from his customers or that he had already paid sales tax on the purchases made by him from his suppliers who were duly registered, is not a valid defence nor can he escape liability under the Act on these grounds."

That was also a case of an unregistered dealer and a similar plea, as has been raised in the instant case, was repelled by the learned Judge. That judgment lends support to the view that we have taken.

(5) For the reasons given above, we answer the question, referred to us for opinion, in the negative. The petitioner will pay costs to the respondent. Counsel's fee Rs. 100.

N.K.S.

INCOME TAX REFERENCE

Before Harbans Singh, C.J. and Bal Raj Tuli, J.

RAMESHWAR PERSHAD,—*Applicant.*

versus

THE COMMISSIONER OF INCOME TAX, DELHI-III, HARYANA & H. P., NEW DELHI,—*Respondent.*

Income Tax Reference No. 46 of 1971.

February 19, 1973.

Income-tax Act (XLIII of 1961)—Sections 2(43), 210, 212, 218 and 221—Advance tax—Penalty for non-Payment of—Whether can be imposed under section 221.

Held, that on the language of section 218 of the Income-tax Act, 1961, it is clear that an assessee, who does not pay on the specified date any instalment of advance tax that he is required to pay under section 210 nor sends an estimate or a revised estimate of the advance tax payable by him under sub-section (1) or sub-section (2) of section 212 of the Act, is deemed to be an assessee in default in respect of such instalment or instalments. Advance tax is not a new category of tax. It is really income-tax payable in advance before regular assessment is made and hence within the contemplation of 'tax' as defined in section 2(43) of the Act. Penalty can be imposed on an assessee who is in default or is deemed to be in default in making a payment of tax under section 221 of the Act.

Reference made under section 256(1) of the Indian Income Tax Act by the Income Tax Tribunal on 30th August, 1971, for opinion on the following question of law in R.A. No. 23/71-72 arising out of I.T.A. No. 225 of 1969-70 for the assessment year 1968-69 :—

"Whether on the facts and in the circumstances of the case, the penalty was properly levied under section 221 for the default in the payment of advance tax?".

Nemo, *for the applicant.*

D. N. Awasthy and B. S. Gupta, Advocates, *for the respondent.*

JUDGMENT

Judgment of the Court was delivered by :—Tuli, J.—The assessee-applicant has not appeared to argue this petition nor has any counsel appeared on his behalf. This case has been on the daily list since August, 1972, and in spite of that the applicant has not made any arrangement for the prosecution of this petition. Consequently, we have heard the learned counsel for the Revenue in order to answer the question referred to us for decision.

(2) The assessee was issued a notice of demand under section 156 of the Income Tax Act, 1961 (hereinafter called the Act), for payment of advance tax under section 210 of the Act in form No. 28 in pursuance of the order of the Income Tax Officer dated July 28, 1967. The notice was served on the assessee on September 4, 1967. The first instalment of Rs. 8,129.00 was due on December 1, 1967, and the second instalment of similar amount was due on March 15, 1968. The first instalment of Rs. 8,129.00, which fell due on December 1, 1967, was not paid by the assessee and notice under section 221(1) of the Act was issued to him on December 15, 1967, requiring him to show cause on December 26, 1967, as to why penalty be not imposed for non-payment of the amount of Rs. 8,129.00. The notice was served upon the assessee on January 4, 1968, but the instalment of Rs. 8,129.00 was not paid by him even after the service of the show-cause notice nor any written explanation was submitted for non-payment of Rs. 8,129.00. Another show-cause notice was issued to him on February 24, 1968, for March 6, 1968, and was served upon the assessee on February 27, 1968, but he neither gave any reply nor paid the amount. The assessee was consequently held to be an assessee in default under section 218 of the Act and a penalty of Rs. 813.00, being 10 per cent of the amount in default, was imposed by order dated March 6, 1968. The assessee filed an appeal which was rejected by the Appellate Assistant Commissioner of Income Tax on October 15, 1969. The assessee then filed an appeal before the Income Tax Appellate Tribunal which was dismissed on March 23, 1971. On the application of the assessee made under section 256(1) of the Act, the Income Tax Appellate Tribunal has referred the following question of law to this Court for opinion:—

> Whether on the facts and in the circumstances of the case, the penalty was properly levied under section 221 for the default in the payment of advance tax ?"

(3) The only point argued before the Appellate Assistant Commissioner of Income Tax and the Income Tax Appellate Tribunal was that advance tax was not 'tax' as defined in section 2(43) of the Act and, therefore, the assessee could not be deemed to be an assessee in default and no penalty could be imposed under section 221 of the Act. The learned Tribunal relied on a Division Bench judgment of the Mysore High Court in *S. Narayanappa and Brothers* v. *Income Tax Officer, Urban Circle, Bangalore and another* (1) which was a case under the Indian Income Tax Act, 1922, wherein it was held that penalty under the provisions of section 46(1) and (1A) of the Indian Income Tax Act, 1922, could be levied on an assessee who committed default in the payment of advance tax demanded under section 18A of that Act. A Division Bench of the Allahabad High Court considered this matter in *Smt. Kusum Kumari* v. *Union of India and others* (2) and held that penalty could be imposed under section 221 of the Act on an assessee who committed default in the payment of advance tax. The relevant observations are as under :—

> "There is no dispute that so far as a default in paying tax other than advance tax is concerned, section 221 will cover such cases. But does that exhaust the scope of section 221 ? Does the scope extend to a default in paying advance tax ? Section 218 lays down the different kinds of cases when an assessee, who has not paid advance tax, is deemed to be in default. No provision of the Act has been placed before us indicating how such an assessee is to be dealt with. Section 273 bears the marginal note 'False estimate of or failure to pay advance tax'. But, when we read the body of the section, the penalty contemplated there appears to refer to an untrue estimate of advance tax furnished by the assessee and to the failure of the assessee to furnish an estimate of advance tax. It does not include a case where an assessee fails to pay the advance tax required of him by the Income Tax Officer under section 210 or upon an estimate furnished by him. Those are the cases mentioned in section 218. It seems

(1) (1959) 37 I.T.R. 257.
(2) (1972) 85 I.T.R. 19.

to us that in order to give effect to section 218, the expression 'tax' in section 221 should be construed widely so as to include therein advance tax also.

We may point out that rule 38 of the Income Tax Rules, 1962, provides for the form of a notice of demand in respect of advance tax served upon the assessee in pursuance of an order under section 210. The notice is in Form No. 28. Paragraphs 6 and 7 of the statutory form warn the assessee that if the instalments of the advance tax are not paid on or before the due dates, the assessee will be treated to be in default in respect of such instalments and will be liable under section 221 to a penalty. On behalf of the revenue, we have been referred to *Narayanappa & Brothers* v. *Income Tax Officer, Bangalore* (1) (supra). In that case the Mysore High Court laid down that the power to impose a penalty under section 46(1) and section 46(1A) could be employed in the case of an assessee who had defaulted in paying advance tax under section 18A. It is pointed out by the petitioner that the decision relates to section 18A, Indian Income Tax Act, 1922, and cannot be applied to a situation obtaining under the new Act. It is not necessary for us to weigh the merits of that contention, because we are satisfied that upon the provisions of the new Act also the position remains the same.

In our opinion, section 221 of the Income Tax Act, 1961, applies to a default in payment of advance tax."

A Division Bench of the Gujarat High Court in *Swastik Engineering Works* v. *Commissioner of Income Tax, Gujarat* (3) also held that "advance tax should be treated as a tax for the purpose of applying the provisions of section 221 of the Income Tax Act, 1961, and the penalty contemplated by section 221 of the Act can be levied in the case of a default made by the assessee in the payment of advance tax demanded under section 210 of the Act. If the assessee fails to make payment of advance tax on the specified date, he would be in default, and so long as this liability is not discharged, the default

(3) (1973) 87 I.T.R. 116.

would continue to subsist within the meaning of section 221 of the Act even beyond the close of the financial year." We are in respectful agreement with the observations of the learned Judges in these cases and on the language of section 218 of the Act we have no doubt that an assessee, who does not pay on the specified date any instalment of advance tax that he is required to pay under section 210 nor sends an estimate or a revised estimate of the advance tax payable by him under sub-section (1) or sub-section (2) of section 212, is deemed to be an assessee in default in respect of such instalment or instalments. Advance tax is not a new category of tax. It is really income tax payable in advance before regular assessment is made and under section 221 of the Act penalty can be imposed on an assessee who is in default or is deemed to be in default in making a payment of tax. Since the assessee in the present case failed to pay the instalment of the advance tax due on December 1, 1967, and did not submit any estimate or revised estimate under sub-section (1) or sub-section (2) of section 212 of the Act, he was rightly deemed to be an assessee in default in respect of that instalment.

(4) The next question for consideration is whether penalty could be imposed on the assessee in the instant case under section 221 of the Act which reads as under :—

> "221. (1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable to pay by way of penalty, an amount which, in the case of a continuing default, may be increased from time to time, so, however, that the total amount of penalty does not exceed the amount of tax in arrears :
>
> Provided that before levying any such penalty the assessee shall be given a reasonable opportunity of being heard.
>
> (2) Where as a result of any final order the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded."

In section 220(1) provision is made that any amount, *otherwise than by way of advance tax*, specified as payable in a notice of demand under section 156 shall be paid within thirty-five days of the service of the notice at the place and to the person mentioned in the notice. Sub-section (2) provides that if the amount specified in any notice of demand under section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at nine per cent per annum from the day commencing after the end of the period mentioned in sub-section (1), and sub-section (4) provides that if the amount is not paid within the time limited under sub-section (1) or extended under sub-section (3), as the case may be, at the place and to the person mentioned in the said notice, the assessee shall be deemed to be in default. It is clear from the language of this section that it applies only to amounts other than advance tax. Section 221(1) enacts that penalty will be payable in addition to the amount of arrears and the amount of interest payable under sub-section (2) of section 220. This language lends support to the construction that the failure to pay only the amounts mentioned in section 220 of the Act will invite penalty proceedings under section 221(1). The section can also mean that an assessee, who is in default or is deemed to be in default, is liable to pay the penalty mentioned in section 221 which will be in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220. The question is which interpretation is to be preferred as being in consonance with the object of the Legislature. The learned counsel for the revenue has invited our attention to section 201 of the Act which provides that any person, company or its principal officer, as provided in sections 191 to 195, who is required to deduct the income tax under section 194 of the Act, does not deduct or after deducting fails to pay tax as required by or under this Act, shall be deemed to be an assessee in default in respect of the tax and shall be liable to pay penalty under section 221 of the Act, but before such penalty is charged, the Income Tax Officer has to be satisfied that such person or principal officer or company, as the case may be has without good and sufficient reasons failed to deduct and pay the tax. Such an assessee in default is not dealt with in section 220(2) of the Act and if penalty can be levied on such an assessee under section 221, it is apparent that the provisions of section 221 were meant to apply

to all assessees in default or deemed to be in default under various provisions of the Act including sections 201, 218 and 220(4) of the Act. Another indication leading to the conclusion that penalty can be imposed on an assessee in default for non-payment of advance tax is contained in Form 28 in which notice is issued to the assessee for payment of advance tax. This form of notice is prescribed under rule 38 and is statutory in nature as the rules and forms are laid before the Houses of Parliament under section 296 of the Act for a total period of thirty days. It has been held by their Lordships of the Supreme Court in *Karimtharuvi Tea Estates Ltd. and another* v. *State of Kerala and others* (4) that such rules have effect as if enacted in the Act. Form 28 prescribed under rule 38 has, therefore, the effect as if it was enacted in the Statute itself. Paragraphs 6 and 7 of the form read as under :—

> "6. If not having made an estimate of the advanie tax payable by you under section 212(1) or (2) you do not pay any instalment of tax on or before the date on which as specified in paragraph 3 of this notice it becomes due, you will be treated as in default in respect of such instalment and will be liable under section 221 to a penalty which may be as great as the amount of the instalment due. If, however, you have under section 213 deferred the payment of a part of the advance tax and have informed the Income Tax Officer accordingly, you will not be treated as in default in respest of sush tax until the date of deferment.
>
> 7. If, under section 212(1) or (2) you send to the Income Tax Officer an estimate of the advance tax payable by you, but do not pay any instalment of tax in accordance therewith on or before the appropriate date, you will be treated as in default in respect of such instalment and will be liable under section 221 to a penalty which may be as great as the amount of the instalment."

These two paragraphs leave no doubt that the Legislature intended that if an assessee committed default in the payment of any instalment of advance tax, he was liable to penalty under section 221 of

(4) (1963) 48 I.T.R. 83.

the Act. This form expressly deals with advance tax and no other tax and, therefore, provides the the strongest clue to the interpretation of section 221 of the Act, that is, it applies to all assessees in default or deemed to be in default and that the penalty imposed under section 221 is in addition to the arrears and the interest payable by them under sub-section (2) of section 221 of the Act.

(5) For the reasons given above, our answer to the question referred to us for opinion is in the affirmative, that is, in favour of the Revenue and against the assessee. Since there is no appearance on behalf of the assessee, we make no order as to costs.

B. S. G.

FULL BENCH

Before R. S. Narula, C.J., Prem Chand Jain and Muni Lal Verma, JJ.

AMAR NATH, ETC.,—*Appellants.*

versus

MUL RAJ, ETC.,—*Respondents.*

Letters Patent Appeal No. 397 of 1971.

January 27, 1975.

Limitation Act (XXXVI of 1963)—Section 5—Expression "sufficient cause"—Meaning of—Punjab High Court Rules and Orders, Volume V, rule 3 of Chapter 2-C—Practice of the High Court in receiving and admitting Letters Patent Appeals against the requirement of rule 3—Whether a "sufficient cause" for extension of prescribed period of limitation.

Held, that the expression "sufficient cause" in section 5 of the Limitation Act, 1963 is not defined in the Act. It means a cause which is beyond the control of the party invoking the aid of section 5 of the Act. The test, whether or not a cause is sufficient, is to see whether it is a *bona fide* cause. Nothing shall be taken to be done *bona fide* or in good faith which is not done with due care and attention. Subject to this test, the expression "sufficient cause" should receive liberal construction so as to advance substantial justice. When no negligence nor in action nor want of *bona fider* is imputable to a party for the delay in filing an appeal, it would constitute sufficient cause.