

**Shri Ram Hari Ram Vs. Deputy Commissioner of**

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**Court :** Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Jan-18-1994

**Reported in :** (1994)48ITD175(Delhi)

**Judge :** G Krishnamurthy, A Kalyanasundharam, M Bakhshi

**Appellant :** Shri Ram Hari Ram

**Respondent :** Deputy Commissioner of

**Judgement :**

1. The assessee, a firm, carrying on the business of jewellery has filed this appeal and has raised the issue of liability of loss of Rs. 36 lakhs worth of jewellery which were stolen from the shop and some minor issues like disallowance of car expenses for personal usage and non-allowing of deduction for donation.

2. Shri C. S. Aggarwal, learned counsel for the assessee, submitted that the shop of the assessee which is located in the busy business area of Chandni Chowk at Dariba Kalan, was broken into by some miscreants on the night of February 1, 1981, which was brought to the notice of the partners of the firm on the next morning when some passers-by saw the locks of the shop broken and the shutters of the shop slightly open. The police were called and an inventory of the stocks was also taken. The inventory of the stock so taken indicated that gold ornaments weighing 22,440.400 gms valued at Rs. 36 lakhs were found missing. The assessee had lodged their report immediately on arriving at the shop along with the police authorities and the details of the loss were provided to the police

authorities only after complete inventory was taken and correlated with the registers as was required to be maintained under the Gold (Control) Act. The authorities were provided with the report that was lodged with the police authorities along with the list of items that were stolen. The police were investigating. They could not trace the culprit and recover the jewellery till the date of the present hearing before us. The Assessing Officer was informed about the details and also was provided with various copies from the excise registers as required to be maintained under the Gold (Control) Act, which was duly informed to the authorities concerned about the theft. He submitted that the copies of the pages wherein the relevant entries of the losses was so indicated has been filed at pages 31, 32 and 33 of the paper-book. He submitted that the assessee even announced a reward of Rs. 25,000 to the person who could help in the recovery of the stolen jewellery. The assessee claimed deduction of the amount as a trading loss, which was held to be not allowable to the assessee because the police authorities had not yet closed the file mentioning therein that the effort to trace is fruitless. The assessee in its appeal had made reference to the various decisions that have been noted in the third edition of Chaturvedi and Pithisaria and claimed all such losses as allowable deduction. The Commissioner of Income-tax (Appeals) after considering all these claims of the assessee had again formed the same view as formed by the Assessing Officer that the loss could not be said to have occurred till April 5, 1985, because there was still a possibility of recovering the stolen goods. Shri Aggarwal submitted that the Commissioner of Income-tax (Appeals) could not appreciate the difference between the loss on account of theft and irrecoverability of a debt. He submitted that loss on account of theft is an event that happened on February 1, 1981. Therefore, the loss is a trading loss at that point of time. It is not the case of the Revenue that the loss has not been quantified and it is also not the case of the Revenue that the loss is not verifiable. He submitted that the only point of difference between the Assessing Officer and the assessee is that the Assessing Officer feels that since the assessee did not care to take adequate insurance to cover the loss, the loss was not allowable. He submitted that it was because of this non-insuring of the jewellery items that the assessee could not even recover a penny but the character remains that of a business loss which cannot be denied to the assessee under any circumstances.

The assessee placed reliance on the following authorities: (ii) A P. S. Cold Storage and Ice Factory v. CIT [1979] 119 ITR 709 (All).

3. The learned Departmental Representative, Sh. Bhardwaj, on the other hand, relied very heavily on the orders of the authorities. He pleaded that though the G.S.-11 and G.S.-12 registers do indicate the stocks as were available with the assessee, there was nothing to indicate that the assessee did possess the stock which is stated to have been lost of the value of Rs. 36 lakhs at the time when the assessee closed the shop on February 1, 1981. He submitted that the thief had taken some part of the jewellery and not the entire jewellery as was available in the shop, which itself gives rise to a doubt as to whether the claim as advanced by the assessee that the jewellery being stolen could at all be believed or not. He made reference to the order of the Commissioner of Income-tax (Appeals) wherein it was categorically observed that when the FIR was lodged, the quantification was still to be done and the investigation was still under process during the year.

4. We have given our very careful consideration to the rival submissions. The assessee is found to have maintained accounts during the course of its business. The registers G.S-11 and G.S.-12 are required and prescribed by the Gold Control authorities. These registers have been found to be regularly checked by the concerned authorities. When the intimation regarding the shutter being found partly opened was received the police authorities were informed and an inventory of the various stocks as were remaining in the shop was taken. Comparing this inventory with the registers G.S-11 and G.S-12, the assessee listed out the items which are not available in the inventory. Such items which were not found in the inventory were treated as items that have been stolen from the shop between the close of the shop the previous evening and the opening of the shop the next morning. The list of the jewellery aggregating to 22,440.400 gms. was provided to the police authorities subsequently. Simultaneously, in the G.S.-11 and G.S.-12 registers, entries were made about these items being stolen and the same was also intimated to the concerned gold control authorities. The assessee placed the value at Rs. 36 lakhs for the stolen jewellery and announced a reward of Rs. 25,000 for the recovery of the stolen jewellery.

5. On the above-mentioned facts, the assessee had claimed loss of the jewellery by way of deduction from its total income at Rs. 36,00,000.

The objection of the Assessing Officer was that though the report of the theft was lodged with the police authorities and the stolen articles were not traced, the report was still pending with the police authorities as on April 5, 1982, which falls after the accounting year of the assessee and thereby the theft could not be said to have matured and transformed into a loss in the accounting period. The related objection was that the claim for deduction of Rs. 36 lakhs did not have any basis. The Commissioner of Income-tax (Appeals) observed that the FIR was lodged with the police authorities on February 1, 1981, and that there was no satisfactory evidence indicating that the jewellery stated to have been stolen was available with the assessee. He observed that even assuming but not admitting that the theft had taken place, in view of the final report of the police which is dated April 5, 1982, that the theft was not traceable, the claim of the loss could not come up for consideration in the assessment year under appeal. The related objection was that the assessee had not taken any adequate insurance cover for such losses and also the basis of the claim of loss of Rs. 36 lakhs had not been furnished. The Commissioner of Income-tax (Appeals) came to the conclusion that at best, the loss could be said to have matured only after April 5, 1982. The facts are on record to indicate that there has been no flaw found in the maintaining of the registers G.S.-11 and G.S.-12 as required under the Gold (Control) Act. There is also no flaw found in regard to purchases as well as the sales of the jewellery. The assessee, therefore, in our view, had no other basis of even finding out that there was a loss of jewellery by theft except by taking physical inventory of the available jewellery and comparing the same with the G.S.-11 and G.S.-12 registers. The registers G.S.-11 and G.S.-12 provided entries describing along with the weight of each of the jewellery. Consequent upon the theft, the G.S.-11 and G.S.-12 registers were updated by providing only entries along with description, weight, quantity of jewellery stolen. There is no material on record available as is evident from a reading of the order of the Assessing Officer and the Commissioner of Income-tax (Appeals) that the Gold Control authorities even indicated that the entries in G.S.-11 and G.S.-12 registers were either incomplete or had given wrong particulars and that they had not accepted or raised a doubt or rejected the

claim made by the assessee in regard to the entries of the various items stated to have been stolen. Keeping these factors in our mind, we feel that the claim advanced by the assessee cannot be brushed aside as irrelevant. The theft had occurred on February 1, 1981, and the police authorities were still investigating the same and it was only on April 5, 1982, that they had come to the conclusion that the items that were stated to have been stolen are not capable of being traced.

6. As observed earlier, the starting point being the registers G.S.11 and G.S.12, followed by the FIR on February 1, 1981, along with the inventory taken at that point of time, followed by the entries made in the registers G.S.-11 and G.S.-12 regarding the loss of jewellery by theft, we are of the view that we have to proceed that the loss of jewellery was established by the assessee. Having come to this extent, the question that remains is what is the value of the loss and whether the loss could be said to have crystallised in the accounting period or not. In so far as the quantum of loss is concerned, the assessee had given the figure of Rs. 36, lakhs. However, in our view, the loss would have to be necessarily valued at the price at which the assessee had procured these jewellery items.

7. In regard to the second limb of the claim as to whether the loss had crystallised in the year or not, we have to observe that the loss by theft and debt becoming irrecoverable are two independent and incomparable items. The police authorities indicating on April 5, 1982, that the goods are not traceable is an indication of the fact that their efforts to trace the goods have failed. But the theft had happened on February 1, 1981, and the loss, in our view, was suffered by the assessee at that point of time. Unlike a case where the debt becomes irrecoverable, which point of irrecover-ability decides the allowability as a deduction, in the case of goods lost by theft or fire, the sufferance of loss is immediate. The subsequent indication by the police authorities that the efforts to trace the goods have yielded no results would have to revert back to the point of time at which the theft had occurred. The loss of goods as suffered by the assessee is of those items in which the assessee trades and, therefore, is clearly a trading loss. The Supreme Court in the case of CIT v. Nainital Bank Ltd, [1965] 55 ITR 707, considered the question whether the loss of cash by dacoity could be allowed as a trading loss. The Supreme Court considered that, for a bank, cash is the stock-in-trade of its business and the

losses in the case of business under varying circumstances is deductible as a trading loss in computing the business income. They, however, observed that the retention of the monies in the premises of the bank to meet the demands of its constituents is part of the operation of banking, carrying with it the ordinary risk of being subject to embezzlement, theft, dacoity or destruction by fire. Such risk of loss is found to be incidental to the carrying on of the operation of the banking business. Since the assessee deals in gold, jewellery and it is the stock-in-trade as far as the assessee is concerned, which necessarily is required to be kept in the shop suffering the risk of theft, etc., the loss that arises on account of theft, etc., is clearly a loss suffered in the course of business and in view of the decision of the Supreme Court, it is clearly allowable to it as a trading loss. We have only to direct the Assessing Officer to allow the loss to the extent of the cost as was incurred by the assessee in purchasing these items.

8. The ground in regard to disallowance of car expenses was not pressed and accordingly this is treated as dismissed. On the last issue regarding claim of deduction under Section 80G in respect of donations provided by the assessee as raised before the Commissioner of Income-tax (Appeals), there is no finding given by him and, therefore, this ground cannot be said to arise from the order of the Commissioner of Income-tax (Appeals).

1. I have gone through the proposed order of my learned Brother and since I have not been able to persuade myself to agree with the reasoning and the findings of my learned Brother, I am passing a dissenting order in accordance with provisions of Section 255.

2. The main issue involved in this appeal of the assessee is relating to the claim of loss of jewellery by theft amounting to Rs. 36 lakhs.

It was claimed that, on February 1, 1981, there was a theft in the business premises of the assessee. In this connection, the assessee filed copy of the FIR No. 147 dated February 1, 1981. The claim of the loss was disallowed by the Assessing Officer for two reasons. One was that there was merely a police report lodged and the matter was still under investigation as reported by the assessee and that the basis for calculation of the loss of jewellery to the tune of Rs. 36 lakhs

had not been indicated. The assessee appealed to the first appellate authority and claimed that they were in a position to furnish further evidence to support the claim for which the matter may be remanded to the Assessing Officer. The first appellate authority had accepted the request of the assessee and remanded the matter to the Assessing Officer for entertaining the evidence relating to the claim for loss of Rs. 36 lakhs and deciding the issue in accordance with law. The only evidence produced before the Assessing Officer in the second round is a photostat copy of the assessee's letter dated April 15, 1986, addressed to Station House Officer, Kotwali Chandni Chowk, Delhi, on the back of which it was written that case FIR No. 147, dated February 1, 1981, under Section 457/381 has been sent as untraced on April 5, 1982, in the Court of Shri Raghubir Singh, Metropolitan Magistrate, Tis Hazari Court, Delhi. The Assessing Officer declined to allow the claim of the assessee again on two grounds. One is due to lack of satisfactory evidence about (1) the availability of the jewellery and (2) the basis of valuation on the date of theft and on the ground that the claim was premature in the year under appeal.

3. The assessee appealed to the Commissioner of Income-tax (Appeals) and filed written submissions dated March 8, 1990 (paper book pages 1 to 7). It was claimed that, since the assessee had furnished a report from the police department that the FIR had been held as untraced, the assessee was entitled to deduction in the year of the theft. Reliance was placed on various authorities in support of the claim that the loss incurred by the assessee in the course of carrying on of business is permissible as a deduction. The Commissioner of Income-tax (Appeals) rejected the claim of the assessee by agreeing with the Assessing Officer on both counts, i.e., the assessee had not established by satisfactory evidence the availability of jewellery on the date of the theft nor had any reasonable basis been furnished for valuation of the jewellery. The second ground for which the loss was held to be not allowable was that the loss could not be held to relate to the year under appeal. The Commissioner of Income-tax (Appeals) further held that if at all the loss could be said to have matured, it would be only after April 5, 1982, and not on February 1, 1981.

4. It was pleaded before us that the assessee had suffered the loss in the year under appeal due to the theft that occurred on February 1, 1981. Giving the background of the theft, learned counsel for the assessee pointed out that, on February 1, 1981, the partners of the firm saw the locks of the shops broken and accordingly the police were called and an inventory of stocks were also taken which indicated the gold ornaments weighing 22,440.400 gms valued at Rs. 36 lakhs missing from the shop. A report had been lodged with police authorities and details of loss provided on the basis of registers maintained under the Gold (Control) Act. It was claimed that the assessee had announced a reward of Rs. 25,000, for any person informing and helping in the recovery of the stolen property. It was, accordingly, pleaded that the loss claimed by the assessee was allowable as a deduction in the year of appeal and that the authorities were not justified in declining to allow the loss.

5. The learned Departmental Representative on the other hand, refuted the contentions raised on behalf of the assessee. It was contended that, apart from the FIR lodged with the police authorities, no evidence of any nature was filed before the Revenue authorities to establish the loss of jewellery by theft to the tune of Rs. 36 lakhs.

The basis for arriving at the value as Rs. 36 lakhs had also not been indicated. It was also not known as to whether the Gold Control authorities had been informed about the theft and as to what view was taken by the said authorities. Moreover, it was contended that, in the year 1986, the assessee had claimed that the loss of jewellery was still being investigated by the police authorities and as such it could not be held that the assessee had suffered a loss without any hope of recovery.

6. On a careful consideration of the rival contentions, I am of the view that the claim of loss made by the assessee is allowable, subject to the condition that the burden that rests upon the assessee to establish the loss is discharged. In this case, the only evidence that has been filed before the Revenue authorities is the FIR lodged by the assessee on February 1, 1981. In the original assessment proceedings, the assessee had claimed that the police were still investigating the theft. This is indicated in the assessment order dated November 5, 1985.

Thereafter, the assessee filed written submissions before the Commissioner of Income-tax (Appeals) and apart from the First Information Report lodged with the police authorities, the assessee did not point out to any other evidence in order to support the claim of the loss. Though before the Commissioner of Income-tax (Appeals), in the first round it was assured by the assessee that sufficient evidence would be produced before the Assessing Officer to establish the loss, no such evidence was produced during the course of fresh assessment proceedings except a copy of the report from the police station that as on April 5, 1982, the report sent to the Metropolitan Magistrate, Tis Hazari Court, was that the theft was untraced.

7. The contentions raised before us for the first time that an inventory of the stocks was taken in the presence of police authorities and the customs authorities were informed about the details of the theft has remained a mere contention unsupported by any evidence. A perusal of the assessment orders and the orders of the first appellate authority in two rounds as well as the written submissions before the Commissioner of Income-tax (Appeals) placed at pages (1 to 7) of the paper book, clearly indicates that the contentions regarding the preparation of inventory and information furnished to the customs authorities and verification by them have been raised for the first time before us. The contentions raised cannot be accepted blindly unless supported by evidence. We are bound to decide the issue on the basis of material on record. The Revenue cannot be held to be at fault in not allowing the claim of loss when the same is not supported by sufficient evidence. Mere first information report of the police authorities is not sufficient for allowance of deduction of Rs. 36 lakhs from the assessable income of the assessee. The assessee has lodged a complaint with the police authorities stating that there was a theft on February 1, 1981. In the first round before the Assessing Officer, the assessee had claimed that the matter was still under investigation (date of order Nov. 1985). Though on April 5, 1982, the police had reported the matter as untraced, there is evidence on record to suggest that the matter was being investigated even after that date.

There is a letter dated May 22, 1981, at page 28 of the paper book from the Zonal Commissioner's Office, Seti None, Nepal, informing the assessee that the person

suspected of the said burglary, Mr. Dana Adhikari, was in their custody. The assessee was asked to present along with documents and evidence in support of the claim of the burglary.

Neither before the lower authorities nor before us, the assessee has indicated the results of the arrest of Mr. Dana Adhikari, the main accused in the theft. What evidence was produced by the assessee before the Zonal Commissioner of Nepal to establish the loss and what was the result is unknown to the Revenue authorities as well as to us. The best evidence to establish the loss on account of theft is supposed to be with the assessee and the assessee is under an obligation to produce the same before the authorities. In this case, the accused had been arrested in Nepal and the assessee had been asked to furnish the documents and evidence and be present for further proceedings. Without knowing the results of such proceedings and without there being sufficient evidence on record to establish the loss, the Revenue authorities would be justified in declining the claim of the assessee.

The assessee has claimed that the Customs authorities had verified the loss as also the police authorities. It is found from the First Information Report lodged at the first instance that the weight and the amount of ornaments lost had not at all been indicated in the First Information Report. This does not lend credence to the contention on behalf of the assessee that the shop was opened in the presence of police authorities, inventory taken and the First Information Report lodged. Copy of a hue and cry announcement is filed before us, which is undated and unsigned. I. It is not known as to when the assessee furnished the details of the jewellery to the police authorities and the customs authorities. II, Whether the assessee was able to recover the jewellery or not as a consequence of the arrest of the main accused is also very relevant to be taken into consideration in deciding the issue of admissibility of the loss, I am, therefore, of the firm view that the claim of the loss cannot be allowed on the basis of evidence on record. However, in order to be fair to the assessee in the background of the Revenue authorities declining to consider the claim of the assessee in the year under appeal on the ground of it being related to the subsequent assessment year, the matter deserves to be set aside to the file of the Assessing Officer for deciding the issue afresh in

accordance with law on the basis of the evidence that the assessee may choose to furnish in order to support the claim of the loss.

8. I agree with the finding of my learned brother regarding the quantification of loss. The assessee, on establishing that they have in fact suffered a loss due to burglary on February 1, 1981, without any recovery, would be entitled to deduction to the tune of purchase value of the goods so lost and not at Rs. 36 lakhs which seems to be the market value of the goods on the date of the alleged theft.

1. The Members could not agree on one of the issues ; accordingly, the point of difference raised in the shape of a question is being referred for the opinion of the Hon'ble Third Member.

"1. Whether, on the facts and in the circumstances of the case, the assessee could be said to have discharged a burden that lay upon it in regard to loss of jewellery by burglary

2. Whether, on the facts and in the circumstances of the case, the claim of loss of jewellery by burglary could be held as established on the basis of evidence adduced by the assessee or something more is required to establish the loss of jewellery ?"

1. In this appeal filed by the assessee, Messrs. Shri Ram Hari Ram, a firm, carrying on business at Delhi in the purchase and sale of jewellery a difference of opinion had arisen between the Members who heard this appeal as to : "1. Whether, on the facts and in the circumstances of the case, the assessee could be said to have discharged a burden that lay upon it in regard to loss of jewellery by burglary

2. Whether, on the facts and in the circumstances of the case, the claim of loss of jewellery by burglary could be held as established on the basis of evidence adduced by the assessee or something more is required to establish the loss of jewellery ?"

2. I would like to refer to the brief history of the case that gave rise to the above difference of opinion. The assessee filed a return on November 7, 1984, declaring

a loss of Rs. 23,58,090, which included inter alia, a claim for the deduction of a sum of Rs. 36 lakhs on account of loss of jewellery in a theft committed at the business premises of the assessee. The Assessing Officer, who made the assessment originally on November 5, 1985, disallowed this loss with the following observations : " Huge losses shown in the statement of income is due to big theft committed at the business premises of the assessee on February 1, 1981, in which gold ornaments weighing 22,440.400 gms valuing Rs. 36 lakhs were stolen. The theft has been claimed as loss in the statement of income resulting in net loss in the return at figures mentioned above. The assessee has also filed a copy of the First Information Report under Section 154, Criminal Procedure Code, lodged with Delhi Kotwali, Chandni Chowk, Delhi, vide form No. 245 (1), Book No. 142, dated February 1, 1981, along with list of ornaments with weight stolen. The police is stated to be still investigating the theft. In the letter dated October 20, 1985, it has been stated that shop and goods were not insured. In these circumstances, it is premature to allow loss on account of theft as the police is still investigating the case."

3. With these observations, the Assessing Officer disallowed the claim.

Being aggrieved, the assessee filed an appeal before the Commissioner (Appeals).

4. The Commissioner (Appeals) disposed of this ground in a very short and laconic order mentioning : "The appellant also wishes to file further evidence in regard to the loss claimed at Rs. 36,00,000 for this assessment year. Such evidence was not available with the appellant earlier and had not been filed before the Income-tax Officer. Therefore, the assessment as made is being set aside to be made afresh." 5. In the fresh assessment made by the Assessing Officer, the assessee filed by way of further evidence a letter dated April 15, 1986, addressed to the Station House Officer, Chandni Chowk, Delhi, on the back of which it was written that the case has been sent to the court of Shri Raghbir Singh, Metropolitan Magistrate, Tis Hazari Court, Delhi, on April 5, 1982, stating that the matter was untraced. This reply the assessee obtained in response to the letter it wrote to the Station House Officer, Kotwali, Chandni Chowk, Delhi, on April 15, 1986,

requesting for the issuance of a conclusion report of the investigation of the theft that took place on February 1, 1981. The Assessing Officer disallowed the claim again observing : (a) that no satisfactory evidence was produced about the availability of the jewellery on the date of theft ; (b) Assuming but without admitting that the theft took place, the police report being dated April 5, 1982, that date would not fall for consideration in the accounting year relevant for the assessment year 1982-83 ; (c) The investigation was still pending even after the close of the accounting year and, therefore, the theft could not be said to have taken place ; and lastly (d) The basis and the method of the valuation of jewellery at Rs. 36 lakhs was not furnished.

6. Against this order, the assessee filed a further appeal before the Commissioner (Appeals) and relied upon the same evidence and sought to support the claim by placing reliance upon a number of decisions given by the various High Courts and the Supreme Court as to the circumstances under which the loss by theft could be allowed as a deduction. Distinguishing those cases, the Commissioner (Appeals) agreed with the view expressed by the Assessing Officer that the loss was not allowable. In particular, he held that the loss as claimed could not be said to have matured until April 5, 1982, because there was every possibility of the recovery of the stolen goods. He held that the goods were not insured but without expressing any opinion as to what would have happened if the goods were insured and what would be the punishment (sic) for the goods if not insured. Lastly he held : "In any case, I find force in the Assessing Officer's conclusion that, if at all, the loss could be said to have matured and final, it will be held to be after April 5, 1982, and not on February 1, 1981, Accordingly, the appeal on this ground is dismissed." 7. Against dismissal of this ground, the assessee preferred a further appeal before the Tribunal.

8. After hearing the parties, the Bench could not agree on the conclusions and they formed their difference of opinion as mentioned above.

9. Now, going through the order of the learned Accountant Member who wrote the leading order, with which the learned Judicial Member disagreed, I find the following findings ; (a) The assessee was found to have maintained accounts in a

regular way during the course of its business and in particular maintained such registers as are prescribed under the Gold (Control) Act, namely, G.S.-11 and G.S.-12 registers. These registers were found to be regularly checked by the concerned authorities and there were no mistakes whatever pointed out in the entries made therein.

(b) When the intimation regarding the shutter of the shop being found partly opened was received, the police authorities were informed. By taking an inventory of various stocks that were lying in the shop and comparing that inventory with the registers G.S.-11 and G.S.-12, the assessee found out the missing items, listed them and furnished the list to the police authorities for investigation and for recovery. That list contained jewellery aggregating to 22,440.400 gms, and this list was provided to the police authorities subsequently. Simultaneously, entries were made in G.S.-11 and G.S.-12 registers as stolen and intimation of this theft was given to the concerned Gold Control authorities. The assessee placed the value of the stolen jewellery at Rs. 36 lakhs. It announced a reward of Rs. 25,000 for the recovery of the stolen jewellery.

10. On the basis of these facts, the learned Accountant Member came to the view that, in the absence of any mistakes or flaws found in the maintenance of G.S.-11 and G.S.-12 registers, or any mistake found in the purchases and sales of jewellery, it could not be said that there was no basis for the claim made by the assessee and that the availability of the jewellery was not shown or proved. He reiterated that, when G.S.-11 and G.S.-12 registers were properly maintained incorporating therein the entries regarding the theft of jewellery and since no adverse comment was made by the concerned Gold Control authorities and since the assessee filed the FIR with the police on the very date of the theft though he furnished the list of articles later, it must be said that the assessee had established the loss of jewellery by theft. But since the assessee had not been able to prove the value of the jewellery at Rs. 36 lakhs, he directed that that loss would have to be valued at purchase price and, for that purpose, he remitted the case to the Assessing Officer to find out the purchase price of the items stolen and allow that amount as a loss. As regards the time at which the loss could be claimed, whether in this accounting year or subsequently, in other words, whether it could be said

that the loss had crystallised in the year of account or not, he came to the conclusion, following the decision of the Supreme Court in the case of CIT v. Nainital Bank Ltd. [1965] 55 ITR 707, that the loss occurred to the assessee in the year of account itself and that the loss should be allowed to it at cost price.

11. But, the learned Judicial Member disagreed with this view. The learned Judicial Member felt that the burden that rested upon the assessee to establish that the loss had taken place was not discharged.

According to him the only evidence was that of the FIR lodged with the police on February 1, 1981, and that was not sufficient to prove the loss. Though the assessee had stated before the Commissioner (Appeals) in the first round that it would adduce sufficient evidence to prove the loss but when the assessment was set aside, the assessee did not produce any evidence before the Assessing Officer to establish the loss other than the report that the police had closed the case on April 5, 1982. It appears that, during the course of hearing before the Bench, two contentions were raised for the first time, namely, that the inventory of the stocks was taken out in the presence of the police authorities and that the Customs authorities were informed about the details of the theft but no evidence was adduced to support these contentions. According to him, a perusal of the assessment order and the orders of the first appellate authorities in both the rounds clearly indicated that these contentions were never taken up before them. According to him, apart from the insufficiency of the FIR for the allowance of the deduction of Rs. 36 lakhs as business loss, though on April 5, 1982, the police had reported the matter as untraced, there was evidence on record that investigation was still in progress. There was a letter dated May 22, 1981, written by the Zonal Commissioner's Office, Seti None, Nepal, informing the assessee that the person suspected of the said burglary, Mr. Dana Adhikari, was in their custody and requesting the assessee to present before them along with documents and evidence in support of the claim of the burglary and that the assessee had not indicated at any point of time the result of the arrest of Mr. Dana Adhikari. The assessee did not produce the best evidence available with it to establish the loss by theft and the obligation that lay upon it was not discharged. According to him, the result of the proceedings before the Nepal authorities was very relevant to

consider whether the loss was established or not. There was a hue and cry announcement made in the papers. Though it gave all the details, it was undated and unsigned. Therefore, it could not be taken as having established the loss by theft. Therefore, the evidence on the record was not sufficient to allow the loss. However, he observed : "In order to be fair to the assessee in the background of the Revenue authorities declining to consider the claim of the assessee in the year under appeal on the ground of its being related to the subsequent assessment year, the matter deserves to be set aside to the file of the Assessing Officer for deciding the issue afresh in accordance with law on the basis of the evidence that the assessee may choose to furnish in order to support the claim of the loss." 11. He, however, agreed with the view expressed by the learned Accountant Member that, if at all the loss was to be allowed, it would only be at cost price. Having thus differed, the learned Members formulated their difference of opinion as extracted above.

12. I am of the opinion, after going carefully through the records and after considering the arguments addressed to me both on behalf of the assessee and on behalf of the Department and after perusing the orders of my learned Brothers, that the assessee could be said, on the facts and in the circumstances of this case, to have discharged the burden that lay upon it in regard to the loss of jewellery by burglary and that the claim of loss of jewellery by burglary could be said to have been established on the basis of the evidence adduced by the assessee and no more is required to establish the loss of jewellery.

13. It is no doubt true that, when an assessee puts up a claim for the allowance of a deduction in computing its income, the burden rests upon him to establish the claim to the satisfaction of the Assessing Officer. In this case, the claim put up by the assessee was that there was a loss of Rs. 36 lakhs by way of theft of its stock-in-trade. There is no doubt that the loss of stock-in-trade by way of theft or fire or destruction is a revenue loss allowable as a deduction in computing the income. There used to be some controversy as to whether loss by theft either of stock-in-trade or money could be allowed as a deduction in computing the income. But, now that controversy was settled by a series of decisions of the Supreme Court, the first major decision was that in the case of CIT v. Nainital Bank Ltd, [1965] 55

ITR 707, to which reference also was made by the learned Accountant Member. Thereafter, several High Courts have followed the dictum laid down by the Supreme Court and were holding that loss by theft was allowable as a deduction in computing the income. There was also another decision in Ramchandar Shivnarayan v. CIT [1978] 111 ITR 263 (SC). There again, the Supreme Court reiterated its earlier decisions and tried to reconcile the varying opinions expressed in the meantime.

14. Now, in this case, the controversy that arose between the Members, by way of difference of opinion which was referred to me was not as to when the loss has taken place, i.e., in which assessment year the loss was to be allowed as a deduction but whether in fact the loss by theft had occurred and was established by the assessee by adducing the necessary evidence and whether the burden that lay upon it was discharged, i.e., to say that the difference of opinion was about the sufficiency of the evidence adduced by the assessee and as to whether the degree of proof produced was enough to discharge the burden that rested upon the assessee.

15. According to the learned Judicial Member, the FIR lodged with the police on February 1, 1981, was not sufficient to prove the loss. He was further of the opinion that though the Commissioner (Appeals) in the first round of appeal, set aside the assessment to provide an opportunity to the assessee to adduce further evidence to prove the loss, no such further evidence was produced and that the evidence produced by way of a conclusion report of the police that the case was closed on April 5, 1982, as untraceable was again not sufficient to prove the factum of loss. He laid great stress upon the fact that the assessee had contended before the Tribunal for the first time that the inventory of the stocks was taken in the presence of the police authorities and that the Customs authorities were informed about the details of the theft but no evidence was adduced in support of these contentions. Another factor that weighed with the learned Judicial Member was that, even after the police had reported that the case was untraceable on April 5, 1982, there was evidence to show that the investigation was still in progress. In this context, he referred to the letter dated May 22, 1981, written by the Zonal Commissioner, Nepal, informing the assessee that the person suspected of the

said burglary was in their custody and that the assessee had done nothing to identify that person and the result of that enquiry was not disclosed and that the result of that enquiry was very relevant to consider whether the loss was established or not. The hue and cry announcement made in the papers was considered by him again as insufficient because it was neither dated nor signed.

16. In my opinion, it cannot be said that the FIR lodged with the police was not sufficient to prove the loss. In all cases of loss, the first thing that the owner of the articles lost was required to do under the law is to report it to the police to enable the police to initiate investigation and recover the lost articles by taking such action as is open to the police. If the police is unable to trace the culprit and recover the articles, it cannot be said that the lodgement of the FIR was not sufficient to prove the loss. If no FIR was lodged, it can be said that the assessee was making a false claim because no person who had lost such a huge sum of Rs. 36 lakhs, would not have kept quiet without lodging a police complaint, that too a businessman.

It is not the case of the Revenue at any point of time that the complaint lodged with the police was false nor had the police stated in their report that the FIR was false. From the inability of the police to trace the lost article or to apprehend the culprit it could not be said that the FIR was false. Unless the FIR was false, it could not be said that the loss had not taken place. The first and the last thing that the owner of a lost article can do or should do is to lodge the FIR with the police and that is prima facie evidence if not conclusive also to show that the theft had taken place. In this case, the police had initiated investigations and come to the conclusion that the case was untraceable and closed it. In addition to that, the Zonal Commissioner, Nepal, also wrote to the assessee that a suspected person was in their custody and required the assessee to appear before them with the necessary evidence, which shows that had it not been for the fact that a theft had taken place, the Zonal Commissioner, Nepal, would not have said that a suspected person was in their custody. This throws ample light and also establishes the fact that there was a theft and the report to the police was not false.

17. Section 154 of the Criminal Procedure Code provided for information to be given to the police in all cognizable cases. The section provided: "154. Information

in cognizable cases.--(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under Sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-section (1) may send the substance of such information, in writing and by post, to the superintendent of police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this code, and such officer shall have all the powers of an officer in charge of the police station in relation to that office." 18. The object of the provision of Section 154 is to obtain early information of the alleged criminal activity to record the circumstances before there is time for them to be forgotten or embellished. To give information under Section 154 of the Criminal Procedure Code is one of the modes by which a person aggrieved may set the criminal law in motion and this is usually known as the FIR. This information, when recorded, is the basis of the case set up for investigation by the informant. The information given under Section 154 makes available to the judicial officers the materials on which the investigation is commenced. It is a safeguard against embellishment or forgetfulness. The Supreme Court observed in *Hasib v. State of Bihar*, AIR 1972 SC 283 that the principal object of the FIR from the informant's stand point is to set the criminal law in motion and from the view point of the investigation authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party.

Therefore, it cannot be said that the FIR lodged with the police did not establish (sic).

19. Section 155 of the Criminal Procedure Code provided for information to be recorded in the case of non-cognizable cases also, the difference being that in the case of non-cognizable cases, the investigation shall start on the order issued by the Magistrate having power to try such cases or commit the case for trial. Section 156 of the Criminal Procedure Code enabled the police officer to investigate cognizable cases without the order of the Magistrate. Section 157 of the Criminal Procedure Code provided the procedure for investigation. It laid down : "157. Procedure for investigation.--(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender: (a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot ; (b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in Clauses (a) and (b) of the proviso to Sub-section (1), the officer-in-charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub-section and in the case mentioned in Clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated." 20. This shows that the Police Officer had to send a report to the Magistrate empowered to take cognizance of such offence and then proceed with

the enquiry either by himself or by deputing one of his subordinate officers. That means that the Police Officer had to send the report to the Magistrate also and the closing of the case can also be with the knowledge of the Magistrate and that the Magistrate having jurisdiction to try the case was informed that the matter was untraceable, showed that the police made investigations and then came to the conclusion that the case was untraceable. It was open to the police to say that no theft had taken place, if the report was false.

The police had not said that. Therefore, it is, in my opinion, not very correct to ignore the FIR and then come to the conclusion that it is not sufficient to establish the theft. Another safeguard provided in this respect is the provisions made in Section 158 of the Criminal Procedure Code which states that every report sent to a Magistrate under Section 157, which I have just referred to, shall be submitted through such superior officer of the police as the State Government by general or special order, appoints. The superior officer is enabled to give instructions to the officer in charge of the police station and it is only after recording such instructions and such report that the superior police officer can transmit the same without delay to the Magistrate. When the police concluded the case on April 5, 1982 stating that it is untraceable, it only means that the report had undergone all those processes as laid down in the Criminal Procedure Code, and such being the case, it cannot be said that the FIR did not establish that the theft had taken place on February 1, 1981.

21. Secondly, the initial and internal evidence is provided by the correctness of the maintenance of G.S.-11 and G.S.-12 registers. As I have mentioned earlier, these registers are prescribed under the Gold (Control) Act and are, therefore, statutory registers. These registers are regularly maintained. So was the finding given by the learned Accountant Member on which the learned Judicial Member did not express any differing opinion. These registers contained the entries made with regard to the loss by theft of 22,440.400 gms. of gold. The immediate authority vitally concerned with the movement of gold was no other than the Gold Control authorities. Those authorities were convinced and were satisfied with the entries made in these G.S.-11 and G.S.-12 registers disclosing the loss of such a huge quantity of gold and they did not find any fault nor did they say or raise any

objection that the loss had not taken place. When the Gold Control authorities who exercise a day-to-day control, as it were on the movement of gold, were convinced that the loss had taken place, that was in my opinion more than a strong proof and evidence that a theft had taken place and, in that theft, so much of gold was lost. We are not to go by the results of investigations or the dates of the report to come to the conclusion as to whether a theft had taken place or not and in that theft the jewellery was lost or not. For the quantum of loss of jewellery in the theft, the lodgement of the FIR, may not be conclusive but the conclusive proof of quantum is provided by the entries made in the G.S.-11 and G.S.-12 registers, which were accepted as correct by the Gold Control authorities. The learned Accountant Member mentioned in his opinion that these registers were frequently checked by the Gold Control authorities. The learned Judicial Member did not find anything to the contrary on this point. Therefore, when these registers were continuously and constantly checked by the Gold Control authorities and such registers contained the entries made for the loss of jewellery by theft, no other evidence can be more conclusive than this to prove the loss of jewellery to the assessee.

22. Now, the question comes as to the quantity as well as its value. As regards the quantity, the only way to arrive at the quantity was to compare the stocks available in the shop after theft by taking physical verification and compare that quantity with the quantity mentioned in G.S.-11 and G.S.-12 registers- There is no other way to find out the quantity lost in the theft. These G.S.-11 and G.S.-12 registers served the purpose of not only meeting the requirement of the statute but also the purpose of a stock register. Thus when the quantity available on physical verification in the shop on February 1, 1981, was compared with the stock particulars already recorded in the stock register, namely, G.S.-11 and G.S.-12 registers, the difference represented the stock lost by theft. The Departmental authorities have not pointed out any mistake in the ascertainment of the quantity lost by this process.

They should have verified as to the correctness of the quantity lost by theft, which they have not done.

23. The Assessing Officer as well as the Commissioner (Appeals) have repeatedly said that the assessee was not able to show the availability of the jewellery by theft and, therefore, the loss could not be taken to have been established. The learned Judicial Member also lent support to this view. But, in my opinion, this ground is not available to the Department for the simple reason that, when the stocks available with the assessee were disclosed by G.S.-11 and G.S.-12 registers and only the difference between the stocks disclosed by those registers and the stocks found on physical inventory taken on February 1, 1981, that the quantity of goods was arrived at, it cannot any more be said that the assessee was unable to show the availability of the jewellery with it on the date of the theft. If this averment of the Department is taken as correct, it would mean that G.S.-11 and G.S.-12 registers were not correct and that they showed a false picture. First, the Department had not verified G.S.-11 and G.S.-12 registers as to the availability of the stocks on that date but recorded a finding on mere guess work, which is purely untenable. Secondly, there was no dispute on this point at any stage before the Tribunal. Both the learned Members have expressed their agreement as seen from their orders, on the correctness of the entries made in G.S.-11 and G.S.-12 registers. If a verification had been made of the stocks shown in G.S.-11 and G.S.-12 registers, then a conclusion can be arrived at one way or the other about the availability of the stocks on the date of theft and the quantity of the loss of jewellery by theft. Without undertaking this exercise, simply to record that the stocks were not available on this date is, in my opinion, an unverified and unwarranted remark. The acceptance of the entries made in these registers by the Gold Control authorities amply prove not only the availability of the stocks with the assessee on the date of the theft but also the fact of theft and loss of articles. This was followed by the assessee by giving a hue and cry announcement in the papers giving the list of jewellery lost. Even at this point of time, the Gold Control authorities would have come to know about the loss of huge quantity of gold ornaments, interrogated the assessee as to the loss of the goods from the stocks, if they had not placed reliance upon G.S.-11 and G.S.-12 registers. This not having been done, the hue and cry announcement made in the papers should also be taken as lending support to the claim of the assessee that it had lost goods on theft of the quantity shown in the announcement. No one so far has come forward

claiming that the advertisement was false. There was also a reward announced, which nobody claimed. This, in my opinion, would show that all that was to be done by the assessee to recover the stolen goods was done. If the police was unable to do anything in the matter, the assessee cannot be blamed.

24. The learned Judicial Member had held that the assessee raised two contentions for the first time which were unsubstantiated. It may be true that an inventory of the stocks was not taken in the presence of the police authorities but the fact that an inventory was taken and sent to the police was an undeniable fact irrespective of the time when it was taken. The inventory was furnished to the police authorities.

This was accepted by the Assessing Officer also. It may not be at the time when the FIR was lodged but a little later. The police made investigations with the help and on the basis of the inventory given.

Nothing would, therefore, turn upon the time when the inventory was taken and was furnished to the police, with the help of which the police initiated investigations. The Customs authorities were informed because the entries made in G.S.-11 and G.S.-12 registers were meant only for them and they have, at a later point of time, verified them and accepted them to be correct. Therefore, these two points, in my opinion, cannot be held against the assessee.

25. The learned Judicial Member felt that, since investigation was on, the assessee could not be said to have established the loss. The very fact that investigations were on and still in progress show that there was something to be investigated into. That itself is sufficient to show that there was a theft which the police was investigating.

Therefore, the fact that investigation was on shows that there was a theft. Secondly, the police concluded their investigations on April 5, 1982, i.e., nearly one year after the Zonal Commissioner, Nepal, had written to the assessee that a suspected person was in their custody and requesting the assessee to be present before them with documents.

This letter was on May 22, 1981. The police must have taken into consideration this letter also before they concluded their investigations on April 5, 1982. It cannot, therefore, be said that the investigation was still in progress. The very fact that even after the letter of the Zonal Commissioner, Nepal, dated May 22, 1981, the police closed the case on April 5, 1982, shows that nothing turned upon that letter and still the case was untraceable. These circumstances, in my opinion, proved conclusively that the assessee had lost its jewellery by theft, that a theft had taken place and that the evidence brought on record sufficiently establishes that a theft had taken place and no more is, in my opinion, required to establish the loss of jewellery.

26. As regards the value, the learned Members have, in my opinion, correctly come to the conclusion that it has to be with reference to the cost price and that it has to be ascertained. In any case, I am not called upon to express my view thereon, nor am I called upon as mentioned in the beginning of this opinion, as to the point of time at which the loss was to be allowed to the assessee as a deduction.

Although in a way the law on this question is settled that the loss must be allowed on the date when the assessee incurred the loss irrespective of the results of the investigations which might take several years to be completed and any recovery of the articles, the value thereof can always be brought to tax under Section 41 of the Income-tax Act.

27. For these reasons, I express my opinion in agreement with the view expressed by the learned Accountant Member.

28. The matter will now go before the regular Bench for decision according to the opinion of the majority.

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