

(1989) 01 CAL CK 0008
In the Calcutta High Court

Case No : Income-tax Reference No. 99 of 1982

Commissioner of Income Tax

APPELLANT

Vs

Smt. Radha Devi Poddar

RESPONDENT

Date of Decision : 31-01-1989

Acts Referred:

Income Tax Act, 1961 — Section 139(2), 143, 144, 147, 148

Citation : (1990) 82 CTR 42 : (1989) 82 CTR 42 : (1990) 185 ITR 544 : (1989) 47 TAXMAN 344

Hon'ble Judges : Suhas Chandra Sen, J; Baboo Lall Jain, J

Bench : Division Bench

Advocate : S.K. Mitra and S.K. Chakraborty, for the Appellant; R. Murarka, for the Respondent

Judgement

Suhas Chandra Sen, J.—In this reference, the question referred by the Tribunal u/s 256(1) of the Income Tax Act, 1961 (the "Act"), is as follows :

"Whether an assessment framed u/s 143(3)/147(a) of the Income Tax Act, 1961, constituted "regular assessment" in the course of which penalty u/s 273(b) of the said Act can be levied ?"

2. The facts of the case, as found by the Tribunal, are as follows :

The assessee is Smt. Radha Devi Poddar as legal representative of the late Roshanlal Poddar. The assessment years involved are 1961-62 to 1964-65.

3. The deceased did not file any return of income. In the course of a raid by the Department on July 17, 1976, some books of account in respect of the business carried on under the name and style of Shankar Textiles at 203/1, Mahatma Gandhi Road, Calcutta, were recovered and seized from the residence of the deceased. The Income Tax Officer initiated proceedings u/s 147(a) read with Section 148 of the Act for making the assessments of the assessee for the years under consideration. The Income Tax Officer completed the assessments u/s 143(3)/ 147(a) of the Act against the deceased for the assessment years under

consideration determining the total income at Rs. 22,36,716 for the assessment year 1961-62, Rs. 2,01,920 for the assessment year 1962-63, Rs. 5,17,070 for the assessment year 1963-64 and Rs. 1,75,730 for the assessment year 1964-65. As the assessee had not filed any estimates of advance tax u/s 212(3) of the Act, the Income Tax Officer held that the assessee came within the mischief of Section 273(b) of the Act and, on that basis, he imposed a penalty of Rs. 13,500 for the assessment year 1961-62, Rs. 11,000 for the assessment year 1962-63, Rs. 32,000 for the assessment year 1963-64 and Rs. 2,500 for the assessment year 1964-65.

4. The assessee filed appeals before the Commissioner (Appeals). The Commissioner (appeals) cancelled the penalty orders by observing as under :

"The definition of "regular assessment" as per Section 2(40) of the Act meant the assessment made u/s 143 or Section 144. Now, referring to the provisions of Section 273 as were applicable to the year under appeal, it was clear therefrom that, if the Income Tax Officer in the course of any proceeding in which regular assessment was made, was satisfied that the assessee had without reasonable cause failed to furnish an estimate of advance tax payable by him in accordance with the provisions of Sub-section (3) of Section 212, he might direct such person to pay penalty. So the definition referred to above did not cover an assessment u/s 147(a). Hence, the penal provisions were not applicable to the facts of the instant case since the prerequisite conditions for application of the aforesaid section were not fulfilled."

5. The Income Tax Officer preferred an appeal to the Tribunal. The Tribunal upheld the order passed by the Commissioner (Appeals) and held that "regular assessment" being defined in Section 2(40) of the Act to mean the assessment made u/s 143 or 144, an assessment or reassessment made u/s 147 cannot, therefore, be considered to be a "regular assessment" to which Section 273(a) can be applied.

6. Mr. Mitra, appearing on behalf of the Revenue, has contended that this is a case of assessment made u/s 147 because no return was filed ; this was strictly speaking not a case of reassessment but a case of assessment of escaped income. Therefore, this assessment made u/s 147 must be treated as "regular assessment" u/s 143.

7. Reliance was placed by Mr. Mitra on the judgment of the Bombay High Court in the case of Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay, . In that case, the question was, whether levying of penalty u/s 18A(9) (a) read with Section 28 of the Indian Income Tax Act, 1922, for the assessment year 1948-49 was valid or not. There, Tulzapurkar J. held that (at page 183) :

"The real question that arises for our consideration is whether the expression "regular assessment" occurring in Section 18A(9) would cover reassessment proceedings u/s 34(1) of the Act or whether that expression should be interpreted to mean only the initial or original assessment made by the Income

Tax Officer u/s 23 of the Act. On this aspect of the matter the provisions of Section 34(1) under which reassessment proceedings were undertaken twice in the instant case, in our view, have a material bearing. It is well settled that the proceedings u/s 34(1) can be undertaken only if the conditions precedent mentioned either in Clause (a) or Clause (b) of that section are satisfied and it is only after such conditions are satisfied that the operative part of Section 34(1) comes into play."

8. Tulzapurkar J. went on to hold that the notice issued u/s 34(1) was deemed to be a notice issued u/s 22(2) of the Act, and thereafter, further proceedings undertaken by the Income Tax Officer were proceedings to "which the provisions of the Act would apply. Ultimately, it was held in that case that (at. page 184) :

"... Looked at from this angle, it seems to us very clear that the expression "regular assessment" occurring in Section 18A(9) of the Act would cover reassessment proceedings undertaken by the Income Tax Officer u/s 34(1) of the Act, if the provisions of Section 18A(9) are read in the context of the last portion of Section 34(1)."

9. That case was decided under the 1922 Act which had not defined the term "regular assessment". The 1961 Act has provided a definition in Section 2(40) which is as follows ;

"2(40) "regular assessment" means the assessment made u/s 143 or Section 144."

10. Therefore, the question is what is meant by the phrase "the assessment made u/s 143 or Section 144". Will it include an assessment made u/s 147 ?

11. Mr. Mitra has relied on the decision of a single Bench of this court in the case of Kashiram Tea Industries Ltd. Vs. Income Tax Officer and Others, , where the principles laid down in the case of Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay, were followed. A different view was taken by another judgment of this court in the case of Monohar Gidwani and Others and Smt. Bhagwanti Gidwani and Another Vs. Commissioner of Income Tax and Others, ,

12. Chapter XIV of the Act deals with "procedure for assessment". Section 139(1) of the Act requires every person having assessable income to furnish a return of income within a specified period of time. If a return has not been filed by a person under the provisions of Section 139(1), the Income Tax Officer may issue an individual notice under Sub-section (2) of Section 139 calling upon such person to file a return of income. Such notice can be issued only if the Income Tax Officer is of the opinion that the person concerned is assessable under the Act. The notice u/s 139(2) must be issued before the end of the relevant assessment year. An assessment u/s 143 can only be made "where a return has been made u/s 139". The best judgment assessment u/s 144 of the Act can be made if any person fails to make the return required by any notice given under

Sub-section (2) of Section 139. In a case where the assessee having taxable income has failed to furnish any return u/s 139(1), and the time to issue notice u/s 139(2) has expired, no assessment can be made under the provisions of Section 143 or Section 144. This will be a case of income escaping assessment. If the assessment proceedings are still pending or if the time limit for issue of notice u/s 139(1) or Section 139(2) has not expired, it cannot be said that any income has escaped assessment because it is open to the Income Tax Officer to take appropriate steps for the assessment of such income.

13. It is only in a case where the Income Tax Officer cannot make an assessment of income u/s 143 or Section 144 that the provisions of Section 147 come into play. The jurisdiction to proceed u/s 147 can be acquired by the Income Tax Officer by issuing a notice u/s 148. The condition precedent for issue of a notice u/s 148 is that the Income Tax Officer must have reason to believe that "income chargeable to tax had escaped assessment for that year". If the escapement of income chargeable to tax takes place by reason of omission or failure on the part of an assessee to make a return u/s 139 for any assessment year or to disclose fully and truly all material facts necessary for the assessment of any particular year, then it will be a case under Clause (a) of Section 147. But in a case where there has been no such omission or failure on the part of the assessee, the Income Tax Officer has reason to believe in consequence of information in his possession that income chargeable to tax has escaped assessment or reassessment in any assessment year, he may still have jurisdiction to proceed under Clause (b) of Section 147. The jurisdiction conferred upon the Income Tax Officer to assess escaped income u/s 147 can be exercised in accordance with the provisions of Sections 148 to 153 of the Act.

14. What is important to note for the purpose of this case is that as long as an assessment proceeding is pending u/s 143 or Section 144 or it is possible to make an assessment under the provisions of Section 143 or Section 144, the Income Tax Officer cannot invoke his jurisdiction u/s 147. If an assessee fails to furnish a return within the time limit prescribed by Section 139(1), the Income Tax Officer cannot straightaway proceed u/s 147(a). It may be open to the Income Tax Officer to issue a notice u/s 139(2) calling upon the assessee to file a return. It is only when the Income Tax Officer has lost his jurisdiction to make an assessment of income u/s 143 or Section 144 that he can issue a notice u/s 148 and thereby acquire jurisdiction to make an assessment u/s 147 subject to the conditions laid down in that section.

15. In the instant case, the assessee had not filed any return of income. The Income Tax Officer could not make an assessment of the assessee's income either u/s 143 or Section 144 because the time limit for issue of a notice u/s 139(2) had expired. The income had escaped assessment. The only way the Income Tax Officer could bring to tax the income which had escaped assessment was under the provisions of Section 147. The proceedings u/s 147 were initiated only because an assessment could not be made u/s 143 or Section 144.

Therefore, an "assessment made u/s 147 cannot be described as "assessment made u/s 143 or Section 144".

16. The Income Tax Officer has no jurisdiction to assess or reassess escaped income except under the provisions of Sections 147 and 148. A notice u/s 148 is a jurisdictional notice. It is only after fulfilling all the conditions laid down in Section 147 and serving a valid notice u/s 148 that the Income Tax Officer acquires jurisdiction to assess or reassess escaped income. Sub-section (1) of Section 148 is in the following terms :

"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."

17. The assessment that is to be made pursuant to a notice u/s 148 has been specifically mentioned "as the assessment, reassessment or recomputation u/s 147". Even though the Income Tax Officer can make use of the procedure laid down in Sections 143 and 144 for the purpose of making assessment, reassessment or recomputation of income pursuant to a notice u/s 148, such assessment, reassessment or recomputation has been treated by the statute as having been made u/s 147.

18. Mr. Mitra has contended that any assessment which has been made by taking recourse to Section 143 or Section 144 must be treated as a regular assessment.

19. This contention is devoid of any merit. Sections 143 and 144 are the only machinery sections in the Act available to the Income Tax Officer for the purpose of making assessment or computation of income. It cannot be said that whenever the provisions of these sections are utilised by the Income Tax Officer, the assessment will be a regular assessment. If such interpretation is accepted, the definition of "regular assessment" will become redundant and otiose and every assessment or computation of income will have to be treated as regular assessment.

20. In the case of Gates Foam and Rubber Co. Vs. Commissioner of Income Tax, , a Division Bench of the Kerala High Court held that "regular assessment" u/s 273 could only mean new assessment u/s 143 or Section 144 and not a reassessment u/s 147.

21. Similar views have been taken by the Punjab and Haryana High Court in the case of SMT. KAMLA VATI Vs. COMMISSIONER OF Income Tax (CENTRAL), PATIALA., , the Allahabad High Court in Commissioner of Income Tax Vs. Smt. Jagjit Kaur, , the Patna High Court in Commissioner of Income Tax Vs. Ram Chandra Singh, and the Orissa High Court in Commissioner of Income Tax Vs. Ganeshram Nayak, .

22. Mr. Murarka also referred us to the judgments of the Andhra Pradesh High Court in Commissioner of Income Tax Vs. Padma Timber Depot, and the Karnataka High Court in Charles D'souza Vs. Commissioner of Income Tax, Karnataka-II, where similar views were taken.

23. Mr. Mitra has tried to distinguish all these cases by arguing that these are cases of reassessment of income u/s 147 and not new assessments. Mr. Mitra has overlooked the principles enunciated in the aforesaid judgments and also the scheme of the Act

"Regular assessment" has been defined to mean the assessment made u/s 143 or Section 144. In this case, a notice u/s 147 became necessary because it was not possible to make an assessment u/s 143 or Section 144. The assessee had not filed any return within the time specified by Section 139(1) ; nor had the Income Tax Officer issued any notice to the assessee u/s 139(2) before the end of the relevant assessment year. Therefore, it was not open to the Income Tax Officer to make an assessment u/s 143 or a best judgment assessment u/s 144. The income had escaped assessment. The only way the Income Tax Officer could proceed to assess the escaped income was by issuing a notice u/s 148. This could only be done if the conditions precedent for issue of such a notice laid down in Section 147 were fulfilled. This is an extraordinary power which can be exercised by the Income Tax Officer only in the circumstances specified in Section 147. Before issuing any notice u/s 148, the Income Tax Officer has to record, his reasons for doing so and comply with the provisions of Sections 149, 150 and 151 of the Act. For this type of proceedings and in the context of the provisions of Section 147, no distinction can be made between an assessment or a reassessment. If a "reassessment" made u/s 147 cannot be regarded as a regular assessment as defined in Section 2(40), I fail to see how an assessment made u/s 147 can be treated as a "regular assessment".

24. The language of Section 147 is very clear. It enables an Income Tax Officer to "assess or reassess such income or recompute the loss or the depreciation allowance as the case may be". Therefore, an assessment that will have to be done u/s 147 cannot be regarded as an assessment made u/s 143 or Section 144. It is true that the Income Tax Officer has to serve upon 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 the Act, so far as may be, apply accordingly as if the notice were a notice u/s 139(2), but that is a procedure to be followed for assessment as well as reassessment. The phrase "so far as may be" in Section 148 makes it clear that the assessment will not be an assessment u/s 143 or 144 and the provisions of Section 143 or Section 144 shall apply with such modifications as may be necessary. The time limit for a notice to be issued u/s 148 is different from the usual notice u/s 139(2). The notice can only be issued after recording the reasons for doing so and in an appropriate case, after obtaining the sanction of the Commissioner. The time limit for completion of assessment u/s 143 or Section 144 as laid down in

Section 153(1) is quite different from the time limit prescribed for completion of assessment, reassessment or recomputation u/s 147. The language of Section 153(2) is also significant. It speaks of "no order of assessment, reassessment or recomputation shall be made u/s 147" and this is to be contrasted with the language of Section 153(1) which is "no order of assessment shall be made u/s 143 or 144 at any time after". Therefore, the statute contemplates two types of assessment. The language of Section 148 is also very clear. The assessment that has to be made pursuant to a notice issued u/s 148 is described as an assessment made u/s 147 even though the machinery of assessment that will have to be availed of is that of Section 143 or Section 144. The other type of assessment is described as an assessment made u/s 143 or Section 144 which has been defined as "regular assessment" in Section 2(40).

25. Similarly in Section 246 which deals with appeals to the Appellate Assistant Commissioner ; Clause (c) deals with, inter alia, any order of assessment under Sub-section (3) of Section 143 or Section 144, whereas Clause (e) deals with "an order of assessment, reassessment or recomputation u/s 147 or Section 150".

26. If an assessment made u/s 143 or Section 144 included an assessment made u/s 147, there would have been no necessity for making separate provisions for appeal for the two types of assessment.

27. In the facts of this case, it is not necessary to travel beyond the scope of the question actually referred to this court. What is the scope or the meaning of the expression "regular assessment" in the other sections of the Act need not be examined in this case and I do not express any opinion on those sections. In my judgment, an assessment made u/s 147 cannot be equated to an assessment made u/s 143 or Section 144 and cannot be brought within the ambit of the definition of "regular assessment" in Section 2(40).

28. The Bombay High Court, in the case of D. Swarup, Income Tax Officer, Companies Circle, Bombay Vs. Gammon India Ltd., , went into this controversy in depth. There it was observed by Chandurkar J. that there was clear indication in the Act itself that the reassessment u/s 147 was not the same as an assessment u/s 143 or Section 144 and a simple grammatical construction of these provisions would also show that the assessments u/s 143 or Section 144 were not the same as those u/s 147. It was further observed that when Section 148 referred to the fact that the provisions of the Act should, so far as might be, apply to the reassessment u/s 147, the effect was only that those provisions could be resorted to for the purpose of making reassessment u/s 147, and the mere fact that the machinery which was availed of for the purpose of assessment u/s 143 or Section 144 could be availed of while making a reassessment u/s 147 would not make the reassessment u/s 147 the same as an assessment u/s 143 or Section 144. It was pointed out that Section 153(1) contained provisions for the time limit for completion of assessments and reassessments, whereas the time limit for assessments u/s 143 or Section 144 was prescribed in Sub-section (1), while under Sub-section (2), a time limit was specifically prescribed for

assessment, reassessment or recomputation u/s 147. It was also pointed out that the provisions regarding appeal were contained in Clauses (c) and (e) respectively of Section 246(1) which showed that Parliament thought it fit to make independent provisions for appeal against an "order of assessment under Sub-section (3) of Section 143 and Section 144" and against "an order of assessment, reassessment or recomputation u/s 147 or Section 150". Subsection (2) of Section 263, which dealt with the power of revision by the Commissioner, specifically provided that "no order shall be made under Sub-section (1)(a) to revise an order of reassessment made u/s 147".

29. It was ultimately held by Chandurkar J. that (at p. 846) :

"The words "regular assessment" which were to be found in subsection (9) of Section 18A of the Indian Income Tax Act, 1922, have, no doubt, been construed by a Division Bench of this court in *Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay*, , cited *supra*, to cover cases of reassessment u/s 34(1). That decision cannot, however, be of any assistance now for construing Section 273. The distinguishing feature which would be enough to hold that the provisions in Section 273 of the 1961 Act should not be construed in the same manner as Section 18A(9) of the 1922 Act, which was construed in *Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay*, is that the words "regular assessment" have now been specifically defined by the Legislature. The 1922 Act did not define the words "regular assessment". In view of the definition of these words in Section 2(40) of the Act, under the accepted canons of construction, wherever those words are used, the meaning given in the definition clause must be substituted. This has also to be considered in the light of the fact that at several places the assessment u/s 143 or Section 144 has been used in contradistinction with reassessment u/s 147. We also do not find anything in the context of Section 273 which would require the words "regular assessment" to be given a meaning different from the one given by the Legislature when these words were defined."

30. I respectfully agree with the views expressed by Chandurkar J. Moreover, there is another aspect to this case. This is a case of penalty u/s 273(b). The charge against the assessee is that he has failed to furnish an estimate of advance tax or failed to pay advance tax as required by Section 212. The Income Tax Officer can take steps for imposition of penalty" in the course of any proceedings in connection with the regular assessment". If there is any doubt about the meaning of the phrase "regular assessment" or if two equally good interpretations are possible, "then the interpretation which is favourable to the assessee must be preferred.

31. In the premises, the question is answered in the negative and in favour of the assessee.

32. There will be no order as to costs.

Baboo Lall Jain, J.

I agree.