

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member  
and Shri Sandeep Gosain, Judicial Member**

**ITA No. 7761/Mum/2014**  
(Assessment Year: 2008-09)

Shri Vipul P. Dalal 11, Sadhana, 'B' Road 32, Churchgate Mumbai 400020	Vs.	D C I T - 12(2) Aayakar Bhavan M.K. Road Mumbai 400020
PAN - AACPD1495Q		
<b>Appellant</b>		<b>Respondent</b>

Appellant by: Shri Deepak N. Kanabar  
Respondent by: Shri Rajneesh K. Arvind

Date of Hearing: 19.09.2016  
Date of Pronouncement: 23.09.2016

**ORDER**

**Per Jason P. Boaz, A.M.**

This appeal by the assessee is directed against the order of the CIT(A)-23, Mumbai dated 07.10.2014 for A.Y. 2008-09.

2. The facts of the case, briefly, are as under: -

2.1 The assessee filed his return of income for A.Y. 2008-09 declaring income of ₹1,22,09,311/- and claimed carry forward of business loss of ₹5,04,26,202/-. The breakup of income is as under: -

(a) Salary income	₹61,90,000/-
(b) Business loss	(₹5,04,26,202/-)
(c) Short term capital gains	₹ 44,12,003/-
(d) Income from other sources	₹11,76,849/-
(e) Long term capital gains	₹1,60,121/-
(e) Income from house property	₹ 3,80,338/-

In the return of income, the assessee did not set off the business loss of ₹5,04,26,202/- against current years income from other heads but carried forward the same to the subsequent year.

2.2 The return was processed under section 143(1) of the Income Tax Act, 1961 (in short 'the Act') on 10.12.2009 wherein the income of the assessee was determined at ₹1,23,19,310/-. As returned by the assessee, the Assessing Officer (AO) also processed the return of income under section 143(1) of the Act without setting off the current business loss against income from other heads. The case was not selected for scrutiny in this year and therefore the order under section 143(1) of the Act dated 10.12.2009 was for all purposes and intent the assessee's order of assessment for A.Y. 2008-09.

2.3 Later, vide letter dated 26.06.2012 addressed to the AO, the assessee sought rectification of the order of assessment for A.Y. 2008-09 dated 10.12.2009 under section 154 of the Act, claiming that there were certain mistakes apparent from the record. It was submitted by the assessee that while verifying the order of assessment under section 143(1) of the Act and computation of tax liability, he realized (i) that he had not set off business loss against other heads of income, i.e. income from other sources, house property, long term capital gains and short term capital gains. A revised computation of income was enclosed and it was submitted that the business loss of ₹5,04,26,202/- incurred during the year is to be allowed to be set off by the Assessing Officer; and (ii) that interest under section 234C of the Act was wrongly charged in the order of assessment. The AO, after considering the averments of the assessee, in his order dated 22.08.2012 observed that as per the return of income filed for A.Y. 2008-09, the assessee had declared total income of ₹1,22,09,311/- and had not claimed set off of business loss of ₹5,04,26,202/-. Further, since no such claim was put forth before the AO, and the return of income was processed under section 143(1) of the Act in accordance with the return of income filed for A.Y. 2008-09, there was no mistake apparent on record in the order of assessment. In that view of the matter, the AO rejected the assessee's application for rectification under section 154 of the Act on both the issues raised.

2.4 Aggrieved by the order under section 154 of the Act dated 22.08.2012 for A.Y. 2008-09 passed by the AO rejecting his rectification application

dated 22.08.2012, the assessee filed an appeal before the CIT (Appeals)-23, Mumbai making submissions vide letter dated 08.09.2014 which are extracted in the impugned order of the learned CIT(A). The learned CIT(A) dismissed the assessee's appeal vide the impugned order dated 07.10.2014 holding as under at paras 2.4 to 2.6 thereof: -

*"2.4 I have considered the facts of the case and the submissions made by the assessee. It is pertinent to note that the return of income of the assessee for the A.Y. 2008-09 was processed under section 143(1) of the Act and no order under section 143(3) was passed. In order to decide the issue, it would be imperative to examine the provisions of section 143(1) of the I.T. Act, 1961. The said provision, insofar as is relevant to the present appeal reads as follows:-*

*[1] Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely: -*

- (a) the total income or loss shall be computed after making the following adjustments, namely:-*
  - (i) any arithmetical error in the return; or*
  - (ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;*
- (b) the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a);*

*2.5 From the above, it would be clear that while processing the return, the Assessing Officer can make the adjustment to the total income returned only on account of any arithmetical error in the return or on account of an incorrect claim. Not claiming of set off of business loss against incomes under the other heads is not an arithmetical error and it is also not in the nature of an incorrect claim. Hence, no adjustment to the total income of the assessee could have been carried out by the Assessing Officer while processing the return under section 143(1) of the I.T. Act, 1961. The Assessing Officer was not under any obligation under the Act to allow the set off of the business loss since he could have made adjustment to the returned income only in terms of the items specified in section 143(1)(a)(i) and (ii) of the I.T. Act, 1961. Therefore, there was no mistake apparent from the records in the intimation under section 143(1) of the I.T. Act, 1961 within the meaning of section 154 of the I.T. Act, 1961.*

*2.6 In view of the aforesaid reasons, the action of the Assessing Officer of rejecting the application made by the assessee under section 154 of the I.T. Act, 1961, being as per law, is upheld. The ground of appeal filed by the assessee is dismissed."*

3.1 Aggrieved by the order of the CIT(A)-23, Mumbai dated 07.10.2014, the assessee has preferred this appeal before the Tribunal raising the following grounds: -

- “1. *On facts and circumstances of the case and in law, the Learned CIT(A)/A.O. erred in not allowing a set-off of Business Loss of Rs.5,04,26,202 against other heads of income (except salary) totalling to Rs.61,29,311.*
2. *That the assessee inadvertently omitted to claim the set-off in the return of income and subsequently the AO rejected the application u/s 154 for rectification of assessment for allowing set-off of Business loss against other heads of income.”*

3.2.1 The learned A.R. for the assessee was heard in support of the grounds raised and reiterated the submissions put forth in proceedings before the CIT(A) vide letter dated 18.09.2014. It was submitted that section 154 of the Act permits rectification of an order either on the suo moto action of the authority concerned or where any such mistake apparent on the fact of the record is brought to the notice of the authority concerned, inter alia, by the assessee. According to the learned A.R. for the assessee, in the case of hand, in the computation attached with the return of income for A.Y. 2008-09, the assessee has returned loss of ₹5,04,26,202/- but had inadvertently not set off the same against other heads of income, i.e. income from house property and other sources. It is contended that since the returned business loss of ₹5,04,26,202/- has been already accepted by the AO while processing the return of income under section 143(1) of the Act vide order dated 10.12.2009, the business loss has to be merely set off against other heads of income, except income from salary and this request for rectification, if acted on by the AO, would neither require reference to any other documents/orders nor would it be a debatable issue that requires any long drawn discussion or debate. It would be merely be rectifying a mistake apparent from the face of the record since there is no estoppel against operation of the statute.

3.2.2 In support of the above averments, the assessee, inter alia, placed reliance on the following judicial pronouncements/CBDT circulars, etc.: -

- (i) CBDT Circular No. 14 (XL-35) dated 11.04.1955 wherein it is conveyed that the intention and purpose of the circular is merely to

emphasise that either suo moto or when a matter is brought to the notice of authorities concerned, action should be taken to see that only legitimate taxes are assessed and collected and that advantage should not be taken by the Department of an assessee's ignorance to collect more taxes from them than are legitimately due.

(ii) CIT vs. Sankala Polymers (P) Ltd. (2012) 20 taxmann.com 378 (Karnataka), wherein it has been held that when a specific provision of the Act has not been applied, while passing an order of assessment, it constitutes a mistake apparent from record, and the authorities have the power to rectify the said mistake by invoking the provisions of section 154 of the Act.

(iii) ACIT vs. Rupam Impex (2016) 66 taxmann.com 181 (Rajkot - Trib.), wherein assessee filed an application seeking rectification of the order of assessment on the ground that in computing income incorrect figures had been taken, which was rejected by the AO on the ground that there was no mistake on the fact of the record since the assessee itself had computed such figures. The Tribunal, relying on CBDT Circular No. 14 of 1955, held that tax cannot be levied on the assessee at a higher amount or rate merely because the assessee under a mistaken belief or erroneously offered income for taxation at a higher rate.

(iv) Zen Tobacco (P) Ltd. (2016) 65 taxmann.com 320 (Ahmedabad - Trib)

(v) Circular No. 587 dated 11.12.1990.

3.3 Per contra, the learned D.R. supported the orders of the authorities below.

3.4.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record. The undisputed facts on record are that the assessee filed its return of income for A.Y. 2008-09 declaring income of ₹1,22,09,311/- comprising business loss of ₹5,04,26,202/-, STCG of ₹44,12,003/-, long term capital gains of ₹1,60,121/-, income from other sources of ₹11,76,849/-, house property income of ₹3,80,338/- and salary income of ₹61,90,000/-. The return of

income was processed under section 143(1) of the Act by order dated 10.12.2009 wherein the assessee's income was determined at ₹1,23,19,310/- due to certain additions/disallowances to the returned income. The business loss of ₹5,04,26,202/- was accepted by the AO as returned by the assessee but set off was not given.

3.4.2 The assessee, vide letter dated 26.06.2012, preferred an application for rectification of the order of assessment for A.Y. 2008-09 dated 10.12.2009, submitting that he had realized that while filing the return of income and computation of income he had inadvertently omitted to set off the business loss of ₹5,04,26,202/- against income from other heads (except salary), i.e. STCG, LTCG, income from other sources and income from house property and that interest under section 234C of the Act was wrongly charged. The AO vide order dated 22.08.2012 rejected the assessee's application under section 154 of the Act on the ground that it is the assessee himself who had declared income of ₹1,22,09,311/- in the return of income filed, without claiming set off of business loss of ₹5,04,26,202/- and also since no revised return was filed nor such claim for set off of business loss was made. On appeal, the learned CIT(A) upheld the AO's view.

3.4.3 Section 154 of the Act can be exercised only when there is a mistake apparent from the records of assessment; a mistake that is obvious and patent, and not something that can be established by a long drawn out process of reasoning on points on which there may be conceivably two opinions. The records, not only means the order of assessment but comprises all proceedings and record on which the assessment is based, i.e. the records of assessment, and it is to this which the assessing authorities must confine itself. We find from the details before us that in the orders of the authorities below, emphasis has been placed on the fact that the mistake of not setting off or claiming set off of the business losses of ₹5,04,26,202/- against the other heads of income (except salary income) was committed by the assessee. This itself, we find has resulted in the error, sought to be rectified, creeping into the order of assessment as well,

since the AO after accepting and determining the business loss, ought to have set off the same against other permissible/eligible heads in accordance with law as embedded in the statute. Rather, it is seen that both the authorities below have sought to justify the mistake on record as one attributable to the assessee.

3.4.4 Proceedings under the Act are not adversarial, i.e. who is responsible for the mistake is not material. On the contrary what is material is that, undoubtedly, in the case on hand there has been a mistake. The fact that the mistake is attributed/attributable to the assessee does not erase the fact that a mistake or legal remedies for a mistake has crept into the order of assessment. Basically, the purpose of assessment of income is that income of the assessee, liable to tax, has to be determined in accordance with the provisions of the Act. In these proceedings, it is not open to the authorities below to take advantage of mistakes admittedly committed by the assessee under a mistaken belief of error, by levying tax or a higher amount/rate. In the case on hand, the assessee admittedly, inadvertently, did not claim set off of business losses against certain heads of income in the return of income. While processing the assessee's return of income for A.Y. 2008-09 under section 143(1) of the Act, the AO after accepting/determining the business loss of the assessee at ₹5,04,26,202/-, was duty bound in accordance with law as laid down in the provisions of the Act to have allowed set off of the business loss to the extent permissible against other heads of income and carry forward of the eligible balance if any. The Hon'ble Bombay High Court in the case of Dattatraye Gopal Bhotte (1984) 150 ITR 460 has noted the relevant portion of the CBDT Circular 14 of 1955 issued to its officers which is extracted hereunder: -

*“..... Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist taxpayer in every reasonable way, particularly in the matter of claiming and securing any relief and in this regard the officers should take the initiative in guiding the tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would in the long run benefit the Department for it would inspire confidence in him that he may be sure of getting a square deal from the government .....”*

The Hon'ble Apex Court in the case of UCO Bank vs. CIT (1999) 237 ITR 889 has held that CBDT circulars are binding on Revenue and that this binding character is to the effect that even if they be found not in accordance with his interpretation of the section or they depart or deviate from such construction.

3.4.5 In view of the factual and legal matrix of the case on hand, as discussed from para 3.1 to 3.4.4 (supra), we are of the considered view that the assessee is entitled to be allowed set off of business loss of ₹5,04,26,202/-, as determined by the AO in the order of assessment for A.Y. 2008-09 dated 10.12.2009, against his other eligible heads of income in accordance with law. In our view, failure on the part of the AO to apply these provisions of the Act in respect of set off of determined business losses, while passing the order of assessment, constitutes a mistake apparent from the record. We, accordingly, direct the AO to rectify the order of assessment for A.Y. 2008-09 dated 10.12.2009 by allowing the assessee set off of the business losses of ₹5,04,26,202/- against other eligible heads of income in accordance with the law. It is accordingly ordered.

4. In the result, the assessee's appeal for A.Y. 2008-09 is allowed as indicated above.

Order pronounced in the open court on 23<sup>rd</sup> September, 2016.

Sd/-  
**(Sandeep Gosain)**  
**Judicial Member**

Sd/-  
**(Jason P. Boaz)**  
**Accountant Member**

Mumbai, Dated: 23<sup>rd</sup> September, 2016

Copy to:

*The Appellant*

1. *The Respondent*
2. *The CIT(A) -23, Mumbai*
3. *The CIT - 12, Mumbai*
4. *The DR, "F" Bench, ITAT, Mumbai*

*By Order*

//True Copy//

*Assistant Registrar*  
*ITAT, Mumbai Benches, Mumbai*

n.p.