

**Assistant Commissioner of Vs. Raja Ram Santosh Kumar**

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**Court :** Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Oct-30-1990

**Reported in :** (1991)36ITD87(Delhi)

**Judge :** M Aggarwal, J Kathuria

**Appellant :** Assistant Commissioner of

**Respondent :** Raja Ram Santosh Kumar

**Judgement :**

1. These four appeals by the Revenue for assessment year 1985- 86 pertain to the firm and three partners and as identical issues are involved, these are disposed of by a consolidated order, for the sake of convenience.
2. This appeal relates to the firm M/s. Raja Ram Santosh Kumar. The first ground is that the Commissioner of Income-tax (Appeals) was not correct in admitting the appeal against the charging of interest under Sections 139(8) and 215/217 of the Income-tax Act, 1961.
3. The learned Departmental Representative vehemently argued that the learned Commissioner of Income-tax (Appeals) had not considered the case of Allahabad High Court (which was the Jurisdictional High Court) in CIT v. Geeta Ram Kali Ram [1980] 121 ITR 708 (FB). It was also pointed out that the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. CIT [1986] 160 ITR 961/27 Taxman 275 had neither considered nor overruled the Allahabad High Court decision cited

supra. It was, therefore, strongly contended that the learned CIT (Appeals) had exceeded his jurisdiction in admitting appeal with regard to the charging of interest under the aforesaid sections.

4. Shri C.S. Aggarwal, the learned counsel for the assessee, on the other hand, submitted that the assessee denied its liability to be assessed to interest and, as such, the appeal was competent before the learned CIT (Appeals) with regard to the charging of interest. He relied on the decision of the Supreme Court in the case of Central Provinces Manganese Ore Co. Ltd. (supra).

5. We have carefully considered the rival submissions as also the facts on record. If the matter is concluded by the judgment of the Jurisdictional High Court which is not modified or over ruled expressly or impliedly by the Hon'ble Supreme Court, we are duty-bound to bow before the Hon'ble Allahabad High Court. In the case of Geeta Ram Kali Ram (supra) the observations of the Allahabad High Court are as under: - In our opinion, the denial Clause applies to a situation where the denial is as to the applicability of the Act as such. For instance, in the case of a non-resident the Act is not applicable to him.

Similarly, agricultural income is not assessable under the Income-tax Act at all. On these points, the denial is that the Act is not applicable. In the Supreme Court's case of CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225, the denial was that in its capacity as an association of persons the assessee was not liable to be assessed at all. Similarly, a person may say that the income belong to his HUF and he is not liable to be assessed in his individual capacity.

These are the instances of denial in particular circumstances.

The ground of objection that the condition mentioned in Section 217 or Section 139 does not exist and so these provisions are not attracted, does not relate to denial of assessment-liability. Such denial is partial not to the income assessed, but to the charge of interest. Then, the ITO does not assess any liability to tax. He finds a default and charges interest. Such a decision is not covered by the denial clause. We are, with respect, unable to agree with this view taken by the Gujarat and Karnataka High Courts Bhikhoobhai N. Shah v. CIT [1978] 114 ITR 197 (Guj.)

and National Products v. CIT [1911] 108 ITR 935 (Kar.) From the above it will be seen that the Allahabad High Court had taken a view which was contrary to the view expressed by the Gujarat and Karnataka High Courts in Bhikhoobhai N. Shah v. CIT [1978] 114 ITR 197 and National Products v. CIT [1977] 108 ITR 935. It is true that the Hon'ble Supreme Court in the case of Central Provinces Manganese Ore Co.

Ltd. (supra) has not specifically considered the Allahabad High Court decision in Geeta Ram Kali Ram's case (supra) but the Supreme Court at page 967 of the report has referred to the aforesaid cases of Gujarat High Court and Karnataka High Court with approval. In the words of the Supreme Court "but we have no hesitation in endorsing the legal position which has commonly found favour with the two High Courts". The Supreme Court has held that inasmuch as the levy of interest is a part of the process of assessment it is open to an assessee to dispute the levy in appeal provided he limits himself to the ground that he is not liable to the levy at all. In view of this decision and considering the fact that the Gujarat and Karnataka High Court decisions referred to above have been cited with approval by the Supreme Court it can be safely presumed that the decision of the Allahabad High Courts in Geeta Ram Kali Ram's case (supra), though not specifically considered by the Supreme Court should be deemed to have been considered and overruled. We accordingly reject the ground of the Revenue with regard to the admissibility or otherwise of the appeal against the charging of interest under Sections 139(8) and 215/217.

6. The next submission of the learned Departmental Representative was that charging of interest under the aforesaid sections was mandatory and was not dependent upon the existence or otherwise of a reasonable cause. It was also submitted by the learned Departmental Representative that in fact there was no reasonable cause at all because the assessee had made a request for sale of gold and silver jewellery for payment of Advance-tax, which request was neither legal nor valid. The learned Departmental Representative also relied on the Tribunal's decision in ITO v. N. Saikrishna [1987] 22 ITD 548 (Hyd.). It was also submitted that the reference to the case of Addl. CIT v. Sohan Lal Dugar [1984] 18 Taxman 501 (Raj.) in the impugned order of the Commissioner of Income-tax (Appeals) did

not help the assessee in the instant case as that case was of penalty under Section 271(1)(a) and not of interest under the aforesaid sections. It was also submitted that as the interest under the aforesaid sections was mandatorily chargeable, the assessee could either move the Departmental authorities for waiver/reduction under Rules 40 and 117A of the Income-tax Rules, 1962 or approach the Commissioner of Income-tax under Section 264 of the Act, but that the forum chosen by it was wrong inasmuch as the Tribunal had no authority to pronounce on the waiver or reduction. In this regard reliance was placed on the Supreme Court decision in Central Provinces Manganese Ore Co. Ltd.'s case (supra) in which it was held that the question whether a case is made out for waiver or reduction of the interest levied under Sub-section (8) of Section 139 or under Section 215 cannot be the subject of an appeal under Clause (c) of Section 246 of the Income-tax Act. He forcefully argued that the order of the Commissioner of Income-tax (Appeals) may be reversed and that of Income-tax Officer restored.

7. Shri Aggarwal strongly relied on the order of the learned Commissioner of Income-tax (Appeals) and submitted that on the facts of the case there was no mala fide intention of the assessee and the assessee's request for sale of jewellery and silver articles seized by the Department was a just and fair request which if accepted and taken to the logical conclusion would have saved the assessee from the interest under the aforesaid sections particularly when its business had been paralysed as a result of the search by the Income-tax authorities and the liquidity position of cash had been seriously impaired. He also relied on the decision of Rajasthan High Court in Golecha Properties (P.) Ltd. v. CIT [1988] 171 ITR 47/36 Taxman 227.

8. We have carefully considered the rival submissions and noted the arguments advanced by both the sides. Before proceeding with the matter it would be proper to note a few relevant facts. The assessee's accounting year for assessment year 1985-86 ended on 31-3-1985. The last date of instalment of advance-tax for assessment year 1985-86 was 15-3-1985. The assessee firm filed an estimate of advance tax on 14-3-1985 on income of Rs. 4,00,000 with tax payable at Rs. 84,286.

Along with this estimate, the assessee submitted an application to the assessing officer that the tax payable on the last instalment, i.e., 15-3-1985 may be realised out of sale of seized jewellery and silver as the assessee was not left with any liquid cash after the search. No steps appear to have been taken by the assessing officer with regard to this request and at the time of regular assessment interest under Sections 139(8) and 215/217 was charged.

9. As the assessee did not pay the last instalment of advance-tax interest under Section 215/217 became chargeable. As the return of income was filed on 23-3-1987 as against the due date of 31-7-1985 interest under Section 139(8) also became chargeable. Interest under the aforesaid sections was in fact charged by the assessing officer. It has been held by the Supreme Court in the case of Central Provinces Manganese Ore Co. Ltd.' (supra) that interest charged for the aforesaid defaults is levied by way of compensation and not by way of penalty. As the defaults have actually been committed by the assessee, interest under the aforesaid sections had to be charged in accordance with the provisions of law.

10. The learned counsel for the assessee has not pointed out any provision of law under which the Income-tax Officer had to act upon the assessee's letter requesting for the sale of seized silver and gold articles for the realisation of tax. The provisions with regard to the search and seizure operations under the Income-tax Law are extraordinary provisions brought on the statute book with a view to combating the menace of un-accounted money. The Income-tax authorities have to deal with the seized assets as per the law and not as per the request of the assessee. Section 132(5) of the Income-tax Act requires that the assessing officer has to estimate the undisclosed income of an assessee in a summary manner to the best of his judgment on the basis of such materials as are available with him. Thereafter he has to calculate the amount of tax on the income so estimated. He has also to determine the amount of interest payable and the amount of penalty imposable under the Income-tax Law. The amount of tax, interest and penalty so calculated has to be added to the existing liability. He may retain in his custody such assets or part thereof as are in his opinion sufficient to satisfy the aggregate of the amount referred to above and immediately release the remaining portion, if any, of the assets to the person from whose custody they were seized.

11. From the above it is clear that within 120 days of the seizure when a summary order under Section 132(5) is passed, the assessing officer has not only to take into consideration the existing liability but also the liability to be calculated as per Clauses (i) and (ii) of Sub-section (5) of Section 132. The assessing officer may retain the entire assets to satisfy the demand contemplated under Clauses (i) and (ii) of Section 132(5). If the assets seized are still in excess of the amount so calculated, these may be adjusted against the existing liability.

12. On 14-3-1985 when the assessee made a request to the Income-tax Officer for sale of silver and jewellery for realisation the advance tax payable on 15-3-1985 the stage of passing the order under Section 132(5) had not been reached. The last date for passing such an order was 5-6-1985 or thereabout as the search had taken place on 5-2-1985.

Though a copy of the order passed under Section 132(5) has not been placed on record, it was admitted before us that the order under Section 132(5) had not been passed till 15-3-1985.

13. It may also be mentioned that the gold jewellery and silver ornaments seized by the Department were of the value of Rs. 1,81,691 plus Rs. 51,000 aggregating to Rs. 2,32,691. Interest under Sections 139(8) and 215/217 actually charged in the case of the firm and the three partners whose cases are before us today was as under: - From the above it will be seen that on the basis of the assets seized the interest actually imposed under the aforesaid sections in the hands of the assessee firm and the three partners was of the order of Rs. 1,44,845. Besides, penalties chargeable under various provisions of the Income-tax law had also to be calculated. Since the assessee firm had declared the entire amount of seized assets in its return of income, tax was to be calculated on such basis in the hands of the firm as well as the partners. That would have also amounted to a substantial amount.

If all these figures are taken into consideration then the value of seized gold jewellery and silver ornaments amounting to Rs. 2,32,691 was not sufficient enough to cover the above amounts let alone the demand which was payable by the firm and the partners as a result of filing of estimates of advance-tax on 14-3-

1985. In this view of the matter, it could be said that even if the Income-tax Officer had acted upon the request of the assessee for the sale of gold jewellery and the silver ornaments, nothing would have been available for payment of the final instalment of advance-tax as requested by the assessee.

14. There is another angle to this matter as well. The asset seized was not cash which could be straightaway adjusted against the demand of advance-tax. The asset was in the form of gold jewellery and silver ornaments. There is a provision under Section 132B of the Act for application of retained assets which provides that the Income-tax Officer may recover the amount of liabilities by sale of such assets and such sale shall be effected in the manner laid down in the Third Schedule. The assets in the instant case were only lying in the custody of the Income-tax Officer. Even if it is assumed though not admitted that after the request of the assessee, these assets could be attached, for the purpose of sale the matter had to be referred to the Tax Recovery Officer, who had to issue a proclamation in this regard as per the provisions of law. The sale had to be by public auction and the sale had to be effected after a certain period of time had elapsed after the proclamation. All this procedure would have taken a long time and it is not conceivable that such an exercise would have been concluded by 31-3-1985. The assessee made a request for the sale of the seized assets on 14-3-1985. The payment of advance tax was to be made by 15-3-1985. At the most any ad hoc payment made before 31-3-1985 may be considered as having been made towards advance-tax, but as stated above since the assessee's request would not have been put into any meaningful or practical shape before 31-3-1985, there was no question of adjusting the demand before that date. In that view of the matter any payment made beyond 31-3-1985 could not have assumed the character of advance-tax payment and, as such, interest under Section 215/217 would have become payable.

15. The sum and substance of the entire discussion is that there may be a good and sufficient ground for reduction or waiver of interest under Rules 40 and 117 A of the Income-tax Rules, 1962 or under Section 264 of the Income-tax Act, but there certainly was no scope for getting any redressal of the grievance in appellate proceedings. The learned counsel for the assessee has relied on the Rajasthan

High Court decision in Golecha Properties (P.) Ltd. (supra) in which it is held that there is neither principle nor authority to support the conclusion that the appellate authority cannot entertain the assessee's request for waiver or reduction of interest and exercise that power given in these statutory provisions. This conclusion, however, is contrary to the decision of the Supreme Court in Central Provinces Manganese Ore Co. Ltd.'s case (supra) in which it has been held that the question whether a case is made out of waiver or reduction of the interest levied under Section 139(8) or under Section 215 cannot be the subject matter of an appeal under Section 246(c) of the Income-tax Act. It is also significant to note that the aforesaid decision of the Supreme Court was not brought to the notice of Their Lordships of the Rajasthan High Court in the case of Golecha Properties (P.) Ltd. (supra).

16. Having regard to the entire facts and circumstances of the case, we hold that interest under Sections 139(8) and 215/217 had been correctly charged as the return of income had admittedly been filed late and last instalment of advance-tax had not been paid. As regards the waiver/reduction of interest, we have no jurisdiction to pronounce on that and the assessee may be at liberty to approach the appropriate authorities for reduction/waiver of interest as per law. We will not express ourselves further on the matter.

18. These three appeals are of the partners. It is common ground that the facts of these cases are identical to those of the firm's case discussed above. For the reasons mentioned in the firm's case, we hold that interest under Sections 139(8) and 215/ 217 has been correctly charged in the hands of the partners and if the assessee's want to seek any reduction or waiver of such interest then they have come to a wrong forum. They will, however, be at liberty to approach the appropriate authorities for reduction/waiver of interest as per law.

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