IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A.L. SAINI, AM

आयकरअपीलसं./**ITA No.303/SRT/2018**

(निर्धारणवर्ष / **Assessment Year: (2013-14)**

(Virtual Court Hearing)

Shri Pankaj Kishorchandra Desai 401, Vishal Society, Vidhya Vihar Society, Jamnagar, Surat-395001	**Vs.**	Principal Commissioner of Income-Tax-1, Aayakar Bhavan, Room No. 123, Majura Gate, Surat
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **ABGPD 9704 M**		
(Appellant)		**(Respondent)**

Assessee by : Shri Esmayeel O Saherwala, C.A

Respondent by : Shri H.P.Meena– CIT-DR

सुनवाईकीतारीख/ **Date of Hearing : 20/01/2022**

घोषणाकीतारीख/**Date of Pronouncement : 13/04/2022**

आदेश / **O R D E R**

PER DR. A. L. SAINI, ACCOUNTANT MEMBER

By way of this appeal, assessee has challenged the correctness of impugned order dated 26.03.2018, passed by the Learned Principal Commissioner of Income Tax ['PCIT' for short], under section 263 of the Income tax Act, 1961, on the following grounds:

"(1) Ld CIT-1 has erred in rejecting the claim of carry forward of long term capital loss of Rs.10,39,479/- of A.Y 2013-14 and along with previous years b/f loss of Rs.16,11,359/- of A.Y 2011-12 and 2012-13 due to misinterpretation of Section 74 r.w.s. 10(38).

(2) Ld. CIT-1 has erred in considering setting off carried forward capital loss against exempt income/tax free income especially those covered U/s.10.

(3) Ld. CIT-1 has failed to understand that Ld. DCIT has rightly and consciously allowed carried forward of losses in due course of scrutiny Asst. proceedings.

(4) Ld. CIT-1, has overlooked, the well accepted income computation custom and procedure and further failed to understand that all income tax recognized software do not set off carried forward capital loss against exempt income.

(5) The appellant prays to quash the order u/s 263 passed by the CIT-1,Surat by allowing legitimate claim of carry forward of losses."

2. Brief facts of the issue in dispute are stated as under. The assessee is an individual and derives income from house property, investment, future / options trading income, capital gains and income from other sources. The assessee filed his return of income for the year under consideration on 17.07.2013, declaring income of Rs.20,69,100/-. Subsequently scrutiny assessment for the year under consideration was finalized by assessing officer u/s 143(3), dated 04.03.2016 wherein assessee's return of income was accepted.

3.Later, Learned Principal Commissioner of Income Tax ['PCIT' for short], has exercised his jurisdiction under section 263 of the Income Tax Act, 1961. On verification of record, it was noticed by ld PCIT that assessee has claimed carry forward of long term capital loss of Rs.10,39,439/- of assessment year 2013-14 along with previous year brought forward loss of Rs.16,11,359/- relevant to assessment years 2011-12 and 2012-13, aggregating to Rs.26,50,798/-respectively. On verification of computation of income shows that assessee has also earned long term capital gain of Rs.35,49,832/-, on sale of units /shares of Kotak Bank, during the financial year 2012-13 relevant to assessment year 2013-14. The long term capital gain has however been claimed by the assessee as exempt u/s 10(38) of the Act. The ld PCIT observed that provision of section 74(1)(b) and 74(1)(c) of the Act clearly provide that loss relating to any long term capital asset shall be set off against income relating to any other long term capital asset, assessable for that assessment year and if the loss cannot be wholly so set off, then the amount of loss not so set off shall be carried forward to the following assessment year and so on. In view of the above provision, the brought forward and current long term capital loss aggregating to Rs.26,50,798/- was mandatorily required to be set off against the long term capital gain of Rs.35,49,832/- and in such event, the long term capital loss available for carry forward beyond assessment year 2013-14 would be nil. **Therefore, ld PCIT observed that claim of carry forward of long term capital loss of Rs.26,50,798/- was therefore, a wrong claim and the assessing officer had erred by allowing the said wrong claim.** This resulted into excess carry forward of long term capital loss to the extent of Rs.26,50,798/-. In view of the above facts, the assessment order u/s 143(3) dated 04.03.2016 passed in assessee's case for the year under consideration was considered erroneous and prejudicial to the interest of the Revenue. Therefore, Ld. PCIT issued show cause notice dated 20.03.2018 to the assessee.

4. In response to the show cause notice, assessee furnished its reply dated 23.03.2018, which is reproduced below:

> *"With reference to your above mentioned notice calling me on 23/03/2018, I submit following explanation:*
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> *1.The interpretation of disallowing carry forward of loss on ground of not setting it off against exempt income is not at all tenable. It is well accepted law and practice that set off of past losses is not to be taken against exempt income/tax free income especially those covered u/s10. If a part of source is exempt by virtue of a particular "**provision**" for benefit of assessee, than it does not enter taxable portion of source. Provisions of Section 74(b) are applicable only against taxable portion of LTCG. It cannot be interpreted against spirit of law.*
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> *Even if we take a so-called twisted vide that set off loss is to be taken against exempt income, than why set off is not taken historically against other exempt incomes like interest from tax free bonds, dividend from shares etc., further in such case exempted loss would become eligible to be carried forward.*
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> *2. Please note that w.e.f. 01.10.2004, provisions of section 10(38), exempting LTCG from eligible shares and Mutual funds came into force. Before such amendment, LTCG was taxable at concessional rate. Hence the provisions of section 74 were applicable erstwhile accordingly.*
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> *3. Without prejudice to above, as the exempt income u/s 10(38) are not taxable anyway, proposed action of extinguishing carried forward losses against it for A.Y 2013-14 is not only irrational but also unjust and unconstitutional.*
>
> *4. Without prejudice to above, all income tax recognized pan india income tax e-filing software do not set off previous carried forward losses against exempt LTCG. **They are carried forward and set off against taxable LTCG only.***
>
> *Without prejudice to above, I would like to inform you that Ld.AO had rightly and consciously allowed carried forward losses in course of scrutiny assessment proceedings for A.Y. 2013-14 after making due inquiries and verifying previous carried forward losses. I am greatly disappointed by the initiative to disturb well settled law and procedures."*

5. However, the Ld. PCIT rejected the contention of the assessee and held that all the queries and contentions raised and put forward by the assessee in his submission dated 23/03/2018 are answered by the provisions of Section 74(1)(b)

and 74(1)(c) of the I.T. Act. Then after, ld PCIT explained the provisions of Section 74(1)(b) and 74(1)(c) of the Income Tax Act in his order and concluded that in view of these provisions under Section 74 of the Income Tax Act, the brought forward and current long term capital loss aggregating to Rs.26,50,798/- was mandatorily required to be set off against the long term capital gain of Rs.35,49,832/-, and in such event, the long term capital loss available for carry forward beyond assessment 2013-14 would be Nil. In view of the above, the claim of carry forward of long term capital loss by the assessee of Rs.26,50,798/- is a wrong claim and the AO has erred by allowing the claim. This has resulted in allowance of excess carry forward of long term capital loss to the extent of Rs.26,50,798/-. In view of the above facts, the assessment order u/s 143(3) dated 04.03.2016 passed in the case of assessee for AY 2013-14 is found to be erroneous and prejudicial to the interest of the Revenue. Therefore, ld PCIT directed the assessing officer to re-compute the total income of the assessee as per the provisions of law.

6. Aggrieved by the order of Ld. PCIT, the assessee is in appeal before us.

7. Before us, Shri Esmayeel Saherwala, Ld. Authorized Representative (AR) for the assessee submits that during the assessment stage, Assessing Officer issued notice u/s 142(1) dated 09.12.2015 and asked the assessee to furnish complete details in respect of immovable property and movable property purchased during the year along with purchase deeds. The Assessing Officer also asked the assessee to furnish the details of investment purchased and sold and also asked the assessee to furnish the shares purchased and sold during the year and to file DEMAT account, of the assessee, vide point No.9 of the show cause notice.

In response to show cause notice, assessee has submitted its reply, vide letter dated 15.01.2016, wherein the assessee has furnished the details as asked by the Assessing Officer in respect of exempt capital gains and investments in shares and securities and trading income in future/options. The Ld.AR further submits that assessee also furnished more details before the Assessing Officer, vide letter dated

02.01.2016 (paper book page-12) in respect of shares purchased and details of the DEMAT account for which assessee claimed exempted long term capital gain. The assessee, during the assessment stage, further submitted vide letter dated 25.01.2016, the contract note in respect of future/option trading. This way, Ld. AR submits that assessee has submitted the entire details and documentary evidences during the assessment proceedings and assessing officer examined these documentary evidences and that is why, the assessing officer took the view that against the exempted long term capital gain under section 10(38), no set off of carried forward long term capital loss of current year and previous years are available. Therefore, the order passed by AO is neither erroneous nor prejudicial to the interest of the Revenue.

8. On the other hand, Shri H.P.Meena, Ld. CIT-DR for the Revenue submitted that assessee is supposed to set off of the previous year`s carry forward long term capital loss and current year`s long term capital loss against the long term capital gain, since the assessee has not done such set off, therefore, ld PCIT has exercised his jurisdiction under section 263 of the Act. In addition to this, Ld. CIT-DR also relied on para no. 11 and 12 of the order of Ld. PCIT and stated that order passed by the ld PCIT under section 263 may be upheld.

9. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld PCIT and other materials brought on record. We note that solitary grievance of the assessee in this lis is that during the assessment year, the assessee earned long term capital gain to the tune of Rs.35,49,832/- which is exempted under section 10(38) of the Act, therefore, current year long term capital loss and previous year`s long term capital loss, amounting to Rs.26,50,798/- should not be set off against such exempted long term capital gain (LTCG) under section 10(38) of the Act.

We note that provisions of law as envisaged in section 74(1)(b) and 74(1)(c) of the Income Tax Act are clear and unambiguous leaving no scope for more than one interpretation. The provisions of section 74(1)(b) and 74(1)(c) of the I.T. Act clearly provide that loss relating to any long term capital asset shall be set off against income relating to any other long term capital asset, assessable for that assessment year and if the loss cannot be wholly so set off, then the amount of loss not so set off shall be carried forward to the following assessment year and so on. However, we note that current year`s long term capital gain earned by the assessee to the tune of Rs.35,49,832/- was exempt under section 10(38) of the Act. Therefore, the long term capital gain, which is exempted under section 10(38) of the Act, would not enter in the computation of total income of the assessee, therefore, assessee cannot set off its current year and previous year`s long term capital loss against such long term capital gain, which is exempted under section 10(38) of the Act, therefore, the stand taken by the ld PCIT is wrong.

10. Therefore, we are of the view that assessing officer, having examined the assessee`s claim has not allowed the assessee`s current year and previous year`s long term capital loss against such long term capital gain, which is exempted under section 10(38) of the Act. Hence, view taken by the assessing officer is sustainable in law. For that reliance can be placed on the judgment of the Hon'ble Apex Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the PCIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order.

Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*'' has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **"unless the view taken by the Assessing Officer is unsustainable in law".**

11.Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, we note that assessee is trading in shares and securities, which were exempted from tax under section 10(38) of the Act, therefore the capital gain exempted from tax, will not form part of total income and it is also not considered for set off of long term capital losses. Therefore, stand taken by the assessing officer that assessee should not utilize the exempt income to set off the losses, is correct. Since the exempt income does not form part of the total income, therefore, it should not be considered for set off losses and therefore, order passed by the assessing officer is neither erroneous nor prejudicial to the interest of revenue. Thus, based on this factual position, we quash the order passed by the ld PCIT.

12. In the result, the appeal of the assessee is allowed.

Order is pronounced on 13/04/2022 by placing the result on the Notice Board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Surat/दिनांक/ Date: 13/04/2022
Dkp Outsourcing Sr.P.S.

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// True Copy //

Assistant Registrar/Sr. PS/PS
ITAT, Surat