

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1581 OF 2022

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Pr. Commissioner of Income Tax-19 Mumbai ...Appellant
Versus
Avinash B. Jaising ...Respondent

Mr. Mamta Olme for the Appellant. _____

Mr. Devendra Jain a/w Saukhya Lakade i/b. Radha Halbe for Respondent.

CORAM: G. S. KULKARNI &
AARTI SATHE, JJ.

DATE: 28th NOVEMBER 2025

Oral Judgment (Per Aarti Sathe, J.) :-

1. This Appeal is filed by the Appellant/Revenue under section 260A of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) challenging the order dated 19th March 2020 passed by the Income Tax Appellate Tribunal (hereinafter referred to as “ITAT”) rejecting the Revenue’s Appeal, filed against an order dated 15th February 2019 passed by the Commissioner of Income Tax-10, Mumbai (hereinafter referred to as “CIT(A)”) for the block period 1st April 1989 to 16th November 1999. By such order, the ITAT rejected the Revenue’s Appeal and upheld the order of the CIT(A) considering that in the case of the father and the brother of the Respondent-Assessee i.e. Mr. Bansi Jairamdas Jaising and Mr. Ravi Jaising, on similar facts, the additions have been deleted by the CIT(A) and further those orders remained unchallenged by the Revenue. The assessment years in question is a block assessment period pertaining to 1st April 1989 to 16th November 1999.

2. By the present Appeal the Revenue has raised the following substantial questions of law:-

“a. Whether on the facts and in the circumstances of the case and in Law, the Hon'ble ITAT was correct in ignoring the fact that the assessee could not substantiate the transfer of funds from the bank statement or books of account which were seized as a computer back up during the course of search and is an afterthought ploy of the assessee to set off as LTCG?

b. Whether on the facts and in the circumstances of the case and in Law, the Hon'ble ITAT was correct in ignoring the fact that the assessee was unaware of the fact that he had sold the shares which has to be set off against the LTCG as he did not point out this fact to the conducting DDIT(Inv) in the statement recorded u/s 131 on 28/01/2000?”

3. Briefly the facts are as under:

i. The Respondent-Assessee is a Director of M/s. Jaisingh Maritime Ltd. and also the Proprietor of M/s. Arber Holdings. There was a search action under section 132 of the Act in the office and residential premises of the Respondent-Assessee on 16th November 1999. Pursuant to the search action, an assessment in the case of Respondent-Assessee was completed under section 158BC(c) of the Act for the block period 1st April 1989 to 16th November 1999 vide assessment order dated 29th January 2002.

ii. By the said assessment order dated 29th January 2002, the Assessing Officer (A.O.) did not allow the set off of Short Term Capital Loss (STCL) of Rs.5,18,74,499/- against the Long Term Capital Gain (LTCG) of Rs. 5,21,24,609/- on the ground that the STCL was not genuine and afterthought on the part of the Respondent-Assessee. The total income of the Respondent-Assessee for a block period 1st April 1989 to 16th November 1999 was assessed at a figure of Rs.5,43,22,000/- after making total addition on account of undisclosed LTCG and unexplained cash credit under section 68 of the Act.

iii. The Respondent-Assessee being aggrieved by the aforesaid assessment order filed an appeal before the CIT(A)s being Appeal No. CIT(A)V/JC.5(1)/75/2001-02 *inter-alia* contending that the A.O. had erred in not

allowing set off of STCL against the LTCG. In his appeal, the Respondent-Assessee also challenged other additions made by the assessment order dated 29th January 2002. The CIT(A) sustained the action of the A.O., confirming the additions made by the A.O. Being aggrieved by orders passed by the CIT(A) the Respondent-Assessee preferred an appeal before the ITAT. The ITAT by an order dated 31st July 2007 remanded the proceedings to the CIT(A) for fresh adjudication on the following grounds:-

- a) *Regarding the year taxability of LTCL on sales of shares of Rs. 5,21,24,609/-.*
- b) *Regarding taxability of STCL on sales of shares of M/s. Jaising Capital Pvt. Ltd. and M/s. Jaising Maritime Ltd. of Rs. 5,18,74,499/-.*
- c) *Addition under Section 68 unexplained cash deposit of Rs. 8,05,500/-*

Further being aggrieved by the order dated 31st July 2007 passed by the ITAT, the revenue preferred an appeal before this Court, which was dismissed on 3rd August 2009.

iv. In the present appeal, the question of law has been raised with regard to set off of STCL against the LTCG. In the remand proceedings before the CIT(A), none appeared on behalf of the Respondent-Assessee personally or through an authorized representative. The CIT(A) after giving sufficient opportunities, dismissed the Respondent-Assessee's appeal by an order dated 31st March 2017 (Appeal No. CIT (A)-10-ITAT/189/2014-15).

v. Being aggrieved by the *ex-parte* order passed by the CIT(A) dated 31st March 2017, the Respondent-Assessee once again preferred an appeal before the ITAT. The ITAT restored the matter again to the CIT(A) for fresh adjudication vide order dated 24th September 2018 in IT(SS) No.4/Mum/2018. While remanding the matter back to the CIT(A) by its order dated 24th September 2018, the ITAT held as follows in respect of the set off of STCL against LTCG in the

block period as claimed by the Respondent-Assessee. The relevant extract of the ITAT order dated 24th September 2018 is reproduced below:-

2. In this appeal, assessee is aggrieved by exparte order of CIT(A) passed without giving opportunity to the assessee. It was also brought to our notice by learned AR that the CIT (A) erred in not considering that, the Short Term capital Loss of Rs both the case of the Appellant's father - Shri Bansi J. Jaising and brother Mr. Ravi B 5.18.74.499/- is allowable to be set-off and were also considered as "ALLOWED in Jaising and being the Identical & common Facts in all the three cases, the similar view naturally last to be adopted, even on the ground of natural Justice.

3. Ground No. 5 was not pressed by Learned AR. The same is therefore dismissed in limini as not pressed.

4. We have considered rival contentions and carefully gone through the orders of the authorities below and found that AO has not allowed setting off of short term capital loss of Rs. 5.18.74.499/-, while arriving at net taxable income of the assessee.

5. Learned AR drawn our attention to the order passed by same CIT(A) in the case of father of the assessee Shri Bansi Jairamdas Jaising and brother Ravi B Jaising, wherein under identical facts, the issue was allowed by CIT(A).

6. Learned AR also invited our attention to the order of the Tribunal dated 31/07/2007 in the case of Shri Bansi Jairamdas Jaising and Ravi B. Jaising, wherein on similar facts, loss computed for assessment years was allowed to be set off against the profits if any of remaining previous years falling within the impugned Block Period.

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8. In para-2, CIT(A) observed that assessee is not interested in pursuing the appeal and that assessee has nothing to say on the additions / disallowance made by the AO. Thereafter, following the decision in the case of Multiplan India Pvt. Ltd., 30 ITD 320 and Estate of Late Tukojirao Holkar, 223 ITR 480, the appeal filed by the assessee was dismissed in limini as not maintainable.

9. Considering the fact that similar issue has been decided by CIT(A) in favour of the father and brother of the assessee as stated above, wherein identical facts were prevailing, therefore, in the interest of justice, we restore the appeal back to the file of the CIT(A) for deciding the appeal on merit after considering his own decisions in the case of father and brother of the assessee and also the order of the Tribunal dated 31/07/2007 as referred by learned AR. We direct accordingly."

vi. Post remand of the Respondent-Assessee's Appeal by the ITAT, the CIT(A) by an order dated 15th February 2019, partly allowed the Appeal filed by the Respondent-Assessee. While doing so, CIT(A) made reference to the orders passed on identical facts in the case of the father and the brother of the Respondent-Assessee i.e. Mr. Banshi Jairamdas Jaising and Mr. Ravi Jaising and allowed the set off of STCL to the Appellant while allowing the Appeal. The CIT(A) reproduced the relevant extracts of the order of his predecessor dated 31st March 2017 passed in the case of the father and the brother of the Respondent-Assessee i.e. Shri. Banshi Jairamdas Jaising and Shri. Ravi Jaising and the categorical findings regarding the shares transferred which resulted in STCL in the hands of the brother and father of Respondent-Assessee i.e. Mr. Banshi Jairamdas Jaising and Mr. Ravi Jaising and also LTCG against which a set off was claimed. Relevant extracts of the order are reproduced below:-

8. We have considered the issue of the date of transfer of shares the MoU as stated by the Revenue, was dated. The consideration for the transfer of shares was received by the assessee on through their bank accounts. So the question to be considered is whether the transfer of shares was closed on 6.3.1997 or 3.4.1997 and whether the date of MoU is to be considered for that purpose. or the date of receipt of money is to be considered. As rightly argued by the learned counsel appearing for the assessee, the share transfer forms will be of great help in dissolving the above dissolving the above dispute. A verification of the share transfer forms can show the exact date of transfer on which date the authorities have endorsed their signature and effected the transfer of shares. We find much force in the argument of the assessee that it was not in their control to produce the share transfer forms before the assessing authority as the forms have already been handed over to the member of Sippi and Puri Families. The inability of the assessee are more apparent when we see that they have already moved petition before the Company Law Board to interfere in the Matter.

9. Therefore, in the facts and circumstances of the case; it is our considered view that the findings arrived at by the assessing authority on the question of the date of transfer of shares is somewhat premature. It is only on the basis of a probability that he has adopted the date of MoU as the date of transfer of shares. This does not seem to be proper. The date of transfer of shares is so crucial that one should decide on the basis of some valid materials and not on the basis of probabilities alone. Therefore, we set aside the issue to the CIT(A) with a direction to decide the matter afresh after conducting

necessary inquiries including, if necessary, after exercising the powers conferred on him under the statues to enforce the production of the documents from the concerned persons. This ground raised by the assessee is, therefore, treated as allowed for statistical purposes.

10. The next question is the disallowance of short term capital loss on the sale of shares made by the assessee to smt. Jaiwanti J. Jaising. Here also, the case of the Assessing Officer is that the sale of shares had not been proved except for some book entries transferring the shares. The Assessing Officer has not looked into the share transfer forms which are proper instruments for transferring the shares from person to person. The Assessing Officer has to examine whether proper share transfer forms were executed by the parties. In this case also, we find that the observation and conclusion of the assessing authority are premature. He has not concluded necessary inquiries. When the assessee has sold the shares for a lesser price to their mother, mother-in-law and grandmother, it is quite natural that the Assessing Officer would get suspicious and would have inclined to presume that the share transactions were fabricated just for the purpose of reducing the tax incidence on the long term capital gains, by claiming set off. That is quite natural. But as rightly pointed out by the learned Counsel appearing for the assessee, the shares were transferred by the assessee on the basis of valuation reports, which were placed before the assessing authority on which no adverse observations were made by him. On going through the records, we find the assessing Officer has no case that the values of shares stated on sale were under-stated by the assessee. As argued by the learned Counsel, there is no law which prohibits the assessee in selling the shares to their mother, mother-in-law reducing the tax liability by way of skill full tax planning. So long as the planning is within the four corners of law, it is not possible for us to stop the assessee. Therefore, we find that the strong presumption that the transactions were only fabricated, should not be allowed to decide the issue and the issue must be decided on available evidence. The CIT(A) should conduct necessary inquiries. For the purpose of the above inquiries, and for the matter of coming into a rightful conclusion, the issue of short term capital loss is also remitted back to the CIT(A) for re-examination.

vii. The CIT(A) also relying upon the aforesaid findings in the case of the father and brother of the Respondent-assessee i.e. Mr. Bansilal Jaising and Mr. Ravi Jaising allowed the set off of STCL against LTCG for the block period. The CIT(A)s also accepted the contention of the Respondent-Assessee that the transfer of shares was deemed to be the date of the execution of the MOU which was executed on 6th March 1997, which fell in the year 1996 relevant to the assessment year 1997-1998 and therefore the transfer was completed in the period covered by the block period of 1st April 1989 to 16th November 1999 making the

LTCG eligible for being used to set off any loss incurred in the previous year. The CIT(A) also accepted the contention of the Respondent-Assessee that the loss incurred of Rs. 5,18,74,499/- by the Appellant in the block period on sale of 45,83,000 shares of Jaising Maritime Limited (JML) and 6,57,400 shares of Jaising Capital Private Limited (JCPL) should be allowed against LTCG of Rs.5,21,24,609/ arising in the block period.

viii. The revenue being aggrieved by the said order dated 15th February 2019 passed by the CIT(A) filed an appeal before ITAT which has been dismissed by the order dated 19th March 2020 (hereinafter referred to as “the Impugned order”). While dismissing the department’s appeal, the ITAT upheld the CIT(A)’s order and held that in Respondent-Assessee’s group case i.e. of his father and brother Mr. Banshi Jaising and Mr. Ravi Jaising on an identical fact pattern claiming the similar reliefs, the CIT(A) by its order dated 31st March 2017, had allowed the set off of STCL against the LTCG.. In fact the ITAT, while reproducing the relevant paragraphs of the order dated 31st March 2017 passed in the case of the father and brother of the Respondent-Assessee i.e. Mr. Banshi Jaising and Mr. Ravi Jaising noted that the quantification of STCL made by the Appellant could not be doubted. Further details were also filed by the father and brother of the Respondent-Assessee i.e. Mr. Banshi Jaising and Mr. Ravi Jaising which conclusively proved that the shares of Jaising Maritime Ltd. and Jaising Capital Pvt. Ltd were transferred and payments for the same have deemed to have been received by the Appellant. The ITAT reproduced the findings of the CIT(A) which reads thus:-

“7.4. Considering that that the the present case are identical to the facts of the cases decided by my predecessor CIT(A) in Appeal No. CIT(A)-10/ITAT/187/2014-15, dated 31/03/2017 in the case of Sh. Banshi Jairamdas Jaising and in. Appeal No CIT(A)-10/ITAT/188/2014-15, dated 31/03/2017 in the case of Sh. Ravi B. Jaising, there is no reason to deviate from the findings given by my predecessor in the above two cases. The findings given by my predecessor in these cases will apply mutatis mutandis to the present case The AQ shall recompute the income of the appellant in the light of the above decision.”

ix. Further, the ITAT has also recorded a finding that the Respondent-Assessee before the CIT(A) has made detailed submissions including the date of acquisitions and date of sale of shares of Jaising Martime Ltd. and Jaising Capital Pvt. Ltd. and also working of the STCL which had been provided by the Respondent-Assessee before the CIT(A). This fact pattern was similar in the case of the father and brother of the Respondent-Assessee i.e. Mr. Bansi Jaising and Mr. Ravi Jaising. The ITAT further held that no material was brought to their notice by the revenue that the findings of the CIT(A) in the case of the father and brother of the Respondent-Assessee i.e. Mr. Bansi Jaising and Mr. Ravi Jaising have been reversed by any superior judicial authorities. The ITAT therefore held that the revenue cannot take a different stand on similar set of facts, once the findings of the learned CIT(A) were accepted by the revenue in Respondent-Assessee's father's and brother's case. In the light of the aforesaid observations, the ITAT held that there was no infirmity in the order of the CIT(A).

4. Ms. Mamta Omle, learned Counsel for the Revenue assailed the impugned order and submitted that a substantial question of law arises in the facts of the case, inasmuch as the ITAT has not considered the facts of the case in the right perspective. She also submitted that merely by placing reliance on the orders passed in the case of the father and brother of the Respondent-Assessee i.e. Mr. Bansi Jaising and Mr. Ravi Jaising, the ITAT could not delete the addition in the case of the Respondent-Assessee. She also submitted that insofar as the Respondent-Assessee was concerned, the order dated 31st March 2017 was an *ex-parte* order of the CIT(A) which was primarily passed on account of the non attendance of the Respondent-Assessee. It was therefore her contention that the impugned order passed by the ITAT has not taken into consideration all the facts. She however, fairly submitted that insofar as the order passed in the case of the father and brother of the Respondent-Assessee i.e. Mr. Bansi Jaising and Mr. Ravi Jaising, the order of the CIT(A) dated 31st March 2017 has attained finality as no appeal has been preferred against that by the revenue.

5. Mr. Jain, Ms. Saukhya Lakade and Mrs. Radha Halbe learned Counsel appearing for the Respondent-Assessee submitted that the impugned order is passed on correct appreciation of facts and also, since on an identical fact pattern, in the case of the father and brother of the Respondent-Assessee i.e. Mr. Bansi Jaising and Mr. Ravi Jaising, the addition has been deleted, the same has to be applied even in the case of the Respondent-Assessee. He therefore submitted that the Appeal filed by the Revenue needs to be dismissed on this ground itself. Further there were no Appeals filed by the Revenue in the case of the father and brother of the Respondent-Assessee i.e. Mr. Bansi Jairamdas Jaising and Mr. Ravi Jaising and hence the same have attained finality.

Analysis

6. We have heard the rival submissions and perused the record including the impugned order. We are of the view that the impugned order does not give rise to any question of law and would not require interference on the questions of law as formed by the Revenue. We find that the impugned order is passed on a proper appreciation of the facts of the case.

7. It is our view that the ITAT has proceeded on a correct footing in dismissing the revenue's appeal inasmuch as the revenue was unable to point out any distinguishing factor in the case of the Respondent-Assessee, when on an identical fact pattern, the additions in the case of the father and brother of the Respondent-Assessee i.e. Mr. Bansi Jaising and Mr. Ravi Jaising have been deleted. The said proceedings have also attained finality as the revenue has not preferred any appeals post the CIT(A)'s order in the case of the Respondent Assessee's brother and father. The revenue cannot therefore blow hot and blow cold at the same time and come to a conclusion which is against the principles of consistency which need to be borne in mind in taxing statutes. In fact, the Respondent-Assessee had submitted before the CIT(A) all the factual details regarding the sale of shares of Jaising Capital Ltd and Jaising Maritime Pvt. Ltd. on account of which, STCL had arisen in the hands of the Respondent-Assessee of which he claims set

off against the LTCG arising in the block period. The Respondent-Assessee also explained in detailed the entire factual matrix in respect of the STCL which has arisen in the hands of the Respondent-Assessee. The details about the date of acquisition, cost of acquisition and selling price of the shares was also submitted before the CIT(A) and the quantification of the STCL was also submitted before the CIT(A). It is therefore our view that both the fact finding bodies i.e. the CIT(A) and ITAT, even on merits, have appropriately appreciated the facts of the case and rightly come to the conclusion that the set off of STCL against LTCG has been rightly availed by the Respondent-Assessee.

8. Thus, the CIT(A) and the ITAT on appreciation of facts have recorded concurrent factual findings in respect of the set off of STCL against LTCG in the block period and have also applied the rule of consistency as required in taxing statutes by relying on the orders passed in the case of father and brother of the Respondent-Assessee i.e. Mr. Bansi Jairamdas Jaising and Mr. Ravi Jaising in the identical fact pattern. Even otherwise in our view, all these issues are findings of facts, which do not give rise to any substantial questions of law requiring interference or consideration in the present Appeal. The Appeal is accordingly dismissed. No costs.

(AARTI SATHE, J.)

(G. S. KULKARNI, J.)