

CALCUTTA HIGH COURT

Commissioner of Income-Tax

Vs

Garia Industries Pvt. Ltd

(Sabyasachi Mukharji J.)

21.06.1982

JUDGMENT

Sabyasachi Mukharji J.

1. In this application under s. 256(2) of the I.T. Act, 1961, as directed by this court the following question of law have been referred to this court:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the appeal against the order of the Income-tax Officer is maintainable ?

2. Whether, in any event, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the return filed by the assessee was a valid return and in directing on that basis that the entire loss should be determined and carried forward for the purpose of set-off in connection with the assessment of the subsequent year ?"

The assessee is a private limited company which was incorporated on July 21, 1960, and its accounts for the first year ended on June 30, 1961, disclosed a loss of Rs. 24,474 including claim for depreciation to the extent of Rs. 9,976. With a view to get this loss determined by the ITO as well as to get it notified under s. 157 of the I.T. Act, 1961, the company filed a return disclosing the losses within the time allowed under s. 139(3) of the Act. No action was taken on this return by the ITO till the company enquired of the ITO as to why no action had been taken. In reply to the companys letter dated February 28, 1966, incorporating the file number of the assessee that no action had been taken as the return was not accompanied by a statement of accounts and auditors report and, as such, the return was treated as invalid. The ITO stated as follows:

"Re: Assessment Year 1961-62 :

In reply to your letter dated February 28, 1966, I am to inform you that no action was taken as the return was invalid for the above assessment year. It was not accompanied by the statement of

accounts and audited report and certificate." The assessee went up in appeal against the order of the ITO as contained in the said communication which we have set out here in before. The AAC was of the view that the letter of the ITO could not be considered as an appealable order in terms of s. 246 of the Act and as such, he dismissed the appeal in limine without considering the merits. The assessee went up in further appeal before the Tribunal and contended that the AAC erred in holding the appeal as incompetent in view of the Supreme Court decision in the case of *Mela Ram and Sons*¹ Reliance was placed on the Allahabad High Court decision in the case of *Maheshwari Devi Jute Mills Ltd.* [1968] 68 ITR 437(Supra). It was pointed out that an appeal was no less an appeal even if it was irregular and incompetent and that the AAC was not justified in rejecting the appeal in limine on the ground of its alleged incompetence. It was further argued before the Tribunal that the ITO was wrong in treating the return showing a loss as an invalid return. The return was in the prescribed form and had duly been verified by the competent authorities and contained all the required particulars. The requirements of s. 139(3) had been met and no notice under s. 139(2) had been served on it. Reference was made to r. 12A and not r. 12B of the I. T. Rules, 1962, by the learned counsel on behalf of the assessee and it was pointed out that the assessee had not been offered an opportunity by the ITO for proving the loss and that the ITO had proceeded to treat the return as invalid under a misapprehension as to the true state of law. At any rate, the letter of intimation as issued by the ITO against which the company had lodged an appeal should be treated to be an assessment order ignoring the loss claimed and, in that view of the matter, the AAC ought not to have dismissed, it was submitted, the assessee's appeal on the preliminary ground. Reliance was placed by the assessee on certain decisions in aid of the proposition that even if the copy of the audited accounts had not been furnished along with the return showing the loss, it was, at the worst, a remedial defect which would not render the return invalid. The Revenue, on the other hand, contended that it was not obligatory on the part of the ITO to pass an order in case an assessee filed a loss return found to, be invalid, as in the present case. It was not incumbent on the ITO to process a loss return or a return showing income below taxable limit and it was argued that the observations of the Supreme Court in the case of *Ranchhoddas Karsondas*², should be appreciated in the context of that case. As the return was not accompanied with the audited accounts, the ITO was justified in treating the return as invalid and as no competent appeal had been filed in terms of s. 246, the AAC was justified in dismissing the appeal in limine on the ground of incompetence. It was open to the assessee to seek alternative remedies but as far as the appeal before the Tribunal was concerned, there was no remedy whatsoever.

After hearing both parties and considering, inter alia, the provisions of s. 139(3) and rr. 12 and 12A of the I.T. Rules, 1962, the Tribunal held that the return filed by the assessee disclosing a loss of Rs. 24,271 was a valid return and that the letter of intimation, as provided by the Act, was

issued by the ITO on May 11, 1965, and, as such, was an order prejudicial to the assessee. It, then, proceeded to discuss the scope and ambit of s. 30 of the Indian I.T. Act, 1922, and referred to the Supreme Court decision in the case of *Mela Ram and Sons* [1956] 29 ITR 607(Supra), referred to hereinbefore, and also to the decision of the Calcutta High Court in the case of *Kooka Sidhwa and Co*³. among others and held that an appeal would always lie before the AAC in a case where income had been Considering the scheme of the I.T. Act, the Tribunal went on to hold that it was quite apparent that the assessee had filed its return showing the loss suffered by it in the first year of its existence for the purpose of the said loss being determined by the ITO and for the purpose of carry forward under s. 22 of the I. T. Act, 1961. As a result of the ITOs action in treating such a return as invalid, the assessee had been deprived of a benefit of the carry forward of the loss. Therefore, it could be said, according to the Tribunal, that the assessee was competent to take up this point in appeal before the AAC. Reference was also made to several other decisions and it was ultimately held that the assessee was entitled to have the loss as disclosed in its return for the assessment year 1962-63 determined by the ITO. Since the composite loss return had been filed including the amount of the depreciation claimed, the Tribunal further held that the ITO should compute the correct amount of the depreciation and treat it as part of the future depreciation allowable as the law provides. From this, as directed by this court, the two questions as indicated hereinbefore, have been referred to this court. The first question relates to the justifiability of the order of the Tribunal that the appeal against the order of the ITO was maintainable. We have set out hereinbefore the relevant order. In order to decide this question, we will have to see the scheme of the different sections of the I.T. Act, 1961. We may refer to s. 70. Section 70 which has the sub-heading "set off, or carry forward and set off" stipulated that where the not result for any assessment year in respect of any source falling under the head of income other than capital gains is a loss, the assessee "shall be entitled to have the amount of such loss set off against his income from any other source under the same head". The other two sub-section of s. 70 are not relevant for our purpose. Section 71 deals with another situation, "Set off of loss from one head against income from another". Sub-section (1) of s. 71 stipulates that where in respect of any assessment year, the net result of the computation under any head of income under the head capital gains is a loss and the assessee has no income under the head capital gains, he shall, subject to the provisions of that chapter, be entitled to have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head. In view of the problems involved in this case, we are not directly concerned either with s. 70 or s. 71 of this Act. Section 72 deals with "carry forwarded and set off of business losses". Section 72 is in the following terms:

"Where for any assessment year, the net result of the computation under the head Profits and gains of business or profession is a loss to the assessee, not being a loss sustained in a

speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off or where the assessee has income only under the head Capital gains relating to capital assets other than short-term capital assets and has exercised the option under sub-section (2) of that section or where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and -

(i) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year:

Provided that the business or profession for which the loss was originally computed continued to be carried on by him in the previous year relevant for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on;

Provided that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such business is re-established, re-constructed or revived by the assessee, so much of the loss as it attributable to such business shall be carried forward to the assessment year relevant to the previous year in which the business is so re-established, re-constructed or revived, and -

(a) it shall be set off against the profits and gains, if any, of that business or any other business carried on by him and assessable for that assessment year; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re-established, re-constructed or revived continues to be carried on by the assessee, be carried forward to the following assessment year and so on for seven assessment years immediately succeeding.

(2) Where any allowance or part thereof is, under sub-section (2) of section 32 or sub-section (4) of section 35, to be carried forward, effect shall first be given to the provisions of this section.

(3) No loss (other than the loss referred to in the proviso to sub-section (1) of this section) shall be carried forward under this section for more than eight assessment years

immediately succeeding the assessment year for which the loss was first computed.

The analysis of the provisions of that section indicated that the assessee has a substantial right to carry forward, for the period mentioned in the section, of this loss to be set off against his future business profits. That the section gives the assessee a substantial right is not really disputed. But the analysis of the section will indicate that there are, however, one or two procedures for remedy. In this connection, we may refer to s. 80 which enjoins that notwithstanding anything contained in that chapter, no loss which has not been determined in pursuance of a return filed under s. 139 shall be carried forward and set off under sub. s. (1) of s. 72 or sub-s. (2) of s. 73 or sub-s. (1) of s. 74 or sub-s. (3) of s. 74A. This is material. Unless the loss has been determined and notified to the assessee, he is not entitled to carry forward. Section 157 of the Act provides for intimation of loss and is in the following terms:

"Intimation of loss. - When, in the course of assessment of the total income of any assessee, it is established that a loss has taken place which the assessee is entitled to have carried forward and set off under the provisions of sub-section (1) of section 72, sub-section (2) of section 73, sub-section (1) of section 74 or sub-section (3) of section 74A, the Income-Tax Officer shall notify to the assessee by an order in writing the amount of the loss as computed by him for the purposes of sub-section (1) of section 72, sub-section (2) of section 73, sub-section (1) of section 74 or sub-section (3) of section 74A."

While we are on the sections, it would be appropriate to refer to s. 139(3) of the Act which deals with the time in which return has to be filed in case no notice is served under sub-s. (2) of the said section. Section 246, which is material, upon which much reliance has been placed, deal with right of appeal, provides, inter alia, as follows:

"246. Appealable orders. - Any assessee aggrieved by any of the following orders of an Income-tax Officer may appeal to the Appellate Assistant Commissioner against such order -

(a) an order against the assessee, being a company, under section 104;

(b) an order imposing a fine under sub-section (2) of the section 131;

(c) an order against the assessee, where the assessee denied his liability to be assessed under this Act or any order of assessment under sub-section (3) of section 143 or section 144, where the assessee objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is a assessed;..."

The other sub-clauses of section 246 need not be set out.

Some aspects of the question involved before us were considered by the Bombay High Court in the case of *All India Groundnut Syndicate Ltd. v. CIT*⁴. There are Bombay High Court noted that the right which the Legislature conferred upon an assessee under s. 24(2) of the Indian I.T. Act, 1922, to carry forward the loss of previous years for a period of six years was an absolute unqualified right and that right was not made conditional upon any computation made by the ITO or any notice issued by him under s. 24(3). In that case for three assessment years the assessee returned a loss but the ITO took the income of the company as "nil" and exempted it under s. 23(3). The assessee made a profit in the subsequent year and claimed to set off against the profit, the loss incurred in the previous years. The ITO disallowed the claim on the ground that the loss had not been notified as required by s. 24(3). There the contention which arose was that, as the computation of the income at "nil" had become final, in the subsequent year the assessee could not claim the right to carry forward the loss and have it set off against the profit of the subsequent year. It was contended that the order of the ITO had become final inasmuch as no appeal was preferred against that order. Referring to the said argument, Chief Justice at pp. 100, 101 of the report, observed as follows:

"Now, Sir Nusserwanji has argued that the order of the Income-tax Officer has become final inasmuch as no appeal was preferred against that order. We fail to understand which is order of the Income-tax Officer which has become final. All that the Income-tax Officer says is "Income nil", and he says that in order to come to a decision that no income of the assessee is liable to tax and, therefore, there is no assessment under section 23(3). Now, the only right to appeal that is given to the assessee is under section 30 and that right of appeal is in respect of the amount of loss computed under section 24. Therefore, if the Income-tax Officer had computed the loss and if the assessee had been dissatisfied with that computation, he had a right of appeal under section 30, and if he refused to exercise that right the computation would have become final. In this case the assessee has actually submitted his return, that return has not been challenged or disputed by the Income-tax Officer, he comes to no conclusion on that, he does not give a finding, he does not compute the loss. All he says is Income nil. It is difficult to understand how, when the Income-tax Officer does not give a finding, and does not compute the loss made by the assessee, the computation of the loss by the assessee has become appealable under section 30 of the Act and no appeal having been preferred the computation becomes final. Before we reach this stage there must be a therefore, of either its finality or appealability arises.

It is then urged that inasmuch as the loss was not computed in the relevant year of assessment, there is no right left to the assessee in the assessment year 1948-49. That

contention, again, is based upon a mis-apprehension. The right to claim a relief which the assessee is claiming only arose to the assessee in the assessment year 1948-49 when the assessee had made profits and sought to set off the losses incurred during the previous years against the profits. The fact that the Income-tax Officer has not computed the loss of the earlier years can have no bearing upon the right of the assessee which arises in the year 1948-49. There is nothing to prevent the Income-tax Officer from computing those losses which the assessee may have incurred earlier and which he has failed to do in the statement of the case notices of demand issued under section 29 by the Income-tax Officer have been annexed. It is difficult to understand with respect to the Tribunal, what relevancy these notices have on the question that we have to decide. The Income-tax Officer did certainly have a great deal of originality because, having assessed the income of the assessee at nil and having come to the conclusion that the assessee was not liable to pay tax, in all solemnity he proceeded to issue a notice under section 29 in respect of a non-existent tax. We have seen the notices and the whole body of the notice is struck off except this cryptic statement that: you have been exempted from paying tax under section 23(3) and the precious right of appeal is left to the assessee against this decision because para. 7 of the notice which deals with appeal has not been struck off. Whichever way one looks at the matter, it is difficult to understand how the Department could possibly have taken up the stand which it has done in this case. The Appellate Assistant Commissioners order on which Sir Nusserwanji strongly relied says this :

The assessment orders determining the result as "nil" have to be taken to mean that the Income-tax Officer has determined the result as neither loss nor income.

When the loss was actually submitted in the return at a certain amount, when the Income-tax Officer has not computed what the loss is, when all that the Income-tax Officer says is that his income is nil yet the Appellate Assistant Commissioner considers it possible to come to the conclusion that the Income-tax Officer has determined that the assessee company did not suffer any loss."

The aforesaid observations indicate that Chief Justice Chagla emphasised that the assessee has a right to set off the loss. Because there was a failure on the part of the ITO to compute that loss, the assessee was entitled to have the loss computed for the purpose of set-off in the subsequent year. The question with which we are concerned in the instant reference is that in the year in question in which loss was claimed, was not computed by the ITO for the grounds as we have set out hereinbefore. Factually, as will appear, return in the instant case has been considered to be incomplete for the alleged reasons given by the ITO while in that case return was time-barred and assessment was not made. Similar was the position in the case before the Calcutta High

Court in the case of *Katkar Match Works (1954) (P.) Ltd. v. CIT*⁵ There, for the assessment year 1959-60, the assessee, which was served with a notice under s. 22(2) of the Indian I.T. Act, 1922, filed a return showing loss beyond the time prescribed. The ITO held that the assessee's claim to get the loss determined was barred under s. 22(2A) of the Act, that there was no obligation on him to complete the assessment in such an event and he dropped the proceedings. An appeal against that order by the assessee was dismissed by the AAC on the ground that s. 30(1) did not provide for an appeal against such an order. The Appellate Tribunal agreed with the AAC. On a reference it was held by this court that the order of the ITO could not be construed as a computation of the amount of loss at nil. The true effect of the order of the ITO was that there had been no determination of the loss by the ITO and consequently the order could not be held to be appealable under s. 30, however liberally the section may be interpreted. Here, as we have mentioned, rejection by the ITO to take any action on the return of the assessee was on different grounds, that is to say, it was not accompanied by certain accounts. We have noticed s. 246. It appears to us that computation of loss is a part of the process of assessment in case the assessee claims set off in the year and also is a necessary process for the assessee's right to carry forward that loss as provided in the Act. Therefore, that computation of loss is a part of the assessment will be evident from the provisions of s. 143 of the I.T. Act which enjoins that computation can be made both of the profit as well as of the loss which permits computation of the total income or loss of the assessee. Therefore, the effect of the order is non-computation of the loss. Further, it amounts to computation of loss as nil. Therefore, it would come within the purview of clause (c) of s. 246 of the Act. These are the two decisions which throw light on the question which we have dealt with in this reference. Therefore, in our opinion, in the fact and circumstances of the case, the effect of the order of the ITO is that there was no proper computation of loss and hence the order is appealable. Clause (c) of s. 246, inter alia, provides for appeal where the assessee objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed. In this case the proper effect of the order is computation of loss at nil. Any other construction may lead to great hardship and an anomalous situation. For example, where the ITO refuses to assess the income or refuses to compute the loss on flimsy or arbitrary grounds or on grounds not legally tenable, then the assessee would be at a loss and will suffer without any remedy, because in view of the scheme of s. 72 read with s. 80 he would have no right, if the loss is not determined, to carry forward that loss to subsequent years, to which he is otherwise entitled. Such a consequence of constructions of the statute, if possible, in our opinion, should be avoided. Incidentally, we may note that the decision of the Bombay High Court was considered by the Supreme Court in the case of *CIT v. Ranchhodas Karsondas* [1959] 36 ITR 569 (supra), and certain observations of the Division Bench of the Bombay High Court was approved by the Supreme Court in preference to the observations of the Calcutta High Court on some other matter. This aspect, with which we are concerned, was not adverted to nor was relevant to be

considered or did not fail for consideration by the Supreme Court.

We may briefly note certain other decisions which were cited before us. In the case of *Mela Ram and Sons v. CIT* [1956] 29 ITR 607(supra), the Supreme Court observed that an order by the AAC holding that there were no sufficient reasons for excusing delay under s. 30(2) of the I.T. Act and rejecting the appeal as time-barred was an order passed under s. 31 and an appeal lay from that order to the Appellate Tribunal. It made no difference whether the order of dismissal was made before or after the appeal was admitted. An appeal presented out of time was an appeal and an order dismissing it as time-barred was one passed in appeal. If an appeal by an assessee was admitted without the fact of delay in its presentation having been noticed, it was open to the Department to raise the objection at the time of the hearing of the appeal. Contentions relating to preliminary issues under s. 30(2) or (3) were open to consideration at the time of the hearing of the appeal. The observations made, though not directly in point are not wholly irrelevant for our present purpose. Reliance was also placed on certain observations in the case of *Maheshwari Devi Jute Mills Ltd. v. CIT*⁷ which upheld the decision of the Supreme Court which is referred to hereinbefore. It is not necessary to discuss the facts of the case. Our attention was also drawn to the decision in the case of *CIT v. Kulu Valley Transport Co. P. Ltd.*⁸. There, in January, 1956, the assessee filed voluntary returns disclosing loss for the assessment years 1953-54 and 1954-55 and the question was whether the loss had to be determined and carried forward under s. 24(2) of the Indian I.T. Act, 1922, though the return were filed within the time specified in the general notice under s. 22(1) and the time had not been extended by the ITO. It was held that no notice had been served on it under s. 22(2). Mr. Justice Hegde and Mr. Justice Grover held that the losses had to be determined and carried forward. But Mr. Justice Shah did not agree. It was held by the majority of the decision that s. 24(2) conferred the benefit of losses being set off and carried forward and there was no provision in s. 22 under which losses have to be determined for the purpose of s. 24(2). Section 22(2A) simply said that in order to get the benefit of s. 24(2), the assessee must submit his loss return within the time specified by s. 22(1). That provision must be read with s. 22(3) for the purpose of determining the time within which a return has to be submitted. It could well be said that s. 22(3) is merely a proviso to s. 22(1). Thus, a return submitted at any time before assessment was made, was a valid return. In considering whether a return made was within time, sub-s. (1) of s. 22 must be read along with sub-s. (3) of that section. A return whether it was a return of income, profits or gains or of loss must be considered as having been made within the time prescribed if it was made within the time specified in s. 22(3). So, actually, there, the question was also different from the one with which we are concerned. It emphasised that the assessee had a right to have his loss set off in appropriate cases and to carry forward the loss within a specified period of time. On behalf of the assessee it was contended that the expression denying his liability "to be assessed in s. 246 of the I.T. Act, 1961, was wide

enough to bring within its purview the right of the assessee to have the loss computed. In this connection, reliance was placed on certain observations of the Privy Council in the case of *CIT v. Khemchand Ramdas*⁸ and our attention was drawn to the observation at p. 421 of the report, of the Bombay High Court in the case of *S. M. Modi v. CIT*⁹ and of the Calcutta High Court in the case of *CIT v. Lalit Prasad Rohini Kumar*¹⁰ In the view we have taken on the other aspect of the matter on the construction of clause (c) of s. 246, in the facts and circumstances of this case, it is not necessary for us to discuss these decisions in detail. If that is the position, then, in our opinion, the question No. 1 must be answered in the affirmative and in favour of the assessee. The next question with which we are concerned, viz., whether, in any event, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the return filed by the assessee was a valid return and in directing on that basis that the entire loss should be determined and carried forward for the purpose of set-off in connection with the assessment of the subsequent year, it was contended, in any event, that the return filed by the assessee was not invalid on the ground mentioned by the ITO in his impugned order. In this connection, whether the requirement that the return should be accompanied by certain statements was directory or mandatory has been urged and reliance was placed on certain observations of the Allahabad High Court in the case of *Dhampur Sugar Mills Ltd. v. CIT*¹¹ of the Delhi High Court in the case of *Qammar-Ud-Din & Sons v. CIT*¹² of the Calcutta High Court in the case of *Mohindra Mohan Sirkar v. ITO*¹³ as also in the case of *Sheonath Singh v. CIT*¹⁴ It appears to us that the appropriate directions in respect of question No. 2 would be, in view of the provisions of law, that the Tribunal was right in holding that the return filed by the assessee was a valid return. But the question has to be determined on the basis whether there was any loss in fact and whether the assessee was entitled to carry forward the said loss. In the facts and circumstances of the case, the appropriate answer would be to say that it is for the Tribunal either to determine whether there has been any loss and the assessee is entitled to carry forward the said loss for the purpose of set-off in the assessment of the subsequent year or to direct the ITO or the AAC to compute the loss and notify the loss to the assessee, in case it was found that there has been a loss. Question No. 2 is, therefore, answered in the manner aforesaid, viz., that the Tribunal was justified in holding that the return filed by the assessee was a valid return; but the Tribunal should itself either find whether there is any loss is claimed by the assessee or would direct the ITO or the AAC to compute the loss, and if, in fact, there is a loss found, the Tribunal shall notify the loss to the assessee in accordance with law.

In the facts and circumstances of the case, parties will pay and bear their own costs.

Suhas Chandra Sen J. - I Agree.

Cases Referred.

- 1[1956] 29 ITR 607
- 2[1959] 36 ITR 569
- 3[1964] 54 ITR 54
- 4[1954] 25 ITR 90
- 5[1975] 99 ITR 251
- 6[1968] 68 ITR 437 (All)
- 7[1970] 77 ITR 518 (SC)
- 8[1938] 6 ITR 414
- 9[1958] 33 ITR 529
- 10[1979] 117 ITR 603, at pp. 611 and 612
- 11[1973] 90 ITR 236 at p. 239
- 12[1981] 129 ITR 703 at p. 706
- 13[1978] 112 ITR 47 at p. 55
- 14[1958] 33 ITR 591 (Cal.)