

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF FEBRUARY 2021

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

I.T.A. NO.103 OF 2012

BETWEEN:

M/S. NANDI STEELS LIMITED
REP. BY ITS DIRECTOR
SRI. ARUN AGARWAL
F4, RICHMOND PLAZA
RICHMOND CIRCLE
BANGALORE-560025.

... APPELLANT

(BY SRI. A. SHANKAR, SP. COUNSEL A/W
SRI. V. CHANDRASEKHAR, ADV., AND
SRI. BHAIKAV KUTTAIAH, ADV., FOR
SRI. M. LAVA, ADV.,)

AND:

THE ASSISTANT COMMISSIONER OF INCOME-TAX
CIRCLE-12(2), R.P. BHAVAN
NRUPATUNGA ROAD, OPP. RBI
BANGALORE-560001.

... RESPONDENT

(BY SRI. K.V. ARAVIND, ADV.)

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THIS I.T.A. IS FILED UNDER SEC. 260-A OF INCOME TAX
ACT 1961, ARISING OUT OF ORDER PASSED IN ITA
NO.546/(BANG)/2008, DATED 09.12.2011 AND ITA

NO.546/BANG/2008, DATED 19.1.2012 FOR THE ASSESSMENT YEAR 2003-04, PRAYING TO:

(i) FORMULATE THE SUBSTANTIAL QUESTION OF LAW AS STATED ABOVE AND ANSWER THE SAME IN FAVOUR OF THE APPELLANT.

(ii) ALLOW THE APPEAL AND SET ASIDE THE FINDINGS TO THE EXTENT AGAINST THE APPELLANT IN THE ORDER PASSED BY THE TRIBUNAL IN ITA NO.546/(BANG)/2008, DATED 9.12.11 REFERRED AS ANNEXURE-A AND ITA NO.546/BANG/2008, DATED 19.1.12 REFERRED AS ANNEXURE-B IN THE INTEREST OF JUSTICE AND EQUITY.

THIS I.T.A. COMING ON FOR FINAL HEARING, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the assessee. The subject matter of the appeal pertains to the Assessment year 2003-04. The appeal was admitted by a bench of this Court vide order dated 18.09.2012 on the following substantial questions of law:

"(i) Whether the Tribunal was justified in law in not allowing the set off of carry forward business loss of Rs.39,99,652/- against capital gain arising on sale of business asset used for the purpose of business on the facts and circumstances of the case?

(ii) Whether the Tribunal was justified in law in not holding that the income arising out of sale of business assets has the character of business income, and consequently the income though assessed as capital gain is entitled to set off against the carry forward business loss on the facts and circumstances of the case?

(iii) Whether the Tribunal was justified in law in holding that the notice issued under section 148 of the Act, was based on the sufficient and relevant reasons and further the assumption of jurisdiction by the Assessing Officer was in accordance with law on the facts and circumstances of the case?

(iv) Whether the Tribunal was justified in law in not serving the copy of the Tribunal

order dated 11.12.2008 as referred in the Tribunal order dated 19.02.2011 in respect of disposal of grounds with regard to issues on Section 148 of the Act on the facts and circumstances of the case?".

2. Facts leading to filing of this appeal briefly stated are that the assessee is a limited company carrying on the business of manufacture of iron and steel. The assessee filed the return of income for the Assessment Year 2003-04 on 14.10.2003 and declared an income of Rs.98,27,270/- under the head 'income from capital gains'. The return was processed under Section 143(1) of the Act on 30.01.2004 and a refund of Rs.4,77,163/- was issued. Thereafter, the Assessing Officer issued notice under Section 148 of the Act on 28.07.2005. The appellant filed the return of income on 17.04.2006 in response to the notice under Section 148 of the Act declaring income of Rs.98,27,270/-.

3. The reasons recorded on 27.05.2005 for reopening the assessment were supplied to the assessee

on 26.07.2006. The reason for reopening the assessment was that the assessee had set off the carried forward business loss of earlier years to the extent of Rs.39,99,652/- against the income declared under the head 'income from capital gains' arising out of sale of land along with building and bore well. The assessee filed objections to the proposal to reopen the assessment vide letter dated 09.08.2006. It is the case of the assessee that Assessing Officer without disposing of the objections by the assessee by a speaking order proceeded to pass an order of assessment under Section 143(3) read with Section 147 of the Act on 04.09.2006 and disallowed the set off of brought forward business loss and held that set off of brought forward loss against capital gain is contrary to provisions of law.

4. The assessee thereupon filed an appeal before the Commissioner of Income Tax (Appeals) on the issue with regard to set off, of brought forward business loss and validity of the notice under Section

148 of the Act. The Commissioner of Income Tax (Appeals) by an order dated 12.03.2008 dismissed the appeal preferred by the assessee. The assessee thereupon filed an appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the tribunal' for short). The assessee during the pendency of the appeal learnt that the tribunal vide its order dated 11.12.2008 decided first four grounds of appeal raised by the assessee with regard to validity of the order of assessment under Section 147 in favour of the revenue. In respect of the issue pertaining to set off of brought forward of business loss, the tribunal made a reference to the President for constitution of special bench of the tribunal. It is the case of the assessee that till today, it has not been served with a copy of the order dated 11.12.2008. The special bench of the tribunal vide order dated 09.12.2011 rejected the grounds raised by the assessee in respect of set off of brought forward business loss and answered the issues in favour of the

revenue. The tribunal by an order dated 19.01.2012 in the light of order passed by the special bench dismissed the appeal preferred by the assessee. In the aforesaid factual background, the assessee has filed this appeal.

5. Learned Senior counsel for the assessee submitted that the proceedings under Section 148 of the Act are bad in law inasmuch as the same proposes to re-assess the income when no assessment has taken place. In this connection, our attention has been invited to paragraph 3 of the order dated 19.01.2012 passed by the tribunal wherein the tribunal has recorded a finding that no assessment has been done under Section 143(3) of the Act. It is further submitted that when the assessment itself was not done under Section 143(3) of the Act, the question of re-assessing the income of the assessee as per the Assessing Officer vide reasons recorded and any errors in reasons recorded is fatal to the assessment and therefore, the entire proceeding is bad in law. It is also urged that the Assessing Officer did

not dispose of the objections taken by the assessee against re-opening of the proceeding and proceeded to pass the order of assessment. It is pointed out that the failure to dispose of the objection of the assessee by a separate speaking order is fatal to the assessment.

6. It is also contended that reasons recorded do not constitute the reason to believe and misinterpretation of the law would not result in reasons to re-assess and the material relied thereupon does not constitute 'reason to believe'. It is also urged that claim of set off was in accordance with decisions of Supreme Court and was based on the proposition that an assessee is entitled to set off of brought forward loss against the income, which has the attributes of business income even though the same is assessable to tax under the head other than 'profits and gains from business'. In this connection, our attention has been invited to Section 72(1)(i) and (ii) of the Act. It is also argued that Commissioner of Income Tax (Appeals) as well as the

tribunal has confirmed the disallowance or reasons other than the reasons for which the Assessing Officer disallowed the claim of set off of brought forward loss. It is also pointed out that proviso to Section 72(i) was omitted by Finance act, 1999 with effect from 01.04.2000 and for the impugned assessment year 2003-04, the assessee was not required to carry on the business for the purpose of set off of brought forward business loss. Reliance has been placed on Circular dated 14.09.1999 issued by Central Board of Direct Taxes (CBDT). It is also pointed out that the Supreme Court in the case of '**CIT VS EXPRESS NEWSPAPERS LTD', 53 ITR 250(SC)** dealt with the issue whether capital gains can be taxed in the hands of the successor company and the issue involved in aforesaid case was not in respect to whether the character of capital gains income was in fact business income. It is also pointed out that the subject matter in question in **EXPRESS NEWSPAPERS** supra was Section 26(2) of the Income

Tax Act, 1922 and not Section 24(2) of the Act, which is akin to Section 72 of the Act. It is further submitted that the aforesaid decision was dealt with by the Supreme Court in '**CIT VS. COCANADA RADHASWAMI BANK LTD', 57 ITR 306 (SC)**'. It is also pointed out that Supreme Court dealt with Section 25(3) in **CIT VS. CHUGANDAS AND CO.', 55 ITR 17 (SC)**. It is also urged that the appellant has brought forward the losses in accordance with the decisions of the Supreme Court in **CIT VS. CHUGANDAS AND CO.', supra** and '**CIT VS. COCANADA RADHASWAMI BANK LTD' supra**. It is also pointed out that the order passed by the tribunal cannot be considered as an order passed under Section 254(1) of the Act nor the same can be construed as an order passed on an application under Section 254(2) of the Act. In support of the aforesaid submissions, reliance has been placed on decisions in '**CIT & ANR. VS. B.N.KESHAV', ITA NO.21/2003 DATED 03.04.2008 (KAR), 'PARASHURAM POTTERY**

WORKS CO. LTD. VS. ITO 106 ITR 1 (SC), CIT VS. CHUGANDAS AND CO.', 55 ITR 17 (SC), 'CIT VS. COCANADA RADHASWAMI BANK LTD', 57 ITR 306 (SC) and 'CIT VS. VIKRAM COTTON MILLS LTD.', (1988) 169 ITR 597 and LETTER DATED 17.08.2020.

7. On the other hand, learned counsel for the revenue submitted that undisputedly the assets sold by the assessee is capital asset and consideration has been offered to tax under the head 'capital gains' therefore, the question of treating the consideration from transfer of a capital asset as business income does not arise. It is also submitted that in order to consider the business income, the land which was the subject matter of the sale should have been held as stock in trade, whereas, undisputedly the same was considered as capital asset and the consideration has been rightly treated under the head of capital gains. It is also argued that the business loss claimed to be set off by the assessee, was carried

forward business loss of the earlier years and the same can be set off only in terms of Section 72 of the Act, which permits only set off of business loss against the profits and gains of business or profession. Therefore, Section 72 of the Act does not apply to the fact situation of the case.

8. It is also pointed out that Section 72(1)(i) of the Act mandates that carried forward business loss can be set off against the profit and gains from business which is assessable for that Assessment Year, whereas, in the instant case, the assessee has not offered any income under the head profits and gains and it is established that the assessee has not carried on any business either in the Assessment Year under consideration or in immediately preceding year and therefore, Section 72 is not applicable. It is also submitted that Section 72(1) of the Act allows set off of carried forward business loss against profits and gains if any business or profession carried on and assessable for

the Assessment Year. The word employed by the legislature viz., 'set off against profits and gains' 'if any' of any business or profession carried on by him, and assessable for that Assessment Year 'clearly mandate that unabsorbed carried forward losses can be set off only against the income from the business carried on by the assessee which is assessable under the head profits and gains alone and not against any other head and if any other interpretation is given, the aforesaid expression would be rendered redundant. It is also urged that in order to claim set off of carried forward business loss under Section 72 of the Act, the same can be claimed only against business income assessable under the head business or profession. While referring to the decision of Supreme Court in case of **CHUGANDAS AND CO.** supra, it is contended that the aforesaid authority is not a proposition to the effect that the profits from capital gains cannot be shifted from income. It is also urged that the case of the assessee is

not of stock in trade but the assets of the assessee are fixed assets and not in stock in trade, therefore, the reliance placed on the decision of the Supreme Court in ***COCANADA RADHASWAMI BANK LTD. SUPRA*** has no application to the facts of the case.

9. We have considered the submissions made by learned counsel for the parties and have perused the record. Before proceeding further, it is apposite to take note of relevant provisions of Section 14, 28, 41(2), 45(1), 56(1), 72 and 74(1) of the Act, which read as under:

14. *Heads of income Save as otherwise provided by this Act, all income shall, for the purposes of charge of income- tax and computation of total income, be classified under the following heads of income:-*

A.- Salaries.

B.-]

C.- Income from house property.

D.- Profits and gains of business or profession.

E.- Capital gains.

F.- Income from other sources. A.-

Salaries.

28. *Profits and gains of business or profession* 1*The following income shall be chargeable to income- tax under the head" Profits and gains of business or profession",-*

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year;

41 *Profits chargeable to tax. (2) Where any building, machinery, plant or furniture,—*

(a) which is owned by the assessee;

(b) in respect of which depreciation is claimed under clause (i) of sub-section (1) of section 32; and

(c) which was or has been used for the purposes of business,

is sold, discarded, demolished or destroyed and the moneys payable in respect of such building, machinery, plant or furniture, as the case may be, together with

the amount of scrap value, if any, exceeds the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chargeable to income-tax as income of the business of the previous year in which the moneys payable for the building, machinery, plant or furniture became due.

Explanation.—Where the moneys payable in respect of the building, machinery, plant or furniture referred to in this sub-section become due in a previous year in which the business for the purpose of which the building, machinery, plant or furniture was being used is no longer in existence, the provision of this sub-section shall apply as if the business is in existence in that previous year.

Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income- tax under the head"

Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

56. (1) *Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.*

72. *Carry forward and set off of business losses 1*

(1) *Where for any assessment year, the net result of the computation under the head "Profits and gains of business or profession" is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried*

forward to the following assessment year, and-

(i) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year: Provided that the business or profession for which the loss was originally computed continued to be carried on by him in the previous year relevant for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on: Provided that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such business is re- established, reconstructed or revived by the assessee, so much of the loss as is attributable to such business shall be carried forward to the

assessment year relevant to the previous year in which the business is so re- established, reconstructed or revived, and--

(a) it shall be set off against the profits and gains, if any, of that business or any other business carried on by him and assessable for that assessment year; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re- established, reconstructed or revived continues to be carried on by the assessee, be carried forward to the following assessment year and so on for seven assessment years immediately succeeding.

(2) Where any allowance or part thereof is, under sub- section (2) of section 32 or sub- section (4) of section 35, to be carried forward, effect shall first be given to the provisions of this section.

(3) No loss other than the loss referred to in the proviso to subsection (1) of this section shall be carried for- ward under this

section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

74. *Losses under the head" Capital gains"*

(1) Where in respect of any assessment year, the net result of the computation under the head" Capital gains" is a loss to the assessee, the whole loss shall, subject to the other provisions of this chapter, be carried forward to the following assessment year, and-

(a) it shall be set off against income, if any, under the head" Capital gains" assessable for that assessment year; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year, and so on.

10. The relevant extract para 5 of the Finance Bill, 1999 and Circular No.779 dated 14.09.1999 is reproduced below for the facility of reference:

5. The condition regarding continuity of the same business for the allowability of loss to an assessee under Section 72 of the Act is proposed to be dispensed with.

(xxi) Section 72 of the Income Tax Act relating to carry forward and set off of business loss has been amended deleting the proviso to clause (i) of Sub Section (1) which stipulated that the business or profession for which the loss was computed has to be continued in order to avail of carry forward and set off of loss. With this omission, business loss can be carried forward and set off even if the assessee is engaged in a different business.

11. It is pertinent to note that proviso to Section 72(1)(i) was omitted by Finance Act, 1999 with effect from 01.04.2000. Therefore, for the Assessment Year in question i.e., 2003-04, the assessee was not required to have carried on the business for the purposes of set off of brought forward business. It is well settled rule of statutory interpretation that intention of statute has to

be gathered from the language employed by the legislature which means attention has to be paid to what has been said and what has not been said [See: '**CIT vs. TARA AGENCIES', (2007) 292 ITR 444 (SC)**]. In '**GVK INDUSTRIES LTD. Vs. ITO', (2011) 332 ITR 130 (SC)**, the Supreme Court dealt with the legal maxim expression *unius est exclusion alterius* and held that express mention of one thing implies the exclusion of another. Section 72(1) of the Act employs the expression computation 'under the head profits and gains or profession', whereas, Section 72(1)(i) does not use the expression under the head. Thus, the legislature has consciously left it open that any income from business though classified under any other head can still be entitled to the benefit of set off.

12. The special bench of the tribunal relied on the decision of Supreme Court in **CIT VS. EXPRESS NEWSPAPERS** supra and held that the appellant is not entitled to brought forward business loss against interest

on capital gains. Thereafter the decision of the Supreme Court in Express Newspapers was considered in **CIT vs. CHUGANDAS AND CO** and **COCANADA RADHASWAMI BANK LTD.** subsequently. In Express Newspapers supra, the Supreme Court dealt with the issue whether the capital gains can be taxed in the hands of the successor company and the issue whether the character of capital gains income was in fact a business income was not considered. In other words, the question of law which was considered by the Supreme Court in Express Newspapers supra was whether the capital gain by the Pre Press company is liable to be assessed in the hands of express company under Section 26(2) of the Act. The relevant extract of the judgment of the Supreme Court reads as under:

The argument that sub-Section (2) of Section 26 read with the proviso thereto indicates that the total income of the person succeeded is the criterion for separate assessment under sub Section (2) and for

assessment and realization under the proviso is on the assumption that sub-Section (2) and the proviso deal with all the heads mentioned in Section 6 of the Act. But if, as we have held, the scope of sub-Section (2) of Section 26 is only limited to the income from the business, the share under Sub-Section (2) and the assessment and realization under the proviso can only relate to the income from the business. The argument is really begging the question itself. In the result we agree with the High Court in regard to the answer it has given in respect of the second question.

13. In case of **COCANADA RADHASWAMI BANK LTD.**, the Supreme Court dealt with the question of set off of business loss which was brought forward from preceding year against the entire income including interest on securities held by the assessee. The Supreme Court in **COCANADA RADHASWAMI BANK LTD.** supra while dealing with the applicability of the decision of the Express Newspapers held as under:

It will be seen that the reason for the conclusion was that capital gains were not income from the business. Though some observations divorced from the context may appeal to be wise, the said decision was mainly based upon the character of the capital gains and not upon their non inclusion under the heading "Business". The limited scope of the earlier decision was explained by this court in Commissioner of Income Tax vs. Chugandas & Co. Therein this court held that interest from securities formed part of the assessee's business income of the purpose exemption under Section 25(3). Sjaaj J., speaking for the court, observed"

"The heads described in Section 6 and further elaborated for the purpose of computation of income in Sections 7 to 10 and 12, 12A, 12AA and 12B are intended merely to indicate the class of income: the heads do not exhaustively delimit sources from which income arises. This is made clear in the judgment of this court in United Commercial Bank Ltd's case, that business income is broke up under different heads only

for the purpose of computation of the total income : by that break up the income does not cease to be the income of the business, the different the heads of income being only the classification prescribed by the Indian Income Tax Act for computation of income."

The same principles applies to the present case.

14. Thus in **COCANADA RADHASWAMI BANK LTD** supra the Supreme Court dealt with Section 24(2) of the Act which is parimateria with Section 72 of the Act. Therefore, the aforesaid decision applies to the fact situation of the case. In view of aforesaid enunciation of law, it is evident that the assessee is entitled to set off brought forward loss against income which has the attributes of business income even though the same is assessable to tax under a head other than profits and gains from business. Therefore, the substantial questions of law 1 and 2 are answered in favour of the assessee and against the revenue.

15. Thus, it is pertinent to note that no order has been passed under Section 254(1) of the Act and the order answering the reference cannot be termed as an order under Section 254(1) of the Act. Therefore, we are not inclined to examine the validity of the proceedings under Section 148 of the Act as on the issue of validity of the aforesaid finding, the tribunal has to record its findings. Therefore, in our opinion the matter requires to be remitted to the final fact finding authority under the Act for recording the findings on merits with regard to remaining two substantial questions of law. Therefore, we do not propose to answer the substantial questions of law Nos.3 and 4. In the result, the findings to the extent against the appellant contained in the order passed by the tribunal dated 09.12.2011 and 19.01.2012 are hereby quashed and the matter is referred to the tribunal for adjudication afresh insofar as it pertains to substantial questions of law No.3 and 4.

In the result, the appeal is disposed of.

**Sd/-
JUDGE**

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JUDGE**

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