

(1976) 11 CAL CK 0032

In the Calcutta High Court

Case No : Income-tax Reference No. 153 of 1976

Sun Engineering Works (P.) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-11-1976

Acts Referred:

Income Tax Act, 1922 — Section 22(2), 24, 34
Income Tax Act, 1961 — Section 147, 147(1)

Citation : (1978) 111 ITR 166

Hon'ble Judges : S.C. Deb, J; Dipak Kumar Sen, J

Bench : Division Bench

Advocate : P.K. Pal and R.N. Dutt, for the Appellant; S.C. Sen and Ajit Sen Gupta, for the Respondent

Judgement

This Judgment has been overruled by : Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., AIR 1993 SC 43 : AIR 1992 SC 43 : (1992) 107 CTR 209 : (1992) 198 ITR 297 : (1992) 5 JT 543 : (1992) 2 SCALE 591 : (1992) 4 SCC 363 : (1992) 1 SCR 732(1) Supp : (1992) 1 SCR 732 Supp : (1992) 64 TAXMAN 442

Dipak Kumar Sen, J.—In this reference u/s 256(2) of the Income Tax Act, 1961, at the instance of the assessee, viz., Messrs. Sun Engineering Works (P.) Ltd., the assessment years involved are 1960-61 and 1961-62. The facts which have been found or are admitted may be shortly stated as follows:

For the assessment year 1960-61, the assessee filed its return of income on the 17th November, 1962, showing a loss of Rs. 36,418. Similarly, for the assessment year 1961-62, the return of its income was filed on the 4th October, 1961, again declaring a loss of Rs. 24,314. The assessment proceedings were disposed of by the Income Tax Officer concerned on the 12th December, 1962, in the following manner :

For the assessment year 1960-61 an order was made in the following language:

"The loss return filed on 17th November, 1960, is discussed with the A/R Sri A.B. Chowdhury. The return filed is beyond time. No action is necessary ; filed N.D."

2. For the assessment year 1961-62 the order recorded was as follows :

"V.O.S. for 1962-63. The return filed on 4th January, 1962, is discussed with Sri A.B. Chowdhury. The loss return is beyond time. Filed as N.D."

3. On the same day the Income Tax Officer concerned addressed a letter to the principal officer of the assessee as follows :

"sub : Assessment years 1960-61 and 1961-62.

With reference to above and your authorised representative's discussion with me I am to inform you that the loss returns submitted beyond time for the assessment years under reference being invalid, no action on them is necessary. Hence, the proceedings for both these years are filed."

4. Being aggrieved by the said orders of the Income Tax Officer the assessee preferred an appeal therefrom to the Appellate Assistant Commissioner. In disposing of the appeal, the Appellate Assistant Commissioner held that the Income Tax Officer was wrong in filing the returns filed by the assessee in response to notices u/s 22(2) of the Indian Income Tax Act, 1922. Even if the said returns were filed u/s 22(2A) of the said Act the same should not have been filed without proper scrutiny and without first computing the loss in accordance with law. It was only after a computation it was possible to know whether the assessment would result in a loss. The appeals were disallowed, as being infructuous, only on the ground that no appeal lay against the action of the Income Tax Officer in filing the returns in the manner he had done.

5. The assessee did not prefer any further appeal from this order of the Appellate Assistant Commissioner.

6. Subsequently, the assessee filed a disclosure petition in respect of some hundi loans and a settlement was arrived at between the assessee and the revenue as a result whereof the assessee became assessable for a sum of Rs. 27,000 for the assessment year 1960-61 and Rs. 9,000 in the subsequent assessment year 1961-62. The Income Tax Officer re-opened the assessments for the said two years u/s 147(1) of the Income Tax Act, 1961, and completed the assessments afresh on a total income of Rs. 27,000 and Rs. 9,000 respectively.

7. Against these reassessments the assessee went up on appeal and succeeded. The Appellate Assistant Commissioner held that the Income Tax Officer should redetermine the loss and set it off against the income from other sources and, if necessary, carry forward the loss to the subsequent assessment year. He also directed that the unabsorbed loss, if any, should be carried forward and set off against the income of the subsequent years.

8. Aggrieved by this order of the Appellate Assistant Commissioner the revenue went up on further appeal before the Income Tax Appellate Tribunal. It was

contended by the revenue before the Tribunal that as the returns originally filed by the assessee were out of time and the Income Tax Officer had treated such returns as invalid and had made the assessments without determining the loss it was not now open to the Appellate Assistant Commissioner to ask the Income Tax Officer to recompute the loss afresh and set it off against the income from other sources. Several decisions were relied on in support of the above contention.

9. It was contended, on the other hand, on behalf of the assessee that the original returns filed pursuant to a notice u/s 22(2) had not really been disposed of by the Income Tax Officer when he filed the proceedings. Definite figures of loss had been claimed and it was incumbent on the Income Tax Officer to determine the exact figure of such loss. The words showing "N. D." did not necessarily convey that the total income computed was "zero" and even if the losses claimed by the assessee were allowed the result would still be "no demand".

10. The Tribunal disposed of the appeal in favour of the revenue. It considered the decisions of the Supreme Court in the case of Commissioner of Income Tax, Calcutta Vs. Bidhu Bhushan Sarkar (Dead) through his Legal Representative Mihir Kumar Sarkar, as also the decision in the case of Esthuri Aswathiah Vs. The Income Tax Officer, Mysore State, and held that the action of the Income Tax Officer in concluding the assessment proceedings amounted to "nil" assessments. It also came to the conclusion that from the letter of the Income Tax Officer dated the 12th December, 1962, referred to earlier that the losses claimed by the assessee were not allowed as the returns were rightly or wrongly treated as invalid. This decision of the Income Tax Officer being upheld in appeal the matter was now concluded. Such "nil" assessments could not be treated as nonexistent.

11. The Tribunal considered various decisions of different courts showing the scope and effect of reassessment proceedings and held that the Appellate Assistant Commissioner was wrong in holding that the determination of the losses claimed originally were still open for review in the reassessment proceedings. The Tribunal allowed the appeal. From this order of the Tribunal the present reference has been initiated and the question which has been called for from the Tribunal by this court is as follows :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in disallowing the assessee's losses of Rs. 36,418 (rupees thirty-six thousand and four hundred and eighteen) only for assessment year 1960-61 and Rs. 24,314 (rupees twenty-four thousand and three hundred and fourteen) only for assessment year 1961-62 as per the returns of losses filed before the Income Tax Officer and initially filed by the Income Tax Officer while the Income Tax Officer added hundi loans as per settlement in reassessment proceedings ?"

12. Mr. P.K. Pal, learned counsel for the assessee, has contended that in the original assessment proceedings all that was determined was that the assessee

had no assessable income. The loss which was in fact suffered by the assessee was never computed and remained undetermined. In such circumstances, Mr. Pal contended that when the proceedings were reopened and the assessee's escaped income were reassessed the losses which had been suffered by the assessee had necessarily to be computed or recomputed. In support of his contentions Mr. Pal relied on a decision of the Supreme Court in the case of Commissioner of Income Tax (Central), Delhi Vs. Harprasad and Co. P. Ltd., . The facts which were before the Supreme Court in that case are not at par with the facts before us. There, in the assessment year 1955-56, the assessee had sold certain shares at a loss which was claimed as a revenue loss. This claim was rejected both by the Income Tax Officer and the Appellate Assistant Commissioner. On appeal, the Appellate Tribunal accepted the contention of the assessee that the loss was a capital loss and that it should be carried forward and set off against capital gains, if any, in the future. The High Court upheld the view of the Tribunal. On appeal by the revenue to the Supreme Court the decision of the High Court was reversed and it was held that the capital loss could not be determined and the respondent was not entitled to the carry-forward of such a loss inasmuch as capital gains did not form part of the total income of the respondent which could be brought to charge and were, therefore, not required to be computed under the Act.

13. The Supreme Court held that the concept of carry-forward of loss did not stand in vacuo and involved the notion of set-off. Its sole purpose was to set off the loss against the profits of a subsequent year. If such set-off was not permissible or possible owing to the profits or income of the subsequent year arising from a non-taxable source, there was no question of a loss to be carried forward. Conversely, if the loss arising in the previous year was under a head not chargeable to tax, it also could not be allowed to be carried forward and absorbed against income in a subsequent year, from a taxable source. In its judgment the Supreme Court discussed the concept of "profits and gains" as opposed to loss in the language as follows (page 124) :

"From the charging provisions of the Act, it is discernible that the words "income" or "profits and gains" should be understood as including losses also, so that, in one sense "profits and gains" represent "plus income" whereas losses represent "minus income". In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee."

14. Mr. Pal also relied on the decision in the case of The Commissioner of Income Tax, Madhya Pradesh Vs. Seth Khushal Chand Daga, . In this case the Supreme Court held that where the Income Tax Officer failed to notify to the assessee the amount of loss for any year as computed by him in accordance with Section 24(3) of the Income Tax Act, the assessee was entitled to have such a loss redetermined in a subsequent year.

15. This decision does not appear to advance the case of the assessee any further.

16. Mr. Ajit Sengupta, learned counsel for the revenue, on the other hand, contended that the matter was concluded by reason of the orders passed by the Income Tax Officer in the original assessments and the same could not be reopened and gone into afresh in the reassessment proceedings. In support of this proposition Mr. Sengupta relied on and cited & large number of decisions which are considered according to their chronological order hereinbelow :

1. In Re: Satyendra Mohan Roy Chowdhury and Others, . In this case a Full Bench of this court considered the nature of reassessment proceedings. Rankin C.J., dealing with Section 34 of the Indian Income Tax Act, 1922, observed at page 451 of the report as follows :

"..... I am unable to say that the language of Section 34 points to an intention to give the assessee a right to reopen the whole assessment before being rendered liable to further tax.....As a matter of the true construction of this section, it appears to me that if the legislature had meant to say that if in any case it appears to the Income Tax Officer that an assessee has been assessed upon too low a figure or at too low a rate, the Income Tax Officer may issue a fresh notice u/s 22(2) and may proceed to reassess such assessee afresh, the language employed would have been noticeably different from that which we find in the present section.

It is clear that the initial duty of the Income Tax Officer is merely to assess the income which has escaped. If this be right, then I think that it would require express words to confer on the assessee a right to reopen other and unconnected matters."

2. In Re: Kashi Nath Bagla . In this case it was held by the Allahabad High Court that Section 34 restricts the jurisdiction of the Income Tax Officer to assess income previously escaping assessment or assessed at too low a rate. No power is conferred to revise the original assessment or to make a new assessment and grant relief on that basis.

3. MADHAVJEE DAMODAR THACKERSAY AND ANOTHER (EXECUTORS) Vs. COMMISSIONER OF INCOME TAX, BOMBAY., . In this case the Bombay High Court, following the Calcutta decision in Satyendra Mohen Roy Choudhury v. Commissioner of Income Tax [1930] 4 ITC 447 (Cal), held that u/s 34 it was not open to the assessee to reopen the whole assessment and seek credit in respect of some items claiming over-assessment. But, on the other hand, it is open for an assessee to show that the income alleged to have escaped assessment has in truth and in fact not escaped assessment but has been brought to tax under some other head.

4. The Anglo French Textile Co. Ltd. Vs. The Commissioner of Income Tax, . This decision of the Madras High Court was ultimately decided in the Supreme Court.

The facts here were that the assessee was a company incorporated in the United Kingdom and it carried on business in French India. For the assessment year 1941-42 the Income Tax Officer issued a notice. The assessee contended that it did not carry on any business in British India and submitted a "nil" return. This was accepted. Subsequently, when a notice u/s 34 was issued the assessee submitted the same "nil" return and also a statement showing a loss on its total world income. The Income Tax Officer accepted the "nil" return but did not allow the carry forward of the loss claimed u/s 24(2).

On these facts the Madras High Court held that u/s 34 of the Indian Income Tax Act, 1922, the Income Tax Officer was not bound to assess the total income but was confined or restricted to assess only the escaped income. The Madras High Court followed *Satyendra Monen Roy Choudhury v. Commissioner of Income Tax* [1930] 4 ITC 447 (Cal) and *Kasinath Bagla v. Commissioner of Income Tax* [1930] 4 ITC 472 (All).

On appeal from this decision of the Madras High Court, the Supreme Court held in *ANGLO-FRENCH TEXTILE COMPANY, LTD. Vs. COMMISSIONER OF Income Tax, MADRAS.*, that when there was no income under any head at all and there was nothing against which the loss could be set off under Sub-section (1) of Section 24, carry-forward of such loss under Sub-section (2) does not come into play.

The Supreme Court expressed no opinion on the view expressed by the High Court that when proceedings were taken u/s 34 the assessee was not entitled to reopen the whole proceedings and the reassessment proceedings were limited to that portion of the income which has escaped assessment.

5. *COMMISSIONER OF Income Tax, PUNJAB, HIMACHAL PRADESH and BILASPUR, SIMLA Vs. JAGAN NATH MAHESHWARY.*, . In this case the Punjab High Court held that when a notice was issued u/s 34 based on certain items of income that had escaped assessment, it was permissible for the Income Tax authority to include other items in the reassessment.

6. *K.C. Mukherjee and Another Vs. Commissioner of Income Tax*, . This case was decided in the Patna High Court. Ramaswami C.J., in his judgment, observed as follows (page 228):

"It is also manifest that u/s 34 of the Act there is no *denovo* assessment in the sense that it is open to the assessee also to show that he has been wrongly assessed in respect of matters which are not covered by the notice u/s 34.....Essentially the proceeding u/s 34 with regard to the escaped income relates to the same proceeding which is commenced with the publication of the general notice u/s 22(1). In some respects it may lead to supplementary assessment and in other cases it may result in an assessment for the first time."

7. *S. Inder Singh Gill Vs. Commissioner of Income Tax, Bombay City-II*, . Here the Bombay High Court followed *Satyendra Mohen Roy Choudhury v. Commissioner of Income Tax* [1930] 4 ITC 447 (Cal) and *MADHAVJEE DAMODAR*

THACKERSAY AND ANOTHER (EXECUTORS) Vs. COMMISSIONER OF INCOME TAX, BOMBAY., and held that in proceedings u/s 34 the assessee was not entitled to claim recomputation of his earlier assessment.

8. K. S. ABDUL SATTAR Vs. COMMISSIONER OF Income Tax, ANDHRA PRADESH., . In this case the Andhra Pradesh High Court held that after reopening u/s 34 the Income Tax Officer was not limited to the information received by him but was entitled to take into account other items which also may have escaped assessment.

9. S. Natarajan Vs. Commissioner of Income Tax, Mysore, . This is a decision of the Mysore High Court. Following earlier decisions it was held that the scope of enquiry u/s 34 of the Act was limited and in proceedings under that section even if the assessee proved losses suffered, the same could not be, in such proceedings, carried forward u/s 24(2)(iii).

10. Kevaldas Ranchhodddas Vs. Commissioner of Income Tax, . In this case the Bombay High Court held that in reassessment proceedings taken u/s 34(1)(a) of the Indian Income Tax Act, 1922, on the ground that loss had been over-estimated, the Income Tax Officer had no jurisdiction to reopen the entire assessment and to determine afresh the assessable profits or to correct errors and omissions in computation. The power conferred was only to recompute the loss and not the income and the recomputation was for the purpose of garnering the income escaping assessment. The provision of Section 34 was not intended for the benefit of the assessee but for the revenue.

11. V. Jaganmohan Rao and Others Vs. Commissioner of Income Tax and Excess Profits Tax, Andhra Pradesh, . This is a decision of the Supreme Court. The facts were that the assessee had purchased a spinning mill which was the subject-matter of a suit which was going on between the vendor and his two sons. The sons, inter alia, claimed that the mill belonged to the joint family and they had a share in the property. During the pendency of that suit the assessee filed return of his income where the income from the mill was not disclosed. The suit was decreed in favour of the sons, the said decree was thereafter reversed in the High Court and, finally, the Privy Council reversed the decision of the High Court. During the pendency of the appeal before the Privy Council the assessee became the sole owner of the mill under a compromise with the sons. The assessment had been completed by the Income Tax Officer on the basis that the assessee had one-third share in the mill. Thereafter, on the basis of the decision of the Privy Council, proceedings u/s 34 of the Indian Income Tax Act, 1922, were initiated. It was contended on behalf of the assessee that the proceedings u/s 34 were invalid but the Supreme Court overruled such contention. In its judgment the Supreme Court observed at page 380 as follows :

"once proceedings u/s 34 are taken to be validly initiated with regard to two-thirds share of the income, the jurisdiction of the Income Tax Officer cannot be confined only to that portion of the income. Section 34 in terms states that once

the Income Tax Officer decides to reopen the assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice u/s 22(2) and may proceed to assess or reassess such income, profits or gains. It is, therefore, manifest that once assessment is reopened by issuing a notice under Sub-section (2) of Section 22 the previous under-assessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started u/s 34(1)(b) the Income Tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year."

12. *Al. Vr. St. Veerappa Chettiar Vs. Commissioner of Income Tax*, . In this case the Madras High Court held that once the reassessment proceedings were validly initiated by the Income Tax Officer in respect of an item of income, either u/s 34(1)(a) or u/s 34(1)(b), the jurisdiction of the Income Tax Officer to reassess was not confined to items in respect of which notice has been issued but extends to all items of income which have escaped assessment and which may fall either u/s 34(1)(a) or 34(1)(b) only subject in the latter case to the period of limitation fixed.

Apart from the cases discussed above Mr. Sengupta cited a number of other cases which do not appear to us to be of much assistance in the instant case and, therefore, we have refrained from dealing with the same in detail. The same are noted below:

C. Vs. GOVINDARAJULU IYER v. COMMISSIONER OF Income Tax, MADRAS., , *O. M. Ahamed Sahib Vs. Commissioner of Income Tax.*, , *Commissioner of Income Tax, Bombay City Vs. A.D. Shroff*, , *Smt. Srilekha Banerjee and Others Vs. Commissioner of Income Tax, Bihar and Orissa*, , *ASHOKA VINIYOGA LTD. Vs. COMMISSIONER OF Income Tax.*, and *K.C. Luckose Vs. Income Tax Officer, B-Ward and Another*, .

We have carefully considered the respective contentions of the parties. Looking at the relevant sections it appears to us that it is necessary for the Income Tax Officer to compute loss for two purposes only. First, for the purpose of set-off of such a loss against the income of the assessee in a particular year where such set-off is permissible, and secondly, where after the set-off if any loss be outstanding, for the purpose of carry forward of such a loss to be set off against the profits and gains in the subsequent assessment years. For this purpose the loss ought to be computed even if there is no set-off because of the income being less than loss.

Section 24 of the Indian Income Tax Act, 1922, provides, inter alia, as follows:

"24. Set off of loss in computing aggregate income.--(1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year:.,....

(2) Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, in any business, profession or vocation, and the loss cannot be wholly set off under Sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no other head of income shall be carried forward to the following year.....

(2B) Where an assessee sustains a loss such as is referred to in Sub-section (2A) and the loss cannot be wholly set off in accordance with the provisions of that sub-section, the portion not so set off shall be carried forward to the following year and set off against capital gains for that year, and if it cannot be so set off, the amount thereof not so set off shall be carried forward to the following year and so on, so however, that no such loss shall be carried forward for more than eight years:.....

(3) 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." The corresponding provisions in the Income Tax Act, 1961, are contained in Sections 70 and 72. A special section in the latter Act, that is, Section 80, is to be noted. This section runs as follows :

"80. Submission of return for losses.--Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed u/s 139, shall be carried forward and set off under Sub-section (1) of Section 72 or Sub-section (2) of Section 73 or Sub-section (1) of Section 74."

17. In the facts and circumstances of the instant case, it appears to us that the Income Tax Officer must have accepted the loss which was claimed by the assessee as otherwise he would not have been able to come to the conclusion that the income was nil and no demand should follow. For the purpose of that year further computation was not necessary because by accepting the loss the entire income, if any, was wiped off. Undoubtedly, there was no computation of such loss for the purpose of the same being carried forward to subsequent years.

18. In the instant case when notices were issued u/s 34 and the matter was reopened the income which had escaped assessment, namely, Rs. 27,000 and Rs. 9,000, respectively, had to be computed. Such income cannot be computed in isolation. Even where an assessment has been completed and a subsequent reassessment on a particular item also has to be done, the previous assessment cannot be wholly ignored, e.g., in order to determine the rate at which the escaped income has to be assessed the Income Tax Officer has to take into consideration the earlier assessment and determine the rate for the escaped item on that basis. In the case before us in order to determine what income has escaped taxation the Income Tax Officer cannot wholly ignore the losses which were suffered in the years in question. There has been no final determination of

such losses for that year for the purpose of assessment and, therefore, many of the decisions cited by Mr. Sengupta, will have no application in the instant case. In the absence of such computation there may not be any carry forward but for the reassessment of the escaped items this loss has to be computed.

19. It is to be noted that the Supreme Court in the case of *ANGLO-FRENCH TEXTILE COMPANY, LTD. Vs. COMMISSIONER OF Income Tax, MADRAS.*, did not accept the limited view of the reassessment proceedings taken in the line of decisions referred. Again, the Supreme Court used very wide language in describing the scope of reassessment proceedings in the case of *V. Jaganmohan Rao and Others Vs. Commissioner of Income Tax and Excess Profits Tax, Andhra Pradesh*, . This Bench has followed and applied the principles laid down in the case of *V. Jaganmohan Rao and Others Vs. Commissioner of Income Tax and Excess Profits Tax, Andhra Pradesh*, in Income Tax Reference No. 192 of 1968, in the case of *Commissioner of Income Tax Vs. Ramsevak Paul and Others*, . If by reason of reopening, the previous under-assessment was set aside and the whole assessment proceedings started afresh, in the instant case, there is no reason why the admitted loss left undetermined should not be recomputed.

20. For the reasons stated above, it appears to us that the losses claimed by the assessee cannot be ignored and they have to be computed for the purpose of determining the income which have escaped assessment. We, however, make it clear that if any portion of such loss is unabsorbed there will be no carry-forward thereof to any subsequent year. To the extent as stated above we answer the question referred in the negative arid in favour of the assessee.

21. In the facts and circumstances of the case, we do not make any order as to costs.

Deb, J.

22. I agree.