* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No. 143/2001**

Reserved on: 17th July, 2014

% **Date of Decision: 25th August, 2014**

COMMISSIONER OF INCOME TAX – III ....Appellant

Through Mr. Kamal Sawhney, Sr. Standing Counsel with Mr. Sanjay Kumar, advocate.

Versus

M/S R.R. HOLDINGS PVT. LTD. …Respondent

Through None.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.

This appeal by the Revenue under Section 260A of the Income Tax, 1961 (Act, for short) pertains to assessment year 1988-89 and emanates from order dated 22nd February, 2001 passed by the Income Tax Appellate Tribunal (Tribunal, for short) on an appeal filed by the respondent-assessee (hereinafter, referred to as assessee).

2. By order dated 18th September, 2002, while admitting the present appeal, the following substantial question of law was framed:-

> "Whether the Income-tax Appellate Tribunal was correct in deleting the interest of Rs.45,92,475/- levied by the Assessing Officer under section 217(1A) of the Income-tax Act, 1961?"

3. The assessee, a company for the previous year ending 3 December, 1987 had filed return of income on 30th July, 1988 declaring loss of Rs.38,590/-. In the statement of assessable income attached with the return, the assessee had computed loss after deducting /reducing Rs.1,82,69,610/-, which it claimed, had been declared as income in the assessment years 1986-87 and 1987-88. During the course of assessment proceedings, the assessee filed a letter that the entire amount Rs.1,82,69,610/- might be taxed in the assessment year 1988-89 and no portion of the said income be assessed in the assessment years 1986-87 and 1987-88. Taxes paid on 17th August, 1987, amounting to Rs.1,14,44,069/- be treated as payment of advance tax for the assessment year 1988-89. The Assessing Officer, however, referred to the assessment orders for the assessment years 1986-87 and 1987-88 and held that the consultancy fee/commission was taxable in the said years, but Rs.1,82,69,610/- was treated as assessee's income in the assessment year 1988-89 on protective basis. Some other additions were also made and after including the protective figure, total income was assessed at Rs.2,04,75,710/-. The Assessing Officer in the assessment order 22nd March, 1991, specifically directed that interest under Sections 201 and 217 should be charged. As per computation sheet I.T.N.S.-1504 demand of Rs.1,85,11,870/- was raised including interest of Rs.56,33,066/- under Section 217 of the Act.

4. The assessee filed an application dated 22nd April, 1991 under Section 154 pleading that the tax rate applicable was 55% instead of 60% and credit of TDS of Rs. 24,109/- should be granted. Relief was granted in the order under Section 154 dated 22nd April, 1991,

wherein the demand raised was reduced to Rs.1,69,66,591/- whi included interest under Section 217 of Rs. 51,62,762/-. The income tax computation sheet filed on record shows interest under Section 217, which was charged. It does not indicate the sub-section under which the interest had been charged.

5. On appeal filed by the assessee, Commissioner of Income Tax (Appeals) noticed that the appeals filed by the assessee for the assessment years 1986-87 and 1987-88 had been allowed and the substantive addition made in the said years were deleted. Accordingly, the assessee did not have any cause for complaint with regard to the addition of Rs.1,82,69,610/- in the present year i.e. assessment year 1988-89 and the order of the Assessing Officer was confirmed. Thus, the protective assessment of Rs 1,82,69,610 /- became substantive, as the aforesaid amount was taxable in the year in question. With regard to the direction of the Assessing Officer to charge interest under Section 217, the Assessing Officer was directed to pass a speaking order. Revenue preferred further appeal before the Tribunal, but there was no interference in respect of the aforesaid direction and the appeal was dismissed vide order dated 25th March, 1997.

6. The Assessing Officer, thereafter, passed an order dated 16th January, 1995 under Section 143(3) read with Section 250 of the Act. In the order, the following chart gives the factual position for different assessment years and the submission of the assessee:-

"Asstt. Yr	Dt. Of filing the return	Returned income	Dt. of filing the revised return	Income	Dt. asstt.
85-86	30.10.85	(-) 11,175	-	(-) 11,180	30.7.87
86-87	20.6.86	(-) 15,327	*	(-) 4,151 u/s 143(1)	28.7.87
87-88	23.6.87	(-) 3,016	**	21,34,420	29.3.90
88-89	13.7.88	(-) 38,590	***	2,04,75,711 Commission income accepted on protective basis	22.3.91

Form No.6-A was filed on 31.8.87 objecting to the assessment u/s 143(1) stating that the correct total income is 1,61,48,329. Assessment was completed by virtue of notice issued u/s 147 on 18.3.91 at Rs 1,77,48,985/-.

A revised statement of income was filed before C1T-III,N. Delhi

vide letter dt.17.8.87 disclosing further income of *Rs*. 21,17,130/-.

Vide letter dated 7.2.89 the assessee revised the income of Rs.1,82,69,610/- and requested the entire taxes paid on 17.8.87 be treated as advance tax."

7. The Assessing Officer rejected the contention that the tax paid on 17th August, 1987, was in the nature of advance tax for the assessment year 1988-89. He observed that the assessee had made voluntary disclosure of commission of Rs.1,61,52,480/- received from M/s Sumitomo Corporation, Japan in the assessment year 1986-87 and Rs.21,17,130/- in the assessment year 1987-88. The amount was received in India on 12th August, 1987 and taxes were paid on

19th August, 1987. In the challan of self assessment, it w specifically mentioned that the tax had been paid in the assessment years 1886-87 and 1987-88. As noticed above, the aforesaid amount Rs.1,82,69,610/- was held to be taxable or assessable in the assessment year 1988-89. The Assessing Officer after referring to the provisions of Sections 207 and 208 to 219 observed that the tax paid on 19th August, 1987 cannot be treated as tax paid for the assessment year 1988-89. The Assessing Officer observed that no statement under Section 209-A(1)(a) or estimate under Section 209-A(1)(b) were filed. Similarly, no estimate under Section 209-A (4) or 212 (3A) were filed. It was observed that the assessee company was required to file an estimate in terms of Section 209-A(1)(b) on or before 15th December, 1987. He accordingly observed that there was default in terms of Section 209-A(1)(b) i.e. requirement to file an estimate of commission income and to pay tax thereon and accordingly, interest was leviable under Section 217.

8. On appeal against the said order, the Commissioner of Income Tax (Appeals) noticed that no credit of tax in the assessment year 1988-89 could be given for the tax paid in the assessment years 1986-87 and 1987-88, though commission income it was held should not be assessed in the assessment years 1986-87 and 1987-88. He rejected the contention of the assessee that payment of self-assessment tax for earlier years should be treated as advance tax paid in this year. He held that interest was rightly charged by the Assessing Officer. He also dealt with the various other contentions of the assessee and rejected the same. He held that the assessee had not filed an estimate

of income and for this default, interest under Section 217 had be charged.

9. Before the Tribunal, assessee for the first time came forward with a plea that it had filed Form No. 29 for the assessment year 1988-89 i.e. it had submitted statement for advance tax in which income was shown as NIL was filed and acknowledged vide receipt number 448776 issued by the Assessing Officer. On verification, the Assessing Officer informed the tribunal that the receipt was found to be genuine as per official records. In view of the aforesaid position, it was submitted that levy of interest under Section 217(1)(a) could not be sustained as the said interest could be levied or imposed if the assessee had not submitted estimate of income and had not paid advance tax. The Departmental Representative in view of the said factual position submitted that filing of Form No. 29 was never asserted or pleaded before the Assessing Officer or the first appellate authority. Even if the said form was filed, the assessee was still liable to pay interest under Section 215 as the advance tax paid was less than 75%/ 83 .33% of the assessed tax or alternatively interest was chargeable under Section 217(1A). The assessee's counsel in rebuttal submitted that in the original order dated 22nd March, 1991 direction of the Assessing Officer was only to charge interest under Section 217 but the sub-section was not mentioned. In the computation form also, it was simply shown that interest was chargeable under Section 217 and was accordingly computed. Further, Commissioner of Income Tax (Appeals) vide his order dated 24th July, 1992 had directed the Assessing Officer to pass a speaking order in respect of levy of interest under Section 217 without specifying the sub-section.

Thus argument of the Revenue that the interest should have be charged under Section 215 or Section 217(1A) should not be accepted.

10. The Tribunal in the order dated 16th August, 1996 held that interest under Section 217(1)(b) could be charged if the assessee had failed to file the estimate. Since it was now accepted that estimate had been filed, no interest was chargeable under the said Section. The Tribunal, therefore, directed deletion of interest. At the same time in the penultimate paragraph, the Tribunal has observed as under:-

> "However, in view of the fact that the asses-see had not made the claim of filing the estimate in Form No.29 before the Assessing Officer and the learned C.I.T.(Appeals) during the course of proceedings before them, the Assessing Officer is free to examine the question of levy of interest under the other provisions of Section 217."

11. The assessee thereafter filled an application under Section 254(2) specifically directed against observations quoted above. The application was opposed by the Revenue pleading that the order of the tribunal was fair as the Assessing Officer was free to examine and levy interest under the other provisions of Section 217. The tribunal while disposing of the application noticed and has recorded in the order dated 7th September, 1998 that the plea that estimate had been filed was taken up for the first time before the Tribunal, and was not taken before the Assessing Officer or even in the relevant columns in the Income Tax Return for the assessment year 1988-89 in which the

relevant columns had been simply scored off. The tribunal, therefore, had held in the aforesaid observations that the Assessing Officer was free to examine the question of levy of interest under other provisions of Section 217. The said observation was not a mistake apparent and did not call for rectification under Section 254(2) of the Act. The miscellaneous application was rejected. The assessee thereupon moved an application under Section 256(1) for reference to the High Court but this application was also rejected.

12. The Assessing Officer passed a detailed order dated 4th February, 1997 under Section 143(3) read with Section 254 of the Act, referring to provisions of Section 209, 211 and 217. He held that the assessee had failed to pay advance tax installments due on 15th June, 1987, 15th September, 1987 and 15th December, 1987 in respect of previous year ending 31st December, 1987. Under the circumstances, interest was chargeable under Section 217(1A) but not under Section 217(1) as estimate of advance tax had been filed. The interest chargeable under the said Section was worked out and computed at Rs.45,92,475/-.

13. The assessee did not succeed as the first appeal was dismissed by the Commissioner of Income Tax (Appeals) by order dated 18th December, 1997. In the second appeal, by the impugned order dated 22nd February, 2001, the tribunal has deleted the interest imposed. In paragraphs 13 to 18 of the impugned order, Tribunal has examined whether the observations of the Tribunal dated 16th August, 1996 quoted above amounted to a direction and finding. The Tribunal in the impugned order has come to the conclusion that the observation

had not or cannot be constituted the finding or direction and was only an observation. This to our mind is completely irrelevant as it made/makes no difference whether it was a finding, direction or an observation, because the tribunal has left it open to the Assessing Officer to consider levy and imposition of interest, if permissible and could have been imposed under the statute. It is clear and apparent that the tribunal had not barred or prohibited the Assessing Officer from imposing interest under Section 215 or 217(1A), as per law. The above quoted portion of the order dated 16th August, 1996, as noticed above attained finality. The assessee had filed an application under Section 254(2) of the Act which was rejected and then moved an application under Section 256(1) which too was rejected. It is, therefore, impermissible and wrong for the assessee to claim that the tribunal had barred or prohibited the Assessing Officer from examining the question of interest under other provisions of Section 217. The said liberty and discretion was granted and it was left to the Assessing Officer to decide whether or not interest could be imposed under any other provision of Section 217 of the Act. After examining the said Section, the Assessing Officer had come to the conclusion that the interest was imposable under Section 217(1A). The said order was affirmed in the first appeal.

14. In order to decide the other question, whether or not interest under Section 217(1A) could have been imposed, we would like to reproduce paragraphs 18 and 19 of the impugned order dated 22nd February, 2001, which read as under:

> "18. Our view gains strength from the terminology employed by the Tribunal in its order. It indicates that the observation cannot constitute a "finding" or a direction. In order to constitute a "direction there must be a mandate of the higher authority where the lower authority is left free whether or not to take an action, it cannot be a direction. The Hon'ble Supreme Court, in the case of Rajendra Nath Vs. CIT 120 ITR 14 were concerned with an identical situation wherein the first Appellate Authority had observed that the 1TO was free to take action to assess the excess in the hands of the co-owners. the said observation, it was held, cannot be construed to be a direction because such observation is neither binding nor necessary for disposal of the appeal. It left a discretion with the lower authority which itself negates the concept of a direction. It is observed at page 20 of the said decision that the direction by a statutory authority is in the nature of an order and requires positive compliance. lt is observed that when a matter is left to the option and discretion of the assessing officer whether or not to take action, it could not, in the opinion of Their Lordships he described as a "discretion".
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> 19. We also find strength in the argument, without prejudice, that, section 217 only empowers the levy of interest while making the regular assessment. Variation in regular assessment, can be taken cognizance by virtue of section 215(3)incorporated in section 217(2). However a fresh charge is not, permissible. If there is an error causing prejudice to revenue and if the limitation permits corrective action under other sections may be permissible not otherwise the law envisages a section to which assumption of jurisdiction can be related. Since in this *case* the assumption of jurisdiction is not, relatable to any section but merely to an observation which is not direction the consequential proceedings are bad in law."

15. In respect of paragraph 18, we have already made observation in paragraph 13 above and have noted that in order dated 16th August, 1996, the Assessing Officer had not been barred or prohibited from

imposing or levying interest under Section 217. Of course, intere could be levied if it was permissible in law. Therefore, we do not understand the first line in paragraph 19 of the impugned order, wherein it stands recorded that "without prejudice", Section 217 only empowered levy of interest while making the regular assessment. Further observation that regular assessment could be made by virtue of Section 215(3) was incorporated in Section 217(2), but a fresh charge was impermissible, does not appear to be logical and coherent.

16. The facts as noted above, clearly reveal that at the time of original assessment under Section 143(3) vide order dated 22nd March, 1991, the Assessing Officer had directed charging of interest under Section 201 and 217. The computation form also referred to and computed interest under Section 217. The first appellate authority had also directed the Assessing Officer to pass a speaking order to charge or levy interest under Section 217. In the assessment order and the computation sheet, the relevant sub-section of Section 217 was not mentioned or stated. The said sub-section was only mentioned in the subsequent order dated 16th January, 1995 passed by the Assessing Officer under Section 143(3) read with Section 250. It is only then, when the Assessing Officer for the first time had applied his mind on whether the interest should be levied under Section 217(1) or 217(1A). The direction given by the first appellate authority against the original assessment order to pass a speaking order on levy of interest under Section 217, given in the order dated 24th July, 1992 has attained finality. The assessee cannot now question and state that the original assessment order was defective as the sub-section to Section 217 applicable was not stated. Further the

first appellate authority while directing the Assessing Officer to pa a speaking order on levy of interest, had given power and authority to the Assessing Officer to impose interest but after giving reasons. This meant that the Assessing Officer had the right to reconsider the question of levy of interest under Section 217 and also examine and state under which sub-section interest was leviable. The plea of limitation, as if the original assessment order under Section 143(3) dated 22nd March, 1991 was being corrected or rectified under Section 154 of the Act, therefore, faulters and was meaningless. It was devoid of any force. Right to correct and modify the assessment order was granted and allowed by the first appellate authority vide order dated 24th July, 1992. Subsequent orders including the order imposing interest under Section 217(1A) and after the interest under sub-section 217 (1)(b) was struck down with liberty as granted vide order dated 16th August, 1996, is relatable and pursuant to the earlier direction and power and authority granted to the Assessing Officer by the order of the Commissioner of Income Tax (Appeals) dated 24th July, 1992. It is only after the order dated 24th July, 1992 that the particular sub-section of Section 217 was specified. In the original assessment order under Section 143(3) dated 22nd March, 1991, no particular sub-section of Section 217 was indicated or mentioned.

17. There is another reason, why we feel that the appeal filed by the Revenue should succeed. Section 217(1) and (1A) both use the expression "on the making of the assessment". Therefore, the interest could be imposed after income of an assessee stands computed pursuant to the assessment. The interest component had to be calculated in the computation form. The assessment order

determines and decided disputes and quantifies the income. T computation form was/is not the assessment order, but quantifies the tax demand/tax payable, interest payable under different sections by the assessee or in case of refund, refund and interest payable by the Revenue. Supreme Court in ***Kalyankumar Ray vs. CIT*** (1991) 191 ITR 634 has observed as under:

> "The statute does not, however, require that both the computations (i.e., of the total income as well as the sum payable) should be done on the same sheet of paper, the sheet that is superscribed 'assessment order'. It does not prescribe any form for the purpose. It will be appreciated that once the assessment of the total income is complete with indications of the deductions, rebates, reliefs and adjustments available to the assessee, the calculation of the net tax payable is a process which is mostly arithmetical but generally time consuming. If, therefore, the Income-tax Officer first draws up an order assessing the total income and indicating the adjustments to be made, directs the office to compute the tax payable on that basis and then approves of it, either immediately or some time later, no fault can be found with the process, though it is only when both the computation sheets are signed or initialled by the Income-tax Officer that the process described in section 143(3) will be complete.
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> In this context, one may take notice of the fact that, initially, rule 15(2) of the Income-tax Rules prescribed Form No. 8, a sheet containing the computation of the tax, though there was no form prescribed for the assessment of the income. This sub-rule was dropped in 1964. Thereafter, the matter has been governed by Departmental instructions. Under these, two forms are in vogue. One is the form of what is described as the 'assessment order' (I. T. 30 or I. T. N. S. 65). The other is what is described as the 'Income-tax Computation Form' or 'Form for Assessment of Tax/ Refund' (I. T. N. S. 150). The practice is that, after the 'assessment order' is made by the Income-tax Officer, the tax is calculated and the necessary columns of I. T. N. S. 150 are filled up showing the net amount payable in respect of the assessment year. This form is generally prepared by the staff but it is checked and signed or initialled by

> the Income-tax Officer and the notice of demand follows thereafter. The statute does not, in terms, require the service of the assessment order or the other form on the assessee and contemplates only the service of a notice of demand. It seems that while the 'assessment order' used to be generally sent to the assessee, the other form was retained on file and a copy occasionally sent to the assessee. I. T. N. S. 150 is also a form for determination of tax payable and when it is signed or initialled by the Income-tax Officer, it is certainly an order in writing by the Income tax Officer, determining the tax payable, within the meaning of section 143(3). It may be, as stated in CIT v. Himalaya Drug Co. [1982] 135 ITR 368 (All), only a tax calculation form for Departmental purposes as it also contains columns and code numbers to facilitate computerisation of the particulars contained therein for statistical purposes but this does not detract from its being considered as an order in writing determining the sum payable by the assessee. We are unable to see why this document, which is also in writing and which has received the imprimatur of the Income-tax Officer, should not be treated as part of the assessment order in the wider sense in which the expression has to be understood in the context of section 143(3). There is no dispute in the present case that the Income-tax Officer has signed the Form I. T. N. S. 150. We, therefore, think that the statutory provision has been duly complied with and that the assessment order was not, in any manner, vitiated."

18. The same view was taken in ***Commissioner of Income Tax vs. Vijay Yarn and Textiles P. Ltd.*** [2008] 303 ITR 219 (P & H) after making reference to judgment in ***Vinod Khurana vs. CIT*** [2002] 253 ITR 578 (P&H). The aforesaid judgments would show that the assessment stands completed when the assessment order was/is passed. The assessment order should state details of income, deduction, rebates, relief etc. After the assessment is completed, the computation of tax etc. is made. It is in this context that we would like to mention and state that the assessment order dated 22nd March, 1991, had specifically directed levy of interest under Section 217 of

the Act and did not specify the sub-section under which the intere should be charged. The said direction to specify the sub-section could be read in the order dated 24th July, 1992, when it was directed by the Commissioner of Income Tax (Appeal) that the Assessing Officer should pass a speaking order. Incidentally, interest under both sub-section (1) and (1A) to Section 217 for the defaulted amount, is alternative but at same/similar rate.

19. We would like to mention and refer two decisions of the high courts in support of what we have opined and held. Bombay High Court in ***Ratan Lal Dhondiram vs. CIT, Poona*** [1983] 141 ITR 363 (Bom) had examined the question whether failure to mention that interest would be imposed or levied under Section 217 would be fatal and amounts to waiver of interest under the said Section. It was noticed that the assessment order in the said case was silent on whether or not interest should be waived, reduced for the reasons or grounds mentioned in Rule 40 of the Income Tax Rules, 1962. Reference was made to decision of Karnataka High Court in ***CIT vs. Executors of the Estate of Late H.H. Rajkuverba Dowager Maharani Saheb of Gondal*** [1978] 115 ITR 301 (Kar) where it was held that an order under Section 217 did not form part of an order of assessment and mere omission on the part of the Assessing Officer to refer to interest payable thereunder in the order of assessment cannot lead to the inference that the Assessing Officer had waived interest payable without any reason for doing so. Support was also drawn from the decision in ***CIT vs. Lalit Prasad Rohini Kumar*** [1979] 117 ITR 603 (Cal.) to affirm the said proposition and it was held that non-

mentioning or failure to state interest would be payable in the order assessment did not lead to an inference that interest has been waived.

20. In ***Executors of the Estate of Late H.H. Rajkuverba Dowager Maharani's case*** (supra), the Commissioner had initiated and invoked his power under Section 263 of the Act and had issued notice why an order should not be made directing payment of interest under Section 217. The assessee had contended that the Commissioner had no jurisdiction, as no order had been passed by the Assessing Officer to levy or not levy interest under Section 217. Thus, the Commissioner could not have exercised his revisionary power. The objection was rejected by the Commissioner and the Assessing Officer was directed to levy interest. Tribunal however held that Commissioner had no power under Section 263 to pass the said direction and cancelled the revisional proceedings. Three questions arose before the Karnataka High Court (1) Whether the ITO was required to make an order under Section 217 to give effect to the said provision; (2) Whether an order under Section 217 formed part of the assessment order; and (3) whether the Commissioner could exercise jurisdiction under Section 263 of the Act when the Assessing Officer had expressed no opinion in his order to impose interest under Section 217. It was held that the proceedings under Section 217 were quasi judicial in nature and, therefore, Assessing Officer had to pass an order to give effect. Secondly, the order under Section 217 could be made after the regular assessment was made and therefore regular assessment did not include the order under Section 217 or Section 215. The order under Section 217 did not form part of the assessment order and it could be made after the regular assessment was made. In

view of the answer given to the second question, the answer to t third question was apparent. Thus, mere omission on the part of the Assessing Officer to impose or refer to Section 217 cannot lead to the inference that the Assessing Officer had waived interest payable without giving reasons for doing so. Thus, it follows that the Assessing Officer did not become functus officio after order of regular assessment was passed and it was permissible and permitted that he could pass an order under Section 217 after he had made regular assessment. Therefore, in the facts of the said case the Commissioner was not justified in invoking Section 263 because the Assessing Officer had failed to mention and state that interest under Section 217 should be levied while passing the regular assessment order.

21. In fact an order under Section 217 should be passed after regular assessment has been made. Before passing order under Section 217, assessee had to be given an opportunity to make submissions and show that no interest would be payable.

22. In view of the aforesaid discussion, the question of law has to be answered in favour of the Revenue and against the respondent assessee. The appeal is accordingly disposed of.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

August 25th, 2014
NA/kkb