

(1992) 12 CAL CK 0021

In the Calcutta High Court

Case No : Income-tax Reference No. 99 of 1981

Satyanarayan Bhalotia

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 15-12-1992

Acts Referred:

Income Tax Act, 1961 — Section 139, 139(4), 148

Citation : (1993) 113 CTR 429 : (1994) 207 ITR 1030 : (1994) 72 TAXMAN 54

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

Bench : Division Bench

Judgement

Ajit K. Sengupta, J.—In this reference u/s 256(1) of the Income Tax Act, 1961, the Tribunal has referred to this court the following questions relating to the assessment year 1977-78 :

"1. Whether, on the facts and in the circumstances of the case, and on a correct interpretation of Sections 80, 139, 148 and other applicable provisions of the Income Tax Act, 1961, the Income Tax Appellate Tribunal was justified in law in upholding the order passed by the Commissioner of Income Tax u/s 263 of the Act in respect of the assessment year 1977-78 ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that the assessment order passed by the Income Tax Officer setting off the speculation loss of Rs. 1,53,199 out of the total speculation loss of Rs. 7,25,607 determined in respect of the assessment year 1974-75 against the speculation profits for the assessment year 1977-78 was erroneous and prejudicial to the interests of the Revenue within the meaning of Section 263 of the Act ?"

2. Shortly stated, the facts as found by the Tribunal are that the assessee is an individual. The Income Tax Officer, while making the assessment u/s 143(3)/147(a) of the Income Tax Act, 1961, allowed the benefit of carry forward of loss amounting to Rs. 1,53,199 which pertained to the assessment year

1974-75.

3. On scrutiny of the assessment record, the Commissioner of Income Tax found that, for the assessment year 1974-75, the assessee" had filed a return in pursuance of the notice issued by the Income Tax Officer u/s 148 and no return was filed under Section. 139(1). The Commissioner of Income Tax was of the opinion that, since the assessee had not filed any return for the assessment year 1974-75 in terms of Section 139, he was not entitled to the benefit of carry forward of loss incurred for the year. He, therefore, came to hold that the Income Tax Officer committed an error in allowing the benefit of carry forward of the aforesaid loss for the assessment year 1974-75. Accordingly, the Commissioner of Income Tax initiated proceedings u/s 263 and issued a show-cause notice, in reply to which the assessee contended that, since his books of account were seized and possessed by the Income Tax Department, he could not file his return of income within the time allowed u/s 139(1), that no notice u/s 139(2) was served on him and that the return filed u/s 148 was to be treated as a return u/s 139(2) as per the clear language of Section 148 itself. It was, therefore, claimed that the order of assessment was not erroneous and prejudicial to the interests of the Revenue. The Commissioner of Income Tax held that, in view of the provisions of Section 80, the loss which was not determined in pursuance of a return filed u/s 139 could not be carried forward and set off against the profit for the subsequent year. He, therefore, rejected the assessee's contention, revised the assessment and directed the Income Tax Officer to withdraw the benefit of carry forward loss of Rs. 1,53,199 given in the original assessment and enhanced the total income by that amount.

4. The assessee preferred a second appeal before the Tribunal. It was contended on behalf of the assessee before the Tribunal that there is no difference between a return filed u/s 139(2) and that filed u/s 148. A reference was made to the provisions of Section 148(1) which provides that, before making the assessment or reassessment 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 u/s 139(2) 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. It was urged that the last portion of Section 148 clearly indicates that once a notice was issued under that section and a return filed by the assessee in compliance therewith, he cannot be deprived of the benefits available to him upon determination of loss in pursuance of that return which is as good as a return filed u/s 139(2). It was next urged that, while deciding the issue, the Commissioner of Income Tax very much relied on the provisions of Section 80 which are machinery provisions and claimed that a fiscal statute should not be strictly construed or applied to those parts of the statute which contain machinery provisions, in view of the decision in the case of Commissioner of Income Tax, Central, Calcutta Vs. National Taj Traders, . Reliance was also placed on the decision of the Supreme Court in the case of Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Others, , for the proposition that

once a notice u/s 148 has been issued, all the consequences which flow from the notice, if issued u/s 139(2), have to follow. It was contended that, by issue of a notice u/s 148, the Revenue cannot take away the right of the assessee to file a return u/s 139. It was, therefore, submitted that the return filed by the assessee should have been treated as a return filed u/s 139(4) and the benefit of carry forward of loss should have been allowed. It was thus strongly submitted that the order of the Income Tax Officer was not erroneous and prejudicial to the interests of the Revenue. It was, however, contended on behalf of the Revenue that the provisions of Section 139(2) and those of Section 148 are not in pari materia. It was urged that notice u/s 148 is issued only in the case of escapement of income either by reason of the omission or failure on the part of an assessee to make a return u/s 139 or to disclose full particulars of his income in the stage of original assessment or as a result of lack of vigilance or due to inadvertence on the part of the Income Tax Officer but the notice u/s 139(2) can be issued and served on any person who, in the Income Tax Officer's opinion, is assessable under the Act. It was claimed that a notice u/s 148 cannot be treated as equivalent to a notice u/s 139(2) and that a belated return cannot be regarded as a return in terms of Section 139(3). Reliance was placed on the decision in the case of Narain Das Paramanand Das Vs. Income Tax Officer, "E" Ward and Others, for that proposition. Reliance was also placed on the decision of the Supreme Court in the case of Brij Mohan Vs. Commissioner of Income Tax , New Delhi, , wherein it has been observed that nowhere does Section 139 declare that where a return is filed within the extended period, it will be deemed to have been filed within the period originally prescribed by the statute. It was, therefore, submitted that the order of the Income Tax Officer was erroneous and as such the Commissioner of Income Tax was justified in invoking the provisions of Section 263 of the Income Tax Act, 1961.

5. The Tribunal upheld the order of the Commissioner of Income Tax and dismissed the assessee's appeal by observing as under :

"We have heard the submissions made by both the parties before us and we are unable to concede to the submission of learned counsel for the assessee that the assessee was entitled to the benefit of carry forward of loss even if he filed a loss return u/s 148. Section 80 of the Income Tax Act, 1961, laid down the essential condition to be fulfilled for obtaining the benefit of carry forward of loss. This section reads as under:

"80. 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".

6. It is, therefore, clear from the language of the section itself that, if a person desires to acquire the benefit of carry forward of loss, he must file a return of that loss u/s 139. If he does not do so, he loses the benefit. As has been observed by the Supreme Court in the case of Mandyala Govindu and Co. Vs. The

Commissioner of Income Tax, Andhra Pradesh, Hyderabad, , right, being the creature of the statute, can be claimed only in accordance with the statute which confers it, and a person who seeks relief under a particular section must bring himself strictly within its terms before he claims the benefit of it. Bearing this principle in mind and considering the facts of the case, we have no hesitation in holding that the order of the Income Tax Officer was erroneous and prejudicial to the interests of the Revenue and as such the Commissioner of Income Tax was justified in invoking the provisions of Section 263 of the Act in this case. We, therefore, uphold his order."

7. The statement of case as forwarded by the Tribunal omits one factual aspect which, in our view, is most material and decisive. It does not appear whether, in this case, the issue of the notice u/s 148 read with Section 147(a) pre-empted the assessee's opportunity of filing the return within the time allowed u/s 139, i.e., whether the notice was issued before the time for filing voluntary returns belatedly u/s 139(4) expired. The Tribunal has, however, gone on the basis that the assessee failed to file the return u/s 139 necessitating the issue of a notice u/s 148 calling upon the assessee to file the return. This aspect is not brought out in the statement of case. To our mind, this is an all important factor for deciding the issue before us. If the assessee was not given an opportunity of filing the return under Sub-section (4) of Section 139, it should not be fair to say that the assessee should be deprived of the benefit of determination of the loss for the purpose of carry forward and set-off in later years. In similar circumstances, it has been held by this court in *Burdwan Wholesale Consumers' Co-operative Society Ltd. Vs. Commissioner of Income Tax, ,* that the chance issue of a notice u/s 148 even while the time for filing a voluntary return was still running, cannot abridge the assessee's statutory privilege of filing a voluntary return u/s 139(4). For, if it does, it will lead to hostile discrimination, because another person, by a mere freak of not being served with such a notice, shall be entitled to the same benefit. The view that we take is consonant with the view of the Madhya Pradesh High Court which held that the assessee would be entitled to the carry forward and set off of its loss even if the loss is determined in pursuance of a return filed u/s 148 but within the time available for filing a belated return voluntarily u/s 139(4). See *Co-operative Marketing Society Ltd. Vs. Commissioner of Income Tax, .*

8. We, therefore, decline to answer the first question and remand the matter to the Tribunal to find out whether the notice u/s 148 of the Act was issued to the assessee for the assessment year 1974-75, before the time allowed u/s 139(4) to file the return belatedly expired.

9. The second question is only consequential. Speculation loss determined pursuant to a return filed u/s 148, but within the time allowed u/s 139(4), is eligible for carry forward and set-off and the same should be carried forward and set-off against the speculation profit available in the subsequent year. The question whether or not the set-off of the speculation loss determined in respect

of the assessment year 1974-75 should be carried forward and set-off against the speculation profit available in the assessment year 1977-78 would depend on the answer to the first question. We, therefore, decline to answer the second question.

10. The matter is, therefore, remanded to the Tribunal. The Tribunal will decide the appeal afresh in the light of the observations made in the judgment.

11. There will be no order as to costs.

Bhagabati Prasad Banerjee, J.

12. I agree.