BOMBAY HIGH COURT

All India Groundnut Syndicate Ltd

Vs.

Commissioner of Income Tax

Income-tax Reference No. 17 of 1953

(Chagla, C.J. and Tendolkar, J.)

04.09.1953

JUDGMENT

Chagla, C.J.

1. The action of the Department as disclosed by the facts submitted to us on this reference is both unjustifiable and entirely indefensible.

2. We are concerned with the assessment year 1948-49 and the assessee before us is the All India Groundnut syndicate in that year of assessment the assessee company sought to set off loss which it had incurred in the previous years under Section 24(2) of the Income-tax Act. The taxing authorities permitted the assessee company 10 set off the loss in respect of certain years-but disallowed the claim with regard to the years 1944-45, 1945-46 and 1946-47, and it is in respect of this refusal on the part of the taxing authorities to grant the relief sought by the assessee company that the question has been submitted to us for our decision.

3. It appears that in the assessment year 1944-45 the assessee incurred a loss of Rs. 16,925, and they made a return to that effect, and the Income-tax Officer passed an order that he took the income of the company as "nil" and exempted it under Section 23(3). It is difficult to understand, how the company was exempted under Section 23(3) because Section 23(3) is not a section dealing with exemption but with assessment itself. What the Income-tax Officer really meant was that as the assessee company had made no profit, on the contrary it made loss, the company's income could not be assessed to tax. The same was the position in 1945-46. In that year the assessee company returned a loss of Rs. 15,654 and the Income-tax Officer made an order in terms identical to the orders which he had' made in respect of the assessment for the year 1944-45. In the assessment year 1946-47 the assessee company returned a loss, but did not specify the amount of the loss. In respect of this assessment also the Income-tax Officer passed an identical order. The assessee company made a profit, for the first time in the assessment year 1948-49 and

therefore it claimed to set off the loss which had been made by it from 1942-43 to 1947-48. The Department allowed the claim of the assessee company in respect of certain years but disc allowed the claim in respect of three relevant years 1944-45, 1945-46 and 1946-47, and the ground on which the relief was refused to the assessee was that inasmuch as the Income-tax Officer had failed to notify the loss as required by Sub-Section (3) of Section 24, the assessee was not entitled to any relief and this contention has been upheld by the Tribunal.

4. Now, Sub-Section (3) of Section 24 of the Act 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 is clear that this sub-section casts a duty upon the Income-tax Officer. The duty is that he has to compute the loss and notify the loss to the assessee. This sub-section was clearly enacted in order to crystallize the loss in any particular year of assessment, to leave no dispute with regard to that loss and to give notice to the assessee of the amount at which the loss was computed by the Income-tax Officer. But the right which the Legislature confers upon the assessee does not arise under this sub-section but it arises under Sub-Section (2) and that right is to carry forward the loss of the previous years for a period of six years, and that right is an absolute unqualified right and that right is not made conditional upon any computation made by the Income-tax Officer or any notice issued by the Income-tax Officer. Therefore, whereas the right is conferred under Sub-Section (2) of Section 24 Sub-Section (3) is merely a machinery or procedural section which provides how and when the Income-tax Officer should compute the loss and how he should communicate that loss to the assessee. But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his right which the law has given to him under Sub-Section (2) of Section 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person - we take it that the Income-tax Department is included in that definition - can put forward his own default in defence to a right asserted by the other party. A person cannot say that the party claiming the right is deprived of that right because "I have committed a default and I the right is lost because of that default."

5. 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 the 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 computation. But in this case there is no computation and no question, therefore, of either its finality or appealability arises.

6. 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 misapprehension. The right to claim a relief which the assessee is claiming only androse 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 paragraph 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 Commissioner's order on which Sir Nusserwanji strongly relies 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.

7. The result, therefore, is that we must answer the question submitted to us in the affirmative. The Commissioner to pay the costs.
Answered affirmatively.