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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Feb-28-1996

Reported in : (1996)59ITD220(Kol.)

Appellant : T.P.S. Builders (P) Ltd.

Respondent : Assistant Commissioner of Income

Judgement :

1. This is an appeal instituted by the assessee against the order of the CIT(A) for the asst. yr. 1987-88 on the following grounds : "(1) Because that the learned CIT(A) erred in law as well as in facts in holding that the business loss of Rs. 88,634 could not be allowed to be carried forward.

(2) Because that in the facts and circumstances of the case the learned CIT(A) ought to have held that the business loss of Rs. 88,634 should be allowed." 2. Briefly stated, the facts of this case are that the assessee is a partner in a registered firm named, Aicam India. The assessee-company filed the original return on 3rd Feb., 1988, showing total income at nil and the revised return on 10th Feb., 1988, showing loss of Rs. 91,440. The Assessing Officer (AO) finalised the assessment and determined the loss at Rs. 91,940 after adjustment of other sources income of Rs. 11,400 being dividend. The AO finally held that since the return of loss is belated the loss will not be carried forward as per law.

3. Before the CIT(A) the assessee submitted that as the firm has filed its return within statutory time the AO ought to have allowed loss of Rs. 91,940 to be carried

forward. The CIT(A) considered the submission of the assessee and held that since the assessee has not filed the return of loss under s. 139(3) by 31st July, 1987, the AO is justified in rejecting the assessee's claim of carry forward of loss. However, the CIT(A) held that the assessee is entitled to carry forward the unabsorbed depreciation of Rs. 3,306 under s. 32(2) of the Act but assessed business loss of Rs. 88,634 should not be allowed to be carried forward.

4. Being aggrieved by the order of the CIT(A) the assessee has preferred this appeal to the Tribunal. The learned counsel for the assessee Sri G. P. Agrawal filed a paper book containing acknowledgement receipt of return of income of M/s Aicam India; copy of assessment order of M/s India for the asst. yr. 1987-88; list of case law relied upon and copy of decision of the Calcutta High Court in the case of Sudhangshu Sakkar Paul vs. CIT (1993) 69 Taxman 606 (Cal) and submitted that the legal contention of the assessee before the Tribunal is that as return of the firm M/s Aicam India in which the assessee-company is a partner was filed within the 30th June, 1987, and the AO of the firm has allowed the loss to be carried forward in view of the provisions of s. 182 and s. 75, the loss ought to be allowed to be carried forward in the hands of the assessee-company, although the assessee has filed its return late. According to Sri G. P. Agrawal, it is immaterial and irrelevant to consider that the partner has filed return of loss late, when the firm has submitted its return in time and the AO of the firm has determined, allocated and allowed the loss to be carried forward. Sri Agrawal further discussed the scheme of the Act for carrying forward and set off of losses and submitted that the business loss as per return of firm filed in accordance with the provisions of s. 139(3) r/w s. 80 is determined and is allowed to be carried forward by the AO of the firm to be set off in accordance with the provisions of s. 182 and as per provisions of ss. 70 to 75. The learned representative also invited our attention to the proviso (b) to sub-s. (10) of s. 139 of the Act and pleaded that a return of a partner of a firm is excluded from being treated as non est. He also pointed out that provisions of s. 139(3) are not applicable to the assessee being a partner but to the firm which has already filed the return in time i.e., on 30th June, 1987. According to Shri Agrawal as the assessment of the firm has been made it is binding on the partner and that the share income/loss has to be assessed in the hands of the partners. In order to support his contention he filed a copy of the Calcutta High Court's decision in the

case of *Sudhangshu Sakkar Paul vs. CIT* (supra) and relied on para 5 of the decision which runs as under : "The facts which have been found by the Tribunal were that the assessee was maintaining the accounts according to the mercantile system. But the fact remains that the assessment of the firm was made as registered firm as such the income from the partnership firm is includible in the hands of the assessee, a partner of the firm.

That apart, s. 182(1) of the Act provided that the income of the firm has been determined by the ITO the share of each partner in the income of the firm shall be included in its total income and assessed to tax, accordingly, in the year in which such allocation has been made. In our view, therefore, apart from the fact that the Tribunal proceeded on the footing that the assessee was following the mercantile system of accounting, in terms of s. 182(1) such income is includible, being the assessee's share in the profit of the firm in the total income of the assessee." Lastly, the learned counsel for the assessee filed a list of 12 case law and placing reliance on them submitted that if two views are possible on this subject or where the taxing provision is ambiguous and is capable of more than one interpretations the interpretation which is beneficial to the assessee must be adopted. Some of the case law are reproduced from his list as under : (1) *CIT vs. Smt. Radha Devi Poddar* (1990) 185 ITR 544, 554 (Cal) (If there is any doubt about the meaning of the phrase "regular assessment" or if two equally good interpretations are possible, then the interpretation which is favourable to the assessee must be preferred).

(6) *CIT vs. Sky Room Pvt. Ltd.* (1992) 195 ITR 763, 765 (Cal) (The well-known rule of construction is that if two interpretations of a taxing statute are possible, the interpretation which favours the assessee must be adopted.) (7) *CIT vs. Indian Tube Co. Ltd.* (1992) 197 ITR 522, 527-28 (Cal) (It is a well-settled rule that when two interpretations are possible, in other words, where the provision is capable of two alternative meanings, the one favouring the tax-payer is to be adopted, particularly when such a provision purports to impose penal interest).

(9) *Dr. P. K. P. Mohammed vs. CBDT* (1993) 203 ITR 479, 489 (Ker) affirmed on facts, in *CIT vs. Dr. P. Mohammed* (1994) 203 ITR 7 (Ker) (It is a well accepted

principle that if two interpretations are possible of a provision in a fiscal statute, the interpretation which is favourable to the assessee is to be preferred especially when the provision is one intended to confer certain reliefs or exemptions in favour of the assessee).

5. The learned Departmental Representative Sri R. N. Sinha on the other hand vehemently argued and strongly supported the orders of the Revenue authorities. According to him there is no ambiguity in taxing provisions and they are not capable of more than one interpretations and, therefore, the orders of the AO and the CIT(A) are perfectly in accordance with the provisions of law. Sri Sinha also relied on r. 11 of the Income-tax (Appellate Tribunal) Rules, 1963, and submitted that if it is felt that the ground No. 2 before the CIT(A) that loss ought to have been carried forward as the firm has filed the return within statutory time, remains undecided, the matter may be restored to the file of the CIT(A).

6. We have carefully considered the rival contentions, the relevant facts and material placed on the record and have also gone through the decisions on which reliance has been placed by the learned counsel for the assessee. In our opinion, the main issues which emerge from the facts and circumstances of the case and which are to be decided by us are as under : (i) Whether business loss in the case of a firm where the return of loss is filed by the firm within time and where business loss has been determined, allocated and allowed to be carried forward by the AO in the case of the firm, can be carried forward and set off automatically against the income in the case of a partner.

(ii) Whether, a partner who has not filed his return of loss within the time prescribed under s. 139(3), can be allowed to carry forward the business loss and set off against his income in future assessment years.

(iii) Whether proviso (b) to sub-s. (10) of s. 139 of the Act where return of a partner of a firm is excluded from being treated as non est is of any help to the assessee on these facts and under these circumstances.

(iv) Whether taxing provisions on this subject are ambiguous or/and are capable of more than one interpretations.

7. Under the general scheme of the IT Act if the profits and losses under different heads are to be aggregated and if the resultant figure is an income it is liable to tax and if the resultant figure is a loss arising out of the business which cannot be set off against the profit of the year, it is carried forward and set off against business profits of the succeeding year. This is the position in respect of all the assesseees except the registered firm and the unregistered firm assessed under s. 183(b). In the cases of these firms the unabsorbed loss is allocated to the partners in the same year and the partners alone are entitled to set off the losses allocated to them in their individual assessments and to carry forward any loss that remains still unabsorbed as provided in s. 75(2) of the Act. The firm as such is not entitled to carry forward the losses and set off in the assessments for subsequent years even for determination of firm's tax. Sec. 75(1) of the Act provides that any loss which cannot be set off against any other income of a registered firm, shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of loss set off and carried forward. For the sake of convenience s. 75(1) and (2) are reproduced as under : "75(1) Where the assessee is a registered firm, any loss which cannot be set off against any other income of the firm shall be apportioned between the partners of the firm, and they alone shall be entitled to have the amount of the loss set off and carried forward for set off under ss. 70, 71, 72, 73, 74 and 74A. (2) Nothing contained in sub-s. (1) of s. 72, sub-s. (2) of s. 73, sub-s. (1) of s. 74 or sub-s. (3) of 74A shall entitle any assessee, being a registered firm, to have its loss carried forward and set off under the provisions of the aforesaid sections." Thus, it is evident that s. 75(1) positively provides that the partners alone shall be entitled to have the amount of loss set off and carry forward for set off under ss. 70, 71, 72, 73, 74, 74A and s. 75(2) negatively provides that nothing contained in sub-s. (1) of s. 72, sub-s. (2) of s. 73, sub-s. (1) of s. 74 or sub-s. (3) of s. 74A shall entitle a registered firm to have its loss carried forward or set off under the provisions of the aforesaid sections. In our opinion, it is, therefore, crystal clear that it is not the registered firm but the partners who are entitled to carry forward and set off of the business loss in their hands and in their assessments. Our view is supported by the M. P. High Court decision in the case of Kalani Udyog vs. ITO (1979) 117 ITR 431 (MP) wherein it was held as under : "Therefore, in view of the imperative language of s. 75, the

assessee, which is a registered firm, is not entitled to carry forward and set off the unabsorbed loss of Rs. 60,419 of the earlier years against its income computed in the asst. yr. 1970-71 for the purposes of levy of tax on such income." 8. Putting the facts of the instant case to the tests laid down by the M. P. High Court in the case of Kalani Udyog (supra) and to the provisions envisaged in s. 75(1) and s. 75(2) we find that the assessment order of the ITO in the case of the firm is legally incorrect to the extent, he has allowed the loss to be carried forward.

The remark of the ITO "losses to be carried forward" is against the provisions of s. 75(2) of the Act, as the business loss cannot be carried forward in the case of the registered firm. The ITO is found to be correct in so far as unabsorbed depreciation is concerned and that has been allowed by the CIT(A), while disallowing the carry forward of the business loss of Rs. 88,634, in the case of assessee. In our view the action of the CIT(A) is, therefore, legally correct. Although the issue of unabsorbed depreciation is not under dispute in order to make the legal position clear on the subject we place reliance on Andhra Pradesh High Court decision in the case of CIT vs. Srinivasa Sugar Factory (1988) 174 ITR 178 (AP), which supports our view by drawing a distinction between the unabsorbed depreciation and business loss. The relevant portion of the decision of the Andhra Pradesh High Court is extracted as under : "A clear distinction is drawn between unabsorbed depreciation and business loss. There are two distinct sections dealing with these two items. Unabsorbed business loss is carried forward and set off against the assessments of the partners exclusively by virtue of s.

72, and that too only for a period of eight assessment years immediately succeeding the assessment year for which the loss was first computed. So far as the unabsorbed depreciation is concerned, it is on a different footing. Under s. 32(2), unabsorbed depreciation is to be added to the amount of depreciation allowance of the firm for the subsequent year and deemed to be part of the depreciation of the subsequent year. It can be carried forward indefinitely. Further, s. 75(2) bars only the carrying forward of the losses of the registered firm once they are apportioned among the partners again to the firm, whereas, there is no such bar as regards the depreciation allowance since s. 32(2) is not subjected to

the operation of s. 75, though it is specifically subjected to the operation of ss. 72(2) and 73(3). One more distinction to be noticed is that while business loss inherently takes within it the feature of outgoings, depreciation allowance is not an actual outgoing." 9. Thus, it is evident according to the scheme of the Act and according to the provisions of s. 75(1) and (2), s. 72(1), s. 73(2), s. 74(1) and s. 74A(3) that unabsorbed loss of earlier years cannot be carried forward and set off against the income of the current year in the case of registered firm and that unabsorbed business loss is carried forward and absorbed in the case of the partners only, exclusively by virtue of s. 72. Accordingly on the basis of the scheme of the Act and the provisions of s. 75 and s. 72 we can boldly conclude that in the instant case although the firm has filed its return within prescribed time and although business loss has been allowed to be carried forward by the ITO the business loss cannot be automatically carried forward and absorbed in the case of the partners, firstly because there is no such scheme or provisions in the Act and secondly, carry forward of business loss was wrongly allowed by the ITO in the case of the firm.

Our answer to question No. (1) is, therefore, negative and accordingly we hold that although the registered firm has filed its return in time and business loss is wrongly allowed to be carried forward by the AO in the case of the firm, the business loss cannot be automatically carried forward and absorbed in the case of the assessee-partner, without fulfilling the required conditions and without observing the requisite formalities in accordance with the provisions of law in the case of the partner.

10. Now, when we turn to the second question i.e., whether the partner who has not filed his return of loss in accordance with the provisions of s. 139(3), can be allowed to carry forward and set off the business loss. We find that the AO and the CIT(A) have disallowed the business loss to be carried forward and set off in the case of the assessee-partner because the return of loss was belatedly filed by the assessee on 10th Feb., 1988, while it was due on 30th June, 1987.

According to the CIT(A) as the return of loss was not filed within the time stipulated in s. 139(3), the assessee-partner is not entitled to carry forward of the business

loss. The provisions of s. 139(3) at the relevant time reads as under : "If any person who has not been served with a notice under sub-s.

(2), [omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f.

1st April, 1989] has sustained a loss in any previous year under the head "Profits and gains of business or profession" or under the head "Capital gains" and claims that the loss or any part thereof should be carried forward under sub-s. (1) of s. 72, or sub-s. (2) of s.

73, or sub-s. (1) or sub-s. (3) of s. 74 inserted by the Finance Act, 1972, w.e.f. 1st April, 1975, or sub-s. (3) of s. 74A he may furnish, within the time allowed under sub-s. (1) or by the thirty-first day of July of the assessment year relevant to the previous year during which the loss was sustained, a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-s. (1)".

From the above provisions it is evidently clear that for claiming the business loss to be carried forward the assessee should have filed the return of loss on or before 30th June, 1987, but in fact, the assessee has filed the return on loss on 10th Feb., 1988, and thus has not complied with the provisions of s. 139(1) r/w s. 139(3) of the Act.

Sec. 80 which deals with the return of loss reads as under : "Sec. 80. - Submission of return for losses - Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed within the time allowed under sub-s. (1) of s. 139 or within such further time as may be allowed by the ITO shall be carried forward and set off under sub-s.

(1) of s. 72 or sub-s. (2) of s. 73 or sub-s. (1) of s. 74 [or sub-s. (3) of s. 74A]." 11. As it is not the case of the assessee that he has applied for extension of time in Form No. 6 nor the time has been extended by the Department, in our opinion, the loss has not been determined in pursuance of the return filed within the time allowed under s. 139(1) and, therefore, cannot be carried forward and set off. In

this view of the matter we answer the second question also in the negative and hold that the CIT(A) has rightly disallowed the carry forward and set off of business loss in the case of the assessee. Our view is duly supported by the Andhra Pradesh High Court decision in the case of Palakol Co-operative Sugars Ltd. vs. ITO (1993) 202 ITR 681 (AP) where it was held as under : "Held, dismissing the petition that the ITO did not grant any extension of time and the petitioner did not file the return within the time allowed under sub-s. (1) of s. 139. Therefore, it follows that though the return filed by the petitioner was within the time contemplated in s. 139(4), it had no right to have the loss determined on the said return and carry forward the loss, if any, to the subsequent assessment years to be set off against the income of those years".

12. Now, we turn to question No. (iii) as to whether s. 139(10) r/w proviso (b) is of any help to the assessee. On critical analysis and judicial scrutiny of legal position we find that the return of loss so furnished does not fall under the mischief of s. 139(10), which is non obstante clause and the return so furnished is a valid return as per the Board's Circular No. 493, dt. 21st Sept., 1987. Once the return is declared valid and not non est under s. 139(10), the assessment made in pursuance of that return is valid and, therefore, the Departmental authorities have rightly decided the issue of business loss against the assessee. Accordingly, this question is also answered negatively as s.

139(10) is of no help to the assessee and it rather helps the cause of the Revenue.

13. Finally we are left with question No. (iv) as to whether taxing provisions are ambiguous or/and are capable of more than one interpretation as claimed by the learned counsel for the assessee. It is pertinent to note that the learned counsel for the assessee has not brought to our notice any conflicting decision of any High Court saying that the unabsorbed business loss in the case of the firm will be allowed to be carried forward and set off or saying that if business loss is allowed to be carried forward in the case of the firm it will be automatically allowed to be carried forward and set off in the case of the partner in future assessments. He has also not pointed out as to how the provisions of law are ambiguous or are

capable of more than one interpretations. In our opinion, all the provisions of the Act applicable to the instant case are plain and simple on one hand and explicit and straight on the other and, therefore, they are neither ambiguous nor capable of two interpretations. In this view of the matter the decisions on which reliance has been placed by the assessee are not applicable to the instant case at all and, therefore, there is no question of favouring the assessee with the interpretation being in favour of the assessee. Our view gets full support from the M. P. High Court decision in the case of Kalani Udyog vs. ITO (supra) wherein it was held as under : "In interpreting a taxing statute, literal construction is the only safe guide. Where the language of a section is plain, it is not open to the Court to adopt a liberal construction. The acceptance of the claim of the assessee to carry forward and set off the unabsorbed loss of previous years would do violence to the language of the section. Moreover, in construing an Act like the IT Act, which has an all India application, there should be uniformity of construction as far as possible".

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