



rejected the appellant's claim to interest. Hence this appeal. A

Allowing the appeal, this Court

**HELD : 1.1.** Section 172(7) of the Income tax Act, 1961 gives the assessee non-resident shippers a valuable right to opt for a regular assessment although a "rough and ready" or a "summary assessment" has already been made under Section 172(4) of the Act. If the assessee exercises this right, the "ad hoc" assessment made under Section 172(4) of the Act is superseded and a "regular assessment" is made as per the provisions of the Act. In such a case all "the provisions" of the Act in the determination of the tax liability including the ancillary or incidental or consequential matters pertaining to it are necessarily attracted. [562-C, E-F] B C

1.2. Section 172(7) creates a legal fiction by which the payments have been treated as advance tax. That is the purpose for which the legal fiction is created. In construing the said legal fiction, it will be proper and necessary to assume all those facts on which alone the fiction can operate. [562-G-H] D

*Mohamed Iqbal Madar Sheikh & Ors. v. State of Maharashtra*, [1996] 1 SCC 722, relied on.

2. On effecting the regular assessment, if there is any excess payment made by the assessee, then the assessee would be entitled to the excess amount paid and also interest, for payment made in excess of the tax assessed. The High Court erred in drawing a distinction between "advance tax" and "payment in advance of the tax" mentioned in Section 172(7) of the Act. The distinction so drawn has no basis. In holding that the payment made under Section 172(4) of the Act is not a payment of advance tax within the meaning of the Act, the High Court failed to give due effect to the language employed in Section 172(7) of the Act and the scope of the legal fiction enshrined therein. Section 172(7) of the Act provides for a regular assessment, wherein all the provisions of the Act will apply. It is not a mere provision for adjustment. The High Court was swayed by the title used in the corresponding provision of the predecessor Act (Income Tax Act, 1922 - Section 44C), wherein there was a heading to the Section - "Adjustment". Section 172 of the Act contains no such heading. The Income Tax Appellate Tribunal was justified in holding that since the payment made under Section 172(4) of the Act is, by fiction, treated as advance tax, all the provisions in respect of the advance tax will apply and if on regular assessment made E F G H

A under Section 172(7) of the Act, there is any excess payment made by the assessee, then the assessee would be entitled to it and also interest thereon under Section 214 of the Act. [563-E-H, 564-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8-13 (NT) of 1984.

B From the Judgment and Order dated 24.3.81 of the Kerala High Court in I.T.R. Nos. 162-167 of 1977.

C G.B. Pai Mrs. A.K. Verma for Ms. Lakshmi Iyengar for the Appellant.

Ranvir Chandra, B.K. Prasad, Rajiv Sharma and Radhakrishnan for the Respondents.

The Judgment of the Court was delivered by

D **PARIPOORNAN, J.** This batch of appeals is preferred against the common judgment delivered by the High Court of Kerala in ITR Nos. 162-167 of 1977 dated 24th March, 1981. The judgment is reported in 130 ITR 301.

E 2. The appellants - assesseees, are non-resident shippers represented by one common agent. The ships carry goods from the Port of Cochin to various places. The ships concerned are, Fernbrook, Fernwave, Fernmoor, Ferngate and Ferndale. Fernbrook called at the Cochin Port during the previous years relating to the assessment years 1967-68, and 1969-70; Ferndale called at the Cochin Port during the year relating to the assessment year 1967-68 and the other ships, Fernwave, Fernmoor and Ferngate called at the Cochin Port during the year relating to the assessment year 1969-70. In respect of the freight earnings, assessments were made on the shippers under Section 172(4) of the Income tax Act, hereinafter referred to as 'the Act'. The said provision enables the Income Tax Officer to make  
F "adhoc" assessment, on the tram-ships. The assesseees paid tax so assessed  
G under Section 172(4) of the Act. Thereafter the assesseees exercised the right conferred on them under Section 172(7) of the Act and claimed "regular assessments" to be made. Returns were filed. It turned out that the total income assessed in all the cases were far less than the one earlier  
H assessed under Section 172(4) of the Act and on which taxes were paid by

the assessees. Reckoning this, the Income Tax Officer held that the asses- A  
 sees are entitled to refunds of the excess amount paid by them. Such  
 amounts were refunded. The assessees claimed that they are entitled  
 to interest for the excess amounts paid by them, which were refunded. Such  
 claims were rejected by the Income-tax Officer. The said rejection was  
 upheld in the appeals by the Appellate Assistant Commissioner. The claim B  
 for interests were rejected on the ground that the payment made in  
 pursuance to assessments under Section 172(4) of the Act cannot be said  
 to be "advanced income tax". In the further appeals filed by the assessees,  
 the Income Tax Appellate Tribunal, Cochin Bench, after review of the  
 relevant provisions of the Act, held that under Section 172(7) of the Act, C  
 the payments made (earlier in the Assessments under Section 172(4) of the  
 Act) would be on par with "advance tax" payments. It was further held that  
 since these payments have, by fiction, been treated as advance tax, it  
 necessarily follows that all the provisions in respect of the payment of  
 advance tax in the Act will apply. From the point of regular assessment,  
 i.e. if there is any excess payment made by the assessee, then the assessee D  
 would be entitled to the interest under Section 214 of the Act. The  
 Appellate Tribunal directed the Income Tax Officer to allow the interest  
 claimed by the assessees.

3. As directed by the High Court, the Income Tax Appellate Tribunal E  
 referred the following question of law in all the cases for the decision of  
 the High Court :

"Whether the amount directed under Section 172 clause (7) of  
 the Income-tax Act, to be treated as a payment in advance of the  
 tax leviable for the assessment year in question, would carry F  
 interest as the amount of advance tax would under Section 214 of  
 the same is payable under Section 207 to 213 of the Act."

The High Court of Kerala, by a common judgment, delivered in all  
 the References took the view that the tax paid under Section 172(4) of the G  
 Act is a payment on assessment and not a payment of advance tax under  
 the Act. It was held that Section 172(7) of the Act permits only "an  
 adjustment" of the payment made under the Section as "payment in ad-  
 vance of the tax leviable for the assessment year" and not a payment of  
 advance tax made under the Act. The question referred to the High Court H

A was answered in the negative, in favour of the Revenue and against the assesseees. It is thereafter, the assesseees moved this Court in S.L.P. (Civil) Nos. 8792-97/1981 and obtained special leave to appeal against the aforesaid judgment of the High Court of Kerala.

B 4. We heard counsel. For the purposes of resolving the controversy in this case, it will be useful to read Section 172 of the Act :

C "S.172. *Shipping business of non-residents.* - (1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, live-stock, mail or goods shipped at a port in India.

(2) .....

D (3) Before the departure from any port in India of any such ship, the master of the ship shall prepare and furnish to the Assessing Officer a return of the full amount paid or payable to the owner or charterer or any person on his behalf, on account of the carriage of all passengers, live-stock, mail or goods shipped at that port since the last arrival of the ship thereat :

E *Provided* that where the Assessing Officer is satisfied that it is not possible for the master of the ship to furnish the return required by this sub-section before the departure of the ship from the port and provided the master of the ship has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the Assessing Officer may, if the return is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the master as sufficient compliance with this sub-section.

F (4) On receipt of the returned, the Assessing Officer *shall assess the income referred to in sub-section (2) and determine the sum payable as tax thereon at the rate or rates in force applicable to the total income of a company which has not made the arrangements referred to in section 194 and such sum shall be payable by*

H

the master of the ship.

A

(5) For the purpose of determining the tax payable under sub-section (4), the Assessing Officer *may call for such accounts or documents as he may require.*

(6) .....

B

(7) Nothing in the section shall be deemed to *prevent the owner or charterer of a ship from claiming before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment be made of his total income of the previous year and the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and if he so claims, any payment made under this section in respect of the passengers, live-stock, mail or goods shipped at Indian port during that previous year shall be treated as payment in advance of the tax leviable for that assessment year, and the difference between the sum so paid and the amount of tax found payable by him on such assessment shall be paid by him or refunded to him, as the cases may be.*

C

D

(Emphasis supplied)

E

Section 172 occurs in Chapter XV of the Act - Liability in Special Cases - and the heading of the Section is "Profits of non-residents from occasional shipping business".

5. At this juncture, it will be useful to bear in mind that Section 2(1) of the Act defines "advance tax". It is as follows :-

F

"S. 2. Definitions. - In this Act, unless the context otherwise requires, --

(1) "advance tax" means the advance tax payable in accordance with the provisions of Chapter XVII-C;"

G

*The above sub-section was inserted in the Act by Direct Tax Laws (Amendment) Act, 1987 with effect from 1.4.1989. We are concerned in this case relating to the periods before the said Amendment Act.*

H

A 6. The scheme of Section 172 of the Act appears to be this : Section  
172(1) of the Act gives a right to the Income Tax Office to *levy and recover*  
tax in the case of any ship belonging to a non-resident, in a *summary*  
*manager(ad hoc* assessment) notwithstanding anything contained in the  
other provisions of the Act. It is an absolute right conferred on the  
B assessing authority. The assessee has no right to object to the same.  
Normally, this will be assessment of the assessee for the year. But, under  
Section 172(7) of the Act a right is given to the assessee to claim before  
the expiry of the assessment year relevant to the previous year in which the  
date of departure of the ship from the Indian port falls, that *an assessment,*  
*according to the provisions of the Act, in a regular manner be made.* Thus,  
C a right is given to the assessee to opt for a regular assessment although a  
"rough and ready" or a "summary assessment" has already been made under  
Section 172(4) of the Act. It is a valuable right. If the assessee exercises  
the right conferred on him under Section 172(7) of the Act, the Income  
Tax Officer *is bound to make an assessment of the total income of the*  
D *previous year of the assessee and the tax payable on the basis thereof "should*  
*be determined in accordance with the other provisions of the Act"* and any  
payment made under the Section (earlier) *"shall be treated as a payment in*  
*advance of the tax" leviable for that assessment year* and the difference  
between the sum so paid and the amount of tax found payable him on such  
assessment, shall be paid to the assessee or refunded to him. The "ad hoc"  
E assessment made under Section 172(4) of the Act is superseded and a  
"regular assessment" is made as per the provisions of the Act. In such a  
case, it is only proper and appropriate to hold that all "the provisions" of  
the Act in the determination of the tax liability including the ancillary or  
incidental or consequential matters pertaining to it are necessarily at-  
F tracted.

7. Section 172(7) of the Act provides that payment made under the  
Section shall be treated as a payment in advance of the tax leviable for that  
assessment year. It only means that such payment would be treated as  
advance of the tax leviable. Such payments are treated on par with advance  
G income tax payments. It is implicit from the tenor and phraseology  
employed in Section 172(7) of the Act to the effect, "payment made under  
the Section ..... *shall be treated as a payment in advance of the tax leviable*  
*for that assessment year,* that in substance, a legal fiction is *created by which*  
*the payments have been treated as advance tax,* That is the purpose for which  
H the legal fiction is created. In construing the said legal fiction, it will be

proper and necessary to assume all those facts on which alone the fiction can operate. The law on the point has been stated in innumerable decisions of this Court. In *Mohamed Iqbal Madar Sheikh and Others v. State of Maharashtra*, [1996] 1 S.C.C: 722 at 727 a three member Bench of this Court stated that law thus :

"..... The effect of a legal fiction by a deeming clause is well known. Legislature can introduce a statutory fiction and courts have to proceed on the assumption that such state of affairs exists on the relevant date, because when one is bidden to treat an imaginary state of affairs *as real he has to also imagine as real the consequences which shall flow from it unless prohibited by some other statutory provision.*"

(Emphasis supplied)

So, necessarily all the provisions in the Act in respect of the payment of advance tax will apply. On effecting the regular assessment, if there is any excess payment made by the assessee, then the assessee would be entitled to the excess amount paid and also interest, for payments made in excess of the tax assessed. We are unable to appreciate the distinction drawn by the High Court between "advance tax" and "payment in advance of the tax" mentioned in sub-section 172(7) of the Act. We hold that the distinction so drawn has no basis. The High Court has further held that the payment made under Section 172(4) of the Act is not a payment of advance tax within the meaning of the Act, as the tax paid under Section 172(4) of the Act is a payment on assessment and not a payment of advance tax under the Act. We are afraid that the High Court has failed to give due effect to the language employed in Section 172(7) of the Act and the scope of the legal fiction enshrined therein. The reasoning of the High Court is rather strained as the distinction drawn is without any substance or difference. Section 172(7) of the Act provides for a regular assessment, wherein all the provisions of the Act will apply. It is not a mere provision for adjustment. The High Court was swayed by the title used in the corresponding provision of the predecessor Act (Income-tax Act, 1922 - Section 44C), wherein there was a heading to the Section - "Adjustment". Section 172 of the Act contains no such heading. We hold that the Income-tax Appellate Tribunal was justified in holding that since the payment made under Section 172(4) of the Act is, by fiction, treated as advance tax; all the

- A provisions in respect of the advance tax will apply and if on regular assessment made under Section 172(7) of the Act, there is any excess payment made by the assessee, then the assessee would be entitled to it and also interest thereon under Section 214 of the Act. We answer the question referred to the High Court in the affirmative, in favour of the assesseees and against the Revenue. The judgment of the High Court is reversed and this batch of appeals allowed with costs, including Advocates' fees quantified as Rs. 5,000 payable in each appeal.
- B

V.S.S.

Appeal allowed.