

आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 307/Mum/2014
(निर्धारण वर्ष / Assessment Year : 2010-11)

GSB Capital Markets Ltd., 78/80 Ali Chambers, Tamarind Lane, Fort, Mumbai - 400 001	बनाम/ v.	DCIT- Range 4(1), Mumbai
स्थायी लेखा सं./PAN :AABCG7866N		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Ajay R. Singh
Revenue by :	Shri Rajesh Ojha

सुनवाई की तारीख /**Date of Hearing** : 04-11-2015
घोषणा की तारीख /**Date of Pronouncement** : 16-12-2015

आदेश / ORDER

PER RAMIT KOCHAR, ACCOUNTANT MEMBER:

This appeal, filed by the assessee company, being ITA No. 307/Mum/2014, is directed against the orders dated 22-10-2013 passed by the learned Commissioner of Income Tax(Appeals)- 8, Mumbai (Hereinafter called "the CIT(A)"), for the assessment year 2010-11.

2. Although the assessee company has raised five grounds of appeal in this appeal filed with the Tribunal but the effective issue involved in this appeal is regarding not allowing the set off of brought forward loss arising from transfer of short-term capital asset incurred during the previous year relevant to the assessment year 2009-10 of Rs. 19,21,095/- against gains

arising from transfer of long-term capital asset earned during the previous year relevant to the assessment year 2010-11 of Rs. 39,89,235/-.

3. The Brief facts of the case are that the assessee company is a member of the Bombay Stock Exchange and engaged in the business of share broking, trading and dealing in shares and securities.

4. During the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Income Tax Act, 1961 (hereinafter called "the Act"), it was seen by the learned assessing officer (Hereinafter called "the AO") that the assessee company has claimed set off of brought forward loss arisen from transfer of short-term capital asset Rs. 19,21,095/- during the previous year relevant to the assessment year 2009-10 against the gains arising from transfer of long-term capital asset of Rs. 39,89,236/- earned by the assessee company during the previous year relevant to the assessment year 2010-11 which, in the opinion of A.O. is not allowable due to difference in the tax rate. The assessee company submitted that the said set off of loss be allowed u/s 74(1) of the Act which reads as under:-

Losses under the head "Capital gains" ,

Section 74(1)(a)

"74(1) where in respect of any assessment year, the net result of the computation under the head "capital gains" is a loss to the assessee, the whole loss shall subject to the other provisions of this chapter, be carried forward to the following assessment year, and -

(a) insofar as such loss relates to a short term capital asset, it shall be set off against income, if any, under the head "capital gains" assessable for that assessment year in respect of any other capital asset."

While the A.O. disallowed the loss in view of section 70(3) of the Act which reads as under:-

“Set off of loss from one source against income from another source under the same head of income.

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1. Save as otherwise provided in this Act, where the net result for any assessment year in respect of any source falling under any head of income, other than “Capital gains”, is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head.”

(2) Where the result of the computation made for any assessment year under section 48 to in respect of any short-term capital asset is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset.

(3) where the result of the computation made for any assessment year under section 48 to 55 in respect of any capital asset (other than a short term capital asset) is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being a short term capital asset.”

In the opinion of A.O., loss arising from transfer of short-term capital assets (on which STT is paid) is assessed at 15% tax rate while the gain arising from transfer of long-term capital assets (on which STT is not paid) is assessed at 20% tax rate and hence the AO held that it cannot be set off in view of section 70(3) of the Act vide assessment orders dated 23-02-2013 passed u/s 143(3) of the Act.

5. Aggrieved by the assessment orders dated 23-02-2013 passed u/s 143(3) of the Act, the assessee company carried the matter before the CIT(A) and made submissions that the section 70(3) of the Act is not applicable to this issue and the A.O. has erred in invoking the provisions of section 70(3) of the Act.

The assessee company, inter-alia submitted before the CIT(A) that the assessee company has rightly claimed set off of brought forward loss arisen from transfer of short-term capital asset during the previous year relevant to the assessment year 2009-10 against the gains arisen from transfer of long-term capital assets earned during the previous year relevant to the assessment year 2010-11 in view of Section 74(1)(a) of the Act and the AO has wrongly invoked provisions of Section 70(3) of the Act whereas set off of the said loss is governed by Section 74(1)(a) of the Act. The assessee company, inter-alia, submitted as under:

“Section 74 was amended by the Finance Act, 2002 made effective from 1-4-2003 and accordingly, it is being made applicable from A.Y. 2003-04 onwards. Memorandum explaining relevant Clause no. 28 of the Finance Bill of 2002 in respect of Amendment proposed and carried out in Sec: 74 is enclosed herewith. The object of the said amendment was to rectify the anomaly by amending the said Section to provide that "where in respect of any A. Y., the net result of computation under the head 'capital gain' is a loss to the assessee, in so far as such loss relates to a short term assets, it shall be carried forward and set off against the income, if any under the head 'capital gain' assessable for the following A. Y. in respect of any other capital assets and in so far as such loss relates to a Long term capital assets, it shall be carried forward and set off against the income, if any, under the head 'capital gains' assessable for the following A.Y. in respect of any other capital assets not being a short term capital assets." The above amendment have made the situation abundantly clear that b/f STCL available for set off against LTCG earned in the subsequent A.Y. made effective from 1.4.2003 end accordingly, it is being made applicable from A. Y. 2003-04 onwards. Memorandum explaining relevant clause no. 28 of the Finance Bill of 2002 in respect of Amendment proposed and carried out in Sec. 74 is enclosed herewith.”

The assessee company also submitted that Section 70 of the Act is not applicable because it deals with intra-head set off of capital losses incurred during the same year against gains of the same year and does not deal with the set off of brought forward capital losses. The CIT(A) rejected the

contentions of the assessee company and held that loss arising from the transfer of short-term capital asset (on which STT is paid) of Rs. 19,21,095/- and gains arising from transfer of long-term capital assets (on which STT is not paid) of Rs. 26,46,573/- are different heads and do not come under similar computation as gain arising from transfer of short-term capital asset in the present case is assessed @ 15% tax rate and gain arising from transfer of long-term capital asset is assessed at 20% tax rate and hence appeal of the assessee company was rejected and the assessment order of the A.O. was upheld whereby the CIT(A) held that brought forward loss incurred on transfer of short-term capital asset (on which STT was paid) of Rs. 19,21,095/- is not allowed to be set off against gain arising from sale of long-term capital asset (on which STT was not paid). Thus, the CIT(A) dismissed the appeal of the assessee company vide orders dated 22.10.2013

6. Aggrieved by the order dated 22.10.2013 of the CIT(A), the assessee company is in further appeal before the Tribunal.

7. The ld. Counsel for the assessee company reiterated the submission as has been made before the lower authorities and submitted that Section 74(1)(a) of the Act is applicable and section 70 of the Act is not applicable to the issue in appeal as it deals with intra-head adjustment of losses incurred during the year while section 74(1)(a) deals with set off of brought forward loss incurred on transfer of short-term capital asset against the capital gain's earned during the year. The Ld. Counsel of the assessee company relied upon the decision of the Tribunal in the case of Capital International Emerging Market Fund v. DDIT(IT) (2013) 145 ITD 491(Mum. Trib.) to contend that merely because two set of transaction are liable for different rate of tax, it does not mean that these transaction does not arise from similar computation as contended by the authorities below. The Ld. Counsel also drew our attention to circular no 8 of 2002, dated 27-08-2002 issued by CBDT which

is explanatory notes on provisions relating to direct taxes to contend that the amendment were made by Finance Act, 2002 to rectify the anomaly and now loss arising from transfer of short-term capital asset can be set off against any capital gains while loss arising from transfer of long-term capital asset can be set off only against long-term capital gains.

8. The Id. D.R., on the other hand, relied on the orders of authorities below and submitted that capital losses can be set off against the income if any arrived at under the 'similar computation' made for the assessment year in respect of any other capital asset. He submitted that section 70(3) of the Act is applicable and Section 74 of the Act is not applicable in the instant case.

6. We have considered the rival contentions and perused the material on record. Before we proceed, it is important to reproduce the relevant section:-

“Losses under the head ‘Capital gains’”

Section 74(1)(a)

“74(1) where in respect of any assessment year, the net result of the computation under the head “capital gains” is a loss to the assessee, the whole loss shall subject to the other provisions of this chapter, be carried forward to the following assessment year, and -

(a) insofar as such loss relates to a short term capital asset, it shall be set off against income, if any, under the head “Capital gains” assessable for that assessment year in respect of any other capital assets.”

While the A.O. disallowed the loss by referring to section 70(3) of the Act which reads as under:-

“ Set off of loss from one source against income from another source under the same head of income

Section 70(3)

70(3) where the result of the computation made for any assessment year under section 48 to 55 in respect of any capital asset (other than a short term capital asset) is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being a short term capital asset.”

It could be seen that section 70 of the Act deals with the set off losses from one source against the income from another source under the same head of income and deals with intra-head adjustment of losses during the same assessment year under the same head of income. While section 74 of the Act deals with the losses under the head ‘Capital gains’ and deals with the carry forward of capital losses and set off against the income of the subsequent financial year and section 74(1)(a) of the Act clearly stipulates that loss arising from transfer of short-term capital asset which are brought forward from earlier years can be set off against the capital gain assessable for the assessment year in respect of any other capital asset which could be either long-term capital gain and short-term capital gain. The amendment made by Finance Act, 2002 has rectified the anomaly as existed which was explained by circular no 8 of 2002, dated 27-08-2002 issued by CBDT which is explanatory notes on provisions relating to direct taxes referring to the amendment made by Finance Act, 2002 to rectify the anomaly as under:

“ 40. Modifications of provisions relating to set off of long term capital loss

40.1 The existing provision contained in section 70 of the Income-tax Act provides that where the net result for any assessment year in respect of any source falling under any head of income is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head. Further, section 74 of the

Income-tax Act provides that a loss under the head “Capital gains” can be carried forward and set off against capital gain in the following eight assessment years.

40.2 Since long-term capital gains are subject to lower incidence of tax, the Finance Act, 2002 has rectified the anomaly by amending the said sections to provide that while losses from transfer of short-term capital assets can be set off against any capital gains, whether short-term or long-term , losses arising from transfer of long-term capital assets, will be allowed to be set off only against long-term capital gains. It is further provided that a long term capital loss shall be carried forward separately for eight years to be set off only against long-term capital gains. However, a short-term capital loss , may be carried forward and set off against any income under the head “Capital gains”.

Thus, as could be seen above from the explanatory notes to Finance Act, 2002 , the loss arising from transfer of short-term capital asset can be set off against any capital gains, whether short-term capital gains or long-term capital gains . It further stipulated that the anomaly existing due to long-term capital gains being subject to lower rate of tax, are hence-forth allowed to be set off only against long-term capital gains. Hence, the contentions of Revenue in this respect as advanced in this appeal cannot be accepted.

Similarly , the contention of the revenue that short-term capital loss can not be set off against long-term capital gains due to difference in tax rate can also not be accepted because of the provisions of Section 74(1)(a) of the Act which clearly stipulates that carried forward losses arising from transfer of short-term capital asset can be set off against income from capital gains assessable for the assessment year in respect of any other capital asset and the decision of the Tribunal in the case of Capital International Emerging Markets Fund v.

DDIT (2013) 145 ITD 491(Mum.-Trib.) supports the contention of the assessee company , whereby the Tribunal held as under:

“3.2. *We have heard the rival submissions and perused the material. We find that identical issue was decided in the favour of the assessee by the Tribunal in the case of DWS India Equity Fund (supra) in following manner :*

"5. We have perused the records and considered the rival contentions carefully. The dispute is regarding set off of short term capital loss arising from STT paid share transactions against short term capital gain arising from non STT transactions. The assessee had earned short term capital gain of Rs.40,25,93,717/- from non STT transactions and it had incurred short term capital loss of Rs.1,26,45,10,006/- from STT paid transactions. The issue is whether short term capital loss can be set off against short term capital gain mentioned above. Under the provisions of section 70(2), short term capital loss arising from any asset can be set off against Short term capital gain arising from any other asset under a similar computation made. The AO held that since gain was from shares on which no STT was paid and loss from STT paid transactions, these fell in different categories and could not be set off against each other. We find that this aspect has already been examined by the Mumbai bench of the Tribunal in the case of First State Investments (Hong Kong) Ltd. v. ADIT(supra), in which it has been held that the phrase "under similar computation made" refers to computation of income, the provisions for which are contained under sections 45 to 55A of the Act. The Tribunal also held that the matter of computation of income was a subject which came anterior to the application of rate of tax which are contained in section 110

to 115BBC. Therefore, merely because the two set of transactions are liable for different rate of tax, it cannot be said that income from these transactions does not arise from similar computation made as computation in both the cases has to be made in similar manner under the same provisions. The Tribunal therefore, held that short term capital loss arising from STT paid transactions can be set off against short term capital gain arising from non SIT transactions. The case of the assessee is identical. Therefore, respectfully following the decision of the Tribunal, we see no infirmity in the order of CIT(A) and the same is, therefore, upheld.

6. In the result, appeal of the revenue is dismissed."

Respectfully, following the above mentioned order of the Tribunal, we decide ground no. 7 in favour of the assessee."

Thus in view of our above discussions and reasoning, we hold that assessee company has rightly claimed the set off of brought forward loss arisen from the transfer of short-term capital asset of Rs.19,21,095/- incurred during the assessment year 2009-10 to be set off against the gains arising from transfer of long-term capital asset earned during the previous year relevant to the assessment year 2010-11 which has been wrongly denied by the A.O. and confirmed/sustained by the CIT(A). Hence, we set aside the orders of authorities below and direct for allowing the set off of brought forward loss arising from transfer of short-term capital asset of Rs.19,21,095/- incurred during the assessment year 2009-10 against the gains arising from transfer of long-term capital assets earned during the previous year relevant to the assessment year 2010-11.

7. In the result, the appeal filed by the assessee company is allowed

Order pronounced in the open court on 16th December, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक: 16-12-2015 को की गई ।

Sd/-

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 16-12-2015

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व.नि.स./ R.K., Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai H Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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आयकर अपीलीय अधिकरण, मुंबई/ ITAT, Mumbai