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AMIN THE INCOME TAX APPELLATE TRIBUNAL
'C' DELHI BENCHES, NEW DELHI

BEFORE SHRI MUKUL SHRAWAT, JM & SHRI RAJENDRA SINGH, AM

834

ITA No. 2930/Del/2007
Assessment Year : 2003-04Dy. Commissioner of Income Tax
Circle-23(1), New DelhiV/s Shri Ghanshyam Dass Seth
M-90, Greater Kailash Part-I
NEW DELHI-110 048.
PAN No. AQOPS 5627N.
(Respondent)

(Appellant)

Appellant by : Shri M.P. Singh, Sr. DR
Respondent by : Smt. Rano Jain, AR**ORDER**PER MUKUL SHRAWAT, JM

This is an appeal at the behest of the Revenue emanates from the order of CIT(A)-X, New Delhi dated 01.03.2007 for assessment year 2003-04 and the substantive grounds raised are reproduced below :-

1. *On the facts and circumstances of the case the Ld. CIT(A) has erred in law and on facts in directing the A.O. to allow the short term capital loss of Rs.8,27,625/-.*
2. *On the facts and circumstances of the case the CIT(A) has erred in law and on facts in ignoring the provisions of Section 94(7) that if the principle units were bought or acquired within the period of three months prior to the record date or sold within a period of three months after the record date, any loss so incurred should be ignored.*
3. *On the facts and circumstances of the case the CIT(A) has erred in law and on facts in ignoring the fact that the assessee had invested funds in purchasing the units of mutual fund a few days before the announcement of bonus / additional units and sold the principle unit only to reduce the tax liability.*
4. *On the facts and in the circumstances of the case the CIT(A) failed to consider the fact that the assessee wrongly interpreted the provisions of section 94(7) of the Income Tax Act, 1961."*

2. Though the facts of the case are going to be appreciated in the following paras but after hearing the rival parties the interesting issue had come up for consideration is that whether or not the "Dividend Stripping" can be treated at par with the "Bonus Stripping" while applying the newly inserted provisions of section 94(7) with effect from A.Y. 2002-03 vis-à-vis section 94(8) with effect from A.Y. 2005-06 of I.T. Act.

3. Facts in brief as emerged from the corresponding assessment order passed u/s 143(3) dated 24/02/2006 were that the assessee individual is in the business of trading in shares. Though the impugned order of the A.O. is lengthy as also narrative however, the initial query pertained to the claim of "short term capital loss" as summarized on page 11 by the A.O. reproduced below :-

"23.

(a) The assessee had invested funds in purchasing units of said mutual fund i.e. IL & FS (G) a few days before the day of announcement of bonus/additional units and has subsequently sold the principal units as per the chart resulting into Short Term Capital Loss of Rs.8,27,625/-.

Unit name	Purchase Per unit	Total units purchased	Purchase value	Sale price per unit	Total Units sold	Sale value
IL&FS Mutual Fund	15.5475 (dt. 09/12/2002)	160797.556	Rs.25,00,000	10.4005 (dt. 16/12/2002)	160797.556	Rs.16,72,375
(dates are mentioned by us)						

Short term capital loss = Rs.25,00,000/- - Rs.16,72,375/- = Rs.8,27,625/-

3.1 It has been noticed by the A.O. that the assessee has computed the short term capital loss of Rs.62,222/-. It was found that there was a short term capital gain of Rs.7,91,302/- on sale of mutual fund units. There was

also a short term capital loss totaling Rs.8,53,524/- on sale of mutual fund units of two concerns. The A.O. has thus, commented that on one hand there was a gain of Rs.7,91,302/- and on the other there was a loss of Rs.8,53,524/- hence, the balance was the short term capital loss of Rs.62,221/-. Total short term capital loss of two components; one of Rs.25,899/- i.e. mutual fund of Templeton India Dividend; and the other component was of Rs.8,27,625/- of IL & FS Bond(G). As is seen from the above chart, the main discussion and disallowance was in respect of IL & FS Bond as according to the A.O. the said units was covered by the provisions of section 94(7) of the I.T. Act. As is evident from the chart the units of IL & FS Bonds were purchased on 09/12/2002 at the rate of Rs.15.548 and those were sold on 16/12/2002 at the rate of Rs.10.401. Thereafter the A.O. has reproduced section 94(7) of I.T. Act, according to which, if any person acquires any unit within the period of three months prior to the date of record date such person sells or transfers such securities within a period of three months after such date and the dividend on such securities is exempt and then on account of the said transaction if there is a loss arising on account of such purchase and sale of unit then the loss shall be ignored to the extent that such loss so exceeded the amount of dividend received or receivable. An another important fact which was placed on record was that the assessee has received additional units 80398.778 as bonus units without cost. According to A.O. the provisions of section 94(7) were applicable since the units of IL & FS Bonds were purchased on 09/12/2002 and those were sold on 16/12/2002 i.e. within a span of 7 days and thereupon incurred a loss of Rs.8,27,625/- which was set off against the short term gains. Further according to A.O. the assessee has earned bonus units in lieu of those units; so the said bonus units were nothing but a gain in the nature of dividend. Therefore, according to A.O., the provisions of section 94(7) were applicable on the said transaction. On the other hand, the contention of the assessee was that the bonus units cannot

be held as dividend received hence, provisions of section 94(7) were not to be applied. It was contested that the instance of allotment of bonus units have been considered by the legislature by introducing sub-section (8) of section 94 which is applicable with effect from 01/04/2005 being inserted by Finance No.2 Act, 2004. For the sake of clarity and to place on record the full facts we hereby reproduce the submissions of the assessee in writing made before the A.O.

"7.

The assessee has purchased 160797.556 units of IL&FS mutual fund on 9th December 2002 for Rs.25,00,000/- @ 15.5475 per units and sold 160797.556 units of IL&FS mutual fund on 16th December 2002 for 16,72,374.98/- @ Rs.10.4005 per units and incurred a short term capital loss of Rs.8,27,625.02 on sale of units of IL&FS mutual fund. The assessee during this period has not received any dividend or income on these mutual fund units. The assessee has received additional units of 80,398.778 units at without cost as bonus units on the principal units purchased on 9th December 2002. The additional units received as bonus has been sold on 19th March 2004 which is pertaining to next-previous year i.e. assessment year 2004-05.

Section 94(8) has been inserted by the Finance (No.2) Act, 2004 w.e.f. 01.04.2005. The above section talks about losses on account of additional units received without any payment i.e. bonus unit. The assessee has received additional unit without any payment on the basis of holding of principal units. The assessee has incurred short term capital loss of Rs.8,27,625/- on account of receipt of additional units received as bonus on the basis of holding of principal units on account of purchase and sale of units. However, the above clause 8 of Section 94 has been effective from assessment year 2005-06, this section is not applicable in our case in the assessment under consideration i.e. assessment year 2003-04."

3.2 However, the A.O. was not convinced and in his opinion the assessee's case had fallen u/s 94(7) of the Act. He has further elaborated that "dividend stripping" is a transaction in which the investor buys units of mutual fund

just before record date of dividend (cum dividend) and holds long enough to receive the dividend and thereafter sales it subsequently (ex dividend). According to A.O. the net result of such transaction is that the investor receives a cash dividend and suffers a capital loss, since the ex dividend price is invariably less than the cum dividend price. According to him facts of the case could not be differentiated because the additional bonus units 80398.778 were allotted to the assessee because of holding of principal units on the record date. According to him the investor undertake dividend stripping because it has got a strategy to avoid tax on capital gains. Applying the principle of the Mc Dowell & Co.152 ITR 148 (SC) he has disallowed the claim of the assessee. The said action of the A.O. was challenged.

4. When this issue was carried before the first appellate authority elaborate discussions were carried out and the main emphasis of the argument was that the A.O. has wrongly applied the provisions of section 94(7) of I.T. Act since the admitted fact was the allotment of additional units, therefore, covered by the newly inserted sub-section (8) of section 94 of I.T. Act. Learned CIT(A) has examined the language of section 94(7) of I.T. Act as also language of section 94(8) of I.T. Act and thereafter summarized that sub-section (7) was inserted by Finance Act, 2001 with effect from 01/04/2002 however, on the other hand, sub-section (8) was inserted by Finance No.2 Act of 2004 with effect from 01/04/2005. Finally he has held as under :-

5.4

From the above clause (c), it is evidently clear that provisions of section 94(7) are applicable where the assessee received dividend or other income on securities or units which is exempt; then loss to the extent of such dividend or income received or receivable shall be ignored. In this case, the appellant had not

received any dividend or income on the units held by him. Though the appellant fulfills the conditions laid down under clause (a) & (b) or sub-section (7) of section 94 as the units were purchased within a period of three months prior to the record date and were not sold also within a period of three months, the condition under clause (c) was not fulfilled. In order to attract provisions of section 94(7), the conditions under clause (a) (b) and (c) are to be fulfilled cumulatively. Since in the case of the appellant, the condition laid down in clause (c) was not fulfilled, provisions of section 94(7) were not attracted. It may be noted that the case of allotment of additional unit or bonus unit has been specially covered under the provisions of section 94(8) which were inserted by the Finance (No.2) Act, 2004 we.f. 01/04/2005.

.....

The appellant's case clearly falls under the ambit of section 94(8). But sub-section (8) is applicable for A.Yr. 2005-06, and subsequent assessment years whereas the case under consideration is for A.Y. 2003-04. Hence, the provisions of section 94(8) are not applicable in the case of the appellant. Therefore, keeping in view the facts and circumstances of the case, I am of the opinion that the A.O. was not justified in invoking the provisions of section 94(7) on the facts of the appellant's case and, thus, was not justified in ignoring loss of Rs.8,27,625/-. The A.O. is directed to allow the short term capital loss of Rs.8,27,625/- as claimed by the appellant."

4.1 Since the issue was decided in favour of the assessee hence, now the Revenue is in appeal.

5. From the side of the Revenue Learned D.R. Shri M.P. Singh and from the side of the respondent assessee Smt. Rano Jain appeared. We have heard the submissions of both the sides and have carefully perused the orders of the authorities below in the light of the case laws cited.

6. On hearing the submissions as also on perusal of the orders of the authorities below the legal question arises, which shall decide the issue in hand, that whether under the facts and circumstances of the case the provisions of section 94(7) shall be applicable in the transactions of allotment of Bonus Units specially when the section 94(8) has been introduced in the Statute covering the situation as arisen in the present appeal. The admitted factual position is that the units of IL & FS mutual fund were purchased on 09/12/2002 at the rate of 15.584 for a consideration of Rs.25,00,000/- which were sold on 16/12/2002 @ of 10.408 for a consideration of Rs.16,72,374/- with the result suffered a loss of Rs.8,27,626/-. During this period additional bonus units were allotted numbering 80398.778 units. It has also been placed on record that those bonus units have been subsequently sold on 19/03/2004 but this is referred just for reference however, this fact has no bearing on the issue to be decided by us.

7. Rather the issue lies within the compass of the legal provisions of sub-section (7) and sub-section (8) of section 94 reproduced below :-

"Avoidance of tax by certain transactions in securities.

(1)

(2)

(3)

(a)

(b)

(4)

(5)

(6)

[(7) *Where -*

(a) any person buys or acquires any securities or unit within a period of three months prior to the record date;

(b) such person sells or transfers –

(i) such securities within a period of three months after such date, or

(ii) such unit within a period of nine months after such date;]

(c) the dividend or income on such securities or unit

then the loss, if any, arising to him on account of such purchase and sale of securities or unit, to that extent such loss does not exceed the amount of dividend or income received or receivable on such securities or unit, shall be ignored [or the purposes of computing his income chargeable to tax.]

[(8) Where –

(d) any person buys or acquires any units within a period of three months prior to the record date;

(e) such person is allotted additional units without any payment on the basis of holding of such units on such date;

(f) such person sells or transfers all or any of the units referred to in clause (a) within a period of nine months after such date, while continuing to hold all or any of the additional units referred to in clause (b),

then the loss, if any, arising to him on account of such purchase and sale of all or any of such units shall be ignored for the purposes of computing his income chargeable by tax and notwithstanding anything contained in any other provision of this Act, the amount of loss so ignored shall be deemed to be the cost of purchase or acquisition of such additional units referred to in clause (b) as are held by him on the date of such sale or transfer.]

8. When sub-section (7) of section 94 was introduced in the Statute i.e. with effect from 01/04/2002 a controversy has arisen about the year of its applicability. This controversy was addressed by several respected coordinate benches and now before us a decision of ITAT, Rajkot Bench in the case of Smt. Bhanuben Chimanlal Malavia vs. ITO [2006] 100 TTJ (Rjt) 337 has been cited wherein it was held as under :-

"The provisions of s. 94(7) have been brought on the statute book by the Finance Act, 2001 w.e.f. 1st April, 2001. In other words, the Parliament did not deem it fit to intervene in the transactions that had already taken place. It was open to resort to giving retrospective effect to the provisions of s. 94(7), but the Parliament had chosen not to do that. Further, provisions of s. 94(7) do not stipulate any cost in relation to the income pay out by a mutual fund. Further Circular No. 14 of 2001 [(2002) 172 CTR (St) 13] itself states that prior to the promulgation of the provisions of s. 94(7), it was legally permissible to claim the losses in the manner the assessee had done.

The instruction issued by the CBDT from F.No. 178/32/2003-ITA-I on 23rd Feb., 2004 did not support the case of the Revenue. It is clearly mentioned in the said instruction that ordinarily disallowance of loss in similar circumstances in respect of assessment years prior to the asst. yr. 2002-03 would amount to applying the provisions of s. 94(7) retrospectively. The Board, therefore, cautions its officers that such an assessment should be made only after in-depth investigation and proper recording and marshalling of all relevant facts because the provisions of s. 94(7) are prospective only."

9. An another decision of respected Special Bench ITAT, Mumbai in the case of Wallfort Shares & Stock Brokers Ltd. vs. ITO [2005] 96 ITD 1 (Mumbai) (TM) has also been cited wherein the observations were as under :-

"The provisions of section 94(7) have been brought on the statute book by the Finance Act, 2001 with effect from 01-04-2002. In other words, the Parliament did not deem it fit to intervene in the transactions that has already taken place. It was open to resort to giving retrospective effect to the provisions

of section 94(7), but the Parliament had chosen not to do that. Further provisions of section 94(7) do not stipulate any cost in relation to the income pay out by a mutual fund. Further Circular No. 14 of 2001 itself states that prior to the promulgation of the provisions of section 94(7), it was legally permissible to claim the losses in the manner, the assessee had done.

The instruction issued by the CBDT from F.No. 178/32/2033-ITA-I on 23-02-2004 did not support the case of the revenue. It is clearly mentioned in the said instruction that ordinarily disallowance of loss in similar circumstances in respect of assessment years prior to the assessment year 2002-2003 would amount to applying the provisions of section 94(7) retrospectively. The Board, therefore, cautions its officers that such an assessment should be made only after in-depth investigation and proper recording and marshalling of all relevant facts because the provisions of s. 94(7) are prospective only”.

10. Apart from these two decisions before us the CBDT instructions Circular No. 14 of 2001 has also been referred. This clarification has made it clear that the amendment of sub-section (7) shall take effect from 01/04/2002 and apply in relation to the A.Y. 2002-03 and the subsequent years.

10.1 The purpose of reproduction of the relevant paras of the precedents and the memorandum explaining the provisions in the Finance Bill is to streamline the legal aspect about the applicability of the amendment in section 94 with respect to introduction of sub-section (7). Therefore, it is clear that the said amendment is applicable for A.Y. 2002-03 and once this position was made clear then the respected co-ordinate bench has held that the assessee in those appeals was not disentitled in the set off loss admittedly prior to the A.Y. 2002-03. So the same analogy is to be drawn while deciding the appeal in hand.

11. Sub-section (8) of section 94 was inserted by Finance Act (No. 2), 2004 with a view to curb the tax avoidance via bonus stripping. Memorandum explaining the said provisions reported in 268 ITR 191 (St.) has indicated the intention of the said legislation that in such case where the person buys or acquires any units within a period of three months prior to the record date and he has allotted additional units on the basis of such units without making any payment, and thereafter he sells or transfers within a period of nine months after such date all or any of such units while continuing to hold all or any of the additional units, then, the loss, if any, arising to him on account of such purchase or sale of units shall be ignored for the purposes of computing income chargeable to tax of such person and the amount of loss so ignored shall be deemed to be the cost of purchase or acquisition of such additional units as are held by him on the date of such transfer or sale.

11.1 The clarification further states that amendment shall take with effect from 01/04/2005 and therefore, shall apply in relation to the A.Y. 2005-06 and subsequent years.

12. On the basis of the above discussion and also with reference to the views already expressed by the respected co-ordinate benches; it can be safely held that the legislature has made a distinction in the two transactions, on one hand, where the dividend or income on such securities or units is received or receivable by such person plus also exempt; and on the other hand, the transactions wherein such person is allotted additional units without any payment on the basis of holding of such units on such date. The transaction in this appeal undoubtedly fall as prescribed u/s 94(8) Clause (a), (b) and (c). Now the question is whether the A.O. was justified in treating the two distinct types of transactions as of identical in nature. Naturally the

answer is in negative. Once the legislature in its own wisdom has made a distinction then no judicial officer has any right to mellow down the intent of the legislation.

12.1 An another allied question has also been raised from the side of the Revenue about the applicability of sub-section (8) of section 94 for the year under consideration specially in the context when the proceedings of the assessment year are in progress and the Revenue Department is in the knowledge of the transaction. The contention of the Revenue Department before us was that since the assessment year under appeal is A.Y. 2003-04 and said insertion of sub-section (8) was in the knowledge of the A.O. then he was expected to take the due cognizance of the change in the law. If we approve this contention of the Revenue Department then naturally we are stepping towards holding that the sub-section (8) of section 94 is retrospective in effect in law. We cannot do so because of the clarification issued by the Revenue Department itself; otherwise also we cannot endorse those arguments because it is well settled that the Income Tax Act, as it stands amended on the first day of April of any financial year, must apply to the assessment of that year. Any amendment in the Act which comes into force after first day of April of a financial year is not to apply to the assessment for that year, even if the assessment is actually made after the amendment came into force.

13. Though the legislature is not prevented from enacting an ex post facto law. But if any law takes away or impairs any vested rights acquired under existing law or creates a new obligation imposes a new liability in respect of transactions, it must so provide in express terms or such should be a necessary implication from the language employed in such an amended provision. Nevertheless, the presumption against retrospective operation is

only in respect of substantive law. On the other hand, there is a presumption of retrospective operation when the statute deals with the procedure. Judicially no person has a vested right in any course of procedure. But in deciding an issue whether or not a particular provision of law is to be applied retrospectively, the real test is not only to consider merely whether the law is a law of procedure or substantive law but also whether the law in question affects or impairs the existing rights including the rights of action which are substantive rights. If a law destroys the existing right or even places any restriction on it; as is happening in the circumstances of this appeal, no retrospective effect would be given to it unless the statute is expressly enacted to that effect.

13.1 Doctrine of *casus omissus* cannot be supplied by judicial interpretative process commonly, except in the case of clear necessity. The settled principles of interpretation are that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. We have read in our personal study that a judge must not alter the material of the texture of which the rug is woven, but he can and should iron out the creases. Hence, we are duty bound to adopt a constructionist views of interpretation so that a literal meaning of the language of the statute can be adopted. Our work as a judge is to interpret provisions of law and not to legislate a law.

14. In the light of the above discussion and the reasons assigned herein ante we are of the conscientious view that the provisions of section 94(8) have to be applied with effect from 01/04/2005 i.e. operative from the A.Y. 2005-06. Since the A.Y. under consideration is 2003-04 therefore, the same shall not be applicable in this appeal. We hereby also hold that the instances as defined in sub-section (7) of section 94 i.e. "Dividend Stripping" are

distinct from the instances of transaction as defined in sub-section (8) of section 94 i.e. "Bonus Units Stripping" and therefore, the transaction in question of this appellant shall fall in the category of the transaction prescribed in sub-section (8) of section 94. With the result, the Learned CIT(A) has rightly reversed the action of the A.O. We hereby endorse the view of Learned CIT(A), resultantly Revenue's ground are dismissed.

15. In the result, appeal filed by the Revenue is dismissed.

Sd/-

[RAJENDRA SINGH]
ACCOUNTANT MEMBER

Sd/-

[MUKUL SHRAWAT]
JUDICIAL MEMBER

Dated : the ----- August, 2008
jb

JUDGMENT PRONOUNCED ON / /2008

(A.M)

(J.M)

Copy forwarded to :-

1. Appellant
2. Respondent
3. CIT, New Delhi
4. CIT(A)-X, New Delhi
5. DR, ITAT 'C' Bench, New Delhi

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By order

Deputy Registrar,
ITAT, Delhi Benches