
(1991) 08 KAR CK 0063

Karnataka High Court

Case No: IT Reference Case No. 94 of 1985

Kareemsons (P.) Ltd.

APPELLANT

Vs

Commissioner of
Income Tax

RESPONDENT

Date of Decision: Aug. 14, 1991

Hon'ble Judges: S. Mohan, C.J; N. Venkatachala, J; K. Shivashankar Bhat, J

Bench: Full Bench

Advocate: K.R. Prasad, K. Ramanujulu and A.A. Kulkarni, for the Appellant; G. Chanderkumar and S.R. Shivaprakash, for the Respondent

Judgement

K. Shivashankar Bhat, J.

A Division Bench of this Court, referred this case to the Special Bench, after doubting the correctness of the decision of an earlier Division Bench; the said earlier decision is in [S. Natarajan Vs. Commissioner of Income Tax, Mysore,](#)

Two questions were referred by the Tribunal to this Court u/s 256(1) of the income tax Act, 1961 ("the Act") which reads as follows:

1. Whether on the facts and in the circumstances of the case, the return filed by the assessee on 13-5-1980 before the normal date of limitation for assessment for the year 1978-79 could be deemed to be a return u/s 139(4) despite the fact that a notice u/s 148 had been issued by the income tax Officer on 27-11-1979?
2. If the answer to the above question is in the negative, whether the assessee is entitled to carry forward of loss declared in a return filed in response to notice u/s 148?

All the relevant facts are found in the order of the Division Bench to which one of us was a party. In response to the notice issued on 27-11-1979, u/s 148 of the Act, the assessee had to file the return by 29-12-1979. But no such return was filed. The return was filed only on 13-5-1980 and the assessee's contention has been that this return should be treated as a return u/s 139(4) of the Act, as it was filed prior to the making of the

assessment order for the relevant year, and that it was filed within the period prescribed by section 139(4). There is no dispute that in case the return was a return u/s 139(4), it satisfied all the statutory requirements stated therein.

2. According to the assessee, since, the return was a return filed u/s 139(4), it falls within the description of "return filed u/s 139" and if so, the loss claimed by the assessee which has been accepted, was eligible to be carried forward, without the bar u/s 80 of the Act against any such "carry forward".

3. The revenue contends that when a notice is issued u/s 148 and a return is not filed within the period stipulated in the said notice, any return filed thereafter cannot claim the status of a return u/s 139(4), even if the return filed was within the period prescribed by section 139(4). Mr. Chanderkumar, the learned counsel for the revenue, contended before us that a proceeding initiated by a notice u/s 148 is a proceeding for the benefit of the revenue and the notice issued to the assessee u/s 148 cannot be treated for all purposes under the Act as a notice issued u/s 139(2); since the assessee failed to file a return u/s 139(1), the assessee cannot take advantage of a proceeding initiated u/s 148 to claim a loss to be determined thereunder, so that it can be carried forward u/s 72 of the Act, read with section 80; the learned counsel urged that the assessee cannot take advantage of his own default in failing to file the return at an appropriate time earlier to have the loss determined; the object of section 147, it was contended, was to assess the escaped income and the proceeding thereunder is solely for the benefit of the revenue.

4. The questions referred are to be answered with reference to the provisions of the Act governing the relevant assessment year, such as sections 80 and 139(4) (which are different from the earlier Indian income tax Act, 1922), read with section 148 thereof.

5. Under the Indian income tax Act, the subject of assessing the escaped income was found in section 34 of the said Act. Section 22 of the said Act provided for filing of the return (a subject, now dealt with by section 139); however, section 22 by itself did not prescribe any period to file the return. The subject of the "loss" was dealt in section 22(2A) which may be compared with the present section 139(3). Under the 1922 Act, a provision similar to the present section 80 was not found. Section 22(2A), which is comparable to section 139(3) enabled the filing of a "loss return" under circumstances stated therein; but failure to file a return under it by itself was not a ground to reject the claim of "loss" in case of a return filed u/s 22(3), i.e., a return filed before any order of assessment was made. In [Commissioner of Income Tax, Punjab Vs. Kulu Valley Transport Co. P. Ltd.](#), this proposition was accepted by the Supreme Court. The relevant passage has been quoted in the order of the Division Bench while referring this matter to the Special Bench. The principle stated by the Supreme Court, when applied to the present section 139, results in the inference that section 139(4) should be read as a proviso to section 139(1) and that a return filed within the time allowed under subsection (4) of section 139 would also be considered as a return filed within the time allowed under sub-section (1). A "loss return" being the return of the "minus income", a phrase used by

the Supreme Court in another decision- [Commissioner of Income Tax \(Central\), Delhi Vs. Harprasad and Co. P. Ltd.](#), such a return also would be a return to be considered by the ITO. The Supreme Court had stated thus:

From the charging provisions of the Act, it is discernible that the words "income" or "profits and gains" should be understood as including losses also, so that, in one sense "profits and gains" represent "plus income" whereas losses represent "minus income"- [Commissioner of Income Tax, Ahmedabad Vs. Karamchand Premchand Ltd., Ahmedabad](#), and [The Commissioner of Income Tax, Bombay Vs. The Elphinstone Spinning and Weaving Mills Ltd.](#), In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. Although section 6 classifies income under six heads, the main charging provision is section 3 which levies income tax, as only one tax, on the "total income" of the assessee as defined in section 2(15). An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the "total amount of income, profits and gains referred to in section 4(1)". Secondly, it must be "computed in the manner laid down in the Act". If either of these conditions fails, the income will not be a part of the total income that can be brought to charge." (p. 124)

Thus, what is taxable is the real income properly deduced as provided by the Act.

6. The decision of the Supreme Court in Kulu Valley Transport Co. (P.) Ltd."s case (supra) meets the argument of Mr. Chanderkumar that any return filed by an assessee after the receipt of a notice u/s 148 but beyond the date stipulated in the notice cannot be treated as a return u/s 139. The correct approach, is to examine whether the "return" satisfies the requirements of section 139(4); and if it satisfies the said statutory requirements, no further argument would arise. The right given to the assessee u/s 139(4) cannot be lost, merely because the revenue instituted proceedings u/s 147, in the meanwhile. Right to file a return, falling within section 139(4), is as much a statutory right vested in the assessee as is the power vested in the Assessing Officer to net in the escaped income for taxation u/s 147. There is no reason to read the two provisions as in conflict with one another, or, to read one provision as overriding the other; both can stand harmoniously to arrive at the true taxable income as demonstrated by the decision of the Supreme Court in Kulu Valley Transport Co. (P.) Ltd."s case (supra).

7. Section 80 during the relevant year reads as follows:

80. Submission of return for losses.-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...."

[Emphasis supplied]

8. The bar against the carrying forward of the loss is attracted here only, if the loss is not determined in pursuance of a return filed u/s 139. u/s 139, filing of a return may come under any one of the three sub-sections"- section 139(1); 139(2) or 139(4). Any return, falling within any of these sub-sections, is a return filed u/s 139.

9. The provision of section 80, as it then stood, in no way barred the "carry forward" of the loss determined in pursuance of a return filed by the assessee and the Assessing Officer had to consider such a return filed by the assessee in the instant case.

10. Therefore, the first question has to be answered in the affirmative, and in favour of the assessee; the return filed by the assessee has to be treated as a return u/s 139(4).

11. In view of the answer to the first question, which results in enabling the assessee to carry forward the loss determined by virtue of the return filed u/s 139(4), need to answer the second question does not arise. Reference answered, accordingly, without any order as to costs.