KERALA HIGH COURT

Eapen Joseph

Vs

Commissioner of Income-Tax

(K.S. Paripoornan and K Sreedharan, JJ.)

30.06.1987

JUDGMENT

K.S. Paripoornan, J.

1. As directed by this court in O.P. No. 1974 of 1978, the Income-tax Appellate Tribunal has referred the following question of law for the decision of this court:

> "Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that the assessment is not barred by limitation ?"

2. The applicant is an assessee to income-tax. The assessment year in question is 1972-73. The status of the assessee is "individual". He filed a voluntary return on May 10, 1974. It was one under Section 139(4) of the Act. He filed a revised return on March 11, 1975. The assessment was completed on March 6, 1976 (annexure A). It is stated that the order was served on the assessee on August 28, 1976. The order of assessment dated March 6, 1976, determined the total income assessable at Rs. 83,960 and levied a tax of Rs. 55,772 inclusive of interest. In the appeal, the assessee/applicant contended that the assessment is barred by limitation in terms of Section 153(1)(c) of the Income-tax Act as it should have been completed within the expiry of one year from the date of filing the return, i.e., before May 10, 1975, and the return filed on March 11, 1975, was an invalid one and should be ignored. The Appellate Tribunal held that the assessee represented before the Income-tax Officer that the return filed on March 11, 1975, is a revised return and received some benefits. Thereafter, it is not possible for the assessee to go back on his earlier representation and contend that what was filed is not a revised return at all and that it should be ignored. He is estopped from contending so. The Appellate Tribunal went further and held that even on merits, there is no merit in the plea. The voluntary return filed in this case under Section 139(4) of the Act is really a return filed within the extended time-limit and the assessee has really complied with the provisions of either Section 139(1) or Section 139(2) of the Act, and Section 139(5) enables a revised return to be filed in cases where the return is filed under Section 139(1) or 139(2). It includes the returns filed in compliance with

either of these two Sub-sections, under the extended time-limit of Section 139(4). What the assessee filed was a revised return within the extended time-limit and once this is accepted, the extended time of one year from the date of filing of the revised return (revised return filed on March 11, 1975), is available to the Department (till March 11, 1976). In this view of the matter, the plea of limitation urged by the assessee was overruled. The assessee filed an application under Section 256(1) of the Income-tax Act to refer the question of law, mentioned hereinabove, for the decision of this court. It was rejected. It is thereafter, as directed by this court, the above question of law has been referred by the Appellate Tribunal for the decision of this court.

3. We heard counsel for the petitioner/applicant, P.G.K. Wariyar and K.B. Menon, as also counsel for the Revenue, Mr. P.K.R. Menon. Before us, counsel for the assessee urged that the decision of the Appellate Tribunal, negativing the plea of limitation, is erroneous in law. It was submitted that for the assessment year concerned 1972-73, the assessee did not file the return in pursuance of Section 139(1) or 139(2) of the Income-tax Act. The return filed on May 10, 1974, is admittedly one filed under Section 139(4) of the Act. Under Section 139(5) of the Act, a revised return can be filed only in cases where the return is filed under Section 139(1) or 139(2) of the Act. Section 139(5) of the Act does not permit a revised return to be riled in cases where the return is filed under Section 139(4) of the Act. So, the return filed on March 11, 1975, cannot be a revised return under Section 139(5) of the Act. It is invalid. It has no legal consequences. It should be ignored. So, it cannot be relied on for the purpose of getting the extended period of limitation under Section 153(1)(c) of the Act. In this case, the assessment should have been made within two years from the end of the assessment year as provided by Section 153(1)(a)(iii) of the Act, i.e., on or before March 31, 1975, or at least within one year from the date of filing the return--within one year from May 10, 1974, under Section 153(1)(c) of the Act. The order of the assessment dated March 6, 1976, is patently barred. The assessee's counsel went to the extreme extent of submitting that even if the assessment order is dated March 6, 1976, it is effective and valid only when communicated or served on the assessee. That was done only on August 28, 1976. If that is considered to be the effective date, when the order of assessment is made for the purpose of Section 153(1) of the Act, it is more than two years from the end of the assessment year under Section 153(1)(a)(iii) of the Act and also one year beyond the date of the return and also the revised return and so even the extended period under Section 153(1)(c) of the Act will not be available at all. Counsel for the Revenue submitted that the second return filed on March 11, 1975, is an additional or the final return and that it will be one filed under Section 139(4) of the Act and so the assessment made in this case within one year from the date of the said final return is competent and valid under Section 153(1)(c) of the Act. In the alternative, it was contended that the Income-tax Officer, while making the assessment, referred the case to the Inspecting Assistant Commissioner for penalty under Section 271(1)(c) of the Act and so the period of eight years from the end of the assessment year in which the income was first assessable under Section 153(1)(b) will be available. In this view of the matter, the assessment is not barred. The plea of limitation is without basis.

4. Having heard the rival contentions of the parties, we are of the view that the plea of the assessee should prevail. Before adjudicating the rival contentions raised before us, it will be useful to quote Sections 153(1) and 139(4) and (5) of the Income-tax Act, 1961 :

"153. Time-limit for completion of assessments and reassessments.--(1) No order of assessment shall be made under Section 143 or Section 144 at any time after--

(a) the expiry of--

(i) four years from the end of the assessment year in which the income was first assessable, where such assessment year is an assessment year commencing on or before the 1st day of April, 1967 ;

(ii) three years from the end of the assessment year in which the income was first assessable, where such assessment year is the assessment year commencing on the 1st day of April, 1968;

(iii) two years from the end of the assessment year in which the income was first assessable, where such assessment year is an assessment, year commencing on or after the 1st day of April, 1969 ; or

(b) the expiry of eight years from the end of the assessment year in which the income was first assessable, in a case falling within Clause (c) of Sub-section (1) of Section 271 ; or

(c) the expiry of one year from the date of filing of a return or a revised return under Sub-section (4) or Sub-section (5) of Section 139, whichever is latest."

"139. (4)(a) 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 the period specified in Clause (b), and the provisions of Sub-section (8) shall apply in every such case ;.....

(5) If any person having furnished a return under Sub-section (1) or Sub-section (2), discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the assessment is made."

5. We shall first dispose of the alternate contention of the Revenue based on Section 153(1)(b) of the Act. The Income-tax Officer did not initiate proceedings under Section 271(1)(c)of the Act. He only referred the matter to the Inspecting Assistant Commissioner. Even so, adverting to the plea based on Section 271(1)(c) of the Act, the Appellate Assistant Commissioner held in para 2 of the order that the time-limit under Section 153(1)(b) of the Act will apply and so the assessee's plea that the assessment is barred by limitation is untenable. The Appellate Tribunal adverted to this plea in para 3 of its order. Either the said plea was not pressed at the time of hearing or the Appellate Tribunal did not adjudicate on that question. The Appellate Tribunal sustained the assessment only under Section 153(1)(c) of the Act on the ground that the assessment was made within one year from the date of the revised return. If the Revenue was aggrieved by the said decision of the Appellate Tribunal in failing to hold that the assessment can be sustained under Section 153(1)(b) of the Act, the Revenue should have taken proceedings for referring the said question of law for the decision of this court. It did not do 30. The Appellate Tribunal sustained the assessment only under Section 153(1)(c) of the Act on the ground that the assessment was made within one year from the date of the revised return. The assessee has challenged the same

in this reference. In such a proceeding, it is not open to the Revenue to sustain the assessment under Section 153(1)(b) of the Act. That plea which found favour with the Appellate Assistant Commissioner was not accepted by the Appellate Tribunal. The Revenue should have taken further proceedings, by way of reference, on that aspect. The argument based on Section 153(1)(b) of the Act fails.

6. The only question that arises for consideration is whether the order of assessment dated March 6, 1976, can be sustained under Section 153(1)(c) of the Act on the ground that it was made within one year from the date of the revised return. For the purpose of disposing of the matter, we need not adjudicate on the extreme contention raised by the assessee's counsel that the order of assessment can be said to be made only when communicated or served on the assessee on August 28, 1976. We will proceed on the basis that the order of assessment was made on March 6, 1976. It is common ground that the return filed by the assessee on May 10, 1974, is one filed under Section 139(4) of the Act. It is agreed by both parties that unless the return filed on March 11, 1975, is a valid return, the assessment made on March 6, 1976, is patently barred. Section 139(5) of the Act permits a revised return to be filed only in cases a return is filed under Section 139(1) or (2) of the Act. But counsel for the Revenue contends that it is open to the assessee to file more than one return under Section 139(4) of the Act and the last of the returns will be considered to be the effective return superseding the earlier ones. In this view of the matter, it was submitted that the return filed on March 11, 1975, is the return filed under Section 139(4) of the Act.

7. We are unable to accept this submission. Firstly, Section 139(5) of the Act permits a later or revised return to be filed only where the (original) return was filed under Section 139(1) or (2) of the Act. Filing of a revised return is not contemplated under Section 1319(5) of the Act, in cases governed by Section 139(4) of the Act. Any return filed subsequent to the filing of an original return is only a revised return. If the filing of such a revised return is not contemplated or permitted in the return filed under Section 139(4) of the Act, it is not possible to say that any number of subsequent returns can be filed under Section 139(4) of the Act itself. The statute expressly provides for filing a revised return (subsequent return) under Section 139(5) of the Act, only in cases where the return is filed under Section 139(1) or (2) of the Act. So, it has to be held that the Act impliedly bars or forbids the filing of a subsequent or revised return in other cases. In this view, there cannot be any subsequent or revised return in a case where the original return is filed under Section 139(4) of the Act. (See vide Ramchandra's case, AIR 1975 SC 915 at p. 918, para 25; also A.R. Antulay's case [1984] 2 SCC 500 at p. 523, para 22). The return filed on March 11, 1975, cannot be considered to be a revised return filed under Section 139(5) of the Act. The return under Section 139(4) of the Act having been filed on May 10, 1974, the subsequent return filed on March 11, 1975, is an invalid return. It has no legal consequences. It has to be ignored. It cannot extend the period of limitation contemplated by Section 153(1)(c) of the Act. In taking this view, we are fortified by the following decisions *O.P. Malhotra v. CIT*[1] *Dr. S.B. Bhargava v. CIT*[2] *and Vimalchand v. CIT*[3] Counsel for the Revenue brought to our notice the

decisions of the Calcutta High Court in *Mst. Zulekha Begum v. CIT*[4] and Kumar *Jagadish Chandra. Sinha v. CIT*[5] and contended that the return filed on March 11, 1975, can be taken to be a return filed under Section 139(4) of the Act itself. With great respect to the learned judges who rendered the said decisions, we are unable to concur with the said view.

8. In the light of the decisions of the Delhi, Allahabad and Rajasthan High Courts, we hold that the return filed on March 11, 1975, is an invalid one. It has to be ignored. There is only one valid return in this case. That was the one filed on May 10, 1974, under Section 139(4) of the Act. On that basis, the assessment made on March 6, 1976, is more than one year after the filing of the return on May 10, 1974. It is patently barred under Section 153(1)(c) of the Act. We should also highlight the fact that the language of Section 139(1) and (2) vis-a-vis the language of Section 139(4) fortify the view taken by the Delhi, Allahabad and Rajasthan High Courts. In Section 139(1) and (2), what is contemplated is the filing of a return and having furnished a return under Sub-section (1) or (2), if any person discovers any omission, he may furnish a revised return under Section 139(5) of the Act. But, in Section 139(4), what is permitted is that any person who has not furnished a return under Section 139(1) or (2) may, before the assessment is made, furnish the return (note the crucial words "the return"--instead of "a return"). Under Section 139(4) of the Act, filing of one return alone is contemplated. In this case, the return was filed on May 10, 1974. In view of Section 153(1)(c) of the Act, the order of assessment made on March 6, 1976, is patently barred. In this connection, we should also bear in mind the language used in Section 153(1) of the Act. It is in the nature of an injunction, stating that no order of assessment under Section 143 or Section 144 can be made at any time after the expiry of the period prescribed therein. It is really a fetter upon the power of the Income-tax Officer to make the assessment. It is a question of jurisdiction. [Vide the decision of the Supreme Court in *S.S. Gadgil v. Lal & Co*[6].

9. We hold that the Income-tax Officer has no jurisdiction to pass the order of assessment dated March 6, 1976. The assessment made on March 6, 1976, is illegal and without jurisdiction. In this view of me matter, we answer the question referred to us in the negative. The Tribunal was wrong in holding that the assessment is not barred by limitation. We answer the question against the Revenue and in favour of the assessee.

10. A copy of this judgment under the seal of this court and the signature of the Registrar shall be forwarded to the Tribunal as required by law.

Cases Referred.

1[1981] 129 ITR 379 (Del)
2[1982] 136 ITR 559 (All)
3[1985] 155 ITR 593 (Raj)
4[1981] 129 ITR 560
5[1982] 137 ITR 722

6[1964] 53 ITR 231 at p. 239