

P. S. Subramanyan, Income-Tax Officer, ... vs Simplex Mills Ltd. on 15 November, 1962

Equivalent citations: [1963]48ITR182(SC)

JUDGMENT

SARKAR J. - This appeal is entirely without substance. It arises out of an application under article 226 of the Constitution made by the respondent-assessee for a writ quashing an order of assessment made under section 34 of the Income-tax Act, 1922.

The respondent made advance payment of tax under section 18A(1) of the Income-tax Act for the assessment year 1952-53. On August 30, 1952, regular assessment for this year was made and a part of the tax paid in advance was thereupon found refundable to the respondent. Under the provisions of sub-section (5) of section 18A, as it then stood, interest at a certain rate was payable on the amount paid in advance by an assessee under this section. Rupees 14,720-14-0 were found payable to the respondent under this provision and this sum was paid some time in September, 1952. On May 24, 1953, sub-section (5) of the section 18A was amended with effect from April 1, 1952. It is not necessary to refer to this amendment in detail and it is enough to state that under it the Government was to have paid to the respondent Rs. 9,404-5-0 instead of Rs. 14,720-14-0.

On March 18, 1957, a notice was issued under section 34(1)(b) stating that as the Income-tax Officer had reason to believe that the respondents income for the assessment year ending March 31, 1953, had been under-assessed and had been the subject of excessive relief, he proposed to reassess the said income. The respondent protested, but proposed to reassess the said income. The respondent protested but, notwithstanding the protest, the assessment under section 34 was made on July 30, 1957. The order of reassessment stated : "As per the amended provision of section 18A(5) the assessee was entitled to interest of a much smaller amount than what has been allowed to him during the original assessment. As excessive relief has been allowed to the assessee in the original assessment under section 23(3) and in order to enable me to recover the excess interest allowed action under section 34 was taken.... Hence I will proceed to recover the excess interest allowed to the assessee during the original assessment. " On the application of the respondent under article 226 of the Constitution this order was set aside by the High Court of Bombay. Hence this appeal.

Section 34 of the Act under which the impugned order was made so far as material for our purposes is in these terms :

"34. (1) If -

(b) the Income-tax Officer has.... reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for profits for any year, or have been under assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has

been computed, he may.... proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance."

The assessment, reassessment or computation under this section is to be made according to the provisions of the Act as if it was pursuant to a notice under section 22 of the Act.

Under this section, therefore, an assessment earlier made can be reopened if income, profits or gains have escaped assessment or have been under-assessed or assessed at too low a rate, or have been made the subject of excessive relief, or excessive loss or depreciation has been computed. It does not seem to us that any of these conditions can be said to have fulfilled in the present case. The notice under section 34 stated all these grounds but only two of them have been mentioned in the notice which has been earlier set out by us become counsel for the appellants has not relied on any other ground. With the other grounds we are not, therefore, concerned in this case. The two that have relied on are where income has been under assessed or has been made the subject of excessive relief. It may be noticed here that the order of July 30, 1957, was based only on the ground that excessive relief had been allowed. It did not hold that the income had been under-assessed.

It does not seem to us that it is a case where the respondents income was under-assessed or where excessive relief was granted in computing that income. It is a case where tax had been paid in advance and upon subsequent regular assessment for the period for while the tax had been paid it was found that what had been paid was in excess of what was actually due. This is really a case of over assessment though only provisional and not for under-assessment at all. The payment of interest was in so sense a relief granted in computing income; it was paid at the rate calculated according to the law then in force. No doubt in view of the subsequent amendment of the law and in view of this amended provision being given retrospective operation covering the date when the original assessment had been made, if the interest has to be computed according to the amendment law then a smaller sum might have been payable as interest. But when it was computed, the new law was not in fact there and, therefore, the computation had been according to the law then in force. That computation cannot be reopened under section 34 because it cannot be said that it is a case either of under-assessment or of excessive relief having been granted. It is really a case where the statutory liability of the State to pay interest was reduced from a higher figure to a lower one. There, quite clearly it was not a case within section 34.

We were referred to the form of the notice of demand for the tax. It was contended that the form showed that in computing the tax interest under section 18A had to be taken into account. Therefore, it was said interest was a part of the tax and when more interest had been paid to the assessee then was due, it had been given excessive relief. As was rightly pointed out by Mr. Kolah appearing for the respondent, this is a wrong reading of the form. The form specified the net amount of the tax payable and thereafter provided for deduction of certain interest to show the amount of the demand. Therefore the interest which had to be deducted in accordance with it in arriving at the demand is not a part of the tax. At least it is not so treated in the form. That is enough to dispose of this argument.

We were then referred to sub-section (8) and (11) of section 18A. Sub-section (8) provides for payment of certain interest by an assessee and sub-section (11) says that any sum other than a penalty or interest paid by an assessee under the provisions of section 18A shall be treated as a payment of tax. It was contended that the provisions of these two sub-section show that the interest with which we are concerned is a part of the tax, and therefore when more interest was allowed to an assessee than was due he was given excessive relief. This is obviously fallacious. These sub-section deal with interest payable by an assessee and we are concerned in this case with interest payable by the Government.

Lastly, our attention was drawn to civil Appeals Nos. 37-40 of 1962 (M. Chockalingam v. Commissioner of Income-tax) in which referring to the proviso to section 35 of the Income-tax Act this court observed :

The learned counsel for the department raised the forlorn argument that the addition of penal interest is not enhancement of assessment as stated in the proviso. We do not see what else it could be."

It was contended that this showed that the penal interest was part of the tax. We do not think so. In any event we are not concerned with a case of penal interest here. It cannot obviously be suggested that the interest payable by the Government to the assessee for amounts paid by the assessee as tax in advance is a tax paid by the assessee.

At the hearing learned counsel for the State sought leave to contend that the order of July 30, 1957, could be supported under section 35 of the Income tax Act. This leave was refused for such a point was not raised in the court below and the action by the revenue authorities had expressly been taken under section 34 of the Act.

This appeal must, therefore, be dismissed with costs and we order accordingly.

Appeal dismissed.