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CENTRAL PROVINCES MANGANESE ORE CO. LTD.

v.

COMMISSIONER OF INCOME TAX

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JULY 15, 1986.

[R.S. PATHAK AND SABYASACHI MUKHARJI, JJ.]

Income-tax Act, 1961—Ss. 139(8), 215, 246 & 264/rr. 117A(v) and 40(1) & (5) of Income-tax Rules, 1962: Order levying interest—Whether appealable—Revision petition during pendency of appeal—Whether maintainable.

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Where an assessee failed to furnish the income-tax return within the prescribed period or did not furnish it at all, sub-s. (8) of s. 139 of the Income-tax Act, 1961 as it stood at the relevant time, provided for levy of interest on him. The second proviso to that sub-section empowered the Income-tax Officer to reduce or waive the interest payable. Where the advance tax paid by the assessee under s. 212 on the basis of his own estimate was less than seventy-five per cent of the tax determined on the basis of regular assessment, sub-s. (1) of s. 215, as it then stood, provided for levy of interest, while sub-s. (4) thereof provided for reduction or waiver of interest payable by the assessee, under certain circumstances. Clause (c) of s. 246 provides an appeal against an order where the assessee denies his liability to be assessed under the Act or against any assessment order under sub-s. (3) of s. 143 or s. 144, where the assessee objects to the amount of income assessed or to the amount of tax determined or to the amount of loss computed or to the status under which he is assessed. Clause (b) of sub-s. (4) of s. 264 specifically directs that the Commissioner shall not revise any order under s. 264 where that order is pending on an appeal before the Appellate Assistant Commissioner.

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Interest was levied against the appellant-assessee under sub-s. (8) of s. 139 for delay in furnishing its return, and under s. 215 for making payment of advance tax under s. 212 at a figure less than 75 per cent of the assessed tax. It preferred an appeal under cl. (c) of s. 246 before the Appellate Assistant Commissioner raising objection to the total income assessed and also including grounds objecting to the interest charged under ss. 139 and 215. On being advised that orders under ss. 139 and

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215 were not appealable, it filed two revision petitions before the Commissioner under s. 264 objecting to the levy of interest under s. 139(8) and s. 215 respectively. On being informed that by reason of cl. (b) of sub-s. (4) of s. 264 the Commissioner was powerless to interfere so long as the appeal was not withdrawn, the appellant made an application to the Appellate Assistant Commissioner requesting permission to withdraw the grounds relating to levy of interest. Subsequently the Commissioner dismissed both revision petitions on the view that it was not sufficient for the appellant to withdraw only those grounds raised in the appeal which related to the levy of interest, and that the appellant should have withdrawn the entire appeal.

Writ petitions filed by the appellant in the High Court assailing the orders of the Commissioner were rejected *in limine.*

On the question: Whether orders levying interest under sub-s. (8) of s. 139 and under s. 215 are appealable under s. 246 of the Act.

Dismissing the appeals by special leave, the Court,

HELD: 1.1 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. [147A-B]

1.2 The levy of interest under sub-s. (8) of s. 139 and under s. 215 is not in the nature of a penalty. It is levied by way of compensation because by reason of the omission or default the Revenue is deprived of the benefit of the tax for the period during which it has remained unpaid. Although s. 143 and s. 144 do not specifically provide for the levy of interest and the levy is in fact attributable to sub-s. (8) of s. 139 or s. 215, it is nevertheless a part of the process of assessing the tax liability of the assessee. [146D-G]

2.1 The question whether a case is made out for waiver or reduction of the interest levied under sub-s. (8) of s. 139 or under s. 215 cannot be the subject of an appeal under cl. (c) of s. 246 of the Income-tax Act. That is a matter which can more appropriately be dealt with by the Commissioner of Income-tax in the exercise of his revisional jurisdiction. But before the revisional jurisdiction of the Commissioner can be invoked, it is necessary for the assessee to demonstrate before the Income-tax Officer that there is a case for waiving or reducing the levy of interest. [148F-H]

A **2.2 Since the statute provides for the waiver or reduction of interest it is open to the Income-tax Officer before imposing a levy under sub-s. (8) of s. 139 and to the Inspecting Assistant Commissioner before doing so under s. 215 to issue notice to the assessee and hear him in the matter. If such an opportunity has not been made available to the**
B **assessee before the order levying interest is made it will be open to the assessee to apply to the Income-tax Officer after such order has been made to show that a reduction or waiver of interest is justified. [148H; 149A-C]**

In the instant case, the assessee having made no application to the Income-tax Officer for reduction or waiver of interest under sub-s. (8)
C **of s. 139 or under s. 215 no question arises of the relevant authority having denied improperly a reduction or waiver of the interest and that being so, no revision petition can be maintained in that regard by the assessee before the Commissioner of Income-tax. [149D-E]**

D *National Products* **v.** *Commissioner of Income-tax, Mysore,* **[1977] 108 I.T.R 935,** *Bhikhoobhai N. Shah* **v.** *Commissioner of Income-tax, Gujarat-V,* **[1978] 114 I.T.R 197 referred to.**

Premchand Sitanath Roy **v.** *Addl. Commissioner of Income-tax. West Bengal-III,* **[1977] 109 I.T.R 751 distinguished.**

E CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 1338 & 1340 of 1974

From the Judgment and Order dated 24.4.1972 of the High Court of Judicature at Bombay in S.C.A. No. 433 of 1972.

F V. Rajgopal, Vinod Bonde, A.K. Verma and P. Rajagopal for the Appellant.

Dr. V. Gauri Shankar and Ms A. Subhashini for the Respondents.

G The Judgment of the Court was delivered by

PATHAK, J. These appeals by special leave are directed against the judgments and orders of the Bombay High Court at its Nagpur Bench dismissing two writ petitions filed by the appellant.

H The appellant is a sterling company which exports manganese

extracted from its manganese mines situated in the States of Maharashtra and Madhya Pradesh. It held these manganese mines up to June 30, 1962. On June 8, 1962 it entered into an agreement with the Government of India under which all the manganese mines except one were transferred to a new company, the Manganese Ore (India) Limited, Nagpur in which the Central Government, the Governments of Maharashtra and Madhya Pradesh and the appellant had shares.

The appellant was assessed to income-tax for the assessment year 1967-68, the relevant previous year being the year ended December 31, 1966. Interest under sub-sec. (8) of sec. 139 of the Income-tax Act, 1961 amounting to Rs.56, 391 and interest under sec. 215 of that Act amounting to Rs.9,42,336, subsequently reduced to Rs.5,07,880 were levied against the appellant. According to the appellant there was ample and clear justification for the delay in furnishing the return under sec. 139 and for the payment of advance tax under Sec. 212 at a figure less than 75 per cent of the assessed tax. On March 22, 1971 the appellant preferred an appeal under cl. (c) of s. 246 of the Act before the Appellate Assistant Commissioner of Income–tax, Nagpur raising objection to the total income assessed and also including grounds objecting to the interest charged under ss. 139 and 215 of the Act. On being advised thereafter that the grounds objecting to the charge of interest were infructuous inasmuch as orders under ss. 139 and 215 of the Act were not appealable, the appellant filed two revision petitions before the Commissioner of Income–tax under s. 264 of the Act, one objecting to the levy of interest under sub-s. (8) of s. 139 and the other to the interest levied under s. 215. In the two revision petitions the appellant explained the circumstances accounting for the delay in filing the return and in underestimating the advance tax. It was mentioned in the revision petitions that an appeal had been filed before the Appellate Assistant Commissioner, and that notwithstanding its pendency the revisional jurisdiction of the Commissioner of Income–tax was being invoked. The Commissioner informed the appellant that by reason of clause (b) of sub–section (4) of s. 264 of the Act, which specifically directs that the Commissioner shall not revise any order under s. 264 where that order is pending on an appeal before the Appellate Assistant Commissioner, he was powerless to interfere so long as the appeal was not withdrawn. Thereafter, a few days later, the appellant made an application to the Appellant Assistant Commissioner in the appeal filed by it referring to the revision petitions preferred before the Commissioner of Income-tax on the question of interest levied under s. 139 and s. 215 of the Act and requesting permission to

withdraw the grounds relating to the levy of interest specially as those grounds could not be taken in the appeal and the orders levying interest were not appealable. It does not appear that any order was made specifically by the Appellate Assistant Commissioner on that application, but it is apparent from the appellate order passed by him disposing of the appeal that he did not consider the grounds relating to the levy of interest. On October 15, 1971 the Commissioner of Income-tax dismissed both revision petitions. He proceeded on the view that it was not sufficient for the appellant to withdraw only those grounds raised in the appeal which related to the levy of interest, and that the appellant should have withdrawn the entire appeal pending before the Appellate Assistant Commissioner. The acceptance of Commissioner's view would have meant that in order to maintain its revision petitions challenging the levy of interest the appellant would have been obliged to abandon also the challenge to the assessment of its income. The appellant filed writ petitions in the Bombay High Court at its Nagpur Bench assailing the orders of the Commissioner of Income-tax rejecting its revision petitions, and on April 24, 1972 the High Court rejected the Writ Petitions *in limine*.

At the relevant time the pertinent portion of sub-s. (8) of s. 139 provided:

> "Where the return under sub-section (1) or sub-section (2) or sub-section (4) for an assessment year is furnished after the 30th day of September of the assessment year, or is not furnished, then (whether or not the Income-tax Officer has extended the date for furnishing the return under sub-section (1) or sub-section (2), the assessee shall be liable to pay simple interest at nine per cent per annum, reckoned from the 1st day of October of the assessment year to the date of the furnishing of the return or, where no return has been furnished, the date of completion of the assessment under section 144, on the amount of the tax payable on the total income as determined on regular assessment, as reduced by the advance tax, if any, paid and any tax deducted at source:
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> Provided that in the case of any person whose total income includes any income from business or profession, the previous year in respect of which expired after the 31st day of December of the year immediately preceding the asessment year, such interest shall be reckoned from the 1st day of January instead of 1st day of October of the assessment year:

Provided further that the Income-tax Officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any person under this sub-section."

It is clear that under the substantive portion of sub-s. (8) of s. 139 the statute requires the levy of interest on the assessee where he fails to furnish an income-tax return within the prescribed period or does not furnish it at all. The second proviso to sub-s. (8) empowers the Income-tax Officer to reduce or waive the interest payable by any person under the sub-section in such cases and under such circumstances as may be prescribed. Rule 117A of the Income-tax Rules 1962 sets forth the cases and the circumstances in which the Income Tax Officer may reduce or waive the interest payable under s. 139. Among the clauses of rule 117A is clause (v) which speaks of:

"(v) any case in which the assessee produces evidence to the satisfaction of the Income-tax Officer that he was prevented by sufficient cause from furnishing the return within time."

As has been mentioned earlier, interest was also levied under s. 215 on the assessee. The relevant sub-sections of section 215 are:

"215(1) Where in any financial year an assessee has paid advance tax under section 212 on the basis of his own estimate, and the advance tax so paid is less than seventy five per cent of the tax determined on the basis of the regular assessment (reduced by the amount of tax deductible in accordance with the provisions of sections 192 to 194, section 194A and section 195) so far as such tax relates to income subject to advance tax and so far as it is not due to variations in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made, simple interest at the rate of nine per cent per annum from the 1st day of April next following the said financial year up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the advance tax so paid falls short of the said seventy-five per cent.

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(4) In such cases and under such circumstances as may be prescribed, the Income-tax Officer may reduce or waive the interest payable by the assessee under this section."

A The related rule is 40 which details the cases and the circumstances in which the interest payable under s. 215 may be reduced or waived by the Income-tax Officer. Sub-rules (1) and (5) of rule 40 of the Income-tax Rules refer to:

B "(1) When the relevant assessment is completed more than one year after the submission of the return, the delay in assessment not being attributable to the assessee.

(5) Any case in which the Inspecting Assistant Commissioner considers that the circumstances are such that a C reduction or waiver of the interest payable under section 215 or section 217 is justified."

At the very outset, it is necessary to consider the nature of the levy of interest under sub-s. (8) of s. 139 and under s. 215. It is not D correct to refer to the levy of such interest as a penalty. The expression 'penal interest' has acquired usage, but is in fact an inaccurate description of the levy. Having regard to the reason for the levy and the circumstances in which it is imposed it is clear that interest is levied by way of compensation and not by way of penalty. The Income-tax Act makes a clear distinction between the levy of a penalty and other levies E under that statute. Interest is levied under sub-s. (8) of s. 139 and under s. 215 because by reason of the omission or default mentioned in the relevant provision the Revenue is deprived of the benefit of the tax for the period during which it has remained unpaid. The very period for which interest is levied under the relevent provision points to the nature of the levy. If that is borne in mind, it will be apparent that the F levy of interest is part of the process of assessment. Although s. 143 and s. 144 do not specifically provide for the levy of interest and the levy is in fact attributable to sub-s. (8) of s. 139 or s. 215, it is nevertheless a part of the process of assessing the tax liability of the assessee. Where the Income-tax Officer considers that there is a case for levying interest under sub-s. (8) of s. 139 or under s. 215, what he does in G practice, is to make an order levying such interest after completing the assessment of the assessee's total income and the tax payable by him.

Now the question is whether orders levying interest under sub-s. (8) of s. 139 and under s. 215 are appealable under s. 246 of the Income-tax Act. Cl. (c) of s. 246 provides an appeal against an order H where the assessee denies his liability to be assessed under the Act or

against any assessment order under sub-s. (3) of s. 143 or s. 144, where the assessee objects to the amount of income assessed or to the amount of tax determined or to the amount of loss computed or to the status under which he is assessed. 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 this connection we may usefully refer to the decision of the Karnataka High Court where in a judgment in *National Products* v. *Commissioner of Income-tax, Mysore*, [1977] 108 ITR 935. Govind Bhat, C.J., explained the position in regard to the levy of interest under s. 139 and under s. 215. After referring to the earlier cases on the point he observed:

> "All decided cases except one have uniformly taken the view that levy of interets under section 18A(6) or section 18A(8) of the 1922 Act or levy of interest under section 215 of the Act is not appealable but in the appeal against a regular assessment, it is open to the assessee to take 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 pay penal interest. In other words, it is open to an assessee to contend in the appeal against an order of assessment that he is not liable to pay any advance tax at all or the amount of advance tax determined as payable by the Income-tax Officer is not correct; but if the assesee does not dispute the amount of advance tax determined as payable by the Income-tax Officer, he merely cannot object to the levy of penal interest or question its quantum. xx xxx xxx
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> xx The levy of penal interest under section 139 or section 215 is made in the regular assessment order; the demand issued pursuant to the assessment order is for the total amount of liability imposed inclusive of tax and interest. While levy of penal interest under section 18A of the 1922 Act up to 1st April 1952, was automatic as was noticed by Chagla, C.J. in *Ramnath*'s case [1955] 27 ITR 192 (Bom.), under the Act such levy is not automatic; discretion is vested in the Income-tax Officer to waive or reduce penal interest in the cases and circumstances mentioned in rule 117A and rule 40 of the Income-tax Rules, 1962. If the case of the assessee falls within the scope of the

A said Rules, the Income-tax Officer is bound in law to consider whether the assessee was entitled to waiver or reduction of interest. It is, therefore, clear that levy of penal interest under sections 139 and 215 is part of assessment. When such penal interest is levied the assessee is "assessed", meaning thereby, he is subjected to the procedure for B ascertaining and imposing liability on him. If the assessee denies his liability to be assessed under the Act, he has a right of appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied under section 215 by the order or assessment, the assessee may altogther deny his liability to pay such interest C 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 D 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."

E The decision was noted with approval by the Gujarat High Court in *Bhikhoobhai N. Shah* v. *Comissioner of Income-tax, Gujarat-V*, [1978] 114 ITR 197. The only dissent expressed in the matter by the Gujarat High Court arose on the question whether the assessee could challenge in appeal his partial liability to be assessed to interest. In this area of dissent we need not enter. But we have no hesitation in endorsing the legal position which has commonly found favour with the two F High Courts. We hold that the question whether a case is made out for waiver or reduction of the interest levied under sub-s. (8) of s. 139 or under s. 215 cannot be the subject of an appeal under clause (c) of s. 246 of the Income-tax Act. That is a matter which can more appropriately be dealt with by the Commissioner of Income-tax in the exercise of his revisional jurisdiction.

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But before the revisional jurisdiction of the Commissioner of Income-tax can be invoked in such a case, it is obviously necessary for the assessee to demonstrate before the Income-tax Officer that there is a case for waiving or reducing the levy of interest. We do not find from H the record before us that any such attempt was made by the assessee. Since the statute provides for the waiver or reduction of interest it is

open to the Income-tax Officer *before* imposing a levy under sub-s. (8) of s. 139 and to the Inspecting Assistant Commissioner *before* doing so under s. 215 to issue notice to the assessee and hear him in the matter. In cases where the jurisdictional fact attracting the levy cannot be disputed, for example that the return has been furnished under s. 139 with delay, it will be a question merely of satisfying the relevant authority that there are circumstances calling for a reduction or waiver of the interest. If an opportunity to do so has not been made available to the assessee before the order levying interest is made, it will be open to the assessee to apply to the Income-tax Officer *after* such order has been made to show that a reduction or waiver of interest is justified. We have been referred to the judgment by one of us (Sabyasachi Mukharji, J.) in *Premchand Sitanath Roy* v. *Addl. Commissioner of Income-tax, West Bengal-III*, [1977] 109 ITR 751. In that case the question was a very different one. The question was whether a right of appeal was available in regard to the improper exercise of discretion under sub-s. (8) of s. 139. We think that in holding that no right of appeal lay in such a case the High Court was plainly right.

As the assessee has made no application to the Income-tax Officer for reduction or waiver of the interest under sub-s. (8) of s. 139 or under s. 215 no question arises of the relevant authority having denied improperly a reduction or waiver of the interest and that being so, no revision petition can be maintained in that regard by the assessee before the Commissioner of Income-tax.

In the result we affirm the orders of the Commissioner of Income-tax rejecting the revision petitions but on grounds different from those adopted by the Commissioner. We leave it open to the assessee to apply to the Income-tax Officer for waiver or reduction of interest under sub-s. (8) of s. 139 and under s. 215 of the Income Tax Act. If the assessee does so within six weeks from today, the Income-tax Officer will dispose of the applications on the merits expeditiously. Subject to the aforesaid observations the appeals are dismissed. In the circumstances there is no order as to costs.

P.S.S. Appeals dismissed.