(1988) 07 CAL CK 0002

Calcutta High Court

Case No: IT Reference No. 118 of 1979

Commissioner of Income Tax	APPELLANT
Vs	
B.K. Birla	RESPONDENT

Date of Decision: July 12, 1988

Acts Referred:

- Income Tax Act, 1961 - Section 256(1), 45, 48, 48, 49

Citation: (1988) 41 TAXMAN 104

Hon'ble Judges: K.M. Yusuf, J; Ajit K. Sengupta, J

Bench: Division Bench

Advocate: S.K. Chakraborty, for the Appellant; R.N. Bajoria, for the Respondent

Judgement

Ajit K. Sengupta, J.
At the instance of the Commissioner, the following question of law has been referred to this Court u/s 256(1) of the income tax Act, 1961 (''the Act'') for the assessment year 1971-72.

Whether, on the facts and in the circumstances of the case, the assessee is entitled to deduction of Rs. 5,000 as contemplated u/s 80T of the income tax Act, 1961 from the long-term capital gains of Rs. 5,864 before the same are set off against the short-term capital loss of Rs. 7,792.

The facts leading to this reference are that for the year under reference the assessee suffered loss of Rs. 7,792 under the head ''Capital gains - Short-term'' and made profit of Rs. 5,864 under the head ''Capital gains - Long-term''. In his return of income as well as during the course of assessment proceedings, the assessee claimed that he should be granted deduction of Rs. 5,000 as contemplated u/s 80T of the Act in respect of ''long-term capital gains'' without setting it off first against ''short-term capital loss'' of Rs. 7,792. The ITO, however, first set off the ''long-term capital gains'' against ''short-term capital loss'' and determined the loss under the head ''Capital gains'' of Rs. 1,928 (Rs. 7,792 minus Rs. 5,864). Moreover, he declined

to give relief u/s 80T with the following remark "Relief u/s 80T is not allowable as there is no long-term capital gains after adjusting short-term capital loss with it.

2. In appeal, it was submitted that the ITO should have first allowed statutory relief of Rs. 5,000 as contemplated u/s 80T and then proceeded to make other adjustment to the total income.

3. The AAC in his order dated 16-7-1975 accepted the assessee''s claim holding that in view of the provisions of section 80T(b) a sum of Rs. 5,000 should be deducted from the long-term capital gains of Rs. 5,864 and the balance set off against short-term capital loss.

4. Before the Tribunal, the revenue submitted that on the correct interpretation of sections 70(2), 80B and 80T of the Act, the AAC was not justified in accepting the assessee''s submissions in this regard. The learned counsel for the assessee, on the other hand, submitted that once the total income of the assessee before giving effect to the deduction contemplated in Chapter VI-A of the Act was a positive figure, the assessee would be entitled to claim deduction u/s 80T (which is one of the sections of Chapter VI-A) in view of the definition of ''gross total income'' contained in sub-section (5) of section 80B. In this connection, he submitted that in the gross total income of the assessee, income chargeable under the head ''Capital gains'' was included and, therefore, the assesses was entitled to claim deduction of Rs. 5,000 as contemplated u/s 80T(b). He, therefore, submitted that the order of the AAC was in accordance with the aforesaid section of the Act and, therefore, should be upheld.

The Tribunal upheld the order of the AAC holding that ''long-term capital gains'' of Rs. 5,864 was included in the gross total income of the assessee as contemplated under sub-section (5) of section 80B and that the mere fact that the same was adjusted against ''short-term capital loss'' of Rs. 7,792 would not disentitle the assessee to claim deduction of Rs. 5,000 as contemplated u/s 80T(b).

5. The short question which falls for determination in this case is whether deduction u/s 80T should be allowed on the gross amount of long-term capital gains prior to setting off of short-term capital loss of the same year.

6. Section 80T provides for an allowance of a straight deduction in the computation of total income of any individual in respect of long-term capital gains included in the gross total income. Capital gains stand on different footing which are computed in accordance with the provisions contained in sections 45 and 48 of the Act. These two provisions do not envisage the adjustment of any other loss either of the same year or of a different year. It is no doubt true that the provisions regarding set off of the loss have a direct bearing on the computation of total income. Accordingly in determining the question the provisions of sections 70 and 71 of the Act cannot be ignored. u/s 70(2)(i) if an assessee suffers loss under the capital gains relating to short-term capital assets he can set it off against the profits of the same year under the head ''Capital gains'' relating to any other capital assets.

7. In Punjab Produce and Trading Co. Ltd. Vs. Commissioner of Income Tax, a question arose whether an assessee, who suffers loss in respect of short-term capital assets and made gains in respect of assets other than short-term capital assets, has to set off first the short-term capital loss against long-term capital gains. The ITO deducted the loss on account of short-term capital assets against the gains in respect of other capital assets in the first instance and thereafter the balance was set off against the income of the assessee from other heads. The assessee preferred an appeal contending, inter alia, that the loss relating to short-term capital assets should have been set off first against other heads of income and not against gains in respect of assets other than short-term capital. This contention was rejected by the AAC. The assessee preferred a further appeal before the Tribunal and contended that the loss in respect of its short-term capital assets was required to be set off against income other than capital gains u/s 71(3). It was contended on behalf of the revenue that loss in respect of short-term capital assets was required to be set off first against the gains in respect of other capital assets u/s 70(2)(i). The Tribunal held that section 71(3) was subject to the other provisions of the relevant Chapter of the Act including section 70(2)(i). It was held further that a loss suffered on short-term capital assets had to be set off first against the gains from other capital assets and thereafter the balance, if any, could be set off against other heads of income. The contentions of the revenue were upheld and the appeal of the assessee was rejected.
In that context the question arose whether on proper interpretation of section 70(2)(i) and section 71(3), the Tribunal was justified in holding that the short-term capital loss should be first set off against the long-term capital gains. The Court after referring to the provisions of section 70(2)(i) and section 71(3) and other connected provisions held as follows:

In that case one of the questions raised was whether the assessee was entitled to set off the short-term capital loss against the long-term capital gains and against income and other gains. The Court after considering the provisions of the Act held that:

From the said sections, it appears that the Legislature intended to draw a distinction between short-term capital assets and other capital assets and income or loss arising out of the two types of capital assets have been treated as if falling under different heads.

Under section 70(2)(i) of the Act, on a computation made under sections 48 to 55 in respect of any short-term capital asset resulting in loss, the assessee becomes entitled to set off such loss against the income arising out of any other capital asset on a similar computation. u/s 71(3) of the Act, where the net result of computation under sections 48 to 55 of the Act relating to short-term capital assets is a loss, the assessee is entitled to have such loss set off against the income under any head except capital gains.

To construe section 70(2)(i) and section 71(3) harmoniously, it must be held that the expression ''any other capital asset'' in section 70(2)(i) refers only to a short-term capital asset. The set off provided u/s 70 appears to be itemwise or sourcewise whereas the set off of the loss u/s 71 appears to be headwise.

Under section 71(2), it appears that choice has been given to the assessee in respect of loss arising from any other head except capital gain to set off the same either against the entire capital gain or only against its income relating to short-term capital assets. Similar choice has not been made available to an assessee u/s 71(3).

In any event, two several and separate rights have been conferred on the assessee under sections 70(2)(i) and 71(3) and, in case of any ambiguity, the construction beneficial to the assessee should be adopted." (p. 380)

The position that emerges is this that short-term capital loss should not be set off first against the long-term capital gains of the same year u/s 70(2)(i). If that be the position, then the short-term capital loss shall be first set off against the other income of the assessee of the same year. The gross total income in this case before any deduction was made under Chapter VI of the Act was a positive figure. The ITO, however, set off short-term capital loss against the long-term capital gains and the resultant loss was set off against the positive income from other heads. The ITO, therefore, did not allow the relief u/s 80T as there was no long-term capital gains after adjustment of short-term capital loss.

Where the gross total income of an assessee is a positive figure and even after set off of the short-term capital loss against other income there would be still a positive income, in such a case loss on short- term capital gains should not be set off first against the long-term capital gains so as to deprive the assessee of the relief available u/s 80T(b). The position would be different when the gross total income is a negative figure.

8. In our view the ITO was not right in deducting from the long-term capital gains, loss on short-term capital assets in determining the relief available u/s 80T(b).

9. We, therefore, reframe the question as follows:

Whether, on the facts and in the circumstances of the case, the assessee is entitled to deduction of Rs. 5,000 as contemplated u/s 80T of the income tax Act, 1961.

For the reasons aforesaid we answer this question in the affirmative and in favour of the assessee.

9. There will be no order as to costs.

K.M. Yusuf, J.

I agree.