

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC" MUMBAI**

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 7489/MUM/2018
Assessment Year: 2005-06**

M/s Apollo Finvest (India) Ltd., Unit No. 803, Morya Blue Moon, Opp. City Mall, Oshiwara Link Road Next to Monginis Cake Factory, Andheri (W), Mumbai-400053. PAN No. AAACA0952A Appellant	Vs.	Asst. Commissioner of Income Tax- 9(1), 1 st floor, Aayakar Bhavan, Queen's Road, Mumbai-400020. Respondent
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Assessee by	:	Mr. S.L. Jain, AR
Revenue by	:	Ms. Smita Verma, DR

Last Date of Hearing	:	04/12/2020
Date of Pronouncement	:	11/01/2021

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2005-06. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-20, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the appellant/assessee read as under :

1. Ld. CIT(A) after having held that gain arising on sale of depreciable assets will be treated as long term gain erred in holding that appellant could not

establish depreciable assets sold held for more than 3 years without appreciating the fact that in submission in assessment proceedings under submission dated 19/10/2007 it was submitted that plant sold was acquired in A.Y. 1996-97 and said submissions was before Ld. CIT(A) in compilation and issue was not in dispute.

2. Ld. CIT(A) erred in holding that legal submission made by appellant that prior to amendment of section 70 & 74 by Finance Act, 2002, carry forward loss was only capital loss without any distinction between short term and long term is not falling within the directions of ITAT under its order without properly appreciating the fact that all the grounds of appeal including additional ground was set aside for adjudication under ITAT order.
3. Ld.CIT(A) failed to appreciate that in the written submission filed before Ld. CIT(A), legal submissions were made and reliance was placed on Special Bench decision in case of Kotak Mahindra Capital Co. Ltd. 148 TTJ 393 (Mumbai) (SB)
4. It is prayed that capital gain arising during the year be adjusted against carry forward loss for A.Y. 2001-02.

3. Briefly stated, the facts of the case are that the assessee-company filed its return of income for the assessment year (AY) 2005-06 on 29.10.2007 declaring *Nil* income under the normal provisions and Rs.12,49,990/- as book profit u/s 115JB of the Act. It is a non-banking public financial company engaged in investment in shares, mutual funds, securities, debentures etc.

In this case, an assessment order u/s 143(3) dated 22.11.2007 was made determining the total income at Rs.24,68,844/- and book profit u/s 115JB at Rs.34,24,459/-. Subsequently, the assessment was reopened u/s 147 of the Act and accordingly an order u/s 143(3) r.w.s. 147 was passed on 29.11.2010. Meanwhile, the assessee filed an appeal before the Ld. CIT(A)

against the original assessment order. The Ld. CIT(A) passed an order dated 08.04.2010 in appeal No. CIT(A)-19/IT-163/07-08 dismissing the assessee's appeal. The assessee filed an appeal before the Tribunal against the order of the Ld. CIT(A). The Tribunal passed an order dated 19.02.2014 in ITA No. 6550/M/2010 setting aside the order of the Ld. CIT(A) with a direction to adjudicate the issue afresh. The relevant portion of the order of the Tribunal is reproduced below:

“5. Briefly stated relevant facts of the case are that the assessee filed the return of income declaring the total income of Rs. NIL under the normal provisions of the Act and Rs. 12.49 lakhs as book profits u/s 115JB of the Act. During the assessment, the AO determined the total income under the normal provisions at Rs. 24,68,840/- and Rs.34,24,459/- as book profits under section 115JB of the Act. AO made addition on account of “short term capital gain” in the assessment. Matter travelled to the first appellate authority.

6. During the proceedings before the first appellate authority, after considering the submissions of the assessee, CIT (A) dismissed the appeal of the assessee. Eventually, the assessee's claim relating to set off of the carried forwarded capital loss of Rs. 9,01,233/- against the current year long term capital gain of Rs.54,38,407/- was denied. Therefore, the assessee raised ground no.1 and 2 in this appeal.

7. During the proceedings before us, at the outset, referring to the issues involved in ground no.1 and 2 of this appeal, Ld Counsel for the assessee mentioned that these issues stand covered in favour of the assessee by virtue of the judgment of the Hon'ble Bombay High Court in the case of Commissioner of Income-tax Vs Ace Builders P. Ltd. (Bom) 281 ITR 210 and many other decisions of this Tribunal such as (1) Geetanjali Trading Ltd vs. ITO vide ITA No.5428/M/2007, dated 24.12.2002 (2) Manali Investments vs. ACIT, 45 SOT 128 (Mum) (URO) etc. Some of these

decisions were not available to the AO / CIT (A) at the appropriate point of time. Therefore, in our considered opinion, the issue should be remanded to the file of the CIT (A) with a direction to examine the applicability of the said decisions to the facts of the present case and decide the grounds as well as the additional grounds as the case may be after granting a reasonable opportunity of being heard to the assessee. Accordingly, ground no.2 and 3 as well as the additional grounds are allowed in the above mentioned manner.

8. In connection with ground nos. 3 & 4, Ld Counsel for the assessee brought our attention to the fact that the provisions for diminution of the value of investment constitutes an allowable deduction for the purpose of computing the book profits and the same issue stands covered by the decision of the ITAT, Kolkata Bench in the case of DCIT vs. Mcleod Russel India Ltd (2013) 24 ITR 262 (Kolkata) and the relevant conclusion of the said decision reads as under:

“Conclusion:-

Assessee was held entitled to deduction of provision for diminution in value of investment and provision for contingency written back in P & L Account while computing book profit, when deduction was not allowed in computing the book profits of year in which provision were created.”

9. On perusal of the said decision of the Tribunal, we direct the CIT (A) to examine the said decision and decide the claim of the assessee. Accordingly, ground nos.3 and 4 raised by the assessee are treated as allowed for statistical purposes.”

4. The main grievance of the appellant is that the AO erred in not setting off the short term capital gain of Rs.54,38,407/- earned by it against long term capital loss brought forward from AY 2001-02, which later on is affirmed by the Ld. CIT(A).

Before the Ld. CIT(A), the counsel for the assessee pointed out that in the provisions for carry forward contained in section 74 of the Act prior to the amendment by the Finance Act, 2002 w.e.f. 01.04.2003, there was no distinction between long term capital loss and short term capital loss and therefore, the AO erred in applying the provisions of section 74 as amended by the Finance Act, 2002. Therefore, it was contended that the AO should have applied the provisions prior to the amendment as the losses brought forward related to the AY 2001-02.

In appeal before the Ld. CIT(A), the assessee claimed that the short term capital gain arose on sale of plant & machinery purchased in AY 1996-97 and therefore, those were long term capital assets ; as per the deeming provisions of section 50 of the Act, the profit arising from the sale of plant & machinery was deemed to be short term capital gain; for the purpose of section 74, the profit is to be treated as long term capital gain since the asset was a long term capital asset.

The Ld. CIT(A) while deciding the issue deliberated on the applicability of the decisions as directed by the Tribunal. As recorded by him, the assessee could not establish that the plant & machinery which were sold were in fact purchased in 1996-97 as claimed. Therefore, he rejected the claim of the assessee that the issue is covered by the decision in *Ace Builders P. Ltd.* (supra) and *Geetanjali Trading Ltd.* (supra).

The Ld. CIT(A) further rejected the contentions of the assessee (i) that setting off of brought forward losses incurred in AY 2001-02 is governed by the provisions of section 74 as it existed prior to the amendment by the

Finance Act, 2002 and (ii) that as per section 74 as applicable to AY 2001-02, there was no distinction between the short term capital gain and long term capital gain for carry forward and set off.

The reasons given by the Ld. CIT(A) are that the scope of the proceedings before him is limited by the direction contained in the order of the Tribunal.

5. Before us, the Ld. counsel for the assessee submits that the appellant acquired depreciable plant in AY 1996-97, being electric meters which were disposed off during the year giving rise to capital gain of Rs.39,99,990/- taxable u/s 50 of the Act. It is explained that total capital gain earned during the year under consideration amounted to Rs.54,38,407/- ; balance capital gain was short term capital gains on mutual funds; said capital gain was set off against carry forward loss for AY 2001-02 of Rs.90,12,331/-.

5.1 It is explained by the Ld. counsel that the Tribunal set aside all the grounds to the Ld. CIT(A). Further, it is explained by him that the issue herein is covered in favour of the assessee by the order of the Special Bench of the Tribunal in *Kotak Mahindra Capital Co. Ltd. v. ACIT* 148 TTJ 393 (Mum) (SB), where in AY 2004-05, the assessee returned short term capital gain of Rs.2.22 crore, which was set off against brought forward long term capital loss to the extent of Rs.42.91 lacs relating to AY 2001-02. As per the AO, in view of amended provisions of section 74(1) as amended w.e.f. 01.04.2003, the assessee was not entitled to claim such set off of long term capital loss for AY 2001-02 against short term capital gain in AY 2004-05, as the amended

provisions of section 74(1) were applicable to AY 2003-04. The Tribunal held that :

“Having accepted the first contention of the Ld. Counsel for the assessee that the provisions of sec.74(1) as amended w.e.f. 01.04.2003 apply only in respect of long-term capital loss of AY 2003-04 onwards and not in respect of long-term capital loss relating to the period prior to 2003-04, the carry forward and set off of which is governed by the pre-amended provisions of sec. 74(1), it follows that the assessee is entitled to claim set off of any brought forward long- term capital loss relating to AY 2001-02 against short-term capital gain. This is because the carry forward and set off long-term capital loss relating to AY 2001-02 would be governed by the provisions of sec.74(1) as existed prior to 01.04.2003.”

It is stated that as there is no contrary decision to the above Special Bench decision, capital loss of AY 2001-02 is entitled to be set off against the capital gain of the year.

5.2 With reference to the observation of the Ld. CIT(A) that acquisition of assets in AY 1996-97 was not proved, the Ld. counsel explains that this fact is not in dispute at any stage. To support the above contentions, he refers to letter dated 19.10.2007 filed before the AO explaining that capital gain is assessable u/s 50 of the Act.

6. On the other hand, the Ld. Departmental Representative (DR) relies on the order of the Ld. CIT(A) and reiterates that the appellant could not establish that the plant & machinery which were sold were in fact purchased in the year 1996-97 as claimed. Thus it is argued that the order passed by the Ld. CIT(A) be affirmed, as he has followed the direction of the order of the Tribunal dated 19.02.2014.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given *infra*.

In letter dated 19.10.2007 filed before the AO, the assessee had filed an explanation in respect of assessment proceedings for AY 2005-06 which is reproduced below :

“2. With reference to your honour’s query regarding loss on sale of fixed assets we have to state that certain buses leased to M.S.R.T.C, numbering 8, were abandoned by the said Corporation. The assessee took delivery thereof and sold for Rs.8.0 lacs. The written down value of these buses were Rs.16,48,777/-, thus resulting in loss of Rs.8,48,777/-. The electric meters leased to H.S.E.B. were sold during the year for Rs.39,99,990/- being written down value of Rs.40,01,641/- thus there has been a loss of Rs.1,651/-. While filing the return of income assessee has included total sales price of electric meters in the short term capital gain u/s 50 of Rs.39,99,990/-. As the assessee has claimed 100% depreciation on the said meters in AY 1996-97 it has been denied by the department. The assessee is agitated against the same and has filed an appeal which is still pending for disposal. In view of the same it is submitted that if the assessee is not allowed 100% depreciation in AY 1996-97, the short term capital offered for taxation u/s 50 will not be taxable and assessment is to be revised accordingly.”

7.1 In the order dated 08.04.2010, the Ld. CIT(A) in appeal No. CIT(A)-19/IT-163/07-08 has held that :

“4.2. It is the submission of the appellant that capital losses incurred prior to 1.4.2003 are governed by pre-amendment Act and hence all short term capital loss or long term capital loss which was actually adjustable against any type of capital gain and were available for carry forward to subsequent year do not bear any distinction between short term capital loss or long term capital loss. The capital loss

carried forward up to assessment year 2002-03 whether arising out of long term capital assets or short term capital assets are capital loss and are adjustable in future years against all types of capital gains. According to the appellant the distinction provided by amendment is applicable to all capital losses assessed for assessment year 2003-04 and onwards. It is the further contention of the appellant that under pre-amended Act the assessee had acquired a vested right to adjust its capital loss against future capital gains under the provisions of law as it existed in assessment year 2001-02 and such vested right has not been taken away expressly by the amended Act.

4.3. I am unable to accede to the arguments of the appellant. There has been an amendment to the Act by Finance Act 2002 w.e.f. 1.4.2003 and as per which loss relating to a long term capital asset shall only be adjusted against long term capital gains. The loss pertains to assessment year 2001-02. In the year in which the loss occurred and at that point of time though appellant did have the right of carry forward to be adjusted against future gains, without making distinction between long term or short term, that right stood extinguished with the amendment brought in the Act w.e.f. assessment year 2003-04. One cannot read into a provision what is not there but abide by the plain and literal interpretation of the Act, it is settled law the casus omissus cannot be supplied. Therefore the action of the AO is confirmed and ground 2 is dismissed.”

7.2 In order dated 06.09.2011, the Ld. CIT(A) in appeal No. CIT(A)-19/IT 125/9(1)/10-11 has held that :

“5. The second ground is raised against the omission by A.O. in not deciding the issue of capital gains on sale of plant and machinery of Rs. 39,99,990/-.

5.2 In appeal it is submitted that short term capital, gain on sale of Plant and Machinery of Rs.39,99,990/- has arisen on sale of Plant and Machinery leased by the appellant to Haryana State Electricity Board on which depreciation was denied in

1996-97. The depreciation being denied in A.Y.1996-97 no capital gain will arise in the current year on sale of said Plant and Machinery. It is pleaded that the issue has not been considered by the Ld. Assessing Officer.

5.3. I have carefully considered the facts of the case, the submissions of the appellant, assessment order. It is noticed that in A.Y. 1996-97 on plant and machinery leased to Haryana State Electricity Board 100% depreciation was claimed but the claim was denied by the A.O. treating the lease transaction as financing arrangement. The CIT(A) allowed the claim of the appellant and the departmental appeal is pending before ITAT. As on date the order of CIT(A) stands for A.Y. 1996-97 the A.O. ought to have given effect to the order of CIT(A) for A.Y. 1996-97 & if not given so far the same may be given now. Given these facts transaction in current year will give rise to capital gains. With these directions ground 2 is dismissed.”

7.3 In view of the reply dated 19.10.2007 filed by the assessee before the AO and the order of the Ld. CIT(A) in appeal No. CIT(A)-19/IT 125/9(1)/10-11 dated 06.09.2011, there is no merit in the observation of the Ld. CIT(A) in the impugned order dated 11.09.2018 that the assessee could not establish the fact that plant & machinery which were sold were in fact purchased in 1996-97 as claimed.

7.4 We may examine here the order of the Tribunal dated 19.02.2014 wherein a direction has been given to examine the applicability of the decisions cited therein.

In *Ace Builders (P.) Ltd.* (supra), the assessee, a private limited company had a flat which were shown as capital asset in the books of account. It claimed depreciation thereon from year-to-year. The resulting written down

value as on 31.03.1999 was Rs.1.43 lacs. In the previous year relevant to the assessment year 1992-93, it sold the said flat for Rs.5.20 lacs and invested the net sale proceeds in the units of 'UTI capital gain scheme' with a view to claim deduction u/s 54E and, accordingly, in the return of income, it declared *Nil* income under the head 'Income from capital gains'. The Assessing Officer held that since the entire plot of building had ceased to exist on account of the sale of the flat, the WDV of the asset was liable to be taken as cost of acquisition u/s 50(2) and that, as the assessee had availed depreciation on the said asset, the gain arising on transfer of such a long term capital asset was liable to be treated as short term capital gain and, therefore, the benefit u/s 54E was not available. On appeal, the Commissioner (Appeals) upheld the order of the Assessing Officer. On further appeal, the Tribunal held that the deeming fiction attached to section 50 had to be restricted only for the method of concluding the capital gains and could not be read into while considering the case for non-chargeability of capital gain. Accordingly, the Tribunal held that the assessee was entitled to the exemption u/s 54E. On appeal by the Revenue, the Hon'ble Bombay High Court held that the Tribunal was justified in allowing the benefit of exemption u/s 54E to the assessee in respect to the capital gains arising on the transfer of a capital asset on which depreciation had been allowed.

7.4.1 In *Geetanjali Trading Ltd.* (supra), the issue before the Tribunal was set off of long term capital loss incurred prior to the assessment year 2003-04 it had the short term capital gain earned during the assessment year 2004-05. While submitting that there is an amendment in the Act and the provision of section 74(1)(b) which was introduced w.e.f. the assessment year 2003-04

grants set off of long term capital loss only against long term capital gain, the assessee's counsel contended before the Tribunal that the assessee had already, prior to the amendment, a vested right to set off the long term capital loss against future short term capital gains. It was further submitted by him that the said vested right cannot get divested, unless specifically withdrawn either explicitly or by implication and further that the amendment brought w.e.f. AY 2003-04 cannot be given retrospective effect as there are no express words attributing retrospective. It was argued by the Ld. Departmental Representative before the Tribunal that the long term capital loss in question was incurred prior to the AY 2003-04 and that section 74(1)(b) was inserted w.e.f. AY 2003-04, and that as per the provisions of that section, long term capital loss cannot be set off against the short term capital gain and that Finance Act and law as on 1st April of that year is applicable. After careful considerations, the Tribunal held that :

“9. The undisputed fact in this case is that the long term capital loss in question was incurred prior to the assessment year 2003-04. In fact it was incurred in the assessment year 2002-03. The law that applies to the long term capital loss incurred in the assessment year 2002-03, was pre-amended law. The Income Tax Act as it then stood, stated that if the net result of the computation under the head "Capital Gains" is a loss, the same shall be actually carried forward for the following assessment year and shall be set off as income, if any, under the head "Capital Gains" assessable for that assessment year and to the extent it could not be set off, the same shall be carried forward to the following assessment year.

10. The issue before us is whether the law that has come into effect with effect from 01-04-2003, can be applied to the long term capital losses that have been incurred by the assessee prior to 01-04-2003. In our humble opinion, the new law cannot be

made applicable. The law as amended by Finance Act, 2002 is applicable to computation of loss under the head "Capital Gains" for the assessment year 2003-04 and after. If the net result of computation was a loss under the head "Capital Gains" in an earlier assessment year, the law as it stood then, gave a vested right of set off to the assessee, against future capital gains income. There is nothing in the amended Act 2002, which withdrew this vested right of the assessee.

11. Coming to the case laws, the Hon'ble Supreme Court in the case of Govinddas and others (supra), held that it is a well settled rule of interpretation, that unless the term of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matter of procedure. If the enactment is ambiguous in language, which is fairly capable of either interpretation, it ought to be construed as prospective only.

12. The Hon'ble Bombay High Court in the case of ACIT vs. Central Bank of India 159 ITR 756 was considering a similar issue and it held as follows :

Capital Gains - Loss under head "Capital Gains"- Carry forward and set off of such loss - Loss arising in year in which it arose - can be carried forward and set off against Capital Gains arising in subsequent year in which Act of 1961 applied - Indian Income Tax Act, 1922, ss. 12B, 22(2A), 24(2B) - Income Tax Act, 1961, ss. 74(1)(b), 80, 297.

This case law in our considered opinion supports the case of the assessee. The settled position of law is that all amendments are prima facie prospective, unless it is expressly stated that the same is retrospective.

13. In view of the above discussion, we accept the contention of the assessee and direct the AO to grant set off of long term capital loss incurred by the assessee in the assessment year 2002-03 against any income assessable under the head "Capital Gains" for any subsequent assessment year."

7.4.2 In *Manali Investments* (supra), the issue was not allowing set off of long term capital gain on the sale of depreciable assets against the brought forward loss from long term capital assets. The assessee was engaged in the business of investment and finance. During the AY 2005-06, it sold certain depreciable capital assets in the shape of Meters & Transformers for a total consideration of Rs.1,45,99,988/-. The gain on the same was shown as long term capital gain, which was set off against the brought forward loss from long term capital assets. The core of controversy was about the determination of the character of Rs.145.99 lacs for the purpose of section 74, as to whether it is a short term capital gain or long term capital gain. The Tribunal by following the decision of the Hon'ble Bombay High Court in the case of *Ace Builders* (supra) held that "there cannot be any rejection of any benefit which is associated with the character of otherwise long term capital gain notwithstanding the fact that capital gain on its transfer has been computed u/s 50 by deeming it as a short term capital gain". Thus the Tribunal held that the assessee was entitled to such set off in terms of section 74 of the Act.

On appeal by the Revenue, the Hon'ble Bombay High Court held that "short term capital gain" computed u/s 50 on long term depreciable assets can be set off against long term capital loss u/s 74 of the Act.

7.5 In *Kotak Mahindra Capital Co. Ltd.* (supra), for the AY 2003-04, the assessee declared short term capital gain and brought forward long term capital loss relating to assessment year 2001-02 to the extent was set off by it against the said short term capital gain. The claim of the assessee for such set off was disallowed by the Assessing Officer as well as the Commissioner

(Appeals) relying on the provisions of section 74(1) as amended by the Finance Act, 2002 w.e.f. 01.04.2003 on the ground that by virtue of the said amended provisions, the assessee was entitled to set off the brought forward long term capital loss relating to assessment year 2001-02 only against long term capital gain and not against short term capital gain. The Tribunal held that :

“The first and most elementary rule of construction is that it has to be assumed that the words and phrases of 'technical legislation' should be used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning the phrases and sentences are to be construed according to the rules of grammar. It is well settled that fiscal laws must be strictly construed, words must say what they mean, nothing should be presumed or implied. The true test must always be language used. Primarily the language employed is the determining factor of the intention of the legislature. The intention of the legislature must be found in the words used by the legislature itself. One has to look at the language employed by the legislature because no canon of construction can be said to be more firmly established than this that the legislature uses appropriate language to manifest its intention.

As already noted, the provisions of section 74(1) as amended with effect from 1-4-2003, going by the plain language and grammatical construction used therein, make it very clear that the same would apply only to the long-term capital loss relating to assessment year 2003-04 and onwards and govern the carry forward and set off of such loss. In other words, the restriction imposed therein in terms of setting off the long-term capital loss only against long-term capital gain and not against the short-term capital gain is applicable only in relation to the long-term capital loss incurred by the assessee in assessment year 2003-04 and subsequent years and the same is not applicable to the long-term capital loss relating to and brought forward from the period prior to assessment year 2003-04 which shall be governed by the provisions

of section 74(1) as stood prior to amendment made with effect from 1-4-2003. The words used in the amended provisions of section 74(1) clearly indicate this position and it appears to be the intention of the legislature. If that was not the intention of the legislature, nothing would have prevented the legislature from employing the appropriate language. Having regard to the language used in the provisions of section 74(1) amended with effect from 1-4-2003, it seems clear that the intention was that the said provisions would deal with the carry forward and set off of long-term capital loss relating to assessment year 2003-04 and onwards.

As a result of aforesaid discussion, it follows that the assessee is entitled to claim set off of any brought forward long-term capital loss relating to assessment year 2001-02 against short-term capital gain. This is because the carry forward and set off of long-term capital loss relating to assessment year 2001-02 would be governed by the provisions of section 74(1) as existed prior to 1-4-2003.

In the present case, the provisions of section 74(1) as amended with effect from 1-4-2003 have been relied upon by the revenue authorities to disallow the assessee's claim for set off of long-term capital loss relating to assessment year 2001-02 against short-term capital gain of the year under consideration. However, as already noted the plain grammatical construction of the language of section 74(1) as amended with effect from 1-4-2003 makes it clear that the same are applicable and deal with carry forward and set off of loss under the head 'capital gain' incurred in assessment year 2003-04 and subsequent years. The right accrued to the assessee by virtue of section 74(1) as it stood prior to the amendment made with effect from 1-4-2003 thus has not been taken away either expressly by the provisions of section 74(1) as amended with effect from 1-4-2003 or even by implication.

In view of the above discussion, it is held that the provisions of section 74 which deal with carry forward and set off of losses under the head 'capital gains' as amended by Finance Act, 2002, will apply only to the unabsorbed capital loss for the assessment year 2003-04 and onwards and will not apply to the unabsorbed capital

losses relating to the assessment years prior to the assessment year 2003-04. Accordingly, assessee was entitled to set off long-term capital loss incurred in assessment year 2001-02 against short-term capital gain made by it in assessment year 2003-04.”

7.6 As mentioned earlier, the Finance Act, 2002 has restored the distinction between short term capital loss and long term capital loss w.e.f. 01.04.2003 by providing for one-way compulsory set off of short term capital loss against long term capital gains, while denying set off of long term capital loss against short term capital gains.

Since the law regarding losses under the head “Capital gains” has undergone changes from time to time, a question often arises whether the law that should prevail is the law pertaining to the year in which loss was suffered or the year in which set off is claimed. The answer is where a right for more liberal treatment is already earned cannot be lost because of subsequent restriction, since vested right cannot be divested, unless specifically withdrawn either explicitly or by implication. In other words, existing rights of set off cannot be treated as withdrawn.

7.7 As mentioned earlier, in the instant case, the appellant acquired depreciation plant in AY 1996-97, being electric meters which were disposed off during the year giving rise to capital gain taxable u/s 50 of Rs.39,99,990/-. Total capital gain earned during the year amounted to Rs.54,38,407/-, balance capital gain was short term capital gain on mutual funds. Said capital gain was set off against carry forward capital loss for AY 2001-02 of Rs.90,12,331/-.

There is merit in the contentions of the appellant that prior to amendment to section 70 & 74 by the Finance Act, 2002, the carry forward capital loss was not bifurcated between short term capital loss and long term capital loss. As mentioned earlier, in *Kotak Mahindra Capital Co. Ltd.* (supra), the Special Bench of the Tribunal held *inter alia* (i) that provisions of section 74(1) as amended w.e.f. 01.04.2003, would apply only to long term capital loss relating to assessment year 2003-04 and onwards and (ii) that restriction imposed therein in terms of setting off long term capital loss only against long term capital gains and not against short term capital gain is applicable only in relation to long term capital loss incurred by assessee in assessment year 2003-04 and subsequent years and same is not applicable to long term capital loss relating to and brought forward from period prior to assessment year 2003-04 which shall be governed by provisions of section 74(1) - prior to amendment made w.e.f. 01.04.2003.

In view of the above factual scenario and position of law delineated at para 7 hereinabove, we direct the AO to allow set off of capital loss carried forward from AY 2001-02 against capital gains earned by the appellant during the year under consideration.

In the submissions filed before the Tribunal dated 30.11.2020, the appellant claims carry forward capital loss of AY 2001-02 at Rs. 90,12,331, whereas in the written submission filed before the Ld. CIT(A) dated 03.09.2016, it claims Rs. 88,61,301/- as balance of AY 2001-02 available for set off against the capital gains of the year under consideration. The AO is directed to verify the above.

In principle, the appeal of the assessee is allowed. However, due to discrepancy in the amount in claims as pointed above, we deem it appropriate to restore the issue to the AO for the limited purpose to ascertain the correct amount.

8. In the result, the appeal of the assessee is allowed for statistical purposes in the terms aforesaid.

Order pronounced in the open Court on 11/01/2021.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 11/01/2021

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai