



* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on : 06.02.2009

ITA 335/2006

**COMMISSIONER OF INCOME TAX-V,
NEW DELHI**

..... Appellant

versus

M/s NALWA INVESTMENT LTD

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sanjeev Sabharwal & Mr Jagdish Rai Goel

For the Respondent : Mr.B.B. Ahuja, Sr. Advocate with Mr D.K. Verma

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. This is an appeal preferred by the Revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') against the judgment dated 29.07.2005 passed by the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') in ITA No. 1705/Del/2002 pertaining to assessment year 1995-96. Vide the



1704/Del/2002 pertaining to assessment year 1994-95 with which we are not concerned in the present appeal.

1.1 By our order dated 7.11.2008 we had admitted the appeal and framed the following question of law:-

“(i) whether the loss determined by the Assessing Officer, being different from the loss as claimed by the assessee in the return, can be carried forward in view of the provisions of Section 80 read with Section 139(3) of the Income Tax Act, 1961?”

“(ii) Whether in the facts and circumstances of the present case, the tribunal has erred in law in holding that the Assessing Officer had exceeded its jurisdiction in not allowing the carrying forward of the loss after the tribunal had issued directions in the earlier round?”

2. In order to adjudicate upon the appeal the following facts require to be noted:-

2.1 The assessee is an investment company holding shares amongst others in Jindal Iron & Steel Co. Ltd. (hereinafter referred to as “JISCO”). There are four other companies including M/s Abhinandan Investments Ltd, (which is the appellant before us in ITA No. 480/07) which also holds a stake in JISCO. Together with the present appellant the four investment companies hold 34% of the shares in JISCO. It is also admitted that these investment companies, as stated above, have also made investments in other public limited companies.

2.2 In 1994, JISCO which was desirous of making a rights issue of



to as 'SRNCD') approached the Securities Exchange Board of _____ (hereinafter referred to as 'SEBI') for necessary approval in that regard. It is not disputed that SEBI gave its approval for the rights issue of SRCND with the condition that if JISCO failed to garner subscription equivalent to 90% of the issue, the issue shall be deemed as having failed and JISCO shall be liable to refund the entire money collected under the said issue. With this crucial condition appended to the rights issue, JISCO embarked upon the said course and made an issue of Rs 500 crores of SRNCDs of a face value of Rs 500/- each. The essential features of the rights issue of SRNCDs as approved by SEBI and as indicated in the order of the authorities below were as follows:-

- (a) each debenture will be of face value of Rs 500 each;
- (b) every residential shareholder will pay a sum of Rs 111/- per debenture on making an application and the balance sum of Rs 389/- per SRNCD was payable on allotment;
- (c) if the company does not receive a minimum subscription of 90% of the issue of SRNCD within sixty days from the closure of the issue the company (i.e., JISCO) it shall refund the entire subscription amount received;
- (d) SRNCD with Detachable Warrant (in short 'DW') was offered to existing shareholders of the company (i.e., JISCO)



whose name appeared in the register of the company (i.e., JIS ---, on 31.10.1994;

(e) 23 debentures for every 100 equity shares held as on 31.10.1994 were required to be issued.

3. It is important to note that at the relevant point in time, in JISCO public held nearly 40.43% of the shares, while financial institutions, mutual funds and banks together held nearly 18.80%. This was excluding the shares held by foreign institutional investors and non-residents of Indian origin.

4. Continuing with the aforesaid narration, the rights issue of SRNCDs opened on 21.11.1994 with 19.12.1994 as the date of closure. In order to attract a large number of subscribers to the rights issue JISCO attached a fixed DW with each debenture with a face value of Rs 10 and a premium of Rs 190/-. JISCO being aware of the fact that in order to make the rights issue a success it had to ensure availability of finance to its investors. In order to achieve the said purpose JISCO entered into an arrangement with Unit Trust of India (hereinafter referred to as 'UTI') whereby UTI agreed to pay the balance sum of Rs 389/- per SRNCD on behalf of the allottees to JISCO. The assessee being an existing stakeholder applied to the rights issue made by JISCO. In accordance with the conditions of the issue, the assessee paid an application money of Rs 111/- per debenture. As arranged UTI paid the balance sum of Rs



389/- to JISCO whereupon JISCO issued a DW in favour of the assessee as well as other investees including Abhinandan Investment Ltd. (i.e. appellant in ITA No. 480/07).

4.1 It is also admitted that the assessee as well as other investors (which includes Abhinandan Investments Ltd) transferred the said SRNCD having a face value of Rs 500 to UTI. This transfer was carried out in the background of the arrangement between JISCO and UTI whereby UTI had agreed to invest a sum of Rs 350 crores in JISCO by agreeing to purchase the SRNCDs at a value of Rs 389/- per debenture.

5. It is in this background that the assessee had filed a return for assessment year 1995-96. The said return was filed on 29.11.1995. In the said return the assessee had initially claimed a short-term capital loss of Rs 91/- per DW on the ground that it had sold each DW at the rate of Rs 20/-. This return was admittedly filed within time as prescribed under Section 139 of the Act and in accordance with sub-section (3) of Section 139. In the return a loss had been claimed even though the loss claimed, as indicated above initially was pegged at Rs 91/- per DW. It is also not disputed that if a revised return had been filed by the assessee the time for the said return would have expired on 31.03.1997.

5.1 The assessee, however, during the course of the assessment proceedings became wiser and consequently by way of a letter dated 24.03.1998 intimated to the Assessing Officer that it was entitled to



claim a loss at the rate of Rs 111/- on each SRNCD transferred to - - - -

The said loss was claimed as a business loss. The Assessing Officer disallowed the loss on the ground that it was not genuine. The Assessing Officer was of the view that the appellant as well as the other investment companies were merely money lenders and the arrangement so configured to give benefit to JISCO and UTI.

6. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal to the Commissioner of Income Tax (Appeals) [hereinafter referred to as the 'CIT(A)']. The CIT(A) sustained the order of the assessing Officer and disallowed the loss claimed by the assessee at the rate of Rs 111/- on each of such debenture transferred to UTI.

7. The assessee preferred a further appeal, to the Tribunal. The Tribunal after considering the matter in great detail brought out the true nature of the transaction. Accordingly, by an order dated 05.06.2000 the Tribunal reversed the order of the CIT(A) and the Assessing Officer. In the operative part of its order dated 05.06.2000 the Tribunal made the following observations:-

“keeping the above facts in view and the judicial pronouncement mentioned above we hold that the appellant companies have sulfide (suffered) a loss @ Rs 111/- per NCD on their sale to UTI and such loss being business loss was allowable deduction. We accordingly direct the AD (AO) to allow deduction of the loss Rs 111/- per NCD on their sale.”



8. In view of the direction contained in the order of the Tribunal dated 05.06.2000 the Assessing Officer issued a notice calling upon the assessee to furnish details of the aforementioned loss on sale of SRNCDs to UTI. In response thereto on 30.08.2000 the assessee furnished the details. The Assessing Officer by an order dated 27.10.2000 gave effect to the order of the Tribunal dated 05.06.2000 by observing as under:-

“In view of the directions of the ITAT the loss on NCDs is allowed as follow:-

Income as per order u/s

143(3) dated 27.3.1998 *7,01,96,195*

Less: Loss on sale 11,98,000 NCDs

@ 111/- each *13,29,78,000*

Assessed Loss: 6,27,81,805”

By the very same order the Assessing Officer observed that since the loss on the SRNCD had been determined by him pursuant to an order of the Tribunal, it was not a loss determined in pursuance of a return filed under Section 139(3) of the Act and hence, the said assessed loss on Rs 6,27,81,805/- shall not be allowed to be carried forward and set off against future income of the assessee. It is important to note that the order passed by the Assessing Officer dated 27.10.2000 is captioned as one having been passed under Section 254 of the Act.

9. Aggrieved by the observation of the Assessing Officer that the said assessed loss could not be carried forward and set off against its future



income the assessee preferred an appeal to the CIT(A). The CIT(A) passed an order dated 22.02.2002 rejected the appeal both on the ground that it was not maintainable as well as on merits. On the maintainability the CIT(A) was of the view that since the order passed by the Assessing Officer (Joint Commissioner of Income Tax) was evidently passed under Section 254 of the Act, it was not an order which was appealable under provisions of Section 246A of the Act being the provision for preferring appeals to the CIT(A). On the merits the CIT(A) was of the view that the direction contained in paragraph 32 of the order dated 05.06.2000 passed by the Tribunal merely required the Assessing Officer to allow deduction of loss as a business loss at the rate of Rs 111/- per SRNCD, and since the Tribunal had not directed that loss which had been determined was required to be carried forward, the Assessing Officer had not exceeded his jurisdiction in not permitting carry forward of the loss as the same could have been carried forward only in accordance with law. The CIT(A) was, therefore, of the view that since the loss had been claimed by the assessee during the course of assessment proceedings by a letter dated 24.03.1998, which was a date much beyond the time available for filing a revised return, it was not a loss which could be carried forward keeping in view the provisions of Section 80 read with Section 139(3) of the Act. In sum and substance the CIT(A) approved of the reasoning set out in the order of the Assessing Officer in disallowing



the carry forward and set off of loss against the future income of the assessee.

10. The assessee being aggrieved preferred a further appeal to the Tribunal. The Tribunal by the impugned judgment reversed the orders of the authorities below and directed the Assessing Officer to allow the assessee to carry forward the said loss and set off against its future income in the subsequent year(s). It might be pertinent to extract the observations of the Tribunal in the impugned judgment both with regard to the maintainability of the appeal before the CIT(A), as well as the jurisdiction of the Assessing Officer, while giving effect to the order of the Tribunal passed in appeal, and also its observations on merits:-

“As regards the maintainability of an appeal before the learned CIT(A) against the order passed by the Assessing Officer giving appeal effects to the Tribunal’s order, the learned counsel for the assessee has cited the decision of Hon’ble Calcutta High Court in case of Kooka Sidhwa & Co. Vs. CIT-54 ITR 54 wherein it was held that when the Income Tax Officer revises the assessment pursuant to the directions of the Appellate Tribunal in an order u/s 33 of the Indian Income Tax Act 1922 (which is analogous to section 254 of the Indian Income Tax Act 1961), the order passed by the Assessing Officer partakes the character of the fresh assessment order referable only to section 23 of the 1922 Act (which is pari-materia with Section 143(3) of the 1961 Act) and an appeal against the said order would lie to the Appellate Assistant Commissioner u/s 30 of the 1922 Act which is similar to Section 246A of the 1961 Act. In another case of Gopi Lal Vs. CIT – 65 ITR 477, Hon’ble Punjab High Court at Delhi held that an appeal lies to the appellant (appellate) Assistant Commissioner against the order of ITO made in pursuance of directions of the Appellate Tribunal



the order of Appellate Tribunal. Keeping in view this proposition propounded by the Hon'ble Punjab High Court as well as the facts of the present case, we are of the view that the order passed by the Assessing Officer giving effect to the order of the Tribunal passed u/s 254 was an order passed u/s 143(3) and the same was appealable in an appeal before the learned CIT(A) as per the provisions of section 246A. In that view of the matter, we hold that the learned CIT(A) was not justified in dismissing the appeal of the assessee filed before him in limine holding that the same was not maintainable.”

“In the recent case, the issue relating to the claim of the assessee on account of loss on sale of NCD was decided by the Tribunal holding the same to be a business loss and the matter was sent to the Assessing Officer with a specific direction to allow the deduction on account of the said loss at the Rs. 111/- per NCD. The scope of the set aside proceedings before the Assessing officer thus was limited by and confined to such specific directions given by the Tribunal which were binding on him and he had no jurisdiction to go beyond such directions and raise or consider a new issue. As such, considering all the facts of the case and keeping in view the legal position emanating from the aforesaid judicial pronouncements, we are of the considered view that the action of the Assessing Officer in not allowing the assessed loss for the year under consideration to be carried forward for set off against the future income was beyond the scope of specific directions given by the Tribunal and the same being beyond his jurisdiction, was not sustainable in law.”

“It is also observed that the action of the Assessing Officer in not allowing the aforesaid loss to be carried forward for set off against the future profit was not sustainable on merits also inasmuch as the original return showing a total loss of Rs 1,14,98,680/- was filed by the assessee u/s 139(3) as is evident from the original assessment passed by the Assessing Officer u/s 143(3) and the said return, the provisions of Section 80, in any case, were not attracted in the present case.



income of the subsequent years in accordance with law. As such, considering all the facts and circumstances of the case, we hold that the action of the Assessing Officer in not allowing the carry forward of assessed loss or the year under consideration for setting off against the income of the subsequent year was not sustainable either in law or on facts and the learned CIT(A) was not justified in upholding the same.”

11. Having heard the learned counsel for the Revenue as well as the assessee we are of the view that the answers to the questions framed has to be found in favour of the assessee and against Revenue for the reasons given hereinafter. It is clear upon perusal of the facts and circumstances quoted by us hereinabove that if JISCO had to have a successful rights issue it was incumbent that it received a subscription equivalent to at least 90% of the issue. The condition with respect to the same imposed by SEBI while approving the rights issue was quite explicit in that regard. The fact that there was an arrangement between JISCO and UTI as also the fact that upon receipt of the face value of Rs 500/- per debenture JISCO would issue DW which would enable the holder to acquire one equity share in the JISCO, was clearly part and parcel of the terms and conditions of the issue. The arrangement between a public financial institution-UTI and JISCO for part financing the investment had been examined by the Tribunal in the first round. The Tribunal after noting the benefit which had accrued both to the assessee, and UTI, that is, while the assessee had acquired an equity share on the other hand UTI had acquired not only a SRNCD of a face value of Rs 500/- at the rate of



Assessing Officer and the CIT(A) and held that the assessee was entitled to claim a loss on sale of SRNCD to UTI as a “business loss” at the rate of Rs 111/- per SRNCD. By the very same order dated 05.06.2000 the Tribunal directed the Assessing Officer to allow deduction of loss at the rate of Rs 111/- per SRNCD.

12. The Assessing Officer (Joint Commissioner of Income Tax) while giving effect to the order of the Tribunal dated 05.06.2000 verified the loss of SRNCD. Upon verification of the loss the Assessing Officer adjusted the loss on the sale of 11,98,000 SRNCD at the rate of Rs 111/- per SRNCD amounting to Rs 13,29,78,000/- against an income of Rs 7,01,96,195/- and arrived at a loss of Rs 6,27,81,805/- under Section 143(3) of the Act. The Assessing officer, however, observed that the assessee was not entitled to carry forward the said assessed loss of Rs 6,27,81,805/- and set it off against its future income as the loss had been determined during the course of the proceedings by virtue of a letter dated 24.03.1998 filed before the Assessing Officer in the first round and was not loss determined in pursuance of a return filed in accordance with the provisions of Section 139(2) of the Act and hence, could not be carried forward and set off under Section 80 of the Act. This view was sustained by the CIT(A). We are of the view that the Tribunal correctly appreciated the provisions of Section 80 of the Act read with Section 139(3) of the Act and allowed the carry forward of loss for the purposes



provision of Section 80 of the Act permits an assessee to carry forward loss and seek its set off under Section 72(1) or 73(2) or sub-section (1) of Section 74 or 74A(3) except when, the loss has not been determined in pursuance of a return filed in accordance with provisions of sub-section (3) of Section 139. Section 80 of the Act reads as follows:-

“Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed in accordance with the provisions of sub-section (3) of Section 139 shall be carried forward and set off under sub-section (1) of Section 72 or sub-section (2) of section 73 or sub-section (1) or sub-section (3) of section 74 or sub-section (3) of section 74A.”

12.1 In the instant case, there is no doubt that the assessee had filed a return under Section 139 of the Act within the prescribed time. It is also not disputed that a loss had been claimed even though the same had been claimed to the extent of Rs 90/- and that too as a capital loss with respect to DWs issued to the assessee, on the assessee investing in the rights issue of JISCO. The assessee carried out a course correction by claiming a loss on sale of SRNCDs to UTI at Rs 111/- per SRNCD as they had sold SRNCDs of a face value of Rs 500/- to UTI at Rs 389/- per SRNCD. The Tribunal in the first round in its order dated 05.06.2000 came to a conclusion based on the judgments of the Supreme Court as well as those of various High Courts that what was important and relevant was the true legal effect of a transaction and in coming to the said conclusion the view that the assessee may take in the return of income or the treatment that is meted out in the books of accounts or the



method of accounting that an assessee uses are not relevant. ---

considering the effect to be given to the transactions which are governed by the provisions of the Act. The Tribunal went on to observe while allowing the claim of loss by the assessee that the fact that in the return filed by the assessee wherein the assessee does not take a proper position, cannot be a ground to take advantage of the ignorance of the assessee if the assessee is otherwise entitled to relief and/or claim of loss as in the instant case. Keeping the aforesaid rationale in mind the Tribunal vide order dated 05.06.2000 had directed the Assessing Officer to allow the assessee's claim of loss on sale of SRNCDs at the rate of Rs 111/- as a business loss. It is evident that the Assessing Officer (Jt. Commissioner of Income Tax) in the second round while giving effect to the orders of the Tribunal dated 05.06.2000 was determining the income/loss in pursuance of an original return filed by the assessee under Section 139 of the Act. In the return the assessee had claimed erroneously a loss to a lesser extent that is at Rs 91/- against DWs as against SRNCDs which was corrected pursuant to a stand taken before conclusion of proceedings by the Assessing Officer in the first round and a stand which was sustained by the Tribunal by its order dated 05.06.2000. In view of the said circumstances obtaining in the present case the Tribunal in the second round vide the impugned judgment has correctly held in our opinion, that both the CIT(A) and the Assessing Officer had misdirected themselves in law in preventing the carry



forward and the set off of the assessed loss against subsequent prof... ..
the conditions prescribed for triggering the provisions of Section 80 of
the Act were not present in the instant case.

13. The matter can be looked at from another angle also. It would in one sense turn the law on its head if after the Tribunal vide its order dated 05.06.2000 had allowed the assessee's claim of loss on sale of SRNCDs at the rate of Rs 111/- per SRNCD as a business loss based on the reasoning that the assessments had to be carried out keeping in mind the real effect of a legal transaction notwithstanding the treatment meted out by the assessee, it would then appear anomalous and incongruous if the Assessing Officer while giving effect to the said order would denude the efficacy of the Tribunal's order by, in a manner of speaking, taking away with one hand what was given by the other, that is, even while adjusting loss in assessment year 1995-96, deprive the assessee of a consequent benefit of carry forward and set off of the balance loss in the subsequent year(s). Such an approach would in our view be completely contrary to the directions issued by the Tribunal. We are here reminded of the observations of the Supreme Court in the case of **CIT vs J.H. Gotla; (1985) 156 ITR 323** where the Court in respect of a income tax matter has observed that while equity and taxes are strangers an attempt should be made to bring them nearer. The observations of the case are apposite and extracted hereinbelow:-



“Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction.”

14. At this stage, it would be pertinent to note the observations of the Supreme Court with respect to the approach that the Income Tax Authorities are required to adopt while assessing the income of an assessee. The relevant observations being apposite are extracted hereinbelow:-

CIT, Bombay vs C. Parakh & Co. (India) Ltd; (1956) 29 ITR 661

“We do not see any force in this contention. Whether the respondent is entitled to a particular deduction or not will depend on the provision of law relating thereto, and not on the view which it might take of its rights, and consequently, if the whole of the commission is under the law liable to be deducted against the Indian profits, the respondent cannot be stopped from claiming the benefit of such deduction, by reason of the fact that it erroneously allocated a part of it towards the profits earned in Karachi.”

CIT, Madras vs Mahalakshmi Textile Mills Ltd; (1967) 66 ITR 710

“By the first question the jurisdiction of the Tribunal to allow a plea inconsistent with the plea raised before the departmental authorities is canvassed. Under sub-section (4) of Section 33 of the Indian Income Tax Act, 1922, the appellate Tribunal is competent to pass such orders on the appeal “as it thinks fit”. There is nothing in the Income Tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal: if for reasons recorded by the departmental authorities in rejecting a contention raised by the assessee,



would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty, to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him.”

Kedarnath Jute Mfg. Co Ltd vs CIT (Central), Calcutta; (1971)
82 ITR 363

“We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension and mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income Tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter.”

15. As regards the other issue as to whether the Assessing Officer in the second round had exceeded his jurisdiction in observing that the loss of Rs 6,27,81,805/- assessed by him could not be carried forward and set off by the assessee against his future income, we are of the opinion that in view of the line of reasoning taken by us, the Assessing Officer in the second round was required to give full effect to the consequences which flowed from the order of the Tribunal dated 05.06.2000. The Assessing Officer to our minds exceeded his jurisdiction by not applying the provisions of law, keeping in mind the correct perspective of the matter at hand.



16. In view of the discussions above, we answer both the questions in favour of the assessee and against the Revenue. In the result the appeal is dismissed. There shall be no orders as to cost.

RAJIV SHAKDHER, J

February 06, 2009
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BADAR DURREZ AHMED, J