Bombay High Court
Commissioner Of Income-Tax, ... vs Daimler Benz A.G. on 9 March, 1977
Equivalent citations: 1977 108 ITR 961 Bom
Author: Tulzapurkar
Bench: V Tulzapurkar, Desai, Kania
JUDGMENT Tulzapurkar, Actg. C.J.

1. In this reference made under section 66(1) of the Indian Income-tax Act, 1922, two questions have been referred to this court by the Appellate Tribunal for determination, the second of which is clearly concluded by the decision of this court in Commissioner of Income-tax v. Tata Engineering & Locomotive Co. Ltd., [1977] 108 ITR 869 (Bom), while on the first question since there are apparently conflicting views expressed in two decisions of our court, the same has been referred to this larger Bench. The two questions referred to this court by the Tribunal run thus :

"(1) Whether, on the facts and in the circumstances of the case, an appeal to the Appellate Commissioner of Income-tax against the levy of penal interest was competent ?

(2) Whether, on the facts and in the circumstances of the case, the assessee was entitled to relief under section 15C of the Act of 1922 in respect of dividend received from Telco, on the basis that 27% of the dividend was exempt as declared in the dividend warrant, or on the basis that only 24% was exempt as ordered by the Income-tax Officer ?"

2. At the outset it may be stated that the second question mentioned above is concluded by the decision of this court rendered in Commissioner of Income-tax v. Tata Engineering & Locomotive Co., Ltd. [1977] 108 ITR 869 (Bom) and it may be stated that when the first question was referred to a larger Bench Mr. Joshi appearing for the revenue had fairly stated that the second question was concluded by the aforesaid decision and that when the reference will be argued before the larger Bench he will concede that the assessee was entitled to the relief under section 15C of the Indian Income-tax Act, 1922, in respect of dividend received from Telco on the basis that 27% of the dividend was exempt as declared in the dividend warrant. Mr. Joshi has accordingly stated before us that the second question may be answered in favour of the assessee. We accordingly answer the second question in favour of the assessee to the effect that relief under section 15C of the 1922 Act will be available to the assessee in respect of dividend received by it from Telco on the basis that 27% of the dividend was exempt as declared in the dividend warrant.

3. Turning to the first question, a few facts giving rise to the question may be stated. The question relates to the assessment year 1958-59, the relevant previous year being the year ended on 31st March, 1958. The assessee M/s. Daimler Benz A. G., West Germany is a non-resident company having two sources of income : (a) the share of profit and royalty receivable from Telco under an agreement dated October 3, 1955, and (b) dividend on shares of Telco held by it. In the assessment done under section 23(3) of the Act, the Income-tax Officer assessed the total income of the assessee at Rs. 15,11,303 which was comprised of net income from the business (Rs. 10,09,157) and dividend income (Rs. 5,02,146). After granting certain reliefs under section 15C(4) in respect of dividends (with which we are not concerned while dealing with the question under reference) the Income-tax

Officer charged penal interest under section 18A(8) (wrongly mentioned as section 18A(6)) and also directed that action under section 18A(9)(b) will be taken separately for the failure of the assessee to file under section 18A(3) an estimate of income and deposit taxes payable on the basis of such estimate. Against the order charging penal interest under section 18A(8) the assessee preferred an appeal to the Appellate Assistant Commissioner but the Appellate Assistant Commissioner refused to entertain the appeal on the ground that no appeal was provided in the Act against the levy of penal interest. The assessee carried the matter in further appeal to the Appellate Tribunal and the Tribunal relying upon the decision of this court in Mathuradas B. Mohta v. Commissioner of Income-tax [1965] 56 ITR 269 (Bom) took the view that the position taken up by the Appellate Assistant Commissioner was untenable. The Tribunal held that the ratio of that decision was that the amount of interest determined under section 18A(8) was a tax within the meaning of the Act, that the assessee would have a right to file an appeal to the Appellate Assistant Commissioner against an order under section 18A(8) by virtue of the clause "denying his liability to be assessed under this Act" occurring in section 30 and that though the decision related to interest charged under section 18A(8) the ration thereof was quite wide to cover a case under section 18A(6) (treating the Income-tax Officer's order as one under sub-section (6) of section 18(A). The Tribunal accordingly set aside the order of the Appellate Assistant Commissioner and directed him to dispose of the contention of the assessee on merits de novo. At the instance of the Commissioner of Income-tax the first question set out at the commencement of the judgment has been referred to this court for its opinion.

4. At the outset it may be stated that on the point as to whether an appeal lies to the Appellate Assistant Commissioner against an order charging penal interest under section 18A of the 1922 Act, two Division Benches of this court have taken apparently conflicting views. In the case of Keshardeo Shrinivas Morarka v. Commissioner of Income-tax [1963] 48 ITR 404 (Bom) the Income-tax Officer had served a demand notice on the assessee under section 29 for payment of tax under section 18A(1) on the basis of the last completed assessment for 1948-49; in reply to this notice the assessee informed the Income-tax Officer on 13th September, 1950, that during the tax year 1950-51, he had suffered a loss in his business and the notice of advance payment of tax, therefore, should be waived. After completing the regular assessment for 1951-52, the Income-tax Officer charged interest in accordance with the provisions of section 18A(6), in view of the fact that no payment had been made by the assessee against advance tax demanded. After the assessment had been made, the Income-tax Officer had also made a reassessment when he found that there was certain section 23A dividend also to be included in the assessee's income and at the time of the reassessment he also made a consequent alteration in the amount of the penal interest computed by him. There was thus in all a total interest of Rs. 7,923 demanded as penal interest from the assessee by the income-tax department. In the appeal which the assessee filed against his assessment, he also challenged the item of penal interest. The Appellate Assistant Commissioner did not entertain the appeal in so far as it related to the levy of penal interest of the ground that it was not appealable. The Appellate Assistant Commissioner's view as to the maintainability of the appeal was confirmed by the Tribunal, relying on the decision of this court in Commissioner of Income-tax v. Jadgish Prasad Ramnath [1955] 27 ITR 192 (Bom). Since section 30 of the 1922 Act relating to appeals from the orders of the Income-tax Officer did not specifically provide for an appeal against the levy of penal interest under section 18A(6) section 18A(8), it was contended on behalf of the assessee on a

reference to this court that penal interest levied under the said provision would be appealable because it formed part of the assessment and an assessee "denying his liability to be assessed under this Act" would be entitled to appeal under section 30(1) of the Act. That contention was negatived and the Division Bench took the view that no appeal lay to the Appellate Assistant Commissioner against the levy of penal interest correctly computed in accordance with the provisions of section 18A(6) of the Act. Following the earlier decision of this court in Jadgish Prasad Ramnath's case [1955] 27 ITR 192 (Bom) the Division Bench consisting of Tambe and V. S. Desai JJ. accepted the position that the distinction between a tax and penalty had been borne in mind by the legislature in laying down the provision of appeal in section 30, inasmuch as, wherever a right of appeal against an order imposing penalty was intended to be given, the same was specifically provided in the said section and, therefore, the absence of a specific provision giving a right of appeal against an order imposing penal interest under section 18A(6) or section 18A(8) in the scheme and context of the other provisions of section 30 would clearly indicate that no right of appeal was intended to be given against such order and such right of appeal was not capable of being incorporated in the provisions of section 30 by pointing out that the expression "liability to be assessed under this Act" used in the section was capable of including the liability to pay a penalty. On the other hand, in the subsequent case of Mathuradas B. Mohta v. Commissioner of Income-tax [1965] 56 ITR 269 (Bom) the facts briefly stated were these : For the assessment year 1947-48, the assessee was claiming that he should be assessed in that year in his status as an individual. Advance tax, however, was not paid by him in his capacity as an individual but as the department was insisting on taxing him in his status of a Hindu undivided family, advance tax had been paid by him in that capacity. The Income-tax Officer took the view that the assessee in his status as an individual was a distinct independent entity, that he was in that year claiming the status as an individual and, therefore, under sub-section (3) of section 18A of the Act, there was an obligation on him to submit an estimate of his income and pay an advance tax. He, not having done so, was liable to pay interest as provided in sub-section (8) of section 18A. The Income-tax Officer accordingly calculated the amount of interest at Rs. 24,214-11-0 and added it to the demand of the amount due from the assessee. The assessee had taken an appeal against the assessment order and one of the grounds taken was that the Income-tax Officer was in error in holding that in the circumstances of the case the penal interest was chargeable. It was argued on behalf of the assessee that the full payment of advance tax was made under section 18A as at that time the authorities had held that there was no partition and the department had been assessing the assessee as a Hindu undivided family. The Appellate Assistant Commissioner accepted his contention and held that the penal interest was not chargeable. In an appeal taken by the department before the Tribunal this finding of the Appellate Assistant Commissioner was challenged and the contention raised was that the Appellate Assistant Commissioner was incompetent to entertain an appeal on the question of charge of penal interest. The Tribunal upheld this contention of the department and held that the Appellate Assistant Commissioner was not justified in entertaining that contention and in this view of the matter the Tribunal set aside the Appellate Assistant Commissioner's order in that respect. At the instance of the assessee, the question whether, on the facts and in the circumstances of the case, an appeal to the Appellate Assistant Commissioner against the charge of penal interest was competent was referred to the High Court. The Division Bench consisting of Tambe and Abhyankar JJ. felt that the first question that arose was whether the levy of interest under section 18A amounted to levy of tax under the Act and, relying upon two Supreme Court decisions in C. A. Abraham v. Income-tax

Officer and Commissioner of Income-tax v. Bhikaji Dadabhai & Co. , took the view that the ratio that emerged from those two decisions was that whatever addition (by way of penalty) was made in the amount of tax by reason of the provisions of the Act which formed part of the machinery of assessment of tax liability, was a tax and that since under sub-section (8) of section 18A the amount of interest determined in accordance with the provision of sub-section (6) was liable to be "added to the tax as determined on the basis of the regular assessment", it was clear that the amount of interest determined under sub-section (8) of section 18A was an addition to the tax and this 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. That being the position, according to the Division Bench, the amount of penalty was tax within the meaning of the Act and the assessee had been disputing his liability to pay interest under section 18A; in other words, the assessee was denying his liability to be assessed to tax which is designated as interest under section 18A of the Act. In the opinion of the Division Bench, therefore, the assessee would have a right to file an appeal under the phrase "denying his liability to be assessed under this Act" occurring in section 30 of the Act. It appears clear that the earlier decision in Morarka's case [1963] 48 ITR 404 (Bom) was not brought to the notice of the Division Bench but the decision of this court in Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom) was brought to the notice of the Division Bench and it was pointed out that in that case Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom) the court had proceeded on the basis that there was a clear distinction between the tax and the penalty or penal interest and, therefore, an assessee who merely denied his liability to pay penalty or penal interest could not be said to deny his liability to be assessed under the Income-tax Act. But the Division Bench in connection with that decision [Mathuradas B. Mohta's case [1965] 56 ITR 269 (Bom)] has observed thus at page 292 :

"It is to be noticed that the decision in Abraham's case and Bhikaji Dadabhai's case were then not available. In view of the decision of their Lordships it can hardly be said that any material distinction between 'tax' and 'penalty' has remained. However, it is not necessary for us to go into the question further. All that has been held by this court is that the assessee is not entitled to a right of appeal merely against an order of the Income-tax Officer imposing penal interest under section 18A of the Income-tax Act for failure to pay advance tax. In the instant case the appeal has not been filed by the assessee merely against an order made by the Income-tax Officer under section 18A of the Act, but the appeal is filed against the order of assessment as a whole and one of the grounds therein is that the addition of interest is bad in law."

5. It will thus appear clear that in this later decision no reference has been made to the earlier decision in Morarka's case [1963] 48 ITR 404 (BOM) and the decision of this court in Jagdish Prasad Ramnath [1955] 27 ITR 192 (Bom) has been sidetracked for two reasons : (a) that the distinction between the tax and penalty made in Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom) may not hold good in view of the two decisions of the Supreme Court in Abraham's case and Bhikaji Dadabhai's case and (b) that Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom) was distinguishable on the footing that all that it had decided was that an appeal merely against an order imposing penal interest did not lie, whereas in the case before the Division Bench the appeal filed by the assessee was not merely against the levy of penal interest but was against the order of assessment as a whole and one of the grounds taken in appeal was that addition of interest was bad

in law. We may point out that in Morarka's case [1963] 48 ITR 404 (Bom) the appeal filed by the assessee was not merely against the levy of penal interest but was an appeal against the Income-tax Officer's regular assessment and in such appeal he had challenged the item of penal interest. Even so, the Division Bench in Morarka's case [1963] 48 ITR 404 (Bom) held that no appeal lay to the Appellate Assistant Commissioner against the levy of penal interest.

6. Apart from the question whether the distinction made is valid or not, the question, in our view, really turn upon the proper interpretation of the phrase "denying his liability to be assessed under this Act" occurring in section 30(1) of the Act and from that point of view the real ratio of this court's decision in the case of Jagdish Prasad Ramnath [1955] 27 ITR 192 (Bom) will have to properly understood. However, it is because of the aforesaid two apparently conflicting decisions that have been rendered by the Divisions Benches of this court on the point that the question under consideration has been referred to this larger Bench.

7. An analysis of the provisions of section 18A which was introduced in the 1922 Act by Act No. 11 of 1944 shows that the said section contains machinery for assessment of advance tax. Sub-section (1) deals with a case of an assessee, who is an old assessee and who is 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 subsequent year is likely to be less; sub-section (3) deals with the case of new assessee and in his case he is to make an estimate himself and if he does make an estimate then, he has got to pay advance tax in the matter laid down in that sub-section; sub-section (6) of section 18A of the Act provides that where an assessee has paid tax under sub-section(2) or sub-section (3) and the payment of advance tax is less than 80% of the final assessment in that particular year, he is liable to pay interest at the rate of 6 per cent. per annum. The third proviso to this sub-section is important and it runs thus :

"Provided also that, where, as a result of an appeal under section 31 or section 33 or of a revision under section 33A 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."

8. It is clear that this proviso lays down a machinery for automatic reduction of interest and 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 made the Income-tax Officer discovers that no advance tax has been paid at all, in which case also there is 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. It is also clear that interest "calculated in the manner laid down in sub-section (6)" will include the third proviso 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. In the instant case, the assessee did not pay any advance tax as, in its opinion, it was under no obligation to pay advance tax under section 18A inasmuch as, being a non-resident company, its income fell under

section 18 of the Act, that is to say, an income in respect of which tax payable was liable to be deducted at source by Telco at the time of payment. It, therefore, did not file any estimate of income under section 18A(3) nor deposit tax payable on the basis of such estimate. Since, however, no advance tax was paid, penal interest was charged to the assessee under section 18A(8) of the Act and the Income-tax Officer also directed that action under section 18A(9)(b) be taken separately for failure to comply with the provision of section 18A(3) of the Act. The question is whether the order imposing penal interest in appealable to the Appellate Assistant Commissioner and that will depend upon whether the case is covered by section 30. Section 30 contains provisions with regard to appeals to the Appellate Assistant Commissioner against certain orders of the Income-tax Officer. On a reading of that section it will appear clear that no appeal has been specifically provided against the order made either under section 18A(6) or under section 18A(8), but sub-section (1) of section 30, inter alia, provides that any assessee denying his liability to be assessed under this Act may appeal to the Appellate Assistant Commissioner against an order of the Income-tax Officer and the question is whether the assessee in the instant case falls within the phrase "denying his liability to be assessed under the Act" and that will depend upon the true or correct interpretation of that phrase.

9. Mr. Joshi, appearing for the revenue, contended that it was well settled that appeal is a creature of statute and unless a right of appeal is provided for under the concerned enactment, there would be no right of appeal available to a litigant. He pointed out that the entire concept of advance payment of tax as provided for by section 18A, which was introduced in the 1922 Act by Act 11 of 1944, deals with the process of early collection of tax, the basis being the principle of "pay as you earn", that is, paying tax by instalments in respect of income of the very year in which the tax is paid; in other words, under the scheme of section 18A no process of assessment is involved. In this behalf he referred us to certain observations of the Supreme Court in Purshottamdas Thakurdas's case [1963] 48 ITR (SC) 206 and the relevant observations which appear at page 211 of the report run thus :

"The section attempts to reconcile the principle of advance payment of tax with the scheme of the Act which is to tax the income of the previous year. The basis of the section is the principle of 'pay as you earn', that is, paying tax by instalments in respect of the income of the very year in which the tax is paid. Sub-section (1) provides for the payment of tax in respect of the income of 'the latest previous year' while under sub-section (11) the tax so paid is treated as having been paid in respect of the income of the year of payment and credit therefor is given to the assessee in the regular assessment made in the next financial year. The advance payment of tax is only provisional, and if after the regular assessment is made the tax paid in advance in advance is found to be in excess of the tax payable, the assessee would be entitled to a refund of such excess."

10. He further pointed out that the concept of advance payment of tax being merely a process of early collection of tax based on the principle of "pay as you earn" receives further support from the fact that even in regard to charge of penal interest there is a provision (third proviso to sub-section (6) of section 18A) which lays down a machinery for automatic reduction of penal interest payable and refund if higher interest has been paid and the automatic reduction depends upon the amount on which interest is liable to be paid being reduced in appeals or revision preferred against regular assessment. He also pointed out that the aspect that section 18A merely deals with the collection of advance tax becomes clear from the fact that the said section was introduced in Chapter IV of the

1922 Act, which deals with the topic like deduction of tax at souce, etc., and become crystal clear from the fact that in the 1961 Act provisions pertaining to advance payment of tax are included in Chapter XVII which deals with collection and recovery of tax. Relying upon this aspect he contended that neither when steps are initiated to enforce payment of advance tax nor when penal interest is charged either under section 18A(6) or section 18A(8) any process of assessment is involved and, therefore, an assessee who feels aggrieved by an order passed by an Income-tax Officer imposing penal interest on him either under section 18A(6) or section 18A(8) cannot be regarded as "an assessee denying his liability to be assessed under this Act", a phrase occurring in section 30(1) of the Act and as such no appeal against the order imposing penal interest either under section 18A(6) or section 18A(8) would lie to the Appellate Assistant Commissioner. In support of his contention strong reliance was placed by him upon two decisions of this court, viz., Commissioner of Income-tax v. Jagdish Prasad Ramnath [1955] 27 ITR 192 (Bom), Keshardeo shrinivas Morarka v. Commissioner of Income-tax [1963] 48 ITR 404 (Bom) and three decisions, one each of the Allahabad High Court, Andhra Pradesh High Court and Madras High Court, viz., Pt. Deo Sharma v. Commissioner of Income-tax [1953] 23 ITR 226 (All), Boddu Seetharamaswamy v. Commissioner of Income-tax [1955] 28 ITR 156 (AP) and South India Flour Mills Private Ltd. v. Central Board of Direct Taxes [1968] 70 ITR 863 (Mad), all of which were rendered under the 1922 Act. He contended that Mathuradas B. Mohta's case [1965] 56 ITR 269 (Bom) should be regarded as having been wrongly decided by this court especially when the decision was rendered without the earlier decision in Morarka's case [1963] 48 ITR 404 (Bom) being brought to the notice of the court.

11. Mr. Joshi also relied upon the position arising under the 1961 Act. He pointed out that before the enactment of the 1961 Act, in the Report of the Direct Taxes Administration Enquiry Committee (popularly known as "Tyagi Committee" Report), while considering the question of conferring rights of appeal a specific recommendation had been made by the Tyagi Committee (vide para. 4.26 at page 86 of the report) that rights of appeal should be provided against the orders passed by the Income-tax Officer under section 18A(6), 18A(7) and 18A(8) authorising levy of interest and sections 18A(9) and 18A(10) authorising levy of penalty in instances of late payment or non-payment of the correct amount of advance tax, but when the Income-tax Bill was referred to the Select Committee, the Select Committee's recommendation was that an order made under section 216 (equivalent to old section 18A(7)) should be made appealable and accordingly under section 246(m) of the 1961 Act an appeal was provided against an order charging interest in a case falling under section 216 (equivalent to old section 18A(7)) and the ultimate result has been that no appeal has been provided for in the 1961 Act against orders of penal interest passed under section 215 equivalent to old section 18A(6) and section 217 equivalent to old section 18A(8); in other words, according to Mr. Joshi, even while enacting the 1961 Act, notwithstanding the recommendation made by the Tyagi Committee, Parliament ultimately provided for an appeal only against an order falling under section 216 (equivalent to old section 18A(7)) and this, according to Mr. Joshi, suggests that order levying penal interest either under section 18A(6) or under section 18A(8) would not be appealable under section 30(1) of the 1922 Act. He relied upon two decisions-one of the Gujarat High Court and the other of the Gauhati High Court, viz., Commissioner of Income-tax v. Sharma Construction Co. [1975] 100 ITR 603 (Guj) and K.B. Stores v. Commissioner of Income-tax [1976] 103 ITR 505 (Gauhati), both rendered under the 1961 Act.

12. On the other hand, Mr. Dastur for the assessee contended that the phrase "assessee denying his liability to be assessed under this Act" occurring in section 30(1) of the Act should be interpreted by having regard to the definition of the expression "assessee" as given in section 2(2) of the Act and to section 23 of the Act. According to him under section 2(2) "assessee" means "a person by whom Income-tax or any other sum of money is payable under this Act" and under sub-section (1) of section 23 what the Income-tax Officer is called upon to do, after being satisfied that a return made under section 22 is complete, is that "he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return". Similarly, in a case falling under sub-section (3) of section 23 after hearing such evidence as may be produced and such other evidence as he may require on a specific point, the Income-tax Officer is expected by his order to "assess the total income of the assessee and determine the sum payable by him on the basis of such assessment"; and he contended that if in the light of these provisions the phrase "assessee denying his liability to be assessed under this Act" is interpreted, it would mean, (a) an assessee who denies his liability to be assessed to any sum under the Act (the word "sum" would include tax, penalty or interest) or at any rate (b) an assessee who denies his liability to be assessed to tax under the Act, which would include denial of liability to pay advance tax and, as a consequence, denial of liability to pay penal interest and, according to him, on either of these interpretations if an assessee were to deny his liability to be assessed to advance tax at all and as a consequence he denies his liability to pay penal interest, such an assessee would clearly fall within the expression "assessee denying his liability to be assessed under this Act" occurring in section 30(1) of the Act and he would have a right of appeal under section 30(1) to the Appellate Assistant Commissioner. He urged that if the ratio of this court's decision in Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom) was correctly appreciated, it would follow that what was decide by this court in that case was that a mere appeal against the quantum of penal interest charged (the same being automatic) either under section 18A(6) or section 18A(8) was not competent but that if the assessee were to deny his liability to be assessed to advance tax at all (which point must be regard as implicitly decided when the Income-tax Officer levies or charges penal interest) the assessee would have a right of appeal to the Appellate Assistant Commissioner under section 30(1) of the Act. He pointed out that the phrase "assessee denying his liability to be assessed under this Act" occurring in section 30(1) of the Act would cover cases where the denial of liability to be assessed may be entire or partial and five different types of cases could properly fall within the said phrase, namely :

(a) an assessee contending that he is not within the ambit of the Act at all; for instance, a non-resident,

(b) an assessee, though falling within the ambit of the Act, contending that his income sought to be assessed is not chargeable at all; for instance, agricultural income,

(c) an assessee having chargeable income but contending that the same falls to be assessed under one and not the other head; for instance, when he receives an income from the house property but contends that the same is not liable to be taxed under the head "Income from property" but is liable to be taxed under the head "business income" or vice versa,

(d) an assessee may accept a particular head of income but denies the source of that income; for instance, when he contends that he has income from business but contends that such income is from "A" business and not form "B" business, and

(e) an assessee contending that part of the income from a particular business is not assessable.

13. According to Mr. Dastur, all these are case which would fall within the phrase "assessee denying his liability to be assessed under this Act", the denial being either entire or partial, and according to him, in all these cases if the Income-tax Officer were to decide that the assessee was liable to advance payment of tax and if he were to levy further penal interest on him either under section 18A(6) or section 18A(8) the assessee would have a right of appeal under section 30(1) of the Act. In support of his contention strong reliance was placed by him upon the decision of this court in Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom) whose ratio, according to him, lays down the aforesaid proposition. He also relied upon the decision of the Supreme Court in Purshottamdas Thakurdas v. Commissioner of Income-tax [1963] 48 ITR (SC) 206, decision of this court in Mathuradas B. Mohta v. Commissioner of Income-tax [1965] 56 ITR 269 (Bom) and an unreported decision of the Karnataka High Court in National Products v. Commissioner of Income-tax - since reported in [1977] 108 ITR 935 (Kar) (I.T.R.C. No. 35 of 1974, decided on March 18, 1976) - a copy of which was made available to the court. As regards position arising under the 1961 Act, on which strong reliance was place by Mr. Joshi, he contended that the mere fact that the Tyagi Committee had recommended that appeals should be provided for against orders made by the Income-tax Officer under section 18A(6), 18A(7) and 18A(8) but that ultimately in the enactment on the recommendation of the Select Committee an appeal has come to be provided for under section 246(m) against an order made under section 216 (equivalent to old section 18A(7)) cannot carry the revenue's case any further. In the first place, he urged that in the instant case the court is not concerned with the position arising under the 1961 Act but with the position arising under the 1922 Act and the court is merely concerned with the proper interpretation of the phrase "assessee denying his liability to be assessed under this Act" occurring in section 30(1) of the 1922 Act. Secondly, he contended that the mere fact that an appeal had been specifically provided for in the new Act against an order made under section 216 (equivalent to old section 18A(7)) would not necessarily go to show that the legislature did not want to provide for any appeal against an order made under section 215 (equivalent to old section 18A(6)) or section 217 (equivalent to old section 18A(8)), for, instance have occurred where the legislature has expressly provided for an appeal even where under the well-settled position of law as evidenced by the decided cases an appeal lay to higher authorities and in that behalf he pointed out that though the Bombay High Court, in its, decisions in S. M. Modi v. Commissioner of Income-tax [1958] 33 ITR 529 (Bom), had settled the position that, where a person is sought to be deemed an assessee in default under section 18(7) on the ground that he did not deduct tax from the salary paid to a non-resident employee under section 18(3A), and is directed to pay Income-tax and super-tax in the case of that employee, that person is charged with tax under the Act and if he denies his liability to be charged with such tax, he is entitled to appeal under section 30(1) of the Act, even so a specific provision in the 1961 Act has been made in section 246(1) providing for an appeal against an order made under section 216 (equivalent to old section 18(7)). According to him further, the position under section 246 of the 1961 Act may not be different, for, under section 246(c), an appeal to the Appellate Assistant Commissioner is provided for in the case

of "an order against the assessee where the assessee denies his liability to be assessed under this Act" and it is possible that notwithstanding the specific provision of section 246(m) which provides for an appeal against the order made under section 216 (equivalent to old section 18A(7)), an appeal against an order charging penal interest either under section 215 (equivalent to old section 18A(6)) or section 217 (equivalent to old section 18A(8)) may lie to the Appellate Assistant Commissioner under section 246(c) where the assessee, for instance, would be denying his liability to pay advance tax at all; and in that behalf he strongly relied upon the Karnataka High Court's decision referred to earlier. He, therefore, urged that the position arising under the 1961 Act would be the same and the question referred should be answered on the proper interpretation of the phrase "assessee denying his liability to be assessed under this Act" occurring section 30(1) of the 1922 Act or in section 246(c) of the 1961 Act.

14. It cannot be disputed that, unless the concerned enactment provides for an appeal the litigant would have no right of appeal. Further, there is no doubt that in section 30 of the 1922 Act, which deals with the topic of appeals to the Appellate Assistant Commissioner against orders passed by the Income-tax Officer, no appeal has been specifically provided against an order passed by an Income-tax Officer under sub-section 18A(6) or section 18A(8) but it is obvious that the answer to the question referred to us must depend upon the true and proper construction of the phrase "any assessee denying his liability to be assessed under this Act" occurring in section 30(1), for, if an assessee can bring his case within the true meaning of that phrase, he would have a right of appeal. It is that that the expression "assessment" occurring in the Act bears a different meaning according to the context in which it is used and the question is, what meaning should be given to the expression "assessed" occurring in section 30(1) of the Act. The Privy Council have in the case of Commissioner of Income-tax v. Khemchand Ramdas [1938] 6 ITR 414 at page 416 (PC) pointed 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 amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the taxpayer and their Lordships have pointed out that the Indian Income-tax Act is no exception in this respect. Therefore, "assessment" may not only be computation of 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 taxpayer. Mr. Joshi contended that since the concept of advance payment of tax is nothing but a process of collection of tax based on the principle of "pay as you earn", there is no question of any process of assessment at all being involved when the Income-tax Officer resorts to section 18A as well as when he further resorts to section 18A(6) or section 18A(8) of the Act and, according to him, further, the expression "assessed" occurring in section 30(1) is referable to the whole procedure laid down in the Act for imposing liability upon the taxpayer. He, therefore, urged that against an order levying penal interest either under section 18A(6) or section 18A (8) no appeal would lie to the Appellate Assistant Commissioner, inasmuch as an assessee against whom such an order has been made cannot be regarded as an "assessee" who is "denying his liability to be assessed under this Act". On the other hand according to Mr. Dastur, every order passed by an Income-tax Officer levying penal interest either under section 18A(6) or under section 18A(8) involves two decisions of an Income-tax Officer, viz., (a) a decision that the assessee is liable to pay advance tax, and (b) a decision on the quantum of penal interest to be charged on the assessee in default, and it is the latter decision of the Income-tax Officer which is not appealable to

the Appellate Assistant Commissioner but so far as the former decision is concerned if the assessee is desirous of challenging the same on the ground that he is not liable to payment of advance tax at all, he would be an assessee falling within the phrase "assessee denying his liability to be assessed under this Act" and, as such, such decision would be appealable under section 30(1) of the Act. He pointed out that a number of cases are conceivable where the Income-tax Officer could be said to have arrived at the former decision wrongly and in those cases it would be highly unfair and inequitable to deny an assessee an opportunity to prefer an appeal against such wrong decision to the Appellate Assistant Commissioner and it was in the context of this submission that Mr. Dastur strongly relied upon the decision of this court in Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom). We find considerable force in this submission of Mr. Dastur.

15. It is true that the scheme of section 18A of the Act has for its basis the principle of "pay as you earn" and in a sense the section deals with the machinery which facilitates the process of early collection of tax but at the same time it cannot be disputed that when an Income-tax Officer resorts to section 18A(1), he implicitly decides that the assessee is one who is under legal liability to pay advance tax. In other words, he first decides that the assessee is in receipt of an income which is not covered by section 18 of the Act that is to say, an income in respect of which there is no provision for deduction of Income-tax at the time of payment. Similarly, he also decides that the assessee is a person who could not be said to be completely outside the ambit of the Act (that is to say, he is not a non-resident). Similarly, he also decides that the assessee is not in receipt of an income which is not chargeable at all (that is to say, his income is not agricultural). If, in respect of such decisions which are implicit in his action in resorting to section 18A(1) of the Act, the assessee feels that the Income-tax Officer has gone wrong, he would be an assessee desiring to "deny his liability to be assessed under this Act" and, therefore, it would be unfair to deny him the right of appeal to the Appellate Assistant Commissioner. It does appear to us that if after resorting to section 18A(1) the Income-tax Officer were to proceed against the assessee by way of charging penal interest on him either under section 18A(6) or under section 18A(8) for some default on his part and the assessee were minded to challenge merely the quantum of penal interest charged to him, he would have no right of appeal to the Appellate Assistant Commissioner, inasmuch as the assessee in that even would not fall within the phrase "assessee denying his liability to be assessed under this Act" occurring in section 30(1) of the Act. On a proper construction of the relevant phrase occurring in section 30(1) of the 1922 Act, therefore, we are clearly of the view that in the former type of cases an appeal would lie to the Appellate Assistant Commissioner whereas no appeal would lie merely against the quantum of penal interest charged by the Income-tax Officer to the assessee.

16. We may now refer to the decided cases on the point. The first and foremost decision which, in our view, makes the aforesaid position clear is the decision of this court in Commissioner of Income-tax v. Jagdish Prasad Ramnath [1955] 27 ITR 192 (Bom). In that case the assessee was a new assessee but did not make any estimate under sub-section (3) of section 18A nor did he deposit the amount of tax based on any estimate. Such failure on the part of the assessee was in relation to assessment years 1947-48 and 1948-49. At the time of making his regular assessment for the aforesaid two years the Income-tax Officer discovered such failure and, therefore, under section 18A(8) he levied interest on the assessee of Rs. 3,549-11-0 and Rs. 9,525-2-0 for the aforesaid two years, respectively, for non-payment of advance tax. The assessee went in appeal 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 appeals lay to him against the imposition of penal interest by the Income-tax Officer. In further appeal to the Tribunal preferred by the assessee two contentions were urged by the department before the Tribunal : (1) that no appeal would lie to the Tribunal as the order passed by the Appellate Assistant Commissioner was not an order under section 31 of the Income-tax Act, and (2) that no appeal lay to the Appellate Assistant Commissioner in respect of levy of a penalty under section 18A(8) of the Act. The Tribunal held that the Appellate Assistant Commissioner's order holding that no appeal lay to him against the imposition of penal interest by the Income-tax Officer was an order passed under section 31 and, therefore, an appeal lay to the Tribunal, and as regards the second contention the Tribunal 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). On a reference to the High Court on the aforesaid two contentions which formed the subject-matter of two questions that were referred, the High Court upheld the Tribunal's view on the first contention; in other words, on the material question the High Court took the view that there was no right of appeal "merely against the order imposing a penal interest" to the Appellate Assistant Commissioner. In our view, there are two passage in the judgment of Chief Justice Chagla in this case which are material and form which the ratio of the case clearly emerges. At pages 198-199 of the report the following passage occurs :

"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 the third proviso to section 18, 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." Again at pages 200 and 201 the following passage occurs :

"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 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 be 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."

17. Two propositions which clearly emerge from the passages quoted above are that an assessee can prefer an appeal to the Appellate Assistant Commissioner against his regular assessment and urge all 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 or even in appeal preferred against an order charging penal interest it would be open to him to raise a contention 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 under section 18A or he could contend that the income calculated by the Income-tax Officer as income of the assessee for the relevant year was not the proper income and that there was no income at all or the income was less than calculated. In other words, where liability to be assessed to advance tax is challenged or to some extent is disputed or denied, an appeal to the Appellate Assistant Commissioner would lie, for, such contention, if it succeeds, must result in reduction of penal interest, but an assessee has no right of appeal merely against the quantum of penal interest charged. In other words, an assessee will have no right of appeal if the contention is that penal interest charged is excessive or should be

reduced or should be waived. The view which we are taking on the proper construction of the phrase "assessee denying his liability to be assessed under this Act" occurring in section 30(1) of the Act receives full support from the aforesaid ratio in Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom).

18. As regards Morarka's case [1963] 48 ITR 404 (Bom) we have already discussed the decision in the case in the earlier part of our judgment and we have pointed out that following the earlier decision in Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom) the Division Bench has merely held that no appeal lies to the Appellate Assistant Commissioner against the levy of penal interest correctly computed in accordance with the provisions of section 18A(6) of the Act. In other words, the emphasis was on the point that to the extent to which the quantum of penal interest charged was made the subject-matter of appeal, an appeal to the Appellate Assistant Commissioner was not maintainable. This becomes amply clear from the frame of the question itself that was referred to the High Court. The material question referred ran thus :

"Whether any appeal lies to the Appellate Assistant Commissioner against levy of penal interest correctly computed in accordance with the provisions of section 18A(6) ?" The question shows that liability to pay advance tax was impliedly accepted. In other words, the question whether an assessee who denied his liability to be assessed to advance tax at all would have a right to appeal to the Appellate Assistant Commissioner or not did not arise for consideration before the Division Bench. As regards Mathuradas B. Mohta's case [1965] 56 ITR 269 (Bom), it is true that the Division Bench has equated charging of penal interest under section 18A(8) with imposition of tax liability and has, therefore, taken the view that when an assessee would be disputing his liability to pay penal interest, he would fall within the phrase "assessee denying his liability to be assessed under this Act" and, therefore, would have a right of appeal under section 30 of the Act. But it may be stated that the assessee had paid advance tax in his capacity as the karta of the Hindu undivided family and was denying his liability to pay advance tax in his status as an individual and when the Income-tax Officer charged penal interest under section 18A(8) to him for having failed to submit an estimate of his income and pay advance tax in his status as an individual, he preferred an appeal to the Appellate Assistant Commissioner. It would thus be clear that the assessee had really raised the basic issue that he was not liable to be assessed to advance tax at all in his status as an individual. This becomes amply clear if paragraphs 16 and 17 of the statement of case set out in the report are carefully scrutinised. It could thus be said that since this basic issue had been raised by the assessee in the appeal which he preferred to the Appellate Assistant Commissioner his appeal to the Appellate Assistant Commissioner was competent, since he was an assessee falling within the phrase "denying his liability to be assessed under this Act" under section 30 of the Act. If these two decisions are regarded from this angle, the apparent conflict between them, in our view, will disappear.

19. The Allahabad High Court's decisions in Pt. Deo Sharma v. Commissioner of Income-tax [1953] 23 ITR 226 (All) did not really decide the point at issue before us. In this case the assessee, having paid in advance under section 18A less than eighty per cent. of the tax determined on the basis of the regular assessment, was charged simple interest at 6 per cent. under section 18A(6). His appeals to the Appellate Assistant Commissioner and the Tribunal were dismissed on merits, his contention

being that the low estimate had been filed by him bona fide and not mala fide and hence penal interest was not chargeable. On a reference to the High Court under section 66(1) a preliminary objection was taken to the maintainability of the reference on the ground that the Tribunal's order could not be regarded as an order under section 33. The court held that had the Appellate Assistant Commissioner or Tribunal, in wrongful assumption of jurisdiction, varied the Income-tax Officer's order, it might have been possible to ask for a reference on the question whether they had jurisdiction to do so but, since they had dismissed the appeals, the Income-tax Officer's order remained and as there was no appeal provided for against that order, the Tribunal's order could not be treated as an order under section 33 and the reference was, therefore, not competent.

20. In Boddu Seetharamaswamy v. Commissioner of Income-tax [1955] 28 ITR 156 (AP) the Andhra Pradesh High Court, following the Allahabad High Court's decision in Pt. Deo Sharma v. Commissioner of Income-tax [1953] 23 ITR 226 (All) held that section 30 did not provide for an appeal to the Appellate Assistant Commissioner against the order imposing penal interest under section 18A(6). Similarly, the Madras High Court in South India Flour Mills Pvt. Ltd. v. Central Board of Direct Taxes [1968] 70 ITR 863 (Mad) also held, following the decision of the Andhra Pradesh High Court in Boddu Seetharamaswamy v. Commissioner of Income-tax [1955] 28 ITR 156 (AP) that section 30, which provides for appeals against specific orders, makes no mention of section 18A(6) and, therefore, a revision to the Commissioner against an order under section 18A(6) would lie but no appeal would lie to the Appellate Assistant Commissioner. Both the High Courts have proceeded on the basis that imposition of penal interest under section 18A(6) was no part of the process of assessment of income under section 23 of the Act. With great respect, the aspect that while resorting to section 18A the Income-tax Officer impliedly decides the question that the assessee is under a liability to be assessed to advance tax and the further aspect that if the assessee feels aggrieved by such decision and desires to prefer an appeal he would be "an assessee denying is liability to be assessed under this Act" seem to have been over-looked by both the courts. These aspect have been clearly brought out in Jagdish Prasad Ramnath's case [1955] 27 ITR 192 (Bom).

21. The Supreme Court decision in Purshottamdas Thakurdas's case [1963] 48 ITR (SC) 206 did not decide the point with which we are concerned; it is merely an illustration of a case where an assessee who has a certain type of income cannot be subjected to the liability of being assessed to advance tax at all. It has been held in this case that section 18(5) read with section 16(2) and section 49B provides for "deduction of Income-tax at the time of payment" in respect of dividend income within the meaning of section 18A(1) and, therefore, section 18A(1) does not apply to dividend income and, therefore, interest under section 18A(6) cannot be charged if a resident assessee fails to include in his estimate under section 18A(2) his dividend income and the tax paid by him in advance is less than eighty per cent. of the tax determined on the basis of the regular assessment.

22. Though we are concerned with the provisions of the 1961 Act, since decisions rendered under the said provisions were cited and discussed at length at the Bar, we would deal with the position arising under the 1961 Act. It is true that in section 246(m) of the Act under clause, an appeal has been provide against an order under section 216 (equivalent to old section 18A(7)) and no appeal has been specifically provided against an order either under section 215 (equivalent to old section 18A(6)) or under section 217 (equivalent to old section 18A(8)) but, in our view, the position under

this Act would be the same inasmuch as section 246(c) provides for an appeal in a case where "the assessee denies his liability to be assessed under this Act" and this phrase would bear the same meaning or construction as it bore under section 30(1) of the 1922 Act. Two decisions, one of the Gujarat High Court and the other of the Gauhati High Court, were relied upon by Mr. Joshi which have taken one view while Mr. Dastur relied upon the decision of the Karnataka High Court which has taken the contrary view and we are inclined to agree with the view of the Karnataka High Court.

23. In Commissioner of Income-tax v. Sharma Construction Co. [1975] 100 ITR 603 (Guj) the Gujarat High Court has taken the view that section 246 of the 1961 Act provides for appeal against different orders enumerated therein and since there is no mention of an order charging interest under section 139 or charging penal interest under section 217, no appeal would lie against an order made either under section 139 or section 217. It is also further held that the phrase "where the assessee denies his liability to be assessed under this Act" in section 246(c) means the assessee who denies his liability to be charged to tax under the 1961 Act and that the word "tax" means income-tax or, in some context, income-tax and super-tax, but not penal interest and hence under section 246(c) no appeal would lie against the order charging penal interest. Similarly, in the case of K. B. Stores v. Commissioner of Income-tax [1976] 103 ITR 505 (Gauhati) the Gauhati High Court has taken the same view. It was held that interest charged under section 139 is not tax under the 1961 Act, that it is only an adjunct to the tax assessed and that, therefore no appeal lies to the Appellate Assistant Commissioner from an order of the Income-tax Officer under section 139(8) charging interest for delay in filing of the return as section 246(c) does not provide for such an appeal. Here again, with great respect, we may point that the aspect that while resorting to section 208 to 213 (group of section which deal with the payment of advance tax under the 1961 Act) the Income-tax Officer impliedly decides the question that the assessee is under a liability to be assessed to advance tax and the further aspect that if the assessee feels aggrieved by such decision and desires to prefer an appeal, he would be an assessee who "denies his liability to be assessed under this Act" seem to have been overlooked by both the courts.

24. We may now refer to the decision of the Karnataka High Court in the case of National Products v. Commissioner of Income-tax [1977] 108 ITR 935 (Kar) (ITRC No. 35 of 1974) decided on March 18, 1976. Mr. Dastur for the assessee strongly relied upon this decision, inasmuch as, after considering the provisions of the 1922 Act as well as as corresponding provisions of the 1961 Act, the Karnataka High Court has ultimately taken the view that where penal interest was levied under section 215 of the 1961 Act and the assessee was desirous of denying 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, an appeal under section 246(c) (which provides for an appeal "where the assessee denies his liability to be assessed under this Act") would lie to the Appellate Assistant Commissioner. The facts in that case were these : The assessee was a registered firm. Its previous year relevant to the assessment year 1970-71 ended on March 31, 1970. Its income-tax return was due on September 30, 1970, but the same was filed on February 25, 1971. The assessment was completed by an order of assessment dated 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 of the 1961 Act and a further sum of Rs. 848

was charged as penal interest under section 215(1) of the said Act. Against the assessment the assessee preferred an appeal to the Appellate Assistant Commissioner objecting to 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 and as regards the objection to the levy of interest, he held that the appeal was incompetent because section 246 of the Act did not provide for such an appeal. In the result, the assessment was confirmed and the appeal was dismissed. The assessee carried the matter in further appeal to the Appellate Tribunal contending that 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. Since the question formulated by the Tribunal and referred to the High Court was not happily worded, with the consent of counsel appearing on both the sides, the High Court recast the question thus : "Whether, on the facts and circumstances of the case, the Appellate Assistant Commissioner was right in declining to consider the objection of the assessee to the levy of 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 ?" On behalf of the assessee reliance was placed upon section 246(C) of the Act which provides for an appeal to the Appellate Assistant Commissioner against an order of the Income-tax Officer "where the assessee denies his liability to be assessed under this Act" (a phrase equivalent to the one obtaining in section 30(1) of the 1922 Act) and it was contended that the appeal preferred by the assessee to the Appellate Assistant Commissioner in that case was competent. In other words, the question raised before the court was what should be the proper or correct interpretation of the phrase "where the assessee denies his liability to be assessed under this Act". The court noted the position that under the 1922 Act the charge of penal interest under section 18A(6) or under section 18A(8) was automatic till March 31, 1952, but that with effect from April 1, 1952, the imposition of penal interest was not wholly automatic but discretion was allowed to the Income-tax Officer either to reduce or waive the interest payable by the assessee; it also noted the position that under the 1961 Act, since inception section 215(4) allows discretion to the Income-tax Officer to reduce or waive penal interest payable by an assessee and that with regard to charge of interest under section 139 of the 1961 Act the proviso to sub-section (8) of section 139 allows discretion to the Income-tax Officer to reduce or waive interest chargeable for failure to file return within the time allowed by law. After considering the aforesaid position that discretion had been conferred upon the Income-tax Officer in the matter of charging interest or penal interest and after considering the various decisions of several High Courts both under the 1922 Act and the 1961 Act (some of which have been referred to by us earlier) the Karnataka High Court has gone on to observe as under - See [1977] 108 ITR 935, 946 (Kar) :

"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, 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 presupposes 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 Officer should have waived or reduced the interest; that objection does not amount to denial of liability to be assessed."

25. The Karnataka High Court has further pointed out that 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 and that 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.

26. Having regard to the aforesaid discussion of the decided cases it appears to us clear that the correct position would be that the assessee will have no right of appeal to the Appellate Assistant Commissioner merely against the quantum of penal interest charged, that is to say, merely for the purpose of raising a contention that interest charged is excessive or should be reduced or should have been waived altogether but an appeal would lie to the Appellate Assistant Commissioner if he were to deny altogether his liability to pay such interest on the ground that he is not liable to pay advance tax at all or that the amount of advance tax determined as payable by the Income-tax Officer is not correct. In the instant case before us there is no doubt that the assessee had preferred an appeal to the Appellate Assistant Commissioner in which the principal ground of attack against the charge of penal interest levied against it was that the assessee-company being a non-resident company was not liable to be assessed to advance tax at all inasmuch as its income was under one or the other head falling under section 18 of the Act and was outside the purview of section 18A of the Act. In other words, it was a clear case of an assessee "denying its liability to be assessed under this Act" and as such the appeal to the Appellate Assistant Commissioner was competent under section 30(1) of the 1922 Act. The Tribunal's view was, therefore, correct.

27. Having regard to the above discussion, the first question referred to us is answered in the affirmative and in favour of the assessee. Revenue will pay the costs of the reference to the assessee.