

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No. 5823/Del/2018
(Assessment Year: 2014-15)**

Heidelberg Cement India Ltd, 9 th Floor, Tower-C, Infinity Towers, DLF, Cybercity, Gurgaon (Appellant) PAN: AABCM2359J	Vs.	DCIT, Circle-2, Gurgaon (Respondent)
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Assessee by : Shri Harpreet Singh Ajmani, Adv
Shri Nitin Narang, CA

Revenue by: Mr. Waseem Arshad, CIT(DR)

Date of Hearing 06/03/2024

Date of pronouncement 15/05/2024

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.5823/Del/2018 for AY 2014-15, arises out of the order of the Commissioner of Income Tax (Appeals)-1, Gurgaon [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No. 497/16-17 dated 27.06.2018 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 05.12.2016, 19.10.2016 & 30.03.2017 by the Assessing Officer, DCIT, Circle-2, Gurgaon (hereinafter referred to as 'ld. AO').

2. The assessee has raised the following grounds of appeal before us:-

"1. That the Ld. CIT(A) has erred in facts and in law, in confirming the disallowance made by the Ld. AO amounting to INR 4,36,432/- on account of reclassification of certain assets as 'Building other than Residential', eligible for depreciation at 10%, which were originally classified by the Appellant as 'Plant and Machinery', eligible for depreciation at 15%.

2. That the Ld. CIT(A)/ Ld. AO has erred in facts and in law by not considering the detailed nature and use of the assets, while holding this disallowance,

3. That the Ld. CIT(A) has erred in facts and in law, in confirming disallowance made by the Ld. AO amounting to INR 1,45,65,906/- (net of depreciation) on account of capitalization of 25% of Technical Know-how Fee incurred by the Appellant in the subject year, on the ground that such expenses have resulted in benefits of enduring nature to the Appellant and thereby constitutes a capital asset.

4. That the Ld. CIT(A)/Ld.AO have erred in facts and in law in not appreciating that the Technical Know-how has been utilized for smooth running of the business of the Appellant and has not lead to acquisition of any new capital asset.

5. The Ld. AO/ CIT(A) erred on facts and in law, by not allowing set off of brought forward 'Long Term Capital Loss' (LTCL) amounting to INR 77,98,71,598/- against the 'Long Term Capital Gains' (LTCG) amounting to INR 93,43,39,072/- of the subject year.

6. The Ld. AO/CIT(A) has erred on facts and in law by ignoring the genuine hardship of the Appellant in relation to reporting in the prescribed return form for the captioned year, wherein the Appellant was forced to report set off of current year business loss against the LTCG of the current year, as the prescribed return form did not facilitate set off of brought forward LTCL with current year LTCG.

7. The Ld. AO/ CIT(A) has erred on the facts and in law by ignoring the submission of the appellant that the assessee has an option to set off the losses under one head of income against income under the head capital gains in a particular year

8. The Ld. AO/ CIT(A) has completely ignored the well settled principle that specific provisions override the general provisions, as the Ld. AO/ CIT(A) has failed to appreciate that section 74 of the Act, being a specific provision for set off of loss under the head capital gains overrides section 71 of the Act."

3. Ground Nos. 1 & 2 raised by the assessee are challenging the action of the Id CIT(A) in confirming the disallowance of depreciation.

4. We have heard the rival submissions and perused the material available on record. The assessee is engaged in the business of manufacturing clinker and cement for sale to customers in India. Its emphasis is to continuously upgrade efficiency by employing modern and latest technologies, reduce costs and improved production. Return for Assessment Year 2014-15 was

electronically filed on 30.11.2014 declaring loss of ₹113,02,65,434/-. During the course of assessment proceedings for AY 2011-12, certain items were reclassified under the head "building, other than residential" instead of "plant and machineries" as claimed by the assessee in its return of income. Accordingly, depreciation on such items was recomputed @10% instead of 15% as claimed by the assessee in its return of income. As the assessee continued to claim the depreciation @15% for AY 2012-13 and 2013-14, the depreciation was recomputed @10% following the order of AY 2011-12. During the year under consideration also, the assessee claimed depreciation @15% on the above mentioned assets/ items and the Id. AO allowed depreciation at the rate of 10% as allowed in the earlier years. This issue is no longer res integra in view of the decision of the coordinate bench of this Tribunal in assessee's own case In ITA No. 2054/Del/2016 for AY 2011-12 dated 31.10.2019, wherein this issue was decided in favour of the revenue by observing as under:-

"14 We have considered the rival arguments made by both the sides and perused the orders of the Assessing Officer and the CIT(A). We have also considered various decisions cited before us. We do not find any infirmity in the order of the CIT(A) on this issue. The coal shed and GI sheets, in our opinion, cannot be considered as plant & machinery when the assessee is engaged in manufacture of cement We find merit in the logic given by the CIT(A) that the godowns, warehouses and other buildings which are utilized in an ordinary manner even for housing plant or machinery would not become plant or machinery by itself. Further, he has also given a finding that the GI sheets are such material which are utilized for the plant and by its nature this cannot be characterized as plant or machinery. Under these circumstances, we uphold the order of the CIT(A) and dismiss the grounds raised by the assessee on this issue. "

5. Respectfully following the same, ground Nos. 1 and 2 raised by the assessee are hereby dismissed.

6. Ground Nos. 3 and 4 raised by the assessee are challenging the decision of the Id CIT(A) in confirming the disallowance on account of capitalization of 25% of technical knowhow fee incurred by the assessee.

7. We have heard the rival submissions and perused the material available on record. The assessee claimed expense on account of technical knowhow fee

during the year to the tune of ₹17 crores. The Id AO observed that this fee was paid to foreign company M/s. Heidelberg Cement Aisa Pte Ltd in lieu of technical know-how assistance from them. The Id. AO observed that the assessee had debited it as revenue expenditure, though it gives rise to benefit/ advantage which is enduring in nature and is in the capital field. The assessee was asked to justify the claim of the said expenses as revenue expenses. The assessee filed detailed reply dated 20.10.2016 justifying its claim to be revenue in nature. The Id AO however, disregarded the contentions and held the same to be capital in nature by holding that the enduring benefit accrued to the assessee in the capital field and granted depreciation thereon. This issue is no longer res integra in view of the decision of the coordinate bench of this Tribunal in assessee's own case in ITA No. 2054/Del/2016 for 2011-12 dated 30.010.2019, wherein, it has been held as under:-

22. We have heard the arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer, in the instant case, disallowed 25% of the total technical know-how expenses of Rs. 14.09,84,000/- which comes to Rs.3,52,46,000/- treating the same as capital expenditure being spent towards acquisition of capital asset as it gives rise to enduring benefit which can be enjoyed by the assessee over a number of years. He accordingly allowed depreciation on this @ 25% amounting to Rs.88,11,500/- and made an addition of Rs.2,64,34,500/- to the total income of the assessee. While doing so, the Assessing Officer held that the scope read with the provisions of technical know-how clearly indicate that the acquisition of technical know-how seeks to improve each and every aspect of the entire business. The agreement between the assessee and the HCA shows that the acquisition of technical know-how has brought in a complete and comprehensive overhauling of the entire business of the assessee. Therefore, the agreement clearly indicates that the technical knowledge the assessee obtained from this agreement with HCA secured to the assessee an enduring advantage and though benefit which was available to the assessee for its manufacturing and industrial process even after the termination of agreement ceases, but, when the agreement never terminates on account of revision/automatic renewal the benefit goes on and on. Further, continuous use of improved practices over several years leads to creation of institutional memory of advanced procedures and techniques. The Assessing Officer further noted that due to latent learning of systematic procedures and techniques through periodic training of personnel in the form of workshops and on the job trainings continues to reap benefits to the assessee way beyond periods confined with the agreement. According to him, the trained manpower continues to perform at higher levels of efficiency with better techniques even if the technical know-how agreement was to terminate.

We find the Id.CIT(A) while upholding the action of the Assessing Officer noted that the payment made by the assessee has bestowed benefits of enduring nature which would not get terminated with the expiry of the agreement. According to him, when the assessee company is into manufacturing of cement and all the technologies given to it for manufacturing of cement would get merged into its business process. The business line of the assessee is of a particular nature which would require updating everyday like software industry or manufacturing of highly sophisticated instruments. The argument of the assessee that it would return all the designs according to him appears worth paper argument only because in a cement manufacturing plant, if the designs have been used for making the business process the changes are irreversible. It is the submission of the Id. counsel that the assessee has to continuously upgrade plant efficiency by employing modern and latest techniques to reduce costs and improve its productivity and quality. The expenditure on technical know-how was incurred by the assessee for technical information and assistance provided by HCA for the various services that were to be rendered by HCA to the assessee. It is also his submission that the benefit of the technical know-how does vest once and for all thereby resulting in an enduring benefit or for the purposes of bringing into existence any asset or advantage of an enduring nature, rather, the object of the technical assistance was for running the business effectively and profitably. Further, it is also his submission that the payment comprising 2% of sales as fee for technical know-how is recurrent depending on sales and pertains only to the period of agreement. We find some force in the above argument of the Id. counsel for the assessee. We find, clause 2.2 of the agreement reads as under:-

"2.2 All the Technical Information supplied by HCA (whether in writing or orally or in any other manner) mention in para 2.1 above for use by MCL and all copies of the Technical Information (or any of it) made by the MCL shall be and remain the property of HCA and MCL acknowledges the copyright in the Technical Information shall belong to an remain vested with HCA. HCA hereby grants to MCL licence to make such number of copies of the Technical Information (or any part thereof) as the MCL may reasonably require for the purposes of Agreement."

22.1 We find clause 5 of the agreement reads as under:-

"Technical know-how fee in respect of each quarter of a year equal to 2% on the basis of the net ex-factory price of the produce exclusive of excise duties minus the cost of standard bought-out components and landed cost of imported components, irrespective of the source of procurement, including ocean freight, insurance, custom duties and net of distribution costs (fright and forwarding) etc. and as shown in the unaudited/audited financial accounts of MCI."

22.2 Similarly, clause 13 of the agreement reads as under:-

"13.1 Upon the expiration of the term or earlier termination of this Agreement, MCL shall:

13.1.1 at its own cost promptly return to HCA, or otherwise dispose of as HCA may instruct, all Technical Documentation and all other documentation and papers supplied by MCL by HCA and all copies thereof and notes and extracts taken there from by MCL, and

13.1.2 destroy all catalogues, advertising and promotional material, stationery and materials of any sort relating to the products....

23. We find somewhat similar issue had come up before the Hon'ble Delhi High Court in the case of CIT vs. Hero Honda Motors Ltd. (supra). In that case: the assessee was a joint venture between the Hero Group and Honda, Japan, for manufacture and sale of motorcycle using technology licenced by Honda; the assessee and Honda thereupon entered into an agreement called 'licence and technical assistance agreement' in terms which assessee paid royalty to the Honda; the assessee claimed deduction of said payment under section 37(1). The Assessing Officer rejected assessee's claim holding that it was in the nature of capital expenditure; and the Tribunal, however, allowed assessee's claim on revenue's appeal.

24. On appeal filed by the Revenue, the Hon'ble High Court held as under:-

"14. What is placed before us is the "licence and technical assistance agreement" dated 2nd June, 1995 for the territory of India. The term 'intellectual property right' stood defined to mean those patents, utility models, design patents and other intellectual property rights relating directly to the products or the licensed parts thereof or to manufacturing of the products and their licensed parts, but excluded trademarks, patents, utility models, design patents and intellectual property rights relating to the manufacturing facilities and the manufacture thereof. The term 'know-how' was defined as any or all secret, technical information except for intellectual property rights, whether in writing or not, including but not limited to drawings, standards, specifications, material list, process manuals and direction maps etc. directly related to products or licensed parts thereof, or necessary for manufacture of the same. The term 'technical information' was to mean 'know-how' and any technical information not included in 'know-how' which related to the product or licensed part or was necessary for manufacture of product or licensed parts which the Honda owned at the time of execution of the agreement or would own from time to time during the subsistence of the agreement. The term 'products' meant two-wheelers or three-wheelers as expressly specified under clauses (a) and (b), identified by licensor's development codes, viz. 198s, KCCA, etc. which had already been developed and was under manufacture under the

earlier agreement. Under clause (c), it would include additional models or types of two/three wheelers pursuant to 'model change as specified in the model agreement. The term 'new models was to mean new models developed by Honda at the request of the respondent assessee with new development code and subject to new model agreement. Similarly, the term 'model change' was defined as conduct through which a new model with new development code was made by a change in any part or entirety of the product, including but not limited to appearance, structure, characteristics of specifications and in each case was subject to a new model agreement. The agreement specifically recorded that the respondent assessee was already engaged in the business of manufacturing, assembling, selling and otherwise dealing with two/three wheelers and their parts as a joint venture. It referred to datedferred and had grad and respondent assessee a right and licencelos manufacture, assemble, se distribute, repair and service two/three wheelers.

15. The other terms of the agreement were:

- (1) Rights and licenses granted by the licensor to the respondent assessee were exclusive, indivisible and non-transferrable, without the right to grant sub-licenses to manufacture, assemble, sell and distribute the product or parts thereof. The rights and duties under the agreement were not assignable or delegatable, directly or indirectly.*
- (2) The aforesaid license was for the term of the agreement, i.c. 10 years from the effective date of 21st June, 1994.*
- (3) The Agreement could be terminated by 60 days' notice to the defaulting party, if it failed to cure the same within the notice period. The agreement could also be terminated forthwith by a party, if the other party had transferred whole or an important part of business; went into liquidation, bankruptcy or insolvency; merged with, or was directly or indirectly transferred to third party; or on significant change in shareholding ownership.*
- (4) Upon expiration of the term of the agreement, i.e. after 10 years, or termination due to default of performance of obligations, the respondent assessee could continue to manufacture, assemble, sell or deliver services but subject to due performance of their obligations, including payment of royalty.*

- (5) *In the event of pre-mature termination, i.e. within 10 years, except due to default of performance of obligations, the respondent assessee was to promptly discontinue manufacturing activities, sale and other dispositions of the products and the parts, as well as the use of intellectual property right and technical information.*
- (6) *Further in the event of expiration or termination, the respondent was to promptly return all documents and tangible properties in connection with the agreement including copies and translations and all information received under the secret and confidentiality clauses.*
- (7) *Honda had right to access the respondent's factories and other facilities for inspections to check and confirm whether conditions/obligations imposed were being complied with.*
- (8) *Knowhow, technical information and other non-public technical or business information was to remain solely and exclusively the property of Honda and was to be held in trust and in confidence for Honda by the respondent assessee. This information was not to be divulged, communicated or made known to third persons in any manner whatsoever, except as expressly provided. Respondent was to take all necessary precautions to keep the said information secret and confidential and restrict its use strictly as per the first as well as the present agreement. The respondent assessee was to establish and maintain internal regulations and procedures for protection of secrecy. The information could be disclosed to employees, Directors or approved sub-contractors when it was reasonably necessary for the purpose of manufacture, assembly, repair and servicing, subject to obtaining a 'written promise' from the approved sub- contractors to treat all information as secret and confidential.*
- (9) *The aforesaid rights and obligations were to persist even on expiration or termination of the agreement.*
- (10) *The respondent assessee was not to use or cause or permit use by any third party, intellectual property right or technical information provided under the agreement.*
- (11) *The respondent assessee was not to claim any title or property right whatsoever during the existence of the agreement. Upon termination as a result of default of the respondent assessee, no such right, title, property or interest whatsoever could be claimed.*

- (12) *There were stipulations in case respondent assessee became aware or had knowledge of any infringement or illegal use of intellectual property right of Honda in India by a third party*
- (13) *The respondent was to submit monthly written report in the designated form to Honda regarding manufacture, sale and inventory and/or sale of parts or products. Honda was entitled to have access to books of accounts, financial statements and records, to the extent they relate to transactions as contemplated under the agreement.*
- (14) *The respondent could not, without Honda's prior written consent, directly or indirectly or through its subsidiary, affiliate, distributor or agent or any other party, carry on or participate in the business of manufacturing, assembling, distributing or otherwise dealing in two/three wheelers of other parties.*
- (15) *On the question of consideration payable, Article 25 of the Agreement provided for fees under two heads namely, (1) Model Fee; and, (2) Running Royalty.*
- a. *' Model fee' was payable on model change under the new model agreement. It was non-refundable and non-creditable against other payments. The agreement in addition stipulated the amount of model fee payable in respect of the product, "C-100" of US\$ 10,00,000/- was payable in three equal instalments; i.e., (i) within first 60 days of the agreement being taken on record by the Government authorities in India; (ii) within 60 days of Honda delivering to the respondent the technical information necessary for manufacture and assembly; and, (iii) within 60 days after the parties confirmed in writing that the manufacture of the model had commenced on commercial basis, or 4 years after the agreement, whichever was earlier.*
- b. *Royalty was running and periodical payment as specified in Exhibit 1 or the amounts calculated by multiplying the rate specified in Exhibit 1 with reference to the ex-factory/exwarehouse sales price. 16. Reading the aforesaid terms and conditions and applying the tests expounded, it has to be held that the payments in question were for right to use or rather for access to technical knowhow and information. The ownership and the intellectual property rights in the knowhow or technical information were never transferred or became an asset of the respondent assessee. The ownership rights were ardently and vigorously protected by Honda. The*

proprietorship in the intellectual property was not conveyed to the respondent assessee but only a limited and restricted right to use on strict and stringent terms were granted. The ownership in the intangible continued to remain the exclusive and sole property of Honda. The information, etc. were made available to the respondent assessee for day to day running and operation, i.e. to carry on business. In fact, the business was not exactly new. Manufacture and sales had already commenced under the agreement dated 24th January, 1984. After expiry of the first agreement, the second agreement dated 2nd June, 1995, ensured continuity in manufacture, development, production and sale. The period of agreement, 10 years in the present case, would be inconsequential for the agreement merely permitted and allowed use of technology subject to payment of royalty and compliances and the proprietorship and ownership right was never granted or transferred. The factum that after 10 years and after returning the tangible properties, the respondent assessee could still have continued to use technical knowhow and information would be a trivial and inconsequential factum as in the automobile industry, technology upgradation is constant and rapid. Gone are the days when one or two manufacturers enjoyed monopoly rights and there was a long and indeterminate wait and queue for purchase of out-of-date models. Technical upgradation and state-of-the-art know-how is injected every year in the automobile industry. Failure to keep up and upgrade would result in product rejection and fall in sales. Persistent upgradation and cutting edge technology is mandate and business requirement in the competitive market of two/three wheelers."

25. We find the Hon'ble Delhi High Court in the case of CIT vs. G4S Securities System (India) P. Ltd. (supra), has observed as under:-

"9. From the terms of the agreement it is noticed that this arrangement was for a period of 5 years, which may be extended by another period of 5 years unless either party gives 6 months notice to the other party prior to the end of such 5 years period. The payment of commission @ 1% was based on the net sales and not lumpsum. On the termination or expiration of the sub license agreement, the assessee was to return all G4F knowhow obtained pursuant to the said agreement. Not only that, the assessee was not even entitled to make use of the trade mark name or G4F knowhow and was forthwith to change its' corporate and/or trade names. All rights and knowhow, therefore,

continued to vest in G4F and it was only the right to use the knowhow that was made available to the assessee and that too based on its net sales. That means all the royalty paid in the shape of 1 % of net sales for the use of trade mark and right to use knowhow could not be considered to be of enduring nature and thus capital expenditure. The expenditure was to be of revenue nature. In the case of Jonas Wood Head and Sons Vs. CIT, 117 ITR 55, it was held that the question regarding capital or revenue expenditure depends on the terms of agreement in each case. In the case of CIT Vs. Gujarat Carbon Ltd., 254 ITR 294, it was held that the payment of revenue under the agreement was directly relatable to services which were in the revenue field and were allowable as revenue expenditure. In the case of Goodyear (I) Ltd. Vs. ITO 73 ITD 189(Delhi), the assessee had not acquired ownership right of technical knowhow but transfer of use of licenses. There was no advantage of enduring nature and hence it was held to be a case of revenue expenditure. In the case of Travancore Sugar and Chemicals Ltd. 62 ITR 566 (SC) it was held that whenever a payment is based on a percentage of turnover or profits, it necessarily has no relation to the capital value of the asset, because it cannot be known at the time of the agreement what the turnover or profits will be over a period of years. In another case reported as DCIT Vs. Swaraj Engines Ltd. (2002) 124 Taxman 188, the Tribunal held, revenue payment is allowable as revenue expenditure, since it is related to sales and that it is paid for better conduct, efficiency and improvement of the existing business or product manufactured by the assessee. In the case of CIT Vs. Lumax Industries Ltd. (2008) 173 Taxman 290 (Delhi), this Court has also held that the payment of license fee on year to year basis for acquisition of technical knowledge would not amount to capital expenditure, but the revenue expenditure.

10. From the ratio of the above said cases, we are of the considered view that under the terms of the agreement as noted above, the ownership rights of the trade mark and knowhow throughout vested with G4F and on the expiration or termination of the agreement the assessee was to return all G4F knowhow obtained by it under the agreement. The payment of royalty was also to be on year to year basis on the net sales of the assessee and at no point of time the assessee was entitled to become the exclusive owner of the technical knowhow and the trade mark. Hence, the expenditure incurred by the assessee as royalty is revenue expenditure and is therefore, relatable under Section 37(1) of the Act. We thus, answer the question in favour of the Assessee and against the Revenue and consequently dismiss all the three appeals."

26. *We find the Hon'ble Allahabad High Court in the case of CIT vs. UPCOM Cables Ltd. (supra) has observed as under:-*

"35. The question as to whether a particular payment made towards technical know-how fee or royalty to a Foreign Company in lieu of an Agreement will be a "capital expenditure" or "revenue expenditure" would depend upon facts of individual case, and, in particular, various terms of Agreement involved therein.

36. In the present case, a concurrent finding has been recorded by CIT(A) and Tribunal both that on termination of Agreement, which was for a period of five years, Assessee would return all relevant material relating to know-how acquired through Agreement. This is one of the relevant consideration observed in Alembic Chemical works Ltd. (supra) to hold that in such a case, payment towards 'Royalty' would be 'Revenue expenditure' and not 'Capital'.

The agreement also shows that it was not an exclusive right available to the Assessee, inasmuch in para 13 of Annexure, of foreign collaboration, approval accorded by Government of India provides that in case item of manufacture is one which is patented in India, payment of 'Royalty'/lump sum made by Indian Company to Foreign collaborator, during period of agreement shall constitute full compensation for use of patent right till expiry of life of patent and Indian Company shall be free to manufacture that item even after expiry of the collaboration agreement without making any additional payments. Assessee claimed that royalty payment is part of percentage of selling price of product and not for acquiring technical know-how of manufactured licensed product having enduring benefit. These facts available on record have not been disputed and we have not been shown any authority so as to justify to take a different view than what has been taken by Tribunal.

37. In view thereof, we answer both the aforesaid questions against Revenue and in favour of Assessee and confirm the view taken by Tribunal on all these aspects."

27. *Respectfully following the decisions cited, supra, we hold that the Id.CIT(A) is not justified in upholding the action of the Assessing Officer in treating 25% of the technical know-how fees as capital in nature. We, therefore, set aside the order of the CIT(A) on this issue and direct the Assessing Officer to treat the entire amount as revenue in*

nature. The grounds raised by the assessee on this issue are accordingly allowed.”

7.1. Similar view was taken by the Tribunal in assessee's own case for AYS 2012-13, 2013-14 and 2015-16. The copy of the said tribunal orders are enclosed at pages 26 to 65 of the paper book. Respectfully following the aforesaid judicial precedents, the ground Nos. 3 and 4 raised by the assessee are hereby allowed.

8. Ground No. 5 to 8 raised by the assessee are challenging the action of the Id CIT(A) in not allowing set off of brought forward long-term capital loss (LTCL) and long-term capital gains (LTCG). Interconnected issue involved therein is the order of priority of set off i.e. where LTCL for AY 2007-08 should be set off first or business loss of the year should be set off first with the long term capital gain.

9. We have heard the rival submissions and perused the material available on record. During the year under consideration, the assessee sold a plot for consideration of ₹166 crores and determined long-term capital gain at ₹93,43,39,072/-. In the return of income originally filed, the assessee had set off the current year's business loss against such long-term capital gain. However, during the course of assessment proceedings, the assessee made a claim for set off of brought forward long-term capital loss of ₹77,98,71,598/- with the long-term capital gain of the year at ₹93,43,39,072/- and only remaining surplus was sought to be set off with the current year's business loss thereon. Revised computation was also filed by the assessee to this effect before the Id AO. The Id. AO rejected the said claim on the ground that the same was not made in the return of income by the assessee. The Id. AO made an observation that mere furnishing a revised computation would not be sufficient to make a claim, even though the view of the assessee may be correct. Accordingly, the Id AO rejected the claim of set off of brought forward long-term capital loss of ₹77,98,71,598/- with the current year's long term capital gain. The Id CIT(A) upheld the action of the Id AO by following CBDT

Circular No. 587 dated 11.12.1990 by holding that the order of precedence should be based on the numerical order of the sections in the Act. In other words, the provisions of section 71 would apply first and not section 74 of the Act for the purpose of set off of loss.

10. At the outset, long-term capital loss of ₹77,98,71,598/- had arose to the assessee for AY 2007-08 on account of sale of shares. Allowability of the said loss for set off with the long term capital gain is not doubted by the revenue. In fact the Id AO himself admits in his assessment order that the assessee would be entitled for set off of brought forward LTCL of AY 2007-08 with LTCL of the current year, but since the said claim was not made by the assessee in the return of income, the same would not be allowed to the assessee. As stated earlier, the Id AO completely ignored the revised computation filed before him by the assessee during the assessment proceedings wherein, first, the assessee had set off the brought forward LTCL of Rs. 77.98 crore with LTCL of the current year and the remaining surplus of LTCL was set off with business loss of the current year. The assessee pleaded that as per format provided in the income tax return, the assessee did not have an option to set off the long term LTCL of the current year against the brought forward LTCL and hence, the same was made by way of the revised computation before the Id AO.

11. We find that the entire basis of confirmation of disallowance was based on reliance placed on CBDT Circular No. 587 dated 11.12.1990. For the sake of convenience, the said CBDT Circular is reproduced below:-

"587 : Circular No. 587, dated 11-12-1990 11 December 1990

479. Whether, where in respect of an assessment year, there is income under a head, the loss, if any, under any other head for that assessment year should first be set-off against it before the carried forward losses under the former head can be set-off against such income

1. The question whether the provisions of section 71 of the Income-tax Act, providing for set-off of loss from one head against income from another in an assessment year, take precedence over the provisions of section 72 (carry forward and set-off of business losses) and section 74 (carry forward and set-

off of losses under the head 'Capital gains' has been considered in consultation with Ministry of Law.

2. The Board are advised that effect has first to be given to the provisions of section 71, i.e., where in respect of an assessment year, there is income under a head, the loss, if any, under any other head for that assessment year should first be set-off against it before the carried forward losses under the former head can be set-off against such income. This position is, however, subject to the exceptions provided in Chapter VI of the Income-tax Act which prohibit inter-head adjustments with regard to certain losses, such as speculation loss or the loss incurred in the activity of owning and maintaining race horses.

3. The view contained in paragraph 2 is reflected in the income-tax return Form No. 1 (for companies other than those claiming exemption under section 11 of the Income-tax Act) notified on 21st November, 1990. However, the format of the income-tax return Form No. 2 (for assessees, other than companies and those claiming exemption under section 11, whose total income includes 'Profits and gains of business or profession') and income-tax return Form No. 3 (for assessees, other than companies and those deriving income from property held for charitable and religious purposes claiming exemption under section 11, whose total income does not include 'Profits and gains of business or profession'), notified on 26-4-1990, was based on the view that carry forward losses have to be set-off in the succeeding assessment years under the respective heads of income before giving effect to the provisions of section 71. In view of the opinion now given by the Ministry of Law, the method of computation of income incorporated in Form No. 1 would hold good for all the assessees."

12. It is pertinent to note that the provisions of section 74 of the Act was duly amended by the Finance Act 2002 w.e.f. 01.04.2003 wherein, it is stipulated that the brought forward LTCL could be set off only against the long term capital gain and not any other income. This amendment is very very crucial to decide the issue in dispute as it effectively restricts the set off of brought forward long term capital loss only with long-term capital gain and not with any other income. This was absolutely not considered by the Id CIT(A) while deciding the issue in dispute. It is pertinent to note that Circular No. 587 dated 11.12.1990 apparently deals with regard to the inter head adjustments to be made. Pursuant to the amendment brought in section 74(1)(b) w.e.f 01.04.2003, the brought forward LTCL could be set off only with LTCL and thus to this extent, no inter head adjustment is available. Hence, it could be safely concluded that the order of precedence mentioned in the aforesaid Circular No. 587 dated 11.12.1990 as vehemently relied upon by the Id CIT(A)

and by the Id DR before us, would not advance the case of the revenue herein, as it is not at all germane to the issue before us. Section 70 of the Act talks about intra-head adjustment and section 71 of the Act talks about inter head adjustments. It is pertinent to note that the provisions of section 71(2) of the Act comes with a rider - "subject to provision of this chapter". Thus, it could be seen that section 71(2) of the Act does not mandate any priority in terms of carry forward and set off of losses. The legislature in its wisdom carved out an exception to the application of the said provision. Section 74 of the Act is a special provision which regulates the carry forward and set off of losses, being capital losses and they have to be treated as a code in itself since it solely regulates the carry forward and allowance of "capital loss" only. The revenue in the instant had looked into the entire issue from the perspective of current year's business loss to be set off with current year's long term capital gain. However, as stated above, the provisions of section 71(2) are qualified by the expression -"subject to the provision of this chapter" which deals with aggregation of income and set off of losses. As stated earlier, the provisions of section 74 of the Act deals exclusively and specifically only with set off and brought forward of capital losses. Section 74 of the Act is also falling within the same chapter "aggregation of income and set off of losses". Section 71(2) of the Act starts with a rider "subject to provision of this chapter". Hence, the order of priority for set off would be first to exhaust the applicability of the provisions of section 74 of the Act which deals exclusively with set off of brought forward capital loss. Needless to mention that if this meaning is not given, then the provisions of section 71(2) of the Act containing the rider "subject to the provision of this chapter" would become redundant and otiose. Hence, a conjoint reading of section 71(2) with section 74(1) is required to be done and once it is read harmoniously, the assessee's claim in the instant case deserves to be accepted, though the said claim was made only in the revised computation of income and not in the return of income. The issue as to whether any valid claim of the assessee could be entertained when the same was not made in the return of income but by way of revised computation was

indeed subject matter of consideration by the Hon'ble Bombay High Court in the case of CIT Vs. Pruthvi Brokers and Shareholders reported in 349 ITR 336 (Bom) and the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Jai Parabolic Springs Ltd reported in 306 ITR 42 (Del). Hence, the claim of the assessee in first setting off the brought forward LTCL of AY 2007-08 with long term capital gain of the current year and the subsequent set off of business loss of the current year with the long term capital gain of the current year is to be accepted as was done by the assessee in the revised computation. Accordingly, the ground Nos. 5 to 8 raised by the assessee are allowed.

13. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 15/05/2024.

-Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated:15/05/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi