



Long-term capital loss on sale of equity shares/equity oriented mutual funds on which STT is paid is not allowed to be set-off and carry forward

Recently, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Nikhil Sawhney¹ (the taxpayer) dealt with the issue of allowability of long-term capital loss on sale of equity shares/ equity oriented mutual funds on which Security Transaction Tax (STT) is paid. The Tribunal held that such long-term capital loss shall not be allowed to be set-off and carry forward. In view of the judicial precedents as well as the authoritative commentary², the lower authorities have not committed any error in ignoring the loss incurred by the taxpayer. Accordingly, the Tribunal held that when the income is exempt, both the positive income as well as the loss, will not enter into the regular computation of the taxpayer.

Facts of the case

The taxpayer is deriving income from salary, interest income from bank deposits and capital gains/losses. During the Assessment Year (AY) 2012-13, the taxpayer suffered a long-term capital loss which included a loss pertaining to the transfer of equity shares and equity oriented mutual funds which is subject to levy of STT.

The Assessing Officer (AO) observed that the word 'income' under the Income-tax Act, 1961 (the Act) includes loss. It not only includes positive income, but also any negative income. Thus, the exemptions provided under Section 10(38) for long term capital gain on sale of equity shares will not only apply to the transactions generating positive income on which STT paid but also apply to the nature of transactions

resulting in negative income or losses. Accordingly, the AO held that long-term capital loss on sale of shares which are liable for STT is not allowable to the taxpayer.

Tribunal's decision

The Supreme Court in the case of Harprasad & Co. (P) Ltd.³ explained that the words income or profits include losses. The Supreme Court reiterated the principle that if the loss is from a source or head of income not liable to tax or congenitally exempt from income-tax, the taxpayer is neither required to show the same in the return nor the AO is required to determine the same. However, the Calcutta High Court in the case of Royal Calcutta Turf Club⁴ held that despite the fact that income from business of breeding of horses and pigs was exempt from tax, since source of income per se was not exempt from tax, loss from such source is available for set-off under the provisions of the Act.

However, the Gujarat High Court in the case of Kishorebhai Bhikhabhai Virani⁵ held that the loss arising on sale of capital asset covered under Section 10(38) would not be includible in computation of taxpayer's income and therefore would not be available for set-off against capital gain.

Subsequently, the Mumbai Tribunal in the case of Raptakos Brett & Co Ltd⁶ has elaborately considered and applied the decisions of the Supreme Court in the case of Harprasad & Co. and the Calcutta High Court⁷

¹ Nikhil Sawhney v. ACIT (ITA No. 1248/Del/2017, AY 2013-14) - Taxsutra.com
² The authoritative commentary of Kanga & Palkhivala's, the law and Practice of Income tax – 11th Edition, page no 531-532 of Vol – I

³ CIT V. Harprasad & Co. (P) Ltd. [1975] 99 ITR 118 (SC)
⁴ Royal Calcutta Turf Club v. CIT [1983] 144 ITR 709 (Cal)
⁵ Kishorebhai Bhikhabhai Virani v. ACIT [2015] 367 ITR 261 (Guj)
⁶ Raptakos Brett & Co. Ltd. v. DCIT- [2015] 69 SOT 383 (Mum)
⁷ Royal Calcutta Turf Club v. CIT [1983] 144 ITR 709 (Cal)

to conclude that long-term capital loss on transfer of shares (on which STT is paid) was allowable. The Tribunal also considered the Gujarat High Court decision but opted to follow the decision of the Calcutta High Court in the case of Royal Calcutta Turf Club⁸ stating that the Gujarat High Court did not consider the decision of the Calcutta High Court.

The Tribunal in the present case observed that when the Gujarat High Court had followed the decision of the Supreme Court in the case of Hariprasad & Co and when facts of the instant case were almost same with the facts before the Gujarat High Court, the Tribunal are inclined to follow the decision of the Gujarat High Court instead of the decision of the co-ordinate benches of the Tribunal. It is a trite principle of judicial discipline that binds us to follow the decision of higher judicial forum. The Tribunal are not authorised to state that any decision of the High Court is 'sub silentio' or 'per incuriam'. It is neither in Tribunal's domain nor do the Tribunal have any authority because the Tribunal are subordinate to the High Court. However, the argument of the taxpayer that the Tribunal should follow the decision of the co-ordinate bench in the case of Raptakose Brett & Co Ltd and not the decision of the Gujarat High Court was required to be dealt with on merits because otherwise the Tribunal's order in the present case would not be complete.

The Supreme Court in Karamchand Premchand Ltd⁹ apart from deciding the issue on merit in favour of the taxpayer held that the loss of business was allowable since source of income was not outside the purview of taxation. However, the controversy before the Tribunal was not whether any source is excluded or included. The controversy was whether the provisions of Section 10(38) which starts with any income would include both positive income/surpluses or negative income/losses. Thus, the argument that the Gujarat High court should have considered Karamchand Premchand Ltd. and not Hariprasad & Co P Ltd. was not correct.

In view of the judicial precedents as well as the authoritative commentary¹⁰, the lower authorities have not committed any error in ignoring the loss incurred by the taxpayer. Accordingly, the Tribunal held that when the income is exempt, both the positive income as well as the loss, will not enter into the regular computation of the taxpayer. The orders of the lower authorities were upheld.

There are no two views on the issue and hence the Tribunal is constrained to take a view in favour of the revenue and against the taxpayer on this issue. Accordingly, following the decision of the Gujarat High Court as well as the authoritative commentary on law and practice of income tax supported by the decisions of the Supreme Court, the Tribunal dismissed the appeal of the taxpayer.

Our comments

The issue with respect to set-off of long-term capital loss on equity shares on which STT has been paid, has been a matter of debate before the Courts and the Tribunal.

The Courts/Tribunal¹¹ in some of the cases have held that long term capital loss arising on sale of listed shares (income from which is exempt from tax) can be carried forward and set-off against other long-term capital gains. However, on the other hand some of the Courts/Tribunal¹² have held that loss on transfer of long-term capital assets specified under Section 10(38), on which STT is paid, cannot be set-off against the long-term capital gains.

The Tribunal in the present case has held that the loss incurred by the taxpayer on sale of equity shares/equity oriented mutual funds on which STT is paid is not allowed to be set-off and carry forward.

⁸ Royal Calcutta Turf Club v. CIT [1983] 144 ITR 709 (Cal)

⁹ CIT v. Karamchand Premchand Ltd [1960] 40 ITR 106 (SC)

¹⁰ The authoritative commentary of Kanga & Palkhivala's, the law and Practice of Income tax – 11th Edition, page no 531-532 of Vol –I

¹¹ United Investments v. ACIT (ITA No. 511/Kol/2017), Raptakos Brett & Co. Ltd. v. DCIT [2015] 69 SOT 383 (Mum), **Rare Investments v. CIT** (ITA No. 3409/Mum/20)

¹² DDIIT v. Asia Pacific Performance SICAV [2014] 30 ITR(T) 333 (Mum), Schrader Duncan Ltd. v. ACIT [2012] 50 SOT 68 (Mum), Kishorebhai Bhikhabhai Virani v. ACIT [2015] 367 ITR 261 (Guj)

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