

N. C. E. (P.) Ltd. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Jun-30-1997

Reported in : (1998)65ITD214(Kol.)

Appellant : N. C. E. (P.) Ltd.

Respondent : Assistant Commissioner of

Judgement :

1 to 4. [These paras are not reproduced here as they involve minor issues.] 5. Grounds numbered 3, 4, 5 and 6 relate to grievance of the assessee that the assessment is barred by limitation under section 153(1)(c) of the Income-tax Act, 1961 and the CIT (Appeals) was wrong in giving a finding that the assessment order was passed within the time prescribed under the statute. In order to appreciate the facts more clearly we reproduce the grounds hereunder : "3. That the CIT (Appeals)-VI should have held that the assessment order is barred by limitation inasmuch as per the provisions of section 153(1)(c) of the Income-tax Act, the Assessing Officer has to pass the order within one year from the date of filing of the Revised Return; 4. That the learned CIT (Appeals)-VI failed to appreciate that the Revised Return having been filed by the appellant on 27-3-1989 was not a valid revised return in view of the Hon'ble Rajasthan High Court (decision) in the case of Vimalchand v. CIT [1985] 155 ITR 593 and Kerala High Court in the case of Eapen Joseph v. CIT [1987] 168 ITR 26 and, hence, no valued assessment order could be passed; 5. That the learned CIT (Appeals)-VI has further wrong in not giving any finding that the assessment order alleged to

have been passed on 27-3-1990 was not passed within the time allowed under the Statute; 6. That without prejudice to above, the CIT (Appeals)-VI should have held that although the order is alleged to have been passed on 27-3-1990, it was served on the appellant only on 19-6-1990 and the appellant has reason to believe that it was not passed within the limitation period." 6. Before the CIT (Appeals) the assessee raised a ground that the assessment order made by the Assessing Officer was illegal and bad in law inasmuch as the assessment was not completed within the time prescribed by the Income-tax Act. The CIT (Appeals) verified the assessment record and found that the assessment was completed on 27-3-1990 and the notice of demand was also dated 27-3-1990. He, therefore, concluded that it was a fact on record that the assessment was completed in time. Accordingly, the CIT (Appeals) rejected the ground raised by the assessee.

7. Being aggrieved by the order of the CIT (Appeals), the assessee has come up in appeal before the Tribunal on the basis of above grounds along with other grounds.

8. The learned counsel for the assessee submitted that in this case, the original return was filed on 27-1-1987; but before that date the assessee had applied for extension of time in Form No. 6 up to 30th November, 1986. Since no return was filed by 30th November, 1986, a notice under section 139(2) was issued on 20-1-1987 and served on the assessee on 10-2-1987. According to the assessee's counsel, the return filed by the assessee was a return under section 139(4) and a revised return was filed on 27-3-1989. The learned counsel, therefore, pointed out that since the assessment was completed on 27-3-1990 it was barred by limitation by one day, if the revised return is taken to be a valid return. He placed reliance on the Hon'ble Supreme Court decision in the case of *Kumar Jagdish Chandra Singh v. CIT* [1996] 220 ITR 67/86 Taxman 122 and contended that according to the ratio of this decision, the return voluntarily filed under section 139(4) cannot be revised.

According to him, since the assessee has voluntarily filed a return under section 139(4), it was not entitled to file a revised return.

Therefore, he argued that the limitation period of one year from the date of revised return under section 153(1)(c) was not available to the Assessing Officer. He further pointed out that the Assessing Officer should have completed the assessment within two years from the date of filing of return, i.e., by 31st March, 1989. According to the learned counsel, since the assessment was completed on 27-3-1990 it was barred by limitation under section 153(1)(c) as well as section 153(1)(a). He further argued that even the limitation prescribed under section 153(1)(b) was not available to the Assessing Officer as the penalty proceedings under section 271(1)(c) read with section 274 were initiated on 27-3-1990, i.e., on the same day and it was received by the assessee on 19-6-1990. The learned counsel further relied on the Supreme Court decision (*supra*) and contended that since the Assessing Officer did not initiate penalty proceedings before 31-3-1989 and did not record his finding to this effect, the extended period of 8 years in the case of concealment of income was also not available to the Assessing Officer. In order to support his contention, the learned counsel for the assessee placed further reliance on the following decisions : (1) *M. B. Mercantile Co. v. CIT* [1988] 169 ITR 201/[1987] 35 Taxman 169 (Cal.), The learned counsel further contended that even the limitation of one year had expired on 26-3-1990 as the assessment order was passed on 27-3-1990 and, therefore, it was barred by limitation by one day. In order to support this contention, he placed reliance on the Allahabad High Court decision in the case of *Niranjan Lal Ram Chandra v. CIT* [1982] 134 ITR 352.

9. The learned Departmental Representative (DR), on the other hand, submitted that a notice under section 139(2) was issued on 20-1-1987 and the return was filed on 27-1-1987 and, therefore, this return should be treated as a return filed under section 139(2). According to him, since the return so filed was a return under section 139(5), the assessee could file a revised return and, in this case, since the revised return was filed on 27-3-1989, the Assessing Officer got the limitation extended by one year and within that period, the Assessing Officer finalised the assessment. He further contended that there is no bar in filing a second return under section 139(4) which was filed in the present case on 27-3-1989 and, therefore, the extension of one year period expired on 27-3-1990. According to him, the assessment was finalised within the time prescribed under

the Act. The learned DR extended his arguments further and submitted that although according to the decision of the Supreme Court (*supra*), once the return is filed under section 139(4), no revised return could be filed, according to him, a return under section 139(4) can be filed voluntarily again to be treated as a return under section 139(4) only.

10. The learned DR also invited our attention to the observations of the Hon'ble Supreme Court in the case of Kumar Jagdish Chandra Sinha (*supra*) at page 75 of the report, which is reproduced hereunder : "The High Court has drawn a distinction between a revised return and a rectified return. May be there is a distinction. We are not concerned here with a rectified return but what was avowedly a revised return and what was in truth a new return." In view of the above, the learned DR argued that since the Hon'ble Supreme Court did not decide this issue the return may also be treated as rectified return. He further contended that as regards limitation under section 153(1)(b) there is no express provision to initiate proceedings under section 271(1)(c) within the normal time. Therefore, he urged, that the assessment in the present case was finalised within time and penalty proceedings under section 271(1)(c) had also been initiated within time.

11. He also relied on the decision of the M.P. High Court in the case of CIT v. Dr. N. Shrivastava [1988] 170 ITR 556/38 Taxman 265 and submitted that according to the ratio of this decision once the return is voluntarily filed under section 139(4), the assessee has the right to file a subsequent return under that provision and limitation for assessment starts from the date of such subsequent return. He pointed out that in the case of Dr. N. Shrivastava (*supra*) where the assessee filed a return under section 139(4) for the assessment year 1978-79 on March 22, 1979, and subsequently filed another return on March 11, 1981 and the assessment order was passed on November 23, 1981, it was held that the assessment was not barred by limitation.

12. On the basis of these contentions and arguments as well as submissions, the learned DR urged that the assessment made on the facts and circumstances of the present case should be declared to have been made within the period of

limitation.

13. In reply, the learned counsel for the assessee submitted that the return filed on 27-1-1987 cannot be treated as return under section 139(2) as the notice under section 139(2) was served on the assessee on 10-2-1987 and the assessee was asked to furnish the return within 30 days of the date of receipt of the notice. According to the learned counsel, the Assessing Officer had accepted the return as revised return and, therefore, it was not a rectified return as the figures were revised. Therefore, the contention of the learned DR is not correct. He further relied on the Allahabad High Court decision in the case of Niranjana Lal Ram Chandra (supra) and submitted that the limitation for making assessment has to be counted from the date on which the second revised return is filed and in that case as the revised return was filed on 8th February, 1972 it was held that time for completion of assessment was extended up to 7th February, 1973 under section 153(1)(c). He, therefore, pointed out that similarly in the present case, the limitation was extended up to 26th March, 1990 as the revised return filed on 27-3-1989 and, accordingly, the assessment finalised on 27-3-1990 is barred by limitation under section 153(1)(c) also.

14. We have carefully considered the rival submissions, the relevant facts and the materials available on record and we have also gone through the case laws on which reliance is placed by both the parties.

In order to appreciate the correct and relevant facts, the chronological history of the case event-wise is necessary; and this is like this. Since the assessee could not file the return within the time prescribed under the Act, it applied for extension of time up to 30-11-1986 in Form No. 6. As the assessee did not file the return within the time applied for, the Revenue department issued notice under section 139(2) on 20-1-1987, which was served on the assessee on 10-2-1987. The assessee, however, filed the return of income on 27-1-1987 showing a loss of Rs. 13,16,380 which included the share of loss in the firm M/s. Chitrakut Project amounting to Rs. 9,12,998. This return was filed before the notice under section 139(2) was served on the assessee as on 10-2-1987. The assessee also furnished a revised return on 27-3-1989 declaring therein a total loss of Rs.

4,03,880 only after determining the loss from the said firm at Nil. Ultimately, the assessment was completed by the Assessing Officer on 27-3-1990 and the total income was determined at Rs. 48,98,561. Penalty proceedings under section 271(1)(c) were also initiated simultaneously for concealment of income and a bogus claim of loss.

15. Being aggrieved by the above assessment order, the assessee filed an appeal before the CIT (Appeals) on one of the grounds that the assessment was not completed within the time prescribed. The CIT (Appeals) decided this ground vide para 3 of his order date 4-10-1991 which is reproduced below : "3. The appellant submitted five grounds of appeal. The first ground of appeal is that the order of assessment made by the DCIT is illegal and bad in law inasmuch as the assessment was not completed within the time prescribed in the Income-tax Act, 1961. From the verification of the asst. records, it is found that the assessment has been completed on 27-3-1990. The notice of demand is also dated 27-3-1990. Therefore, it is fact on record that the asst. has been completed in time. Therefore, this ground is rejected." It is noticed from the finding of the CIT (Appeals) that he decided the issue without going into the details and hazards of computation of limitation and the relevant provisions of the law dealing with the period of limitation prescribed for finalising the assessment.

16. In view of this as well as in order to appreciate the relevant facts and the relevant provisions of the law correctly, we frame the issues as under in the form of three questions : (i) Whether, the original return filed on 27-1-1987 is a return under section 139(2) or (4) and what is its effect on the period of limitation (ii) Whether, the revised return filed on 27-3-1989 is a valid return under sub-section (2), (4) or (5) of section 139 If yes, its effect on limitation (iii) Whether, the assessment for the year 1986-87 completed on 27-3-1990 is barred by limitation If yes, under which section, i.e., under section 153(1)(a), (b) or (c) of the Act For a proper appreciation of questions and facts, it is appropriate for us to set out the relevant provisions of the Act as obtaining at the relevant time. Sub-sections (1), (2), (4) and (5) of section 139 read as under : "139. Return of income. - (1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the

maximum amount which is not chargeable to income-tax, shall furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed - (a) in the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act, includes any income from business or profession, before the expiry of six months from the end of the previous year or where is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of June of the assessment year, whichever is later; (b) in the case of every other person, before the 30th day of June of the assessment year : (2) In the case of any person who, in the Income-tax Officer's opinion, is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the Income-tax Officer may, before the end of the relevant assessment year, serve a notice upon him requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed : (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 clause (iii) of the proviso to sub-section (1) shall apply in every such case.

(i) where the return relates to a previous year relevant to any assessment year commencing on or before the 1st day of April, 1967, four years from the end of such assessment year; (ii) where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April, 1968, three years from the end of the assessment year; (iii) where the return relates to a previous year relevant to any other assessment year, two years from the end of such assessment year.

(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."

17. The relevant portion of section 153(1) is extracted and reproduced as under :
"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 - (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 [substituted by Finance Act, 1968 (with e.f. 1-4-1968)] (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 the filing of a return or a revised return under sub-section

(4) or sub-section

(5) of section 139,

18. The first question before us for consideration is whether the original return filed on 27-1-1987 is a return under section 139(2) or (4). The original return was filed on 27-1-1987. As the assessee had not furnished the return within the time allowed under sub-section

(1) or sub-section

(2) of section 139 and it was furnished before the end of the period of two years from the end of this assessment year, in our opinion, this is a return filed under section 139(4). The contention of the learned DR that this is a return under section

139(2), as it was filed after the issuance of notice under section 139(2) on 20-1-1987 is not correct - firstly, because the notice under section 139(2) was served on the assessee on 10-2-1987 and secondly, the return was not furnished within 30 days, as prescribed in the notice. For these reasons, this return cannot be termed as return furnished under section 139(2). According to the Hon'ble Supreme Court decision in the case of Kumar Jagdish Chandra Sinha (supra), no revised return can be filed under sub-section

(5) of section 139 in the case where a return is filed under section 139(4). Once this is so, the contention of the assessee that the revised return filed by the assessee on 27-3-1989 is not valid in law appears to be correct. If we proceed on the finality of decision that the original return filed on 27-1-1987 is a return filed under section 139(4), the limitation for making assessment in the instant case should have expired on 31-3-1989. As the assessment was made on 27-3-1990, it is barred by limitation.

19. Coming to question (ii) as to whether the revised return filed on 27-3-1989 is a valid return under section 139(2), (4) and (5) and if yes what is its effect on limitation for completing the assessment, at the outset itself, we may say that once we have taken a decision, respectfully following the decision of the Hon'ble Supreme Court in the case of Kumar Jagdish Chandra Sinha (supra), that the revised return is an invalid return, it is a futile exercise and repetition of the subject already dealt with. But, in our opinion, it is necessary to say so in order to meet the arguments and contentions of both the parties.

The first contention of the revenue is that the revised return filed by the assessee on 27-3-1989 may be treated as a return under section 139(2), as notice under section 139(2) was already issued on 20-1-1987 and served on the assessee on 10-2-1987, i.e., before the revised return was filed. The assessee's contention is that as this return was not filed within 30 days from the date of service of notice under section 139(2) and it was filed long after that date, it cannot be treated as a return under section 139(2). The second contention of the assessee is that the Assessing Officer has already treated the same as revised return. In our opinion, the contention of the assessee holds good and, therefore, we hold that this revised

return cannot be treated as a return under section 139(2), as it was not filed within the time prescribed in the notice issued to the assessee.

20. Then whether it is a revised return under section 132(5) In our opinion, it is not so as in this case, the assessee did not file the return under section 139(1) and section 139(2) so that it is possible for the assessee to discover any omission therein and to revise the same. Moreover, the original return filed by the assessee was belated return under section 139(4) which could not have been revised as per provision of the law and as per the ruling of the Hon'ble Supreme Court in the case of Kumar Jagdish Chandra Sinha (supra).

21. The revenue has also pleaded that the revised return should be treated as rectified return, as the Hon'ble Supreme Court in the case of Kumar Jagdish Chandra Sinha (supra) without deciding the issue observed as under at page 75 of the report : In our opinion, even if the revised return is treated as rectified one, it may be treated so only under section 139(4) and not under section 139(5) as specific conditions are prescribed in sub-section (5) of section 139.

22. The next alternative contention of the learned DR is that once the assessee has voluntarily filed the return under section 139(4), the assessee has right to furnish a subsequent return under that provision and the limitation period starts from the date of filing of such return under section 139(4). In support thereof, he placed reliance on the Madhya Pradesh High Court decision in the case of Dr. N. Shrivastava (supra). We find that there is some force in the arguments of the learned DR as there is no explicit provision in section 139 to prohibit the assessee from filing a second or more than one return under section 139(4). In view of this, the revised return so filed may be treated as a second return or latest return filed under section 139(4). In a similar case like this viz., in the case of Dr. N. Shrivastava (supra), the M.P. High Court held as under : "Where, an assessee filed a return under section 139(4) for the assessment year 1978-79 on March 22, 1979, and subsequently filed another return on March 11, 1981, and the assessment order was passed in November 23, 1981, it was held that the assessment was not barred by limitation." In this view of the matter if the Assessing Officer has acted upon such return without any objection from the

assessee it would not be open to the assessee to challenge and contend later that the return filed subsequently was invalid. Our view gets support from the Calcutta High Court decision in the case of Mst. Zulekha Begum (Khatoon) v. CIT [1981] 129 ITR 560 wherein at pages 568-569, it was observed as under : "On a consideration of the sections and the decisions cited it appears to us that if an assessee after having filed a return under section 139(4) files another return subsequently it is to be assumed that he has given a go-by to the return filed previously and that so far as he is concerned the return filed subsequently is the correct and proper return. Where the ITO accepts the return filed subsequently, allows it to be filed and proceeds to assess thereunder without any objection from the assessee, it would not be open to the assessee to contend later that the return filed subsequently was invalid." "For the above reasons, we hold that the subsequent return filed by the assessee was a valid return under section 139(4) of the 1961 Act and that the assessment thereunder was within the time prescribed under section 153 of the said Act." 23. The result of the above discussion and conclusion arrived at by us is that although the revised is invalid, as revised one under section 139(5), as per judgment of the Supreme Court, as discussed above, it is a valid return under section 139(4) as a second return, after the original one, was filed. Thus, we come to the final conclusion that on the basis of the scheme of the Act and on the facts and circumstances of the case, the revised return filed on 27-3-1989 may be treated as a rectified return under section 139(4) or it may be taken as second belated return under section 139(4). Once this is so, the limitation for finalising the assessment is available to the Assessing Officer up to the expiry of one year from the date of filing this return under section 139(4) as per provisions of section 153(1)(c), i.e., one year from 27-3-1989 on which this return was filed.

24. In the light of the above discussion and conclusion, we now switch over to question No. (iii) : as to whether the assessment completed on 27-3-1990 is barred by limitation and if yes under what provision of the law It is seen that limitations for completion of assessment are laid down in section 153(1)(a)(iii), (b) and (c) which we have reproduced above. The normal time-limit for completion of assessment is laid down in sub-section (1)(a)(iii) of section 153, i.e., two years from the end of the assessment year in which the income was first assessable. In

the instant case, as the assessment year is 1986-87, the normal limitation of two years from the end of the assessment year expires on 31-3-1989. As the assessment for this assessment year was completed on 27-3-1990, it is barred by limitation under section 153(1)(a)(iii).

25. In a case falling under clause (c) of sub-section (1) of section 271, the time-limit for completion of assessment, as laid down in section 153(1)(b) is 8 years from the end of the assessment year in which the income was first assessable. The contention of the learned DR is that since the Assessing Officer initiated penalty proceedings under section 271(1)(c) and as there was no express provision to initiate proceedings under section 271(1)(c) within the normal time and the limitation of 8 years as prescribed in section 153(1)(b) was available to the Assessing Officer, the assessment was not barred by limitation.

No doubt it is case covered by the provisions of section 271(1)(c), as it is evident from last para of page 2 of the assessment order and from last but one para of the assessment order, wherein the Assessing Officer has very clearly recorded that the penalty for concealment and bogus loss was initiated under section 271(1)(c). The assessee, on the other hand, placed reliance on the following decisions and contended that as the Assessing Officer did not initiate the penalty proceedings under section 271(1)(c) before 31st March, 1989 and did not recorded his finding to that effect the extended period of 8 years was not available to him : 1. M. B. Mercantile Co.'s case (supra) : wherein it was held that before expiry of normal period of limitation, the ITO should record facts regarding concealment supported by the materials on record.

2. Smt. Savitri Rani Malik's case (supra) : wherein it was held that the assessee must be informed about the discovery of concealment of income within the normal period of limitation.

3. Dr. G. K. Pendkar's case (supra) : wherein it was held "where the Income-tax Officer does not bring, within the normal period of limitation for completing assessment, material for coming to a prima facie conclusion that there was concealment of income, the extended time-limit under section 153(1)(b) of the Income-tax Act, 1961, is not available to the Income-tax Officer." 26. Several High

Courts have also held in favour of the Revenue and, therefore, there is difference of opinion on the subject, which may be called second stream of thought as ambiguous language is employed in section 153(1)(b) and two things are possible on the subject. The Hon'ble Supreme Court in the case of Kumar Jagdish Chandra Sinha (supra) has examined the controversy in details and has resolved the same by preferring the first stream of thought that within the period of four years, the Assessing Officer must either initiate proceedings under section 271(1)(c) or record his opinion that it is a case falling under section 271(1)(c) of the Act. In this respect, the Hon'ble Supreme Court's observations at page 77 of the report are as under : "Since this Court has already taken one view and because the said view is one of the two possible views of the matter, we follow the same and, accordingly, uphold the first stream of thought mentioned above.

Applying the above understanding of section 153(1)(b), it must be held in this case that the assessment is barred by time. Admittedly, the Income-tax Officer had not initiated the proceedings under section 271(1)(c) within a period of four years prescribed by section 153(1)(a)(i) (which is the applicable provision herein) nor had he made any order or record or a note in the relevant file indicating that it is a case falling under section 271(1)(c)." 27. Applying the same ruling to the instant case, we find that the Assessing Officer has not recorded any finding or has brought any material on record within two years to show that it was a case of concealment. In this view of the matter, as well as respectfully following the decision of the Hon'ble Supreme Court, we hold that since the Assessing Officer has not initiated any proceedings under section 271(1)(c) within a period of two years, nor had he made any order, or record or note in the relevant file to indicate that it is prima facie a case falling under section 271(1)(c), the time-limit of eight years is not available to him and, therefore, the assessment made by him on 27-3-1990 is barred by limitation under section 153(1)(b) also.

28. The third limitation period as envisaged in section 153(1)(c) is of one year from the date of filing of the return or revised return under sub-section (4) or (5) of section 139. As we have already held that there was no valid revised return under section 139(5), we confine our discussion to the return filed under section 139(4) only as discussed above. As the latest one is to be considered, we find that the

second return under section 139(4) was filed on 27-3-1989 and the period of one year expired on 26-3-1990. As the period of one year expired on 26-3-1990 and the assessment was completed on 27-3-1990, it is barred by limitation. In our opinion, the contention of the learned DR that the limitation expired on 27-3-1990 does not hold good.

29. In the case of Niranjana Lal Ram Chandra (supra), where the second revised return was filed on 8-2-1972, it was held by the Allahabad High Court that the time for completion of assessment was extended up to 7-2-1973 only. Respectfully following this decision, we hold that the assessment completed in the present case on 27-3-1990 is barred by time by one day under section 153(1)(c) of the Act.

30. Thus, we come to the conclusion that the assessment made beyond the time prescribed of two years is not saved by the provisions of sections 153(1)(b) as well as 153(1)(c) of the Act.

31. Judged from any angle, the assessment completed on 27-3-1990 is barred by limitation under sub-section (1)(a), (b) and (c) of section 153 of the Act. We, therefore, hold that as the assessment so completed is barred by time, it is invalid in law. Accordingly, we annul the assessment and vacate the order of the CIT (Appeals). In view of this, it is not necessary for us to decide the other grounds of appeal.

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