PETITIONER:
M. CHOCKALINGAM & ANOTHER

Vs.

RESPONDENT:
COMMISSIONER OF INCOME-TAX,MADRAS & ANOTHER

DATE OF JUDGMENT:
12/10/1962

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
KAPUR, J.L.
SHAH, J.C.

CITATION:
1963 AIR 1456 1963 SCR Supl. (1) 599

ACT:
Income Tax-Rectification of mistake-Assessee, if must be given notice and an opportunity of being heard-Principle of natural justice, if violated-Incom-tax Act, 1922 (11 of 1922), ss. 35, 184(2), (3), (6) fifth proviso, (8)-Income Tax Rules. 1922, r. 48.

HEADNOTE:
The appellants had not paid advance tax according to their own estimate of the income for the assessment years 1951-52 and 1952-53 and they were liable to penal interest under s. 18A (8) of the Income Tax Act. The Income Tax Officer overlooked this fact and did not add penal interest to the tax leviable. In 1956, lie started proceedings under s. 35 of the Act for the rectification of the assessment and ordered the levy of penal interest without sending notice to the appellants. Against this order the appellants moved the Commissioner of Income Tax in revision. They were not heard by the Commissioner and were informed by the Income Tax Officer that their applications were rejected. The appellants challenged the orders before the High Court under Art. 226 of the Constitution, and the petitions were dismissed. It was urged by the respondents in this Court that the fifth proviso to sub-s.(6) could not apply to a case of penal interest leviable under sub-s (8) of s. 18A since that sub-section was mandatory and that the fifth proviso to s. 18A (6) did not override the mandatory character of sub-s. (8).
Held, that the fifth proviso to', sub-S.(6) does apply to a case arising under sub-s. (8). Sub-section (6) is expressly made applicable and the discretion contemplated under the fifth proviso read with r. 48 is open not only in cases arising under sub ss.(2) and (3) of s. 18A but also in cases arising under sub-s(8). There is nothing to show that in applying sub-s. (6) any of the provisos are to be left out.
Gursahai Saigal v. The Commissioner of Income-tax Punjab, [1963] 3 S.C.R. 893 and Income-tax Officer, Circle It,
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Madura v. M. R. Vidyasagar,. [1962] Supp. 2 S.C.R. 613, referred to.
Lata Mangeshkar v. Union of India, [1959] 36 I.T.R. 52 7.

held inapplicable.
Held, further, that the authorities acting under the Indian Income-tax Act have to act judicially. In the present case the proviso to s. 35 itself makes it incumbent upon the Income-tax Officer to give notice and a hearing to the assessee when the effect of the rectification would be the enhancement of the assessment. The appellants did not receive a notice and were not heard and there was a clear breach of the principles of natural justice.
Commissioner of Inland Revenue v. Hood Barr,?, [1961] 39 T.C. 683 and Sinha Govindji v. Deputy Chief Controller of Import8 & Export8, [1962] 1 S.C.R. 540, relied on.

JUDGMENT:
CIVIL APPELLATE, JURISDICTION : Civil Appeals Nos. 37 to 40 of 1962.
Appeals from the judgment and order dated September 30,1958, of the Madras High Court in Writ Petitions Nos. 501, 502, 514 and 515 of 1956.
K.N. Rajagopal Sastri and M. S. K. Ayyanqar, for- the appellants.
Gopal Singh,R. N. Sachthey and P. D. Menon, for the respondents.
1962. October 12. The judgment of the Court was delivered by
HIDAYATULLAH, J.-These are four appeals filed by two brothers Chockalingam and Meyyappan against a common judgment of the High Court of Madras dated September 30, 1958, by which the High Court dismissed four petitions under Article 226 of the Constitution filed by them. Each of the appellants had filed two such petitions for the assessment years 1951-52 and 1952-53 in respect of which they Were ordered to pay. penal interest under section 18 A (8) of the Income-tax Act. The High Court
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certified the cases as fit for appeal to this Court and hence the present appeals.
The facts are these. Chockalingam and Meyyappan are the sons of one Meyyappa Chettiar. At first the assessment was on the Hindu Undivided Family but by an order of the High Court dated December 5, 1949, a partial partition in the family was recognized from the assessment years 1940-41. It is not necessary to narrate the events that transpired after the decision of the High Court. The judgment of the High Court was given effect to after 1953 and the assessments for the years 1951-52 and 1952-53 made on the brothers as individuals were completed on July 11, 1953, and August 30, 1954, respectively for the two years. The appellants had not paid advance tax according to their own estimate of the income for these two years and they were liable to penal interest under section 18A (8) of the Income-tax Act. The Income-tax Officer, Karaikudi, overlooked this fact and did not add penal interest to the tax leviable. In 1956 the Income-tax Officer started proceedings under section 35 of the Income-tax Act for the rectification 'of the assessment. No notice was sent to either brother and the Income-tax Officer ordered the levy of penal interest as follows

I.	On Chockalingam	
	1951-52	Rs. 13,391- 7-0
	1952-53	Rs. 8,281/-
II.	On Meyyappan	
	1951-52	Rs. 13,440-11-0
	1952-53	Rs. 8,254- 6-0

There is no appeal against the order under section 35, Income-tax Act. The appellants therefore applied under section 33A to the Commissioner of Income-tax for revision of those orders. We were told at the hearing that they were not heard by the
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Commissioner. They were informed by the Income-tax Officer by a letter dated April 9, 1956, that their applications were rejected. As there was no further remedy, the appellants filed four petitions Under Article 226 of the Constitution, challenging the orders of the Income-tax Officer and the Commissioner of Income-tax on the ground that they were opposed to the principles of natural justice. Before the High Court it was contended by the Department that there was a patent failure on the part of the Income-tax Officer to add penal interest to the tax, which he could rectify under section 35 as an error apparent from the record. This contention of the Department was accepted and the High Court dismissed the petitions because in its opinion there was no substantial but a 'Procedural' defect and the failure to issue the notice caused no prejudice because the result would have been the same even if the notice had been issued. In our opinion, and we say it respectfully, the High Court was in error in holding that there was no breach of the principles of natural justice in this case and the High Court ought to have quashed the orders.

Section 35 which deals with the rectification of mistakes provides that the Income-tax Officer (among other officers) may at any time within four years from the date of any assessment order etc. passed by him, on his own motion rectify any mistake apparent from the record of the assessment and shall within the like period rectify any mistake which has been brought to his notice by an assessee. One of the provisos says that no such rectification shall be made, having the effect of enhancing an assessment or reducing the refund unless the Income-tax Officer has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

Section 18A which was inserted by the Income-tax Amendment Act, 1944 (11 of 1944) provides for
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advance payment of tax by an assessee. Subsection (8) of that section says that where, on making the regular assessment, the Income-tax Officer finds that no payment of advance tax has been made in accordance with the previous provisions of that section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment. Sub-section (6) says that if in any year an assessee has paid advance tax under sub-section (2) or (3) on the basis of his own estimate and the tax so paid is less than eighty per cent of the tax determined on the basis of the regular assessment, so far as such tax relates to income to which the provisions of section 18 do not apply, and if it is not due to any variation in the rate of tax, simple interest at the rate of six per cent per annum from the 1st day of January in the year in which the tax was paid up to the date of the said regular assessment, is payable by the assessee on the amount by which the tax paid falls short of the eighty per cent. A number of provisos are added to sub-section (6) and the fifth proviso says :-

> "Provided further that 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."

"Prescribed" means prescribed by rules made under the Act and rule 48 of the Indian Income-tax Rules, 1922, provides for the different cases and circumstances as follows :-

"48. The Income-tax Officer may reduce or waive the interest payable under section 18A in the cases and under the circumstances mentioned below, namely:-

(1) Where the relevant assessment is completed more than one year after the submission

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of the return, the delay in assessment not being attributable to the assessee.

(2) Where a person is under section 43 deemed to be an agent of another person and is assessed upon the latter's income.

(3) Where the assessee has income from an unregistered firm to which the provisions of clause (b) of sub-section (5) of section 23 are applied.

(4) Where the "previous year" is the financial year or any year ending near about the close of the financial year and large profits are made after the 15th of March, in circumstances which could not be foreseen.

(5) Any case in which the Inspecting Assistant Commissioner considers that the circumstances are such that a reduction or waiver of the interest payable under section 18A(6) is justified.

It will appear from this that the action under section 35 may be taken in favour of the taxpayer without any notice to him but if the action has the effect of enhancing an assessment or reducing the refund, the Income-tax Officer, acting under section 35, must send a notice' to the assessee and give him a reasonable opportunity of being heard. This admittedly was not done in this case. It is urged by the learned counsel for the Department that this proviso cannot apply to a case of penal interest leviable under sub-section (8) to section 18A because that sub-section is mandatory, that the fifth proviso to section 18A (6) does not override the mandatory character of the eighth sub-section and that the writ jurisdiction was rightly not exercised by the High Court in favour of the appellants because even if notice had been given to them, penal interest would

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have to be added in any event since the Income-tax Officer had no option.

There is no doubt that the eighth sub-section applied to the assessments of the two appellants. It is also indisputable that as they had made no advance payment of tax the Income-tax Officer was obliged under that sub-section to calculate the interest in the manner laid down in sub-section (6) and add it to the tax. It has now been ruled by this Court recently in Gursahai Saigal v, The Commissioner of Income-tax, Punjab, (1) that sub-section (6) can be read with sub-section (8) inspite of certain difficulties of language in applying the provisions of the former sub-section to the latter. This Court points out that the intention of section 18A is to charge interest whenever the tax-payer is in default in making an advance payment of tax, and that sub-section (6) must be read mutatis mutandis so as to advance the clear intention underlying sub-section (8) and not to defeat that intention. This being established, the question

is whether sub-section (6) must be read with all its provisos. The argument here is that according to the terms of sub-section (8) only the "manner" of calculation can be taken from sub-section (6) and the fifth proviso does not lay down any manner of calculation'. The fifth proviso says that in certain circumstances and in certain cases the Income-tax Officer may reduce or waive interest payable by the assessee. The proviso operates after the amount of tax is determined and cuts across the sub-section. The Income-tax Officer, though empowered to reduce or waive the interest payable by the assessee, is controlled by the rules which prescribe the circumstances under which and the cases in which he can take that action. The relevant rule has been quoted above. All the sub-rules are equally applicable to sub-section (6) and sub-section (8). Sub-rule (5) of that rule is general in its terms and it lays down that in a case in which the Inspecting

(1) [1963] 3 S.C.R. 893,

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Assistant Commissioner considers that the circumstances are such that a reduction or waiver of interest is justified the Income-tax Officer may reduce or waive the interest payable. Such a case may be where a part of the tax is paid and also a case where no tax is paid This right of an assessee to obtain a decision of the Inspecting Assistant Commissioner in either case is denied to the assessee if he is not sent a notice and is not afforded a hearing as required by section 35 (Proviso). It is contended on the strength of a ruling of Bombay High Court in Lata Mangeshkar v. Union of India(1) that the addition of interest being compulsory under sub-s.(8) the fifth proviso under subs.(6)-which invests the Income-tax Officer with discretion is not applicable. It is also stated in that case that sub-s.(8) only requires that the calculation should be in accordance with sub-s.(6) and the fifth proviso to sub-s. (6) is not concerned with calculation and cannot be applied to cases arising under sub-s. (8). We do not agree that the fifth proviso to sub-s.(6) does not apply to a case arising under sub-s.(8). Sub-section (6) without reserve is-expressly made applicable and this Court in Gursahai Saihgal 8(2) case has ruled that in cases arising under the sub-s. (8) the sixth sub-s. is to be applied mutatis mutandis. If sub-s. (6) is applicable the discretion which is contemplated under the fifth proviso read with rule 48 is open not only in cases arising under sub-ss. (2) and (3) of section 18A but also in cases arising under sub-s. (8). There is nothing to show that in applying sub-s. (6) any of the provisos are to be left out. The eighth sub-section no doubt uses the word "shall" but in the context of sub-s. (6) and the fifth proviso the word can only be read as mandatory if the relief under the proviso is not given. The circumstances which enter an Income-tax Officer to give relief in cases arising under sub-s. (2) and (3) may also be circumstances justifying relief in cases arising under sub-s. (8). It was ruled in Income-tax Officer, Circle II, Madura v. M. R. Vidusagar,(3) that the 5th proviso and rule 48

(1) [1959] 36 I. T. R. 527.

(2) [1963] S.C R. 893

(3) [1962] supp. 2 S.C.R. 613.

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Were intended to relieve against the rigour of the in flexible rule originally enacted in sub-s.(6). the effect of the introduction of the proviso mutatis mutandis affects sub-s. (8) as well. all the sub-rules of rule 48 apply equally to a case of part payment and a case of no payment of advance

tax. There may be as good a justification for not paying the advance tax wholly as for not paying it partly. The present case is an apt illustration because the order of the High Court was passed in 1947 and effect to it was given by the Tribunal in 1950. The compromise with the Income-tax Department in relation to the back years took place in 1952 and the assessments for 1947-48 and 1949-50 were only completed on the last day of March, 1953. It is thus apparent that for the assessment years 1951-52 and 1952-53 the appellants might if opportunity had been given to them, have convinced the Inspecting Assistant Commissioner that they had good grounds for not paying the advance tax because their cases were still in the process of consideration and settlement. No doubt, the Inspecting Assistant Commissioner might have disagreed with their claim but the opportunity to bring the cases to the notice of the Inspecting Assistant Commissioner was denied to the appellants if they did not receive a notice and were not heard against the express direction in the proviso to section 35. In our opinion, there was a clear breach of the principles of natural justice in the present case.

It is contended that this is not a case in which we should reverse the order of the High Court because the grant of writ is discretionary and if the High Court declined to give a writ because in its opinion penal interest was payable, we should not take a contrary view and grant the writ here. The question is not whether penal interest was payable or 'not but whether an opportunity had to be given to the appellants as required by the proviso to section. 35 to show cause against the demand for penal interest. If this

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opportunity was not given the High Court should have acted to rectify that error. The authorities acting under the Indian Income-tax Act have to act judicially and one of the requirements of judicial action is to give a fair hearing to a person before deciding against him. In a recent case of the House of Lords Commissioner of Inland Revenue v. Hood Barrs,(1) it was held that such proceedings were quasi-judicial and if the section required a notice and notice was not given there was a breach of the principles of natural justice and Certiorari lay to quash the order made. Lord Reid at page 706 observed

> "I do not think it necessary in this case to decide what degree of formality, if any, is required in proceedings before General Commissioners, for this at least is clear: no tribunal, however informal, can be entitled to reach a decision against any person without giving to him some proper opportunity to put forward his case. It may well be that these Commissioners acted in good faith and with the best intentions, but that is not enough."

A simlar view was also expressed by this Court in Sinha Govindji v. Deputy Chief Controller of Imports & Exports.(2) It is more so in this case where the proviso to section 35 itself makes it incumbent upon the Income-tax Officer to give notice and a hearing to an assessee when the effect of the rectification would be the enhancement of the assessment. 'The learned counsel for the Department raised the for long argument that the addition of penal interest is not enhancement of assessment as stated in the proviso. We do not see what else it could be The word "assessment" is used in the proviso not as an equivalent of the tax calculated at the rate given in the Finance Act but the

total amount which the assessee is required to pay. The proviso applies whenever the effect of the order is to touch the pocket

(1) (1961) 39 T. C. 683

(2) (1962) 1 S. C. R. 540.

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of the assessee and in our opinion this was such a case.

In the result the appeals, are allowed. A writ of Certiorari will issue and the order of the Income-tax Officer will be quashed. The Income-tax Officer will, however, be free to take such action as may be open to him. In the circumstances of the case, the parties will bear their costs here and in the High Court.

Appeals allowed.