

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "सी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI
BEFORE S/SHRI B.R.BASKARAN, AM AND AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No.7875/Mum/2010
(निर्धारण वर्ष / Assessment Year:2006-07)

CIFCO LTD, Bhupen Chambers, Dalal Street, Fort, Mumbai-400023	बनाम/ Vs.	Income Tax Officer 3(1)(1), Aayakar Bhavan, M K Road, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN. :AAACC1766G

अपीलार्थी ओर से / Appellant by	Shri Nishit Gandhi
प्रत्यर्थी की ओर से/Respondent by	Mrs.Radha Narang

सुनवाई की तारीख / Date of Hearing : 31.12.2015
घोषणा की तारीख /Date of Pronouncement: 2.3.2016

आदेश / O R D E R

Per B R Baskaran, AM:

The appeal filed by the assessee is directed against the order dated 14.09.2010 passed by Ld CIT(A)-7, Mumbai and it relates to the assessment year 2006-07.

2. The assessee is aggrieved by the decision of the Id.CIT(A) in confirming the assessment of amount received on sale of premises as "Short Term Capital Gain" (STCG).

3. The facts relating to the issue are stated in brief. The assessee had borrowed loan of Rs.3.25 crores from M/s Kenilworth Investments Limited. The above said company M/s Kenilworth Investments Limited had taken

loan from another company named as M/s Dhanraj Mills Limited. Consequent upon the Stock Scam, M/s Dhanraj Mills Limited was declared as a 'notified party' by the Special Court set up under Trial of Offences Relating to Transactions in Securities Act, 1992. In the course of realizing the dues due to be received by M/s Dhanraj Mills Limited, the assessee was declared as Judgment debtor and accordingly a property belonging to the assessee was taken control by the custodian and it was decreed to be sold in settlement of amount due from M/s Kenilworth Investments Limited to M/s Dhanraj Mills Limited. We have earlier noticed that the assessee had taken loan from M/s Kenilworth Investments Limited, which in turn had borrowed money from M/s Dhanraj Mills Ltd. The property belonging to the assessee was auctioned for a sum of Rs.6,80,12,659/-. The assessee had claimed depreciation on the property so sold and hence in the return of income, the assessee declared STCG on sale of property u/s 50 of the Act as under:

Sale proceeds	Rs.6,80,12,659/-
Less: Cost of transfer	<u>Rs.3,25,00,000/-</u>
Total	Rs.3,55,12,659/-

The assessee considered the amount borrowed from M/s Kenilworth Investments Ltd as "Cost of transfer" on the reasoning that the loan amount is a charge on the property and accordingly computed the Short term capital gain. Against the STCG declared by the assessee, the assessee had set off of business loss of the current year and also brought forward unabsorbed depreciation.

4. It is pertinent to note that the assessee had taken certain alternative contentions before the AO, i.e., the assessee had claimed that the sale consideration of the property was not taxable, since it was not transferor of the assets, it did not derive any benefit from such sale and hence no

real income had accrued to it. The assessee also put up another claim that brought forward business loss should have been allowed to be set off against the STCG, since surplus realized on sale of premises is in the nature of business income, but came to be taxed as STCG under deeming provisions of section 50 of the Act. In this regard, the assessee placed reliance on the decision rendered by the Mumbai Bench of the Tribunal in the case of J K Chemicals V/s ACIT (ITA No.8206 and 8648 (Bom) of 1989.

5. The AO explained that the assessee has actually derived benefit from transfer of assets by way of satisfaction of the loan payable by it to M/s Kenilworth Investments Limited and accordingly held the assessee has derived income from sale of the asset. He further held that the loan amount taken from M/s Kenilworth Investments Limited cannot be considered as cost of transfer. With regard to the decision in the case of J K Chemicals (supra) relied upon by the assessee, the AO took the view that the business loss to the extent of depreciation already allowed to the assessee and can be said to be eligible for set off against the STCG worked out under section 50 of the Act since any surplus realized over and above shall represent as capital gains.

6. The AO did not agree that the amount of Rs.3.25 crores borrowed from M/s Kenilworth Investments Ltd represented a charge on the property and accordingly rejected the claim for deduction of Rs.3.25 crores as cost of transfer. The AO noticed that the cost of premises was Rs.81,34,682/- and the assessee had availed depreciation to that extent. Accordingly, the AO took the view that the sale proceeds to the extent of Rs.81,34,682/- represents recovery of depreciation and accordingly held that the brought forward business loss can be allowed to be set off against

STCG to the extent of Rs.81,34,682/-. Accordingly the AO allowed set off of current year's business loss, brought forward depreciation and brought forward business loss to the extent of Rs.81,34,862/-.

7. In the appellate proceedings, the Id.CIT(A) upheld the view taken by the AO and hence the assessee has filed this appeal before us.

8. The Id. AR appearing for the assessee reiterated the contentions made before the tax authorities. He submitted that the loan amount of Rs.3.25 crores taken by the assessee from M/s Kenilworth Investments Limited should be considered as cost of transfer, since the property came to be auctioned because of availing of the loan and hence the loan amount should be considered as encumbrance attached to the property. In this regard, he placed reliance on the decision rendered by the Hon'ble Calcutta High Court in the case of Gopee Nath Paul and Sons V/s DCIT (2005) 278 ITR 240 (Calcutta).

9. On the contrary, the Id D.R submitted that the amount borrowed by the assessee has got no relation with the title of the property and hence the same cannot be considered as Cost of transfer.

10. We heard the parties on this issue and perused the record as well as the decisions relied upon by the assessee. The decision rendered by the Hon'ble Calcutta High Court in the case of Gopee Nath Paul and Sons (supra) relates to the expenditure incurred for removing encumbrances. In the instant case, the loan amount of Rs.3.25 crores is an independent transaction unconnected with the property and hence, in our view, the borrowings cannot be considered as "an encumbrance attached to the property". In that view of the matter, the same cannot be considered as

expenditure incurred for removing encumbrances. Hence, we are of the view, that the facts prevailing in the instant case is distinguishable and hence the assessee cannot take support of the decision rendered in the case of Gopee Nath Paul and Sons (supra).

11. The Ld A.R also contended that the assessee did not derive any benefit from the sale of the property and hence no real income has accrued to it. However, as observed by the AO, the liability of the assessee against the loan taken from M/s Kenilworth Investments Limited has stood satisfied upon the sale of premises of the assessee, meaning thereby, the assessee has actually derived benefit from the sale. Even though the assessee has not signed the transfer documents, the property should be considered to have been sold on behalf of the assessee only by virtue of the court decree. Hence these contentions of the assessee are liable to be rejected.

12. The Ld A.R, in the alternative, submitted that the sale proceeds of the asset actual represents business income and it is taxed as Short term Capital gain in terms of deeming provisions of sec. 50 of the Act. Hence the brought forward business losses should be allowed to be set off against the STCG computed u/s 50 of the Act. In this regard, he placed reliance on the following case law:-

(a) Lavish Apartment (P) Ltd Vs. ACIT (2012)(210 Taxmann 9)

(b) Sri Padmavathi Srinivasa Cotton Ginning & Pressing Factory Vs. DCIT (125 TTJ (Visakha) 411).

(c) Digital Electronics Ltd Vs. Addl. CIT (2011)(135 TTJ (Mum) 419).

13. We have carefully considered the above said decisions. In the case of Lavish Apartments, the issue was relating to set off brought forward business loss against the income assessed under the heads Income from House property and income from other sources. In the other two cases, the question of setting off of brought forward loss against the STCG computed u/s 50 of the Act has been considered.

14. We have earlier noticed that the cost of premises was Rs.81,34,682/- and the assessee had availed depreciation to that extent. Under the provisions of sec. 41(2) of the Act that existed in the Statute prior to the insertion of sec. 50 of the Act, the amount recovered on sales to the extent of depreciation already allowed was taxed as balancing charge. We notice that the assessing officer has followed the same principle and accordingly held that the sale proceeds to the extent of Rs.81,34,682/- can be considered as business income and accordingly allowed set off.

15. The claim of the assessee is that the entire amount of STCG should be considered as business income and accordingly set off of brought forward business loss should be allowed against it. We are unable to agree with the said contentions. The claim of the assessee may be accepted, if otherwise the sale proceeds are considered as business income under the commercial principles. Following observations made by Hon'ble Supreme Court in the case of CIT Vs. Chugandas & Co. (1965)(55 ITR 17) are relevant here:-

"The heads described in section 6 and further elaborated for the purpose of computation of income in section 7 to 10 and 12, 12A, 12AA and 12 B are intended merely to indicate the classes of income: the heads do not exhaustively delimit sources from which income arises. This is made clear in the judgment of this court in the United Commercial Bank Ltd's case, that business income is

broken up under different heads only for the purposes of computation of the total income: by that break up the income does not cease to be the income from business, the different heads of income being only the classification prescribed by the Indian Income tax Act for computation of income.”

The same view was expressed by Hon'ble Supreme Court in the case of Cocanada Radhaswami Bank Ltd (1965)(57 ITR 306). Hence, in order to claim set off of brought forward business loss, it is required to be shown that the income taxed under any other head actually constitutes Business income.

16. In the instant case, the sale proceeds realized over and above the cost of asset, in our view, cannot be categorized as business income under commercial principles; rather it represents capital receipt realized on sale of a capital asset as per the commercial principles. Hence, in our view, the assessing officer was justified in restricting the claim to the extent of Rs.81,32,684/-. Accordingly, we uphold the order of Ld CIT(A) on this issue.

17. In the result, the appeal filed by the assessee is dismissed.

Pronounced accordingly on 2nd March,,2016.

घोषणा खुले न्यायालय में दिनांक: 2nd March,2016. को की गई ।

Sd
(AMARJIT SINGH)
JUDICIAL MEMBER

sd
(B.R. BASKARAN)
ACCOUNTANT MEMBER

मुंबई Mumbai: 2nd March, 2015.

व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai