CALCUTTA HIGH COURT

Commissioner of Income-tax

Vs.

Govindalal Dutta

Income-tax Ref. No. 108 of 1954

(P. Chakravartti, C.J. and B.K. Guha, J.)

04.09.1957

JUDGMENT

Chakravartti, C. J.

1. On the 4th September, 1951, one Govindalal Dutta, an owner of a tea business, filed voluntary returns of his income in respect of five consecutive years. Those were assessment years 1946-47 to 1950-51. Of the returns so filed, that for the assessment year 1946-47 showed a loss of Rs. 37.925-2-9 and that for 1947-48 showed a loss of Rs. 36,033-15-0, while that for the year 1948-49 showed a paltry profit of Rs. 75-3-3. In making assessments on these returns, the Income-tax Officer paid no attention to the returns for 1946-47 and 1947-48. The first return to be dealt with was the return for the year 1948-49 and on that return he made an assessment on an income of Rs. 5,545/-.

2. It does not appear from the Income-tax Officer's order that he was asked to take into account the losses of the earlier years and set them off against the profits for the assessment year 1948-49, if he found that losses incurred in earlier years had been made out. In the assessee's appeal to the appellate Assistant Commissioner, however, a specific ground relating to the question was taken. Ground No. 4 was that the Income-tax Officer ought to have carried forward the losses for the two earlier years, that is to say, the accounting years 1945 and 1946 respectively, against the profits of 1948-49. Though that ground was taken, there was no oral argument in its support at the time of the hearing, because the pleader who appeared for the assessee withdrew from the case after his prayer for an adjournment had been refused. It appears that the adjournment was asked for on the ground that notice of the hearing had been received by the appellant only two days earlier, but it occurred to the Appellate Assistant Commissioner to call for the envelope in which the notice served on the assessee had been enclosed and when the envelope was produced, it was found that in fact the notice had been served much earlier. In those circumstances, the Appellate Assistant Commissioner was not disposed to grant the adjournment prayed for and the result was that the pleader withdrew from the case.

3. The Appellate Assistant Commissioner disposed of the fourth ground taken on behalf of the assessee shortly. He held that no claim of any earlier loss had been made in the return and,

therefore, the action of the Income-tax Officer in not engaging himself in any enquiry about earlier losses had been perfectly in order. The statement of the Appellate Tribunal that the Appellate Assistant Commissioner did not decide this contention of the assessee, as remarked by them in the appellate order, or that he rejected the assessee's appeal "without going into this point", as observed in the Statement of the Case, is correct only to the extent that the Appellate Assistant Commissioner did not deal with the contention on its merits.

4. In his further appeal to the Tribunal, the assessee contended that the Income-tax Officer was bound to finalize the assessments for 1946-47 and 1947-48 first and then, if he found that there were losses to be carried forward, to give the assessee the benefit of those losses in his assessment for the year 1948-49. That contention was accepted by the Tribunal. It appears to have been contended on behalf of the Department that the returns for the years 1946-47 and 1947-48 being voluntary returns, showing loss, were not valid returns at all and, therefore, the Income-tax Officer was not required by law to take any notice of them. The Tribunal repelled that argument by holding that the returns for the two years in question were not returns in pursuance of either Section 22 (1) or Section 22 (2) and not being such returns, could be filed as valid returns at any time before the assessment was made. They thought that the view they were taking had the support of the decision in *Harakchand Makanji and Co. v. Commissioner of Income Tax, Bombay City*[1], In the Statement of the Case, they have given a further reason and said that Section 22 (3) of the Act provides for the submission at any time before the assessment of a return which is not a return under either Section 22 (1) or Section 22 (2) of the Act. Having thus disposed of the objection taken on behalf of the Department, the Tribunal proceeded to hold that the right given to assessees under Section 24 (2) of the Act to carry forward losses for a period of six years was an absolute and unqualified right and there could be no justification for refusing to give effect to that right on the ground that the returns for the years, in which the losses were claimed to have occurred, were voluntary returns, showing loss. The Income-tax Officer, the Tribunal thought, had no right to ignore such returns and, according to them, it had been so held in the case of *All India Groundnut Syndicate Ltd. v. Commissioner of Income Tax, Bombay City*[2], In that view, the Tribunal held that since the years in respect of which losses had been claimed were years immediately preceding the assessment year in question, the Income-tax Officer could not make a valid assessment for that year until and unless he had determined the losses in respect of the earlier years, because if there had been in fact losses in those years, such losses would have to be set off against the income of the assessment year in question. In the result, the Tribunal set aside the assessment and directed the Income-tax Officer to deal with the returns filed by the assessee for the assessment years 1946-47 and 1947-48 and then to make the assessment for the year 1948-49.

5. The Commissioner of Income-tax was unable to accept the decision of the Tribunal and required them to refer the matter to this Court for its opinion. Accordingly, the Tribunal have referred the following question of law:

> "Whether on the facts and in the circumstances of this case, in making the assessment for the assessment year 1948-49, the Income-tax Officer was bound in law to set off the losses sustained in the assessment years 1946-47 and 1947-48
> and for such purposes determine the losses for these two years?"

[1]1948-16 ITR 119: AIR 1948 Bom 401

[2](1954) 25 ITR 90: AIR 1954 Bom 232

6. Before the Tribunal, it seems to have been assumed by both parties that in order that losses of an earlier year could be allowed to be carried forward and set off against the profits' of a subsequent year, it was necessary, that, in respect of the earlier year, there should have been an assessment. It was on the assumption of that position in law that the parties advanced their rival contentions regarding the validity of the return filed by the assessee. The assessee insisted that since he had filed returns of his income for the years 1946-47 and 1947-48 and since those returns were returns which he was entitled to file, the Income-tax Officer was bound to make assessments on them and, by determining his losses in such assessments, give him the right to have the losses carried forward and set off against the profits of the year 1948-49. On the other hand, the Department contended that the returns filed, being voluntary returns showing loss, were no returns at all and, therefore, since there could be no assessment on them in law, no losses of the years to which the returns related could be carried forward to be set off against the profits of the assessment year in question. Both sides thus proceeded on the view that there had to be an assessment.

7. Before us Mr. J. C. Pal, who appeared on behalf of the assessee, did not contend that under the law, as it stood at the relevant time, an assessee was entitled to file a voluntary return under Section 22 (1) of the Act and show therein a loss. Indeed, Mr. Pal himself submitted that no such return could be filed under the law as it then stood. There can be no question that in making that submission, contrary to what had been contended on behalf of his client before the authorities below, Mr. Pal was entirely right. Under Section 22 (1), as it stood before its amendment in 1953, a person was required to file a return only if his total income during the previous year exceeded the maximum amount which was not chargeable to tax. The return contemplated was thus only a return of income and not a return of loss and not even a return of income, but a return of taxable income, if the person concerned himself thought that his income of the previous year had reached the assessable limit. If, on the other hand, he had suffered a loss or even if he had earned an income but such income was below the taxable limit, he was not required to come forward with a return and proclaim his loss to the Income-tax Officer or proclaim the meagreness of the income which he had made. Not only, had a person no duty to file a return voluntarily in compliance with a general notice under Section 22 (1), if he had suffered a loss, but it is clear that he had even no right to report his loss to the Income-tax Officer by filing a return. The view of the Appellate Tribunal that Section 22 (3) of the Act provides for the filing of a voluntary return, showing loss, at any time before the assessment is made, appears to me to be completely mistaken. What Section 22 (3) says is that if a person has not furnished a return within the time allowed by or under Section 22 (1) or Section 22 (2), he may furnish a return at any time before the assessment is made. Obviously, what is contemplated is that if no notice under Section 22 (2) was served upon a person, but, having had an assessable income in the previous year, he had a duty to file a return under Section 22 (1) and yet had not filed it or if, having been required by a notice under Section 22 (2) to file a return, he had failed to comply with the notice, he can file his return at any time before the completion of the assessment. The voluntary return which may thus be filed at any time before the assessment is completed must, it is clear, still be a return, as contemplated by Section 22 (1), that is to say, a return showing a taxable income. As to a return filed in compliance with a notice under Section 22 (2), such a return can obviously be either a return showing an assessable income or a return showing loss, because, having been required by a notice under the section to furnish a return of his income and total world income during the previous year, he was under a duty to file a return, whatever his condition as to profit or loss

might be. The limitation contained in Section 22 (1) to the effect that a return was to be filed only if the total income during the previous year "exceeded the maximum, amount which is not chargeable to income-tax" does not find place in Section 22 (2). What Section 22 (3) plainly means is that if a person, being under a duty to file a return, which, in the case of a voluntary return must be a return of a taxable income and, in the case of a return in compliance with a notice under Section 22 (2), may be a return, showing either profit or loss, failed to file it in time, he may file the return, which he failed to file in due time, before the completion of the assessment. Except granting an extension of time for the purpose of furnishing returns, Section 22 (2) has no other effect and it certainly does not confer any new right on asses-sees to file returns of types not contemplated by Section 22 (1). Dealing with the identical question with reference to the corresponding sections of the Bengal Agricultural Income-tax Act, I had occasion to explain the true meaning of Section 22 (3) in the case of *Commr. of Agricultural Income-tax v. Sultan Ali Gharami*[3], I see no reason to modify the view which I then expressed.

8. The Tribunal has referred to two decisions, both of the Bombay High Court. In (1948) 16 ITR 119: AIR 1948 Bombay 401, the question was neither raised, nor decided and all that can be said is that a voluntary return, showing loss, was treated in that case as valid return without any question as to its validity being raised. What happened was that in the course of the assessee's assessment for the assessment year 1943-44, he filed a voluntary return in respect of the year 1942-43, showing a loss and the date, on which he did so was 18th of June, 1943, which was after the expiry of the assessment year 1942-43. In those circumstances, it was contended on behalf of the assessee that no return having been filed within the assessment year in question, income for the year had escaped assessment and consequently the Department was not entitled in law to assess him in respect of the year in question without first issuing a notice under Section 34 of the Act. It was that contention which was repelled by the Court and the ground given was that since a return had in fact been filed by the assessee in respect of the year in question, it could not be said that income had escaped assessment and, therefore, the Department was not required to serve a notice under Section 34. No point as to whether a voluntary return, showing loss, could be a return in law at all was taken or considered by the Court. The other decision relied upon by the Tribunal is the case of (1954) 25 ITR 90: AIR 1954 Bombay 232. In my view, that case has no bearing whatever on the present question. It appears that for the years 1944-45, 1945-46 and 1946-47, the assessee filed returns, showing losses and the Income-tax Officer, in making assessments for the years in question, merely held that the income was nil, but did not either determine the losses, nor notify the assessee as to the amount he was entitled to carry forward under Section 24 (3). The contention of the Department was that since no loss had been notified under Section 24 (3) in respect of the three years in question, no loss incurred during any of them could be carried forward and set off against the profits of subsequent years. That contention was repelled by the Court which held that it was the duty of the Income-tax Officer, when he made the assessments, to determine the losses and to notify their amount to the assessee and that, not having done, what it was his duty to do, he could not turn round and take advantage of his own wrong. There is nothing in the report whatever to show that in respect of the three years in question, the returns filed by the assessee were voluntary

[3](1951) 20 ITR 432 at p. 442 (Cal)

returns filed under Section 22 (1). Although it is not expressly so stated, the implication of the extremely detailed Statement of Case submitted by the Tribunal is that the returns were filed in compliance with a notice under Section 22 (2). Be that as it may, no one ever suggested that the returns were voluntary returns and no question as to their being nonetheless valid was raised or

decided.

9. In my view, the returns filed by the assessee in the present case in respect of the years 1946-47 and 1947-48, being voluntary returns and returns which showed loss, were no returns at all in law and the Income-tax Officer was not required to make any assessments on them.

10. This finding, however, does not dispose of the question which has been referred to us, because what we are asked to say is whether the Income-tax Officer was bound in law to determine the losses for 1946-47 and 1947-48 and set them off against the profits of 1948-49. It may be that the Income-tax Officer was not bound to make an assessment in respect of the years 1946-47 and 1947-48 but whether he was still bound to determine the losses for those years for the purposes of Section 24 (2), as applied to the assessment year 1948-49, is a further question.

11. Before I deal with that question, it may be convenient to dispose of a short point. I have already pointed out that in the return filed by him for the assessment year 1948-49, the assessee did not claim any set off in respect of the losses of the earlier years. It would be recalled that that was the sole ground on which the Appellate Assistant Commissioner disposed of the assessee's claim that the losses of the earlier years should have been determined. If there had been no further fact in the case, it would be difficult to allow the assessee to raise this question at subsequent stages of the assessment proceedings, since so far as the Income-tax Officer's order goes, it is not stated that he raised the question before him. If the returns filed for 1946-47 and 1947-48 were no returns in law, it could be argued that they were not before the Income-tax Officer at ail and since his attention was also not drawn to them by any claim of set off in the return for 1948-49, it could not be said that the Income-tax Officer had erred in not proceeding to determine the losses of the earlier years. It, however, appears that the Department's case throughout has been that the Income-tax Officer ignored the returns of the earlier years, because they were voluntary returns, showing losses. It is thus admitted that the returns came to the notice of the Income-tax Officer and he applied his mind to them and then decided not to deal with them in view of their invalidity. If so, I think it will not be right to answer the question referred to us in the negative on the short and technical ground that no set off in respect of the losses had been claimed in the return and, therefore, the Income-tax Officer was not bound in law to determine the losses and if he found any losses to exist, to set them off against the profits of the assessment year in question. That was even not the contention of the Department before the Tribunal and the question referred must be understood in the light of the contentions respectively advanced by the parties at the hearing of the appeal before the Tribunal.

12. The question, before us, is whether in view of the provisions of Section 24 (2), the assessee was entitled to have his claim of losses during the two earlier years examined and to be given the benefit of those losses in his assessment for 1948-49, if the losses claimed were made out. I have already held that the Income-tax Officer was not bound to make an assessment in respect of the earlier years. The Department's contention before us was that he was not bound even to determine, for the purpose of Section 24 (2), whether there had been any losses during the earlier years which the assessee was entitled to have carried forward and set off against the losses of 1948-49, because Section 24 (2) did not apply to the case of losses during years for which there had been no assessment. Mr. Meyer contended that such meaning of Section 24 (2) was implicit in the use of the word 'assessee' and he drew our attention to the definition of that word, as it stood at the relevant time. The definition of assessee, given in Section 2 (2), as it stood before the

recent amendment, was "a person by whom income-tax is payable". Mr. Meyer invited us to contrast the language of the definition with the language of Section 24 (2) and pointed out that whereas the former used the word 'person', the latter used the word 'assessee'. He accordingly contended that in order that Section 24 (2) would apply to a person and the benefit of it could be available to him, he had to be, as the section expressly stated, an assessee, that is to say, he had to be a person by whom income-tax was payable. A person who had suffered loss was not a person by whom income-tax was payable and, therefore, the section did not contemplate a person who had suffered losses, as the assessee in the present case had.

13. The contention thus put forward on the basis of the word 'assessee' is plainly untenable and it is only fair to Mr. Meyer to say that, after some discussion he himself conceded that it could not be correct. If in order to qualify for the benefit of Section 24 (2), a person has to be a person by whom income-tax is payable the section cannot apply to any case at all and there cannot be any loss to be carried forward from any year to any year. The stage of Section 24 (2) is reached after the stage of Section 24 (1) has been passed and it is only when the operation contemplated by Section 24 (1), that is to say, the operation of setting off the loss under any of the heads mentioned in Section 6 of the Act against the income of any or all of the other heads has resulted in the final emergence of a business loss, that Section 24 (2) comes into play. The loss which can be carried forward under the section is so much of the year's business loss as "cannot be wholly set off under sub-section (1)" and, therefore, the person who has such a surplus loss in his hands, if I may use that expression, cannot in any circumstances be a person who will satisfy the definition of 'assessee' and be a person by whom income-tax is payable. There can be no doubt, it appears to me, that the word 'assessee' is used in Section 24 (2) in a loose and a general sense and means merely a person whose income-tax affairs are being considered or who is himself considering the state of his profit and loss. The difficulty which the word 'assessee', as interpreted by its old definition, presented, if the definition was to be literally applied, has now been removed by a change in the definition, whereby not only a person by whom income-tax is payable under the Act, but also every person in respect of whom any proceeding has been taken for the assessment of either his income or the loss sustained by him has been brought within the ambit of the definition.

14. A greater difficulty, however, is presented by the expression "previous year" on which Mr. Meyer did not offer any argument. To turn to the definition clause again, 'previous year' is defined in Section 2 (11) as, to omit the portions irrelevant for the present purpose, "the twelve months ending on 31st day of March", or on some other day, according to the manner in which the accounts have been made up, "preceding the year for which the assessment is to be made". A previous year is thus inter-linked with an assessment year or, to be more precise, a year for which an assessment is to be made. If one takes that definition literally, one may argue that Section 24 (2) applies only to losses of the year preceding the year for which an assessment is to be made and that, therefore, in the present case, if any loss of the earlier years could be taken into account at all, those would only be the losses of the accounting year 1947-48, but not the losses of any earlier years. If that contention be correct, losses of accounting years earlier than the accounting year 1947-48 could not be taken into account at all, because for the assessment years, relative to those accounting years, no assessment had been made or was going to be made. It appears to me, however, that it will not be right, nor consistent with the intention of the section to take the expression 'previous year' in the literal sense of its definition. The section gives a person, who has in his hands some business losses which could not be set off against profits the right to carry

it forward for six years. That right is not qualified in any manner and I cannot imagine that although it is not expressly so stated, the Legislature, nevertheless, intended, by the use of the expression 'previous year', to limit the commencement of the carrying forward to the first accounting year for which there would be an assessment. So regarded, the section would mean that if a person, starting a business in a particular year, went on making losses for five successive years but in the sixth year made some income, he would be entitled to set off against the income of the sixth year only the surplus loss of the fifth year, but not any earlier loss. To read the section in that sense would be, to my mind, to adopt a construction that would defeat its purpose. In my view, the expression 'previous year' has also been used in Section 24 (2) in a loose and general sense and means only a year which, for income-tax purposes, would be an accounting year relative to an assessment year, irrespective of whether any assessment was actually made. I would, therefore, hold that in taking the view that the right given to an assessee under Section 24 (2) of the Act to have his losses carried forward and set off against the losses of subsequent years, is an unqualified right, subject only to such limitations as the section itself contains, the Tribunal was right.

15. It appears to me that such construction of the section also receives support from the terms of Sub-section (3) of the section. That section provides that "when, in the course of the assessment of the total income of any assessee, it is established that a loss of profits or gains has taken place which he is entitled to have set off under the provisions of this section, the Income-tax Officer shall notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of this section". It will be noticed that the section speaks of a loss being established in the course of the assessment of an assessee and the loss contemplated is a loss of profits or gains which the assessee is entitled to have set off under the provisions of the section. Under the provisions of sub-section (2) of the section, an assessee is entitled to have his business loss carried forward and set off against subsequent profits from the same business for six years. I can see no reason to hold that the loss contemplated by sub-section (3) is not the whole loss of all those six years, or any or more of the years within that period. Sub-section (3), in speaking of loss which an assessee is entitled to have set off under the provisions of the section, adds no qualification and obviously has in view all the loss which, under the terms of the section, an assessee is entitled to have carried forward. If that be so, then the assessee in the present case was entitled in the course of his assessment for the year 1948-49 to try to establish, if he could, that a loss had been suffered by him within the six preceding years and that it had not been possible to set off such loss against the profits of the respective years, nor had it been possible to set off the business part of the loss against the profits from the same business of subsequent years.

16. I think I ought to mention that the view I am taking is opposed to what was held by the Madras High Court in the case of *O. M. Ahamed Sahib v. Commissioner of Income Tax*[4], which was not cited before us. The facts in that case were that during the assessee's assessment for the year 1943-44, the Income-tax Officer discovered that he had carried on business even in the year 1942-43 and, upon that discovery, he issued a notice under Section 34 of the Act. It was, however, found after the return had been filed that the assessee had not made an income in the year 1942-43. When the assessment for 1943-44 was resumed, it was contended on behalf of the assessee that the Income-tax Officer should have computed his loss for the year 1942-43 in the proceeding under Section 34 in respect of the year. The contention was easily repelled, because Section 24 (3) speaks of assessment proceedings and not proceedings under Section 34. It was next contended that the loss of the year 1942-43 should be investigated in the course of the assessment for the year 1943-44 and that the assessee had a right to such investigation under

Section 24 (3) of the Act, but that contention was also repelled on the ground that what Section 24 (3) contemplated was an ascertained loss, that is to say, a loss determined by the taxing authorities in an earlier assessment proceeding and not loss left at large. With great respect to the very experienced Judge who delivered the judgment in that case, I am unable to accept the basis of the decision as correct, because there would be an ascertained loss determined by the taxing authorities for earlier years only when there could be an assessment for those years. Where no notice under Section 22 (2) is served and the assessee has suffered loss, so that he cannot file a voluntary return and so that no assessment can take place, it cannot be right to exclude a claim of loss on the ground that it was not determined at an assessment. I can see no reason to import any such qualification in Section 24 (3) which is not warranted by the language used and which, it would be impossible to satisfy in spite of there having been a loss in fact.

17. I think, regarded from whatever point of view the matter may be, the only right conclusion at which one can arrive is that in the facts of the present case and assuming, as it must now be assumed, that the assessee did make a claim of set off before the Income-tax Officer, the Officer was required by law to investigate the claim of loss in regard to the accounting years relative to the assessment years 1946-47 and 1947-48. He was, however, not required to make assessments in respect of those years and indeed, for reasons I have already given no assessment could in law be made on the returns filed. There is an additional reason in respect of the assessment year 1946-47 why no assessment could be made, because the return was filed after the expiry of four years from the end of the assessment year. The Income-tax Officer was, however, required, since a claim of set off of earlier loss had been made before him, to investigate into the claim and see if it was established that losses had taken place in the two earlier years which the assessee was entitled to have set off under the provisions of Section 24 (2).

18. The losses claimed in respect of the two earlier years appear to have been regarded in the course of the proceedings below as the loss of those years. We had occasion to refer to the returns themselves and it transpired that not the whole of the losses had been incurred in those particular years, but a large part had been brought forward from still earlier years. In any investigation which he might make, the Income-tax Officer would, therefore, have to see, since the assessee's right was limited to losses which he would be entitled to have set off under the provisions of the section, if any part of the losses had been suffered

[4](1952) 22 ITR 87: AIR 1953 Mad 340

beyond six years. and so would he have to see whether the losses were such losses as could be carried forward in law and in that connection see whether there were other heads of income in the relative years and also whether the losses were business losses. This, however, bears only upon the question as to how the Income-tax Officer would have to determine the losses.

19. In my opinion, although the view taken by the Appellate Tribunal as to the true import and effect of Section 24 (2) was correct, the order directing assessments to be made on the returns for 1946-47 and 1947-48 was plainly not correct. The utmost which the Income-tax Officer could be required to do was to investigate into and determine the losses of the earlier years fit to be earned forward, if there were any. In effect, the process might not differ from making an assessment, but nevertheless, no formal assessment could in law be made.

20. For the reasons given above, the answer to the question referred must, in my opinion, be :

"Yes, but not to make assessments for the years 1946-47 and 1947-48, but only to investigate into the claim of losses and find whether it was established that losses had taken place during the years in question which the assessee was entitled in law to have carried forward and set off against the profits of 1948-49."

21. As the actual order of the Tribunal is erroneous, there will be no order as to costs.

Guha, J.

22. I agree.

Reference answered accordingly.