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

+ ITA 62/2024

MS CAMBRIDGE CONSTRUCTION DELHI
PRIVATE LTD. (FORMERLY MS CAMBRIDGE
CONSTRUCTION DELHI LTD.) Appellant

Through: Mr. Ved Jain, Mr. Nischay
Kantoor & Ms. Soniya Dodeja,
Advs.

versus

INCOME TAX OFFICER, WARD 5(3) Respondent

Through: Mr. Sanjeev Menon, JSC for
Mr. Zoheb Hossain, SSC.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR
KAURAV

ORDER
25.01.2024

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CM APPL. No. 4891/2024 (Ex.)

Allowed subject to all just exceptions.

Application stands disposed of.

CM APPL. 4892/2024 (28 days delay in filing)

This is an application filed by the appellant seeking condonation of 28 days delay in filing the appeal. For the reasons stated in the application, the delay of 28 days in filing the appeal is condoned.

Application is disposed of.



ITA 62/2024

1. The instant appeal has been preferred against the order of the Income Tax Appellate Tribunal [“ITAT”] dated 14 July 2023 passed in ITA No. 6655/Del/2019 for Assessment Year [“AY”] 2013-14.

2. Having heard learned counsel for parties we find that the instant appeal would merit admission on the following question of law:

A. Whether the ITAT misdirected itself in facts and in law in upholding the order of the Commissioner of Income Tax (Appeals) [“CIT(A)”] and the Assessing Officer [“AO”] and denying set off of long term capital loss of Rs. 9,40,93,506/-, out of the total unabsorbed losses of Rs. 13,06,81,733/- pertaining to AY 2007-08 against the long term capital gain arising on sale of property in AY 2013-14?

3. The solitary dispute which has been raised before us pertains to a claim of a set off of Long Term Capital Gains against carried forward losses. The carried forward losses stood duly embodied in the return of income which was filed for AY 2007-08. Undisputedly, the AO did not enter any adverse comment in respect of the same. However, when the matter reached the desk of the AO for the year in question, namely AY 2013-14, the claim for set off of Long Term Capital Gains against the carried forward losses was negated in the following terms:

“ On perusal of the computation of income in the ITR, it was noticed that the assessee has claimed brought forward (b/f) LTCL of Rs.12,72,375/- for AY 2005-06 and Rs. 13,06,81,733/- for AY 2007-08, which was adjusted against the LTCG for the current year, the assessee was therefore, asked to justify its claim of B/F losses with reliable and relevant documents. In reply, the assessee filed a copy of ITR and the assessment order u/s 143(3) dated 23.11.2009 passed by the then AO. On perusal of the same, it was noticed that the assessment in this case for AY 2007-08 was



completed at an income of Rs. 1,45,467/- against the nil returned income, which was adjusted out of B/F losses, meaning thereby, that the total income/loss as per this order was nil. No details whatsoever were filed by the assessee as a proof, in support of its claim of B/F loss for AY 2005-06. The assessee merely stated that it filed a copy of return of income for AY 2007-08, wherein the B/F long term capital loss for AY 2005-06 as well as AY 2007-08 is clearly mentioned in schedule CFL. It was also stated that the said return for AY 2007-08 is clearly mentioned in schedule CFL. It was also stated that the said return for AY 2007-08 was filed u/s 139 (1) on 30.10.2007. It was further stated that when the AO has not commented upon the assessee's claim of loss, it is presumed that the same has been accepted by the AO. Since, the assessee is not the author of the assessment order; it has no control over the language of the order.

The assessee's submissions were considered carefully, and the same were found not tenable for the reasons that in the assessment order, the AO has very loudly, clearly and specifically mentioned that the assessee filed its return declaring nil income. The AO made certain additions/disallowances to assess the total income at Rs.1,45,467/- for AY 2007-08, which was adjusted against the B/F losses. Since, the assessment order has been passed after a period of almost two years from filing of the return and after affording the assessee sufficient opportunity of being heard, it prevails over the return. It may further be noted that if there was any mistake in the assessment order, the assessee had many options like resorting to filing of a rectification application u/s 154, filing of an appeal before CIT(A) or moving a petition u/s 204 of IT Act before the concerned authorities. However, the assessee did not exercise any option for any remedial action as discussed above. It is therefore, evident that there was no mistake in the assessment order even in the eyes of the assessee. Hence, the income assessed in the aforesaid assessment order dated 23.11.2009 had attained finality. Here, it is worthwhile to note that the assessee being a company incorporated way back in the year 1980 is advised by the prominent professionals, hence, ignorance of law is not an admissible contention. Since, the income has been assessed at nil, it is held that the assessee has no B/F losses for the said year. The assessee's claim of B/F long term capital loss for AY 2007-08 is therefore, not tenable and hence rejected.

It may be reiterated that the assessee has not filed any details whatsoever for AY 2005-06 to justify its claim of B/F long term capital loss of Rs.12,72,375/-. However, enquiries were made from the ITD system and it was found that the assessee filed its return u/s 139(1) of IT Act and the case was not selected for scrutiny. Hence the assessee's return attained finality. Although,



the assessee failed to file any evidence to justify its claim of B/F loss for AY 2005-06, the returned loss of Rs. 12,72,375/- is treated as an admissible claim for the reason as discussed above and in the interest of natural justice.”

4. The aforesaid view as taken by the AO has been affirmed by the CIT(A) as well as the ITAT. Insofar as the ITAT is concerned, it has while dealing with the aforesaid question observed as under:

“26. When the assessee received the assessment order for A.Y 2007-08, he was well aware that the Assessing Officer has not allowed the carried forward of losses claimed by it and yet chose to remain silent and did not care to invoke the provisions of section 154 of the Act, nor filed any appeal before the Id. CIT(A).

27. Now, at this stage, referring to the return for A.Y 2007-08, the Id. counsel for the assessee cannot claim that the loss was claimed by the assessee. Assuming, yet not accepting the loss was claimed by the assessee, but the fact of the matter is that he said loss was never assessed and allowed by the Assessing Officer. Therefore, we do not find any merit in the claim of the assessee. We decline to interfere with the findings of the Id. CIT(A). Ground No. 2 with all its sub-ground is dismissed.”

5. As we view the conclusions which were recorded by the AO, it is manifest that the return for AY 2007-08 and the assertion of carry forward of losses was not doubted. The claim for adjustment came to be rejected on the premise that since the carried forward losses had not been spoken of in the assessment order framed for AY 2007-08, the proper course for the assessee would have been to invoke Section 154 of the Income Tax Act, 1961 [“Act”].

6. Mr. Menon, learned counsel appearing for the respondents, has drawn our attention to the following observations as rendered by the Supreme Court in **Commissioner of Income Tax, U.P. vs Manmohan Das (Deceased)** [(1966) 2 SCR 531]:

“ 2. At the instance of the Commissioner of Income-tax, U.P., the following questions were referred to the High Court of Allahabad under Section 66(1) of the Indian Income-tax Act, 1922:



"(I) Whether on a true interpretation of the deed of agreement dated 2nd January, 1931, appointing the assessee as treasurer of the Allahabad Bank Limited, income earned by the assessee from his activities as such Treasurer fell to be computed under Section 10 of the Act or Section 12 of the Income-tax Act?

If the answer to this question is that such income is liable to be computed under Section 10 of the Act,

(2) Whether the assessee could claim a set off of the loss suffered by him in the preceding year 1950-51 against his profits in the year under consideration, i.e., 1951-52, having failed to prefer an appeal against the refusal by the Income tax Officer making the assessment for the year 1950-51 to allow the assessee to carry forward the loss under Section 24(2) of the Act ?"

The High Court held that the remuneration received by the assessee from the Allahabad Bank was income liable to be taxed under Section 10 of the Income-tax Act, and that the assessee could claim to set off the loss computed in the Assessment Year 1950-51 against the profits in the subsequent year. With certificate granted by the High Court, this appeal has been preferred by the Commissioner of Income-tax.

3. The second question presents little difficulty. In making assessment for the year 1950-51 the Income Tax Officer declared that the loss computed in that year could not be carried forward to the next under Section 24(2) of the Income Tax Act, as it was not a business loss. The Income Tax Officer has under Section 24(3) to notify to the assessee the amount of loss as computed by him, if it is established in the course of assessment of the total income that the assessee has suffered loss of profits. Section 24(2) confers a statutory right (subject to certain conditions which are not material) upon the assessee who sustains a loss of profits in any year in any business, profession or vocation to carry forward the loss as is not set off under sub-section (1) to the following year, and to set it off against his profits and gains, if any, from the same business, profession or vocation for that year. Whether the loss of profits or gains in any year may be carried forward to the following year and set off against the profits and gains of the same business, profession or vocation under Section 24(2) has to be determined by the Income Tax Officer who deals with the assessment of the subsequent year. It is for the Income Tax Officer dealing with the assessment in the subsequent year to determine whether the loss of the previous year may be set off against the profits of that year. A decision recorded by the Income Tax-Officer who computes the loss in the previous year under



Section 24(3) that the loss cannot be set off against the income of the subsequent year is not binding on the assessee.”

7. The principles with respect to set off and carry forward of losses as enunciated therein would in fact support the contention of the assessee. In our considered opinion, while it was incumbent upon the assessee to have established the incurring of losses and which was sought to be set off against the Long Term Capital Gains for the year in question, namely AY 2013-14, there was no occasion for the assessee having taken the Section 154 route since undisputedly the AO while framing the assessment for AY 2007-08 had not adversely commented upon the same.

8. In view of the above, we are of the considered opinion that the impugned orders would be liable to be set aside and the matter remitted to the AO to examine the claim for eligibility and set off afresh bearing in mind the evidence and other material that the assessee may place for its consideration. All rights and contentions of respective parties in this respect are kept open.

9. Consequently, we answer the question as framed in favour of the assessee. The appeal shall accordingly stand allowed. The impugned order dated 14 July 2023 is hereby set aside. The matter shall stand remanded to the AO to proceed further in terms provided hereinabove.

YASHWANT VARMA, J

PURUSHAINDRA KUMAR KAURAV, J

JANUARY 25, 2024/kk