

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH : BANGALORE**

**BEFORE SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER  
and  
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

ITA No.1287/Bang/2014  
(Assessment year: 2005-06)

Ms.Zenobya Burjorjee,  
L/R of Sarosh Burjorjee,  
No.288, 6<sup>th</sup> Bloc, 18<sup>th</sup> D Main,  
Koramangala,  
Bangalore-560095. ... Appellant  
*PAN: ABOPB0685M*

Vs.

Asst. Commissioner of Income-tax,  
Circle 7(1),  
Bangalore. ... Respondent

Appellant by: Shri Mukesh Jain, CA.  
Respondent by: Dr. P.V.Pradeep Kumar, Addl.CIT(DR)

Date of hearing : 12/10/2015  
Date of pronouncement: 13/11/2015.

**O R D E R**

**Per VIJAY PAL RAO, JM:**

This appeal by the assessee is directed against the order dated 01/08/2010 of the CIT(A) for the assessment year 2005-06.

2. The assessee has raised the following grounds:

1. The learned Assistant Commissioner of Income Tax has erred in passing the order in the manner passed by him and the learned Commissioner of Income Tax (Appeals)-III has erred in confirming the same. The order being bad in law is liable to be quashed
  
2. The learned Assistant Commissioner of Income Tax has erred in disallowing the short- term capital loss incurred and concluding that the loss would have been allowed if the sale were made after nine months as against the applicable law of three months in the month of June 2004 and the learned Commissioner of Income Tax (Appeals)-III has concurred the same view.
  
3. The learned Assistant Commissioner of Income Tax has failed to appreciate that the amendment to the section 94 (7) was made after the redemption of units and the Commissioner of Income tax has not appreciated the contentions of assessee
  
- 4 The learned Assistant Commissioner of Income Tax has erred in not applying the law applicable on the date of transaction and the Commissioner has also failed to appreciate the law on the date of transaction.
  
- 5 The learned Assistant Commissioner of Income Tax and Commissioner of Income tax has failed to appreciate the case laws presented to them and have the passed the order in contrary order without appreciating the judgments of the case law
  
6. In view of the above and on other grounds to be adduced at time of hearing. **it is** requested that the impugned order be

- i. quashed or at least the additions made be deleted,
- ii. the interest charged under section 234 B be deleted

3. The assessee is an individual and engaged in the transaction of purchase and sale of shares and mutual funds. The assessee filed its return of income on 6/12/2005 declaring income of Rs.14,03,668/-. During the period relevant to the assessment year under consideration, the assessee has purchased mutual funds worth Rs.28,65,96,316/- and sold them for Rs.27,53,30,191/- thereby incurring short-term capital loss of Rs.1,02,66,124/-. The details of transaction of purchase and sale of mutual funds and the loss incurred by the assessee are given in para.3 of the assessment order as under:

Sl.no	Mutual fund	Purchase date	Price	Sale date	Sale price	Loss
1	Birla Yield plus	20-11-03 24-11-03 7-1-04	16489186	16-6-04	13728334	2760851
2	Chola triple ace	26-3-04	20000000	28-6-04	1392670	4872814
3	HSBC equity fund	20-4-04	30000000	17-5-04	23592085	6407915
4	Templeton india growth fund	19-9-03 27-2-04	6263598	16-6-04	5970565	293033
5	Templeton India growth fund	21-4-04	18735537	17-5-04	14266441	4469096

4. The Assessing Officer(AO) examined the above details in light of the provisions of sec.94(7) of the Income-tax Act,1961 [the 'Act' for short]. The AO found that out of the above investments in mutual funds, investment in HSBC and Templeton Growth Fund is not covered under the provisions of 94(7)of the Act as no dividend was declared. Therefore, the AO excluded

these two transactions from the purview of sec.94(7) and proceeded for dividend scripting in respect of three remaining transactions viz., Birla Yield Plus, Chola triple ace and Templeton India Growth. The AO held that as per sec.94(7) when the units were sold within 9 months of the record date and the assessee received dividend then to the extent of dividend so received short-term capital loss on these transactions is to be disallowed. The AO has given details of the dividend received by the assessee at page 3 as under:

<i>Sl.No.</i>	<i>Name of the fund</i>	<i>Value of dividend received</i>
1	Birla yield plus	23,63,218
2	Chold Tripple Ace	41,78,011
3	Completon growth	62,63,598

Thus, the AO invoked provisions of sec.94(7) of the Act in respect of the above three investments which were sold by the assessee within the period of 9 months of the record date and further the assessee has received dividend from these three investments.

5. Aggrieved by the action of the AO, the assessee filed appeal before the CIT(A) and submitted that sale in respect of all these transactions took place in the month of June 2004 whereas the period of 9 months has been brought to the provisions of sec.94(7) by the Finance Act,2004 w.e.f. 01/04/2005. The assessee contended that on the date of sale of these investments, the provisions were in existence therefore, section 94(7) is applicable only in case where any person buys or acquires units

within a period of 3 months prior to the record date and sells the units within a period of 3 months of such date. Thus it was contended that the amended provisions of sec.94(7) would not apply in the case of the assessee when the transaction of purchase and sale were completed prior to the bill for amendment is introduced in the Parliament. The CIT(A) did not accept the contention of the assessee and held that the provisions of sec.94(7)(b)(ii) of the Act is squarely applicable to the case of the assessee. She has fortified her view by the judgment of the Hon'ble Supreme Court in the case of *Karimthanavi Tea Estates Ltd. vs. State of Kerala* 60 ITR 262.

6. Before us, learned AR of the assessee submitted that the liability of the tax was not foreseeable at the time of transaction carried out by the assessee because the amendment in the provisions of sec.94(7) was brought into statute subsequently and therefore, the assessee cannot be held liable for tax when it was not possible for the assessee, to foresee any such provision in the Act. He has further submitted that any amendment which imposes obligation or imposes new liabilities has to be treated as prospective and cannot be retrospective. In support of his contention, he has relied upon the decision of the Ahmedabad bench of the Tribunal in the case of *Mitsu Industries Ltd. vs. DCIT* (98 TTJ 990). He has also relied on the decision of the Hon'ble Gujarat High Court in the case of *Nirmal Textiles Ltd.* (224 ITR

378) and submitted that the Hon'ble High Court has held that capital gains is not income which accrues from day to-day during the previous year but arises at the fixed point of time i.e. on the date of transfer. Therefore, for tax on capital gains, law to be applied is the law on the date of transfer. He further submitted that harmonious construction of the provisions is required to be considered for the purpose of determining the tax liability of the assessee on the basis of subsequent amendment in the provisions of the Act.

On the other hand, learned departmental representative has submitted that there is no dispute that the substituted sec.94(7)(b)(ii) of the Act is applicable w.e.f. 1/4/2005 and therefore, in view of the judgment of the Hon'ble Supreme Court in the case of *Karimthanavi Tea Estates Ltd* (supra) the amended provision was to be applied to the assessment year 2005-06. He has relied upon the orders of the authorities below and submitted that when the provision is applicable w.e.f. 1/4/2005 then the provisions which existed on the beginning of the assessment year under consideration is applicable for the transaction carried out during the previous year relevant to the assessment year under consideration.

8. We have considered the rival submissions as well as the relevant material on record. There is no dispute that prior to amendment by Finance Act 2004 in the provisions of sec.94(7) of

the Act, loss if any, arising from the purchase and sale of securities or units acquired within a period of three months prior to record date and unsold within 3 months after such record date, then the loss on sale of units shall be ignored to the extent of the amount of the dividend or income received which is exempt as per the provisions of the Act. Post amendment the requirement of holding the units has been enhanced to a period of 9 months from the recorded date and therefore, as per amended provisions of sec.94(7), if any person buys or requires any unit within a period of 3 months prior to recorded date and sales/transfers the same within a period of 9 months after such record date, then the loss if any arising from such sale/purchase shall be ignored to the extent of the amount of dividend or income received or receivable which is exempt as per the provisions of the Act. Therefore, prior to introduction of the Finance Act, 2004, no assessee could foresee that the loss arising from the transaction of purchase and sale of securities or units shall be ignored and cannot be set off against the other income to the extent of the dividend received or receivable on those securities or units even if such securities or units were purchased prior to 3 months from the record date and sold after three months from the record date. Tax planning is not prohibited if it is within the frame work of law and therefore, if a transaction is carried out by the assessee which is as per the existing provisions of law and there is no reason to foresee any change in law which enhances the tax liability of the assessee in

respect of the transaction completed then such subsequent amendment in the provisions of the Act cannot be applied on such transactions which are completed even prior to the said amendment was proposed. The Hon'ble Gujarat High Court in the case of *Nirmal Textiles Ltd.* (supra) has observed that the liability of tax on capital gain arises on a fixed point of time when the capital asset is transferred and therefore, the taxable event is the date of transfer unlike the profits and gains of business which accrued at the end of the previous year in paras.11 to 14 as under:

**"11.** We may refer to well established canons of interpreting the taxation statute. There are three stages in imposition of a tax. There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment, that ex hypothesi has already been fixed. But the assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery if the person taxed does not voluntarily pay. The dictum of Lord Dunedin in *Whitney vs. IRC* (1926) Appeal Cases 37 has been quoted time and again by the Federal Court and the Supreme Court of India in various decisions and does not need elaboration. The other principle in the present context is, that the taxable event is that which on its occurrence creates or attracts the liability to tax. Such liability does not exist or accrue at any earlier or later point of time.

This is what the apex Court stated in Goodyear India Ltd. vs. State of Haryana (1990) 76 STC 71 (SC).

**12.** These two principles do lead us to the conclusion that in so far as the first part of imposition of tax is concerned, namely what persons in respect of what property are liable to pay tax is to be determined with reference to law as on the date on the occurrence of event which creates or attracts the liability to tax, unless the statute by express or by necessary implication provides otherwise. In computing such liability what is to be excluded, or included or conditions or allowances of deductions or exemptions and like matters of law as it exists on 1st of April of the relevant assessment year govern the assessment.

**13.** Applying the aforesaid principles, if we view the facts of the present case the taxable event which attracted liability to tax was the transfer of immovable property as a result of which the income in the nature of capital gain arose during the previous year.

**14.** The next question which calls for consideration is whether the charge having attracted on the date of transfer, further question whether the transfer is of long-term capital assets or short-term capital assets is to be determined as per law in force on the 1st of April, 1975, or, as the case may be, 1974 when the assessment year commenced or in accordance with law on the date of the taxable event. ”

The transaction in question was completed prior to the bill proposing the said amendment to be introduced then it is not disputed that the assessee could not visualize the subsequent

amendment in the provisions of sec.94(7) and enhancement of tax liability as per the subsequent amendment. When the incident of tax being sale of units occurred prior to the introduction of the bill proposing the amendment in section 94(7) then the additional tax liability cannot be fastened on the transactions of and sale of securities/units by virtue of subsequent amendment. Accordingly, in view of the above discussion and in the facts and circumstances of the case, we hold that by virtue of the amendment vide Finance Act 2004 in section 94(7) no additional tax liability can be imputed on the transaction of sale of M.F.units completed prior to the introduction of bil proposing the amendment. Hence, the addition made by AO by invoking the provision of section 94(7) is deleted.

9. Appeal allowed.

*Pronounced in the open court on 13<sup>th</sup> November, 2015.*

sd/-  
**(Abraham P George)**  
**ACCOUNTANT MEMBER**  
*eksrinivasulu, sps*

sd/-  
**(Vijay Pal Rao)**  
**JUDICIAL MEMBER**

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar  
Income-tax Appellate Tribunal  
Bangalore