(1989) 08 CAL CK 0035

In the Calcutta High Court

Case No : IT Reference No. 109 of 1983

Commissioner of Income Tax APPELLANT

Vs

Satyanarayan Bhalotia RESPONDENT

Date of Decision : 07-08-1989

Acts Referred:

Income Tax Act, 1961 — Section 139, 139(2), 143, 143(3), 147

Citation : (1994) 74 TAXMAN 34

Hon'ble Judges : Bhagabati Prasad Banerjee, J;Ajit K. Sengupta, J

Bench : Division Bench

Judgement

Ajit K. Sengupta, J.—In this application u/s 256(1) of the income tax Act, 1961 (''the Act'') for the assessment year 1975-76, the following question of law has been referred to this Court:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in cancelling the order u/s 154 of the income tax Act passed by the income tax Officer?

The facts as are relevant to the dispute are that the assessee suffered a loss of Rs. 7,25,607 from speculative business for the assessment year 1974-75. No return was filed by the assessee u/s 139 of the Act for that year. No notice u/s 139(2) was issued either. Subsequently, the assessee filed return for the assessment year 1974-75 in response to a notice u/s 148 of the Act. The assessment was completed on 30-6-1977 on a total income of Rs. 63,850. He also determined the speculative loss at Rs. 7,25,607 and directed the loss to be carried forward to the subsequent year. For the assessment year 1975-76, the assessee did not file any return in terms of section 139, but he did file a return in compliance with the notice issued u/s 148. The ITO while completing the assessment for the year 1975-76 adjusted the speculative loss of Rs. 7,25,607 against the speculative profit. But he was of the opinion that as the speculative loss for the assessment year 1974-75 was determined in the assessment in pursuance of the return filed u/s 148 and not the return filed u/s 139, the assessee was not entitled to the benefit of carry forward and set off of speculation loss for the assessment year 19,74-75 against the speculation profit for the assessment year 1975-76. According to him, there was a mistake apparent on the face of the record and he invoked the provisions of section 154 of the Act. The contention before the ITO was that section 154 could not be invoked inasmuch as the assessee filed return u/s 148 and that must be deemed to be a return filed u/s 139. Accordingly, section 80 of the Act will have no application. It was also pointed out that it was not a mistake apparent from the record and, accordingly, the ITO should not proceed any further with the proceedings. The ITO, however, did not agree with the submission and disallowed speculation loss.

2. Being aggrieved, the assessee appealed to the Commissioner (Appeals) who was of the view that the ITO committed a mistake by granting carry forward of loss and set off against the speculative profit for the assessment year under reference which was rectifiable u/s 154. The assessee then came before the Tribunal and reiterated the same contentions. After considering the several decisions cited before the Tribunal, the Tribunal held that the authorities were not justified in invoking the provisions of section 154 as there was no mistake apparent from the record.

3. At the hearing before us, the same contentions have been reiterated. There is no dispute that the assessee did not file any return u/s 139 and that for both the assessment years 1974-75 and 1975-76 returns were filed pursuant to the notices issued u/s 148.

4. The mistake alleged was that speculation loss of Rs. 7,25,607 determined for the assessment year 1974-75 could not be carried forward in terms of section 80 of the Act and that, accordingly, the setting off of the loss of Rs. 5,72,408 of the said total loss of Rs. 7,25,607 had been wrongly done.

5. It is contended by Mr. Sukumar Bhattacharjee, the learned counsel for the assessee, that on merits there cannot be any question that the benefit of set-off as originally given is available to the assessee. If the assessments were made in the normal course, those would have been on the lines adopted for the order of assessment dated 30-7-1977, and there is no mistake and certainly not a mistake which is apparent from the record.

6. On the question whether the earlier loss can be set off or not there may conceivably be two opinions. Where there might conceivably be two opinions, the matter was outside the jurisdiction of section 154.

7. The question, therefore, is whether there is a mistake apparent from the record. In other words, whether in this case the loss was determined in pursuance of a return filed u/s 139.

Section 80 provides as follows:

Submission of return for losses. -Notwithstanding anything contained in this

Chapter, no loss which has not been determined in pursuance of a return filed u/s 139, shall be carried forward and set off under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) of section 74 or sub-section (3) of section 74A.

Section 148(1) provides as follows:

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.

8. The ITO and the Commissioner (Appeals) have held that the provisions of section 80, as they stood at the material time, gave a clear mandate to the authorities to deny the benefit of carry forward unless the loss had been determined in pursuance of a return filed u/s Which has not been determined in pursuance of a return filed u/s 139.

9. If the return filed for the assessment year 1974-75 in response to a notice u/s 148 has to be treated as a return filed u/s 139, then the loss determined in the assessment order passed on the basis of the said return has to be treated as one ''determined in pursuance of a return filed u/s 139''. In our view having regard to the language of section 148(1) as it stood at the material time, a return filed in response to a notice u/s 148 must be treated as a return filed u/s 139. Section 148(1) enacts, inter alia, that the provisions of the Act are to apply, so far as may be, as if the notice issued u/s 148 were a notice issued u/s 139(2). Even though the qualifying clause ''so far as may be'' has been used, there is no valid reason to suggest that for the purposes of section 80 the deeming provision will not apply.

10. The qualifying clause ''so far as may be'' does not by itself create any situation in which the legal fiction created u/s 148(1) that the notice issued u/s 148(1) would be treated as a notice issued u/s 139(2) may be whittled down.

11. No standard form is prescribed for notice u/s 148(1). All that the section requires is that the notice containing all or any of the requirements which may be included in a notice u/s 139(2) shall be served. It is not necessary to issue a separate notice u/s 139(2) along with a notice u/s 148(1). Section 148(1) provides that the provisions of this Act apply as if the notice issued under this section were notice issued u/s 139(2). The deeming provisions u/s 148(1) had necessarily to be introduced inasmuch as there is no provision or procedure separately laid down for the purpose of making a reassessment initiated by the issue of a notice u/s 148(1). In the case of proceedings initiated u/s 148(1), the assessment can be completed (except in case of default) only in terms of section 143 of the Act. Section 143, however, in all its sub-sections refers to a return made u/s 139. Unless, therefore, the return made in response to notice u/s

148(1) can be treated as a return u/s 139, the assessment or reassessment in pursuance to a notice u/s 148(1) cannot be set into process. Section 143 does not even by implication refer to a return filed in response to notice u/s 148(1). Thus, so far as the assessment made u/s 143 is concerned, one cannot import a distinction as between a return made in response to notice u/s 148(1) and that made u/s 139. What section 148 enacts is to treat the reassessment proceedings as assessment proceedings and proceed accordingly u/s 139 and other provisions of the Act. To hold otherwise would be destructive of the very object and purpose of the reassessment proceedings.

12. The above being the position, it follows that a return made in response to notice u/s 148(1) has to be treated as a return filed u/s 139 within the meaning of not only section 143 but also section 80. If it is not a return u/s 139 within the meaning of section 143, no action for assessing or reassessing the income where a return has been made in pursuance to the notice u/s 148(1) can ever be taken. If, therefore, the return is a return u/s 139 within the meaning of section 143, there is no reason why the return should not logically be construed as the return referred to in section 80. Under that section no loss which has not been determined in pursuance of a return filed u/s 139 shall be carried forward and set off. The section refers to the determination of loss. Such determination cannot be made except in accordance with the procedure laid down in section 143, which in its turn, as already mentioned above, refers only to a return u/s 139. Section 143 specifically refers to making of an assessment of total income or loss of the assessee. The determination of the loss would become an idle formality unless the same is allowed to be carried forward and set off under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) of section 74 of the Act, as the case may be.

13. It is argued that a return made in response to a notice u/s 148(1) has to be distinguished from a return made u/s 139. But that distinction breaks down once the loss as per return made in response to notice u/s 148(1) is actually determined by the ITO. It is perhaps open to the ITO not to pursue the proceedings initiated u/s 148(1) and drop the proceedings without acting upon the return in order merely to determine a loss. But having made a determination of the loss in accordance with the provisions of section 143, it is not open to him to say that the loss determined is not in pursuance of a return filed u/s 139 within the meaning of section 80. The proceedings u/s 148(1) can be initiated when there is an escapement of assessment of income. Under Explanation (1) to section 147 escapement of assessment would include, inter alia, a case where excessive loss had been computed in the original assessment. If as a result of the reassessment a fresh figure of loss is determined, it can have effect in reducing the amount of loss earlier carried forward only through the operation of section 80. It would not be open to the assessee to say that the loss reassessed can have no effect having been determined in pursuance of a return filed in response to a notice u/s 148(1) only.

14. Legal fictions are only for a definite purpose and they are limited to the purpose for which they are created. They may not be extended beyond their legitimate field but they must be carried to their logical conclusion. A legal fiction cannot be interpreted to work injustice. It is worthwhile to refer to the observation of Lord Asquith in East & Dwelling Co. Ltd. v. Finsbury [1952] AC 109 where he said:

If you are bidden to treat an imaginary state of affairs as real, you must also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed must inevitably have followed from or accompanied it; and if the statute said that you must imagine certain state of affairs, it cannot be interpreted to mean that having done so, you must cause or presume or allow your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

If it is deemed to be a notice u/s 139, then all consequences must follow and the benefit of carry forward as provided u/s 80 cannot be denied to the assessee.

15. The assessee, therefore, cannot be denied the benefit of carry forward of loss. Accordingly, the ITO did not commit any mistake in allowing the benefit of carry forward loss in the assessment made u/s 147, read with section 143(3). The ITO did not have any jurisdiction to make the proceedings of section 154. The question which was before the authorities was whether in a case like this where the interpretation of a section is involved, that is to say, sections 80 and 148(1), it can be said that there was a mistake apparent on the face of the record. The Supreme Court in the case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, held that it is not open to the ITO to go into the true scope of the relevant provisions of the Act in a proceeding u/s 154. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by long drawn process of reasoning on points on which there may conceivably be two opinions. Accordingly, in our view, when a mistake has to be discovered on the interpretation or the construction of the provisions of the Act, it can never be a mistake apparent from the record.

16. There is another aspect of this matter. The rectification was sought to be made in the assessment for the assessment year 1975-76 but the determination of loss and direction that the speculative loss shall be carried forward was made in assessment order for the assessment year 1974-75. It appears that for the assessment year 1975-76 the assessee had speculation profit of Rs. 7,72,778. Against that the speculation loss carried forward and set off in respect of the assessment years 1971-72, 1973-74 and 1974-75, aggregating to Rs. 7,72,778, had been set off. The speculation loss for the assessment year 1974-75 was Rs. 7,25,607 and out of which Rs. 5,72,408 was set off against the speculation profit for the assessment year 1975-76. The result was that only the unabsorbed loss of Rs. 1,53,199 for the assessment year 1974-75 was required to be carried forward, being the difference between Rs. 7,25,607 and Rs. 5,72,408. Unless the

assessment order for the assessment year 1974-75 is rectified and the determination of loss for that year is set aside and the loss is not allowed to be carried forward, the order of assessment for the subsequent year cannot be touched in respect of the said determination because the order of assessment for the year 1974-75 has become final. Once the loss has been determined and directed to be carried forward in the assessment year 1974-75, this determination cannot be challenged by the ITO in the subsequent assessment year. He cannot contend that the loss was not properly allowed for the year 1974-75. In that case he should have first rectified the order of assessment for 1974-75 and then as a consequence thereof rectify the order of assessment of 1975-76 which he has not done in this case.

17. For the reasons as aforesaid, we are of the view that the Tribunal was right in coming to the conclusion as it did. We, therefore, answer the question in this reference in the affirmative and in favour of the assessee. There will be no order as to costs.

Banerjee, J.

I agree.

