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**(1996) 02 P&H CK 0006**

**In the Punjab And Haryana At Chandigarh**

**Case No :** IT Reference No's. 64 and 65 of 1981 & Income-tax Reference No's. 64 and 65 of 1981

Commissioner of Income Tax

APPELLANT

Vs

Rajesh Talkies

RESPONDENT

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**Date of Decision :** 08-02-1996

**Acts Referred:**

Income Tax Act, 1961 — Section 139, 139(1), 139(2), 139(4), 14

**Citation :** (1996) 87 TAXMAN 204

**Hon'ble Judges :** N.K. Sodhi, J; Ashok Bhan, J

**Bench :** Division Bench

**Advocate :** R.P. Sawhney, Ms. Aradhna Sawhney and Atul Thubal, for the Appellant; B.S. Gupta and Sanjay Bansal, for the Respondent

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## Judgement

N.K. Sodhi, J.—The assessment years in question are 1968-69 and 1969-70. The assessee-firm did not file returns of its income for these years within the time allowed u/s 139(1) of the income tax Act, 1961 ("the Act"). These returns could be filed up to 30-6-1968 and 30-6-1969 respectively. The assessee filed application on 30-6-1969 seeking extension of time up to 31-12-1969 for filing the returns for both the years. The ITO did not pass any order on the applications and no further application for extension was received from the assessee nor did it file the returns for the two years. The ITO issued notices on 12-7-1971 u/s 148 of the Act for the assessment years in question which were served upon the assessee on 22-9-1971. These notices were issued on the assumption that its income had escaped assessment on account of its non-filing of the returns within the time prescribed u/s 139. The assessee thereafter filed the returns on 17-3-1973 and the assessment for both the years was framed on 30-3-1973 u/s 147 of the Act. The ITO also levied interest of Rs. 5,325 and Rs. 5,556 for the two years respectively for late filing of the returns. The assessee then filed applications u/s 154 of the Act with a request to delete the interest charged as, according to it, the same was not chargeable. These applications were rejected and the ITO held that the charging of interest was in order. Being

aggrieved by the order of the ITO dismissing the applications for rectification u/s 154, the assessee filed two appeals before the A AC who upheld the order of the ITO and observed that the returns filed by the assessee were not u/s 139(1) as they had not been filed by 30-6-1968 and 30-6-1969. He further observed that the returns could not be deemed to have been filed u/s 139(2) read with section 148 as these were not filed within the time allowed by notices issued u/s 148. It was pointed out that the returns could be treated to have been filed u/s 139(4) and this section duly provided for the charging of interest. The assessee filed second appeal before the Tribunal, Chandigarh. The Tribunal held that the returns in question had neither been furnished within the period prescribed u/s 139(1) nor u/s 139(4) and, therefore, interest was not leviable. It accepted the assessee's appeals holding that the mistake committed by the ITO was apparent from the record and that the assessee was not liable to pay interest and that the applications u/s 154 deserved to be allowed. The rectifications sought by the assessee were thus directed to be made. On an application filed by the department u/s 256(1) of the Act, the Tribunal declined the reference as, according to it, no question of law arose from its decision. The petitions filed by the revenue u/s 256(2) were allowed by this Court and the Tribunal has referred the following two questions of law for our opinion: 1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in ignoring the fact that the return was filed after the issue of notice u/s 148 of the income tax Act which contained all the requirements of a notice u/s 139(2), including the provision of charging of interest for delay in filing the returns?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the question involved in this case regarding the charging of interest was not a debatable point and hence not beyond the scope of section 154 of the income tax Act?

We are of the view that the first question referred to us has not been properly framed and the same is recast as under:

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was not liable to pay interest for the late filing of returns for the assessment years 1968-69 and 1969-70?

Re. Question No. 1

2. The argument of Mrs. R.P. Sawhney, the senior advocate appearing for the department is that the notice issued u/s 148 should be deemed to be a notice u/s 139(2) and the returns filed in response thereto should also be deemed to have been filed under the latter provision. It is then urged that all the provisions of the Act will consequently apply to such returns and since these were not filed within the time allowed by the notice, the assessee became liable to pay interest in terms of the proviso to sub-section (2) of section 139 as it then stood. The argument further is that the ITO while assessing the escaped income u/s 147 frames the assessment by resorting to section 141 of the Act and that he has no

power to make an independent assessment u/s 147. He referred to the Full Bench decision of the Kerala High Court in *Lally Jacob Vs. Income Tax Officer and Others*, and to a Division Bench judgment of the Calcutta High Court in *Burdwan Wholesale Consumers' Co-operative Society Ltd. Vs. Commissioner of Income Tax*, in support of his contention. Mr. B.S. Gupta, the senior advocate appearing for the assessee, on the other hand, contended that the legal fiction provided in section 148 was limited only for the purpose of treating the notice issued there under to the one issued under sub-section (2) of section 139 and that the return filed in pursuance thereto cannot be deemed to have been filed u/s 139. His argument is that the returns were filed by the assessee u/s 147 read with section 148 and that the ITO has an independent power to frame an assessment u/s 147 and for this purpose he has not to resort to the provisions of section 143 of the Act. Neither section 147 nor any other provision provided for charging of interest and the Tribunal, according to the counsel, was right in holding that the assessee was not liable to pay, interest for late filing of returns. Mr. Gupta drew support from two Division Bench judgments of the Calcutta High Court in *Koppind Pvt. Ltd. Vs. Commissioner of Income Tax*, and *Commissioner of Income Tax Vs. Banshidhar Jalan and Sons*, He also relied on a Division Bench judgment of the Gauhati High Court in *Commissioner of Income Tax Vs. Triple Crown Agencies*, .

Before we examine the rival contentions of the parties, it is necessary to notice the relevant provisions of section 139 as they then stood for the two assessment years in question and also the provisions of section 148. They read as under:

139. Return of income. -(1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income tax, shall furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed-

(a) In the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act, includes any income from business or profession, before the expiry of six months from the end of the previous year or where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of June of the assessment year, whichever is later;

(b) in the case of every other person, before the 30th day of June of the assessment year:

Provided that, on an application made in the prescribed manner, the income tax Officer may, in his discretion, extend the date for furnishing the return-

(i) In the case of any person whose total income includes any income from business or profession the previous year in respect of which expired on or before the 31st day of December of the year immediately preceding the assessment

year, and in the case of any person referred to in clause (b), up to a period not extending beyond the 30th day of September of the assessment year without charging any interest;

(ii) In the case of any person whose total income includes any income from business or profession the previous year in respect of which expired after the 31st day of December of the year immediately preceding the assessment year, up to the 31st day of December of the assessment year without charging any interest; and

(iii) up to any period falling beyond the dates mentioned in clauses (i) and (ii), in which case, interest at six percent per annum shall be payable from the 1st day of October or the 1st day of January, as the case may be," of the assessment year to the date of the furnishing of the return-

(a) in the case of a registered firm or an unregistered firm which has been assessed under clause (b) of section 183, on the amount of tax which would have been payable if the firm had been assessed as an unregistered firm, and

(b) in any other case, on the amount of tax payable on the total income reduced by the advance tax, if any, paid or by any tax deducted at source, as the case may be.

(2) In the case of any person who, in the income tax Officer's opinion, is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the income tax Officer may, before the end of the relevant assessment year, serve a notice upon him requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:

Provided that on an application made in the prescribed manner the income tax Officer may, in his discretion, extend the date for the furnishing of the return, and when the date for furnishing the return, whether fixed originally or on extension, falls beyond the 30th day of September or, as the case may be, the 31st day of December of the assessment year, the provisions of sub-clause (iii) of the proviso to subsection (1) shall apply.

(3) and (4) \*\*\*\*

(4)(a) Any person who has not furnished a return within the time allowed to him under sub-section (1) or sub-section (2) may, before the assessment is made, furnish the return for any previous year at any time before the end of the period specified in clause (b), and the provisions of clause (iii) of the proviso to sub-section (1) shall apply in every such case.

(b) the period referred to in clause (a) shall be-

(i) where the return relates to a previous year relevant to any assessment year

commencing on or before the 1st day of April, 1967, four years from the end of such assessment year;

(ii) where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April, 1968, three years from the end of the assessment year;

(iii) where the return relates to a previous year relevant to any other assessment year, two years from the end of such assessment year;

(5) to (7) \*\*\*\*

(8) Notwithstanding anything contained in clause (iii) of the proviso to sub-section (1), the income tax Officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any person under any provision of this section.

148. Issue of notice where income has escaped assessment. -(1) Before making the assessment, reassessment or recomputation u/s 147, the income tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

(2) The income tax Officer shall, before issuing any notice under this section, record his reasons for doing so.

The returns as filed by the assessee on 17-3-1973 were obviously not filed within the time prescribed by sub-section (1) of section 139. These returns were also not filed under sub-section (4) of section 139 either because those could be filed only up to 31-3-1972 for both the years. What is contended on behalf of the revenue is that the returns will be deemed to have been filed under sub-section (2) of section 139 because of the legal fiction contained in section 148 as the returns were filed in response to the notice received by the assessee there under. There can be no quarrel with the proposition that the notice issued u/s 148 is to be treated as one issued under sub-section (2) of section 139. This is clear from the bare provisions of section 14. The question that arises is that would the return filed in response to the notice be also deemed to have been filed u/s 139(2) or will it be a return filed u/s 147 read with section 148. Having given our thoughtful consideration to the rival contentions of the parties, we are of the opinion that the return filed in response to a notice issued u/s 148 is not to be deemed to be a return u/s 139(2) and the returns filed under the two provisions cannot be equated with each other. Section 147 as its very heading suggests, makes a provision for assessing income that has escaped assessment. In the normal course assessee files a return of his income under any of the provisions of section 139 and his income is assessed by the ITO u/s 143. If any income escapes assessment, the ITO then proceeds to assess or reassess the same u/s 147. The procedure required for making assessment u/s 143 or for assessing the

escaped income u/s 147 has to be the same and it is for this limited purpose that section 148 provides that before any escaped income is to be assessed or reassessed, the assessee shall be served with a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139. The Legislature has not indeed provided any separate procedure for assessing the escaped income but just adopted the one prescribed for an assessment u/s 139(2) read with section 143 by saying that the notice issued u/s 148 will be treated as if it was issued u/s 139(2). Section 148 does not talk of the filing of any return nor does it equate the return filed in pursuance thereof to the return filed under sub-section (2) of section 139. The argument that the ITO has no independent power of making an assessment u/s 147 and that whenever escaped income is assessed under this provision, the ITO has to resort to the provisions of section 143 for the purpose of making an assessment cannot be accepted in view of a binding precedent of this Court in CIT v. Usha Aggarwal [1989] 178 ITR 406. It has been held in this case that there is a clear distinction between an assessment u/s 143 and u/s 147 read with section 148 and that an assessment u/s 147 does not depend upon the authority of section 143 for its completion. The learned Judges have further held that section 147 itself authorises the ITO to assess, reassess or recompute the escaped income and the power in section 147 to make an assessment is quite independent of the power to make the assessment u/s 143. Thus, as held in this case, the assessment u/s 147 is a specific different from the assessment u/s 143 and both have been treated differently under the Act.

3. In Koppind (P.) Ltd." s case (supra), the business loss computed on the basis of a return filed in response to a notice u/s 148 was not allowed to be carried forward. Section 80 of the Act provides that the loss determined in pursuance of a return filed u/s 139 alone shall be carried forward. The question, that arose before the Calcutta High Court was as to whether the return filed by the assessee in pursuance of a notice u/s 148 could be said to have been filed u/s 139(2) so as to entitle the assessee to carry forward its business loss. The income tax authorities including the Tribunal had disallowed the claim of the assessee holding that the return filed by it after receipt of a notice u/s 148 could not be said to have been filed u/s 139(2) and, therefore, it was not allowed to carry forward its loss. The learned Judges upholding the view of the Tribunal and while deciding the matter in favour of the revenue observed as under:

We consider that, if there be any fiction u/s 148, that fiction has limited use as machinery for carrying out the process of assessment or reassessment of the escaped income, as the case may be, u/s 147. Assessment in pursuance of a notice u/s 139 and assessment in pursuance of a return u/s 148 read with section 147 have distinct and separate character and purpose. The purpose of section 139 is not only to assess the income but also to assess losses and secure to the assessee, the benefits or reliefs as the law avails. But, the purpose of assessment u/s 147, for which the enabling provision is section 148, is to make up for any escapement of assessment." (p. 233)

Again, it was observed as under:

Section 148 only seeks to assess what has not been assessed and not brought to tax; and as the machinery to effectuate that function, it can avail itself of the same machinery available in a proceeding u/s 139. This does not mean a total and complete equation between sections 139(2) and 148. Nor does it allow the provisions of section 148 to surpass its purpose." (p. 236)

The learned Judge also considered an earlier Division Bench judgment of their Court in *Burdwan Wholesale Consumers' Co-operative Society Ltd.*" s case (supra) and did not follow the same because an earlier Full Bench decision of the Calcutta High Court had not been brought to the notice of the learned Judges deciding *Burdwan Wholesale Consumers' Co-operative Society Ltd.*"s case (supra). In *Koppind (P.) Ltd.*"s case (supra), the learned Judges followed the principles enunciated in the earlier Full Bench decision in *In Re: Satyendra Mohan Roy Chowdhury and Others*, . In the ultimate analysis, the findings in *Koppind (P.) Ltd.*"s case (supra) were recorded in the following words:

...We follow the principle as laid down by this Court in *Satyendra Mohan Roy Chowdhury* AIR 1930 Cal. 627 (FB), and, by applying the same, hold that by filing a loss return in pursuance of a notice u/s 148 but beyond the time available for filing a voluntary return u/s 139(4) the assessee cannot be entitled to determination of the loss for the purpose of carry forward and set off, because section 80 has a clear mandate that it is only the loss determined in pursuance of a return filed u/s 139 that is eligible for carry forward and set off." (p. 238)

We are in respectful agreement with the view expressed by the learned Judges in *Koppind (P.) Ltd.*"s case (supra). The same view was taken by another Division Bench of the Calcutta High Court in *Banshidhar Jalan & Sons* "case (supra). In *Triple Crown Agencies* "case (supra), the assessee did not file its return of income under any of the sub-sections of section 139 and it was only in response to a notice received u/s 148 that a return of income was filed. The ITO while assessing the income also levied interest under sections 139 and 217(1A) of the Act as the same could be levied only on a regular assessment. The assessee filed an appeal before the Commissioner and contended that no interest could be levied as the assessment made u/s 148 was not a regular assessment as defined in section 2 (40) of the Act. This contention was upheld and a further appeal filed before the Tribunal was dismissed against the order of the lower appellate authority. On a reference made to the High Court the question that arose was whether the assessment made u/s 147 read with section 148 was an assessment u/s 143 so as to be termed as "regular assessment" within the meaning of section 2(40). While holding that it was not so, the learned Chief Justice observed as under:

A reading of the provisions in sections 139, 143, 147 and 148 of the Act would make it clear that the assessment or reassessment contemplated u/s 147 is quite different in nature and content from the assessment u/s 143. Assessment or

reassessment u/s 147 can be made only after issue of a notice u/s 148. The provision in section 148 declaring that, as far as may be, the provisions of the Act shall apply as if the return were a return u/s 139 is a device adopted to indicate the procedure to be followed after issue of the notice u/s 148. The procedure contemplated in section 143 is required to be followed as far as may be. This cannot lead to the inference that assessment or reassessment u/s 147 is assessment u/s 143 or that it is a regular assessment as defined in section 2(40) of the Act... "(p. 382)

4. We may now deal with the cases cited by the learned counsel for the revenue. Burdwan Wholesale Consumers' Co-operative Society Ltd.'s case (supra) undoubtedly supports the contention of the revenue when it holds that a notice u/s 148 is in effect a notice u/s 139(2) and that this legal fiction has to be given the fullest possible effect and that for intents and purposes the return filed in response to a notice u/s 148 is a return filed u/s 139(2). We do not agree with the view expressed by the learned Judges in this case and a later Division Bench judgment of the Calcutta High Court in Koppind (P.) Ltd.'s (supra) also did not accept this view. Again, the Kerala High Court in Lolly Jacob's case (supra) held that an assessment for the first time made u/s 147 is a regular assessment because section 148 enjoins the ITO to serve a notice containing all the requirements of section 139(2). The learned Judges were of the view that notice u/s 148 has to be deemed to be a notice u/s 139(2) and if other provisions of the Act are applied, an assessment in pursuance to that can be made only u/s 143 or section 144. According to the Kerala High Court, there is no separate provision in the Act under which escaped income can be brought to tax. They were, therefore, of the view that section 147 does not enable an ITO to pass an effective order of assessment and when escaped income is brought to tax the assessment has to be made u/s 143. We respectfully disagree with the view expressed by the learned Judges in view of the binding precedent of our own Court in Usha Aggarwals case (supra) where a contrary view has been taken. There is, in our opinion, yet another reason for which we are not inclined to accept the view of the Kerala High Court. It is significant to notice that the Legislature has provided separate appeals against orders passed both under sections 143 and 147. It, therefore, implies that an order passed u/s 147 is independent of section 143 and that the ITO while assessing the escaped income has not to resort to section 143.

5. In the result, we hold that a return filed in pursuance of a notice received u/s 148 is not a return filed u/s 139(2) and there being no provision for levy of interest u/s 147 or any other provision as applicable to the relevant assessment years, the Tribunal was right in holding that the assessee was not liable to pay interest for the late filing of returns for the assessment years 1968-69 and 1969-70.

Re. Question No. 2

6. It was strenuously urged by Shri R.P. Sawhney, the learned counsel for the

revenue that the Tribunal was not justified in allowing the application for rectification u/s 154 because the matter regarding the charging of interest for late filing of return was a debatable issue and it could not be said that the order of the ITO charging interest suffered from any mistake apparent from the record which could be rectified by resorting to the provisions of section 154. Mr. Gupta the learned counsel for the assessee, on the other hand, submitted that since the interest was not payable and the ITO had charged the same, the mistake was so apparent that it could be rectified and, therefore, no fault could be found with the order of the Tribunal in this regard.

7. Having heard the counsel for the parties on this question, we are of the opinion that there is force in the contention of Mr. R.P. Sawhney. In order to attract the provisions of section 154, there must be a mistake and the mistake must be apparent from the record. A mistake apparent from the record would be where mandatory provisions of statute are overlooked or wrongly applied on the uncontroverted facts or where an order is clearly and obviously inconsistent with a specific or clear provision or where a mistake or error apparent in assessment is discovered. It has to be an obvious and patent mistake and not something which can only be established by a long drawn process of reasoning. An error which is far from self-evident is not an error apparent. On a point of law there may be two possible opinions and in that event the so-called error may be there when the ITO adopts a view which is not accepted by the jurisdictional High Court or by any appellate authority but such a mistake cannot be said to be one that is apparent from the record which could be rectified by resorting to the provisions of section 154. The Apex Court in *T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay*, observed that "a mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions". In the case before us, the question as to whether interest was payable or not depended upon the interpretation of the provisions of section 148 read with section 139(2). There is divergence of opinion amongst some High Courts on the question whether a return filed in pursuance of a notice issued u/s 148 is a return u/s 139(2) or not. It is true that while answering the first question, we have taken the view that it is not though the ITO had taken the other view. The issue is obviously debatable on which different opinions have been expressed and, therefore, the error pointed out in the order of the ITO cannot be said to be one apparent from the record and, therefore, the same could not be rectified in a petition filed u/s 154. In this view of the matter, the Tribunal was not right in holding that the issue regarding charging of interest was not a debatable point and hence not beyond the scope of section 154. We, therefore, answer the second question in the negative, i.e., in favour of the revenue and against the assessee. The reference made by the Tribunal stands answered as aforesaid.