

IN THE INCOME TAX APPELLATE TRIBUNAL,
"E" BENCH, MUMBAI.

Before Shri Pramod Kumar, Accountant Member
and Shri V.Durga Rao, Judicial Member

I.T.A No.3382/ Mum/2010
Assessment year: 2005-06

The Tata Power Co. Ltd., ***Appellant***
Corporate Centre, Block B, 5th floor,
34, Sant Tukaram Road, Carnac Bunder,
Mumbai.
PA No.AAACT 0054 A

Vs

Addl. CIT, Range 2(1) ,..... ***Respondent***
Aayakar Bhavan, M.K. Road,
Mumbai.

Appearances:

Dinesh Vyas, for the appellant
Jay Kumar, for the respondent

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the assessee appellant has challenged correctness of learned Commissioner's order dated 25th March, 2010 passed under section 263 of the Income tax Act, 1961, for the assessment year 2005-06, on the following grounds:

"The CIT erred in directing that section 54EC benefit is to be restricted to the capital gains computed after setting off brought forward capital loss, having failed to appreciate that:

- a. Section 54EC is an exemption section, which lays down that "capital gains are not to be charged on investment in certain bonds".

- b. To the extent of investment made in bonds prescribed under section 54EC, capital gains are exempt ab initio and do not enter into the computation of total income;
 - c. Only the balance capital gains (after exemption under section 54EC), if any, are taxable, if not offset by brought forward capital losses;
 - d. The appellant's view is supported by the structure of the Income tax Return Form (Form 1) itself as explained to the CIT in our letter dated 8th February, 2010."
2. On merits, thus, the short issue that we are required to adjudicate in this appeal is as to at what stage, exercise of set off of brought forward long term capital losses is to be carried out-before granting deduction under section 54EC or after granting deduction under section 54EC.
3. The backdrop in which the controversy arises is this. During the relevant previous year, the assessee had disclosed long term capital gain of Rs.233,49,65,341 and claimed deduction of Rs.124,54,00,000 u/s.54EC on account of investment in specified bonds of NABARD. The assessee also had brought forward long term capital loss amounting to Rs.111,06,47,369, which was set off against long term capital gain after allowing deduction under section 54EC. In effect thus, not only the entire long term capital gains were set off against long term capital loss brought forward but also an amount of Rs.210,82,028 remained to be set off, out of long term capital loss so brought forward, and was carried forward as such. Subsequently, however, learned Commissioner called upon the assessee to show cause as to why deduction allowed not be subjected to revision proceedings on the ground that brought forward long term capital loss ought to have been adjusted before granting of deduction under section 54EC. In the opinion of the learned Commissioner, the AO, by allowing deduction under section 54EC prior to setting off long term capital loss brought forward, committed an error which has rendered the assessment erroneous and also prejudicial to the interest of the revenue, and is liable to be subjected to revision under section 263 as such. In response to show cause notice, it was submitted by the assessee that deduction under section 54EC is to be granted while computing income taxable under the head "income from capital gains" and it is only after the said exercise having been carried out that the question of

setting off long term capital loss brought forward would arise. Learned Commissioner, however, was not impressed. He was of the view that section 54EC is beneficial section to the assessee but while availing the said benefit, the assessee cannot be entitled to have benefit of Section 54EC as well as carried forward business loss". On this basis, learned Commissioner concluded that the benefit under section 54EC cannot be made available only after working out resultant long term capital gain by virtue of section 74(1) of the Income tax Act. The assessee is aggrieved and is in appeal before us.

4. We have heard Shri Dinesh Vyas, learned Senior Advocate and Shri Jay Kumar, learned Commissioner (DR). We have also perused the orders of the authorities below as also the material available on record and duly considered the factual matrix of the case as also the applicable legal position. The basic thrust of learned counsel's submission is that the Commissioner has erred in proceeding on the basis that exercise of setting off brought forward long term capital loss is to be done before granting deduction under section 54EC. He submits that while deduction under section 54EC is to be granted at the time of computing the income under the head "capital gains", the exercise of setting off the brought forward long term capital loss is to be done after the income under the head "capital gains" is so computed. He also submits that by virtue of section 54EC, effectively the long term capital gain, when invested in specified bonds and subject to fulfillment of conditions associated therewith, is an income exempt from tax and an income which is exempt from tax cannot be involved in any exercise of the setting off the brought forward loss. It is his contention that by setting off an income which is exempt from tax and by taking into account such income for the purpose of setting off brought forward loss, the very object and purpose of exemption is nullified. It is submitted that the stand of the learned Commissioner is not only erroneous but wholly contrary to the basic scheme of carried forward and set off of loss. Learned departmental representative, on the other hand, relies upon the order of the learned Commissioner and invites our attention to the provisions of section 80AB. It is his contention that deduction granted under the Income tax Act, cannot be more than the income which is included in the gross total income. However when, it is pointed out to him that section 80AB deals with deduction under chapter VIA whereas section 54EC falls under Chapter IV and,

therefore, 80AB has no application in the matter at all and learned Commissioner (DR) simply relies upon the impugned order passed by the Commissioner.

5. We find that a plain reading of Section 54EC indicates that it sets out a situation in which the capital gain is not to be taxed. The said section provides that where the capital gain arises from the transfer of a long term capital gain asset and the assessee invests, within the permissible time limit wholly or partly in such long term capital gains, such capital gains will not be charged to tax under section 45 in entirety, where the investment is not less than the capital gains in question, or on prorata basis, where the investment is less than the capital gains in question. It is thus clearly an exemption provision in nature inasmuch as it specifies the situation in which capital gains, otherwise taxable, will not be taxed. In effect when and to the extent section 54EC comes into play, the related capital gains cannot be part of chargeable income under the head "income from capital gains". Section 74 which deals with carry forward and set off of loss under the head "capital gains", provides that when a long term capital loss is carried forward, "it shall be set off against income if any, under the head "capital gains" assessable for that assessment year in respect of any other capital asset not being short term capital asset". In other words, thus, when a long term capital loss is carried forward, it can be set off only against such income as or assessable under the head capital gains in a subsequent year. A plain reading of these provisions would show that while section 54EC comes into play in the process of computing capital gains which are assessable under the head "capital gains" section 74(1) (b) comes into play only when the income assessable to tax under the head capital gains is computed. The stage at which set off of carried forward long term capital loss is to be given is subsequent to the stage at which income under the head capital gains is computed and deduction under section 54EC is to be given in the course of the latter. In this view of the matter, the question of setting off brought forward long term capital loss arises only after the income under the head capital gains is computed and that the processing in computing the income under the head capital gains must also taken into account section 54EC as well. There was thus no infirmity in the stand of the Assessing Officer while allowing the claim of the assessee. There was no error in the assessment order to that extent. Therefore, we are of the considered view that

the learned Commissioner erred in assuming the order under section 263 because these errors can only be assumed when the order of the AO is erroneous and prejudicial to the interest of the revenue whereas in the present case, the order was not erroneous at all. We, therefore, uphold the grievance of the assessee and quash the impugned revision order.

6. In the result, appeal of the assessee is allowed.

Pronounced in the open court on 31st May 2011.

Sd/-
(V. Durga Rao)
Judicial Member

Sd/-
(Pramod Kumar)
(Accountant Member)

Mumbai, Dated 31st May, 2011
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Copy to:

1. The appellant
2. The respondent
3. Commissioner of Income Tax (Appeals),, Mumbai
4. Commissioner of Income Tax, , Mumbai
5. Departmental Representative, Bench 'E, Mumbai

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BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI