

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “D” KOLKATA

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.330/Kol/2017
Assessment Year:2010-11

Gouranga Cement Pvt.Ltd., Patpur, P.O.& Dist.Bankura Pin 722 101 [PAN No.AACCG 1513 F]	बनाम / V/s.	DCIT, Circle-3, “Bilash Bhawan”, Candmaridanga, Bankura, Pin-712 101
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri D.K. Sen, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Soumyajit Dasgupt, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	19-03-2018
घोषणा की तारीख/Date of Pronouncement	03-05-2018

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), Durgapur dated 28.11.2016. Assessment was framed by DCIT, Circle- Bankura u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 25.03.2013 for assessment year 2010-11. The grounds raised by the assessee per its appeal are as under:-

1. For that the order of assessment passed u/s. 143(3) and sustained by the Ld. CIT(A), Durgapur is arbitrary, illegal and bad both in law and fact.
2. For that the Ld. CIT(A), Durgapur, in consideration of the facts and circumstances of the case, erred in sustaining order of the AO in making adjustment of unabsorbed business loss of Rs.16,64,524/- of the earlier year against capital gain.
3. For that the Ld. AO in consideration of facts and circumstances of the case is not justified to adjust unabsorbed business loss of the earlier year against capital gain during the year.
4. For that the Ld. AO in consideration of the facts and circumstances of the case, erred in charging interest for Rs.1,598/- u/s. 234A and Rs.3,71,166/- u/s. 234C of the Income Tax Act, 1961.

5. For that the appellant reserves its right to add to, to alter and/or to amend the ground/s taken and adduce paper/s document/s at the time of hearing.”

Shri D.K. Sen, Ld. Advocate appeared on behalf of assessee and Shri Soumyajit Dasgupta, Ld. Departmental Representative appeared on behalf of Revenue.

2. In this appeal various grounds have been raised by assessee out of which ground No. 1 and 5 are general in nature and do not require separate adjudication.

3. First issue raised by assessee in ground No.2 and 3 are inter-related and therefore being taken up together. The issue raised is that Ld. CIT(A) erred in confirming the order of Assessing Officer by adjusting the unabsorbed business loss of ₹16,64,524/- against the capital income.

4. Briefly stated facts are that assessee in the present case is a private limited company and engaged in the business of civil construction and broker activities. The assessee during the year has filed its return of income *inter alia* disclosing the following items of income / loss:-

Sl.No.	Particulars	Amount (Rs)
1.	Business income	13,36,761/-
2.	LTCG	86,30,598/-
3.	Unabsorbed brought forward business loss	16,64,524/-

The assessee in its return of income set off the business profit against the brought forward of unabsorbed business loss. However, AO disregarded the working of assessee for setting off the unabsorbed brought forward business loss. The AO set off of the brought forward unabsorbed business loss against the LTCG income declared by assessee.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that as per the provision of Section 72 of the Act, the brought forward business loss of ₹16,64,524/- only can be set off against the business income. Therefore, the action of AO i.e. setting off the brought forward business loss against the LTCG income is contrary to the provision of the Act. However, Ld. CIT(A) disregarded the contention of assessee and confirmed the order of AO after having reliance on the order of ITAT Mumbai Tribunal in the case of *Digital Electronics Ltd. vs. ACIT* (2011) 135 TTJ 419 (Mum).

The assessee being aggrieved by this order of Ld. CIT(A) is in appeal before us.

6. Before us Ld. AR for the assessee reiterated the same arguments that were made before Ld. CIT(A) and relied on the judgment of Hon'ble Punjab & Hayana High Court in the case of *CIT vs. Rubber Udyog Vikas P. Ltd.* (2011) reported in 335 ITR 558 (P&H).

On the other hand, Ld DR submitted that case law relied upon by Ld. AR in the case of *Rubber Udyog Vikas P. Ltd.* (supra) pertains to the penalty proceedings therefore no reference to the present case can be made. He vehemently relied on the order of Authorities Below.

7. We have heard the rival contentions and perused the material available on record. In the instant case the assessee has shown business income of ₹13,36,761/- and LTCG income of ₹86,30,498/- only. Besides the above assessee has shown unabsorbed brought forward business loss of ₹16,64,542/- which was set off against the business income to the extent of ₹13,36,761/- by the assessee. The assessee has offered the tax on LTCG at special rate @ of Rs. 20% for Rs. 17,26,100.00 (20% of Rs. 86,30,498.00 only) which transpires that the assessee has not set off the remaining brought forward business loss of Rs. 3,27,763.00 (16,64,542.00 – 13,36,761.00) against the LTCG. Thus the balance amount of unabsorbed brought forward business loss of ₹3,27,763/- was carried forward to the subsequent year by the assessee.

However, the AO set off the entire business brought forward loss against the LTCG income declared by assessee. Thus, AO levied tax on the business of ₹13,36,761/- as well as charged LTCG tax @ 20% on the remaining amount of LTCG income i.e. Rs. 69,65,974.00 (Rs. 86,30,498.00 – 16,64,542.00). The view taken by the AO was upheld by the Ld. CIT(A). Now the issue before us arises for our consideration so as to whether the impugned loss of ₹16,64,824/- i.e. unabsorbed brought forward loss should be set off against the business income of ₹13,36,761/- and balance of ₹3,27,763/- against the LTCG income. At this juncture, we find important to reproduce the provision of Sec 72 of the Act, which reads as under:-

“Carry forward and set off of business losses.

³⁸72. ³⁹[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, ⁴⁰[* * *] 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 ;

⁴¹[* * *]

(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 :]

⁴²[**Provided** that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such business is re-established, reconstructed or revived by the assessee, so much of the loss as is attributable to such business shall be carried forward to the assessment year relevant to the previous year in which the business is so re-established, reconstructed or revived, and—

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

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re-established, reconstructed or revived continues to be carried on by the assessee, be carried forward to the following assessment year and so on for seven assessment years immediately succeeding.]

(2) Where any allowance or part thereof is, under sub-section (2) of section 32 or sub-section (4) of section 35, to be carried forward, effect shall first be given to the provisions of this section.

(3) No loss ⁴²[(other than the loss referred to in the proviso to sub-section (1) of this section)] shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.”

A plain look at the above statutory provision makes it clear that the unabsorbed brought forward business loss needs to be set off against the business income declared by assessee for the year under consideration. There is no dispute that assessee has shown business income of ₹13,36,761/- for the year under consideration. Therefore, in our considered view, assessee is very much entitled to claim the set off of the brought forward unabsorbed business loss against the income declared under the head “business”.

The amount which has not been set off against the business income of the assessee can be set off against the LTCG income of the assessee in view of the order of Hon’ble

Mumbai Tribunal in the case of *Digital Electronics Ltd.(supra)* wherein it was held as under :

“Section 72 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, 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 is to be carried forward to the following assessment year and is allowable for being set off 'against the profits, if any, of that business or profession carried on by him and assessable for that assessment year'. Thus, for setting off the income, while the loss to be carried forward has to be under the head 'Profits and gains of business or profession', the gains against which such loss can be set off, has to be profits of 'any business or profession carried on by him and assessable in that assessment year'. In other words, there is no requirement of the gains being taxable under the head 'Profits and gains of business or profession' and, thus, as long as gains are 'of any, business or profession carried on by the assessee and assessable to tax for that assessment year', the same can be set off against loss under the head profits and gains of business or profession carried forward from earlier years.

In the case of CIT v. Cocanada Radhaswami Bank Ltd. [1965]57 ITR 306 (SC), the Supreme Court held that as long as the profits and gains are in the nature of business profits and gains, and even if these profits are liable to be taxed under a head other than income from business and profession, the loss carried forward can be set off against such profits of the assessee. In that view of the matter, the objection raised by the authorities below are devoid of any legal substance.

Therefore, the income earned in the relevant year, although not taxable as 'profits and gains from business or profession' was an income in the nature of income of business nevertheless. The assessee was, therefore, indeed justified in claiming set off of business losses against the income of capital gains.”

It is undisputed fact that the assessee has the earned the long term capital income by way of transfer of the business assets such as factory building, Plant & Machinery, electric installation under the head slump sale. Thus the nature of LTCG is in the nature of business profit & gains which is liable to be taxed under the head capital gain by virtue of the provisions of law. But the nature of LTCG is business only as discussed above in the case of *Digital Electronics Ltd.(supra)*.

7.1 In view of above, we direct the AO to set off the business loss of Rs.13,36,761.00 against the business income and the remaining loss of Rs. 3,27,763.00 should be set off against the LTCG as discussed above. This ground of assessee's appeal is partly allowed.

8. Next issue raised by assessee in ground No.4 relates to the levy of interest u/s 234A/234C of the Act. The AO is directed to grant consequential relief to the assessee.

9. **In the result, assessee's appeal is partly allowed in terms of above.**

Order pronounced in open court on 03/05/2018

Sd/-
(न्यायिक सदस्य)
(S.S.Viswanethra Ravi)
Judicial Member

Sd/-
(लेखा सदस्य)
(Waseem Ahmed)
Accountant Member

*Dkp, Sr.P.S

दिनांक:- 03/05/2018 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Gouranga Cement Pvt.Ltd., Patpur, P.O.&Dist. Bankura, Pin-722 101
2. प्रत्यर्थी/Respondent-DCIT, Circle-3, Bilash Bhawan, Chandmaridanga, Bankura, Pin 712101
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary Head of Office/DDO
आयकर अपीलीय अधिकरण, कोलकाता