
(1992) 09 BOM CK 0078

In the Bombay High Court

Case No : Income-tax Reference No. 315 of 1979

Commissioner of Income Tax

APPELLANT

Vs

V.D. Saraf (Huf)

RESPONDENT

Date of Decision : 29-09-1992

Acts Referred:

Income Tax Act, 1961 — Section 139, 139(2), 143, 143(3), 144

Citation : (1994) 207 ITR 217

Hon'ble Judges : V.A. Mohta, J;B.P. Saraf, J

Bench : Division Bench

Advocate : P.N. Chandurkar, for the Appellant; K.P. Dewani and Manoj Moryani, for the Respondent

Judgement

V.A. Mohta, J.—The following four questions (renumbered as 1 to 4) are referred to this court by the Tribunal u/s 256(1) of the Income Tax Act, 1961, at the instance of the Commissioner of Income Tax :

"(1) Whether the provisions of section 144B of the Income Tax Act, 1961, can be invoked in an assessment being made under sections 147/148 of the Income Tax Act ?

(2) Whether the assessment made in the instant case was time-barred as it was made after the time-limit available u/s 153(2) of the Income Tax Act, 1961 ?

(3) Whether the provisions of Explanation 1(iv) to section 153 of the Income Tax Act, 1961, had any application to the facts of the instant case ?

(4) Whether, in the facts and circumstances of the case, the Tribunal was right in dismissing the Appeal No. 300/ (Nag) of 1977-78 filed against the order of the Appellate Assistant Commissioner u/s 154 dated April 18, 1977, without going into the merits thereof ?"

2. These four questions arise out of the common order of the Tribunal dated July 28, 1978, passed in I. T. A. Nos. 214/(Nag) of 1977-78 and 300/(NAG) of

1977-78 in the case of Shri V. D. Saraf (Hindu undivided family), Kathmandu, Nepal, for the assessment year 1963-64. The first three questions are proposed in R. A. No. 124/(Nag) of 1978-79 and the fourth question is proposed in R. A. No. 131/(Nag) of 1978-79.

3. The basic facts are :

On January 28, 1972, the Income Tax Officer served a notice u/s 147(a)/148 on the assessee, as, according to the Income Tax Officer, the assessee's income chargeable to tax had escaped taxation due to failure to file the return. Pursuant to the said notice, the assessee filed a return on December 30, 1975, showing an income of Rs. 64,492. On March 27, 1976, the Income Tax Officer sent a draft assessment order to the Inspecting Assistant Commissioner u/s 144B. On September 22, 1976, the Income Tax Officer received back the draft assessment order along with instructions on the basis of which he passed an assessment order on that very day on a total income of Rs. 5,37,670 u/s 143(3)/147(a) read with section 144B. The Appellate Assistant Commissioner on appeal filed by the assessee deleted two items of Rs. 2,55,400 and Rs. 48,000 out of the additions made by the Income Tax Officer. The Revenue filed an appeal against the said order of the Appellate Assistant Commissioner and the assessee filed a cross-objection challenging the legality of the assessment order u/s 147(a). At the time of hearing, the assessee filed additional grounds in the cross-objections contending that the assessment was barred by time. The contention was that the assessment u/s 147(a) ought to have been completed before the expiry of four years from the end of the assessment year in which the notice u/s 148 was served as provided u/s 153(2). The notice was served in the assessment year 1971-72, and, hence the assessment could not have been made after March 31, 1976. The Revenue's contention was that section 144B applied and since resort to those provisions was made, the time-limit got extended by a period of nearly six months in view of Explanation 1(iv) to section 153 and hence the assessment made on September 22, 1976, was within time. The Tribunal accepted the interpretation canvassed by the assessee and quashed the assessment as barred by time.

4. Having heard the parties, we are inclined to prefer the view canvassed on behalf of the Revenue keeping in view not only the letter of section 144B, but also its spirit.

5. First the letter :

"Section 144B(1). Notwithstanding anything contained in this Act, where, in an assessment to be made under sub-section (3) of section 143, the Income Tax Officer proposes to make any variation in the income or loss returned which is prejudicial to the assessee and the amount of such variation exceeds the amount fixed by the Board under sub-section (6), the Income Tax Officer shall, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the assessee."

6. Now the spirit :

"As regards disputed additions in assessments, a point has been made before us that often decisions are taken by the Income Tax Officer behind the assessee's back and the assessee comes to know of additions and disallowances only after the assessment has been made and an order is received by him. In many cases, the dispute could have been avoided if adequate opportunity had been given to the taxpayer to explain the position. We are aware that such situation do frequently arise. To ensure that the assessee gets a reasonable opportunity of meeting the objections of the Income Tax Officer before an assessment is finalised, we recommend that there should be a provision in the law requiring the Income Tax Officer to send a draft assessment order to the assessee, to start with, in all cases where the additions or disallowances proposed to be made in an assessment under sub-section (3) of section 143 exceed in the aggregate Rs. 25,000. Where the taxpayer objects to the assessment being made on the basis of the draft order, he should intimate his objections within seven days to the Inspecting Assistant Commissioner who will, after hearing the assessee and the Income Tax Officer, pass the final order of assessment himself. For this purpose, the Inspecting Assistant Commissioner should have the power to accept, reduce, or enhance the income proposed in the draft order. Such a measure will also ensure that major disputes with the taxpayer are settled or dealt with at a level higher than that of the Income Tax Officer."

(Wanchoo Committee recommendations made in the Final Report of December, 1971.)

7. Considering the above predominantly beneficial purpose behind inserting section 144B in the Act, it is difficult to visualise the legislative intent behind excluding from the operation of these provisions the assessment made in proceedings initiated u/s 147. Section 147 does not create any change. It is essentially a machinery provision under which income can be assessed or reassessed subject to the provisions of sections 148 to 153. Section 148 provides for serving a notice containing all or any of the requirements which may be included in a notice u/s 139(2). It also mentions that the provisions of the Act shall "so far as may be" apply accordingly as it the notice issued under that section. "Assessment" includes assessment as per section 2(8) and "regular assessment" as per section 2(40), means the assessment made u/s 143 or section 144.

8. The word "assessment" is used in the Act sometimes as meaning the computation of income, sometimes determination of the amount of tax payable, and sometimes the whole procedure laid down in the Act for imposing the liability on a taxpayer. Hence the said word must be understood in the different sections with reference to the context in which it is used. In section 265, it has a comprehensive meaning and includes reassessment and in section 147 (as it stood then) its meaning is restricted. Section 147 empowers the Income Tax Officer to proceed de novo in the case of escaped income. Once the assessment

is reopened the previous assessment ceases to exist and fresh assessment proceedings commence.

9. In some respects it may lead to a supplementary assessment and in others it may result in reassessment for the first time. But in no case are the proceedings separate or distinct from the original assessment proceedings. It is of extreme importance to keep in mind the basic principle that for one year there can be only one assessment of an assessee in the same status. Section 147 is not a self-contained code and assessment made under that section has also to be completed either u/s 143(3) or section 144.

10. The phraseology of section 144B makes it absolutely clear that there is an obligation to forward a draft assessment order, where in making an assessment u/s 143(3), the Income Tax Officer proposes to make variations exceeding certain limits prejudicial to the assessee in the income or loss returned by him. Section 144B provides to the assessee a forum in the nature of a mini appeal against such proposed assessment. Therefore, in truth and substance, section 144B though inserted as an independent section, is in the nature of a proviso to section 143(3) and should be read as such.

11. There are no direct decisions of the Privy Council or the Supreme Court on section 144B. But two decisions under the *pari materia* provisions of the Indian Income Tax Act of 1922 will have a bearing on the subject. The Privy Council in the case of *CIT v. Mahaliram Ramjidas* [1940] 8 ITR 442 held that section 34 is only a machinery provision which empowers the Income Tax Officer to proceed afresh u/s 22(2). The Supreme Court in the case of *V. Jaganmohan Rao and Others Vs. Commissioner of Income Tax and Excess Profits Tax, Andhra Pradesh*, has held that once assessment is reopened u/s 22(2), the previous assessment order is set aside and the whole assessments start anew.

12. The object oriented view taken by us finds support in the following two decisions - one by the Kerala High Court in the case of *Kerala Kaumudi (P.) Ltd. Vs. Commissioner of Income Tax*, and the other by the Delhi High Court in the case of *R. Dalmia and Others (A.O.P.) Vs. Commissioner of Income Tax (and Vice Versa)*, . The literal view based only on the absence of reference to section 147 in section 144B is taken by the Punjab and Haryana High Court in the case of *Commissioner of Income Tax Vs. Usha Aggarwal*, .

13. The Bombay High Court had occasion to deal with the scheme of section 147 though in the context of a best judgment assessment u/s 144 in the case of *R.B. Seth Shreeram Durgaprasad and Fatechand Narsingdas (Export) Firm Vs. Commissioner of Income Tax*, . We notice in that judgment identity of our approach. Following observations are worth noticing (at page 25) :

"At the outset, it must be noted that under the provisions of section 147 of the Income Tax Act, 1961, if the Income Tax Officer finds that income chargeable to tax has escaped assessment, "he may, subject to the provisions of sections 148 to 153, assess or reassess such income". Section 148 of the said Act requires the

Income Tax Officer, before making an assessment or reassessment u/s 147, to "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 the Act shall, so far as may be, apply accordingly, as if the notice were a notice issued under that sub-section". It will, therefore, be seen that section 144 of the said Act, being a provision of the Act, applies after a notice is served u/s 148, which notice is a Pre-condition to the making of an assessment or reassessment u/s 147. Section 144 says that : "if any person fails to make the return required by any notice given under sub-section (2) of section 139. . . . the Income Tax Officer, after taking into account all relevant material which the Income Tax Officer has gathered, shall make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment". A best judgment assessment, applying the provisions of section 144, can, therefore, be made when the provisions of section 147 have been invoked and the assessee has failed to respond to a notice u/s 148 of the said Act."

14. Strong reliance was placed on behalf of the assessee upon the decision of the Bombay High Court in the case of D. Swarup, Income Tax Officer, Companies Circle, Bombay Vs. Gammon India Ltd., , wherein it has been held that no penalty could be levied u/s 273 on the basis of reassessment u/s 147 because regular assessment does not cover reassessment u/s 147. That decision was also brought to the notice of the Bench which decided R.B. Seth Shreeram Durgaprasad and Fatechand Narsingdas (Export) Firm Vs. Commissioner of Income Tax, , but its ratio was not applied to an assessment u/s 144 on the ground that the context of the two provisions was dissimilar.

15. Our attention was also invited on behalf of the assessee to sections 214, 215, 246, 263 and 273 in which the order of assessment and/or reassessment u/s 147 has been treated differently from the order u/s 143(3). The context of all these provisions is also entirely different and they cannot be pressed into service for the construction of section 144B.

16. This takes us to the consideration of some other decisions upon which reliance was placed on behalf of the assessee :

(1) The Kerala High Court in the case of Gates Foam and Rubber Co. Vs. Commissioner of Income Tax, .

(2) The Orissa High Court in the case of Commissioner of Income Tax Vs. Ganeshram Nayak, .

The above two decisions are also in the context of penalty u/s 273.

(3) Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay, .

In this decision it is held that regular assessment u/s 18A(9) (a) would cover cases of reassessment undertaken u/s 34(1) of the old Act of 1922.

(4) The Kerala High Court in the case of Lally Jacob Vs. Income Tax Officer and Others, .

17. It is held in this decision that assessment made for the first time by resort to section 147 will also be a regular assessment for the purpose of invoking the provisions of section 217 of the Act.

18. It would thus be seen that the contexts in all these cases were wholly different and hence the ratio of those decisions cannot apply to the controversy before us.

19. In the result, we answer question No. (1) in the affirmative and favour of the Revenue. In view of the above answer to question No. (1) questions Nos. (2), (3) and (4) do not arise.

20. No order as to costs.