IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

I.T.R. No. 8 of 1995

Judgment reserved on: 14.11.2007

Date of decision:19th November, 2007

Commissioner of Income Tax ..Petitioner

Versus

Vishwa Bhushan Banta ..Respondent

Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice V.K.Ahuja, Judge.

Whether approved for reporting?[1] Yes

For the Petitioner: Ms. Vandana Kuthiala, Advocate

For the Respondent: Mr. M.M.Khanna, Senior Advocate, with Ms. Pushpa Attri, Advocate

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Per Deepak Gupta, J.

The following question has been referred for the opinion of this court by the Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal) :-

> "Whether on the facts and in the circumstances of the case, the ITAT was right in law in holding that the assessee was eligible for the benefit of carry

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

forward of losses determined for the year on a return filed in pursuant to notice u/s 148 ?"

The brief facts necessary for decision of the aforesaid question are that the assessee is an individual. He did not file any return for the assessment year 1984-85. On 18.5.1985 the assessing officer issued a notice to the petitioner under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the Act) requiring him to furnish return of his income in respect of the said year. The assessee filed his return in response to the notice on 25.11.1987. In this return he declared a loss of Rs. 3,15,200/-. The assessing officer processed the return and determined the loss at Rs. 1,280/-. However, the assessee was not permitted to carry forward the loss on the ground that the loss return had not been filed within the time allowed under Section 139(3) of the Act.

The assessee filed an appeal and the CIT (Appeals) held that the return in question had been filed within the time provided in Section 139(4) of the Act and hence the assessee was entitled to carry forward the losses in view of the decision of the Calcutta High Court in **Presidency Medical Centre (P) Ltd. Vs.**

Commissioner of Income Tax, West Bengal-III (1977) 108 ITR 838 and the decision of the Madhya Pradesh High Court in **Co operative Marketing Society Ltd. Vs. Commissioner of Income Tax, M.P.-I, Bhopal, (1983) 143 ITR 99.** The CIT directed the assessing officer to allow the benefit of carrying forward the loss to the assessee.

The Revenue filed an appeal before the Tribunal. The Tribunal did not agree with the finding of the CIT(A) and held that the return was not a return under Section 139(4) of the Act since it was a return filed under Section 148. According to the Tribunal the return filed under Section 139(4) should be voluntary return. It further held that the voluntary return should have been filed before 31.3.1987. In the present case the return was filed on 25.11.1987 and, therefore, the return was not filed in time.

However, the Tribunal decided the matter against the Revenue on different considerations. The Tribunal held that as per the provisions of Section 148 when a notice under Section 148 was issued, it would include the provisions of Section 139(2) and the law had created a fiction whereby when a notice was issued under

Section 148 of the Act, all provisions of Section 139(2) shall apply. It, therefore, held that the return filed in response to notice under Section 148 should be treated a return filed under Section 139(2) of the Act and, therefore, it was a return within the meaning of Section 139 of the Act and the assessee was entitled to carry forward the loss in terms of Section 80 of the Act.

To appreciate this legal question it would be apposite to refer to certain provisions of the Act, as they existed in the assessment year 1983-84.

> "**Submission of return for losses.**
> **80.** Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed under Section 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 or sub-section (3) of Section 74-A."

Section 139(1) provides for filing of return by every person whose income exceeds the maximum amount which is not chargeable to income tax.

Section 139(2) read as follows:-

> "In the case of any person who, in the Assessing 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 Assessing Officer may, before the end of the relevant assessment year, issue a notice to him and serve the same 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 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.

Section 139(3) at the relevant time read as follows:-

"If any person who has not been served with a notice under sub-section (2), has sustained a loss in any previous year under the head "Profits and gains of business or profession" or under the head "Capital gains" and claims that the loss or any part thereof should be carried forward under sub-section (1) of section 72, or sub-section (2) of section 73, or sub-section (1) of Section 74 or sub-section (3) of section 74A, he may furnish, within the time allowed under sub-section (1) or within such further time which, on an application made in the prescribed manner, the Income Tax Officer may, in his discretion allow a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1).

Section 139(4) at the relevant time read as follows:-

> "(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.
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> (b) The period referred to in clause (a) shall be-
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> (i) where the return relates to a previous year relevant to any assessment year commencing on or before the Ist day of April, 1967, four years from the end of such assessment year;
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> (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;
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> (iii) where the return relates to a previous year relevant to any other assessment year, two years from the end of such assessment year."

Section 148 at the relevant time read as follows:-

> "148(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee 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 notice were a notice issued under that sub-section.
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> (2) The assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

It is obvious that under Section 80 of the Act as it stood at the relevant time, no assessee was permitted to take benefit and carry forward the loss to the subsequent assessment year in case he had not filed a return under Section 139 of the Act.

Under Section 139(2), as it then stood, the assessing officer could issue notice to any person to file a return if he felt that income of such person was assessable to tax. Section 139(3) provided that the person who had not been served notice under sub-section (2) of Section 139 of the Act, could file a return of loss within the time allowed under sub-section (1) or within the such further time which the Income Tax Officer in his discretion allow on the application of the assessee.

Section 139(4) provided that if any person had not filed the return within the time allowed to him under sub-section (1) or sub-section (2) he may, before the

assessment is made furnish the return for any pervious year within the time prescribed in clause (b) of sub-section 4. The relevant portion for our purpose is sub clause (iii) which provides that the return relates to a previous year relevant to any other assessment year and has been filed within 2 years from the end of such assessment year. In this case the relevant assessment year was 1984-85. the end of the assessment year was 31.3.1983. The return was, therefore, required to be filed under Section 139(4) latest by 31st March, 1987. The return was actually filed on 25.11.1987 beyond the period of 2 years. Therefore, it cannot be treated to be a return filed under Section 139(4) of the Act. Further more, the return under Section 139(4) must be a voluntary return and not a return filed in pursuance to notice.

The next question which arises is whether the Tribunal was right in holding that the return filed under Section 148 should be treated to be a return filed under Section 139(2) and, therefore, benefit of carry forward of loss is to be given to the assessee.

The provision of Section 148 clearly shows that the assessing officer can, in his notice under Section 148, include all the requirements of sub section (2) of

Section 139 of the Act. It has further been provided that the provisions of the Act shall so far as may be, apply as if notice was issued under sub-section (2) of Section 139 of the Act. It is thus apparent that the return filed pursuant to the notice under Section 148 of the Act was to be treated as a return filed under Section 139 of the Act. The only requirement of section 80 of the Act as it stood at the relevant time was that the return had been filed under Section 139 of the Act. By fiction created by law a return filed pursuant to notice under section 148 would be a return under Section 139(2) of the Act. Since it is the return under Section 139(2), the provisions of Section 139(3) would not be applicable because the said provisions, at the relevant time, started with the clause that "if any person who has not been served with a notice under sub-section (2)". The return would be deemed to be a return filed under Section 139 by fiction created by law.

The Calcutta High Court in **Presidency Medical Centre (P) Ltd. Vs. Commissioner of Income Tax, West Bengal-III CIT 108 ITR 838** held that if a return is filed within the time specified by sub-section (4) of section 139 of the IT Act, it would be deemed to be in accordance with law and the loss has to be determined

and carried forward as a matter of course under Section 72(1) read with Section 80 of the Act, even though the return was not filed within the time provided by section 139(1) of the Act. The Calcutta High Court relied upon the judgment of the Apex Court in **Commissioner of Income Tax, Punjab Vs. Kulu Valley Transport Co. P. Ltd. (1970) 77 ITR** 518, while taking this view.

As already held by me above, the return in the present case has not been filed within the period of 2 years as laid down under Section 139(4) and, therefore, this authority is not applicable to the facts of the present case. A Division Bench of the Madhya Pradesh High Court was dealing with a similar question as has arisen in the present case. There also, the assessee had not filed returns for the assessment years 1972-73 and 1973-74. Notices were issued to him under Section 148 of the Act and the assessee filed his return of income for the said years pursuant thereto. The assessee filed returns showing loss and losses were computed by the ITO for both the years. However, he declined to carry forward the losses for the purpose of set off during the subsequent years on the ground that the return was not filed within the time allowed in Section 139 of the Act. The court did

not go into question whether an assessee would be entitled to benefit of a return filed pursuant to a notice under Section 139(2) of the Act on the ground that the return filed by the assessee was within the time prescribed under sub-section (4) of section 139 of the Act.

On behalf of the Revenue reliance has been placed upon the judgment of the Kerala High Court in **Smt. Ashima Hariharan Vs. Commissioner of Income-Tax (1996) Vol. 220 ITR 89**. In that case the relevant year was 1980-81. The assessee did not file the return by the due date. Notices were issued to the assessee under Section 148 of the Income Tax Act, 1961 in October, 1983 and the assessee filed her return on November 10, 1983. The Income Tax Officer on assessment of the return accepted the losses, but did not permit carry forward of losses. The court held that the return had not been filed within 2 years of the end of assessment year, i.e. by 31st March, 1983 and, therefore, was not filed within the time prescribed under Section 139(4) of the Act. It further held that there is no question treating the return as being filed under Section 139(2) of the Act. It appears that Kerala High Court did not consider the provisions of Section 148 of the Act whereby return filed

pursuant to notice under Section 148 would be treated as one having been field pursuant to a notice under Section 139(2) of the Act.

We are of the view that in view of the provisions of Section 148, as it then stood, even if the assessee had not filed the return within the time provided for in Section 139(3) or 139(4) of the Act, if the return was filed in terms of Section 139(2) of the Act, then the assessee would be entitled to carry forward the loss to the subsequent assessment year in terms of section 80 of the Income Tax Act. Section 80, as it then stood, clearly provided that no loss which has not been determined in pursuance of a return filed under Section 139 of the Act, shall be carried forward or set off. Section 148 of the Act, as noticed above, provides that notice can be issued on all or any of the requirements mentioned in Section 139(2) of the Act. It further provided that the provisions of Income Tax Act shall apply as if the notice was a notice issued under Section 139(2). Therefore, even where the assessee is called upon to file a return by a notice under Section 148 of the Act by fiction created by law, it would be deemed that notice was issued under Section 139(2) of the Act. Therefore, under the provisions of Section 80

of the Act, as it then stood, the assessee would be entitled to carry forward the losses. The question is, therefore, answered in favour of the assessee and against the revenue.

A copy of this judgment under the signature of Registrar General of this Court be forwarded to the Tribunal.

(Deepak Gupta), J.

November 19, 2007(K) (V. K. Ahuja),J.