C.I.T. MADRAS AND ANR. A

v.

DALMIA CEMENT (BHARAT) LTD.

SEPTEMBER 21, 1993

[B.P. JEEVAN REDDY AND S.P. BHARUCHA, JJ.] B

Income Tax Act, 1922 : Ss.24.30—Return of Loss—I.T.O. Communicating to assessee of his taking no cognizance of returns on ground of returns being time barred—Effect of—Formal order by I.T.O. notifying loss—Whether imperative for maintainability of appeal—Matter referred to larger Bench. C

The respondent-assessee filed its returns for the assessment years 1950-51 to 1955-56 showing losses. The Income Tax Officer communicated to the assessee that no cognizance of the returns could be taken as the same were barred by time. For the assessment years 1960-61 and 1961-62 the assessee filed returns showing losses after bringing forward and setting off losses of the earlier years commencing from the assessment year 1950-51. The Income Tax Appellate Tribunal directed the I.T.O. to quantify the losses for the assessment years 1952-53 to 1954-55 and allow to the assessee a set off against its income for the assessment years 1960-61 and 1961-62. The reference was decided by the High Court in favour of the assessee. The Revenue filed the appeals by special leave. D E

The Revenue contended that the communication of the I.T.O. to the assessee that the proceedings for assessment years 1950-51 to 1955-56 had been closed due to the returns being filed beyond the stipulated period, was an order against which an appeal lay and as the assessee took no steps in that regards the Tribunal erred in directing the I.T.O. to quantify the losses for those assessment years and allow set off against assessee's income for the assessment years 1960-61 and 1961-62. The appellant relied on a Division Bench decision of the Calcutta High Court in *C.I.T.* v. *Garia Industries Pvt. Ltd.*, 140 ITR wherein it was held that the appeal filed by the assessee against the reply of the I.T.O. informing it that its return showing loss for a particular year was invalid, was maintainable as the proper effect of the reply of the I.T.O. to assessee was that the loss had been computed by him at 'nil'. The appellant also relied on judgments of Patna and Madhya Pradesh High Courts to the same effect. F G H

A The respondent-assessee in support of his claim placed reliance upon the judgment of a Bench of three Judges of this Court in *C.I.T.* v. *Khushal Chand Daga,* 2 ITR 177. The assessee therein had filed an appeal against the assessment for the year ending Diwali 1941 made by the I.T.O., but had not questioned the loss computed by him. For the subsequent assessment years the assessee claimed to reopen the question of the loss B to be carried forward contending that it was in a much higher figure, and when the matter came before this Court, it held that though under s.30, an appeal lay in the event of assessee objecting to the amount of the loss computed and notified under s.24 but as the I.T.O. had not notified the loss, computed by him by an order in writing, no appeal could be taken in C that regard and the assessee was, therefore, entitled to have the loss redetermined in a subsequent year.

Feeling difficulty with regard to the judgment in *Khushal Chand Daga's* case and, referring the matter to a larger Bench, this Court,

D HELD : 1. A formal order notified by the ITO to the assessee under section 24(3) of the Income Tax Act 1922 is not imperative before an appeal is maintainable. The position taken in this behalf by the Calcutta, Patna and Madhya Pradesh High Courts eminently reasonable and deserves consideration. [375-A-B]

E *C.I.T.* v. *Garia Industries Pvt. Ltd.*, 140 I.T.R. 636; *Bihar State Electricity Board* v. *Commissioner of Income-tax,* 101 I.T.R 740 and *Jaikishan Gopikishan & Sons* v. *C.I.T.,* 84 I.T.R. 645, referred to.

2. The judgment of this Court in *Khushal Chand Daga's* case, which F requires reconsideration, notes that the loss had been determined in the relevant year at a particular figure and that the assessee has appealed against the assessment but had not questioned the loss that had been determined. The loss has to be determined in the assessment proceedings. There was an appeal against the assessment. Necessarily, therefore, the appeal would involve the determination of the loss. In any event, the loss G having been determined for the relevant year in the assessment proceedings in that behalf, the assessee could not be permitted to raise in the course of proceedings for assessment for subsequent years the question as to the correctness of the determination of that loss. There cannot be, at one and the same time, two different assessments of income or loss in H respect of the same assessment year. [374-E-H]

C.I.T. **v.** *Khushal Chand Daga,* **42 I.T.R. 177 view expressed therein referred for consideration by larger Bench.** A

C.I.T. **v.** *Manick Sons,* **74 I.T.R. 1, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 745-746 (NT) of 1976. B

From the Judgment and Order dated 27.9.1973 of the Madras High Court in Tax Case No. 103 of 1968. (Reference No. 34 of 1968)

M.C. Manchanda, Dr. K.P. Bhatnagar and D.S. Mehra for the Appellants. C

Harihar Lal, Vineet Maheshwari and R.K. Maheshwari for the Respondents.

The following Order of the Court was delivered : D

We are of the view that this appeal should be heard by a larger Bench. By this order we are indicating, briefly, the reasons for this view.

It is an appeal by special leave against the judgment of the Madras High Court on a reference under section 66(1) of the Indian Income-tax Act, 1922, relating to the Assessment Years 1960-61 and 1961-62. E

The question that the High Court was called upon to consider read thus :

> "Whether the Appellate Tribunal has justification to direct the Income-tax Officer to quantify the losses for the assessment years 1952-53 to 1954-55 and allow the set off against the share income from the partnership firm for 1960-61 and 1961- 62?" F

The High Court answered the question in the affirmative and in favour of the assessee (the respondent.)

Very briefly, the relevant facts are that the assessee filed its returns for the Assessment Years 1950-51 to 1955-56 on 23rd April, 1956, and claimed that it had suffered losses. The Income- tax Officer issued to the assessee a notice under section 23(2) of the Indian Income Tax Act, 1922, fixing the matters for hearing, but, on 3rd October, 1958, he informed the assessee in writing that no cognisance could be taken of these returns as G H

A they had been filed beyond the period stipulated in that behalf.

For the Assessment Year 1960-61 the assessee filed a return showing a loss after bringing forward and setting off losses of the earlier years commencing from the Assessment Year 1950-51. For the Assessment Year 1961-62 the assessee again claimed relief by way of set off in relation to
B losses incurred in the earlier years. The Income Tax Appellate Tribunal, as the question indicates, directed the Income-tax Officer to quantify the losses for the Assessment Years 1952-53 to 1954-55 and allow to the assessee a set off against its income for the Assessment Years 1960-61 and 1961-62. On a reference the High Court answered the question referred
C to it in the affirmative and in favour of the assessee.

On behalf of the Revenue learned counsel submitted that the ITO had by his letter dated 3rd October, 1958, intimated to the assessee that he was closing proceedings for the assessment Years 1950-51 to 1955-56
D on the ground that the returns of these years had been filed beyond the period stipulated in that behalf. No steps had been taken by the assessee thereagainst, so that the losses it claimed for these assessment years could be determined. The communication of the Income-tax Officer dated 3rd October, 1958, was an order against which an appeal lay. The losses for the previous years relevant to Assessment Years 1952- 53 to 1954-55
E could only have been determined by assessment orders, and assessment orders for those years had become time barred. The Tribunal could not, therefore, have given directions to the ITO to quantify the losses for these assessment years and allow set off against the assessee's income for the Assessment Years 1960-61 and 1961-62. Learned counsel for the Revenue
F relied upon he judgment of this Court in *C.I.T.* v. *Manick Sons,* 74 I.T.R. 1, where it was held that the Tribunal may give directions for re-opening the assessment of the year to which the appeal it was hearing related but it could not give any directions in respect of a period not covered by that year. Emphasis was laid upon the judgment of a Division Bench of the Calcutta High Court in *C.I.T.* v. *Garia Industries Pvt.,* 140 I.T.R. 636. The
G assessee therein filed a return disclosing a loss. No action was taken on the return and, in reply to the assessee's letter of enquiry, the ITO stated that the return was invalid. The assessee went in appeal against the order of the ITO as contained in the reply. The AAC held that the appeal was not competent. On further appeal the Tribunal held that the appeal was
H maintainable and the return was valid and it directed the ITO to determine

the loss. On a reference, the High Court held, on an analysis of the relevant provision, that an assessee had a substantial right to carry forward his loss to be set of against future business profits. Unless the loss had been determined and notified to the assessee he was not entitled to carry it forward. The proper effect of the reply of the ITO to assessee was that the loss had been computed by him at 'nil'. Any other construction would lead to great hardship and an anamolous situation. The court, therefore, held that the appeal by the assessee against the ITO's reply was maintainable. To the same effect are judgments of the Patna High Court *Bihar State Electricity Board* v. *Commissioner of Income-tax,* 101 I.T.R. 740 and the Madras High Court. *Jaikishan Gopikishan & Sons* v. *C.I.T.,* 84 I.T.R. 645.

Learned counsel for the assessee placed great reliance upon the judgment for a Bench of three learned Judges of this Court in *C.I.T.* v. *Khushal Chand Daga,* 42 I.T.R. 177. The assessee therein was a partner in a firms. In the year of account ending Diwali 1941, he received his Share of assets and property from this firm and stated business on his own. In that year his sources of income were speculation, allowance from Government as treasurer, house property and dividends. The assessee had also received some profits from his share in an unregistered firm, against which were set off his loss in his individual business. The I.T.O. who made the assessment, determined the loss to be carried forward at a certain figure. The assessee appealed against the assessment but did not question the loss which had been determined. For the Assessment Year 1942-43 the assessee claimed to reopen the question of the loss to be carried forward, contending that it was in a much higher future. This contention was not accepted by the authorities or by the Tribunal. The contention was, however, raised again by the assessee in assessments for the Assessment Year 1948-49 and 1949-50; the assessee contended that the profits which he had received from the unregistered firm (in the year of account ending Diwali 1941) could not be set of against his loss in his individual business as the profits of the unregistered firm had borne tax not in his hands but in those of the firm. While this contention was rejected by the authorities, it was accepted by the Tribunal and the Tribunal was then moved to refer to the High Court, *inter alia,* this question:

> "(1) Whether the assessee was competent in law to raise a question registered to the determination of loss for the assessment year 1941-42 as finally determined in appeal, in the course of proceed-

A ings for the assessment year 1942-43 when the loss brought forward from 1941-42 was being set off?"

The High Court answered the question against the Revenue, which appealed to this Court by special leave.

B It was contended that the loss which had been determined and ordered to be carried forward (in the year of account ending Diwali, 1941) must be deemed to have become final because no appeal was filed against that determination. But this Court said:

C "It appears that the procedure laid down by section 24(3) under which the Income-tax officer has to notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of that section was not followed. No doubt, under section 30 an appeal lies, if the assessee objects to the amount of loss computed and notified under section 24; but inasmuch as the D Income-tax Officer had not notified the loss computed by him by order in writing, an appeal could not be taken on that point. In our opinion, the assessee was, therefore, entitled to have the loss re-determined in subsequent year."

E We, very respectful, have come difficulty with regard to this judgment and are of the view that it requires re-consideration by a larger Bench. We say so for, principally, these reasons.

The judgment notes that the loss had been determined in the relevant year at a particular figure and that the assessee had appealed against the F assessment but had not questioned that loss that had been determined. The loss has to be determined in the assessment proceedings. There was an appeal against the assessment. Necessarily, therefore, the appeal would involve the determination of the loss.

G In any event, the loss having been determined for the relevant year the assessment proceedings in that behalf, it is difficult to see how the assessee could be permitted to raise in the course of proceedings for assessments for subsequent years the question as to the correctness of the determination of that loss. There cannot be, at one and the same time, two different assessments of income of loss in respect of the same assessment H year.

It is also a little difficult to see why a formal order notified by the ITO to the assessee under section 24(3) of the 1922 Act is imperative before an appeal is maintainable. We are of the view that the position taken in this behalf by the Calcutta, Patna and Madhya Pradesh High Courts in the judgments aforementioned is eminently reasonable and deserves consideration. A B

Accordingly, we direct that the papers be placed before the Honourable the Chief Justice for placing the appear, if he so deems fit, before a large Bench..

R.P. Matter Referred to the Larger Bench.