

आयकर अपीलीय अधिकरण न्यायपीठ, नागपुर में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL BENCH, NAGPUR

(At e-Court, PUNE)

BEFORE SHRI D. KARUNAKARA RAO, AM AND  
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.621/NAG/2008

निर्धारण वर्ष / Assessment Year : 2005-06

Shri Abdullabhai Hasanali,  
Through L/H Zohara Bai,  
C/o M/s Loya Bagri & Co.,  
Chartered Accountants,  
Gandhibag, Nagpur

PAN: ABUPA3467C

.....अपीलार्थी / Appellant

बनाम / V/s.

CIT-II, Nagpur

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.317 & 318/NAG/2012

निर्धारण वर्ष / Assessment Years : 2006-07 & 2007-08

Shri Abdullabhai Hasanali,  
Through L/H Zohara Bai,  
C/o M/s Loya Bagri & Co.,  
Chartered Accountants,  
Gandhibag, Nagpur

PAN: ABUPA3467C

.....अपीलार्थी / Appellant

बनाम / V/s.

ACIT, Circle-3, Nagpur

.....प्रत्यर्थी / Respondent

Assessee by : Shri Rajesh Loya  
Revenue by : Dr. Milind Bhusari, CIT

सुनवाई की तारीख / Date of Hearing : 15.10.2019  
घोषणा की तारीख / Date of Pronouncement : 15.10.2019

**आदेश / ORDER****PER D. KARUNAKARA RAO, AM:**

Out of three appeals filed by the assessee, one appeal is against the revision order of the CIT-II, Nagpur, dated 15.10.2008 for the assessment year 2005-06. Remaining two appeals are against respective orders of CIT(A)-II, Nagpur, both dated 10.02.2012 emanating from the regular assessment orders for the assessment years 2006-07 and 2007-08, respectively.

**ITA No.621/NAG/2008, A.Y. 2005-06**

2. The grounds raised by assessee are as under:-

- (1) *That the order of the Commissioner of Income Tax u/s. 263 is bad in law and on facts.*
- (2) *That the learned Commissioner of Income Tax erred in law and on facts in coming to the conclusion that the order passed by Assessing Officer u/s. 143(3) is prejudicial as well as erroneous to the interest of Revenue. On the facts and circumstances of the case and in law the action is not justified.*
- (3) *That the learned Commissioner of Income Tax erred in law and on facts in not adjusting long term capital gain of Rs.18,56,944/- against the brought forward losses under the head capital gain loss. On the facts and circumstances of the case and in law the action is not justified.*
- (4) *That the learned Commissioner of Income Tax erred in law and on facts in making addition of long term capital gain of Rs.18,56,944/- to the returned income. On the facts and circumstances of the case and in law the action is not justified.*
- (5) *That the learned Commissioner of Income Tax erred in law and on facts in not carry forward the remaining loss of Rs.51,21,325/- on account of capital gain loss.*
- (6) *That the learned Commissioner of Income Tax erred in law and on facts in initiating penalty u/s. 271(1) (c).*
- (7) *That for any other ground with kind permission of Hon'ble members at the time of hearing of appeal.*

3. From the above it is evident the core issue relates to the correctness of allowing by Assessing Officer the assessee's claim of set off of brought forwarded long term capital loss relating to (sale of units) US 64 of

Rs.51,21,325/- against the current year's taxable capital gain of Rs.18,56,944/-.

4. Before us, the Ld. Counsel for the assessee submitted this is the case where assessment was originally completed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') on 11.08.2006 allowing the said claim of set off of the brought forward of long term capital loss against current year's taxable long term capital gains. The CIT, relying on certain decisions, opined that by allowing such set off of brought forward losses, there is loss of revenue and therefore, the CIT held the order passed by the Assessing Officer erroneous and prejudicial to the interest of Revenue. The CIT drew parallel to the way the exempt agricultural income is treated in matters of such set off of brought forward long term capital losses against the assessee. Thus, the CIT denied the set off long term capital loss, which was originally allowed by the Assessing Officer and directed the Assessing Officer, accordingly. On these facts, the Ld. Counsel filed written submissions and the same are extracted as under:-

"Ground No. 1 &2 :

*The order of the learned CIT u/s.263 is bad in law and on facts. The learned CIT erred in law and on facts in coming to the conclusion that the order passed by the AO u/s. 143(3) is prejudicial as well as erroneous to the interest of revenue.*

(1) *Facts:*

Asstt. Year 2005-06 :

<i>Return for Asstt. Year 2005-06 filed</i>	<i>on 22-08-2005</i>
<i>Intimation u/s. 143(1) issued</i>	<i>on 27-10-2005</i>
<i>Assessment u/s. 143(3) accepting returned income</i>	<i>on 11-08-2006</i>
<i>Notice u/s.263 issued</i>	<i>on 08-09-2008</i>
<i>Order u/s.263 passed</i>	<i>on 15-10-2008</i>

Asstt. Year 2004-05 :

<i>Return for Asstt. Year 2004-05 filed</i>	<i>on 20-05-2004</i>
<i>Intimation u/s.143(1) issued</i>	<i>on 03-01-2005</i>
<i>Notice u/s.148 issued</i>	<i>on 14-10-2008</i>
<i>Assessed u/s.147 r.w.s. 143(3)</i>	<i>on 31-07-2009</i>

*Appeal pending with CIT(A)*

(2) *The issue of determination of loss or verification of loss was not before the AO. Thus the AO has not committed any error. On the pretext of revision proceedings, the learned CIT is revising the loss claim in Asstt. Year 2004-05 which is legally not permissible.*

(3) *On the day when the assessment order for A.Y.2005-06 was passed there was nothing on record contrary to valid return and intimation for A.Y. 2004-05 and which was never found incorrect or illegal claim.*

(4) *The brought forward loss cannot be redetermined and possibility of verification of such losses in subsequent seven years is illogical and consequently the action u/s.263 cannot be undertaken for such purposes. There is no error by the AO.*

(5) *The learned CIT did not record whether the twin condition that the order passed by the AO is erroneous in so far as it is prejudicial to the interest of the revenue has been satisfied.*

(i) *Jewel of India Vs. ACIT (2010) 325 ITR 92 (Bom.)*

(6) (a) *The assessment order was earlier made u/s.143(3) after due scrutiny of records maintained by the assessee. The AO has adopted the possible view.*

(i) *Malabar Industrial Co. Ltd. Vs. CIT (2000) 243 ITR 83 (SC)*

(ii) *CIT Vs. Max India Ltd. (2007) 295 ITR 282 (SC)*

(b) *Section 10(38) is identical to section 10(33). Similar claim of allowing Long Term Capital Loss u/s. 10(38) on sale of listed shares have been allowed in the following cases :-*

(i) *Raptakos Brett & Co. Ltd., vs. DCIT (2015) 58 taxmann.com 115, Mumbai*

(ii) *ACIT vs. Shri Somnath Vaijanath Sakre ITA No. 2605/Pune/2016 dated 8-3-19*

(iii) *United Investments vs. ACIT, Kolkata ITA No. 511/Kol/2017 dated 1-7-2019*

(7) *The notice u/s.263 may kindly be seen. The revision was proposed on the ground that the conversion of US 64 Units in US Bonds is not a transfer within the provisions of section 47(10). However the revision was made on a different ground that the assessee has claimed deduction u/s. 10(33) on positive income and so the loss is not allowable.*

(8) *Similar issue has been dealt by the Hon'ble Mumbai bench in the case of Shri Kirit Vrajlal Babaria vs. DCIT, 43, Mumbai in ITA No.2939/Mum/2009. It was held as under :-*

(a) *No finding is recorded by the CIT that the order passed by the AO is erroneous and in so far as it is prejudicial to the interest of the revenue.*

(b) *The CIT ought not to have given specific direction to complete the assessment in a particular manner.*

(c) *The AO has taken one of the possible views which is valid in law.*

*The order u/s. 263 was cancelled.  
The facts are identical in the case of assessee and therefore, the order u/s. 263 needs to be quashed.”*

5. On the other hand, the Ld. DR for the Revenue relied heavily on the order of CIT.

6. On hearing both the sides, we find relevant to go through certain decisions on this issue of allowability of such set off of such brought forward capital loss against taxable capital gains of the current year. On similar issue in connection with the provisions of section 10(38) of the Act, which are parameteria with the provisions of section 10(33) of the Act, Pune Bench of Tribunal in cross appeals in the case of Shri Somnath Vaijanath Sakre in ITA Nos.2986/PUN/2016 and 2605/PUN/2016, for assessment year 2012-13 vide order dated 08.03.2019 held such set off, constitutes an allowable claim. The assessee brought our attention to the contents of para 10 of the said order in this regard. From the said para, we find that relying on the judgment of Hon'ble High Court of Gujarat in the case of Kishorebhai Virani Vs. ACIT reported in (2014) 367 ITR 261 (Guj) and various decisions in the cases of CIT Vs. Mithilesh Kumari (1973) 92 ITR 9 (Del), Addl.CIT Vs. K.S. Gupta (1979) 119 ITR 372 (A.P.), S.Balanalias Shanmuqam Vs. DCIT (2009) 120 ITD 469 (Pune) and discussing all these judgments, Pune Bench of Tribunal held as under:-

*“10.....*

*We further find that Hon'ble Calcutta High Court in the case of Royal Calcutta Turf Club (supra) has held that long term capital loss on sale of shares would be allowed to be set off against the long term capital loss on sale of land in accordance with Sec.70(3) of the Act. We thus find that the issue in the present ground is similar to the issue before the Mumbai ITAT in the case of Raptakos Brett & Co., Ltd., (supra). We therefore following the decision of Hon'ble Supreme Court in the case of M/s. Vegetable Products Ltd. (supra) and the decision of Co-ordinate Bench of the Mumbai Tribunal in the case of Raptakos Brett & Co., Ltd., (supra) hold that assessee is entitled to set off of the loss of long term capital gains from the shares on which security transaction is paid or payable against the long term capital gains earned from shares on which no security transaction is paid / payable. We thus hold accordingly. Thus, the ground of assessee is allowed.”*

7. From the above extract from the said decision, it is evident that such set off, as allowed by the Assessing Officer, constitute a view taken by the Assessing Officer at the time of making of original assessment order dated 11.08.2006. This view was in existence right from the time of making an assessment i.e. 01.06.1992 vide the decision of Hon'ble High Court of Calcutta in the case of Royal Calcutta Turf Club Vs. CIT reported in (1983) 144 ITR 709 (Cal). Considering the above, it is evident there is a view already in existence which was followed by the Assessing Officer at the time of allowing claim of assessee. Considering the same, view taken by the CIT during revision proceedings u/s 263 of the Act constitutes an another view. Relying on the judgment of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs. CIT (2000) 243 ITR 83 (SC), we are of the opinion the CIT is barred from assuming the jurisdiction u/s 263 of the Act merely to take another view which is different from that of the view taken by the Assessing Officer. Without going into other arguments of assessee on this view itself, the order of CIT is required to be quashed. Accordingly, the grounds raised by assessee are allowed.

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8. In both the appeals, the common issue raised in the grounds relates to allowability of set off of the brought forward capital loss, generated out of sale of US64 units, against the current year's long term capital gains which is already adjudicated by us while dealing with the appeal on the revision order u/s 263 of the Act in ITA No.621/NAG/2008 (supra).

9. Considering the same, we are of the opinion the issue now stands covered by our order in the said appeal of assessee (supra). Accordingly, the Assessing Officer is directed to allow the claim of assessee of the set off of brought forward capital losses against current year's taxable long term capital gains. Thus, the Assessing Officer is directed to grant set off of said losses after considering correct figures of losses and gains as per law. The Assessing Officer shall provide reasonable opportunity of being heard to the assessee in this regard. The grounds raised by assessee in both the appeals are allowed as above.

10. In the result, all the appeals of assessee are allowed as indicated above.

Order pronounced in open Court on 15<sup>th</sup> day of October, 2019.

**Sd/-**  
**PARTHA SARATHI CHAUDHURY**  
**JUDICIAL MEMBER**

**Sd/-**  
**D. KARUNAKARA RAO**  
**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 15<sup>th</sup> October, 2019.

GCVSR

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-II, Nagpur.
4. The CIT-II, Nagpur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,  
Nagpur / DR, ITAT, Nagpur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.