PETITIONER:
INCOME-TAX OFFICER & ANOTHER, BOMBAY

Vs.

RESPONDENT:
THE SIMPLEX MILLS LTD., BOMBAY

DATE OF JUDGMENT:
15/11/1962

BENCH:

ACT:
Income Tax-Reassessment-Validity-Advance payment of tax found refundable in part on assessment-Payment of legal interest to aseessee-Amendment of law reducing amount-Recovery of excess-Indian Income-tax Act, 1922 (11 of 1922), 34, 18 A (1), (5)) (8), (11).

HEADNOTE:
The assessee respondent made advance payment of tax under s. 18 A (1) of the Income-tax Act' for the assessmetn
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year 1952-53. A part- of the amount paid was found refund-able on regular assessment on August 30, 1952. On September 11, 1952, a sum of Rs. 14,720-14-0 was paid to the respondent as interest under s. 18 A (3), on the amount refundable as it then stood. The sub-section was amended on May 24, 1953, with retrospective effect from April 1, 1932. Under the law as it stood after the amendment the assessee was entitled to Rs. 9,404-5-0 and no more. The Income-tax Officer issued a notice under s. 34 (1) (b) proposing to recover the excess paid by way of reassessment on the grounds that the respondent bad been under-assessed and also that it had been allowed excessive relief. By an order made by him based on the latter ground, he directed recovery of the excess. The respondent moved the High Court under Art. 226 of the Constitution and that court set aside the order.
Held, that S. 34 of the Act had no application. None of the conditions for its applicability had been fulfilled in the present case.
The case was not one of under-assessment but really one of over-assessraent though provisional for more had been paid in advance as tax than was found payable. Neither was the case one of grant of excessive.relief for the interest paid by the Government on the amount paid by the assessee in excess of what was found to be due, was not a grant of relief to the assessee at all. Excess payment of such interest cannot, therefore, be a case where excess relief has been allowed to an assessee,
Sub-sections (8) and (11) of s. 18 A deal with interest payable by an assessee and do not show that interest payable by the Government under s. 18 A (3) is part of tax payable by the assessee so as to lead to a contention that excess allowance of such interest was in substance grant of excess relief to the assesse.
It could not also be said that the interest payable by the Government to an assessee for tax paid in advance was a tax paid by the, assessce.
M. Chockalingam v. Commissioner of Income-tax, Madras, [1963] Supp. 1 S.C.R. 599, explained and distinguished.

JUDGMENT:
CIVIL APPELLATE, JURISDICTION : Civil Appeal No. 165 of 1962.
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Appeal by special leave from the judgment and order dated March 11, 1959 of th e Bombay High Court in Appeal No. 60 of 1958.
N. D.Karkhanis and R. N. Sachthey, for the appellants.
R. J. Kolah, J. B. Dadachanji, O C. Hatkw and Ravinder Narain for the respondent.
1962. November 15. The judgment of the Court was delivered by
SARKAR, J. This appeal is entirely without substance. It arises out of an application under Art'. 226 of the Constitution Mack by the respondent assessee for a writ quashing an order of assessment made under s. 34 of the Income-tax Act, 1922.
The respondent made advance payment of tax under s. 18 A (1) of the Income-tax Act for the assessment year 1952-53. On August 30, 1952, regular assessment for this year was made and a part of the tax paid in advance was thereupon found refundable to the respondent. Under the provisions of sub-s. (5) of s. 18A, as it then stood, interest at a certain, rate was payable on the amount paid in advance by an assessee under this section. Rupees 14,720-14-0 were found payable to the respondent under this provision 'arid this sum was paid sometime in September 1962. On May 24' 1953, subs. (5) of s. 18A 'Was amended with effect from April 1, 1952, It is not necessary to refer to this amendment in detail and it is enough to state that under it the Government was to have paid to the respondent Rs. 9,404-5-0 instead of Rs. 14,720-14-10.
On March 18, 1957, a notice was issued under s. 34 (1) (b) stating that as the Income tax Officer had reason to believe that the respondent's income for the assessment year ending March 31, 1953 had
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been under-assessed and had been the subject of excessive relief, he proposed to re-assess the said income. The respondent protested but notwithstanding the protest, the re-assessment under s.34 was made on July 30, 1957. The order of reassessment stated: ""As per the amended provisions of Section 18A (5) the assessee was entitled to interest Pr a much smaller amount than what has been allowed to him during the original assessment. As excessive relief has been allowed to the assessee in the original assessment, u/s. 23 (3) and in order to enable me to recover the excess interest allowed action under section 34 was taken Hence 1 will proceed to recover the excess interest allowed to the assessee during the original assessment." On the application of the respondent under Art. 226. of the-Constitution this order was set aside by the High Court of Bombay. Hence this appeal.
Section 34 of the Act: under which the impugned order was made so far as material for our_purposes is in these terms:

> S. 34. (1) "If-
> (a).....
> (b).....the Income-tax Officer has reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed or assessed at too

low a rate, or have been made the subject of excessive relief under this Act, or that, excessive loss or depreciation allowance has been computed,
he may..... proceed to assess or re-asses s such income, profits or, gains or recompute the loss or depreciation allowance ;"

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The assessment, reassessment or recomputation under this section is to be made according to the provisions of the Act as if it was pursuant to a notice under s. 22 of the Act.
Under this section, therefore, an assessment earlier made can be re-opened if income, profits or gains have escaped assessment or have been 'under-assessed or assessed at too low a rate or have been made' the subject of excessive relief or excessive loss or depreciation has been computed. It does not seem to us that any of these conditions can be said to have' been fulfilled in the present case. The notice under s. 34 stated all these grounds but only two of them have been mentioned in the notice which has been earlier set out by us because counsel for the appellants has not relied on any other ground. With the other grounds we are not, therefore, concerned in this case. The two that have been relied on are cases where income has been under-assessed or has been made the subject of excessive relief. It may be noticed here that the order of July 30, 1957 was based only on the ground that excessive relief had been allowed. It did not hold that the income had been under assessed.
It does not seem to us that it is a case where the respondent's income was under-assessed or where excessive relief was granted in computing that income. It is a case where tax had been paid 'in advance and upon subsequent regular assessment for the period for which the tax had Seen paid it was found that what had been paid was in excess of what was actually due. This is really a case of over-assessment though only provisional and not of under-assessment at all. The payment of interest was in no sense a relief granted in computing income, it was paid at the rate calculated according to the law then in force. No doubt in view of the subsequent amendment of the law and in view of this amended provision being given retrospective, operation covering the date. when the

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original assessment :had: been made, if 'the interest has to be computed according to the amended law then a smaller-sum might have been payable as interest. but when it was computed, the new law was not in fact there and, therefore, the, computation had been according to the law then in force. That computation cannot be re-opened under s. 34 because it cannot be said that it 'is a case either of under assessment or of excessive relief having been granted. It is really a case where the statutory liability of the State to pay interest was reduced from a higher figure to a lower one. Therefore, quite clearly it was not a case within s. 34.
We were referred to the form of the notice of demand for the tax. It was contended that the form showed that in computing the tax interest under s. 18A had to be taken into account. Therefore, it was said, interest was a part of the tax and when more interest had been paid to the assessee than was due, it had been given excessive relief. As was rightly pointed out by Mr. Kolah appearing for the respondent, this is a wrong reading of the form. The form specified the net amount of the tax payable and thereafter

provided for deduction of certain interest to show the amount of the demand. Therefore the interest which had to be deducted in accordance with it in arriving at the demand is not a part of the tax. At least it is not so treated in the form. That is enough to dispose of this argument.

We were then referred to sub-ss. (8) and (11) of s. 18A. Sub-section (8) provides for payment of certain interest by an assessee and sub-s. (II) says that any sum other than a penalty or interest paid by an assessee under the provisions of s. 18A shall be treated as a payment of tax. It was contended that. the provisions of these two sub-sections show that the interest with which we are concerned is a part of the tax, and therefore, when more interest was allowed to an assessee than was due, he was

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given encessive relief. This is obviously fallacious The sub-sections deal with interest payable by an assessee and we are concerned. in this case 'with interest payable by the Government.

Lastly, our attention was drawn to M. Chockalingam v.. The Commissioner of Income tax, Madras (1), in which referring to the proviso to s. 35 of the Income-tax Act this Court observed "The learned counsel for the Departrnent raised the, forlorn argument that the addition of penal interest is not enhancement of assrssment as stated in the proviso. We do not see what else it could be. "; Itwas contended that this showed that the penal interest was part of the tax. We do not think so. In any event, we are not concerned with a case of penal interest here. It cannot obviously be suggested that the interest payable by the Government to the assessee for amounts paid by the assessee as tax in. advance, is a tax paid by the assessee.

At the hearing learned counsel for the State sought leave to contend that the, order of July 30, 1957, could be supported under s. 35 of the, Income-tax Act. This leave was refused for such a point was not raised in the Court below and the action by the revenue authorities had expressly been taken under s. 34 of the Act.

This appeal must, therefore, be dismissed with costs and we order accordingly.

Appeal dismissed.

(1) [1963] SUPP. 1 S.C.R. 599.

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