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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 1349 OF 2008

The Commissioner of Income Tax – 3,
Mumbai

...Appellant

Versus

Galiakot Containers Pvt. Ltd. Mumbai

...Respondents

Mr. Sham V. Walve, with Mr. Prithish Chatterjee for Appellant.

Ms. Arati Vissanji for Respondents.

CORAM : K.R. SHRIRAM &
R.I. CHAGLA, JJ.

DATE : 13 SEPTEMBER, 2021.

ORDER :

1. This is an Appeal under Section 260 A of the Income Tax Act, 1961 (“the Act”) filed by the Revenue impugning an order dated 14th May, 2008 passed by the Income Tax Appellate Tribunal for AY 2002-03. Respondents had filed return of income declaring total income under Minimum Alternate Tax (MAT) at Rs.17,88,797/-. The return was processed under Section 143 (1) on 8th April, 2004 accepting the return of income. The case was reopened on 13th June, 2005 after recording reasons for re-opening that the assessee had set off unabsorbed business loss against capital gain. Assessee vide its

letter dated 30th June, 2005 had objected to the reopening. Finally after granting a personal hearing and hearing the assessee the Assessment Officer has passed an order dated 7th December, 2006 disallowing the set off against short term capital gains by assessee of the earlier years' unabsorbed depreciation and carry forward a business loss against capital gain. The assessee had sold block of assets, i.e., buildings / development, factory building, and plant and machinery and had shown short term capital gain of Rs.1,55,63,915/-. The assessee also sold immovable property, i.e., land and the long term capital gain shown is Rs.72,70,784/-. While computing the total income assessee had set off the earlier years unabsorbed depreciation and carry forward of business loss against this capital gain. The Assessment Officer had allowed set off of unabsorbed depreciation against short term capital gain as an admissible adjustment but disallowed set off of carry forward of business loss against either short term capital gain or long term capital gain.

2. Aggrieved by this order of the Assessment Officer, Respondents preferred an appeal under Section 246 A (1) (B) of the Act before the CIT (Appeals). CIT (Appeals) passed an order dated

26th November, 2007 dismissing the appeal. According to CIT (Appeals) the capital gains cannot be set off only against the business income in view of the provisions of Section 72 and the capital gains by selling fixed assets cannot be part of business income. Against this order, Respondents filed an appeal before ITAT (“Tribunal”), where two questions of law were framed. We are only concerned with the second question since, the Tribunal answered the first question in favour of revenue and assessee has not challenged that finding. The second question was:-

2. On the facts and in the circumstances of the case, and in law, the learned CIT(A) erred in confirming the learned Assessing Officer’s action of not allowing set off under Section 72(1) of the unabsorbed brought forward business loss against the deemed short term capital gain assessed under Section 50 in so far as such gain represented the recoupment of depreciation allowed in the past, and, therefore, its true nature and character was that of the business income, notwithstanding its assessment under a different head on deeming basis. Your appellant, therefore, prays that the set off of brought forward business loss be allowed against the deemed short term capital gain assessed under Section 50.

The Tribunal decided this question in favour of assessee because what was sold by assessee was a business asset.

The answer of ITAT to the second question is challenged by the revenue in this appeal.

3. The Appeal came to be admitted on 28th January, 2009 on the question No. (A), which reads as follows:-

(A) Whether on the facts and in the circumstance of the case and in law the Hon'ble Tribunal was justified in allowing the set-off of brought forward business loss u/s. 72(1) of the Income-tax Act, 1961 against the deemed short-term capital gain assessed u/s.50 of the Income-tax Act, 1961?

4. Section 72 sub section 1 of the Act reads as under:-

“72(1) Where for any assessment year, the net result of the computation under the head “Profits and gains of business or profession “ is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and –

(i) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on:

Provided

Sub section (1) of Section 72, therefore provides that where for any assessment year, the net result of the computation under the head “profits and gains of business or profession” is a loss to the assessee, it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year. Section 72(1) of the Act employs the expression “computation under the head profits and gains of business or profession”, whereas, Section 72(1) (i) does not use the said expression but it says “against profits and gains, if any of any business or profession”. Therefore, what is required to be seen is whether profits and gains against which the loss is sought to be set off was part of the business activity of the assessee or business asset of the assessee. Admittedly, in this case the assessee had sold block of assets, i.e., buildings / development, factory building, plant and machinery and had shown short term capital gain of Rs.1,55,63,915/- plus long term capital gain of Rs.72,70,984/- by sale of immovable property. The

assessee was in the business of manufacturing metal containers and the computations of gain was under a different head nevertheless the profit or gain on sale of depreciable assets to extent of recoupment of depreciation is nothing but business income in substance. The assessee is entitled to set off brought forward loss against income which has the attributes of business income even though the same is assessable to tax under head other than profit and gain from business. We find support for this view from *Principal Commissioner of Income Tax Vs. Alcon Developers*¹ and *Nandi Steels Ltd. Vs. Assistant Commissioner of Income Tax, Circle -12(2), Bangalore*².

5. Therefore, in our view the Tribunal was correct in answering the question in favour of assessee and against the Appellant. The substantial question of law is answered accordingly.

6. Appeal disposed.

[R.I. CHAGLA J.]

[K.R. SHRIRAM, J.]

1 (2021) 432 ITR 277 (Bom)

2 (2021) 128 taxmann.com 267 (Karnataka)