M/S K. Govindan & Sons vs C.I.T. Cochin on 1 December, 2000

Equivalent citations: AIR 2001 SUPREME COURT 254, 2001 (1) SCC 460, 2000 AIR SCW 4389, 2001 TAX. L. R. 171, 2001 (1) LRI 269, 2001 (1) SRJ 185, (2001) 114 TAXMAN 94, 2000 (3) JT (SUPP) 394, 2000 (8) SCALE 47, (2000) 164 CURTAXREP 490, (2000) 8 SCALE 47, (2001) 247 ITR 192, (2001) 1 KER LT 270, (2001) 160 TAXATION 389, (2000) 8 SUPREME 65

Author: D.P.Mohapatra

Bench: S.P.Bharucha, D.P.Mohapatra

CASE NO.:
Appeal (civil) 1144 1999

PETITIONER:
M/S K. GOVINDAN & SONS.

Vs.

RESPONDENT:
C.I.T. COCHIN

DATE OF JUDGMENT: 01/12/2000

BENCH:
S.P.Bharucha, Y.K.Sabharwakm D.P.Mohapatro

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J J U D G M E N T D.P.MOHAPATRA,J.

The question that arises for determination in this appeal is whether in an assessment made under Section 147 of the Income Tax Act, 1961 (for short 'the Act') it is open to the assessing authority to charge interest for default in filing return under Section 139(8) of the Act? For answering this question it is necessary to determine what is a 'regular assessment' for the purpose of Section 139(8) of the Act.

Shorn of unnecessary details the facts leading to the present proceeding may be stated thus: For the assessment@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJ year 1984-85 the assessee, appellant herein, filed a return of income in response to a notice issued under Section 148 of the Act. While completing the assessment the assessing authority charged interest under Section 139(8) and also

under Section 217 of the Act. In the appeal filed by the assessee before the Commissioner of Income Tax (Appeals) it was contended that the assessment in the case was not a 'regular assessment' within the meaning of Section 2(40) of the Act and, therefore, no interest could be charged under Section 139(8) of the Act. The contention did not find favour with the appellate authority so far as the interest charged under Section 217 is concerned, but the contention was accepted in respect of the interest under Section 139(8) of the Act. The assessee carried the matter further in appeal to the Income Tax Appellate Tribunal wherein the contention of the appellant as noted above was accepted and the order passed by the assessing authority and confirmed by the appellate authority were set aside. The Tribunal held that the assessment was not a 'regular assessment' but only a 're-opened assessment' under Section 147(a) of the Act. In compliance with the direction of the High Court in a petition filed by the Revenue under Section 256(1) of the Act, the following question was referred by the Tribunal: "

> Whether on the facts and circumstances of the case levy of interest under Section 139(8) in an assessment under Section 143(3) read with Section 147(a) is valid in law ?" The High Court by the judgment dated 31.7.1998 in ITR No.63 of 1996 answered the question in the affirmative and held thus:
>
> "Considering explanation 2 to Section 139(8) which is clarificatory in nature and the other case law we are of the considered view that the assessment made for the first time under Section 147(a) read with Section 148 is a 'regular assessment' and that being so the assessing officer could legally charge interest under Section 139(8)."

The said judgment is under challenge in this appeal filed by the assessee. It will be convenient to refer to the relevant provisions of the Act before considering the merits of the case. In Section 2(40) the term 'regular assessment' is defined to mean the assessment made under sub-section(3) of Section 143 or Section 144. In Section 139(8) a provision is made regarding liability of the assessee to pay simple interest at the rate of fifteen per cent per annum, reckoned from the day immediately following the specified date to the date of the furnishing of the return or, where no return has been furnished, the date of completion of the assessment under Section 144, on the amount of the tax payable on the total income as determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source. In the proviso to sub-section (8) the assessing officer is vested with power in such cases and under such circumstances as may be prescribed, to reduce or waive the interest payable by an assessee under the sub-section. Explanation 2 to sub-section (8) on which strong reliance is placed by the appellant reads thus:

> "Explanation 2- Where, in relation to an assessment year, an assessment is made for the first time under Section 147, the assessment so made shall be regarded as a regular assessment for the purposes of this sub- section"

This explanation was introduced in the Act by the Taxation Laws (Amendment) Act, 1984 w.e.f. 1.4.1985. The question to be considered is whether the explanation has application to the assessment year 1984-85. The answer to the question depends on whether the explanation is to be read as a clarificatory or an amendatory provision. It was not disputed before us that if the provision

is construed as clarificatory then it will be applicable to the assessment year 1984-85. Section 143 lays down the procedure to be followed in a case where a return has been made under Section 139, or in response to a notice under sub-section (1) of section 142. Section 144 deals with the procedure in a case of Best judgment assessment which has application if any person fails to make the return required under sub-section (1) of Section 139 or fails to comply with all the terms of a notice issued under sub-section (1) of Section 142 or having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of Section 143. Section 147 deals with the cases of income escaping assessment. Closely linked with it is Section 148 which makes provision for issue of notice where income has escaped assessment. Both the sections are quoted below:

> "147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this Section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this Section and in Sections 148 to 153 referred to as the relevant assessment year) :
>
> Provided that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub- section(1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

Explanation 1 - Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2 - For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :-

> (a) where no return of income has been furnished by the assessee although 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;
>
> (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but -

(i) income chargeable to tax has been under- assessed;

or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

148. (1) Before making the assessment, reassessment or re-computation under Section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139 (2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

That it is so, is clear on a fair reading of Section 147 in which provision is made for both assessment and re-assessment in a case where any income chargeable to tax has escaped assessment for any assessment year. The proviso treats at par the assessment under Section 143(3) and under Section 147 and makes no distinction whether the escapement of income is by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section 1 of Section 142 or Section 148. Under clauses (a) and (b) of Explanation 2 to Section 147 - cases where no return has been furnished by the assessee and where a return of income has been furnished by the assessee but no assessment has been made, have both been included in the expression 'escaped assessment'. Section 148 mandates the assessing Officer to serve a notice on the assessee before making the assessment, re-assessment or re-computation under Section 147. From the aforementioned provisions, it is manifest that an initial assessment made by the assessing officer either on the assessee voluntarily furnishing a return of the income or furnishing such a return on being served a notice under Section 148, is a 'regular assessment' under Section 2(40) of the Act, but an order passed by the assessing officer making a re-assessment or revised assessment in a case where an assessment had been made, does not come within the meaning of the said expression. In both the cases the manner of making the assessment is similar. The position that follows is that while making the assessment under Section 147 in a case where the assessee furnishes a return in pursuance of the notice served on him under Section 148 of the Act the provision for charging interest under Section 139(8) is applicable and it is open to the assessing officer to charge interest on the assessee in such proceeding. This construction of the statutory provisions, in our view, is in accord with the intent and purpose for which the power to charge interest on a defaulting assessee has been vested in the assessing officer. To hold otherwise will mean that an assessee who files a

delayed return will be liable to pay interest while an assessee who does not file any return is free from such a liability. Such an interpretation of statutory provisions, which will result in an absurd situation, cannot be accepted. Next we may notice a few decisions of the High Courts dealing with the point. In the case of K.Gopalaswami Mudaliar vs. Fifth Additional Income Tax Officer, Coimbatore, and others [(1963) ITR 49 p. 322 (Madras High Court)] it was held that in cases where no return has been submitted by the assessee, the expression "regular assessment" in Section 18A(6) refers to an assessment made under Section 23 after the issue of a special notice under Section 22(2) during the year of assessment itself, as well as an assessment by the issue of a notice analogous to one under Section 22(2) in proceedings initiated under Section 34(I)(a). In either event, it is nothing more than a regular assessment in the sence that it is an initial assessment made upon the assessee and not an assessment which has once been made but is reopened. (emphasis supplied) The High Court of Delhi construing the term 'regular assessment' in the light of provisions of Sections 214,215,216 and 244(1)(a) of the Act took a similar view in National Agricultural Co-operative Marketing Federation of India Ltd. vs. Union of India and others [(1981)130 ITR p. 928], wherein it was held inter alia that the words 'regular assessment' shall as far as possible, be interpreted consistently in all the provisions in Chapter XVII-C. No difficulty will be caused by its interpretation to mean only the first or the initial assessment. It was also held that for the purposes of Sections 214,215 and 273 there is no reason why an assessment made for the first time under Section 143 should be outside the purview of that section. There are indications in Sections 215 and 216 itself to show that the expression "regular assessment" cannot mean anything but the first or original assessment.

The view taken in the aforementioned two decisions was approved by a full bench of the Kerala High Court in Lally Jacob vs. Income-Tax Officer and others, [(1992) 197 ITR p.439)], which took the view that any assessment made for the first time by resort to Section 147 will also be a regular assessment for the purpose of invoking Section 217 of the Act. Elucidating the point, the full Bench observed:

> "A reading of Sections 147 and 148 makes it clear that, at any rate, an assessment for the first time made by resort to Section 147 is a regular assessment. Section 148 enjoins the Income-tax Officer before making an assessment under Section 147 to serve a notice on the assessee containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 139. The further provision in that section is very significant which provides that the aforesaid notice has to be treated as if it is a notice under Section 139(2) and that all the provisions of the Act shall apply to the subsequent procedure and the final assessment. In other words, the notice issued under Section 148 has to be deemed to be a notice under Section 139(2) and, if the other provisions of the Act have to be applied, an assessment in pursuance of that can be made only under Section 143 or Section 144. We were not shown any other provision by which the Income-tax Officer is authorised to make an order of assessment under the Act. The provisions contained in Section 140A also give an indication that an assessment made in pursuance of a notice under Section 148 is a regular assessment under Section 143 or Section 144, for Section 140A(2) provides that any admitted tax paid in pursuance of Section 140A(1) shall be deemed to have

> been paid towards the regular assessment under Section 143 or Section 144. It is pertinent to note that Section 140A(1) deals with a return required to be furnished under Section 139 or Section 148. That makes the provision clear that an assessment made under Section 147 also will be a regular assessment under Section 143 or Section 144. Accordingly, we hold that any assessment made for the first time by resort to Section 147 will also be a regular assessment for the purpose of invoking Section 217 of the Act. With great respect, we dissent from the view expressed in certain decisions referred to earlier in this judgment which take a contrary view."

A contra view has been taken by a Division Bench of Gauhati High Court in Commissioner of Income-Tax vs. Triple Crown Agency, [(1993) 204 ITR p.377)], in which the Court was of the view that a reading of the provisions of Sections 139, 143, 147, 148 and 217 (1A) of the Act makes it clear that the assessment or reassessment contemplated under Section 147 is quite different in nature and content from the assessment under Section 143; that a proceeding initiated under Section 147 and terminating in assessment or reassessment is not a 'regular assessment' as contemplated in Section 139(8) and to such a case the provisions of Section 139(8) cannot apply. Construing the explanation 2 to sub- Section (8) of Section 139 the High Court took the view that the provision has only widened the scope of the expression "regular assessment" by bringing within its ambit assessment made for the first time under Section 147. The amendment has been incorporated in view of the decisions of various High Courts. The amendment to the provision is not clarificatory in nature but is clearly amendatory in nature.

The Punjab and Haryana High Court in Commissioner of Income- Tax vs. Smt. Sushma Saxena, [(1997) 223 ITR p. 395], took the view that an assessment or reassessment made under Section 147 was not a 'regular assessment' within the meaning of Section 2(40). As noted in the judgment in that case the Patna High Court in Prakash Lal Khandelwal vs. I.T.O. [(1989) 180 ITR p.604] also was of the view that if the assessee filed his return for the first time pursuant to notice under Section 148 of the Act, then it was evident that the assessee was assessed under Section 143(3) read with Section 147 of the Act and, therefore, it was not a "regular assessment".

In Modi Industries Ltd. and others vs. Commissioner of Income-Tax and Another, [(1995) 216 ITR p.759], this Court had occasion to deal with the meaning of "regular assessment" in Section 214 of the Act. The Court observed:

> "Coming to the core question, viz., the meaning and purport of the expression "regular assessment" in Section 214(1), we are of the opinion that the said expression means and refers to the original assessment made under Section 143/144. This conclusion we arrive at on the basis of more than one reasoning. As we shall `demonstrate presently, whichever way one approaches the issue, one comes to the same conclusion as we have arrived at. The first approach- which we may call the long haul approach- involves a broad survey of the nature of advance tax and the scheme of the enactment in so far as it is relevant to the question herein while the second approach - which may be called the "short haul approach" emphasises the intrinsic indicators in Section 214 itself which lead unmistakably to the same

conclusion, viz., that "regular assessment" in Section 214 means the first or original assessment, as it may be called and not any other." (emphasis supplied) It was further observed (at p.791) "The procedure for making an assessment under Section 143 or Section 144 has been laid down in Chapter XIV of the Income-tax Act, 1961 (Sections 139 to 158). Section 139 deals with the return of income. Section 140 lays down by whom and how a return has to be signed and verified. Section 141 provides for provisional assessment which may be made even before a regular assessment. Section 142 empowers the Income tax Officer to make enquiry before assessment. Sections 143 and 144 lay down the manner in which the Income- tax Officer will make an assessment of income. Under sub-section (1) of Section 143, the Income-tax Officer will straightaway assess the total income or loss of the assessee and determine the sum payable by him or refundable to him on the basis of the return of income filed by the assessee, if he was satisfied that the return was correct and complete. No enquiry was necessary before passing an order under this sub-section. But, if the Income-tax Officer was not satisfied with a return, he had to serve upon the assessee a notice requiring him to attend his office and produce any evidence on which he may rely in support of the return. After considering the evidence produced by the assessee and after taking into account all relevant material which he had gathered, the Income-tax Officer had to pass an order assessing the total income or loss of the assessee and determine the sum payable by him or refundable to him on the basis of such assessment.

It was further observed (at p.796):

Interest will have to be paid by an assessee, if the advance tax paid is less than seventy-five per cent of the tax determined on the basis of regular assessment, after giving credit to the assessee for the amount of tax deducted at source. The interest, however, will be paid only up to the date of the regular assessment. It clearly appears from the provisions of Section 214 and Section 215 that "regular assessment" cannot have any other meaning than the first order of assessment, that means the date of the first order of assessment."

The decisions of the Madras High Court in K.Gopalaswami Mudaliar case (supra), the Delhi High Court in National Agricultural Co- operative Marketing Federation of India case (supra) and Kerala High Court in Lally Jacob case (supra) lay down the correct position in law and they have our approval. The decisions of the Gauhati High Court in CIT Vs. Triple Crown Agency case (supra) and of Punjab & Haryana High Court in Commissioner of Income-Tax vs. Sushma Saxena (supra) were not correct in law. The view taken by us that a first or initial assessment under Section 147 of the Act is a 'regular assessment' within the meaning of Section 139(8) of the Act, has been the position of law even before the explanation in Section 139(8) was added by amendment. In that view of the matter the explanation merely clarified the position taking it beyond pale of doubt. The Parliament thought it necessary to add the explanation with a view to remove the doubt raised in certain decisions of different High Courts in which a contrary view was taken. Thus the explanation is merely a clarificatory provision and has application to the period of assessment in the case i.e.

assessment year 1984-85.

The appeal filed by the assessee, being devoid of merits, is dismissed with costs.