

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI D. KARUNAKARA RAO, AM AND  
SHRI S. S. VISWANETHRA RAVI, JM

आयकर अपील सं. / ITA No.951/PUN/2017  
निर्धारण वर्ष / Assessment Year : 2008-09

Trimbak Hatcheries Pvt. Ltd.,  
Flat No.4 & 5, Anandkunj Apartment,  
Old Gangapur Naka, Gangapur Road,  
Nashik - 422005.

PAN : AABCT0456H

.....अपीलार्थी / Appellant

बनाम / V/s.

ACIT, Circle-1,  
Nashik.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Kishor Phadke  
Revenue by : Shri Pankaj Garg

सुनवाई की तारीख / Date of Hearing : 05.11.2019  
घोषणा की तारीख / Date of Pronouncement : 06.11.2019

**आदेश / ORDER**

**PER D. KARUNAKARA RAO, AM:**

This appeal is filed by the assessee against the order of CIT(A)-1, Nashik dated 13.02.2017 for the Assessment Year 2008-09.

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

- “1. The learned CIT(A)-1, Nasik and the learned AO erred in law and on facts in not allowing **set-off of brought forward business loss** amounting to Rs. 1,98,42,328/- **against the short term capital gain** arising from sale of building and other depreciable assets, which were used for carrying out business activities.
2. The learned CIT(A)-1, Nasik and the learned AO erred in law and on facts in **not allowing set-off of brought forward business loss** against the long term capital gain arising from sale of land, which was distressed sale.
3. The appellant craves leave to add / modify / alter / delete all or any of the grounds of appeal.”

3. Before us, at the outset, ld. Counsel for the assessee submitted that the issue of grant of benefit of “set off of back forward business loss and back forward unabsorbed depreciation against the short term capital gain” is raised for adjudication in the grounds and a similar issue was already adjudicated by the Tribunal in the preceding assessment year 2007-08 in assessee’s own case vide ITA No.521/PN/2013 dated 28.08.2014. Ld. AR submitted that the Tribunal rejected the assessee’s prayer for such set-off. Further, ld. AR mentioned that, aggrieved with the said order of the Tribunal in that year, the assessee filed Income Tax Appeal before the Jurisdictional High Court and the same stands admitted by the Hon’ble High Court vide its order dated 03.07.2018, copy of which is placed on record.

4. Coming to the merits, ld. Counsel for the assessee submitted that, the issue agitated by the assessee in the grounds i.e. granting set-off of brought forward business losses against the short term capital gains arising out of sale of building and other depreciable assets, is common in the assessment year 2007-08 and 2008-09. Bringing our attention to the order of the CIT(A), ld. Counsel for the assessee read out the following para 7 to 7.2 of the order of the CIT(A) :-

*“7. I have considered the facts of the case, the assessment order, the order of the CIT(A)-1, Nashik dated 24/10/2011, the order of the Hon’ble ITAT, Pune dated 28/08/2014 and the submission of the appellant. The order of Hon’ble ITAT for the A.Y. 2008-09 has held interalia as under:-*

*19. In so far as the assessment year 2008-09 is concerned, in this year also, assessee sold certain other assets belonging to erstwhile business of poultry. Assessee sold its remaining land, plant & machinery to M/s Prathmesh Ceramics Pvt. Ltd. vide sale deed dated 04.04.2007 for a consideration of Rs.1,20,00,000/-. The Assessing Officer treated the sale as a slump-sale and subjected the entire sale transaction to tax as a long term capital gains and computed the income at Rs.1,20,00,000/-. The CIT(A) has also affirmed the said action by noticing that assessee has sold the assets without individually valuing them for a lump-sum consideration of Rs.1,20,00,000/-. Since assessee’s net worth was negative i.e. a loss of Rs.1,03,90,435/-, the full value of sale consideration of Rs.1,20,00,000/- has been held to be taxable as*

long term capital gain. In this background, assessee is in further appeal before us and has raised the following Grounds of Appeal :-

“1. The learned CIT(A), Nasik erred in law and on facts in sustaining the view of the learned AO that the appellant has not carried out any business in A.Y. 2008-09 and further erred in disregarding business loss of Rs.9,39,096/- incurred and crystallized during A.Y. 2008-09.

2. The learned CIT(A), Nasik erred in law and on facts in confirming the treatment given by the learned AO of applying the provisions of sec. 50B and sec. 2(42C) of the ITA, 1961, and treating the transaction of sale of business assets as slump sale transaction. The I-T authorities ought to have appreciated that what was sold by the appellant were various assets such as land, building, etc. and that too, under a distress situation.

3. Consequentially, the learned CIT(A)-Nasik and the learned AO erred in law and on facts in not granting deduction of indexed cost of land, sold by the appellant during A.Y. 2008-09. 4. The learned CIT(A), Nasik erred in law and on facts in not allowing set off of brought forward business loss and unabsorbed depreciation against short long term capital gains arising from sale of building and other depreciable assets used for carrying out business activities.”

20. Before we attempt to adjudicate the specific Grounds of Appeal raised by the assessee it may be noticed that in the assessment of assessment year 2007-08, which has been dealt with in earlier paras, assessee had partly sold assets of poultry business and the assessment was finalized without treating it as a slump sale. In this view of the matter, it was a common point between the parties that the controversy be re-visited by the Assessing Officer in particularly having regard to the assessment of the preceding year and also our order for the said assessment year in the earlier paragraphs. Before parting, we may also notice the plea setup by the assessee before us is that the sale of asset in question can be treated as slump sale only when all assets and liabilities of an undertaking are sold and the business is transferred in one-go as a going concern. According to the assessee, the said feature is missing in the present case. Be that as it may, we deem it fit and proper to set-aside the orders of the lower authorities and restore the matter back to the file of the Assessing Officer who shall re-visit the controversy afresh in the background of the assessment for assessment year 2007-08 as also our decision of even date for the assessment year 2007-08.

7.1 For A.Y. 2007-08, the Hon'ble ITAT has held as under :-

12. Against the aforesaid taxable income, assessee challenges the order of the CIT(A) upholding the action of the Assessing Officer in denying set-off of brought forward business loss of Rs.1,98,42,328/-. In this context, the plea of the assessee is that the aforesaid taxable income reflects surplus arising from the sale of land and other assets of its poultry business, and thus such surplus is in the nature of business income. According to the appellant, though such surplus is taxable as “Capital gains” as per the provisions of the Act, but the real character of such surplus is business income; and thus, the same is available for set-off against the brought forward business loss. In-principle, we have no quarrel with the proposition being advanced by the appellant as per our discussion in earlier paras, based on the judgement of the Hon'ble Delhi High Court in the case of Lavish Apartment (P) Ltd. (supra). So however, the moot point to be determined is whether by applying commercial

*principles, can the impugned income/receipts be classified as business income/receipts. The aforesaid determination is necessary because it is only when the impugned income/receipts are characterized as 'business income' judged by the application of commercial principles, the same shall be available for setting-off the brought forward business loss and not otherwise.*

13. *Ostensibly, one limb of the impugned taxable income/receipts are on account of sale of assets of assessee's business of poultry. Whether such like receipts are in the nature of business income or not on an application of commercial principles was an issue before the Special Bench of the Tribunal in the case of Nandi Steels Ltd. (supra). In the case before the Special Bench, the assets sold by the assessee were capital assets and income from sale of such assets was assessed under the head 'capital gains. Nevertheless, the case setup by the assessee was that gain on a sale of a capital asset was to be treated as 'business income' based on commercial principles and was accordingly available for setting-off the brought forward business loss. The Special Bench of the Tribunal disagreed with the assessee and held that the assets sold by the assessee were not business assets whose sale would result in earning of business income classified on the basis of commercial principles. On the contrary, as per the Special Bench, the same were capital assets and thus the profits received on their sale were capital receipts. On this basis, the Special Bench held that the gain on sale of capital assets was not available to be set-off against the brought forward loss of earlier years. In coming to such conclusion, the Special Bench referred to the judgement of the Hon'ble Supreme Court in the case of CIT vs. Express Newspapers Ltd. (1964) 53 ITR 250 (SC) wherein it has been observed that the fact that capital gains are connected with the capital assets of the business cannot make them the profit of the business. Therefore, having regard to the aforesaid, it cannot be said that even after applying commercial principles the impugned receipts on account of sale of capital assets are in the nature of business income so as to be available for setting-off the brought forward business loss of earlier years.*

14. *Now, the second limb of the impugned taxable income before setting-off of unabsorbed depreciation is on account of lease rent on lease of building, farm, quarters and plant & machinery. Even if we were to concede the point of the assessee that such receipts have an imprint of business income on an application of commercial principles, yet it does not help the assessee, as the same has been set-off against unabsorbed depreciation, and the net resultant taxable income does not contain any element of such income.*

15. *In view of the aforesaid discussion, we therefore find no justification on the part of the assessee to claim that the taxable income worked out by the CIT(A) is available for setting-off the brought forward business loss. The CIT(A), in our view, justifiably declined the plea of the assessee.*

7.2 *In view of the aforesaid order of the Hon'ble Tribunal, it is clear that the Hon'ble ITAT has directed to treat the sale of assets as held in A.Y. 2007-08 which is capital gains against which brought forward business loss and depreciation is not allowable. Since the decision is given for A.Y. 2007-08 and the issue has attended finality, the A.O. cannot take a different view in A.Y. 2008-09. The Assessing Officer is directed to follow the way in which similar transaction is taxed in A.Y. 2007-08, for A.Y. 2008-09."*

5. Before us, both the parties mentioned that the issue is identical and the matter is now decided in favour of the Revenue by the said order of the Tribunal in the assessment year 2007-08 (supra). Considering the above developments, we are of the opinion, the issue is identical and the facts are common and the issue now stands covered by the order of the Tribunal in assessee's own case for the assessment year 2007-08 (supra). Accordingly, we find the order of the CIT(A) containing an adverse decision decided against the assessee on the said issue, is fair and reasonable. Thus, the ground nos.1 and 2 raised by the assessee stand dismissed.

6. In the result, the appeal of the assessee is dismissed.

Order pronounced on 06<sup>th</sup> day of November, 2019.

**Sd/-**

**(S. S. VISWANETHRA RAVI)**  
न्यायिक सदस्य/JUDICIAL MEMBER

**Sd/-**

**(D. KARUNAKARA RAO)**  
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 06<sup>th</sup> November, 2019.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-1, Nashik.
4. The CCIT, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

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