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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 1570 OF 2016

The Pr. Commissioner of Income Tax-6 ...Appellant
vs
M/s Creative Textile Mills Pvt. Ltd. ...Respondent.

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Mr A.R.Malhotra a/w Mr N.A.Kazi for the Appellant.
Mr Madhukar Agrawal I/b Atul Jasani for the Respondent.

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CORAM : AKIL KURESHI &
B.P.COLABAWALLA, JJ.
FEBRUARY 13, 2019.

P.C. :

The Revenue is in appeal against the Judgment of the Income Tax Appellate Tribunal, raising the following question of law.

> "Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal has erred in cancelling the order u/s 154 of the Income Tax Act ignoring the fact the mistake being apparent from the record as per provisions of section 71 (2) of the Act has been rectified by the Assessing Officer?"

2 The brief facts are as under.

The respondent - assessee is a registered company. The return filed by the assessee for the Assessment Year ("A.Y." for short) 2005-06 was taken into scrutiny. The Assessing Officer ("A.O." for short) passed an order of assessment which was carried in appeal by the assessee. The Commissioner of Income Tax (Appeals) ["CIT(A)" for short] passed an order consequent to which the A.O. also passed the order giving effect to the appellate order. After that, the A.O. noticed, which he thought was an apparent error, in the assessment of the assessee, with respect to the long term capital gain. He, therefore, after putting the assessee to notice, passed an order dated 29th March, 2012 rectifying his original order and reduced the carry forward of business loss. This was on the basis that, according to the A.O, during the period relevant to the A.Y. in question, the assessee had declared low tax capital gain. According to the A.O. in terms of Section 71(2) of the Income Tax Act, 1961 ("IT Act" for short) the assessee was under compulsion to set off business loss against the capital gain. Only thereafter the remaining sum could be carried forward for the next year. The assessee carried the matter in appeal. The CIT(A) dismissed the appeal upon which the assessee carried the matter before the Tribunal. Before the Tribunal, the assessee mainly contended that the issue was not free from doubt and that, therefore, the A.O. could not have exercised the rectification power which is limited in nature. The Tribunal accepted such contention and reversed the order of Revenue Authorities, upon which the Revenue has filed this appeal.

3 Having heard learned counsel for parties, we notice that

sub-section (1) of Section 71 of the Act provides that where in respect of any assessment year the net result of the computation under any head of income other than “capital gains' is a loss and the assessee has no income under the head 'capital gains' he shall, subject to the provisions of this Chapter, be entitled to have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head. This provision came up for consideration before this Court in the case of **Commissioner of Income Tax Vs British Insulated Calender's Ltd.** Reported in **202 ITR 354** in which it was held that under sub-section (1) of Section 71 of the Act the assessee has no option in setting off the business loss against the heads of other income as long as there was no capital gain during the year under consideration. The case of the assessee does not fall under sub-section (1) of Section 71 of the Act since the assessee had declared capital gain. Such a situation would be covered by sub-section (2) of Section 71 of the Act which reads as under;

> “(2) Where in respect of any assessment year, the net result of the computation under any head of income, other than “Capital gains”, is a loss and the assessee has income assessable under the head “Capital gains”, such loss may, subject to the provisions of this Chapter, be set off against his income, if any, assessable for that assessment year under any head of income including the head “Capital gains” (whether relating to short-term capital assets or any other capital assets)”

4 In case of **British Insulated Calender's** (supra) this Court had in respect to sub-section 2 of Section 71 observed that “ in

case of the assessee declaring capital gain, he had an option to set off the business loss, whereas no such option is given for sub-section (1)". Before the High Court, of course, the provision of Sub-Section 2 of Section 71 of the Act was somewhat different and the expression " or, if the assessee so desires, shall be set off only against his income, if any, assessable under any head of income other than 'capital gains'" has since been deleted. Nevertheless, the question that would arise is, whether even in the unamended form sub-section (2) of Section 71 of the Act mandates the assessee to set off its business loss against the capital gains of the same year when this provision used an expression "may" as compared to the expression "shall" used in sub-section (1). In the present case, we are not called upon to judge the correctness of interpretation of either the revenue or the assessee. Sufficient for us to come to the conclusion that the question was far from being clear. It was clearly debatable. In this position, the A.O., as per the settled law, could not have exercised the rectification powers. We find no error in the view of the Tribunal. The Income Tax Appeal is dismissed. No order as to costs.

(B.P.COLABAWALLA, J.) **(AKIL KURESHI, J.)**