Commissioner Of Income Tax, Madrasand ... vs M/S Dalmia Cement (Bharat) Ltd on 16 August, 1995

Equivalent citations: 1995 AIR 2453, 1995 SCC (6) 256, AIR 1995 SUPREME COURT 2453, 1995 AIR SCW 3619

Author: B.P. Jeevan Reddy

Bench: B.P. Jeevan Reddy, S.C. Sen, G.T Nanavati

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           PETITIONER:
COMMISSIONER OF INCOME TAX, MADRASAND ANR.

        Vs.

RESPONDENT:
M/S DALMIA CEMENT (BHARAT) LTD.

DATE OF JUDGMENT16/08/1995

BENCH:
JEEVAN REDDY, B.P. (J)
BENCH:
JEEVAN REDDY, B.P. (J)
SEN, S.C. (J)
NANAVATI G.T. (J)

CITATION:
 1995 AIR 2453            1995 SCC  (6) 256
 JT 1995 (6)    60        1995 SCALE  (4)727


ACT:



HEADNOTE:



JUDGMENT:
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J U D G M E N T B.P. JEEVAN REDDY, J.

Cardozo, J. had once exclaimed: "The precedents have turn upon us and they are engulfing and annihilating us, engulfing and annihilating the very devotees that worshipped at their shrine". We were inclined to repeat his observation after hearing this matter, a feeling which will be borne out as the judgment proceeds.

The matter arises under the Indian Income Tax Act, 1922 (hereinafter referred to as "1992 Act"). Of the six questions referred by the Tribunal for the opinion of the Madras High Court under Section 66(1) of the Act, only Questions 2, 3 and 4 are relevant for our purpose. They read:

> "2. Whether, on the facts and in the circumstances of the case, the assessee was entitled to have the losses for the assessment years 1952-53 to 1954-55 quantified and set-off against its share income from the partnership firm of Dalmia Magnesite Corporation for the assessment years 1960-61 and 1961-62?
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> 3. Whether the Appellate Tribunal has jurisdiction 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?
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> 4. Whether, on the facts and in the circumstances of the case, the assessee was entitled to have the losses of the assessment years 1955-56 to 1959-60 set off against its share income from Dalmia Magnesite Corporation for the assessment years 1960-61 and 1961-62 under the provisions of Section 24(2) (iii) of the Indian Income-tax Act, 1922?
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> We shall state the facts insofar as they are relevant to the said questions alone.
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> The respondent-assessee is a public limited company carrying on the business of mining Manganese Ore and selling it as such or after calcining it. During the years 1945 to 1956, it claimed to have suffered losses in that business. On April 23, 1956 the respondent-assessee filed its returns, for the first time, for the previous years relating inter alia to assessment years 1952-53 to 1954-55. The Income Tax Officer issued a notice under Section 23(2) and the matters were posted for hearing on May 7, 1956 but later the Income Tax Officer informed the assessee that no cognizance can be taken of the said returns as they had been filed beyond the period stipulated under Section 22(1) and Section 22(2A) of the Act. In respect of the assessment years 1955-56, 1956- 57, 1957-58, 1958-59 and 1959-60, for which years the returns were filed in time, the Income Tax Officer found that the assessee had suffered losses and determined the same for each of the said years.
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> For the assessment year 1960-61, the assessee filed, in the first instance, a return disclosing a profit of Rs. 1,00,136.00, but later filed a revised return showing a loss of Rs. 60,351.00 after bringing forward and setting off the losses of the earlier assessment years commencing from the assessment year 1950-51. The Income Tax Officer rejected the assessee's claim that it was entitled to bring forward and set-off the losses of the earlier years against the profits for the previous year relating to the assessment year 1960- 61 in view of clause (ii) of sub-section (2) of Section 24. In other words, he was of the opinion that the business in which losses arose in the earlier year was not the same business which was carried on during the previous year relevant to assessment year 1960-61. On appeal, the Appellate Assistant

Commissioner affirmed the Income Tax Officer's view that the income of the previous year relevant to assessment year 1960-61 arose from a business which was different from the business which was carried on during the earlier years. On further appeal, however, the Tribunal agreed with the assessee. It held that the business carried on during the previous year relevant to 1960-61 and the business carried on during the earlier year was one and the same. The Tribunal also rejected the contention urged by the Revenue before it that in as much as the losses have not been quantified for the assessment years 1952-53 to 1954-55, the assessee was not entitled to carry forward the losses of those years for being set-off. It also rejected the Revenue's contention that during the course of assessment for the assessment year 1960-61 or for that matter 1961-62, the Tribunal cannot direct the quantification of the losses in respect of the said three earlier assessment years, viz., assessment years 1952-53 to 1954-55. Aggrieved with the said decision of the Tribunal, the Revenue applied for referring the aforesaid questions for the opinion of the High Court, as stated above.

Of the three questions concerned herein (Question Nos.2, 3 and 4), the High Court took up Question No.3 for consideration first. The contentions urged by the Revenue were to the following effect: under the Income Tax Act, each assessment year is an unit by itself. While dealing with an appeal in relation to a particular assessment year, the Tribunal cannot travel outside the scope of the appeal and deal with matters relating to other assessment years. In respect of the assessment years 1952-53 to 1954-55, no loss was determined by the Income Tax Officer for the reason that the returns were filed beyond the period prescribed. On the basis of such returns, no loss could have been determined and allowed to be carried forward in view of the provision contained in sub-section (2A) of Section 22. In any event, the assessment in respect of the said three earlier assessment years - whether right or wrong- had become final and the Tribunal had no jurisdiction while dealing with appeal relating to the assessment year 1960-61 (or assessment year 1961-62, as the case may be), to reopen the assessment relating to the said three earlier assessment years, determine the loss for those years, carry it forward and set it off against the profits made during the year relevant to assessment year 1960-61 (or 1961-62). Reliance was placed on Income Tax Officer v. Muralidhar Bhagwan Das [(1964) 52 I.T.R. 335] and Commissioner of Income Tax v. Manick Sons [(1969) 74 I.T.R. 1] in support of the above propositions. The said contentions were rejected by the High Court in the following words:

"On the facts of this case, it cannot be said that the Tribunal has exceeded its jurisdiction in directing the Income-tax Officer to quantify the losses in relation to the assessment years 1952-53 to 1954-55 and to allow a set-off of the losses for those years in relation to the assessment years 1960-61 and 1961-62. The Tribunal while disposing of the appeal relating to the assessment years 1960-61 and 1961-62 has to actually determine the taxable income of the assessee for these 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. 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, then the Tribunal cannot refuse to consider that question on the ground that the losses in respect of which the set off has been claimed relate to some earlier years. As a matter of fact, an identical question came to be considered by the Supreme Court in Commissioner of Income-tax Madhya Pradesh v. Khushal Chand Daga [(1961) 42 I.T.R. 177]. The question there was whether the Tribunal could direct the quantification of the losses for the earlier years while dealing with an appeal relating to the subsequent assessment year. The Supreme Court held that the assessee is entitled to have the losses re-determined in the subsequent year if the income-tax Officer had not duly followed the provisions of the statute in determining the quantum of losses in the earlier years. Though that case did not relate to the jurisdiction of the Tribunal, the principle of the said decision has to be applied to the facts of this case. Admittedly, the assessee, in this case, applied for extension of time for the submission of the returns for the assessment years 1952-53 to 1954-55 and in fact obtained the required extension from the Income-tax Officer himself. It is also seen that after the submission of the returns within the extended time, the matters were posted for enquiry and the assessee was asked to produce materials in support of the said returns. But, somehow, the Income-tax Officer chose to close the proceedings saying that he will not take cognizance of those returns as they had not been filed within the time provided in section 22(1) or section 22(2A). But it has been held by the Supreme Court in Commissioner of Income-tax, Punjab v. Kulu Valley Transport Co. P. Ltd. [(1970) (77) ITR 518] that though a return disclosing the loss is not filed in time as fixed in the general notice under section 22(1) or section 22(2A), the provisions of section 24(1) and (2) of the Act should be taken into account for the purpose of granting relief to the assessee, in relation to the assessment for the subsequent year. It has therefore, to be taken that the non- consideration of the returns and the non-determination of the losses in relation to the years 1952-53 to 1954-55 by the Income-tax Officer cannot be said to stand in the way of the assessee getting the relief under section 24(1) or section 24(2) in relation to the assessment years 1960-61 and 1961-62. We have to, therefore, hold that the Tribunal, in this case, while dealing with the assessment for the years 1960- 61 and 1961-62 is justified in directing the Income-tax Officer to determine the losses in relation to the assessment years 1952-53 to 1954-55 for the purpose of granting relief to the assessee under section 24(1) and section 24(2) in relation to the assessment years in question. The third question is, therefore, answered in the affirmative and against the revenue".

The High Court then took up Questions 2 and 4 which related to the merits of the claim, viz., whether the business carried on during the previous year relating to assessment year 1960-61 (and 1961-62) is the same as the business carried on during the earlier years including the previous years relevant to the aforesaid three assessment years. The High Court agreed with the Tribunal that it was the same business. Accordingly, the questions were answered in favour of the assessee and against the Revenue. The correctness of the opinion expressed by the High Court is questioned in these appeals.

The appeals had come up earlier before a Bench comprising one of us (B.P.Jeevan Reddy, J.) and S.P.Bharucha, J. The learned counsel for the respondent assessee placed strong reliance upon the decision of this Court in Commissioner of Income-tax, Madhya Pradesh v. Khushal Chand Daga (42 I.T.R.177) - which was also relied upon by the High Court. On a careful perusal of the said judgment, however, the Bench found some difficulty with respect to the precise ratio of the judgment. The Bench was of the opinion that the matter requires consideration by a larger Bench for the reasons mentioned in its order of reference. The matter was accordingly directed to be placed before the Hon'ble Chief Justice of India for placing it before a larger Bench. The appeals have now come up before this three-Judge Bench. We have heard the counsel for both the sides at some length.

Relevant Provisions of the 1922 Act and the Corresponding Provisions of the Present Act:

> Sub-section (1) of Section 22 of the 1922 Act provided that before the 1st day of May in each year, the Income Tax Officer shall give notice, by publication in the press and by publication in the prescribed manner, requiring every person whose total income during the previous year exceeded the taxable limit to furnish within sixty days a return in the prescribed form, verified in the prescribed manner and containing the requisite particulars. There is no corresponding provision in the present Act. Sub-section (2) of Section 22 provided that in the case of any person whose total income is, in the opinion of the Income Tax Officer, such as to render such person liable to income tax, the Income Tax Officer may serve a notice upon him requiring him to furnish within the prescribed period, not being less than thirty days, a return in the prescribed form containing the requisite particulars. The corresponding provision in the 1961 Act is sub-section (2) of Section 139. Both the old and the new provisions empower the Income Tax Officer to extend the period for filing the return on proper cause being shown. Sub-section (2A) of Section 22 provided that where a person claimed to have suffered losses and to carry them forward under sub-section (2) of Section 24, he must furnish his return within the time specified in the general notice issued under Section 22(1) or within such further time as the Income Tax Officer may allow in any case. It would be appropriate to set out the sub-section in its entirety:
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> "22(2A). If any person, who has not been served with a notice under sub-section (2) has sustained a loss of profits or gains in any year under the head `Profits and gains of business, profession or vocation', and such loss or any part thereof would ordinarily have been carried forward under sub-

section (2) of section 24, he shall, if he is to be entitled to the benefit of the carry forward of loss in any subsequent assessment, furnish within the time specified in the general notice given under sub-section (1) or within such further time as the Income-tax Officer in any case may allow, all the particulars required under the prescribed form of return of total income and total world income in the same manner as he would have furnished a return under sub-section (1) had his income exceeded the maximum amount not liable to income-tax in his case, and all the provisions of this Act shall apply as if it were a return under sub-

section (1)."

The corresponding provisions in the present Act are Section 139(3) and Section 80.

Sub-section (3) of Section 23 dealt with assessment. It provided that on the day specified in the notice issued under section 23(2) or on any subsequent date, the Income Tax Officer shall, after hearing the evidence produced by the assessee, pass an order in writing assessing the total income of the assessee and also determine the amount payable by him as tax on the basis of such assessment. The corresponding provision in the present Act is sub-section (3) of Section 143. Section 143(3), however, speaks specifically of determining not only the income of the assessee but also the loss-and as would be emphasised later, this is a very relevant distinction between the two provisions.

Section 24 of the 1922 Act contained provisions relating to set-off of losses in computing the aggregate income. The main limb of sub-section (1) provided that "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". The corresponding provision in the present Act is Section 71.

Clause (ii) of sub-section (2) of Section 24 contained a limitation upon the right of the assessee to carry forward the losses. The limitation was that the losses could be carried forward and set-off only if the same business was continued in the subsequent year as well. The corresponding provision in the present Act is clause (i) of sub-section (1) of Section 72.

Sub-section (3) of Section 24 provided 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". (emphasis added). This provision is of crucial relevance to the question at issue herein. The corresponding provision in the present Act is Section 157.

[When we referred to the "corresponding provision" in the present Act, we meant only a broad correspondence.] Contentions of the Parties:

> The submission of the learned counsel for the assessee in the appeals before us is that inasmuch as the requirement of Section 24(3) has not been complied with in respect of the aforesaid three earlier assessment years (1952-53 to 1954-55), the assessee is entitled to claim in the assessment proceedings relating to the assessment year 1960-61 (and 1961-62) that the loss sustained during those three earlier assessment years be determined now, be carried forward and set-off against the profits arising during the previous year relating to assessment year 1960-61 (and 1961-

62). It is further submitted that the intimation given by the Income Tax Officer that no cognizance can be taken of the returns of the said three assessment years on the ground that they were filed beyond the period stipulated under Section 22(1) and Section 22(2A) is neither an order of

assessment nor an order within the meaning of Section 24(3). For this reason also, the assessee is entitled to have the losses for the said three assessment years determined and carried forward to be set-off against the profits of the subsequent assessment years 1960-61 (and 1961-62). Strong reliance in support of the above proposition is placed upon the decisions of this Court in Khushal Chand Daga, Commissioner of Income-tax, Punjab v. Kullu Valley Transport Company Private Limited [1970 (77) I.T.R. 518] and Commissioner of Income Tax, Uttar Pradesh v. Manmohan Das (59 I.T.R. 699).

On the other hand, the contention of the learned counsel for the Revenue is that the intimation of the Income Tax Officer that no cognizance can be taken of the returns filed by the assessee with respect to the said three earlier assessment years was an order which could have been appealed against by the assessee, if he so choose. (In such a situation, the question of intimation of the amount of loss determined under Section 24(3) could not have arisen, says the counsel.) Since the assessee failed to prefer an appeal against the said intimation, his right to have the losses determined for those years stood negatived. In such a case, he cannot re-agitate or seek to re-open the very same question in the assessment proceedings relating to subsequent assessment year(s) inasmuch as each assessment year is a separate unit under the Income Tax Act. Reliance is placed upon certain decisions of this Court in support of the said proposition to which we shall refer at the appropriate stage.

A few clarification by way of clearing the ground:

> The first feature to be noted in this case is that the assessee did not choose to file an appeal against the intimation given by the Income Tax Officer that he would not take cognizance of the returns filed for the assessment years 1952-53 to 1954-55 on the ground that they were filed beyond the period prescribed by law. Had the assessee preferred appeal(s) against that intimation, the majority decision of this Court in Kulu Valley Transport Company Private Limited could probably have come to its rescue. Indeed, the facts of that case are more or less similar to the facts of this case, with the crucial difference that in that case the assessee preferred appeals against a similar intimation and it is in those proceedings that it was held by this Court ultimately, by a majority, that under the provisions of the 1922 Act, a return of loss filed before making the assessment is a valid return and that Income Tax Officer is obliged to determine the loss on the basis of such return.
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> Strong reliance is placed by the learned counsel for the assessee upon the decision of this Court in Manmohan Das. In our opinion, however, the principle of the said decision is of no relevance to the facts and circumstances of this case. The main question considered in the said decision was whether income received by the assessee under the agreement dated January 2, 1931 (whereunder he was appointed as the Treasurer of the Allahabad Bank) was business income assessable under Section 10 or salary income under Section 7 or income from sources under Section 12. The Income Tax Officer and the Appellate Assistant Commissioner held that it was not business income while the Tribunal held that it was business income. The other

question concerning Section 24 arose in the following circumstances: for the assessment year 1950-51, though the assessee suffered a net loss of Rs.38,027.00, the Income Tax Officer declared that "the loss computed in that year could not be carried forward to the next year under Section 24(2) of the Income Tax Act as it was not a business loss". (This was consistent with his holding that the income of the assessee accruing under the said agreement, whereunder the loss was incurred, was not business income). The Tribunal, however, held that the income accruing under the said agreement (whereunder the said loss was incurred) was business income and accordingly allowed the loss to be carried forward and set-off against the income of the succeeding year. The matter was carried to this Court mainly on the question as to the nature of the income. The entire discussion in the decision pertained to the said question. Before taking up the said main question, however, Shah, J., (who delivered the opinion of the Court) took up the other question (concerning Section 24) more by way of clearing the ground for the main question. The learned Judge observed:

"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 under Section 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 under section 24(3) that the loss cannot be set off against the income of the subsequent year is not binding on the assessee."

The decision thus lays down that it was not the function of the Income Tax Officer while making the assessment to decide or declare whether the loss determined by him for that assessment year can be carried forward and set off against the income of the future year(s) under Section 24(2) of the Act or not. The question whether the loss determined for a previous year is to be carried forward and set off against the income of the succeeding year, it is held, is a matter to be decided by the Income Tax Officer dealing with the assessment relating to the subsequent year in which year the loss is sought to be set off by carrying it forward from the previous year. On that basis, it is held that the declaration made by the Income Tax Officer in the assessment order relating to the assessment year 1950-51 that the loss incurred in that year cannot be carried forward was beyond his jurisdiction. Since this Court, held agreeing with the Tribunal and High Court, that the income arising under the agreement aforesaid was business income, it held that the loss determined in the previous assessment year can be carried forward and set off against the profits of the succeeding/subsequent assessment year under section 24(2) of the Act. It is for this reason, we say that the ratio or the principle of this decision has no application to the fact of this case.

MAIN ISSUE:

> Now coming to the main contention of the assessee, which is based upon the language of Section 24(3) and the decision of this Court in Khushal Chand Daga, it would be appropriate to first ascertain the facts of the said decision. The decision of this Court records that "learned counsel for the commissioner (commissioner was the appellant before this court) stated that the Department was not very anxious for the decision, because this particular assessee has had only losses in the years following, and no loss would be occasioned to the Revenue, if the losses brought forward be re-determined". Though this Court observed that it was not really concerned with the said aspect, yet it appears that the lack of interest on the part of the appellant led to certain errors in stating the relevant facts. With a view to ascertain the correct factual position, we turned to the decision of the High Court reported in Seth Khushal Chand Daga v. Commissioner of Income-tax, Madhya Pradesh (31. I.T.R. 417), a decision of the Nagpur High Court. The report contains the statement of the case submitted by the Tribunal as well. The statement of the case shows that the questions referred to the High Court therein related to two different sets of assessment years. The first set of assessment years is 1941-42 and 1942-43. The question referred for these assessment years, at the instance of the assessee, was to the following effect:
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> "Whether the assessee was competent in law to raise a question with regard to the determination of loss for the assessment year 1941-42, as finally determined in appeal, in the course of proceedings for the assessment year 1942-43 when the loss brought forward from 1941-42 was being set off?"

The other set of assessment years concerned in the said case is 1948-49 and 1949-50. In respect of these assessment years, the following two questions were referred at the instance of the assessee, viz., "(1) Whether Section 12-B of the Indian Income-tax Act of 1922 is ultra vires the Indian Legislature; and (2) whether on the facts and in the circumstances of the case the profit of Rs.16,400 on the sale of the three houses can be said to be covered by the second proviso to Section 12B(1) of the Act." For these assessment years, (1948-49 and 1949-50), yet another question was referred at the instance of the Revenue, viz., "Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the loss suffered by the assessee from his personal business (including his share of loss from another firm) cannot be set off under Section 24(1) against his taxed share income from an unregistered firm?".

(The wording of the question suggests that it must have been referred at the instance of the assessee. Be that as it may, we go by the statement of the case) Thus, there were two questions involving Section 24, viz., one relating to the first set of assessment years (1941-42 and 1942-43) referred at the instance of the assessee and the other concerning the second set of assessment years (1948-49 and 1949-50) referred at the instance of Revenue. The report in Seth Khushalchand Daga (31 I.T.R. 417) does not contain the reasons for which the question, referred at the instance of the Revenue, relating to assessment years 1948-49 and 1949- 50 was answered against the Revenue. Para 10 of the report merely says: "As regards the question raised in Miscellaneous Civil Case No.98 of 1954 decided by us today, for the reasons stated therein we answer the question in the affirmative." The report (decision), however, contains the reasons for which the other questions referred at the

instance of the assessee (one relating to assessment year 1942-43 and the other two questions relating to assessment years 1948-49) were answered for or against the assessee, as the case may be. We must refer to the same. So far as the question relating to the validity of Section 12B was concerned, the High Court answered it against the assessee relying upon the decision of this Court in Naveenchandra Mafatlal v. Commissioner of Income-tax, Bombay City (26 I.T.R.758). The other question regarding the applicability of the second proviso to Section 12-B(1) was also answered against the assessee in view of the finding of fact recorded by the Tribunal. So far as the question relating to assessment year 1942-43 is concerned, the High Court answered it in favour of the assessee and against the Revenue. (In reality, the said question arose in the assessment proceedings relating to assessment year 1942-43, though it involved consideration of the question relating to carrying forward of the loss incurred in the previous assessment year 1941-42). The facts relevant to this question, as stated in the order of the Tribunal (as extracted in the Statement of the Case) are the following:

> "The assessee was a partner of an unregistered firm in the year of account relevant for the assessment year 1941-42. His share of profits in that unregistered firm amounted to Rs1,75,256 according to the assessment order. The assessee, it appears, had suffered a loss of more than Rs.2 1/2 lakhs. The Income-tax Officer set off the assessee's share of profit in the unregistered firm against the loss of Rs.2 1/2 lakhs. Thus, according to the Income-tax Officer there was only a loss of Rs.53,840 to be carried forward to the next year." In the assessment proceedings relating to assessment year 1942-43, the assessee raised a contention that the figure of loss determined in the previous year (viz., Rs.53,840.00) is incorrect and that it should be much more. This contention was rejected by the Income Tax Officer and Appellate Assistant Commissioner. The Tribunal too rejected it observing that such a contention could only have been raised in the appeal against the assessment order for the assessment year 1941-42 and that it could not be raised in the appeal preferred against the assessment order relating to the subsequent assessment year, i.e., 1942-43. As a matter of fact, the Tribunal found from the records before it that the assessee had preferred an appeal against the assessment order relating to the assessment year 1941-42 but he did not take up this contention in that appeal. The Tribunal accordingly refused to permit the assessee to raise the said contention in the assessment proceedings relating to the subsequent year. The High Court, however, upheld the contention of the assessee on a reasoning, which may be set out in full in its own words:
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> "The first question raised by the assessee is whether he is entitled to raise a question with regard to the determination of loss for the assessment year 1941-42 in the course of proceedings for the assessment year 1942-43 when the loss brought forward from 1941-42 was being set off. A similar question arose in All India Groundnut Syndicate Ltd. v. Commissioner of Income-tax [1954 (25) ITR 90] and was answered as below:
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> "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 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 that case the question was as to the effect of the failure of the Income- tax Officer to notify the loss of the previous years as required by section 24(3) of the Act, but that does not make any difference to the principle enunciated above. No question arose in the assessment year 1941-42 in this case of computing the amount of the loss. That question arose in the assessment year 1942-43. Therefore, what was done in the preceding year does not affect the right of the assessee to get the amount of the loss which was liable to be carried forward duly determined in the subsequent proceedings. We accordingly answer the question in the affirmative." (Emphasis supplied to indicate the error in the reasoning. As a matter of fact, loss was determined at Rs.53,840/- in the assessment proceedings relating to assessment year 1941-42.) A reading of the above paragraph shows that the decision of the High Court was mainly influenced by the decision of the Bombay High Court in All India Groundnut Syndicate Limited. It is perhaps on the basis of the observations in the said decision that the High Court held that "no question arose in the assessment year 1941-42 in this case of computing the amount of loss (and that) that question arose in the assessment year 1942-43", though as a matter of fact there is a substantial difference between the material facts of both the cases. (The facts in the Bombay decision are referred to at a later stage of this judgment.) It is on the same basis, it appears, the Nagpur High Court made the following further observation: "what was done in the preceding year does not affect the right of the assessee to get the amount of the loss which was liable to be carried forward duly determined in the subsequent proceedings". The High Court also took note of the fact that the Income Tax Officer had failed to notify the loss for the previous year (assessment year 1941-42) as required by Section 24(3) of the Act but it observed at the same time that such failure does not make any difference to the principle enunciated in All India Groundnut Syndicate Limited. We find the reasoning of the High Court rather involved and difficult to follow but that need not detain us since we are concerned only with the ratio and the principle of the decision of this Court in appeal. We now turn to the decision of this Court.

The facts as stated in the first two paragraphs shows that this Court was led to assume that the question raised in the assessment proceedings relating to assessment year 1942-43 was again raised in the assessment proceedings relating to assessment years 1948-49 and 1949-50 which is not the correct factual position as would be evident from the Statement of the Case contained in Seth Khushalchand Daga (31 I.T.R. 417). The question involving Section 24 regarding the assessment years 1948-49 and 1949-50 was based upon altogether different facts. Be that as it may, the

relevant question (relating to 1942-43 and involving 1941-

42) was dealt with and answered in the following words:

> "As regards the first question, the only contention raised was that the loss which had been determined and ordered to be carried forward must be deemed to have become final, because no appeal was filed against that determination. But 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 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 a subsequent year. Learned counsel for the Commissioner stated that the Department was not very anxious for the decision, because this particular assessee had had only losses in the years following, and no loss would be occasioned to the revenue, if the losses brought forward be re-determined. But that is a matter, with which we are not concerned. In our opinon, the judgment of the High Court impugned before us was correct in the circumstances of the case."

(Emphasis supplied) A reading of the above paragraph shows that the only ground upon which this Court held that the assessee was entitled to claim in the assessment proceedings relating to the assessment year 1942-43 that the loss computed in the previous year be re-opened and re-determined for the purpose of being carried forward and set-off against the profits of the assessment year 1942-43 is the failure of the Income Tax Officer to notify by an order in writing the amount of loss computed by him in the previous assessment year as required by Section 24(3) of the Act. This Court also observed that because of the failure of the Income Tax Officer to notify the loss by an order in writing, an appeal could not also be taken on that point. (As a matter of fact, it may be reiterated, under the order of assessment made in respect of the assessment year 1941-42, the Income Tax Officer had determined the loss at Rs.53,840.00 and that the assessee had preferred an appeal against the said order of assessment though he did not choose to urge therein any ground with respect to the correctness of the amount of loss determined by the Income Tax Officer.) In our opinion, the ratio of the said decision must be understood in the light of the legal position obtaining under the 1922 Act. As pointed out by us hereinbefore, under Section 23(3) of the Act the Income Tax Officer was required to "assess the total income of the assessee and determine the sum payable by him on the basis of such assessment". The sub-section did not expressly speak of determining the loss as well as the amount of refund as is provided by section 143(3) of the present Act; that was left to be provided by Section 24(3). It would be appropriate to set out sub-section (3) of Section 23 of 1992 Act and sub-section (3) of Section 143 of the present Act to bring out the contrast.

> "Section 23(3). On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may

> require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment."
>
> "Section 143(3). On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as the assessee may produce and such other evidence as the Income-tax Officer may require on specified points, and after taking into account all relevant material which the Income-tax Officer has gathered, shall, by an order in writing, assess the total income or loss of the assessee, and determine the sum payable by him or refundable to him on the basis of such assessment."

It is true that an order of assessment would not only determine the income but also the loss, even so Section 23(3) has to be read along with Section 24(3) of the 1922 Act. So read, it would mean that in case of loss, it was mandatory upon the Income-tax Officer to "notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of this Section". Sub- section (3) of Section 24 must be construed to be mandatory in view of absence of words in sub-section (3) of Section 23 regarding the determination and intimation of loss. Inasmuch as in Khushal Chand Daga the Income Tax Officer failed to notify to the assessee the loss computed by him (for the assessment year 1941-42), this Court said that the assessee could not question the amount of loss so determined by way of an appeal. [Section 30 provided an appeal inter alia against an order computing the loss under Section 24, which means and refers to the order in writing contemplated by Section 24(3)]. It is for this reason that this Court held in Khushal Chand Daga that the computation of loss by the Income Tax Officer in the assessment proceedings relating to assessment year 1941-42 was not final and could be re-opened and re-agitated by the assessee in the assessment proceedings relating to assessment year 1942-43. It is obvious that such a plea would not be available under the present Act inasmuch as sub-section (3) of Section 143 expressly provides the determination of not only the total income but also the loss. Because of the language of sub- section (3) of Section 143 of the present Act, the provision contained in Section 157 of the present Act (correspondent to Section 24(3) of the 1922 Act) cannot be deemed to be mandatory but only directory. In other words, the position under the present Act is that even if the intimation in writing contemplated by Section 157 is not given by the assessee, Yet the assessee will not be entitled to raise a question similar to the one raised by the assessee in Khushal Chand Daga because under the present Act he can, and should, raise that question in the appeal preferred against the order of assessment since an order of assessment under the present Act determines not only the assessee's income, if there is one, but also the loss, if there is one.

The question then arises, how far does the ratio of Khushal Chand Daga help the assessee before us. In this case, the Income Tax Officer intimated the assessee that since the loss returns filed for the assessment years 1952- 53 to 1954-55 were filed beyond the period prescribed by law, he would not take cognizance of the said returns. In other words, he refused to make an assessment. True it is that this stand of Income Tax Officer was wrong in law as held in Kulu Valley Transport; but that only means that he failed to do his duty by law, viz., refused to make an order of assessment on the basis of such returns and to determine the loss. Had he made an assessment and determined the loss

then, he would have been obliged to intimate the assessee of the same under and as required by Section 24(3). As against this, in Khushal Chand Daga, an assessment was duly made for the previous assessment year (1941-42) and loss also computed but the failure of the Income Tax Officer lay in not sending an intimation specifying the amount of loss determined as contemplated by Section 24(3). It was held that such failure to intimate under Section 24(3) disabled the assessee from questioning the quantum of loss determined by way of an appeal. To put it in different words, while the failure in Khushal Chand Daga related to the second stage (failure to intimate the amount of loss determined), the failure in the case before us relates to the anterior stage (failure to make an assessment and determine the loss). In this context, it is essential to keep the language of Section 24(3) and Section 30(1) in mind. Section 24(3) provided 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 computed by him for the purposes of this Section". Section 30(1), which provided for appeal against the Income Tax Officer's order read thus (insofar as is relevant): "any assessee objecting to the amount of income assessed under section 23 or section 27 or the amount of loss computed under Section 24....may appeal to the Appellate Assistant Commissioner against the assessment or against such refusal or order". Khushal Chand Daga seems to say that where such intimation is not given, the assessee cannot question the quantum of loss determined by way of appeal and that such a plea cannot be urged in the appeal preferred against the order of assessment. This holding rendered in the light of the language of Section 24(3) and Section 30(1) is diferrent from a refusal to make the assessment altogether as has happened in the case before us. To repeat, the failure in this case pertained to the anterior stage and could have been appealed against as a "refusal" to make an assessment order under Section 30(1) as was done in Kulu Valley Transport, whereas in Khushal Chand Daga, no appeal could be preferred according to the holding in that case disputing the quantum (`amount') of loss determined in assessment proceedings in the absence of an intimation under Section 24(3). This is the qualitative difference between both cases and hence the principle of Khushal Chand Daga has no application herein.

The learned counsel for the assessee relied strongly upon the decision of the Bombay High Court in All India Groundnut Syndicate Limited referred to and relied upon in Seth Khushalchand Daga (31 I.T.R.417). In this case, the assessee filed a return of loss of three assessment years, but the Income Tax Officer treated the income of the assessee as nil. Because he took the income as nil and did not determine any loss, obviously there was no occasion for notifying the loss to the assessee under and as contemplated by Section 24(3). In the next assessment year, the assessee made profits and claimed to set off the loss incurred during the earlier three assessment years against the profit made in the subsequent assessment year. The Income Tax Officer disallowed the claim on the ground that the loss was not notified under Section 24(3) of the Act for the three earlier assessment years. When the matter came to the High Court, it was held that the Income Tax Officer was at fault in not determining the loss on the basis of the loss-returns filed by the assessee for the three previous years. The High Court observed:

> "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."

Accordingly, it was held that the assessee was entitled to have the losses in the three previous assessment years determined, carried forward and set off against the profits of the later assessment year in the assessment proceedings relating to the later assessment year. The learned counsel for the Revenue disputes the correctness of the view taken in this decision. He says that the intimation of assessment of income as `nil' was an appealable order and that non- filing of appeal against it disentitled the assessee from seeking to reopen and re-agitate the said issue in the course of assessment proceedings for the subsequent assessment year. He points out that in Kulu Valley Transport, precisely such an intimation was appealed against. Counsel also relies upon two decisions of High Courts in this behalf, to which a reference would be in order. The first one is the decision of the Madhya Pradesh High Court in Jaikishan Gopikishan and Sons v. Commissioner of Income-tax Madhya Pradesh (84 I.T.R. 645). In this case, the assessee filed a return of loss beyond the time prescribed under the notification issued under Section 22(1) of the 1922 Act. The Income Tax Officer simply `filed' the return on the ground that it was filed beyond the time. The High Court held, following the decision of this Court in Kulu Valley Transport, that in such a case the order `filing' the return should be treated as an order by which the Officer has determined the loss as nil and therefore appealable under Section 30 of the Act. The other decision is that of Patna High Court in Bihar State Electricity Board v. Commissioner of Income-tax, Bihar (101 I.T.R.740). This was also a case where the returns were filed beyond the period prescribed by the 1922 Act as well as the 1961 Act. The Income Tax Officer intimated the assessee that since the returns were filed beyond the prescribed period, no action was being taken by him thereon and that the loss for those years would not be carried forward for being set off against the income of the subsequent years. Following the decision of this Court in Kulu Valley Transport, the High Court held that the intimation of the Income Tax Officer must be held to be an order computing the loss as nil and, therefore appealable.

It is enough for us to say that we do not accept the reasoning of the Bombay High Court in full. The true position has already been indicated by us hereinbefore while indicating the distinction between the facts and ratio of Khushal Chand Daga and the case before us. The intimations of the nature concerned in the said three decisions of the High Courts, as also the intimation concerned in the case before us, should be understood and construed as a refusal to make an assessment and to compute the loss, which is appealable under Section 30 of the 1922 Act as rightly held by the Madhya Pradesh and Patna High Courts, which necessarily means that if not appealed against, that question cannot be re-agitated in the assessment proceedings relating to a subsequent assessment year. Moreover, as eludicated hereinabove, refusal to make an assessment is wholly different and distinct from the failure to intimate the `amount' of loss determined as required by Section 24(3). They are two different things and two different stages. The stage of intimation of quantum of loss

under Section 24(3) arises only after making an assessment under Section 23(3) and after detemining the loss. Now, a return showing loss need not be accepted implicity. On making the assessment, the Income Tax Officer may find that it is not a case of loss but one of profits or he may agree that there is loss. The amount of loss is also a matter of assessment. In other words, an assessment is necessary for determining the loss. Only after such determination, could the intimation contemplated by Section 24(3) be given specifying the amount of loss. Without an assessment being made, no one can assume that the return showing loss is correct one. Where the Income Tax Officer refused to make an assessment and determine the loss on the ground that returns were filed beyond the prescribed period, the assessee must appeal against such intimation and have the Income Tax Officer compelled to make an assessment.

We must reiterate that the controversy of the above nature cannot arise under the present Act. Under the present Act, Section 143(3) requires the Assessing Officer to determine not only the profits/income taxable but also to determine the loss, if there is one. In this view of the matter, Section 157 of the present Act [corresponding to Section 24(3)] loses its significance. It must be understood as merely directory. Under the present Act, the assessee is entitled to and ought to question the amount of loss determined in the appeal preferred against the assessment order itself. He need not wait till he receives the intimation under Section 157. Nor does he suffer any disability on account of not appealing against such intimation, if he has already preferred an appeal against the order of assessment. In this connection, the language of clause (a) of sub-section (1) of Section 246 of the 1961 Act is worth noting. It provides an appeal against "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...". Section 246 does not provide for an appeal against the intimation under Section 157 of the Act. For that matter, none of the provisions in the present Act corresponding to the provisions in Section 24 of the 1922 Act find a mention in Section 246. It can even be said that an intimation by the Income Tax Officer refusing to take cognizance of return - or a similar intimation - implying his refusal to make an assessment and determine the loss is "an order against the assessee" within the meaning of clause (1) of sub-section (1) of Section 246 of the present Act and is appealable as such.

For the reasons recorded hereinabove, the appeals are alowed, the judgment of the High Court is set aside and Question No.2 of the three questions set out at the inception of the judgment is answered in favour of the Revenue and against the assessee. So far as Questions 3 and 4 are concerned, the opinion expressed by the High Court therein has not been questioned before us and is accordingly affirmed. We hold that the assessee having failed to appeal against the intimation of the Income Tax Officer refusing to take cognizance of loss returns filed by the assessee for the assessment years 1952-53 to 1954-55, cannot claim in the assessment proceedings relating to subsequent years that the loss in the said earlier assessment years (1952-53 to 1954-

55) be determined, carried forward and set off against the profits of the subsequent year or years, as the case may be.