

R. Dalmia

Vs

Commissioner of Income Tax

Civil Appeal Nos. 4913-26 of 1992

(S. P. Bharucha, N. Santosh Hegde JJ)

05.02.1999

JUDGMENT

S.P. Bharucha J

1. These appeals, by certificate, impugn the correctness of the judgment of a Division Bench of the High Court at Delhi. The question is whether the additional period of 180 days given by Explanation 1(iv) of Section 153 of the Income Tax Act, 1961, is available when the assessment or reassessment is made under Section 147.

2. We are concerned with assessments/reassessments made under Section 147. In one set of appeals the Assessment Year involved is 1947-48. The notice under Section 148 was issued on 24th March, 1964. Subsequent proceedings were stayed by the High Court on 29th May, 1964, the order of stay being made on a writ petition filed by the assessee. The writ petition was dismissed, and the stay vacated, on 17th May, 1974. The draft order under Section 144B was made on 10th March, 1978 and the final order of assessment was made on 14th September, 1978. Assuming that the extended period of limitation of 180 days aforementioned was not available to the Revenue, the period for making the assessment had expired on 19th March, 1978. In the second set of appeals the Assessment Years involved are 1947-48 and 1948-49. The notices under Section 148 were issued on 24th March, 1964 and 20th March, 1965. Subsequent proceedings were stayed by the High Court on 23rd February, 1968 and 21st August, 1968, the orders of stay being made on writ petitions filed by the assessee. The writ petitions were dismissed, and stay vacated, on 27th April, 1978. The draft orders under Section 144B were made on 16th May, 1978 and 31st July, 1978 and the final orders of assessment were made on 6th September, 1978 and 7th April, 1979. Assuming that the extended period of 180 days aforementioned was not available to the Revenue, the period for making the assessments had expired on 5th June, 1978 and 7th December, 1978.

3. The assessee's challenge to these assessments was taken to the Income Tax Appellate Tribunal. The Tribunal held that the assessments were barred by time because Section 144 B, in its view, applied only to assessments made under Section 143(3) and could not be applied to assessments and reassessments made under Section 147. At the instance of the assessee as also the Revenue, the following questions were referred to the High Court at Delhi :

"1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that provisions of section 144-B were not applicable to assessments made pursuant to the provisions of section 147 in the case of J. Dalmia, HUF, for assessment years 1947-48 and 1948-49 and in the case of AOP for assessment year 1947-48 ?

2. Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the provisions of Section 144-B are procedural and apply to all assessments pending at the time when the said provision was introduced by Taxation Laws (Amendment) Act, 1975 w.e.f. 1.1.1976 ?

3. Whether on the facts and in the circumstances of the case, Tribunal was right in law in holding that assessments in the case of J. Dalmia (HUF) for A.Ys. 1947-48 and 1948-49 and in the case of AOP for A.Y. 1947-48 were barred by time limitation ?"

The High Court took the view that the provisions of Section 144-B were applicable to assessments and reassessments made under Section 147 and answered the questions accordingly.

The High Court at Madras in *Commissioner of Income Tax v. Sundaram Spinning Mills and Ors.*, 225 ITR 214 and *CIT v. Simson and McConechy Ltd.*, 177 ITR 526, the High Court of Punjab and Haryana in *CIT v. Usha Aggarwal*, 178 ITR 406, and the High Court of Calcutta in *Commissioner of Income Tax v. Smt. Radha Devi Poddar*, 185 ITR 544, have reached conclusions similar to that reached by the Delhi High Court in the impugned judgment. The contrary view has been taken by the Kerala and Bombay High Courts in *Kerala Kaumudi Pvt. Ltd. v. CIT* 181 ITR 30, and *CIT v. V.D. Saraf (HUF)*, 207 ITR 217.

4. Section 153 provides the time limit for completion of assessment and reassessments. Sub-section (1) thereof deals with assessments under Sections 143 and 144 and sub-section (2) deals with assessments under Section 147. Explanation (1) to the section says that in computing the period of limitation for its purposes "(iv) the period (not exceeding one hundred and eighty days) commencing from the date on which the Income-tax Officer forwards the draft order under sub-section (1) of Section 144B to the assessee and ending with the date on which the income-tax Officer receives the directions from the Inspecting Assistant Commissioner under sub-section (4) of that section, or, in a case where no objections to the draft order are received from the assessee, a period of thirty days' shall be excluded.

Section 144B reads thus :

"144B. Reference to Inspecting Assistant Commissioner in certain cases. - (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 (hereinafter in this section referred to as the draft order) to the assessee.

(2) On receipt of the draft order, the assessee may forward his objections, if any, to such variation to the Income-tax Officer within seven days of the receipt by him of the draft order or within such further period not exceeding fifteen days as the Income-tax Officer may allow on an application made to him in this behalf.

(3) If no objections are received within the period or the extended period aforesaid, or the assessee intimates to the Income-tax Officer the acceptance of the variation, the Income-tax Officer shall complete the assessment on the basis of the draft order.

(4) If any objections are received, the Income-tax Officer shall forward the draft order together with the objections to the Inspecting Assistant Commissioner and the Inspecting Assistant Commissioner shall, after considering the draft order and the objections and after going through (wherever necessary) the records relating to the draft order, issue, in respect of the matters covered by the objections, such directions as he thinks fit for the guidance of the Income-tax Officer to enable him to complete the assessment. Provided that no directions which are prejudicial to the assessee shall be issued under this sub-section before an opportunity is given to the assessee to be heard.

(5) Every direction issued by the Inspecting Assistant Commissioner under sub-section (4) shall be binding on the Income-tax Officer.

(6) For the purpose of sub-section (1), the Board may, having regard to the proper and efficient management of the work of assessment, by order, fix, from time to time, such amount as it deems fit :

Provided that different amounts may be fixed for different areas :

Provided further that the amount fixed under this sub-section shall, in no case, be less than twenty-five thousand rupees.

(7) Nothing in this section shall apply to a case where an Inspecting Assistant Commissioner exercises the powers or performs the functions of an Income-tax Officer in pursuance of an order made under Section 125 or section 125A."

Section 147, so far as it is relevant, reads thus :

"147. Income escaping assessment. - if -

(a) the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in section 148 to 153 referred to as the relevant assessment year)."

Section 148 reads thus :

"148. Issue of notice where income has escaped assessment. - (1) Before making the assessment, reassessment or recomputation under Section 147, the Income-tax Officer shall serve on the assess 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 above 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."

Section 151 reads thus :

"151. Sanction for issue of notice. - (1) No notice shall be issued under section 148 after the expiry of eight years from the end of the relevant assessment year, unless the Board is satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice.

(2) No notice shall be issued under section 148 after the expiry of four years from the end of the relevant assessment year, unless the Commissioner is satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice."

5. Section 139 is in Chapter XIV, which deals with the procedure for assessment. Section 139 itself deals with the return of income; sub-section (2) thereof empowers the assessing officer to issue a notice to an assessee calling upon him file a return. Section 142 deals with the inquiry that is to be made before an assessment. Section 153 deals with assessments.

6. The argument on behalf of the assessee was that the provisions of Section 144-B did not apply to assessments and reassessments under Section 147 and that they applied only to assessments under Section 143. Therefore, the extended time limit for assessment given by Explanation 1(iv) of Section 153 was not available in respect of assessments and reassessments under Section 147. Attention was drawn in this behalf to the provisions of Section 126, which relates to appealable orders. It was pointed out that assessments under Section 143 and assessments and reassessments under Section 147 were differently treated (sub-section (1) clause c and e). Reference was also made to Section 263, relating to the powers of revision of orders prejudicial to the Revenue, and it was pointed out that Section 263 expressly provided that it was inapplicable to orders of reassessment made under Section 147. A similar argument was advanced relying upon Section 144-A.

7. On behalf of the Revenue it was contended that Section 147 by itself did not permit assessments and determination of the tax due. Therefore, recourse to Section 143 was necessary. The assessment or reassessment was not under Section 147 but Section 143/147. It is submitted that Section 143 makes no distinction between Section 144-B proceedings taken originally and Section 143-B proceedings taken pursuant to a notice under Section 148.

8. Before analysing the relevant provisions of the Act, reference must be made to two judgments of this Court. In *CIT v. Sun Engineering Works Pvt. Ltd.*, 198 ITR 297, it was held :

"As a result of the aforesaid discussion, we find that, in proceedings under section 147 of the Act, the Income Tax Officer may bring to charge items of income which had escaped assessment other than or in addition to that item or items which have led

to the issuance of the notice under Section 148 and where reassessment is made under Section 147 in respect of income which has escaped tax, the Income Tax Officer's jurisdiction is confined to only such income which has escaped tax or has been underassessed and does not extend to revising, reopening or reconsidering the whole assessment or permitting the assessee to reargue questions which had been decided in the original assessment proceedings.....Keeping in view the object and purpose of the proceedings under Section 147 of the Act which are for the benefit of the Revenue and not an assessee, an assessee cannot be permitted to convert the reassessment proceedings as his appeal or revision, in disguise, and seek relief in respect of items earlier rejected or claim relief in respect of items not claimed in the original assessment proceedings, unless the relatable to "escaped income", and reargue the concluded matters. Even in cases where the claims of the assessee during the course of reassessment proceedings relating to the escaped assessment are accepted, still the allowance of such claims have to be limited to the extent to which they reduce the income to that originally assessed. The income for purposes of "reassessment" cannot be reduced beyond the income originally assessed."

9. The other judgment of this Court is in *Modi Industries Ltd. v. CIT*, 216 ITR 759. It dealt with the construction to be placed upon the expression "regular assessment" occurring in Section 214. There was nothing in the 1961 Act, it was held, to suggest that "regular assessment" had been used in any sense other than the first assessment made under Section 143 or 144.

10. Section 147 empowers an Income tax Officer to assess or reassess income chargeable to tax that has escaped assessment in any assessment year. He may do so subject to the provisions of Sections 148 to 153. Before making an assessment or reassessment under Section 147, the Income Tax Officer must, by reason of the provisions of Section 148, serve on the assessee a notice to file a return of this income "and the provisions of the Act shall, so far as may be, apply accordingly as if the notice were a notice issued under" Section 139(3). Section 151 says that no notice under Section 148 may be issued by the Income Tax Officer without the sanction of a higher authority as stated therein.

11. After a notice to file a return has been issued under Section 139 a return must be filed by the assessee signed in the manner prescribed by Section 140. An inquiry must then be held as required by Section 142 and an assessment be made under Section 143. If the Income-tax Officer proposes to make a 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, the provisions of Section 144-B require the Income tax Officer to forward a draft of the proposed order of assessment to the assessee. The assessee may then forward objections to such variation to the Income tax Officer. If no objections are received, the Income Tax Officer may complete the assessment on the basis of the draft order. If, however, objections are received, the Income tax Officer must forward the draft order together with the objections to the Inspecting Assistant Commissioner and the Inspecting Assistant Commissioner must, after considering the draft order, the objections and the record, issue such directions as he thinks fit for the guidance of the Income tax Officer to enable him to complete the assessment, but no directions which are prejudicial to the assessee may be given before an opportunity is given to the assessee to be heard. The directions are binding on the Income tax Officer. It is to enable this procedure to be carried out that Explanation 1(iv) of Section 153 gives an extended period of 180 days to complete the assessment.

11. By reason of Section 148, after a notice thereunder has been served on the assessee containing the requirements which must be included in a notice under Section 139(2), "the provisions of this Act shall so far as may be applied accordingly as if the notice were a notice issued under that sub-section." What this implies is, in our view, clear. Even after a notice is issued under Section 148, if the Income-tax Officer proposes to make a variation in the income returned pursuant to such notice which is prejudicial to the assessee and the amount of such variation exceeds the amount fixed by the Board, the Income tax Officer must forward a draft of the proposed order of the assessment to the assessee. The assessee is entitled to forward objection to such variation. If he does not do so, the Income tax Officer may complete the assessment or reassessment on the basis of the draft order. If, however, the assessee does raise objections, the Income Tax Officer must forward the draft order together with the objections to the Inspecting Assistant Commissioner must, after considering the draft order, the objections and the record, issue such directions as he thinks fit for the guidance of Income Tax Officer to enable him to complete the assessment or reassessment, but no directions which are prejudicial to the assessee may be issued before an opportunity is given to the assessee to be heard. The directions issued by the Inspecting Assistant Commissioner are binding on the Income Tax Officer.

12. If, therefore, the procedure that is prescribed by Section 144-B is to be applied even to assessments and reassessments under Section 147 and, as we have stated, we think it must, having regard to the terms of the provisions of the Act herein before referred to as also because the provisions of Section 144-B are intended to safeguard the interest of the assessee, the extended period of limitation prescribed by Explanation 1(iv) to Section 153 must apply.

13. It was submitted on behalf of the assessee that the provisions of Section 144-B were not applicable to assessments and reassessments under Section 147 because Section 144-B stated that it applied only to "an assessment to be made under sub-section (3) of Section 143." The submission cannot be accepted because the words we have quoted from Section 148 cannot be ignored. A notice having been issued under section 148, the procedure set out in the sections subsequent to Section 139 has to be followed "so far as may be". Section 144-B is a procedural provision. It fits into the procedural scheme as hereinbefore noted and, therefore, it cannot be excluded by reason of the use of the words "so far as may be". Nor is there any other good reason to exclude it from the procedure to be followed subsequent to a notice under Section 148.

14. It was pointed out by learned counsel for the assessee that no assessments could be reopened under Section 147 by the issuance of a notice under Section 148 unless sanction for such issuance had been obtained under Section 151. The authorities empowered to grant such sanction under Section 151 being higher in rank than an Inspecting Assistant Commissioner, it was submitted that it was incongruous that actual assessment or reassessment pursuant to such notice should be supervised by and be subject to the directions of only an Inspecting Assistant Commissioner. This was an indication that Section 144-B had no application to assessments and reassessments under Section 147. We do not see an incongruity. The reopening of an already completed assessment for the reason that the Income tax Officer has reason to believe that income chargeable to tax has escaped assessment is a serious matter. The Act requires the Income tax Officer to record his reasons for issuing a notice under Section 148. The Act also requires that such notice shall not be issued unless the higher authorities mentioned in Section 151 sanction its issue. The assessment or reassessment consequent upon such notice is a different matter. Different considerations apply to a situation where in making the order of assessment or reassessment the Income Tax Officer proposed to vary the income returned by the assessee in a manner that has been fixed by the Board, and the assessee has objected to the variation. The Inspecting Assistant Commissioner is then required to

consider the proposed order, the objections and the record and give appropriate, and building, directions to the Income tax Officer.

15. It was submitted by learned counsel for the assessee that in response to a notice under Section 148 an assessee was likely to make a return only of the income which he had originally returned and on the basis of which the original assessment order was made. Therefore, more often than not, the Income tax Officer was likely to make a variation thereof, prejudicial to the assessee, which exceeded the amount fixed by the Board. That may well be so but in our view, it can make no difference to the construction of the provisions. Section 144-B, provides a measure of protection to assessee - that substantial variations, prejudicial to them, should not be made in their returned incomes only by Income tax Officers : these should be made only after consideration by Inspecting Assistant Commissioners. That a larger number of assessee might get such protection is not a good reason for holding that the provisions of Section 144-B are inapplicable to assessments and reassessments under Section 147.

16. As to the argument based upon Sections 144-A, 246 and 263, we do not doubt that assessments under Section 143 and assessments and reassessments under Section 147 are different, but in making assessments and reassessments under Section 147 the procedure laid down in Sections subsequent to Section 139, including that laid down by Section 144-B, has to be followed.

17. We have not dealt individually with the judgments of the High Courts that have taken a view favourable to the assessee because the arguments that appealed to the High Court were the arguments that we have already considered.

18. On a construction of the most pertinent provisions, therefore, we are of the view that Section 144-B applies to assessment and reassessments under Section 147 and that therefore, the extended period of limitation provided by Explanation 1(iv) of Section 153 is available for making such assessments and reassessments. The appeals are dismissed. with costs.