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TXA NO.15-2017
IN THE HIGH COURT OF BOMBAY AT GOA
TAX APPEAL NO.15 OF 2017

The Pr. Commissioner of Income Tax
Aaykar Bhavan, Patto,
Panaji Goa.

... Appellant

Versus

M/s. Alcon Developers,
Sukerkar Mansion, First Floor,
M.G. Road, Panaji,
Goa 403 001.

... Respondent

Ms. Susan Linhares, Standing Counsel for the Appellant.
Mr. P. Pardiwala, Senior Advocate with Mr. Vinod Korgaonkar,
Advocate for the Respondent.

Coram:- M. S. SONAK &
SMT. BHARATI H. DANGRE, JJ.

Reserved on:- 20th January 2021

Pronounced on:- 22nd January 2021

JUDGMENT (Per M. S. Sonak, J.):

Heard Ms. Susan Linhares for the appellant and Mr. P. Pardiwala learned Senior Advocate with Mr. Vinod Korgaonkar for the respondent.

2. The tax effect in this appeal is ₹75,17,162/-. Therefore, in terms of CBDT Circular No.17/2019, the same, should not have been

ordinarily pursued by the Revenue. However, Ms. Linhares, on instructions, submitted that this was a matter where the revenue audit objections had been raised and accepted by the department and therefore, the revenue wishes to pursue this appeal, consistent with the exemptions provided in CBDT Circular No.17/2019 and 21/2015. Accordingly, we have heard the learned counsel on merits.

3. This Appeal was admitted on 27.09.2017 on the following substantial questions of law:-

“(a) Whether the Hon'ble ITAT is right in ignoring the provisions of Section 263 wherein the Hon'ble Pr. CIT, Panaji rightly invoked the proceedings under Section 263 in respect of the Assessment Order which was erroneous and prejudicial to the interest of revenue?”

“(b) Whether the Hon'ble ITAT is right in ignoring the settled legal position on the issue involved in the case and without taking into consideration the decision of Special Bench Bengaluru ITAT Bench in the case of Nandi Steels Limited (2012) 17 Taxmann.co. 93(Bang.)(SB) and Hon'ble Supreme Court's decision in the case of Express Newspapers Ltd., on the identical facts of the instant case?”

4. The respondent-assessee in the present case is a firm involved in the business of building and property development as also the manufacture of ground granulated blast furnace slab (GGBS), microfine slag, microfine cement, and cement products.

5. For the assessment year 2011-12, the assessee filed a return of

income declaring total income of ₹23,28,174/- after setting off the brought forward loss of ₹4,45,36,935/-. The assessment officer (AO) vide order dated 31.03.2014 assessed under Section 143(3) of the Income Tax Act, 1961 (said Act) and determined the total income of the assessee at ₹88,47,561/- after making addition of ₹65,19,381/- to the returned income of the assessee.

6. The Principal Commissioner of Income Tax (PCIT) vide order dated 24.03.2016 made under Section 263 of the said Act invoked his revisional jurisdiction and set aside the assessment order dated 31.03.2014 on the ground that the same was both erroneous and prejudicial to the interest of the Revenue since the brought forward loss of ₹4,45,36,935/- was allowed to be set off against the income from the capital gains of the assessee during the relevant assessment year, though, the same was not liable under Section 72 of the said Act. The PCIT directed the AO to make a fresh assessment after examining the relevant facts and in the light of the legal position expounded by the PCIT after affording the assessee an opportunity of being heard.

7. The respondent-assessee appealed to the Income Tax Appellate Tribunal (ITAT) and the ITAT, by its order dated 15.09.2016 set aside PCIT's order dated 24.03.2016 and restored the AO's order dated 31.03.2014. Hence the present appeal on the aforesaid substantial questions of law.

8. Ms. Linhares at the outset submits that the ITAT's impugned order is contrary to the decision of the Special Bench of the ITAT at Bengaluru in case of *Nandi Steels Ltd. v. ACIT – (2012) 17 Taxmann.com 93 (Bang.) (SB)* as well as the decision of the Hon'ble Supreme Court in the case of *CIT v. Express Newspapers Ltd. - (1964) 53 ITR 250 (SC)*. She submits that in both these decisions it has been categorically held that the brought forward business losses may be set off only against the income from the business for the subsequent but relevant assessment year. She submits that the brought forward business losses cannot be set off against the income from capital gains, which is what was done by the AO in the present case. She, therefore, submits that the AO's order dated 31.03.2014 was both erroneous as well as prejudicial to the interest of the Revenue and there was no error on the part of the PCIT in invoking its revisional jurisdiction under Section 263 of the said Act. She submits that since the ITAT has not appreciated this aspect and even not followed the decision of the Special Bench of the ITAT and the Hon'ble Supreme Court in *Express Newspapers Ltd. (supra)*, the substantial questions of law as framed may be answered in favour of the Revenue and against the assessee.

9. Mr. Pardiwala, the learned senior advocate for the respondent- assessee submitted that the decision of the Hon'ble Supreme Court in *Express Newspapers Ltd. (supra)* was in the context of provisions of Section 26(2) of the Income Tax Act, 1922 and the same, has been

explained by the Hon'ble Supreme Court in the subsequent decisions in *CIT v. Chugandas and Co. - (1965) 55 ITR 17 (SC)* and *CIT v. Cocanada Radhaswami Bank Ltd. - (1965) 57 ITR 306 (SC)*. He, therefore, submits that the ITAT's order dated 15.09.2016 is not contrary to the law laid down in *Express Newspapers Ltd. (supra)* but rather is consistent with the decisions of the Hon'ble Supreme Court in *Chugandas and Co. (supra)* and *Cocanada Radhaswami Bank Ltd. (supra)*.

10. Mr. Pardiwala also pointed out that the ITAT's decision is entirely consistent with the decision of the ITAT in *Digital Electronics Ltd. v. Additional CIT – 135 TTJ (Mumbai) 419*, in which it is held that the unabsorbed business losses could be set off against the capital gains charged under Section 50 of the said Act. He submits that this Court in *CIT v. Hickson and Dadajee (P.) Ltd. - (2020) 122 Taxmann.com 94 (SC)* has noted the statement of the learned counsel appearing on behalf of the Revenue that the decision of the ITAT in *Digital Electronics Ltd. (supra)* had been accepted by the Revenue. He, therefore, submitted that it is now not open to the Revenue to urge any position contrary to that expressed in *Digital Electronics Ltd. (supra)*.

11. Mr. Pardiwala submitted that in this matter there is no dispute that the assessee had sold one of its business undertaking namely the undertaking relating to the GGBS business and made a profit of

₹4,74,16,156/-. He submitted that since a business undertaking was sold, the assessee was entitled to recoupment of depreciation charged in respect of that business at least to the extent of ₹2,84,31,062/- since the same was like business income. He also relied upon *Express Newspapers Ltd. (supra)* in support of this contention.

12. Mr. Pardiwala submitted that since there was no error in the view taken by the AO, the PCIT was not justified in invoking its revisional jurisdiction under Section 263 of the said Act in this matter. Mr. Pardiwala, without prejudice to the aforesaid submissions and purely by way of concession, submitted that the assessee, having regard to some observations in paragraph 10 of the ITAT's order dated 15.09.2016, will accept that the AO had allowed excess set off to the extent of ₹22,34,366/- and therefore pay the proportionate tax thereon.

13. The rival contentions now fall for our determination.

14. The AO, vide his order dated 31.03.2014 allowed the respondent-assessee to set off the brought forward losses of ₹4,50,84,063/- against the income from capital gains derived by the respondent-assessee by selling its undertaking relating to GGBS business for 8 Crores. After deducting the net worth of the said undertaking which was ₹3,25,83,844/- the profit from the sale of this asset was determined at ₹4,74,16,156/-.

15. Now there is no dispute that concerning this GGBS undertaking, the respondent-assessee had claimed depreciation of ₹2,64,53,052/- for the assessment year 2010-11 and depreciation of ₹19,78,010/- for the assessment year 2011-12. Thus, the total depreciation claimed by the respondent-assessee in respect of the GGBS business undertaking was ₹2,84,31,062/-. Based thereon, the respondent-assessee had claimed that from out of the income of ₹4,74,16,156/- from the sale of the GGBS business undertaking, at least an amount of ₹2,84,31,062/- was nothing but the recoupment of depreciation charged in respect of that business undertaking and therefore, the same was like business income which was quite correctly set off during the relevant assessment year.

16. The ITAT in its impugned order dated 15.09.2016 has accepted the aforesaid contention of the respondent-assessee by relying on *Express Newspapers Ltd. (supra)*, which has explained that if the sale price exceeds the written down value, but does not exceed the original cost price, the difference between the original cost and the written down value shall be deemed to be profits of the year previous to that in which the sale takes place, that is to say, the difference between the price fetched at the sale and the written down value is deemed to be the escaped profits for which the assessee is made liable to tax. As the sale price was higher than the written down value, the difference represents the excess depreciation mistakenly granted to the assessee. Therefore, in substance, brings to charge an escaped profit or gain of

the business carried on by the assessee.

17. Applying this reasoning, the ITAT, concluded that from out of the income of ₹4,74,16,156/- from the sale of the GGBS business undertaking, at least an amount of ₹2,84,31,062/- was nothing but the recoupment of depreciation which was allowed as a business deduction and therefore, this amount was like business income even though the same may have been assessed under the head “*capital gains*” for computing the total income in terms of the provisions of the ITAT. According to us, the view taken by the ITAT in this matter is certainly a plausible view and therefore, gives rise to no substantial question of law as such, in the facts and circumstances of the present case.

18. Besides, we find that the Revenue is attempting to interpret the decision in *Express Newspapers Ltd. (supra)*, rather widely, even though, the Hon'ble Supreme Court itself, in its subsequent decisions has clarified that the observations upon which Ms. Linhares relies, were made in the context of the provisions of Section 26(2) of the I.T. Act, 1922.

19. In *Express Newspapers Ltd. (supra)*, the Hon'ble Supreme Court was deciding whether the capital gains made by the Free Press Company was liable to be assessed in the hands of the Express Company (successor) under Section 26(2) of the I.T. Act, 1922. It is in the context of such an issue that the Hon'ble Supreme Court held

that the tax payable by the assessee under the head “*capital gains*” in respect of any profits or gains arising from the sale of a capital asset effected during a prescribed period. However, the deeming clause does not lift the capital gains from the sixth head in Section 6 and place them under the fourth head. The legal fiction is limited to the purpose for which it was created and could not be extended beyond its legitimate field. Therefore, the loss falling under one head of income cannot be set off against any income falling under any different head.

20. In *Chugandas and Co. (supra)* the Hon'ble Supreme Court was considering the question of whether an assessee is entitled to benefit of Section 25(3) of the I.T. Act, 1922 in respect of the interest on securities. There was no dispute in this matter that the principal business of the assessee was dealing in securities. The securities held by the assessee were its stock in trade and interest on those securities was received from time to time. The Revenue had relied upon *Express Newspapers Ltd. (supra)* and the Hon'ble Supreme Court, after quoting the very passage relied upon by Ms. Linhares in the present matter held that it was quite obvious having regard to special nature of “*capital gains*” which are not in truth income but are deemed income for the purpose of taxation and the phraseology used, the liability of the successor under the proviso to Section 26(2) is only in respect of tax on income, profit, and gains of the business strictly so-called, to be computed under section 10 read with section 6(iv) and not in respect of all receipts which may be regarded as income of the business. The

schemes of section 25(3) and section 26(2), proviso, are different. The first grants an exemption because there has been a double levy of tax, and an intention to exempt all income, profits, and gains of business from taxation may be attributed to the legislature. Section 26(2) fastens liability of the predecessor, if he cannot be found, upon the successor and must be strictly construed. The legislature has imposed by section 26(2) liability upon the successor to be assessed for profits earned in the business carried on by his predecessor, and unless there is a clear intention expressed in the statute to include in that expression what in reality is not income, but is deemed income, the liability to assessment would justifiably be limited to profits of the business which is computable under section 10.

21. Thus, it is clear that the observations in *Express Newspapers Ltd. (supra)* were in the context of the specific provisions of Section 26(2) of the I.T. Act, 1922, and the same were not intended to be of some general application as contended by Ms. Linhares in the present case.

22. This position is further clarified in *Cocanada Radhaswami Bank Ltd. (supra)* where the Hon'ble Supreme Court was considering the question whether on the facts and circumstances of the case before it, the assessee was entitled to set off the business loss of ₹59,912/- brought forward from the preceding year against the entire income including interest on securities held by the assessee. In this case, as well,

the Revenue had urged that the income from business and income from securities fell under different heads and that they were mutually exclusive. Therefore the losses under the head “*business*” could not be carried forward from the preceding year to the succeeding year and set off under Section 22(4) of the I.T. Act, 1922 against the income from securities held by the assessee. The Revenue had strongly relied upon the aforesaid observations from *Express Newspapers Ltd. (supra)*.

23. The Hon'ble Supreme Court, after quoting the observations from *Express Newspapers Ltd. (supra)* upon which reliance has been placed by Ms. Linhares, held that though such observations divorced from text may appear to be wide, the said decision was mainly based upon the character of the capital gains and not upon their non-inclusion under the heading “*business*”. The Hon'ble Supreme Court then referred to its own decision in *Chugandas & Co. (supra)* and stated that this decision has explained the limited scope of the earlier decision in *Express Newspapers Ltd. (supra)*. The matter was ultimately decided against the Revenue and in favour of the assessee holding that the assessee was entitled to set off the business losses brought forward from the preceding year against the entire income including the income from interest on securities held by the assessee.

24. Therefore, upon taking into consideration the decisions of the Hon'ble Supreme Court in the case of *Chugandas & Co. (supra)* and *Cocanada Radhaswami Bank Ltd. (supra)* explaining the limited scope

of the decision in *Express Newspapers Ltd. (supra)*, we are afraid, we cannot accept the submissions of Ms. Linhares that the ITAT's order is contrary to the law laid down by the Hon'ble Supreme Court in *Express Newspapers Ltd. (supra)*.

25. *Digital Electronics Ltd. (supra)* was cited on behalf of the assessee before the PCIT who made the order dated 23.03.2016 invoking his revisional jurisdiction under Section 263 of the said Act. However, the PCIT, held that the decision of the ITAT in *Digital Electronics Ltd. (supra)* was made “without taking into consideration the Apex Court decision given in identical factual text in the case of *Express Newspapers Ltd.*”. The PCIT further relied upon the decision of the Special Bench Bengaluru in *Nandi Steels Ltd. (supra)*, which had again relied upon *Express Newspapers Ltd. (supra)* and chosen to interpret the said decision widely and not restrictively.

26. In *Hickson and Dadajee (P.) Ltd. (supra)* the first substantial question of law was whether on the facts and in the circumstances of the case and law, the ITAT was justified in allowing set-off of brought forward business loss against deemed short-term capital gains arising from the sale of building and plant and machinery. The ITAT, in the said case, had allowed the appeal of the respondent-assessee on the issue of set-off of the brought forward losses against deemed short term capital gains arising on the sale of building, plant, and machinery following the decision of its coordinate bench in *Digital Electronics*

Ltd. (supra). In *Digital Electronics Ltd. (supra)* the ITAT had held that under Section 72 of the said Act, the loss under the head “*profits and gains of business or profession*” can be carried forward and the same can be set off against profits of any business or profession. It was held that it was not the requirement of Section 72 of the said Act that such gain or profit must be taxable under the head “*profits and gains of business or profession*”. Thus carry forward business losses could be set off against the short-term capital gains on the sale of the building.

27. In *Hickson and Dadajee (P.) Ltd. (supra)* the learned counsel appearing for the Revenue had very fairly stated that the decision of the ITAT in *Digital Electronics Ltd. (supra)* had been accepted by the Revenue. This Court, also observed that no distinguishing features in the facts before it had been demonstrated by the Revenue, which would warrant taking of a different view from that taken by the ITAT in *Digital Electronics Ltd. (supra)* which was accepted by the Revenue. Accordingly, the first substantial question of law was answered against the Revenue and in favour of the assessee.

28. Thus, it is quite clear that the view taken by the ITAT in its impugned order dated 15.09.2016, is entirely consistent with the view taken by the coordinate bench of the ITAT in *Digital Electronics Ltd. (supra)*. As was noted by this Court in *Hickson and Dadajee (P.) Ltd. (supra)*, the Revenue, has accepted the decision of the ITAT in *Digital Electronics Ltd. (supra)*. Based thereon, this Court has accepted the

position that it is not the requirement of Section 72 of the said Act that such gain or profit must be taxable only under the head of “*profits and gains of business or profession*”. The carryforward business losses would therefore be set off against the short-term capital gains on the sale of building, plant, and machinery. This is yet another reason not to accept the submissions of Ms. Linhares and to answer the substantial questions of law against the Revenue and in favour of the assessee.

29. Although, we may not be entirely in agreement with the ITAT on the aspect of invocation of the revisional jurisdiction under Section 263 of the said Act by the PCIT, we feel that the impugned order made by the ITAT warrants no interference because there is nothing fundamentally wrong in the view taken by the ITAT having regard to the decisions of the Hon'ble Supreme Court in the case of *Chugandas & Co. (supra)*, *Cocanada Radhaswami Bank Ltd. (supra)* and the decision of this Court in *Hickson and Dadajee (P.) Ltd. (supra)*. Therefore, there is no point in dilating on the first substantial question of law when the second substantial question of law which relates to the merits will have to be answered against the Revenue and in favour of the assessee.

30. Besides, Mr. Pardiwala, the learned counsel for the assessee based on instructions from the assessee has fairly stated that the assessee will pay proportionate tax on the basis that the AO allowed excess set off to

the extent of ₹22,34,366/-. In fact, even the ITAT, in paragraph 10 of its order had held that the AO, if at all, had allowed excess set-off of ₹22,34,366/- and therefore the appeal of the assessee is “*partly allowed*”. This would mean that the assessee was still to pay proportionate tax since the AO had allowed excess set-off of ₹22,34,366/-.

31. Accordingly, this appeal is disposed of by making the following order:

(a) The substantial questions of law as framed are decided against the Revenue and in favour of the assessee ;

(b) However, the respondent-assessee, consistent with the statement made on its behalf is directed to pay proportionate tax based on the premise that the AO had allowed excess set off to the extent of ₹22,34,366/-. This payment to be made within three months from today.

(c) In the facts and circumstances of the present case, there shall be no order as to costs.

SMT. BHARATI H. DANGRE, J.

M. S. SONAK, J.