(1978) 02 CAL CK 0040

Calcutta High Court

Case No: Income-tax Reference No. 181 of 1971

Commissioner of Income Tax		APPELLANT
	Vs	
Karnani Industrial Bank Ltd.		RESPONDENT

Date of Decision: Feb. 15, 1978

Acts Referred:

- Income Tax Act, 1922 - Section 18A(6), 29, 35

Citation: (1978) 113 ITR 380

Hon'ble Judges: Dipak Kumar Sen, J; C.K. Banerji, J

Bench: Division Bench

Advocate: Suhas Sen and Ajit Sengupta, for the Appellant;Tapas Roy and U.P. Mukherjee, for the Respondent

Judgement

Sen, J.
Pursuant to the directions of this court u/s 66(2) of the Indian Income Tax Act, 1922, the Tribunal in this reference has drawn up a statement of case and referred the following questions :

" (1) Whether, on the facts and in the circumstances of the case, the demand notice dated the 11th December, 1964, for the sum of Rs. 12,573.03 was validly issued ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that an order u/s 35(1) of the Indian Income Tax Act, 1922, should have been passed by the Income Tax Officer before issuing the demand notice dated 11th December, 1964 ? "

2. The facts found and/or admitted in these proceedings are that Messrs. Kamani Industrial Rank Ltd., Calcutta (now known as Karnani Finance Enterprise Ltd.), the assesses, was assessed to Income Tax u/s 23(3) of the Indian Income Tax Act, 1922, in the assessment year 1956-57, the relevant previous year whereof ended on the 31st December, 1955. In the assessment order it was recorded that interest would

be charged u/s 18A(6) of the Act. Such interest was calculated and necessary entries were made in the Demand and Collection Register.

3. In the notice of demand sent to the assessee on the 20th August, 1960, the interest charged u/s 18A(6) was not included.

4. On the 11th December, 1964, after the lapse of over four years, the Income Tax Officer issued another notice of demand including in it a sum of Rs. 12,573.03 being the interest which was not included in the earlier notice. This notice was served on the assessee on the 14th December, 1964.

5. Being aggrieved by this notice the assessee preferred an appeal to the Appellate Assistant Commissioner objecting to the legality of the issue thereof. It was contended by the assessee in the appeal that : (a) the Income Tax Officer was not competent to issue the second notice of demand after the expiry of four years ; (b) the mistake, if any, in the first notice of demand could not be recited without a further notice to the assessee as the rectification enhanced the demand against the assessee ; and (c) as no action had been taken u/s 35 of the Indian Income Tax Act, 1922, the revised notice was illegal. The Appellate Assistant Commissioner dismissed the appeal as incompetent as according to him no appeal lay against an order passed u/s 35 of the Act.

6. There was a further appeal by the assessee to the Income Tax Appellate Tribunal. It was contended that the fresh notice demanding penal interest after the expiry of more than four years was clearly illegal. It was further contended that an order should have been passed u/s 35 after giving the assessee a show-cause notice. A decision of the Supreme Court in M. Chockalingam and Another Vs. Commissioner of Income Tax, Madras and Another, was cited in support of the contentions of the assessee.

7. It was contended on behalf of the revenue, that the issue of the earlier notice of demand did not bar the Income Tax Officer from issuing a supplementary notice calling upon the assessee to pay interest actually charged but not intimated. It was contended further that there was no mistake on record and no question of correction of any mistake. There was no time-limit prescribed for issue of a demand notice.

8. The Tribunal found that as the revised or supplementary notice touched the purse of the assessee it was therefore necessary to give to the assessee an opportunity of being heard. It was held that the Income Tax Officer ought to have given the assessee a notice of his intention to revise the said assessment under the provisions of Section 35(1) of the Act as there was a mistake in the record being the non-inclusion of the interest calculated in. the demand notice which could only he corrected by means of an order made u/s 35(1). Proceedings u/s 35 having become barred by time, the assessee could not be faced with a pending demand raised against him after the lapse of over four years.

9. Mr. Suhas Sen, learned counsel for the revenue, has contended before us that the order of the Tribunal is erroneous on more than one count. He contended that the Tribunal was not correct in holding that there was scope for proceeding u/s 35 of the Act. In the instant case, there was no mistake in the record inasmuch as the assessment was properly made and interest duly charged. Mr. Sen drew our attention to Section 29 of the Act which provides as follows :

" 29. Notice of demand.-----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."

10. Mr, Sen submitted that this section east the duty on the Income Tax Officer to serve upon the assessee or other person liable to pay the tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable. This, the Income Tax Officer, failed to do in this case in the first instance and subsequently a correct notice was served on the assessee. There was no bar in the Act on serving more than one notice or withdrawing an earlier notice and issuing a fresh notice and there was no time limit prescribed for service of such a notice.

11. In support of his contentions Mr. Sen cited several decisions which we shall consider in their chronological order :

(a) Protap Chandra Ganguly Vs. Commissioner of Income Tax, . The facts in this case were that an assessment was made u/s 23(4) of the Indian Income Tax Act, 1922, being an assessment in default of filing a return. On the basis of this assessment a notice of demand was issued which contained certain inaccuracies, viz., that it was not made clear therein that the assessment had been made in default of filing a return. This notice of demand was cancelled and a fresh notice was issued. It was contended on behalf of the assessee that the second notice of demand was not legal. A Special Bench of this court did not accept the contentions of the assessee and observed as follows (page 411) :

" The first question is whether the second notice of demand was a legal one. The answer to that is that there can be no objection whatever to it. There was a perfectly good assessment order on 27th July and the fact that a mistaken notice was sent to the assessee in no way prevents a proper notice being sent when the mistake was discovered. "

(b) RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras, . The facts in this case were that an assessment u/s 34 of the Indian Income Tax Act, 1922, was completed on the 24th March, 1947, and the order as well as the notice of demand u/s 29 were despatched on 25th March, 1947, and received by the assessee on 2nd April, 1947. The assessee contended that the assessment in question was made only on the 2nd April, 1947, when the assessment order was communicated to him, that is more than four years after the close of the assessment year 1942-43. The Madras

High Court did not accept this contention of the assessee and held that the time-limit of four years provided by Section 34(2) was in respect of one stage of proceedings, namely, the assessment of the income and the determination of the tax payable. This could be done by the Income Tax Officer himself and it was not necessary that the order of assessment should be communicated to the assessee within that period.

(c) M. Chockalingam and Another Vs. Commissioner of Income Tax, Madras and Another,) . The facts here were that assessments for the years 1951-52 and 1952-53 were completed on the 11th July, 1953, and 30th August, 1954, respectively. The assessees had not paid advance tax according to their own estimate of income for these years and became liable to pay penal interest u/s 18A(8). The Income Tax Officer overlooked this fact and did not add penal interest to the tax leviable. In 1956, the Income Tax Officer started proceedings u/s 35 of the Act without any notice to the assessee and directed levy of penal interest. After application for revision u/s 35A was rejected by the Commissioner of Income Tax, proceedings under Article 226 of the Constitution were initiated, challenging the orders of the Income Tax Officer as being contrary to the principles of natural justice. On an appeal from an order of the High Court dismissing the said application, the Supreme Court held that action u/s 35 may be taken in favour of the taxpayer without any notice but if the action had the effect of enhancing the assessment or reducing the refund, the Income Tax Officer must send a notice to the assessee and give him a reasonable opportunity of being heard. The contentions of the revenue that facts had been established to show that penal interest was leviable and the issue of a notice was a mere formality were rejected and it was held that the authorities under the statute had to act judicially and one of the requirements of judicial action was to give a fair hearing to a person before deciding against him. The Supreme Court also negatived the contentions of the revenue that the addition of penal interest was not enhancement of assessment and held that the proviso to Section 35 would apply whenever the effect of the order was to touch the pocket of the assessee.
(d) P. S. SUBRAMANYAN, Income Tax OFFICER, COMPANIES CIRCLE 1(1), BOMBAY, AND ANOTHER Vs. SIMPLEX MILLS LTD., . Here the assessee had made advance payment of tax u/s 18A(1) of the Indian Income Tax Act, 1922, for the assessment year 1952-53. On the 30th August, 1952, on regular assessment a part of the tax paid in advance was found refundable to the respondent with interest. u/s 18A(5), at it stood at the relevant time, a sum of Rs. 14,720-14-0 was found payable and was paid to the assessee on account of interest some time in September, 1952. On the 24th May, 1953, Section 18A(5) was amended with effect from 1st April, 1952. Under the amended section the assessee became entitled to refund of Rs. 9,404-5-0 instead of Rs. 14,720-14-0.

On the 18th March, 1957, a notice was issued u/s 34(1)(b) proposing reassessment which was made on the 30th July, 1957. It was held that excessive relief had been

allowed to the assessee in the original assessment and the Income Tax Officer proceeded to recover the excess interest paid. This order was quashed by the Bombay High Court in an application under Article 226 of the Constitution. On appeal, the Supreme Court held that it was not a case where the assessee''s income was under-assessed nor that excessive relief had been granted in computing that income. The interest paid was not a relief granted in computing the income but something paid at a rate calculated according to the law then in force. When the interest was computed it was validly made according to law then in force and, therefore, could not be reopened u/s 34. The Supreme Court upheld the judgment of the High Court.

(e) N. Subba Rao Vs. Third Income Tax Officer, City Circle II, Bangalore, . The facts in this case were that a firm was assessed to Income Tax for the assessment year 1953-54, by an order of assessment made on the 15th March, 1954. Very soon thereafter, the firm discontinued its business. The Income Tax Officer issued a certificate u/s 46(2) of the Indian Income Tax Act, 1922, and sought to initiate proceedings to realise from the partners the tax dues of the firm. One of the partners of the firm moved an application under Article 226 of the Constitution against such proceedings and it was held that the proceedings for recovery of tax could be initiated only against an assessee in default. Though u/s 44 of the Act, a partner was liable to pay the tax assessed on the firm before its discontinuance, as no notice of demand u/s 29 had been served, a partner could be held to be an assessee in default.

Thereafter, the Income Tax Officer issued notice of demand to all the partners u/s 29 of the Act. The petitioner, a partner, challenged this notice before the Mysore High Court on the ground that it was issued over four years after the assessment and, thus, was clearly illegal. The High Court found that Section 29 did not prescribe any period of limitation for issuing a notice. In any event, the High Court held that the notice was issued to the petitioner within a reasonable time and the petitioner had no reason to be aggrieved with the notice.

(f) BADRI PROSAD BAJORIA Vs. COMMISSIONER OF Income Tax (CENTRAL), CALCUTTA., . The facts in this case were that the assessee was a partner in three registered firms and also derived income from dividends, director''s fees and commission. He was assessed to Income Tax for the assessment year 1954-55 and his assessment was completed on the 26th March, 1959. Thereafter, a notice of demand u/s 29 of the Indian Income Tax Act, 1922, was served on the assessee on the 1st April, 1959. It was contended that the assessment order passed u/s 23(3) of the Act not having been communicated to the assessee within four years after the end of the assessment year, as provided u/s 34(3), was barred by limitation, and invalid in law. This contention was rejected by this court in a reference and it was observed as follows (page 364) :

" An assessee''s statutory obligation to move a higher court or Tribunal against an order cannot be set in motion until the order is communicated to him. It cannot be denied that an order, before it is made effective, must be served on the person against whom the order is made. Thus, from the point of view of the person who is affected by the order, the order is made when it is communicated to him. But this does not mean that, until an order is communicated, the order is not made at all. Notice u/s 29 of the Income Tax Act pre-supposes an order of assessment u/s 23(1) or 23(3). Notice u/s 29 can only be served after an order of assessment is made. Thus, the making or passing of an assess ment order, the issue of notice u/s 29, and service of notice or communication of the assessment order are different stages or steps before an assessee pays the assessed tax. In other words, the date of making the order, the date of issue of notice and the date when the order is communicated need not necessarily be the same date. Admittedly, in the instant case, the order of assessment was made on 26th March, 1959, which is a date within 4 years after the end of the assessment year. It is true that the order of assessment has been communicated to the assessee on 1st April, 1959, which date falls 4 years after the end of the assessment year. But the date of communication of the order cannot be the date of making the order because communication pre-supposes the determination of the thing to be communicated. From the point of view of taxability or liability to pay tax on the part of the assessee, the date of communication may be the most effective date. An order to be communicated must presuppose the existence of an order and the existence of the order is only possible when the Income Tax Officer has made that order. From the point of view of the Income Tax Officer, he has discharged the statutory liability to assess if he makes an order of assessment within 4 years after the end of the assessment year. The statute does not say that the Income Tax Officer must communicate the order of assessment within 4 years after the end of the assessment year. "

(g) Commissioner of Income Tax, West Bengal III Vs. Balkrishna Malhotra, . This decision was cited for the following observation of the Supreme Court at page 762 of the report :

" It has been stated over and over again by this court as well as by the Judicial Committee that the words '' assessment '' and '' assessee '' arc used in different places in the Act with different meanings. Therefore, in finding out the true meaning of those words in any provision, we have to see to the context in which the word is. used and the purpose intended to be achieved. It is true that Sub-sections (1), (3) and (4) of Section 23 require the Income Tax Officer to '' assess the total income of the assessee and determine the sum payable by him ''. In other words, in those provisions the word '' assess '' has been used with reference to computation of the income of the assessee and not the determination of his tax liability. But in Section 34(3) the word used is not '' assess '' but '' assessment''. The question for decision is what is the meaning of that word ? As long back as September 24, ,1953, the High Court of Madras in RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax,

Madras, came to the conclusion that the word "assessment" in the proviso to Section 34(3) means not merely the computation of the income of the assessee but also the determination of the tax payable by him. "

12. Mr. Tapas Roy, learned counsel for the assessee, has drawn our attention to the second notice of demand which is a part of the statement of the case and submitted that this was not a supplementary, but a fresh notice of demand and it incorporated the entire amount. He further contended that reading Sections 18, 23 and 29 of the Indian Income Tax Act, 1922, it would be clear that the scheme of the statute was that u/s 29 of the Act the notice issued should contain the entire demand raised against the asses-see. Therefore, it was necessary to include in this notice also the amount due on account of interest. This duty to issue proper notice of demand was mandatory and, therefore, the first notice issued was incorrect. A notice of demand undoubtedly being a part of record, to correct the same Section 35 of the Act had to be invoked.

13. Mr. Roy also contended that if more than one notice of demand was served on the assessee, his right to appeal may be prejudiced or made nugatory.

14. In support of his contentions Mr. Roy relied on the case of M. Chockalingam and Another Vs. Commissioner of Income Tax, Madras and Another, . He also cited Meka Venkatappaiah Vs. Additional Income Tax Officer, . The facts in this case were that the assessee was assessed as an individual for the first time in the assessment year 1947-48. This assessment was finalised on the 13th March, 1952, after successive appeals to the Appellate Assistant Commissioner and the Appellate Tribunal. On the 25th June, 1952, the Income Tax Officer issued a notice to the appellant u/s I 8A(8) of the Indian Income Tax Act, 1922, alleging that he had not paid advance tax and therefore, he was liable to pay penal interest under that section. The assessee filed objections and denied his liability to pay such interest. On the 31st October, 1953, the assessee received a notice u/s 35 of the Act proposing to rectify the assessment on the ground that while completing the assessment for 1947-48 the penal interest u/s 18A was not charged by mistake. The assessee''s objections were negatived by the Income Tax Officer and also by the Commissioner on revision. Thereafter, the assessee filed an application under Article 226 of the Constitution challenging the proceedings u/s 38. It was held by the Andhra Pradesh High Court that a person who had not been assessed previously was under a statutory obligation to send his return voluntarily and pay the amount of advance tax as prescribed by Section 18A(8). Section 18A(8) laid a statutory obligation on the Income Tax Officer to levy penal interest u/s 18A(6) and add the amount to the regular assessment and if this was not done the omission, was a clear mistake apparent from the record and could be rectified u/s 35.

15. Mr. Roy also cited M.K. Venkatachalam, I.T.O. and Another Vs. Bombay Dyeing and Mfg. Co., Ltd., . The facts in this case were that the assessee was assessed to tax for the assessment year 1952-53, by an assessment order on the 9th October, 1952.

The assessee was given some credit for the interest accruing on tax paid in advance u/s 18A(5). The said section was subsequently amended with retrospective effect from the 1st April, 1952, and under the amended section the assessee became entitled to be credited with a lesser sum. The Income Tax Officer, proceeding u/s 35 of the Act, rectified the mistake and demanded payment of the sum refunded in excess. In proceedings under Article 226 of the Constitution, the Bombay High Court issued a writ of prohibition against the revenue on the ground that there was no mistake apparent on the record. On appeal, the Supreme Court reversed the decision of the High Court and held that the effect of the amending Act was that it should be deemed to have come into force on the 1st April, 1952, and that the amendment of Section 18A must be deemed to have been included in the principal Act as from 1st April, 1952, for all purposes, and, therefore, the assessment order was inconsistent with Section 18A as it came to stand and it must be deemed that there was a mistake apparent from the record.

16. In the instant case no proceedings have been taken u/s 35 of the Indian Income Tax Act, 1922, for the purpose of rectifying any mistake. Neither the assessment, nor the calculation, nor inclusion of the penal interest are alleged to be erroneous. None of the same has been challenged by the assessee at any stage. The only contention of the assessee is that such interest should have been included in the first notice of demand and as it had not been done the only course open to the revenue was to correct the said notice already issued, which was a part of the record. This not having been done, the second notice issued in respect of the same demand is illegal. None of the decisions cited on behalf of the assessee supports this contention. The question of rectification arose in the cases of Meka Venkatappaiah Vs. Additional Income Tax Officer, and M. Chockalingam and Another Vs. Commissioner of Income Tax, Madras and Another, , as the penal interest had not been charged at the time of original assessment and the order of assessment had, therefore, to be rectified. The decision of the Special Bench of this court in the case of Protap Chandra Ganguly Vs. Commissioner of Income Tax, , is that a correct notice of demand in conformity with the assessment can always be issued to the assessee. There is no statutory time limit for the issue of such a notice. It is clear from the other decisions cited, viz., RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras, , N. Subba Rao Vs. Third Income Tax Officer, City Circle II, Bangalore, and BADRI PROSAD BAJORIA Vs. COMMISSIONER OF Income Tax (CENTRAL), CALCUTTA., , that though an assessment has to be completed within four years from the completion of the assessment year, a notice of demand can be validly issued even after that period. The right to appeal against the demand arises from the date of service of the second notice and it cannot be held that the assessee''s right is being prejudiced in any way.

17. In our view, the purpose of a notice u/s 29 of the Act is to bring to the attention of and demand from the assessee the order of assessment and the amount of tax including interest and other items due from the assessee. It is the statutory duty of

the Income Tax Officer concerned to give this notice, and there is no bar to the issue of such a notice if a proper or correct notice have not been issued earlier.

18. For the reasons given above, we are unable to accept the contention of the assessee. We answer the questions referred as follows :

The question No. 1 is answered in the affirmative and in favour of the revenue. Question No. 2 is answered in the negative and also in favour of the revenue. There will be no order as to costs.

C.K. Banerji, J.

19. I agree.