[1993] 45 ITD 448 (BOM)

IN THE ITAT BOMBAY BENCH ‘C’

Jatin (Alias Rajesh) Khanna

vs.

First Income-tax officer

R.D. AGRAWALA. JUDICIAL MEMBER AND R.K. BALI, ACCOUNTANT MEMBER

IT APPEAL NO. 3210 (BOM.) OF 1985 [ASSESSMENT YEAR 1980-81]

APRIL 24, 1992

K. Shivram for the Appellant.
A. Mansukhani for the Respondent.

ORDER

Per Shri R.K Bali, Accountant Member - This is an appeal by the assessee against the order dated 22-3-1985 passed by the CIT (Appeals)-II, Bombay. Briefly, the facts in this case are that the assessment was completed by the Assessing Officer under section 143(3) read with section 144B on 31-3-1984, which has been challenged by the assessee to be barred by limitation. The relevant details of events relating to the submission of return and the final completion of assessment are as under:

eturn due	-	31-7-1980
orm No. 6 seeking extension filed	-	31-7-1980
Extension allowed up to	-	30-9-1980
Form No. 6 filed again	-	31-10-1980
xtension refused	-	03-11-1980
Notice under section 139(2) issued	-	10-12-1980
Form No. 6 filed again	-	06-01-1981
)Extension refused	-	09-01-1981
Return filed	-	19-06-1981
evised return filed was acted upon by the Assessing		

cer for the purpose of assessment	-	09-03-1983
Draft order issued by the Assessing		
cer and served on the assessee on	-	30-03-1984
Final Order of the assessment passed		
he Assessing Officer on	-	25-09-1984

2. In grounds of appeal Nos. 1 to 9 the assessee has challenged the action of the learned 1st Appellate Authority in confirming the order of the Assessing Officer having been passed within the period of limitation specified in the Act.

3. Two alternative contentions have been taken up by Shri K. Shivram, learned counsel for the assessee in regard to the ground that the assessment has framed by the Assessing Officer is time barred.

4. The first contention is that the return filed on 9-3-1983 was not a revised return under section 139(5) and, therefore, the benefit of the extended time limit under section 153 (1)(c) was not available to the Assessing Officer. It was submitted that a revised return under section 139(5) could be filed only if the assessee had furnished a return under section 139(1) or section 139(2), but in the instant case, the return which was voluntarily filed by the assessee and the time limit i.e. (31-7-80) was not on return either under section 139(1) or under section 139(2) and therefore, not capable of revision under section 139(4). It was thus pleaded that the assessment, to be valid, should have been completed within the normal time limit and since it has not been so done, it was invalid. In this connection reliance has been placed on the decision of the Hon'ble Delhi High Court in the case of O.P. Malhotra v. CIT [1981] 129 ITR 3791, Allahabad High Court in the case of Dr. S.B. Bhargava v. CIT [1982] 136 ITR 5592, Rajasthan High Court in the case of Vimalchand v. CIT [1985] 155 ITR 593 3.

5. The second alternative contention is that even if the return filed on 9-3-1983 is taken as a revised return under section 139(5) the assessment would still be beyond the time limit as it is beyond the time specified under section 153(1)(c) read with clause (iv) of Explanation 1 to section 153. It was further submitted that the learned CIT (Appeals) has wrongly held that the extended period of 8 years time limit was available to the Assessing Officer under section 153(1)(b) because in order to avail of this extended period of limitation there should be a finding that the assessee has concealed the particulars of his income prior to the period of normal limitation and this fact should be brought to the notice of the assessee within the normal period which was not done in the present case, as the penalty notice under section 270(1)(c) was only issued along with assessment order framed under section 143(3) read with section 144(B) on 31-3-1984. For this proposition Shri K. Shivram relied on the decision of the Supreme Court in the case of CIT v. Suraj Pal Singh [1991] 188 ITR 297 and that of Gauhati High Court in the case of Smt. Savitri Rani Malik v. CIT [1990] 186 ITR 701. Reliance was also placed on the decisions of Orissa High Court in CIT v. Sajitha Bakery [1991] 192 ITR 658.

6. Shri A. Mansukhani, learned departmental representative supported the order of the learned CIT (Appeals) on this ground and submitted that a return filed under section 139(4) can be revised under section 139(5). It was submitted that sub-section 4 of section 139 is not an independent provision by itself and cannot be taken to exist separate from sub- sections (1) and (2) of section 139. It was argued

that the filing of return under section 139(4) must be regarded as a filing of a return under section 139(1) or, as the case may be, under section 139(2). In this view of the matter it was pleaded that a return under sub-section 4 really takes the character of a return under sub-section (2) wherever the assessee has been required to submit the return but has delayed furnishing the same. Accordingly it was submitted that the extended period of limitation was available to the Assessing Officer. For this proposition reliance was placed on the decision of Hon'ble Calcutta High Court in Kumar Jagadish Chandra Sinha v. CIT [1982] 137 ITR 722, Balish Singh & Co. v. CIT [1987] 165 ITR 5754, CIT v. Dr. N. Shrivastava [1988] 170 ITR 5565 (MP) and Nanjappa Textiles v. CIT [1985] 153 ITR 1096 (Mad.).

It was however, conceded by Shri A. Mansukhani, departmental Representative, as well as Shri K. Shivram, learned counsel for the assessee that there is no direct decision of the Hon'ble Bombay High Court on this issue. With regard to the second contention of Shri K. Shivram learned counsel for the assessee, Shri A. Mansukhani, learned D.R. submitted that the draft assessment order in this case was passed on 30-3-1984 which was served on the assessee on the same day to which the assessee has objected by filing a reply on 12-4-1984. It was submitted that in the draft assessment order at page 3 there is a finding by the Assessing Officer that the assessee has concealed income of Rs. 5 lacs which was credited in the Books of the firm M/s. Shakti Raj Film Distributors in the account of the assessee which was not declared in the returns of income filed by the assessee. The Assessing Officer has given a finding in draft assessment order that the Balance Sheet of M/s. Shakti Raj Film Distributors in which the assessee was a partner was signed by the assessee and in the Books of the firm, the assessee's account was credited with a sum of Rs. 5 lacs which amounted to constructive receipt by the assessee and as such should have been declared in his return of income filed by the assessee. Accordingly, it was submitted by Shri A. Mansukhani, learned D.R. that since the finding of concealment of income to the extent of Rs. 5 lacs was recorded in the draft assessment order which was duly served on the assessee on 31-3-1984 itself and was also objected to by the assessee by filing its reply dated 4-4-1984, the assessment order as finally passed by the Assessing Officer was within time being in accordance with the provisions of section 153 (1) (3) as held by the learned CIT (Appeals) and for that proposition Shri A. Mansukhani relied on the decision of the Hon'ble Calcutta High Court in Jyoti Prakash Mitter v. Union of India [1978] 112 ITR 378 as well as, the Hon'ble Punjab & Haryana High Court in S. Kanwal Tej Singh v. ITO [1966] 60 ITR 23 , Sonepat Iron & Steel Rolling Mills v. CIT [1989] 179 ITR 596/48 Taxman 118 and the Madras High Court in Nanjappa Textiles case (supra).

7. We have considered the rival submissions. As admitted by Shri Shivram, learned representative of the assessee as well as Shri A. Mansukhani learned D.R., there is no direct authority of the jurisdictional High Court on the issue as to whether return filed under section 139(4) can be revised under section 139(5) and there is a conflict of judicial decision on the issue between the Hon'ble Calcutta, Madhya Pradesh and Madras High Courts deciding the issue in favour of the Revenue while the Hon'ble High Courts of Delhi, Rajasthan and Allahabad having taking the view favourable to the assessee. In this connection it will be relevant to refer to the Full Bench decision of the Hon'ble Punjab & Haryana High Court in Nandlal Sohanlal v. CIT [1977] 110 ITR 170 .- At page 211 wherein Hon'ble Shri Justice O. Chinnappa Reddy, as he then was have observed that a Judge faced with a conflict of precedent should not abdicate his judgment and accept the view which is favourable to the assessee. It is only where a Judge finds that two equally reasonable views are possible and he is unable to decide which is the better view, that he may adopt the rule of interpretation that the view favourable to the assessee might be accepted. In this case as chronological dates recorded in para one of this order clearly indicate that the assessee had in the first place repudiated its original return filed on 19-6-1981 and characterised it as not being a return under section 139(2) although it was filed in response to a notice under section 139(2). Secondly, the assessee while he had filed revised return on 9-3-1983 in supersession of its earlier

return dated 19-6-1981, nevertheless has taken a stand that it is not a revised return under section 139(5). The audiciousness of the stand on the part of the assessee, however, should not deter us from going into the question. The assessee is entitled to plead a technicality either as conception or application of the taxing provision and there is no estoppel against it in the statute. However, we do not accept the submission of the learned counsel even as a matter of construction. Section 139(5) is in the following terms - "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".

8. The provision speaks of a person having furnished a return under section 139(1) or section 139(2) and such a person may furnish revised return. In the present case, the question is whether the return filed by the assessee on 9-3-1983 is a revised return. This would depend upon whether the original return dated 19-6-1981 was a return under section 139(2) of the Act. It is true that a return has to be furnished under section 139(1) or section 139(2) within the time limit therefor. Where a return is filed although in response to a notice under section 139(2) subsequent to expiry of the time limit the question is whether it can be regarded as a return furnished under section 139(2) of the Act. The Act makes provision for the filing of a return even where the time allowed by a notice under section 139(2) had expired. Under section 139(4) of the Act, an assessee who has not furnished a return within the time allowed under section 139(1) or section 139(2) may, before the assessment is made, furnish the return for any previous year, after the assessment year 1967-68, within two years from the end of such assessment year. In the present case the assessee having filed revised return on 9-3-1983 relying on section 139(5) cannot now be heard to say that the return was an invalid return and should be ignored. No assessee can be expected to file a return before the Assessing Officer, who acts on that return and told by the assessee ultimately that the return must be ignored, except in cases where the Assessing Officer has lost his power to act on the return. There is no warrant in the statute for encouraging an assessee to indulge in this kind of fun of filing within a statutory period a return and then claiming that the ITO cannot act on it as it is time barred. He cannot hope to find in this provision any opportunity for the proverbial last laugh wherever else, as it some times happens, he looks for and achieves it. Thus, we will hold that the revised return filed by the assessee on 9-3-1983 was a valid return under section 139(5). Coming to the alternative contention of the assessee that even if the revised return is considered as a valid return the assessment having been finally framed on 25-9-1984 is still beyond the period of limitation as available under section 144(B), we are of the opinion, that the extended time of limitation is available to the Assessing Officer under section 153(b). In this case the ITO had given a finding with regard to the initiation of penalty proceedings under section 271 (1)(c) in the draft assessment order passed on 30-3-1984. Under section 153(1) three time limits are prescribed. In the instant case on the application of section 153 the three expiry dates would be:

(i)31-3-1983 being expiry of two years from the end of the assessment year in which the income was first assessable under section 153(1)(a),

(ii)31-3-1989 being the expiry of 8 years period under clause (b), and

(iii)30-3-1984 being the expiry of one year period from the date of the revised return as extended by a further period of 6 months under section 144(B).

As under section 153(1) the time limit that will have to be taken note of will be the latest date of expiry amongst the 3 points viz. 31st March, 1989 by the application of clause (b) of section 153(1), the assessment in the instant case having been made well within the, said date would be valid. In fact the

decision of the Hon'ble Supreme Court in Suraj Pal Singh's case (supra) relied upon by Shri K. Shivram, learned counsel for the assessee, as well as, Shri A. Mansukhani, Senior D.R supports the case of the Revenue because in that case the assessment relating to assessment year 1961-62 made on 25th March, 1970 was held to be barred by limitation as the ITO has not recorded any finding of concealment within a period of 4 years. In the present case there is a finding of concealment in the draft assessment order which is within the period of limitation considering the return filed on 9-3-1983 as a valid return and as such the extended period of limitation under section 153(1)(b) will be available to the Assessing Officer. The finding of concealment in the draft assessment order was communicated to the assessee on the same date which is accepted by the assessee in its reply dated 4-4-1984 filed in the office of the Assessing Officer on 12-4-1984 objecting to the proposed addition made in the draft assessment order. In this view of the matter, we are of the opinion, that the assessment framed by the Assessing Officer is valid and not barred by limitation as canvassed by Shri K. Shivram, learned counsel for the assessee. Accordingly, this point is decided against the assessee and in favour of the Revenue.

9. The second point of dispute in this appeal relates to the addition of Rs. 5 lacs made by the Assessing Officer as representing the remuneration received by the assessee from M/s Balaji Pictures. Briefly, the facts are that M/s Balaji Pictures was the producer of motion picture viz., 'Janata Havaldar' in which the assessee was the leading male artiste. As per the agreement entered into by the assessee with Balaji Pictures on 5-8-1977 the assessee was to get a remuneration of Rs. 5 lacs. Till the amount of Rs. 5 lacs was paid Balaji Pictures was not to release the picture for exploitation in any part of India. M/s. Shakti Raj Film Distributors (SRFD) is a partnership concern in which the assessee and Shri Shakti Samant were partners. SRFD by an agreement dated 5-9-1977 with Balaji Pictures (BP) became the distributors of picture in respect of Bombay territory and the consideration therefor was a total hire amount of Rs. 10 lacs payable before release of the picture. The picture was released on 27-4-1979. In the accounts of SRFD for the year ending 31-3-1980 the entire hire amount of Rs. 10 lacs had been debited but to the extent of Rs. 5 lacs the credit had been given to an account titled "Shri Jatin Khanna Account Janata Havaldar". The return of income in the case of SRFD for the assessment year 1980-81 had also been filed treating the entire sum of Rs. 10 lacs as expenditure relating to the distribution of the picture Janata Havaldar. In the case of the assessee, when asked as to why no remuneration in respect of Janata Havaldar had been shown, though as per the relative agreement a sum of Rs. 5 lacs was receivable by the assessee on the release of the picture and the picture having been released during the accounting year, the assessee came up with the explanation that no remuneration had, in fact, been received and as the accounts were being kept on cash basis, no income was shown. It was explained to The Assessing Officer that there was an agreement between SRFD and the assessee, as evidenced by letter dated 7-9-1977 written by SRFD to the assessee, by which out of the total hire amount of Rs. 10 lacs mentioned above, only Rs. 5 lacs was payable to B.P. by SRFD and the balance was to be adjusted against the remuneration due to the assessee from B.P. It was submitted before the Assessing Officer that the remuneration due to the assessee had to be paid by SRFD only on the realisation from the distribution of the picture exceeding the payment of Rs. 5 lacs to B.P. and the other costs incurred and to the extent of such excess, but not exceeding Rs. 5 lacs. It was claimed that there was no such excess, as the picture was a failure. However, the Assessing Officer brought to tax the sum of Rs. 5 lacs on the ground that the crediting of the assessee's account in respect of this sum in the books of SRFD during the accounting year was a constructive receipt of this amount by the assessee and this action of the Assessing Officer was confirmed by the learned CIT (Appeals). In appeal before us it was pleaded by Shri K. Shivram, learned counsel of the assessee that the amount of Rs. 5 lacs was not payable to the assessee till such time as the realisation exceeded to that extent over the cost incurred on the distribution of the film and since the assessee was following cash system of accounting nothing could have been included in the assessee's hand for this year. Alternatively, it was pleaded that if at all a view was taken that there was a

constructive receipt, it would be relatable to the assessment year 1978- 79 as the agreement in respect of remuneration due was entered into by the assessee with SRFD on 7-9-1977 which fell in the previous year relevant to that assessment year 1978-79. It was pleaded that if any claims have been made by SRFD contrary to the factual position in its income-tax case, that at the most, could call for action in that case, but cannot be made the basis for the assessment in the assessee's case. Shri A. Mansukhani, learned D.R supported the order of the ITO, as well as, the learned 1st Appellate Authority. We have considered the rival submissions. It is seen from the assessment order that the fact of an agreement between SRFD and the assessee in regard to hire amount payable in respect of the picture Janata Havaldar was not even brought to the notice of the ITO assessing SRFD. It is a fact that the entire sum of Rs. 10 lacs was claimed as the cost of acquisition by SRFD. Even if SRFD was adopting mercantile system of accounting, if the contention that there was an agreement between the assessee and SRFD was correct, SRFD could have taken into account such cost only as what was payable. In these circumstances, there is every reason to believe that the agreement between the assessee and SRFD was something which was made up only for the purposes of explaining away to the Assessing Officer as to why the assessee had not shown the remuneration due from Balaji Production. A perusal of the agreement as reproduced in para 2.4 of the order of the learned 1st Appellate Authority which is in the form of a letter does not indicate that the amount of Rs. 5 lacs would become payable to the assessee only if there was realisation after meeting all other out goings. The entries made in the books of accounts of SRFD in which the assessee is a partner clearly indicate that the crediting of his account in the books of SRFD was in fact a constructive receipt by him. Thus, for the reasons given in para 2.3 to 2.5 of the appellate order with which we are in agreement the addition of Rs. 5 lacs made to the income of the assessee is hereby confirmed and this point is decided against the assessee. The above point is disposed of the grounds of appeal Nos. 10 to 14. Ground of appeal No. 15 is that the learned CIT (Appeals) erred in disallowing 1/3rd of the motor-car expenses on the alleged ground that the same were for the personal purpose and further erred in disallowing 1/3rd of the depreciation on the said motor-car. No specific argument were advanced in support of this ground by Shri K. Shivram, learned representative for the assessee. Admittedly, the car is also being used for personal purposes by the assessee and as such the disallowance upheld by the CIT (Appeals) is hereby confirmed and this ground of appeal is also decided against the assessee. Ground No. 16 is that the CIT (Appeals) erred in taxing the income from over-flow receipts of the Picture 'Anand' on actual receipt basis when the same amount had been already taxed in earlier years on accrued basis. On a specific query from the Bench Shri K. Shivram, learned representative of the assessee could not point out as to in which year the actual over-flow receipts of Rs. 45,829 have been taxed and since admittedly, the assessee is following the cash system of accounting, the Assessing Officer, as well as, the learned it appellate authority were justified in taxing the over-flow receipts amounting to Rs. 45,829 and their action is hereby confirmed, this ground of appeal is also decided against the assessee.

10. In the result appeal filed by the assessee is dismissed.