹² The question for decision in the said case was whether an appeal lies against an order of rectification made by the Income-tax Officer under section 35(1) of the Indian Income-tax Act, 1922. Right of appeal was claimed by the assessee on the basis of the clause "any assessee... denying his liability to be assessed under this Act" occurring in section 30(1) of the 1922 Act. Relying on the pronouncement of the Judicial Committee of the Privy Council in *Commissioner of Income-tax v. Khemchand Ramdas*¹³ Bhagwati C.J. (as he then was) held that the word "assessed" in the context is used in a comprehensive sense to mean "subjected to the whole procedure for ascertaining and imposing liability on the taxpayer" and that the meaning of the expression "any assessee... denies his liability to be assessed under this Act" is that the assessee contends that he is not liable to be assessed under any provisions of the Act, or, in other words, he is not liable to be subjected to any part of the procedure laid down in the Act for imposing liability to tax. In the words of the learned Chief Justice - See [1973] 90 ITR 332, 342, 343, 345 (Guj) :

"The word 'assessment', it is well-known, has different meanings according to the context in which it is used. It may mean sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure for ascertaining and imposing liability on the taxpayer : vide

⁸[1968] 70 ITR 863 (Mad)

¹⁰100 ITR 603 (Guj)

¹²[1973] 90 ITR 332 (Guj)

⁹[1955] 28 ITR 156 (AP)

¹¹[1955] 27 ITR 192 (Bom)

¹³[1938] 6 ITR 414, 421 (PC)

*Commissioner of Income-tax v. Khemchand Ramdas*¹⁴ The question would, therefore, be what is the sense in which the word "assessed" is used in this context ? Obviously, it is used in a comprehensive sense to mean 'subjected to the whole procedure for ascertaining and imposing liability on the taxpayer'. There is nothing in the context of section 30, sub-section (1), which compels us to give a narrow meaning to the word 'assessed'. On the contrary, the words 'under this Act' clearly go to show that the reference here is to the whole procedure laid down in the Act for imposing liability upon the taxpayer. The legislature has deliberately and advisedly used the words 'under this Act' and not 'under' 'a' or 'any' provision of this Act. What is meant by the expression 'any assessee..... denies his liability to be assessed under this Act' is that the assessee contends that he is not liable to be assessed under any provision of the Act, or, in other words, he is not liable to be subjected to any part of the procedure laid down in the Act for imposing liability to tax. When an assessee claims that he is not liable to be proceeded against under section 35, sub-section (1), which, paraphrasing it in the language of S. Sankappa's case, means that he is not liable to be assessed by a proceeding for rectification under section 35, sub-section (1), he is not 'denying his liability to be assessed under this Act'. His objection then is only against a proceeding for assessment under a particular provision of the Act. He does not say : 'I am not liable to be assessed at all under any provision of the Act' which is what is connoted by the expression 'denies his liability to be assessed under this Act'. Of course, we must make it clear that denial of liability to be assessed may be in

respect of the whole income or any part of the income. It may be based on any ground, whether of fact or of law, and it may be total denial of liability or denial of liability under particular circumstances. But, the denial must be of 'the liability to be assessed under this Act' and not merely under any particular provision of the Act. The denial of liability contemplated by section 30, sub-section (1), is, therefore, denial of liability to be charged with tax under the Act, which is the same thing as saying that the assessee is not liable to be assessed at all under any provision of the Act or to be subjected to any part of the procedure laid down in the Act for imposing liability to tax. The denial of liability contemplated in section 30, sub-section (1), is not confined to absolute or total denial of liability."

19. In *Mandal Ginning & Pressing Co.'s case* [1973] 90 ITR 332 (Guj), it was held that there was no right of appeal under section 30(1) against an order of rectification made under section 35(1) of the 1922 Act, on the reasoning that when the assessee claims that he is not liable to be proceeded against under section 35(1) he is not denying his liability to be assessed under the Act but his objection is only against the proceeding for assessment under the particular provision of the Act.

20. In the *Law and Practice of Income-tax by Kanga and Palkhivala*, sixth edition, volume I, at page 930, the learned authors have stated :

"Appeal. - Under the 1922 Act there was no right of appeal against an order levying interest. Under this Act a right of appeal is specifically provided against an order under section 216 charging interest [section 246(m)], but there is no right of appeal against an order charging interest under section 215 or 217. However, in

¹⁴[1938] 6 ITR 414 (PC)

any case where the amount of tax on which interest was payable is reduced in appeal against the regular assessment, the interest charged would be reduced to a smaller figure or to nil [section 215(3) and section 217(2)]."

21. All decided cases except one have uniformly taken the view that levy of interest under section 18A(6) or section 18A(8) of the 1922 Act or levy of interest under section 215 of the Act is not appealable but in the appeal against a regular assessment, it is open to the assessee to take every contention which, if accepted, must result in the Income-tax Officer holding that there was no liability to pay advance tax and, therefore, there was no liability to pay penal interest. In other words, it is open to an assessee to contend in the appeal against an order of assessment that he is not liable to pay any advance tax at all or the amount of advance tax determined as payable by the Income-tax Officer is not correct; but if the assessee does not dispute the amount of advance tax determined as payable by the Income-tax Officer, he merely cannot object to the levy of penal interest or question its quantum. The decision in *Mohta's case*¹⁵ where it was held that the order levying penal interest is appealable, rested on the reasoning that under the 1922 Act penal

interest amounted to additional tax. That reasoning is no longer valid since the word "tax" has been defined in section 2(43) of the Act to mean any tax and super-tax, chargeable under the provisions of the Act. The definition of the word "tax" in the Act does not bring within its scope penal "interest" levied for belated return or for non-payment of advance tax.

22. The levy of penal interest under section 139 or section 215 is made in the regular assessment order; the demand issued pursuant to be assessment order is for the total amount of liability imposed inclusive of tax and interest. While levy of penal interest under section 18A of the 1922 Act up to 1st April, 1952, was automatic as was noticed by Chagla C.J. in *Ramnath's case*¹⁶ under the Act such levy is not automatic; discretion is vested in the Income-tax Officer to waive or reduce penal interest in the cases and circumstances mentioned in rule 117A and rule 40 of the Income-tax Rules, 1962. If the case of the assessee falls within the scope of the said Rules, the Income-tax Officer is bound in law to consider whether the assessee was entitled to waiver or reduction of interest. It is, therefore, clear that levy of penal interest under sections 139 and 215 is part of the assessment. When such penal interest is levied the assessee is "assessed", meaning thereby, he is subjected to the procedure for ascertaining and imposing liability on him. If the assessee denies his liability to be assessed under the Act, he has a right appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied under section 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 Income-tax Officer as payable ought to be reduced. In either case he denies his liability, wholly or partially, to be assessed. Similarly, where interest is levied under section 139 of the Act, the assessee may deny his liability to pay such interest on the ground that the return was not belated or that the penal provision was not attracted at all to his case. In such a case also he denies his liability to be assessed to interest. But where the assessee does not deny his liability to be assessed to interest, but his objection relates to the question of waiver or reduction of interest under rule 117A or rule 40 of the Income-tax Rules, 1962, as the case may be,

¹⁵[1965] 56 ITR 269 (Bom)

¹⁶[1955] 27 ITR 192 (Bom)

such objection does not amount to denial of liability to pay interest under section 139 or section 215 of the Act. Waiver or reduction of interest pre-supposes that the liability has been incurred by the assessee. If no liability has been incurred, then there is no question of exercise of discretion of waiver or reduction of interest. In those cases, the assessee admits his liability but contends that in the proper exercise of discretion, the Income-tax Officers should have waived or reduced the interest; that objection does not amount to denial of liability to be assessed.

23. The assessee in an appeal against the order of assessment cannot question the interest assessed if he does not deny his liability to be assessed to such interest under section 139 or section 215 of the Act. The scope of the appeal against the order of assessment levying interest is

limited; the assessee can be allowed only to urge that he is not liable, wholly or partially, to be assessed to interest.

24. The fact that clause (m) of section 246 provides for an appeal against an order made under section 216 is no ground to hold that an assessment order levying penal interest under section 139 or section 215 is not appealable if the case falls under the first part of clause (c) of section 246. If the assessee denies his liability to be "assessed" under the Act, he has a right of appeal and that right of appeal cannot be denied.

25. In the instant case, the Appellate Assistant Commissioner has declined to consider the assessee's objection to the levy of interest. He has not stated what the assessee's objections were. The Tribunal has merely affirmed that order. If the assessee's objection was that under the relevant provisions of law, it was not liable to be assessed to penal interest, that objection, the Appellate Assistant Commissioner was bound to consider. He was in error in declining to consider the objection on the ground that the appeal was not competent.

26. For the reason stated above, we answer the question as re-formulated by us in the negative and in favour of the assessee. The assessee will be entitled to the costs of this reference. Advocate's fee Rs. 250.

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