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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 66/2012

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Date of Decision : 8th February, 2012.

PRAMOD MITTAL Appellant
Through: Mr. S. Krishnan, Adv.

versus

CIT Respondent
Through Ms. Suruchi Aggarwal, sr. standing
counsel

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

CM 1322/2012

This is an application for condonation of delay of 35 days in filing of the appeal. For the reasons stated in the application, the delay is condoned.

Application is disposed of.



ITA 66/2012

This appeal by Pramod Mittal impugns order dated 15.7.2011 passed by the Income Tax Appellate Tribunal (tribunal, for short). The appeal pertains to the assessment year 2005-06.

2. Ld. counsel for the appellant submits that the appellant-assessee, who is an individual, had taken over the running business of a partnership firm, in which he was a partner, including fixed assets, current assets and liabilities. It is submitted that the appellant in his return filed in status of an individual was entitled to set off the loss of Rs.22,40,193/- suffered by the partnership firm. This loss should be reduced from the income earned by the appellant as an individual. The appellant relies upon Section 78(2) of the Income Tax Act, 1961 (Act, for short) and decisions of the Supreme Court in *CIT Vs. Madhukant M. Mehta* (2001) 247 ITR 805 (SC) and *Saroj Aggarwal Vs. CIT* (1985) 156 ITR 497 (SC).

3. We have considered the contentions raised by the petitioner but do not find any merit in the same. Partnership firm is a separate and distinct unit of assessment. The petitioner and his brother constituted a



partnership firm, which was dissolved w.e.f. 18.9.2004. The partnership firm will have to be assessed on the income for the period 1.4.2004 to 18.9.2004. After the dissolution of the partnership firm, it ceased to exist. The petitioner in terms of the dissolution deed became entitled to fixed assets, current assets and liabilities of the firm. The other partner was paid the current account balance and capital balance standing to his credit. After 18.9.2004, the appellant continued to carry on the business as a sole proprietor. As a sole proprietor the income earned was taxable in his hand as an individual and as a separate unit/person.

4. Section 78(2) of the Act reads: -

“78. Carry forward and set off of losses in case of change in constitution of firm or on succession –

(1)

(2) Where any person carrying on any business or profession has been succeeded in such capacity by another person otherwise than by inheritance, nothing in this Chapter shall entitle any person other than the person incurring the loss to have it carried forward and set off against his income.”

5. Section 78(2) will apply to the facts of the present case as the partnership firm was dissolved and ceased to exist w.e.f. 18.9.2004. The



partnership firm after the said date did not continue. This is not a case of inheritance due to death under the law of succession. The loss suffered by the appellant as an individual can be included and accounted for but not the loss suffered by a different person/ unit i.e. the partnership firm. Section 78(2) of the Act does not permit the said set off or diminution.

4. The *Madhukant M. Mehta* (supra) the sole proprietor had expired and after his death his heirs had succeeded and carried on business in partnership. In this case the losses suffered by the deceased proprietor were allowed to be set off in terms of Section 78(2) of the Act. Section 78(2) carves out an exception in case of succession by inheritance. The general rule is that it is only the person who has suffered the loss is entitled to set off and account for the same and not a different or a third person. In the case of *Madhukant M. Mehta* (supra) it was succession by inheritance. In the case of *Saroj Aggarwal* (supra) there was a partnership firm and on death of one of the partners, the legal heirs of said partner were inducted as partners. It was noticed that the partnership was not dissolved on the death of the partner. In such circumstances, Section 78(2) was interpreted and benefit of carry forward of the loss was given.



The partnership firm which suffered the losses continued throughout with induction of legal heirs of the deceased partners. This again is a case of succession by inheritance.

5. It will be appropriate to refer to Section 170(1) of the Act, which reads: -

“Section 170. Succession to business otherwise than on death.

(1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession, -

(a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;

(b) the successor shall be assessed in respect of the income of the previous year after the date of succession.”

6. Section 170(1) is very lucid and clear. The partnership firm has to be assessed in respect of profit and gains from the business for the period up to 18th September, 2004. After the said date and after the partnership firm was dissolved, the sole proprietor has to be assessed in respect of



profits and losses. The income earned by the appellant, as an individual, would include his share of loss as an individual but not the losses suffered by the partnership firm. The losses suffered by the partnership firm cannot be set off from the income of the appellant as an individual, in the absence of any specific provision in the Act. The partnership firm and individual are two separate taxable entities or persons under the Act.

7. There is no contradiction between Section 78(2) and Section 170(1). They provide for different situations. Section 170(1) provides for a situation where a person carrying on business or profession is succeeded to by another person, who continues to carry on that business. In such a situation, the sub-section says that predecessor in business shall be assessed in respect of the income of the previous year up to the date of succession and the successor in business shall be assessed in respect of the income after the date of succession. This sub-section only provides as to who will be assessable in respect of the income of the previous year from business, when there is a change in the person carrying on the business by succession. Section 78(2) provides for a different situation. It speaks only of carry forward of the losses of a person who was carrying on a



business or profession and who was succeeded to by another person. It makes no provision for the division of the income of the previous year between the predecessor and successor. It says that it is only the person who incurred or suffered the loss who will be entitled to carry forward the same and set it off, and no other person. An exception to this rule is the case of succession by inheritance.

8. In the present case the assessee has claimed to set off the loss of Rs.22,40,193/- against his income earned for the period from 18.09.2004 to 31.03.2005. The loss is not the loss suffered by him. It is the loss suffered by the erstwhile partnership firm before 18.09.2004 on which date the firm was dissolved. When the assessee took over the business of the erstwhile partnership firm, it was not a case of succession by inheritance. The appeal is accordingly dismissed. No costs.

SANJIV KHANNA, J

R.V.EASWAR, J

February 08, 2012/vld