

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs.

Jagdishprasad Ramnath

I.T. Ref. No. 3 of 1954

(Chagla, C.J. and Tendolkar, J.)

26.08.1954

JUDGMENT

Chagla, C.J.

1. One Jagdishprasad (assessee) who was a partner in a firm styled Govindram Ramnath and Co., did not pay to the Income-tax authorities advance tax as required by Section 18A(3), Indian Income-tax Act, 1922. The Income-tax Officer, therefore, levied penal interest for non-payment of advance tax for the relevant two years of assessment under Section 18A (8) of the Act. The assessee appealed to the Appellate Assistant Commissioner in respect of the orders passed by the Income-tax Officer levying penal interest. The Appellate Assistant Commissioner held that no appeal lay to him against the imposition of penal interest by the Income-tax Officer. The assessee appealed to the Appellate Tribunal. The Tribunal held that the order passed by the Appellate Assistant Commissioner was an order passed under Section 31 of the Act and, therefore, an appeal lay to the Tribunal. The Tribunal further held that an appeal lay to the Appellate Assistant Commissioner in respect of an order passed by the Income-tax Officer levying penal interest under Section 18A (8) of the Act, observing in its order as follows:

The following questions of law were referred to the High Court:-

- (1) Whether the order passed by the Appellate Assistant Commissioner dated 13-2-1952 is an order passed under Section 31, Income-tax Act and an appeal lies to the Tribunal from it?
- (2) Whether on the facts and circumstances of the case an appeal lies to the Appellate Assistant Commissioner from an order passed by the Income-tax Officer levying penal interest under Section 18A(8), Income-tax Act?

Chagla, C.J.

1A. The Income-tax Officer imposed penal interest upon the assessee under Section 18A(8), Income-tax Act in the sum of Rs. 3549-11-0 for the assessment year 1947-48 and a sum of Rs. 9525-2-0 in respect of the assessment year 1948-49. The assessee appealed against the imposition of this penal interest to the Appellate Assistant Commissioner, and the Appellate Assistant Commissioner held that no appeal lay against the penal interest imposed by the Income-tax Officer. The matter was taken to the Appellate Tribunal and the Tribunal upheld the view of the Appellate Assistant Commissioner, and a question has now been submitted to us whether an appeal lies against penal interest imposed by the Income-tax Officer under Section 18A(8) of the Act.

2. Now, Section 18A is a new section which was inserted in the Act by Act 11 of 1944 and it contains a machinery for assessment of advance tax. Sub-section (1) deals with the case of an assessee who is an old assessee and who has to pay advance tax on the basis of his previous income, and Sub-Section (2) enables such an assessee to make an estimate if in his opinion the income of the subsequent year is likely to be less. Sub-section (3) deals with the case of a new assessee, and in his case he has to make an estimate himself and if he does make an estimate, then he has got to pay advance tax in the manner laid down in that sub-section. The assessee in this case was a new assessee but he did not make any estimate under Sub-Section (8). Sub-section (6) of Section 18A provides that where an assessee has paid tax under Sub-Section (2) or (3) and the payment of advance tax is less than 80 per cent. of the final assessment of his income in the particular year, he is liable to pay interest at the rate of 6 per cent., and reference may be made to the third proviso to this sub-section which is to the following effect:

"Provided also that, where, as a result of an appeal under Section 31 or 33 or of a revision u/s. 33-A or of a reference to the High Court under Section 66, the amount on which interest was payable under this sub-section has been reduced the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded together with the amount of income-tax that is refundable."

Therefore, this proviso lays down a machinery for an automatic reduction of interest payable and a refund if higher interest has been paid and the automatic reduction will depend upon the amount on which interest is liable to be paid being reduced. Sub-Section (8) deals with a case where after the regular assessment has been paid the Income-tax Officer discovers that no advance tax has been paid at all, in which case also there is a liability to pay interest 'calculated in the manner laid down in Sub-Section (6),' and the amount of interest is to be added to the tax as determined on the basis of the regular assessment. Now, in our opinion, it is clear that interest "calculated" in the manner laid down in Sub-Section (6) will include proviso 3 to that sub-section. In other words, there would be an automatic reduction of interest not only in a case falling under Sub-Section (6) but also falling under Sub-Section (8) if the higher authority were to reduce the amount on which interest was liable to be paid.

3. Now, in this case as no advance tax was paid, a penal interest was imposed under Sub-Section (8) of Section 18A of the Act by the Income-tax Officer and the question is whether this order is subject to appeal to the Appellate Assistant Commissioner. Turning to Section 30, which deals with the provision with regard to appeals to the Appellate Assistant Commissioner, there is no appeal specifically provided against an order made under Section 18A(6) or (8). What is urged by the assessee is that he falls under the general words used in Section 30(1), viz., that an assessee denying his liability to be assessed under the Act can appeal against the order of the Income-tax Officer, and what is urged by Mr. Kolah on behalf of the assessee is that in this case he has denied his liability to be assessed under the Act and therefore there is a right of appeal against the order imposing penalty. This contention was accepted by the Tribunal and therefore the Commissioner has come on this reference before us.

4. Now, it is perfectly true that the expression "assessment" has been very widely construed and it has been observed that it bears a different meaning according to the context in which it is used, and we accept Mr. Kolah's contention that in Section 30 we must construe the expression "assessed" in its widest connotation. The Privy Council in a well-known passage in - '*Commissioner of Income Tax, Bombay and Aden v. Khemchand Ramdas*¹', points out that one of the peculiarities of most Income-tax Acts is that the word "assessment" is used as meaning sometimes the computation of income, sometimes the determination of the tax payable and sometimes the whole of the procedure laid down in the Act for imposing liability upon the tax payer, and their Lordships point out that the Indian Income-tax Act is no exception in this respect. Therefore "assessment" may not only be the computation of the income, it may not only be the determination of the amount of tax payable, but it may refer to the whole procedure laid down in the Act for imposing liability upon the tax payer. But, in our opinion, it is clear that when the Privy Council referred to imposing liability upon the tax payer, the liability was the liability to pay tax and not liability to pay a penalty. Mr. Kolah has been at pains to satisfy us that the imposing of a penalty under the Act is as much a liability as the imposing of a tax, and if an assessee denies his liability to pay penalty, he is denying his right to be assessed under the Act. We are unable to accept that contention. The distinction between a tax and a penalty is clear, and the main object and the main purpose of a taxing statute is to lay down a machinery for the recovery of tax. An assessee is liable to pay tax if he has a taxable income. An assessee is not liable to pay a penalty unless he commits a default and the object of a taxing statute is not to recover a penalty from the assessee but to recover tax. The recovery of penalty is merely incidental and only arises when there is a default on the part of the assessee.

5. Mr. Kolah relied on a recent decision of the Madras High Court which supports what we have just observed, and the case on which reliance has been placed is a case reported in - '*Joint Official Liquidators, P.J. Bank Ltd. v. Commissioner of Income Tax, Madras*²', That was also a case of payment of advance tax and what the Madras High Court held was that advance tax was a tax in respect of which the State had got priority over all debts of a company, the company in this

case being liable to pay advance tax, and what was urged before the Madras High Court was that an advance tax was not a tax within the meaning of the Income-tax Act in respect of which the State had a prior charge. This contention was rejected by the Madras High Court and the Madras High Court pointed out what was the nature of the tax and the learned Chief Justice points out that (p.859):

" 'A tax in the general understanding of the termsignifies an exaction for the support of the Government'. (Vide - '*United States v. Bulter*³', at p.61 (C)). The primary meaning and object of taxation is raising money for the purposes of Government by means of contributions from individual persons."

Then the learned Chief Justice quotes Cooley on Constitutional Law (4th Edn., p.61) and the definition of "taxes".

¹ AIR 1938 PC 175

³(1936) 297 US 1

² AIR 1954 Mad 858

"The word 'taxes' in its most enlarged sense embraces all the regular impositions.....and enjoyments of the people for the purpose of raising public revenue."

Now, it is impossible to suggest that a penalty is an exaction for the support of Government, nor can it be suggested that a penalty is money raised for the purpose of Government by means of contributions made from individual persons. We are sure that Government would not like to carry on the State by means of penalties imposed on assesseees. They would rather wish that the assesseees were honest and paid their taxes than they were compelled to pay penalty.

6. There is also clear indication in the Act itself that the Legislature did not intend to provide for a right of appeal against the imposition of penal interest. There are various other sections in the Act where power is given to the Income-tax authorities to impose a penalty, and we find that in these cases an appeal has been specifically provided. Now, for instance, there is a penalty provided under Sub-Section (2) of Section 25, there is a penalty provided under Section 28, there is a penalty provided under Sub-Section (6) of Section 44E and Sub-Section (5) of Section 45 and Sub-Section (1) of Section 46, and in all these cases Section 30 specifically provides for a right of appeal. It is also interesting to note that under Section 29 the Legislature has made a distinction between "tax", "penalty" and "penal interest", and under that section a notice of demand has to be served upon a person liable to pay either tax, penalty or interest; and again under Section 47, which deals with recovery of penalties in contradistinction to recovery of tax under Section 46, provision is made for the recovery of any sum imposed by way of penalty under the various provisions which are set out there and also interest payable under the provisions of Section 18A. Therefore, the Legislature has clearly kept in mind the distinction between a penalty imposed under certain provisions of the Act and the interest which the assessee is liable to pay under Section 18A, and while providing for a right of appeal against orders of penalty the Legislature has not provided for any appeal against the payment of penal interest. Now, there may be good reason why the Legislature did not do so, because in the case of

penal interest it must be more a matter of simple computation than anything else. If an assessee is liable to pay a certain amount of tax according to his regular assessment, and it is found that he has either not paid advance tax or that his advance tax does not come up to 80 per cent. of the tax, then he is liable to pay interest, and it may be suggested that penal interest is nothing more than a mere mode of computation, because it must not be forgotten that the assessee has a right of appeal against his regular assessment and he may get his assessment altered either as to income or as to tax. It appears to us that the assessee would be able to agitate in his appeal against the regular assessment not only the question as to the quantum of his taxable income or the quantum of the tax which he is liable to pay but also the question as to whether a particular income falls under a particular source or not, because the main grievance that Mr. Kolah has made is this that if we come to the conclusion that there is no right of appeal against an order imposing penal interest even though the Income-tax Officer may hold that advance tax was liable to be paid in respect of income which does not fall under Section 18A and which for instance falls under Section 18, the assessee would be deprived of his right to contest that decision. It may be pointed out that under Section 18A it is not in respect of every income that there is a liability to pay advance tax. Section 18A in terms excludes income which falls under Section 18 in respect of which tax has to be paid at the source. But, in our opinion, Mr. Kolah's grievance is not justified because if the Income-tax Officer were to take the view that a certain income does not fall under a head which falls under Section 18, it would be open to the assessee to challenge that decision in the appeal against his regular assessment and to get the appellate authority to hold that the income falls under Section 18 and therefore Section 18A has no application. This right would permit the assessee to escape wholly or partially from the consequences of penal interest. Again it would be open to the assessee to urge before the appellate authority that the income upon which the quantum of interest was charged should be reduced and if such quantum was reduced then again the penal interest would also be reduced, because the whole object of proviso 3 to Section 18A, Sub-Section (6), is to bring about automatic revision in the rate of interest. Therefore, the scheme of the Act is that penal interest must follow upon the regular assessment, the appeal should be against the regular assessment and in the regular assessment it should be open to the assessee to take all points which may legitimately not only reduce the taxable income or the tax to be paid or with regard to the proper head under which the income should fall but also reduce the quantum of penal interest and the Legislature having provided for this in the regular appeal itself did not think it necessary that a separate right of appeal should be given to the assessee to appeal against the quantum of penal interest.

7. Now, it has been urged by Mr. Kolah with some force that although he may not be entitled to appeal against the quantum of penal interest, it would be open to him to argue that he was not liable to pay advance tax at all, and therefore the machinery set up by Section 18A has no application to him and he could not be assessed under Section 18A and therefore he would not be denying his liability to pay penalty but would be denying his liability to be assessed under the Act. As we have pointed out, it is undoubtedly true that Section 18A lays down a special machinery for assessment of advance tax. It is also true that Section 18A provides for the

recovery of advance tax, and it cannot be disputed that if an assessee was compelled to pay advance tax and he denied his liability to be assessed for that advance tax, he would be entitled to appeal under Section 30.

8. It appears that under Section 18A, Sub-Section (1), there is a clear liability upon an old assessee to pay advance tax, and if he fails to pay advance tax, that could be recovered from him; but the position is different when we turn to the case of a new assessee under Sub-Section (3). The liability to pay advance tax in his case only arises if he submits an estimate, but if he fails or refuses to submit an estimate, no obligation to pay advance tax can arise and his only liability would be, if it was found on his regular assessment that he was liable to pay advance tax, to pay a penalty under Section 18A. Therefore, it is difficult to take the view that in the case of a new assessee who had never been assessed to advance tax and upon whom there never was a liability to pay advance tax that he could legitimately say that he is denying his liability to be assessed under the Act. In fact he has never been assessed. In fact no liability to pay advance tax has ever been imposed upon him. In fact he has never been called upon to pay advance tax. It is only on his being assessed under the regular assessment that it has been found that he should have made an estimate under Sub-Section (3) of Section 18A and paid advance tax and therefore he is liable to pay penalty. Therefore the decision of the Income-tax Officer is not that the assessee is liable to be assessed to payment of advance tax. That stage having long past, that question cannot arise, but his only decision is that on his failure to pay advance tax which the assessee was liable to pay he is liable to pay penal interest.

Now, Mr. Kolah says that he should be entitled to contest the underlying assumption in the Income-tax Officer's order that he was liable to pay advance tax and that is the right of appeal which he is claiming. 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 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 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.

9. In our opinion, therefore, the Tribunal was in error in holding that there was a right of appeal merely against the order imposing a penal interest, but we would uphold the order of the Tribunal sending the matter back to the Appellate Assistant Commissioner and direct that he should hear the appeal of the assessee and dispose of it in the light of our judgment.

10. We now proceed to answer the questions raised before us. Our answer to question (2), which is really the substantial question, is in the negative. With regard to question (1) it is clear that the order made by the Appellate Assistant Commissioner that the appeal was incompetent was made under Section 31. That is the view we have taken in - '*K.K. Porbunderwalla v. Commissioner of Income Tax*³', If the order of the Appellate Assistant Commissioner was made under Section 31, then clearly an appeal lay to the Tribunal from that order, and it was open to the Tribunal to either confirm the view of the Appellate Assistant Commissioner or to differ from him. In this case the Income-tax Tribunal differed from the view taken by the Appellate Assistant Commissioner and remanded the appeal to the Appellate Assistant Commissioner for disposal according to law. Therefore, we must answer the question (1) in the affirmative.

⁴AIR 1952 Bom 157

11. The assessee to pay 3/4ths of the costs.

Answers accordingly.