

IN THE INCOME TAX APPELLATE TRIBUNAL

"B" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA no.5269/Mum./2012
(Assessment Year: 2007-08)

Bhavyesh P. Shah

C/o. Kalyaniwalla & Mistry, Army & Navy

Bldg. 3rd Floor, 148 M.G. Rd. Fort

Mumbai 400001

PAN AABPS6308N

..... Appellant

v/s

ACIT CIT12(1)

Aayakar Bhavan ,

Mumbai 400020

..... Respondent

Assessee by : Shri. Nitesh Joshi

Revenue by : Shri. Kailash Kanojiya

Date of Hearing -04.05.2017

Date of Order- 01.06.2017

ORDER

PER: SHAMIM YAHYA

This appeal by the assessee is directed against order of Ld. CIT-A dated 22.12.2011 and pertains to assessment year 2007-08.

2. The grounds of appeal read as under:

This Appeal is against the Order u/s.143(3) passed by the Commissioner of Income-tax (Appeals)-21, Mumbai and relates to Assessment Year 2007-2008.

1) *Both the lower authorities erred in not allowing set off of speculation loss brought forward from Assessment Year 2001-02 against the speculation profit of the current year.*

2) *Having regard to the facts and circumstances of the case and the provisions of law, the appellant submits that the Assessing Officer be directed to set off speculation loss brought forward from Assessment Year 2001-02 against the speculation profit of the current year.*

3) *Both the lower authorities erred in not carrying forward speculation loss for set off in future years - Rs.1,73,127/-.*

The Appellant craves leave to add to, alter or amend, the above Grounds of Appeal as and when advised.

3. At the outset we note that there is a delay of 141 days in filing the appeal.

4. For the condonation of delay of 141 days, assessee has submitted an affidavit wherein it has been prayed that the delay was on account of wrong advice of the consultant who was of the opinion that since learned CIT(A) has relied upon Hon'ble Supreme Court decision, there was no purpose of filing appeal against the same. He was subsequently advised that in view of the Special Bench decision, assessee has a good case and appeal should be filed. This resulted in a delay of 141 days which the assessee has prayed that it should be condoned.

5. Upon hearing both the Counsel and perusing the records, we condone the delay. Accordingly the delay is condoned.

6. In this case on the impugned issue A.O held under:-

It is seen from the computation that the assessee has shown loss of Rs.17312/- under the head profits and gains of business after setting off the speculation profit of A.Y.2007-08 of Rs.5,27,331/ - by the carry forward speculation loss of A.Y.2001-02.

Section 73(4) of the I.T.Act, 1961, clearly states that "no loss shall be carry forward under this section for more than four assessment years immediately succeeding the assessment year for which the loss was first computed."

The above subsection came into force w.e.f. 01.04.2006. It is amply clear that speculation loss of A.Y. 2001-02 cannot be carried forward after A.Y 2005-06. Hence, the profit and gains from speculation business stands assessed at Rs.5,27,331/-.

As discussed in the above paragraphs, the speculation loss carried forward in A.Y.2008-09 is also reduced from Rs.1,73,127/- to Nil. Penalty proceedings u/s.271(1)(c) of the I.T. Act, 1961 for furnishing inaccurate particulars of income.

7. Upon assessee's appeal Ld. CIT-A held as under:-

I have considered the facts of the case. The appellant earned speculation loss in A.Y. 2001-02. Such speculative loss of Rs.1,73,127/- for A.Y. 2001-02 had been adjusted by the appellant against the speculation profit of the year of Rs.5,27,331/-. Section-73 of the Income Tax Act deals with loss in speculation business. As per sub-section (4), no loss shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed. By Finance Act 2005 w.e.f. 1.04.2006, this condition of eight years had been reduced to four years. As explained above, the speculation loss was earned by appellant in A.Y. 2001-02. In A.Y. 2001-02 the condition of eight years was applicable. However, the assessment year under consideration is A.Y. 2007-08. In A.Y. 2007-08 the amended provisions i.e. condition of four years was applicable. In the facts and circumstances, the question for consideration as to whether the condition of eight years as applicable to A.Y. 2001-02 will be applicable in the year under consideration or the amended provision relating to four years will be applicable in this case.

In the case of Govinddas & Others 103 ITR 123, the Supreme Court held that:-

"Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provided or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new

obligation or impose a new liability otherwise than as regards matters of procedure".

The Hon'ble court further held that the retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment."

In the case of Reliance Jute Industries Ltd. vs. CIT reported in 121 ITR 921, judgement dated 10.10.1979. The Hon'ble Supreme Court held a under:-

"Loss - Carry forward and set off - Law applicable - Before amendment by Finance (No.2) Act, 1957, loss could be carried forward from year to year until completely absorbed but after the amendment, it could be carried forward only upto 8 years

- loss incurred in asst. Yr. 1950-51 could not be set off against income of asst. year 1960-61 as, unless otherwise provided expressly or by necessary implication, law to be applied is that in force in the relevant assessment year".

The above decision of Hon'ble Supreme Court in the case of Reliance Jute and Industries had been referred and applied by various Court in various cases. However, as per search in CTR-CD, in no case the decision of Supreme Court in Reliance Jute and Industries has been distinguished not applied. In the facts

and circumstances, the law laid down by the Supreme Court in Reliance Jute Industries Ltd. still hold goods as of date.

By following the decision of Hon'ble Supreme Court in the case of Reliance Jute & Industries Ltd. it is held that the AO was justified in applying the amended provisions of section 73(4) of the Act and disallowing appellant's claim of carried forward of speculation loss of A.Y.2001-02 against the speculation profit of the year under consideration. This ground of appeal is therefore, dismissed.

8. Against above order is in appeal before us. We have heard both the counsel and perused the records.

9. Learned Counsel of the assessee submitted that similar issue was considered by the Special Bench of the ITAT in the case of Kotak Mahindra Capital Co. Ltd., v/s. ACIT 18 ITR (Trib)213 Special Bench vide order dated August 10, 2012. The Special Bench has held as under:-

"The first and most elementary rule of construction is that it has' to be assumed that the words and phrases of a technical legislation should be used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning the phrases and sentences are to be construed according to the rules of grammar. It is well-settled that fiscal laws must be strictly construed, words must say what they mean, nothing should be presumed or implied.

Primarily the language employed is the determining factor of the intention of the Legislature. The intention of the Legislature must be found in the words used by the Legislature itself It is a well-settled rule of construction that, in the first instance, the grammatical sense of the words is to be adhered to and the elementary rule is that the words used in a section must be given their plain grammatical meaning.

The provisions of section 74(1) of the Income-tax Act, 1961, as substituted with effect from April 1, 2003 use the present tense which refers to long-term capital loss of the current year. Therefore the provisions of section 74(1) as substituted with effect from April 1, 2003 are not applicable to long-term capital loss relating to periods prior to assessment year 2003-04 and set-off (such loss is therefore governed by the provisions of section 74(1) as they stood prior to the amendment made by the Finance Act, 2002 with effect from April 1, 2003. The expression "and so on" used in clause (b) of section 74(1), existed prior to amendment with effect from April 1, 2003, is sufficient to clarify that if the long-term capital loss cannot be wholly set off against long term capital gains of the immediately succeeding year, it shall be carried forward to the year following such succeeding assessment year and shall be set off against income if any under the head "capital gains" assessable for that assessment year.

The plain language and grammatical construction used in the provisions of section 74(1) as amended with effect from April 1, 2003, makes it clear that the restriction imposed therein in terms of setting off long-term capital loss only against long-term capital gains and not against short-term capital gains is applicable only in relation to the long-term capital loss incurred by the assessee in the assessment year 2003-04 and subsequent years and is not applicable to the long-term capital loss relating to and brought forward from periods prior to the assessment year 2003-04 which shall be governed by the provisions of section 74(1) as they stood prior to amendment made with effect from April 1, 2003. The words used in the amended provisions of section 74(1) clearly indicate this position and it appears to be the intention of the Legislature which was that the provisions would deal with the carry forward and set-off of long-term capital loss relating to the assessment year 2003-04 and onwards.

The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed. The right which accrued to the assessee by virtue of section 74(1) as it stood prior to the amendment made with effect from April 1, 2003 has not been taken away either expressly by the provisions of

section 74(1) as amended with effect from April, 2003, or even by implication.

Held accordingly, allowing the appeal, that the assessee was entitled to claim set-off of brought forward long-term capital loss relating to the assessment year 2001-02 against short-term capital gains for: the assessment year 2003-04.”

10. Referring to the above, learned Counsel pleaded that in view of the above decision, the issue needs to be decided in favour of the assessee.

11. Per contra, learned DR relied upon the orders of the authorities below.

12. Upon careful consideration we note that both the decisions referred by learned CIT(A) have been considered by the Special Bench in the abovementioned case. Following the above precedent, we hold that assessee's claim of set off of speculation loss of A.Y.2001-02 against the speculation income of the year under consideration has to be allowed. As held by the Special Bench which followed the decision of Apex Court in the case of Govinddas & Others vs. ITO (supra), (a decision of larger Bench of the Apex Court comprising three of their lordships) that the golden rule of construction is that in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a

claim in litigation at the time when the act was passed. Accordingly, respectfully following the precedent, we set aside the orders of the authorities below and decide the issue in favour of the assessee.

13. In the result, this appeal filed by the assessee stands allowed.

Order pronounced in the Open Court on 01.06.2017

**Sd/-
PAWAN SINGH
JUDICIAL MEMBER**

**Sd/-
SHAMIM YAHYA
ACCOUNTANT MEMBER**

MUMBAI, DATED: 01.06.2017

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

*Nishant Verma
Sr. Private Secretary*

By Order

(Dy./Asstt.Registrar)

ITAT, Mumbai