

ALLAHABAD HIGH COURT

Metal India Products

Vs.

I.T. Commr.

Income-tax Reference No. 625 of 1972

(Satish Chandra, C.J., K.C. Agrawal and R.M. Sahai, JJ.)

05.04.1978

JUDGEMENT

Satish Chandra, C.J.

1. The assessee is a firm. It carries on business of manufacture and sale of building fittings at Hathras. For the assessment year 1963-64, the return was due to be filed on or before Sept. 30, 1963 under Section 139 (1) of the Income-tax Act, 1961. For the assessment year 1965-66, the return under Section 139 (1) was due to be filed on or before Sept. 30, 1965. No notice under Section 139 (2) was served on the assessee for either of the two years. The assessee filed its return under Section 139 (4) of the Act on Oct. 12, 1966 for both the assessment years. It declared an income of Rs. 9,920/- for the assessment year 1963-64 and an income of Rs. 37,140/- for the assessment year 1965-66.
2. The Income Tax Officer, by an assessment order dated December 25, 1967, assessed the total income for 1963-64 at Rs. 14,776/-, while for the year 1965-66 he computed the assessable income at Rs. 45,205/-
3. Finding that there was delay in filing the return, the Income Tax Officer initiated penalty proceedings under Section 271 (1) (a) of the Act. He imposed a penalty of Rs. 960/- for the assessment year 1963-64 and of Rs. 3,312/- for the year 1965-66 on the finding that there was a delay of 37 months in filing the return for the earlier and of 12 months in filing the return for the subsequent year.
4. The assessee went up in appeal but failed. The tribunal also confirmed the view that the assessee having committed default in filing the returns beyond

time prescribed by Section 139 (1), penalty was leviable. On the question of quantum, the Tribunal returned the case to the Appellate Assistant Commissioner for reconsideration. At the instance of the assessee, the tribunal has solicited our opinion on the following questions of law :

"1. Whether, upon the facts and in the circumstances of the case, the return of income filed under Section 139 (4) is to be treated as a return filed within time?

2. Whether, upon the facts and in the circumstances of the case the assessee was legally liable to penalty under Section 271 (1) (a)?"

5. The reference came up for hearing before a Division Bench of this Court. It was urged before it that a return filed under Section 139 (4) is a distinct kind of return for which no penalty has been provided under Section 271 (1) (a) and as such, no penalty can be imposed. In support, reliance was placed upon a Division Bench decision of this Court in *Income Tax Officer v. Adarsh Construction Co.* ¹ The Bench thought that this case required reconsideration and it, therefore, referred the case to a Full Bench. That is how the case has come up before us.

6. Chapter XIV of the Act is entitled "Procedure for assessment."It begins with Section 139. Sub-section (1) of Section 139 requires every person who has assessable income to furnish a return of his income. It also lays down a period of limitation for it. The proviso to sub section (1) authorizes the income Tax Officer to extend the date for furnishing the return up to a certain point of time without charging any interest, and beyond that time, upon payment of interest.

7. Sub-section (2) of Section 139 authorizes the Income Tax Officer to issue a notice requiring a person to file the return of his income within 30 days of the service of the notice. The proviso thereto entitles the Income Tax Officer to extend the time on the same lines as in the proviso to sub section (1). Sub-sec, (4) of Section 139 provides :

"(4) Any person who has not furnished a return within the time allowed to him under sub section (1) or sub section (2) may, before the assessment is

made, furnish the return for any previous year at any time before the end of four assessment years from the end of the assessment year to which the return relates, and the provisions of sub-Clause (iii) of the proviso to sub section (1) shall apply in every such case."

8. Section 139 lays down three periods of limitation for filing a return. A return may be filed within the time allowed under Sub-section (1) or if a notice has been issued by the Income tax Officer under Sub-section (2) within the time allowed under it and, thirdly, under Sub-section (4) within four years from the end of the assessment year and before the assessment order is passed. If a return is filed within any of these three time limits, the Income Tax Officer is bound to take it into consideration and make an assessment under Section 148, but if a return is filed after an assessment order has been made, or after the expiry of four years from the end of the assessment year, it is a waste paper which can be ignored by the Income-tax Officer. It is not a return contemplated by any provision of the Income Tax Act.

9. Sub-sections (1) and (2) of Section 139 provide a definite date up to which alone a return can be filed, while sub section (4) gives to the assessee a locus poenitentiae. He may file a return at any time before assessment has been made and before expiry of four years. Even though the assessee may have defaulted in filing the return within the time prescribed by sub-sections (1) and (2), yet if he files the return within the time limit mentioned under sub section (4), the return is valid and is bound to be taken into consideration in making an assessment.

10. We may now examine Section 271. This section occurs in Chapter XXI which is headed as "Penalties Imposable." S. 271 carries a marginal note "Failure to furnish returns, comply with notices, concealment of income, etc." Clause (a) of Section 271 (1) deals with failure to furnish returns, clause (b) with failure to comply with notices and clause (c) with concealment of income : Clause (a) reads:-

"271 (1), If the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person,

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub section (1) of Section 139 or by notice given under sub section (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub section (1) of Section 139 or by such notice, as the case may be or
(b)....."

11. Clause (a) is in two parts. At first sight there appears to be a sort of repetition or overlapping. But a closer look discloses that they deal with two different situations. The first part refers to failure to furnish while the second part deals with failure to furnish within the time allowed. The first sub-clause applies where a return has not been filed at all while the second clause applies when a return has been filed but beyond the time allowed by sub section (1) to Section 139 or by the notice given under sub section (2) of Section 139 or Section 148.

12. Each of the two parts deals with two events : (i) with reference to sub section (1) of Section 139 and (ii) in relation to the notice given under sub section (2) of Section 139.

13. If there is a total failure to furnish the return, a default takes place in respect of sub section (1) of Section 139 and if in spite of a notice given under Section 139 (2), a return is not filed, another default takes place when the time mentioned in the notice expires. Similarly, under the second sub-clause both these events cause a default. If a return is filed beyond the time allowed by sub section (1) of Section 139 a default is committed on the expiry of the time provided by sub section (1) of Section 139. Similarly, if a return is filed after the expiry of the time given in the notice under sub section (2) of Section 139, another default takes place.

14. On its language, penalty under clause (a) becomes imposable the moment the particular default occurs.

15. The principal contention raised on behalf of the assessee before the Tribunal was that sub section (4) of Section 139 acted as a proviso to sub section (1) of

Section 139. If an assessee filed his return within four years from the end of the assessment year as contemplated by Section 139 (4) he must be deemed to have filed his return within the time allowed by sub section (1) of Section 139. In other words, the phrase "within the time allowed by sub section (1) of Section 139" should be construed so as to include the time up to when return may be filed under sub section (4) of Section 139. It is difficult to accept this submission.

16. On its language, clause (a) of Section 271 (1) refers specifically to sub section (1) and sub section (2) only. Sub-section (4) is not referred to at all :

17. In the next place, if the legislature intended that sub section (4) should act as a proviso to sub section (1) or sub-sec (2), it would have enacted sub section (4) expressly as a proviso to sub-sec (1) or (2) specially when we find that the legislature has enacted several provisos to sub section (1) and a proviso to sub section (2). Last, but not least, treating sub section (4) as a proviso to sub section (1) or sub-sec (2) would render sub-section, (1) or sub section (2) completely superfluous and ineffective for purposes of imposition of penalty under clause (a) of Section 271 (1). If it was intended that in a case where an assessee files his return at any time up to the making of assessment order and within four years from the end of the assessment year, no penalty is imposable, then there was no reason at all to mention sub section (1) or (2) in clause (a) of Section 271 because in cases where a return has been filed within the time prescribed by sub section (4), there could possibly be no default in respect of sub section (1) or (2) so as to give cause of action for drawing up penalty proceedings. The legislature would have provided in clause (2) of Section 271 (1) that if a person without reasonable cause failed to furnish a return within four years from the end of the assessment year, he shall be liable to penalty. Instead of so enacting, Parliament chose to be specific by saying "within the time allowed by sub section (1) of Section 139." This shows that for purposes of penalty the filing of the return within the time prescribed by sub section (4) was immaterial. The emphasis was to check evasion of the time prescribed by sub section (1) or sub section (2) of Section 139. If the time prescribed by sub section (1) or (2) passes, default takes place, attracting liability to penalty.

18. As already seen, clause (a) of Section 271 (1) is in two parts. One applies to an absolute failure to file the return, while the other governs late filing. According to the assessee's contention, an assessee would be liable to penalty under the first part if he fails to furnish the return even within four years. Ex hypothesi, the second part of clause (a) would then apply to a case where a return is filed after the expiry of four years. As already seen, a return filed after the expiry of four years is a mere scrap of paper. It is not a return of income in the eye of law. It cannot be taken into consideration by the Income Tax Officer even for purposes of assessment. In view of this settled position, an assessee who files a return after the expiry of four years is liable to be treated as having not filed a return at all, so as to be covered by the first part of clause (a). From this point of view, the second part of clause (a) becomes redundant. It will never be operative.

19. In our view, there is no justification for imputing to Parliament an intention to make the basis of distinction, a point which renders a part of the enactment otiose.

20. Thus, there is intrinsic evidence that the time-limit prescribed by sub section (4) of Section 139 has no relevance to the accrual of the defaults attracting penalty, under clause (a) of Section 271 (1).

21. Before the Tribunal, reliance was placed on the decision of the Supreme Court in *Commissioner of Income-tax v. Kulu Valley Transport Company Private Limited*² This case is distinguishable. In that case, no question of imposition of penalty arose for consideration. It was held that a return filed beyond time prescribed by Section 22 (2-A) was a valid return. This Supreme Court decision has been discussed at length by the Gujarat High Court in *Additional Commr. of Income Tax v. Santhosh Industries*³ by the Madras High Court in *K. C. Vadadri v. Commr. of Income Tax, Madras*⁴ by a Full Bench of the Orissa High Court in *Commr. of Income Tax v. Ganga Rani Chapolia*⁵ and by a Division Bench of this Court in *Addl. Commr. of Income Tax v. Sita Devi Chand*⁶ We respectfully agree with the reasons mentioned in these decisions for distinguishing the Kulu Valley case. In all these cases, it has been held that filing of a return within the time prescribed by Section 139 (4) will not exempt the assessee from liability to penalty for violating sub section (1) or sub section

(2) of Section 139. The same view has been taken by the Rajasthan High Court in *Addl. Commr. of Income Tax, Rajasthan v. Noor Mohammad and Co.*⁶ by the Calcutta High Court in *Sunderlal v. Income Tax Officer, Calcutta*⁷ and by the Rajasthan High Court in the *Commr. of Income Tax, Rajasthan v. Indra and Co.*⁸ In this case, the Rajasthan High Court held that an assessee is liable to penalty for not submitting the return within the time allowed by Section 139 (1) even though he subsequently files a return in pursuance of a notice under Section 139 (2) within the time prescribed by that notice.

22. The case of *Adarsh Construction Co.* (1968) 70 ITR 796 (All) which has caused this reference to a Full Bench, remains to be considered. In our opinion, this decision is distinguishable. In that case, the question was whether the notice under Section 22 (3) and the consequent assessment order made under Section 23 (4) were valid. We are not called upon to decide any such question and we refrain, from making any observations with regard to the actual decision on that point. At page 799 the Bench observed :

"There should be no difficulty in treating return filed under sub section (3) as a distinct class."

This observation was made in respect of the power to issue notice and to pass a best judgment assessment. In regard to penalty, the Bench observed :

"Mr. Gulati invited our attention to section 28 of the Act. Section 28 provides for penalty for concealment of income. Section 28 refers to sub-sections (1) and (2) of Section 22, but makes no reference to sub section (3) of the said section. Mr. Gulati contended that the language of Section 28 suggests that a return filed under sub section (3) of Section 22 is covered by Section 28. We do not think so. The returns to be furnished under sub-sections (1) and (2) are obligatory. On the other hand, the return furnished under sub section (3) is voluntary. The legislature rightly decided that there should be penalty for non-compliance with the requirements of sub-sections (1) and (2), but there is no need for prescribing a penalty for failure to furnish a voluntary statement under sub section (3) of Section 22."

23. Sub-section (3) of Section 22 is now sub section (4) of Section 139. All that this decision says is that no penalty was prescribed for failure to furnish a return under sub section (4) of Section 139. There can be no quarrel with this proposition. The Bench observed that the legislature rightly decided that there should be penalty for non-compliance of the requirements of sub-sees. (1) and (2). Again no quarrel can be had with this observation. It seems to suggest that even where a voluntary return has been filed under sub section (4) of Section 139 which is equivalent to sub section (3) of Section 22, yet penalty is leviable for non-compliance with the requirements of sub-sections (1) and (2) of Section 139. If at all, this decision is in conformity with the view that has appealed to us and the various High Courts mentioned above. The questions as referred to us do not bring out the true controversy. We accordingly reframe the questions as follows:-

- "1. Whether on the facts and in the circumstances of the case the return of income filed under Section 139 (4) be treated as a return filed within the time prescribed by Section 139 (1).
2. Whether on the facts and in the circumstances of the case, the assessee was legally liable to penalty under Section 271 (1) (a)."

24. We would, therefore, answer the first question in the negative against the assessee and in favors of the Department and the second question in the affirmative in favors of the Department and against the assessee. As the assessee has not represented, there will be no order as to costs.

25. Let these answers and this opinion be transmitted to the Income Tax Appellate Tribunal under the signatures of the Registrar and the seal of the Court.

Reference answered accordingly.

Cases Referred.

1. ((1968) 70 ITR 796 (All))
2. (77 ITR 518): (AIR 1970 SC 1734)

3. (93 ITR 563 at p. 578): (1974 Tax LR 753 at p. 761)
4. (87 ITR 76 at p. 80): (1972 Tax LR 784 at p. 786)
5. (1978 UPTC 407 at p. 409): (1977 Tax LR 37)
6. (97 ITR 705): (1973 Tax LR 1559)
7. ((1974)-97 ITR 183)
8. (79 ITR 702): (AIR 1970 Raj 207)