IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH: 'E' NEW DELHI

BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT

AND

SMT SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A .No.-225/DEL/2014

(ASSESSMENT YEAR-2009-10)

Opus Reality Development Ltd. 404, Roots Tower, District Centre, Laxmi Nagar Delhi AAACO9775H **(APPELLANT)**	Vs	ACIT Circle-13(1) New Delhi **(RESPONDENT)**

Appellant by	**Sh. Vinay Kumar, CA**
Respondent by	**Sh. P. Dam. Kanunjna, Sr. DR**

Date of Hearing	**21.04.2016**
Date of Pronouncement	**09.06.2016**

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 10/10/2013 passed by CIT(A)-XVI, New Delhi.

2. The grounds of appeal are as under:-

"1. The Learned Assistant Commissioner of Income Tax, Circle 13(1), New Delhi has erred in law as well as on facts of the case while allowing the adjustment of business loss against the Long Term Capital Gains only,

as against the contention of the assessee company for adjustment of business loss first against the interest Income and then against the Long Term Capital, thereby leaving only LTGC to be taxed at 20% as applicable on it.

2. It is prayed that the aforesaid adjustment so made in the rectification order be revised as per applicable law and the excess tax liability of the assessee company be deleted.

3. The assessee company is in the business of Property Development and Share Trading, beside this assessee company also earned interest income under the income from other sources. The assessee filed return of income declaring Rs. 1,12,19,604/-. The assessee declared loss from business amounting to Rs. 70,32,63,487/-, income from long term capital gains of Rs. 70,43,33,287/- and income from other sources in the form of interest received on FDR of Rs. 1,01,49804/- in his return of income. Assessment in this case for the A.Y. 2009-2010 was made on 15.12.2011 u/s 143(3) of Act at total income of Rs. 2,20,27,670/- after making disallowance u/s. 14A for Rs. 7,68,500/- and disallowance of professional fee for Rs. 1,00,39,564/-.

4. The Assessing Officer held that business loss has to be set off against long term capital gain first and the remaining loss, if any, can then be set off against interest income. Thus income computed and Assessing Officer after set off of Business loss against LTCG, the held that net result remains is long term capital gains of Rs. 1,18,77,864/- which has to be taxed @20% plus applicable

surcharge and education cess and the interest income of Rs. 1,01,49,804/- is to be taxed at normal rate.

5. The assessee filed appeal before the CIT(A) on the ground that AO erred while allowing the adjustment of business loss against the Long Term Capital Gains only, as against the contention of the assessee company for adjustment of business loss first against the Interest Income and then against the Long Term Capital, thereby leaving only LTGC to be taxed at 20% as applicable on it. The CIT (A) held that the AO is justified in allowing the set off of business loss against long term capital gain first and the remaining loss, if any, against interest income.

6. The Ld. AR submitted that in view of Section 71 of the Act, the assessee is entitled to set off of business loss against its long-term capital gains and as the assessee carried on business during the year under consideration it was entitled to the set off of the business loss against its 'other income'. The Ld. AR further submitted that the business loss should have been adjusted first, by the Assessing Officer.

7. The Ld. DR relied upon the order of the CIT (A) and assessment order u/s 153(3) as well as rectification order u/s 154.

8. We have perused all the records and heard both the parties. Section 71(2) makes it clear that in respect of any assessment year, when the net result of the computation under any head of income, other than 'Capital gains', is a loss and the assessee's income is

assessable under the head 'Capital gains', the assessee would be entitled to the set off such loss against his income, assessable for that assessment year under any other head including income assessable under the head Capital gains'. The Section does not states that the business loss has to be adjusted first with particular head of income. In respect of any assessment year, when the net result of the computation under any head of income, other than 'Capital gains', is a loss and the assessee's income is assessable under the head 'Capital gains', the assessee would be entitled to set off such loss against his income which is assessable for that assessment year under any other head including income assessable under the head 'Capital gains'. The Ld. AR relied upon the order of the ITAT, Pune Bench in case of Coated Fabrics (P.) Ltd. Vs. JCIT (2006) 101 ITD 297 (Pune) before the CIT (A) submitting that the said order is squarely covering the issue before hand. The ITAT held as under:

> *2. We have looked into the legal aspect of this issue and have found that as far as the language of Section 71(2) is concerned, there is no sequence prescribed for set off of loss under a particular head of income. For ready reference, relevant section is reproduced below:*
>
> *71.(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).*

As the heading of the section indicates i e., "set off of loss from one head against income from another", the option is left open as far as Sub-section (2) is concerned. Contrary to this, the heading of Section 70 is restrictive in nature i.e., "set off of loss from one source against income from another source under the same head of income". So, the first thing is, if the losses from one source can be set off against income from another source under the same head of income for the same assessment year, the set off is to be made as prescribed under Section 70 of Income-tax Act, If, however, such losses cannot be so set off, then Section 71 comes into operation, which provides for set off of loss against income for the same assessment year under any other head. Hence, the set off as provided under Section 70 appears to be itemwise or sourcewise whereas the set off of the loss under Section 71 appears to be headwise. This is the basic principle laid down as far asSection 70 compared with Section 71 is concerned. However, as far as the issue in hand is concerned, we are confined to Section 71 of Income-lax Act. If at all, we have to examine the sequence, then the guiding factor is inbuilt in Section 71 itself because Sub-section (1) of Section 71 specifies that in respect of any assessment year, if the net result of the computation under any head of income, other than the capital gain, is a loss and the assessee has no income under the head "Capital gains", he shall be entitled to have the amount of such loss set off against his income assessable for that assessment year under any other head. So, the first step is that in case assessee has no income under the head 'Capital gains', then a loss under any head of income is subject to set off against income under any other head. Next comes into operation is Sub-section (2) which is applicable in such cases where the assessee has income assessable under the head "Capital gains". In the present appeal, Sub-section (2) is applicable because the assessee has a positive income under the head "Capital gains". On careful reading of Sub-section (2) it is apparent that there is no such restriction imposed on exercising the option of setting off of business loss against income under any other head other than income under the head "Capital gains". The expression used in Sub-section (2) simply enables an assessee to set off business loss under any head of income including the head "Capital gains". So, it appears that the Legislature has given a choice to a tax payer in respect of loss arising from

any other head except capital gain to set off the same either against the income under any head of the income or against the income under the head "Capital gains" whether relating to short-term capital asset or any other capital asset. If we further compare another Sub-section of Section 71 i.e., Sub-section (3), it is evident that similar choice was not made available to an assessee because in case the net result is a loss under the head "Capital gains", the assessee shall not be entitled to have such loss set off against income under the other head. Sub-section (3) provides that, "Where in respect of any assessment year, the net result of the computation under the head "Capital gains" is a loss and the assessee has income assessable under any other head of income, the assessee shall not be entitled to have such loss set off against income under the other head". So, the Legislature has made its intention very much clear that wherever a restriction was required to be imposed against set off of income against a particular head of income, the same was prescribed under the statute. As far as application of Sub-section (2) is concerned, we are of the considered view that an assessee is entitled to the set off of business loss against any head of income as also against capital gains.

2.1 Our view is further fortified by an old Circular No. 26(LXXVI-3) [F.No. 4(53)-IT)/54], dated 7-7-1955 wherein it was prescribed how loss suffered under one head could be set off against income under any other head. This circular was in respect of old Section 24 of 1922 Act and the directions were that, quote "the Department should adopt that mode which will give assessee the maximum benefit" unquote, relevant portion reproduced:

There is nothing in Section 24(1) to indicate that a particular mode of set-off shall be followed. [In the absence of any such indication, the general rule to be followed in all fiscal enactments is that where words used are neutral in import, a construction most beneficial to the assessee should be adopted]. The words "he shall be entitled to have the amount of loss set-off" occurring in Section 24(1), would seem to be consistent with the conferment of a benefit on the assessee which he can claim as of right. Hence, in the above illustration, the assessee's contention should prevail

and the department should adopt that mode which will give the assessee the maximum benefit.

2.2 Further, our view is strengthened by a decision of 1TAT Bombay Bench in the case of XYZ v. ITO [1982] 13 TTJ 93 wherein the said Circular No. 26(LXXVI-3)[F.No. 4(53)-IT/54] (supra) was duly considered and it was finally held that the above circular had given a clue that where there is an ambiguity in the matter of set off of loss against income under various heads, it should be done in a manner without doing violence to the language of the section and also in a manner which gives maximum benefit to the assessee. So, it was held by the Tribunal that the assessee had the option to get the short-term loss set off either against the capital gain or against other income, since the assessee had claimed set off of loss against ineome under the other head; the same was held as acceptable.

2.3. Having regard to the pith and substance of the afore-cited circular further buttressed by the language of Section 71(2) itself as elaborately discussed here-in-above, no ambiguity is left that the option is available to an assessee for set-off of any head of loss against any head of income including the capital gain assessable for that assessment year [Section 71(2)] of Income-tax Act. However, for the sake of completeness, we also refer the decisions in the cases of CIT v. Podar Cement (P.) Ltd. and CIT v. Vegetable Products Ltd. as cited by the Learned A.R. on the proposition that interpretation of a taxing statute should be construed as beneficial to the assessee.

3. To sum up, we hereby direct the Assessing Officer to first set off the business loss against the income under the head "Other sources" and if balance is left, the same is directed to be set off against the income under the head "Capital gains". Resultantly, the ground raised by the assessee is hereby allowed.

The said ITAT decision is applicable in the present case as facts are similar in both the matter as relates to whether option is available to an assessee for set off of any head of loss against any head of

income including capital gain assessable for that assessment year. The said question was answered in favour of the assessee therein. The CIT(A) while dismissing the appeal of the assessee, mis-interpreted the said order of the Appellate Tribunal which is binding on the CIT(A) and has to be followed by the CIT(A) being superior appellate authority. The decision of the Hon'ble Supreme Court in the case of UoI Vs. Kamlakshi Finance Corporation Ltd (AIR 1992 Supreme Court 711, 712) 55 ELT 433 (S.C) ruled as under: *"It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of appellate authorities. The order of the Appellate collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the Department – in itself an objectionable phrase – and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to the assessees and chaos in administration of tax laws"*.

9. In the result, appeal is allowed.

The order is pronounced in the open court on 09th of June, 2016.

Sd/-	**Sd/-**
(G. D. AGRAWAL)	**(SUCHITRA KAMBLE)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 09/06/2016

*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

		Date	
1.	Draft dictated on	21/04/2016	PS
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9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		