

**(1980) 07 MP CK 0004**

**Madhya Pradesh High Court**

**Case No:** Miscellaneous Civil Case No. 82 of 1975

Commissioner of Income Tax

APPELLANT

Vs

Narpat Singh Malkhan Singh

RESPONDENT

---

**Date of Decision:** July 25, 1980

**Acts Referred:**

- Income Tax Act, 1961 - Section 143(3), 212, 215, 215(4), 216

**Citation:** (1981) 5 TAXMAN 133

**Hon'ble Judges:** G.P. Singh, C.J; U.N. Bhachawat, J

**Bench:** Division Bench

**Advocate:** P.S. Khirwadkar, for the Appellant; H.S. Shrivastava, for the Respondent

---

**Judgement**

G.P. Singh, C.J.

This is a reference made by the Appellate Tribunal u/s 256(1) of the income tax Act, 1961 (hereinafter referred to as "the Act") referring for our answer the following question of law:

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the order of the Additional Commissioner of income tax, passed u/s 263 of the income tax Act, 1961, was without jurisdiction and hence invalid in law?

The facts, briefly stated, are that for the assessment year 1970-71 the assessee filed return declaring a total income of Rs. 28,942. The ITO, however, assessed the total income at Rs. 33,650 u/s 143(3) of the Act by his order dated 11-12-1970. The assessee filed an appeal to the AAC confining his objection to the disallowance of certain expenses amounting to Rs. 3,574 by the ITO. The AAC by his order dated 27-3-1971 accepted the assessee's appeal in part and allowed a reduction of Rs. 2,000 in the total income of the assessee. The Additional Commissioner thereafter served a notice u/s 263 of the Act on 28-9-1972 on the assessee to show cause why the assessment not set aside as it was prejudicial to the revenue. The assessee

objected By is order dated 7-11-1972, the, Additional Commissioner overruled the objection and held that the order of the ITO u/s 143(3) was erroneous and prejudicial to the revenue as it was passed without charging interest u/s 217(1A) of the Act and without initiating penalty proceedings u/s 273(c) of the Act. The assessee filed an appeal against the order of the Additional Commissioner which was allowed by the Tribunal on 23-2-1974 on the reasoning that the order of assessment passed by the ITO merged in the order of the AAC and the Additional Commissioner had no jurisdiction to interfere in revision u/s 263.

2. The power of revision conferred on the Commissioner by section 263 to call for and examine the-record of any proceeding under the Act and to interfere if he considers that any order passed therein by the ITO is erroneous insofar as it is prejudicial to the interest of the revenue, does not empower the Commissioner to interfere with any order passed by the AAC. Therefore, if any order of the ITO had merged in the order passed in appeal by the AAC, the same cannot be set aside in revision by the Commissioner. The argument of the learned standing counsel for the department, however, is that in the instant case the appeal before the AAC against the order of assessment passed by the ITO was on the limited question of disallowance of certain expenses and it cannot, therefore, be said that the entire order of assessment had merged with the order of the AAC and, therefore, the Commissioner could revise the order of the ITO without disturbing the points decided by the AAC. In our opinion, there is no merit in this argument. It is true that the only point raised by the assessee before the AAC against the order of assessment passed by the ITO related to the disallowance of certain expenses but the effect of the order of the AAC was to reduce the taxable income and thereby to modify the order of assessment passed by the ITO. Setting aside of the order of assessment was done in the revision by the Additional Commissioner necessarily resulted in setting aside of the order of the AAC and as the power of revision was not available against the order of the AAC, the order of assessment could not be set aside by the Additional Commissioner. The learned standing council relied upon the case of [Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central](#), . In this case, the ITO had omitted to charge interest u/s 217 of the Act and the Commissioner in revision directed the ITO to compute and recover interest although in the mean time the order of assessment had been the subject-matter of appeal before the AAC. The Calcutta High Court held that the merger of the order of assessment was only in respect of matters which were taken up in appeal and as the question of charging of interest was not involved in appeal, the Commissioner could direct the ITO to charge interest u/s 217. It will be noticed that in this case the Commissioner had not set aside the order of assessment passed by the ITO which was the subject-matter of appeal. The order of the Commissioner directing the ITO to compute and recover interest was passed without disturbing the order of assessment. In the instant case, the Additional Commissioner in revision set aside the order of assessment passed by the ITO. The case of the Calcutta High Court is,

therefore, distinguishable and is not applicable. We will again" refer to the decision of the Calcutta High Court for examining the question whether the Commissioner can pass an order in revision directing the ITO to compute and recover interest without disturbing the order of assessment.

3. The ITO's jurisdiction to impose penalty u/s 273(c) arises if he in the course of any proceeding in connection with the regular assessment is satisfied that the assessee has without reasonable cause failed to furnish an estimate of the advance tax payable by him in accordance with the provision of sub-section (3A) of section 212 of the Act. The words "in the course of any proceeding" have been the subject-matter of interpretation by the Supreme Court and it is settled that the necessary satisfaction conferring jurisdiction on the ITO to impose penalty has to be reached before passing of the order of assessment- [Commissioner of Income Tax, Madras, and Another Vs. S.V. Angidi Chettiar](#), and [D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat, II Ahmedabad](#). To put it differently, the ITO has no jurisdiction to impose penalty u/s 273 if he omits to record his satisfaction before completing the assessment. If an order of assessment is passed without recording the satisfaction that circumstance exists for imposition of penalty when such a satisfaction should have been recorded, the Commissioner can, in the exercise of his power of revision u/s 263, set aside the assessment and direct the ITO to make a fresh assessment after taking into account the circumstances which make out a case for imposition of penalty. An order of assessment which does not record the satisfaction of the ITO regarding the existence of circumstances making out a case for imposition of penalty, when it is clear that such circumstance do exist, will be an order prejudicial to the interest of the revenue because after the order of assessment the ITO will have no jurisdiction to impose penalty. The Commissioner in such a case in exercise of his revisional power has to set aside the order of assessment to enable the ITO to initiate penalty proceedings. The case of [Addl. Commissioner of Income Tax Vs. Indian Pharmaceuticals](#), is a case of this type. The difficulty in the instant case. However, is that the order of assessment passed by the ITO cannot be set aside in revision for the reason that it would result in setting aside the order of the AAC passed in appeal. It necessarily follows that it was not open to the Additional Commissioner to set aside the assessment order passed by the ITO and to direct him to make a fresh assessment keeping in mind the provisions of section 273(c). The Additional Commissioner could not have also directed the ITO to initiate proceeding for imposition of penalty u/s 273(c) without setting aside the order of assessment for the reasons that the ITO had no jurisdiction after the order of assessment to initiate penalty proceedings as he had not recorded his satisfaction at or before the passing of the order of the assessment that the circumstances existed which made out a case for initiating penalty proceedings.

4. The next question is whether the Additional Commissioner in revision could have directed the ITO to charge interest u/s 217(1A) without disturbing the assessment order. Interest u/s 217(1A) can be charged where, on making the regular

assessment, the ITO finds that any such person as is referred to in sub-section (3A) of section 212 has not sent the estimate referred to therein. Two things are thus necessary for exercise of the power to charge interest: (i) the ITO has to find that any such person as is referred to in sub-section (3A) of section 212 has not sent the estimate referred to therein; and (ii) this finding has to be given on making the regular assessment. There has been some debate before us as to the meaning of the words "on making the regular assessment".. It was submitted by the learned standing counsel that these words mean that the requisite finding has to be reached at the time of making the assessment in the assessment order itself and the computation of interest chargeable u/s 217(1A) becomes part of assessment order u/s 143(3). The learned counsel for the assessee, however, submitted that the words "on making the regular assessment" mean "soon after passing the assessment order". It was also pointed out that under rule 40 of the Rules read with section 215(4) of the Act the ITO has not only to find that there is failure to send the estimate but also to see whether there are circumstances which require reduction or waiver of interest. According to the learned counsel, the ITO is required to pass a separate judicial order u/s 217(1A) after noticing the assessee (sic). It was submitted by the learned counsel for the assessee on this basis that as the assessment order was not a bar for passing an order u/s 217(1A), it could not be said that the order of assessment which does not charge interest is an order prejudicial to the revenue revisable on this ground u/s 263. Having regard to the circumstances of this case, it is not necessary for us to decide whether an order charging interest u/s 217(1A) is a part and parcel of the order of assessment or whether the ITO can pass such an order even after passing the order of assessment, for, on either view, in our opinion, the Additional Commissioner had no jurisdiction to interfere. We may, however, point out that a separate provision for appeal in section 246 against an order u/s 216 shows that an order under that section does not form part of the order of assessment u/s 143(3) which is separately appealable. Section 217 is similar to section 216. Section 216 applies when the income has been underestimated for purposes of advance tax and section 217 applies when no estimate has been sent at all. If an order u/s 216 is different and distinct from an order of assessment passed u/s 143(3), it would be "logical to hold that an order u/s 217 is also of the same nature and different and distinct from the order of assessment u/s 143(3). However, as stated earlier, it is not necessary to decide this point. Assuming first that an order u/s 217 is a part of the order of assessment made u/s 143(3) and the finding that the assessee has not sent the estimate referred to in sub-section (3A) of section 212 has to be given at the time of making the assessment order, the ITO will have no jurisdiction to charge interest unless the assessment order is set aside. As earlier stated by us, the assessment order is set aside (sic). As earlier stated by us. the assessment order could not be set aside by the Additional Commissioner in revision in the instant case because that would also result in setting aside the order of the AAC passed in appeal. In this view of the matter, the Additional Commissioner could not in revision set aside the order of assessment and direct the ITO to make

reassessment after taking into account the provisions of section 217(1A) as was done in the instant case. Now assuming that the ITO is competent to pass an order u/s 217(1A) even after the making of the order of assessment and that the necessary finding that the assessee has failed to submit the estimate for purposes of advance tax need not be recorded in the assessment order, the position then would be that the order of -assessment would not be a bar for taking action u/s 217(1A) and, therefore, it would not be possible to say that the order is prejudicial to the revenue on the ground that interest has not been charged therein. We have earlier pointed out that the jurisdiction in revision u/s 263 arises only when the Commissioner finds that an order of the ITO is erroneous insofar as it is prejudicial to the revenue. This finding is the very foundation of the revisional jurisdiction exercisable by the Commissioner. A complete absence of any order u/s 217(1A) will not bring the case within the revisional jurisdiction. So, in either view the Additional Commissioner, on the facts and in the circumstances of the instant case, was not competent to direct the charging of interest u/s 217(1A).

5. In the Calcutta High Court's case *Singho Mica Mining Co. Ltd. v. CIT* (supra) to which reference has already been made, the question that in the absence of an order u/s 217 of the 1961 Act or section 18A(8) of the 1922 Act, there could be no revision, was not decided as this question was not agitated earlier. In *Addl. CIT v. Saraya Distillery* [1978] 115 ITR 34 (All.), it was held that an order of assessment which did not charge interest u/s 215 was prejudicial to the revenue and could be interfered in revision by directing the ITO to charge interest. Section 215 is not in pari materia with sections 216 and 217. This case, therefore, cannot be taken to be decisive on the question whether an order u/s 216 or section 217 is an order separate and distinct from the order of assessment u/s 143(3). Moreover, in the Allahabad High Court's case, the order of assessment had not been subjected to appeal before the AAC. In [Commissioner of Income Tax Vs. Cochin-Malabar Estates Ltd.](#), another case relied upon by the learned standing counsel, the Commissioner in revision set as be the assessment order and directed fresh assessment as the ITO had failed to charge interest u/s 215. This case also proceeds upon the basis that an order u/s 215 is a part of the assessment order. We have already pointed out that we are not concerned in the instant case with section 215. Further, because of the intervention of appeal to the AAC in the instant case, the assessment order cannot be set aside. The Kerala High Court's case also, therefore, has no application. For the reasons given above, our answer to the question referred in that the Tribunal was right in law in holding that the order of the Additional Commissioner passed u/s 263 was without jurisdiction and hence, invalid in law. There shall be no order as to costs of this reference.