

(1988) 12 MAD CK 0011

In the Madras High Court

Case No : Writ Petition No's. 1481 and 1482 of 1979

Kanaka Films Private Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 09-12-1988

Acts Referred:

Income Tax Act, 1922 — Section 24(2)

Income Tax Act, 1961 — Section 143, 144, 147, 24(2), 24(3)

Citation : (1989) 75 CTR 209 : (1989) 177 ITR 88

Hon'ble Judges : Venkataswami, J; K.A. Thanikkachalam, J

Bench : Division Bench

Advocate : K. Srinivasan, for the Appellant; C.V. Rajan, for the Respondent

Judgement

Thanikkachalam, J.—These two writ petitions were filed to issue a writ of mandamus or any other appropriate order in the nature of a

direction directing the respondent to carry forward the unabsorbed business loss and set it off against the business income of the petitioner of the

assessment years 1970-71 and 1971-72.

2. The petitioner is an assessee. He filed returns of income declaring an adjusted carried forward loss of Rs. 16,441 and an income of Rs. 4,385

after adjusting the balance loss of earlier years. The Income Tax Officer, in his orders dated November 30, 1970, and December 29, 1971,

computed the income at Rs. 2,950 and Rs. 24,786 respectively.

3. For the assessment years 1962-63 to 1966-67 assessments were completed on August 14, 1968, February 20, 1968, February 22, 1969,

January 27, 1979 and January 27, 1979 respectively. For the assessment year 1963-64, the Income Tax Officer made an addition of Rs.

5,10,921 being hundi loans and interest paid and for the assessment years

1964-65 to 1966-67, the Income Tax Officer disallowed the interest payment on the hundi loans. The petitioner filed appeals against the said orders of assessments. The Appellate Assistant Commissioner set aside the assessments and directed the Income Tax Officer to redo the assessments for the assessment years 1963-64 to 1966-67, subsequently, the assessment for the assessment year 1962-63 was reopened u/s 147 of the Income Tax Act on the ground that the hundi transactions were not genuine and the income returned had to be enhanced. The petitioner preferred appeals to the Appellate Assistant Commissioner against the reopening of the assessment for the assessment year 1962-63 and the de novo assessments for the assessment years 1963-64 to 1966-67 and the additions made in the reassessments for the above years. The Appellate Assistant Commissioner, by his order dated February 24, 1972, set aside the assessments for the said years with a direction to redo the assessments after giving the petitioner an opportunity of being heard.

4. In the meanwhile. The Income Tax Officer completed the assessments for the assessment years 1967-68 to 1971-72. For the assessment year 1967-68 the Income Tax Officer determined the loss of Rs. 13,162 and carried forward and set off this loss in the subsequent years up to 1970-

71. For the assessment years 1970-71 and 1971-72, the Income Tax Officer determined the income at Rs. 2,590 and Rs. 24,786, respectively, without conceding the claim to carry forward and set off the 1962-63 assessment year's loss first, on the ground that because of the reopening of the assessment for the assessment year 1962-63 and the de novo assessments in pursuance of the Appellate Assistant commissioner's order for the assessment years 1963-64 to 1966-67, there was no loss to be carried forward.

5. After the receipt of the order of the Appellate Assistant Commissioner the petitioner sent letters dated February 4, 1972, February 21, 1972, February 28, 1972, June 17, 1972 and April 3, 1973 to the Income Tax Officer requesting him to revise the demand raised by him on the ground that the Appellate Assistant Commissioner has set aside the assessment orders of the earlier years and subsequently the demand raised already had become invalid. But the Income Tax Officer did not comply with the request of the petitioner and after three years, i.e., on March 28, 1975,

completed the reassessments again including the hundi credits of Rs. 2.75 lakhs and Rs. 96 thousand for the assessment years 1962-63 and 1963-

64, respectively. The petitioner filed appeals against the reassessment orders to the Appellate Assistant Commissioner, the Appellate Assistant

Commissioner, by his orders dated July 23, 1977 and July 28, 1977 for the assessment years 1962-63 and 1963-64, respectively deleted the

additions to the extent of Rs. one lakh and Rs. 50,000 respectively, on the ground that these credits could not be regarded as not genuine. In the

subsequent years the Appellate Assistant Commissioner granted consequential relief in respect of interest payments.

6. As against the orders of the Appellate Assistant Commissioner, the petitioner filed appeals to the Income Tax Appellate Tribunal, Madras.

Aggrieved by the orders of the Appellate Assistant Commissioner granting partial relief, the Department also filed appeals to the Income Tax

Appellate Tribunal. These appeals, I.T.A. Nos. 1419 to 1423/Mds/1977-78 and I.T.A. Nos. 1503 and 1505/Mds/1977-78, for the assessment

years 1962-63, 1963-64 and 1964-65 respectively, were disposed of by the Appellate Tribunal by its common order dated July 31, 1978. The

Tribunal allowed the appeals of the petitioner and dismissed the appeals of the Department.

7. After the passing of the order of the Appellate Tribunal dated July 31, 1978, the respondent herein, on September 30, 1978, passed an order

purporting to give effect to the order of the Appellate Tribunal for the assessment years 1962-63 to 1966-67. In the said order for the assessment

year 1966-67, the respondent computed the income at nil and determined the balance of loss for the assessment year 1963-64 to be carried

forward at Rs. 18,041. The Income Tax Officer, did not carry forward this loss and adjust it in the subsequent years' income, in accordance with

section 72 of the Income Tax Act, 1961, and by his letter dated November 24, 1978, directed the petitioner to pay the alleged arrears of tax for

the assessment years 1970-71 and 1971-72.

8. Thereafter, on December 16, 1973, the petitioner sent a reply giving the computation of income and loss for the assessment years 1962-63 to

1971-72 and stated that no tax was payable by the assessee. The Income Tax Officer, by his letter dated January 3, 1979, informed the petitioner

that the loss for the assessment year 1965-66 could not be set off now against the income for the assessment years 1970-71 and 1971-72, since

action u/s 154 of the Income Tax Act was barred by time. Again on September 21, 1979, the petitioner sent another letter to the Income Tax

Officer stating that as per section 72 of the Income Tax Act, it was entitled to carry forward the loss for the Income Tax Act, it was entitled to

carry forward the loss for the assessment year 1963-64 up to the assessment year 1971-72 and that it was the statutory duty of the respondent to

make suitable rectification u/s 154 of the Income Tax Act. The respondent, in his letter dated February 26, 1979, informed the petitioner that the

revision of the assessment for the assessment years 1970-71 and 1971-72 could not be entertained since it was barred by time u/s 154 of the Act.

In the letter, the Department stated that sections 71 and 72 of the Act merely prescribe the procedure for the set off and carry forward and set off

of losses, that these can be given effect to by means of orders under sections 143, 144, 147, 154 and 264 etc., subject to limitation and that as

already informed by him, the assessment for the assessment years 1970-71 and 1971-72 could not be revised by carrying forward of the losses.

9. According to the petitioner, the action of the respondent in not carrying forward the balance of loss of Rs. 18,041 in the assessment year 1963-

64 and setting off the same against the income of the assessment years 1970-71 and 1971-72 is contrary to law and arbitrary. According to the

petitioner, setting off loss u/s 72 of the Income Tax Act is mandatory in nature and is not discretionary. The petitioner further pointed out that he

has a statutory right and the respondent has corresponding duty to set off the loss carried forward from 1963-64 to the eight following years.

Accordingly, it was contended that the respondent having computed the carried forward business loss at Rs. 18,041, he is bound to set it off

against the income of the assessment year 1971-72. According to the petitioner, the respondent is bound to carry forward the loss of Rs. 18,041

as determined in the order dated September 13, 1978, and set it off first against the income of the assessment years as follows:

(1) 1968-69 ... Rs. 8,940

(2) 1969-70 ... Rs. 3,360

(3) 1970-71 ... Rs. 2,590

10. The balance of Rs. 3,151 is to be given set off against the income of Rs. 24,786 for the assessment year 1971-72. After adjusting the loss of

Rs. 18,041 it is stated that the respondent is bound to give set off to the loss of Rs. 13,162 for the assessment year 1967-68 against the balance

income of the assessment year 1971-72. It was also stated that the respondent is not correct in adjusting the loss of Rs. 13,162 for the assessment

year 1967-68 against the income of the assessment years 1968-69 and 1970-71 without first adjusting the loss for the assessment year 1963-64.

11. According to the petitioner, the assessment the assessment for the assessment years 1970-71 and 1971-72 were completed before the

assessment for the assessment years 1962-63 to 1967-68 were finalised which resulted in a loss to be carried forward to the following year up to

1971-72 and hence the respondent cannot refuse to revise the assessments for the assessment years 1970-71 and 1971-72 on the ground that

they have become final and the revision could be done only in accordance with the provision of section 154 of the Income Tax Act. According to

the petitioner, by virtue of the order of the Income Tax Appellate Tribunal for the assessment years 1962-63 to 1966-67 which has become final,

the assessments for these years and other years get automatically revised and the respondent is bound to give effect to the provisions of section 72

of the Act by setting off the loss of the preceding years carried forward against the income of the following eight years. It was also stated by the

petitioner that after the earlier years' loss is given set off, then there is hardly any need to pay the present demand of tax and interest.

12. On the other hand. Learned standing counsel appearing for the Department contended that sections 71 and 72 of the Income Tax Act

prescribe the procedure for the set off and carry forward of business loss, these can be given effect to by means of orders under sections 143,

144, 147, 154, 264, etc. Orders under these sections can be passed subject to the period of limitation. According to learned standing counsel, the

assessments for the years 1970-71 and 1971-72 could not be revised. The carry forward of the loss can be made only through action u/s 154 of

the Income Tax Act which is barred by limitation in this case. According to learned standing counsel, there is no failure on the part of the

Department to give affect to the Appellate Assistant Commissioner's finding. It was stated that the assessments for 1970-71 and 1971-72 could

not be rectified u/s 154 of the Income Tax Act earlier, in view of the fact that until the Appellate Tribunal passed the order on July 31, 1978 there

was no loss to be carried forward. Learned standing counsel further pointed out that the petitioner is seeking revision of assessments u/s 154 of the

Income Tax Act for the year 1966-67 to 1971-72. The time limit specified u/s 154 is four years from the date of the order sought to be revised.

13. Therefore, according to learned standing counsel, the time limit of four years from September 30, 1978, is incorrect as the order sought to be

revised is not the revision order dated September 30, 1978 (in fact, there was no such revision order dated September 30, 1978 for 1969-70 to

1971-72) but the order passed earlier for the assessment years 1969-70, 1970-71 and 1971-72. Learned standing counsel further pointed out

that there is no specific finding given by the Tribunal in its order for carrying forward the loss as contended by the petitioner.

14. We have heard counsel appearing on both sides. We have set out the facts in detail, the fact remains that while giving that while giving effect to

the order of the Appellate Tribunal in I.T.A Nos. 1419 to 1423 (Mds)/1977-78 and I.T.A. Nos. 1503 to 1505 (Mds)/1977-78, dated July 31,

1978, the assessment was revised as under:

Business: income as admitted Rs. 1,78,402

Less: Business loss of 1963-64 set off Rs. 1,78,402

Total income Nil

Losses to be carried forward:

1964-64 business loss Rs. 18,041

15. The question that arises for consideration in these two writ petitions in whether the assessee is entitled to carry forward and set off the business

loss as determined by the Income Tax Officer in the consequential order passed by him on September 30, 1978, as the alleged computation of the

amount of loss does not become final unless the Income Tax Officer notifies in writing the amount of loss as computed by him to the assessee. If no

such notice in writing was given to the assessee, the assessee would be entitled to have the loss redetermined in the subsequent year though he had

not filed any appeal against the non-determination as he could not file one in the absence of such notice. The Commissioner of Income Tax,

Madhya Pradesh Vs. Seth Khushal Chand Daga, and B.B. Iranee (Legal Representative of B.R. Iranee, deceased) Vs. Commissioner of Income

Tax, Bombay City II, .

16. It completing an assessment, determination has to be made by the Income Tax Officer of either the total income of the assessee to tax or of the

loss which the assessee has incurred in respect of any particular assessment year. However, where the resultant figure is a loss, the question

whether such loss is to be carried forward and set off is to be determined in a subsequent year where set off is claimed or is permissible. Section

72(1) provides that where the net result of the computation under the head ""Profits and gains of business or profession"" is a loss and such loss

cannot be or is not wholly set off against the income under any other head of income in accordance with the provisions of section 71, so much of

the loss as has not been so set off, subject to the other provisions of Chapter VI, shall be carried forward to the following assessment year and

shall be set off against the profits and gains, if any, of any business or profession for that assessment year. Therefore, section 72(1) has a direct

impact upon the computation under the head ""Profits and gains of business or profession"" Cambay Electric Supply Industrial Co. Ltd. Vs. The

Commissioner of Income Tax, Gujarat-II, Ahmedabad, .

17. Sub-section (2) of section 72 provides that 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 section 72. This is for the simple reason that there is a limitation of

eight years beyond which the losses cannot be carried forward while that is not the case with the other allowances and it is, therefore, appropriate

to have the losses set off first in the order of priority.

18. The assessee has a statutory right and the Assessing Officer has a corresponding duty to set off the loss carried forward from one year to the

following year. If carry forward is later allowed in appellate or revisional proceedings or as a result of a reference and by that time the assessment

for the year or years following are completed, the office is duty bound to rectify the assessments by allowing proper set off New Ambadi Estates

P. Ltd. Vs. Commissioner of Agricultural Income Tax Bangalore and Another, ;
Commissioner of Income Tax, Uttar Pradesh Vs. Manmohan Das

(Deceased), . It might be that the loss suffered by the assessee may not have
been realised or may be the subject-matter of a pending litigation. If

the assessee is maintaining his accounts on the mercantile system, the
authorities cannot deny set off of the loss on ground of pendency of litigation

LAXMI GINNING AND OIL MILLS Vs. COMMISSIONER OF Income Tax, PATIALA., .
In an appeal for a subsequent year, the Appellate

Tribunal has jurisdiction to direct the Income Tax Officer to quantify the losses for
earlier assessment year(s) and allow set off thereof against the

income of such subsequent year. In the case of Commissioner of Income Tax Vs.
Dalmia Cement (Bharat) Ltd., , while dealing with a similar

question the Madras High Court held as under (headnote):

That the Tribunal while dealing with the appeals for 1960-61 and 1961-62 has to
actually determine the taxable income of the assessee for those

years and for this purpose it has necessarily to find out whether the assessee is
entitled to carry forward the losses and set them off against the

profits of the years in question and if in law the assessee is entitled to carry
forward and set off the losses of the previous years in the assessment

years in question, the Tribunal cannot refuse to consider the question on the
ground that the losses in respect of which the set off has been claimed

relate to some earlier years. The Appellate Tribunal had jurisdiction to direct the
Income Tax Officer to quantify the losses for the earlier

assessment years and allow the set off for the years 1960-61 and 1961-62 and,
hence, the view of the Tribunal was justified.

19. So also, while considering a similar question, the Supreme Court in the case
of Commissioner of Income Tax, Uttar Pradesh Vs. Manmohan

Das (Deceased), , held as under at p. 702:

The second question presents little difficulty. In making his order of assessment
for the year 1950-51, the Income Tax Officer declared that the

loss computed in that year could not be carried forward to the next year u/s
24(2) of the Income Tax Act, as it was not a business loss. The

Income Tax Officer has, u/s 24(3) to notify to the assessee the amount of loss as
computed by him, if it is established in the course of assessment

of the total income that the assessee has suffered loss of profits. Section 24(2)

confers a statutory right (subject to certain conditions which are not material) upon the assessee who sustains a loss of profits in any BHFE year in any business, profession or vocation to carry forward the loss as is not set off under sub-section (1) to the following year, and to set it off against his profits and gains, if any, from the same business, profession or vocation for that year, whether the loss of profits or gains in any year may be carried forward to the following year and set off against the profits and gains of the same business, profession or vocation u/s 24(2) has to be determined by the Income Tax Officer who deals with the assessment of the subsequent year. It is for the Income Tax Officer dealing with the assessment in the subsequent year to determine whether the loss of the previous year may be set off against the profits of that year. A decision recorded by the Income Tax Officer who computes the loss in the previous year u/s 24(3) that the loss cannot be set off against the income of the subsequent year is not binding on the assessee.

20. In view of the above legal position, if once the loss is determined by the Income Tax Officer he is duty bound to carry forward and set off the loss of the earlier years in the subsequent years. According to the facts in the present case, after the passing of the order of the Tribunal on July 31, 1978, the Income Tax Officer has given effect to the said order of the Tribunal on September 30, 1978. In the consequential order, the Income Tax Officer determined the loss. Thereafter, it is not open to the Income Tax Officer determined the loss. Thereafter, it is not open to the Income Tax Officer to say that he cannot carry forward and set off the business loss already determined by him in subsequently assessment years. The Income Tax Officer is duty bound to rectify the assessments already completed by him after the Appellate Tribunal rendering its order on July 31, 1978. Thus, considering the facts appearing in this case in the light of the judicial pronouncements cited supra, we hold that the petitioner is entitled to carry forward and set off the business loss as prayed for in these writ petitions. In that view of the matter, the respondent herein is directed to carry forward the unabsorbed business loss of Rs. 18,041 and set off the same against the business income of the petitioner in the assessment years 1970-71 and 1971-72. In accordance with law.

21. Accordingly the two writ petitions filed by the petitioner are allowed with

costs of Rs. 500. Counsel"s fee one set