

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

TAX APPEAL NOS.37/2005 TO 41/2005 AND 43/2005 TO
50/2005

TAX APPEAL NO.37/2005

Sk.Muneer Sk.Mannu Choudhary,
age 65 yrs., occu.business,
r/o Old Mondha, Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3(1), Aurangabad.
..Respondent..

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TAX APPEAL NO.38/2005

Master Oil Company,
Through its Proprietor,
Sk.Muneer Sk.Mannu Choudhary,
age 65 yrs., occu.business,
r/o Old Mondha, Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3 (1), Aurangabad.
..Respondent..

=====

TAX APPEAL NO.39/2005

Sk.Khalil Sk.Mannu Choudhary,
age 50 yrs., occu.business,
r/o Old Mondha, Aurangabad.
Through General Power of Attorney
Sk.Muneer Ssk.Mannu Choudhary,
age 65 yrs., occu.business
r/o Jinsi, Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3 (1), Aurangabad.
..Respondent..

=====

TAX APPEAL NO.40/2005

M/s Choudhary & Sons,
a proprietary concern of
Sk.Fattu Sk.Mannu Choudhary,
age 50 yrs., occu.business,
r/o Old Mondha, Aurangabad.
Through General Power of Attorney
Sk.Muneer Sk.Mannu Choudhary,
age 65 yrs., occu.business,
r/o Old Mondha, Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3(1), Aurangabad.

..Respondent..

=====

TAX APPEAL NO.41/2005

Sk.Aziz Sk.Munir Choudhary,
age 60 yrs., occu.business,
r/o Old Mondha, Aurangabad.
Through his General Power of
Attorney Sk.Muneer Sk.Mannu
Choudhary, age 65 yrs., occu.
business r/o Old Mondha,
Aurangabad.

..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3(1), Aurangabad.

..Respondent..

=====

TAX APPEAL NO.43/2005

M/s K.C. & Company,
Through its proprietor
Sk.Muneer Sk.Mannu Choudhary,
age 65 yrs., occu.business,
r/o Old Mondha, Aurangabad.

..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3 (1), Aurangabad.

..Respondent..

=====

TAX APPEAL NO.44/2005

Sk.Nazir Sk.Kasim Choudhary,
age 27 yrs., occu.business,
r/o Old Mondha, Aurangabad.
Through his General Power of
Attorney Sk.Muneer Sk.Mannu
Choudhary, age 65 yrs., occu.business,
r/o Old Mondha, Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3(1), Aurangabad.
..Respondent..

=====

TAX APPEAL NO.45/2005

Sk.Azim Sk.Fattu Choudhary,
age yrs., occu.business,
r/o Old Mondha, Aurangabad.
Through his General Power of
Attorney Sk.Muneer Sk.Mannu
Choudhary, age yrs., occu.
business r/o Old Mondha,
Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3 (1), Aurangabad.
..Respondent..

=====

TAX APPEAL NO.46/2005

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Ashok Brothers,
through its General Power of Attorney,
Sk.Muner Sk.Mannu Choudhary,
age 65 yrs., occu.business,
r/o Old Mondha, Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3 (1), Aurangabad.
..Respondent..

=====

TAX APPEAL NO.47/2005

Sk.Nazim Sk.Fattu Choudhary,
age 27 yrs., occu.business,
r/o Old Mondha, Aurangabad.
Through his General Power of
Attorney Sk.Muneer Sk.Mannu
Choudhary, age 65 yrs., occu.
business r/o Old Mondha, Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3(1), Aurangabad.
..Respondent..

=====

TAX APPEAL NO.48/2005

Sk.Kasim Sk.Mannu Choudhary,
age 50 yrs., occu.business,
r/o Old Mondha, Aurangabad.
Through his General Power of

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Attorney Sk.Muneer Sk.Mannu
Choudhary, age 65 yrs., occu.
business r/o Old Mondha, Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3(1), Aurangabad.
..Respondent..

TAX APPEAL NO.49/2005

Sk.Saieed Sk.Munir Choudhary,
age 30 yrs., occu.business,
r/o Old Mondha, Aurangabad.
Through his General Power of
Attorney Sk.Muneer Sk.Mannu
Choudhary, age 65 yrs., occu.
business r/o Old Mondha, Aurangabad.
..Appellant..

Versus

Deputy Commissioner of Income Tax,
Circle 3 (1), Aurangabad.
..Respondent..

=====

TAX APPEAL NO.50/2005

Amir Khan Mohd.Khan Pathan,
age 55 yrs., occu.business,
r/o Old Mondha, Aurangabad.
Through his General Power of

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Attorney Sk.Muneer Sk.Mannu
Choudhary, age 65 yrs., occu.
business r/o Old Mondha, Aurangabad.
..Appellant.

Versus

Deputy Commissioner of Income Tax,
Circle 3 (1), Aurangabad.
..Respondent..

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Shri S.V. Gangapurwala, Advocate for appellants.

Shri Alok Sharma, Assistant Solicitor General for
respondent.

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CORAM: N.V. DABHOLKAR &
M.G. GAIKWAD, JJ.

DATE: 14/15.3.2007

ORAL JUDGMENT (Per Dabholkar, J.) :

1. All these are appeals u/s 260-A of the
Income Tax Act, 1961, and since the facts are
absolutely similar / identical and the same
question of law is raised in all the appeals, those

are being considered for disposal by this common judgment. (Henceforth we shall refer the appellant as "assessee" for the sake of brevity and the respondent as "department").

2. A search was conducted by the authorities of the department in accordance with the provisions of Section 132 of the Income Tax Act, 1961 (henceforth referred to as the Act for the sake of brevity) in the premises of the appellants on 24.9.1998. Certain assets, cash, documents and books of accounts were seized from the premises of all the appellants. On 9.10.1998, the appellants requested Assistant Director of the Income Tax (Investigation) for inspection of the seized documents and xerox copies of some of those. Similar prayer was repeated on 3.3.1999 and 6.4.1999. On 5.7.1999, Assessing Officer directed the appellants to pay requisite copying charges for obtaining xerox copies of the seized documents. The assessee submitted copy of the challen

regarding deposit of copying charges and requested for the copies of seized documents on 30.7.1999. On 11.10.1999, the Assessing Officer directed the assessee to arrange for a xerox machine for the purpose of getting the documents xeroxed. Ultimately, copies of the seized documents were furnished to the appellants on 1.11.1999.

. In the meanwhile, on 28.2.1999, the Assessing Officer issued a notice u/s 158-BC (a) of the Act asking the assessee to file the return within 16 days from the date of notice. It is the claim of the appellants that taking into consideration the time required for furnishing the copies, the Assessing Officer had extended the time for the purpose of filing the return and the time was extended till 24.2.2000 (In fact, on referring to the documents, it appears that it was only on 17.3.2000, the Assessing Officer refused to extend the time for filing return in response to notice u/s 158-BC(a) of the Act).

. Deputy Commissioner of Income Tax, Circle 3(1), Aurangabad, on 29.9.2000 passed an order u/s 158-BC (c), undisclosed income of the appellants was determined and these amounts are different in case of each appellant. Levy of interest u/s 158-BFA(1) of the Act was ordered because of delay in filing the return. (It is the contention of the appellants that they filed the return some time in August, 2000). Penalty u/s 158-BFA (2) was directed to be considered by initiating separate penalty proceedings.

. This order was challenged by the appellants before Commissioner of Income Tax (Appeals)-II, Aurangabad. The appeals were dismissed by judgment and order dated 11.3.2002. The learned Commissioner concluded the order thus:

".....In my opinion, therefore, even on merits, the appellant does not have a

strong case.

10. However, as there is no provision for appeal against charging of interest, I decline to interfere with the order of AO."

. On going through the order, it is evident that the reasons for delayed filing of return were pleaded before the learned Commissioner (Appeals), which did not find favour with him and, therefore, he has recorded a conclusion saying that even on merits, the appellants do not have a strong case. However, mainly the appeal is dismissed as unavailable remedy.

. The assessee carried the matter before Income Tax Appellate Tribunal, Pune Bench, Pune, which authority also considered all 14 appeals together on one common issue i.e. levy of interest u/s 158-BFA (1) of the Act. After considering the rival contentions and the judicial precedents

placed before them, learned Members of ITAT dismissed the appeals and the conclusion can be read in para 33 thus:

"In view of the discussions in the above paragraphs, we hold that u/s 246-A of the Act, an appeal is not provided against levy of interest u/s 158-BFA(1). Since the appeal filed by assessee has been held as not maintainable, the other grounds relating to the quantum of interest have become infructuous. The order of CIT (A) is, therefore, upheld."

. Thus, the decision of Commissioner of Income Tax (Appeals) that remedy of appeal was not available to the assessee is upheld by the ITAT and the appellants are before us challenging the said decision.

3. Heard respective counsel.

4. We may state here itself the grounds of appeal those were pleaded by the assessee before Commissioner of Income Tax (Appeals):

"The order of the AO is arbitrary, contrary to the fact and bad in law.

The interest levied by the AO is just mechanical _____ and hence the same should be cancelled."

. On reference to Column 9 in Form No.35 of the appeal memo, the purpose of appeal can be judged.

"9. Where a return has been filed by appellant for the assessment year in connection with which the appeal is preferred, whether tax due on the income returned has been paid in full (if the answer is in the affirmative, give details	Appeal preferred is against the charging of interest u/s 158-BFA (1)
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of date of payment and amount paid) "

. The grounds of appeal are specifically reproduced because the only issue under consideration, for its adjudication, may require a reference as to the nature of challenge raised by the assessee in the appeal before CIT (Appeals).

5. Section 246-A is the provision relevant providing a remedy of appeals against orders. Advocate Shri Gangapurwala for all the assessees has placed reliance upon clauses (k) and (l) of sub-section (1) of the said section. We may usefully reproduce the part of said Section 246-A, which we feel necessary to be referred for the purpose of adjudication of these appeals:

"246-A - Appealable orders before Commissioner (Appeals) :

(1) Any assessee aggrieved by any of the

following orders (whether made before or after the appointed day) may appeal to the Commissioner (Appeals) against -

(a) an order against the assessee where the assessee denies his liability to be assessed under this Act or an intimation under sub-section (1) or sub-section 1B of Section 143, where the assessee objects to the making of adjustment, or any order of assessment under sub-section (3) of Section 143 or Section 144, to the 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.

(k) an order of assessment made by an Assessing Officer under clause (c) of Section 158-BC in respect of search initiated u/s 132 or books of account, other documents or any assets requisitioned

u/s 132-A on or after the 1st day of
January, 1997;

(1) an order imposing a penalty under
sub-section (2) of Section 158-BFA."

. As is done by the adjudicating authorities of the department, learned Assistant Solicitor General has placed reliance upon the text of Section 246-A to the extent reproduced hereinabove and has submitted that clause (a) provides an appeal against an order of assessment where the assessee denies his liability to be assessed, clause (k) is specific provision where an assessee can challenge an assessment u/s 158-BC (c) carried out after search initiated u/s 132. Thus, clause (k) enables a person, who is charged by the department of being guilty of undisclosed income and tax payable on such undisclosed income is assessed by the department u/s 158-BC (c) of the Act to prefer an appeal against such assessment.

Clause (1) provides an appeal in case penalty as u/s 158-BFA(2) is imposed while doing the assessment u/s 158-BC (c) about undisclosed income of an assessee. Learned Assistant Solicitor General emphasised that there is no clause, which provides an appeal against the order levying interest as empowered by Section 158-BFA (1).

. In order to meet this challenge, learned counsel for the appellants has placed reliance upon couple of judicial pronouncements.

DATE: 15.3.2007

. AIR 1987 Supreme Court, 438 - Central Provinces Manganese Ore Co. Ltd. V/s C.I.T. was relied upon by Advocate Shri Gangapurwala for dual purpose. He advanced two propositions on the basis of observations of the Hon'ble Apex Court within the reported judgment. He propounded that levy of interest is a process of assessment and, therefore, if an appeal is provided against assessment, by

virtue of Section 246-A of the Act, it must be said that appeal is also provided against part of assessment i.e. levy of interest. As a second line of argument, he submitted that only as against levy of interest, appeal is available, although the scope of such appeal is restricted to the denial of liability as laid down by the Hon'ble Apex Court.

. In para 8 of the said judgment, the Hon'ble Apex Court observed thus:

"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 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 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 relevant provision points to the nature of the levy. If that is borne in mind, it will be apparent that the levy of interest is part of the process of assessment."

. In view of the terminal part of the observations quoted hereinabove, it is the submission of Advocate Shri Gangapurwala that if interest is part and parcel of the assessment,

Section 246-A(1) Clause (k), which allows an order of assessment passed by the Assessing Officer under Clause (c) of Section 158-BC to be appealed against, also enables the assessee to prefer an appeal against the order of levy of interest. We feel that observations of the Supreme Court in para 9, which we are reproducing hereinbelow partly reply the argument advanced by Advocate Shri Gangapurwala:

"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 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."

. We read the observations in two parts. There need be no controversy that Clause (c) of Section 246 provides an appeal against an order where the assessee denies his liability to be assessed, for any of the reasons stated in those observations. We are of a considered view that the clause underlined for the purpose of emphasis i.e. "to dispute the levy in appeal" would be required to be read as disputing the levy of interest in an appeal challenging the assessment (original assessment and not only assessment of interest) on the ground that assessee is not liable to be assessed. If the original assessment itself is

challenged, in the said appeal, the assessee can certainly challenge the levy of interest. However, according to Advocate Shri Gangapurwala, the terminal part of this quotation hereinabove indicates that levy of interest only can be challenged, although to a limited extent that he is not liable to the levy at all. If the clause "to dispute levy in appeal" is read as understood by us and described hereinabove, in that case, the challenge to the levy of interest, although raised within the appeal against entire assessment would be limited. But it is the submission of Advocate Shri Gangapurwala that by virtue of the portions underlined for the purpose of emphasis in the two quotations hereinabove, enables the assessee to prefer an appeal challenging the levy of interest, without challenging the assessment, although to a limited extent i.e. he is not liable to levy of interest.

. In second sub-paragraph of para 9 of the

judgment, the Hon'ble Supreme Court reproduced observations of Karnataka High Court in the matter of National Products V/s Commissioner of Income-tax, Mysore - (1977) 108 ITR, 935, which read thus:

"All decided cases except one have uniformly taken the view that levy of interest 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."

. We feel that these observations of Karnataka High Court reproduced with approval by

the Hon'ble Apex Court support our interpretation of the observations in the first sub-paragraph of para 9 of the judgment. The appeal as against levy of interest is within the womb of appeal as against entire assessment. The observations that levy of interest is part of the process of assessment, we feel, are, therefore, required to be read also in the light of these further observations of the Supreme Court. Second sub-paragraph of para 9 is concluded thus;

"..... but if the assessee 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."

. These observations again support our understanding of the observations of the Supreme Court in earlier para 8 and earlier part of para 9

that appeal available as against levy of interest, as expressed by the Apex Court, is an appeal within the womb of an appeal against total assessment. We shall be fortified by further observations in third sub-para of para 9 and we quote:

"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.

.....

It is, therefore, clear that levy of penal interest under sections 139 and 215 is part of the assessment. When such penal interest is levied the assessee is "assessed", meaning thereby, he is subjected to the procedure for 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 of assessment, the assessee may altogether deny his liability to pay such interest 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 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." (emphasis added)

. After considering the decision of Gujarat High Court in the matter of Bhikhoobhai N. Shah V/s Commissioner of Income-tax, Gujarat V - (1978) 114 ITR, 197, which is also relied upon by Advocate Shri Gangapurwala, the Supreme Court concluded its observations thus:

"But we have no hesitation in endorsing the legal position which has commonly found favour with the two 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."

. These observations clearly distinguish that refusal to reduce or waive the penal interest is not part and parcel of the assessment and, therefore, is not at all assailable by an appeal. In the matter at hands, we are not concerned with such a situation, because it is not the case of assessee that he had prayed for reduction or waiver of the interest levied and such a prayer was rejected by the authorities.

6. In the case of Bhikhoobhai, a Division Bench of Gujarat High Court observed thus;

"No appeal lies against an order levying penal interest either under section 139 or section 215 or under section 217 if in the appeal the assessee merely challenges the quantum of penal interest or failure on the part of the Income-tax Officer to waive

penal interest or to reduce penal interest.

If, however, the assessee denies his liability to pay penal interest at all (a) on the ground that he was not liable to pay advance tax at all in the case of levy of penal interest under section 215 or section 217, or (b) contends that the conditions for the exercise of the power to levy penal interest under section 139 did not exist in his case, it would be open to him to challenge the order levying penal interest because in such an eventuality he would be challenging his liability to be assessed and would be denying his liability to be assessed at all to penal interest."

. It must be said that observations of Gujarat High Court do support the submission advanced by Advocate Shri Gangapurwala. The Division Bench of Gujarat High Court has expressed

in unambiguous words that appeal against levy of interest is available, although to a limited extent i.e. denying a liability to be assessed for levy of interest and that too by demonstrating that the conditions for exercise of the power to levy interest did not exist.

7. In fact, both the propositions advanced by Advocate Shri Gangapurwala that levy of interest is part and parcel of assessment and that appeal against levy of interest is available, although scope of such appeal may be limited to denial of liability to be assessed, stand supported by the case law relied upon by him. However, before applying those observations to the matter at hands, we are required to take into consideration as to whether the provisions under which appellants are assessed for penal interest are *peri materia* with the provisions regarding which the observations in the reported judgment are recorded.

. The cases relied upon interpret the provisions of Sections 139, 215 and 246 of the Act. The interest is chargeable u/s 215 of the Act when the advance tax self assessed by the assessee and paid is less than 75% of the advance tax as may be assessed by the Assessing Officer. Provision regarding interest, so far as Section 139 of the Act is concerned, is contained in sub-section (8) (a) of the said provision. The interest is levied u/s 139 (8) (a) for default in filing return on or before specified date. Hence, it must be said that Section 139 (8) (a) is more closer to Section 158-BFA. This is because the interest leviable under both these provisions is on account of default on the part of assessee to submit the return before specified date and before the time prescribed in the notice.

. However, we must keep in mind that Section 139 and Sections 158-BFA r/w 158-BC are placed in two different chapters of the Act. Section 139 is

comprised in Chapter XIV titled as "Process for Assessment", whereas Sections 158-BFA and 158-BC are included in Chapter XIV-B inserted by Act 22 of 1995 with effect from 1.7.1995. This chapter is titled as "Special Procedure for Assessment of Search Cases". While taking into consideration any provisions levying either tax or interest or penalty from the two chapters, we must bear in mind that the assessee covered by the two chapters do not stand on the same footing. The assessee covered under Chapter XIV is an ordinary assessee, whereas the assessee as covered under Chapter IXV-B is one, who is charged by the Department of being guilty of suppressing his income of having undisclosed income, which is required to be unearthed by search and seizure. It may not be out of place to say that the assessee of the second category is bound to be dealt with stringent law.

. On reference to Section 139 (8) (a) and more

particularly reference to the proviso to the said sub-section, it is evident that the Assessing Officer in such cases and under such circumstances, as may be prescribed, is empowered to reduce or waive the interest payable by any assessee under the said sub-section i.e. interest charged for default in submitting return before specified date. Although we have abandoned comparison of Section 215 with Section 158-BFA r/w 158-BC, because interest levied under the said provision is for reason different than default in submitting return within time limit, it may usefully be pointed out that sub-section (4) of Section 215 empowers the Assessing Officer to either reduce or waive the interest levied. On reference to Section 158-BFA(1), such discretion in favour of the Assessing Officer is conspicuously absent. Section 158-BFA(2) is regarding levying of penalty and it is evident from the text of said sub-section (2) that imposition of penalty is not mandatory and the said sub-section again contains a proviso laying

down the circumstances when no order imposing such penalty shall be made. Within sub-section (1) of Section 158-BFA, there is no provision empowering the Assessing Officer either to reduce the interest or to waive it or to come to a conclusion that it need not be levied. The provision is couched in the words "The assessee shall be liable to pay simple interest....." Thus, there is no option or escape from interest leviable u/s 158-BFA (1) to an assessee, who is being assessed only after raid and search u/s 132 of the Act.

. For the purpose of emphasis, we may refer to Section 158-BC (a) (ii), which is pertaining to the notice period and the same reads:

"(ii) in respect of search initiated or books of account or other documents or any assets requisitioned on or after the 1st day of January, 1997, serve a notice to such person requiring him to furnish within

such time not being less than fifteen days but not more than forty-five days,

as may be specified in the notice, a return in the prescribed form"

. The provision does not seem to keep any room enabling the Assessing Officer to grant time extension beyond forty-five days.

. The learned Commissioner of Income-tax (Appeals), therefore, appears to be justified in recording observations in para 9 that the language of Section 158-BC (a) (ii) does not indicate that the Assessing Officer had any discretion to grant time extension.

. For the reasons discussed hereinabove and in the light of distinction between the scheme of assessment of income, the tax payable, interest and penalty leviable against two types of assesseees, we

must say that whether observations in the cases relied upon apply to the case of present appellants itself is doubtful. However, we shall revert to this aspect a little later.

8. Even if the ratio relied upon by learned counsel Shri Gangapurwala from the judgment of Bhikhoobhai (supra) is to be held applicable to the case of present appellants, in that case, the appeal challenging levy of interest as u/s 158-BFA r/w Section 158-BC, would have a limited scope. The appellant will have to prefer an appeal by contending that the interest is not leviable. The assessee will be able to deny the liability of interest on only two grounds. This is because the levy of interest is founded on two pillars. Firstly, that assessee has undisclosed income, which is unearthed by search, and secondly, he has not submitted return within the time prescribed by the notice u/s 158-BC (a) served upon the assessee after such search. Naturally, the assessee will be

able to deny the liability towards levy of interest only by contending that he has no undisclosed income or that he has submitted return within the time prescribed by the notice. It is not the case of present appellants that they have no undisclosed income (It is for the purpose of discussion of these reasons that we have reproduced grounds of appeal raised by appellants before the Commissioner, I.T. (Appeals) in para 4 of this judgment). They have come with a case that interest levied by Assessing Officer is just mechanical. They have not come with a case that they are not liable for levy of interest, because they have submitted return within the time limit prescribed by the notice. In the absence of any such grounds in the appeal before the Commissioner, even if we are to accept entire interpretation of the word "assessment" as tried to be derived by Advocate Shri Gangapurwala from the two reported judgments relied upon, the appeal was unsustainable since it did not challenge the levy of interest on

the ground that appellants were not liable for such levy (because they had submitted the return within prescribed period).

. In the matter at hands, the grievance of the appellants is mainly based on the fact that they could get the copies of the documents seized only on 1.11.1999 and they had been pursuing for the same by communications dated 9.10.1998; 3.3.1999; 6.4.1999 and 5.7.1999. Unfortunately, for the appellants, admittedly they submitted the returns only in August, 2000, which is not within forty-five days since the date of supply of copies of documents. However, as described hereinabove, unfortunately for the appellants, the Assessing Officer has no discretion either to reduce or to waive the interest and reduction of interest can only be by reduction of period. The grounds as to why return was submitted late, therefore, may not present a sustainable appeal as contemplated by the observations in the reported judgments, relied upon

by Advocate Shri Gangapurwala. The appellants may feel that they are pitted against a harsh legislation, but that is what it is.

09. In the matter at hands, the search u/s 132 was effected on 24.9.1998. Notice u/s 158-BC(a) was issued on 20.9.1999 granting 16 days time. Time extension, if any, granted by the Assessing Officer would be illegal if it was beyond forty-five days, because the statute does not permit him to grant a period exceeding forty-five days for directing the assessee to submit the return. It was open for the appellants to challenge the entire assessment and challenge the levy of interest within the womb of it. It was open for the appellants to challenge the levy of interest, if for the sake of arguments, the observations in Bhikhoobhai's case are available to them, on the limited ground that they are not liable for levy of interest because the conditions for the exercise of the power to levy penal

interest as contemplated by Section 158-BFA did not exist i.e. he submitted the return within the period prescribed or that he has no undisclosed income. The grounds of appeal are not to this effect and, therefore, on the facts, the appeals of the appellants are not sustainable even if they are considered entirely supported by the observations in the two reported judgments.

. That time extension beyond forty-five days shall have no effect, because grant of such extension will be against the legal provision. Even if we are to refer to Section 139 (a), we find words inserted in the said provision indicating that time extension, if any, granted by the Assessing Officer is inconsequential so far as the issue of levy of interest because of default in submitting the return within prescribed limit. The clause inserted is "whether or not the Assessing 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".

10. The learned Members of ITAT in para 11 of the judgment have referred to observations of the Full Bench of this High Court in the matter of CIT V/s Daimler Benz A.G. (1977) 108 ITR 961 to the effect that unless the concerned enactment provides for an appeal, the litigant would have no right of appeal. Taking a clue from these observations, it was submitted by learned Assistant Solicitor General by referring to Section 246-A and more particularly Clauses (k) and (l) that the said provision provides an appeal against assessment as made u/s 158-BC. It provides appeal against an order imposing penalty under sub-section (2) of Section 158-BFA. But it does not provide an appeal against levying of interest u/s 158-BFA (1). In fact, we find that these Clauses (k) and (l) are also inserted in Section 246 as Clauses (d-a) and (d-b) by Act 14 of 1997 with effect from 1.1.1997

thereby making an appeal before Deputy Commissioner available, which formerly was available only before Commissioner (Appeals). The learned Members of ITAT felt that observations of the Supreme Court in the matter of Central Provinces Manganese Ore Co.Ltd. (supra) were not applicable to the cases of appellants, because no particular section of the Income-tax Act was specifically mentioned in relation to the word "assessment" and, therefore, the said word was given wide meaning by the Supreme Court so as to include the levy of interest. (These observations in para 24 of the impugned judgment have a reference to the observations in para 8 of the reported judgment). On the other hand, word "assessment" as mentioned in Clause (k) of Section 246-A(1) is with reference to specific Clause (c) of Section 158-BC wherein the word "assessment" refers only to the assessment of undisclosed income and determination of tax payable therein.

. Here we intend to come back to the issue, which we left incomplete in para 8. We have taken into consideration other distinguishing features as between Section 139 and Section 158-BFA in the said para and the crucial distinction, which makes the observations of the Supreme Court unavailable to the appellants, can be discussed as under.

. As already stated, Sections 139 and 158-BFA are placed in different chapters of the Act, Section 139 is pertaining to return of income, Section 142 is pertaining to inquiry before the assessment and Section 143 is regarding "assessment" as under Chapter XIV. We intend to quote opening part of Section 143:

"143. Assessment :

(1) where a return has been made under Section 139, or in response to a notice under sub-section (1) of Section 142 :-

(i) if any tax or interest is found due on the basis of such return "

. We feel that the opening part of Clause (i) indicates that assessment as contemplated by Section 143 as contained in Chapter XIV includes assessment of leviable interest. As against this, Section 158-BC, which is the provision for procedure for block assessment and more particularly Clauses (b) and (c), it is evident that procedure for block assessment of an assessee, who is being assessed after search u/s 132 does not include within its fold assessment of leviable interest. By virtue of Clause (b), the Assessing Officer is required to proceed to determine the undisclosed income of the block period in the manner laid down by Section 158-BB. By Clause (c), the Assessing Officer on determination of undisclosed income of the block period is required to pass an order of assessment and determine the

tax payable by the assessee on the basis of such assessment. IT is evident that determination of interest that can be levied for default in submitting return within prescribed limit is not the part and parcel of the assessment u/s 158-BC as in the case of assessment u/s 143.

. Thus, even if the word "assessment" for the purpose of Section 139 may include within its fold the interest levied as observed by the Supreme Court in the reported judgment, we are afraid the same analogy may not be applicable to the interest levied u/s 158-BFA, because such levy of interest is not part and parcel of "assessment" as u/s 158-BC. In fact, separate section is carved out as 158-BFA for levying interest and imposing penalty. We are, therefore, of a considered view that the judgments relied upon do not help the appellants to persuade us and believe that levy of interest as u/s 158-BFA is part of assessment and, therefore, appeal as contemplated by Clause (k) of Section

246-A(1) would enable the assessee to challenge levy of interest independently.

. We are, therefore, in agreement with the view taken by ITAT that levy of interest u/s 158-BFA (1) is not appealable u/s 246-A. We may hasten to add that the levy of interest can be appealed with full force and all possible contentions, provided such a challenge is together with challenge to assessment as u/s 158-BC.

11. For the reasons discussed hereinabove, we are inclined to confirm that the appeals filed by the appellants before the Commissioner (Appeals) were not maintainable as such remedy of appeal against levy of interest only is not provided by the statute. All the appeals, therefore, are dismissed.

(M.G. Gaikwad, J.)

(N.V. Dabholkar, J.)

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