IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI SPECIAL BENCH "A", MUMBAI

BEFORE SHRI G.E. VEERABHADRAPPA, PRESIDENT,
SHRI I.P. BANSAL, JUDICIAL MEMBER
AND SHRI P.M. JAGTAP, ACCOUNTANT MEMBER

ITA No.521/Mum/2007
(Assessment year: 2003-04)

Kotak Mahindra Capital Co. Ltd.,
1st Floor, Bakthawar,
229, Nariman Point,
Mumbai -400 021 .... Appellant
PAN: **AAACK 5577 D**

Vs.

The Asst. Commissioner of Income-tax
Range 3(2),
Aayakar Bhavan,
Mumbai -400 020 .... Respondent

Appellant Assessee by:	Shri F.V. Irani
Respondent Revenue by:	Shri Pavan Ved
Date of Hearing:	20.06.2012
Date of Pronouncement:	10.08.2012

O R D E R

PER BENCH:

This Special Bench has been constituted by the Hon'ble President to dispose off the appeal filed by the assessee in this case against the order of ld. CIT(A) III dated 09/11/2006 and to decide the following question of law arising from ground no.2 raised in the said appeal:

> ***"Whether 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 or will also apply to the unabsorbed capital losses relating to the assessment years prior to the assessment year 2003-04."***

2. The assessee in the present case is a company which is engaged in the business of investment banking and dealing in Government securities. The return of income for the year under consideration was filed by it on 20.11.2003 declaring total income of ₹ 45,80,01,886/-. In the said return, short-term capital gain of ₹ 2,21,91,307/- earned during the year under consideration was declared by the assessee and the same was set off against brought forward long-term capital loss to the extent of ₹ 42,91,526/- relating to A.Y. 2001-02. According to the A.O., the assessee was entitled to set off the brought forward long-term capital loss only against long-term capital gain and not against short-term capital gain by virtue of the provisions of sec.74(1) as amended w.e.f. 01.04.2003. He held that since the said provisions amended w.e.f. 1.4.2003 were applicable to the year under consideration i.e. A.Y. 2003-04, the assessee was not entitled to claim the set off of brought forward long-term capital loss relating to A.Y. 2001-02 against short-term capital gain for the year under consideration i.e. A.Y. 2003-04. He, therefore, disallowed the claim of the assessee for set off of long-term capital loss brought forward from A.Y. 2001-02 against short-term capital gain for the year under consideration in the assessment completed u/s.143(3) vide an order dated 30.11.2005.

3. Against the order passed by the A.O. u/s.143(3), an appeal was preferred by the assessee before the Ld. CIT (A) challenging therein *inter alia* the action of the A.O. in disallowing its claim for set off of brought forward long-term capital loss relating to A.Y. 2001-02 against short-term capital gain for the year under consideration. It was submitted on behalf of the assessee before the Ld. CIT (A) that there was no restriction on the setting off of long-term capital loss against short-term capital gain and vice-versa prior to 2003-04 and such restriction came only from A.Y. 2003-04. It was contended that long-term capital loss of ₹ 42,91,526/- was determined in the case of the assessee for the first time in A.Y. 2001-02 and by virtue of pre-

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amended provisions of sec.74(1), the assessee had got the right to carry forward and set off the said long-term capital loss against short-term capital gain of any subsequent year/s. It was contended that the said right had accrued and vested in the assessee as per the provisions of sec.74(1) prevalent at the relevant time and the same could not be taken away by the amendment made subsequently to sec.74(1). In support of this contention, reliance was placed on behalf of the assessee on the decision of Hon'ble Supreme Court in the case of CIT vs. Shah Sadiq and Sons 166 ITR 102 wherein it was held that the repeal of a particular provision shall not affect the right / privilege of the assessee in view of the protection granted in sec.6(c) of the General Clauses Act. Reliance was also placed on behalf of the assessee on the decision of Hon'ble Calcutta High Court in the case of Krishna Chand Pvt. Ltd. vs. CIT 204 ITR 23 wherein it was held that a restriction in setting off the loss could be applicable only prospectively and not retrospectively.

4. The Ld. CIT (A) did not find merit in the submissions made on behalf of the assessee on this issue. According to him, the assessee had an option to set off the long-term capital loss against short-term capital gain only up to A.Y. 2002-03 and as per the amendment made in the provisions of sec.74(1) w.e.f. 1.4.2003 applicable to A.Y. 2003-04 onwards, brought forward long-term capital loss could be set off only against long-term capital gain. For this conclusion, he relied on the decision of Hon'ble Supreme Court in the case of Reliance Jute Industries vs. CIT 120 ITR 921 wherein it was held that assessment for one assessment year cannot be affected by the law in force in another assessment year in the absence of a contrary provision specifically made. He held that the right claimed by the assessee under the law in force in a particular assessment year thus was available only in relation to the proceedings pertaining to that year. He noted that the amendment made in sec.74(1) w.e.f. 1.4.2003 restricted the set off of the long-term capital loss only against long-

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term capital gain and since the said amendment was applicable to the year under consideration i.e. A.Y. 2003-04, the assessee was not entitled for the set off of brought forward long-term capital loss relating to A.Y. 2001-02 of ₹ 42,91,526/- against short-term capital gain of ₹ 2,21,91,308/- for the year under consideration i.e. A.Y 2003-04. Accordingly, the action of the A.O. in disallowing the assessee's claim for such set off was upheld by the Ld. CIT (A). Aggrieved by the order of the Ld. CIT (A), the assessee has preferred this appeal before the Tribunal.

5. This appeal filed before the Tribunal initially came up for hearing before the Division Bench which took note of the fact that there were contrary views taken by the co-ordinate Benches on the issue involved in ground no. 2 relating to the assessee's claim for set off of brought forward LTCL relating to A.Y. 2001-02 against STCG for A.Y. 2003-04. In the case of Komaf Financial Services Limited vs. ITO reported in 131 TTJ 359, the Mumbai Bench had taken a view that amended provisions of sec.74(1) will apply to the losses under the head "capital gain" for any assessment year and not only to the losses relating to the assessment year 2003-04 onwards. A contrary view, however, was taken by another Division Bench at Mumbai in the case of Geetanjali Trading Ltd. vs. ITO (ITA No.5428/Mum/2007 dated December, 2009), wherein it was held that the amended provisions of sec.74(1) will apply only in respect of losses for assessment year 2003-04 and onwards. Taking note of these two contrary decisions of the co-ordinate Benches as well as for the other reasons given in the referral order, the Division Bench made a reference to the Hon'ble President, ITAT for constituting a Special Bench. Accordingly, this Special Bench has been constituted by the Hon'ble President, ITAT u/s.255(3) of the Income-tax Act, 1961 to dispose of this appeal as well as to decide the important question of law as involved in ground no.2 of this appeal.

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6. The learned counsel for the assessee Shri Farrokh Irani submitted that the case of the assessee on the issue under consideration is that the amendment in Section 74 of the Act applies only to LTCL made in AY 2003-04 and subsequent years and does not have the effect of denying it the right to set off LTCL made prior to AY 2003-04 against STCG of subsequent years. He submitted that he has three propositions to put forth in support of the case of the assessee which are without prejudice to each other. As a first proposition, he submitted that a bare construction of Section 74, as amended by the Finance Act, 2002, itself makes it clear that it disqualifies only LTCL made in AYs 2003-04 and onwards from set off against STCG of subsequent years. In this context, he invited our attention to the provisions of section 74, as amended by the Finance Act, 2002, which read as under:

> *"Losses under the head "Capital gains"*
> *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) in so far as such loss relates to a short-term capital asset, 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;*
>
> *(b) in so far as such loss relates to a long-term capital asset, 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 a short-term capital asset;*
>
> *(c) **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;"*

7. Shri Farrokh Irani contended that the language used in the amended provisions especially the highlighted words used therein leave no doubt that the amended Section 74 does not affect LTCL for assessment years prior to AY 2003-04 and that it applies only to LTCL made in AY 2003-04 and subsequent years. In support of this

contention, he relied on the decision of the Special bench of the Tribunal in the case of DCIT vs. M/s. Times Guaranty Limited 40 SOT 14 (MUM)(SB) and submitted that the issue before the Special Bench was whether unabsorbed depreciation for AYs 1997-98 to 1999-2000 (when there were restrictions on set off of unabsorbed depreciation) could be set off without any restriction in AY 2003-04 and 2004-05 (when such restrictions were removed). He submitted that the issue involved in the said case thus was of a similar nature as involved in the present case and while deciding the same, it was held by the Special Bench that the liberalized provisions introduced w.e.f. AY 2002-03 applied only to unabsorbed depreciation computed for AY 2002-03 and subsequent years and did not apply to unabsorbed depreciation for the earlier years where there were restrictions on the setting off of unabsorbed depreciation. He submitted that this conclusion was arrived at by the Special Bench on the basis of the wording of Section 32(2) of the Act and drawing support from Section 74 of the Act which is the relevant provision in the present case.

8. Shri Farrokh Irani took us through the relevant portion of the order Special Bench in the case of Time Guaranty Limited (supra) and specifically pointed out the following observations recorded by the Special Bench based on the wording of Section 32(2) of the Act to arrive at a conclusion that the liberalized provisions applied only from AY 2002-03 (when such liberalized provisions were introduced) and not to earlier years :

> *"24. ………… First thing in sub-section (2) is the reference to the assessment of the assessee in which **full effect "cannot be" given** to any allowance under sub-section (1)in any previous year. Later part of the provision provides that the allowance or part of the allowance to which **effect "has not been" given**, shall be added to the amount of allowance for depreciation in the succeeding years. At both the places present tense has been used in negative terms while referring to the allowance to which effect **'cannot be' and 'has not been' given**. So the starting point of sub-section (2) is the assessment of the assessee and the*

allowance u/s. 32(1) to which full effect cannot be given. Section 32(1) deals with depreciation allowance for the current year. It implies that it is only when the assessment of the assessee from A. Y. 2002-2003 onwards is made in which depreciation allowance for the current year u/s. 32(1) cannot be given full effect to owing to the inadeguacu of the profit, that the directive of the deeming provision u/s. 32(2) shall apply. The mention of the words "cannot be" and 'has not been' indicates that it speaks of the deprecation allowance u/s. 32(1) for the current year. .... In the like manner, other sections such as 74 and 74A etc., to the extent thezj talk of loss for the current year, refer to "cannot be" and "has not been" set off. On going through these sections it is palpable that wherever there is mention to loss under a particular head for the current year which is sought to be set off against the income under the same head or other heads of the income for that very year, the set of words 'cannot be' and 'has not been' have been brought into play. .... In order to make reference to such losses of earlier years, the words used have been 'could not be set off'. Thus it is manifest that the words "cannot be" as used in section 32(2) in the third period, refer only to the current year's depreciation, which is parallel to section 75 before substitution. The brought forward unabsorbed depreciation of earlier years cannot be included within the scope of section 32(2). If the intention of the legislature had been to allow such b/fd unabsorbed depreciation respecting the second period also at par with the depreciation for the year u/s 32(1) in third period, then sub section would have been differently worded somewhat like "where in the assessment of the assessee full effect could not be given to any allowance or .... "employing the expression 'could not be' akin to that used in the post-substituted sec. 75. Since subsection (2) of sec. 32 has been worded in present and not in past or past prefect tense and this being a deeming provision, the brought forward unabsorbed depreciation of the second period cannot be brought within its purview."

9. Shri Farrokh Irani submitted that the above observations of the Special bench directly support the assessee's case and, on the basis thereof, it must be held that the restrictive provisions of Section 74 of the Act apply only to LTCL made in AY 2003-04 and subsequent years just as the Special Bench in the above case held that the liberalizing provisions of Section 32(2) of the Act applied only to unabsorbed depreciation for AY 2002-03 and subsequent years.

10. Shri Farrokh Irani also relied on the decision of division bench of this Tribunal in the case of Virendra Kumar Jam Vs. ACIT (ITA No. 1009/Mum/2000 dated 31/05/2010) wherein the issue was whether the amendment to Section 73 of the Act restricting the period for carrying forward and setting off of speculation loss from the earlier period of 8 years to a restricted period of 4 years, applied to speculation losses made in AYs prior to the amendment. He submitted that the ITAT held for the following reasons given in paragraph 6 of its order that the wording of Section 74 showed that it did not affect earlier unabsorbed speculation losses :

> *"6. It is also significant, as rightly pointed out on behalf of the assessee, that sub-section (4) of section 73 refers only to the loss to be carried forward to the subsequent years. It does not say anything about the set off of the speculation loss brought forward from the earlier years. There is a distinction between a loss brought forward from the earlier years and a loss to be carried forward to the subsequent years. The sub-section deals only with the speculation loss to be carried forward to the subsequent years and in the very nature of things it cannot apply to speculation loss quantified in any assessment year before the assessment year 2006-07. ....Herein we are concerned with the assessee's right to set off the brought forward speculation losses against the speculation profits for the assessment year 2006-07. Sub-section (4) of section 73 does not deal with this situation. Hence, it has no application."*

11. Shri Farrokh Irani submitted that the above decision of the Tribunal clearly supports the assessee's case that the amended provisions of Section 74 of the Act do not adversely affect the set off of brought forward LTCLs of AY 2001-02 against STCG of AY 2003-04. He submitted that the said decision has also been followed by the ITAT in the case of Gloria Securities Pvt. Ltd., Vs. ITO (ITA No. 680/Mum/2010 dated 31/08/02010). He reiterated that a bare construction of Section 74 of the Act, as amended by the Finance Act, 2002, itself thus makes it clear that the set off of LTCL made in AY 2001-02 against STCG made by it in AY 2003-04, is not affected.

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12. As a second and independent proposition, Shri. Irani submitted that the vested right, which the assessee had for setting off the LTCL made by it in AY 2001-02 against STCG, is not affected by the amendment to Section 74 of the Act. He submitted that it is well settled that a vested right acquired by the assessee cannot be negated except by a clear and specific legislative provision. In this connection, he relied upon the decision of the Madras High Court in the case of CIT Vs. S.S.C. Shoes Ltd., reported in 259 ITR 674 wherein the assessee had claimed deduction under Section 8OHHC of the Act which was allowed only partially on account of the provisions of Section 8OVVA of the Act which placed a limit on the quantum of Chapter VIA deductions which could be claimed by the assessee in any particular assessment year. Section 8OVVA provided that the Chapter VIA deductions not allowed in any particular assessment year could be claimed in a subsequent assessment year. The claim of the assessee for deduction under Section 8OHHC of the Act for AYs 1987-88 and 1988-89 was limited by virtue of Section 8OVVA of the Act and the disallowed portion of its Section 8OHHC deduction was carried to AY 1989-90 when it was claimed by the assessee. However, Section 8OVVA was deleted w.e.f. 1st April, 1988 and, on the basis of such deletion, the Revenue Authorities denied the assessee its claim for the allowance in AY 1989-90. The Hon'ble Tribunal and the Madras High Court held that the assessee had acquired a vested right to carry forward and claim the balance unabsorbed Section 8OHHC deduction and that this could not be defeated even though Section 8OVVA of the Act was deleted. He invited our attention on the following observations of the Madras High Court being relevant in the present context :

> *"Though the Supreme Court was dealing with a case of repeal of an. enactment, the principle laid down by the Supreme Court would apply to carry forward the deduction provided under section 8OVVA(4) of the Act. Hence, we are of the view that it is not necessary to consider the larger question that section 6 of the General Clauses Act does not apply to the omission of a provision and the omission of a*

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> *provision is different from "repeal" as held by the Supreme Court in Rayala Corporation P. Ltd. and M.R. Pratap v. Director of Enforcement (1969) 2 SCC 412; AIR 1970 SC 494 and Kolhapur Canesugar Works Ltd. V. Union of India, AIR 2000 SC 811; (2000) 2 SCC 536, as the assessee had secured a right to carry forward the unabsorbed deduction deeming the same as the deduction of the next following assessment year when section 8OVVA was in existence and in full force, which was not taken away by the omission of the provision from the statute book. Following the principle laid down bu the Supreme Court, we hold that the Appellate Tribunal was correct in holding that a vested right had accrued to the assessee to treat the deduction disallowed as a part of deduction for the next assessment year to be allowed in the computation of the total income for the next following assessment year and the assessee is entitled to carry forward the deduction for the subsequent assessment years, if not allowed, as the deduction disallowed would join the main stream of deduction".*

Shri Farrokh Irani submitted that it is important to note that the Madras High Court decided the issue in favour of the assessee de-hors Section 6 of the General Clauses Act but on the general principle that vested rights could not be affected.

13. Shri Farrokh Irani also relied on the decision of three Judge Bench of the Hon'ble Supreme Court in Govinddas & Ors. vs. ITO 103 ITR 123 and submitted that a similar view has been taken by the Hon'ble Supreme Court in the said case as is evident from the following observations recorded at page no. 132 of the report:

> "*Now, it is a well-settled rule of interpretation allowed by time and sanctified by judicial decisions that, unless the terms 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 new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in volume 36 of the Laws of England (third edition) and reiterated in several decisions of this court as well as English courts is that "all statutes other than those which are merely declaratory or which relate only to matters of procedures or evidence are prima facie prospective' and retrospective operation should not be given to a*

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statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only……………..”

14. Shri Farrokh Irani submitted that the above decision of the Supreme Court has been applied and followed by the Tribunal in the case of Geetanjali Trading Ltd. Vs. ITO (ITA No. 5428/Mum/2007 decided in December 2009) where the controversy was identical to the assessee's case. He invited our attention to paragraphs 10 and 11 on pages 56 and 57 of the case law paper book which are reproduced below:

"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 b 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".

15. As a third proposition, Shri Farrokh Irani submitted that the Department's attempt to apply the amended provisions of Section 74 to deny the assessee a set off of the LTCL relating to A.Y. 2001-02 against the STCG for A.Y. 2003-04 would amount to giving

retrospective effect to Section 74 of the Act which is impermissible without a clear and specific legislative indication to that effect. He contended that this proposition is also supported by the decision of the Supreme Court in Govinddas's case (supra) and relied upon the relevant observations recorded by the Hon'ble Apex Court in this regard which have been reproduced above. He contended that the assessee thus is entitled to claim the set off of brought forward LTCL relating to A.Y. 2001-02 against STCG for A.Y. 2003-04.

16. Regarding the adverse decision of the Tribunal in the case of Komaf Financial Services Limited (supra), Shri. Irani submitted that the view taken therein by the division bench, with due respect, is not correct. He submitted that first of all the first proposition now raised by him before this special bench based on the bare interpretation of Section 74 of the Act has not been considered by the Tribunal in the case of Komaf Financial Services Limited. Secondly, Shri Irani submitted that the said decision of the Tribunal proceeds on the principle of vested rights only with reference to Section 6(c) of the General Clauses Act and ignores the fact, as recognized by the Madras High Court in the case of S.S.C. Shoes Ltd. (supra) and by the Supreme Court in the case of Govinddas & Ors. (supra) that there is a well recognized legal concept of vested right even de-hors Section 6(c) of the General Clauses Act. He contended that all these relevant and vital aspects however were not brought to the notice of the division bench of this Tribunal in the case of Komaf Financial Services Limited which had no occasion to consider that same. He contended that the decision of the ITAT in the case of Komaf Financial Services Limited, with respect, thus does not lay down the correct legal position. He contended that even the preponderance of judicial opinion on this issue is in favour of the assessee.

17. In reply, the learned CIT DR Shri Pawan Ved submitted that the assessee in the present case has claimed the set off of brought forward

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Long term capital loss relating to AY 2001-02 against short term capital gain for AY 2003-04. He submitted that the Law relating to set off of long term capital loss however is different for these two years. He submitted that the contention of the assessee is that such set off should be allowed as per law for AY 2001-02, while the contention of the Revenue is that such set off should not be allowed as per the amended law applicable for AY 2003-04.

18. Shri Pawan Ved invited our attention to the relevant provisions of section 74(1) as stood prior to 01.04.2003 and as amended from 01.04.2003 and submitted that the comparative analysis of these provisions clearly shows that the assessee gets right of carry forward in the year of loss, if it is not set off fully in the year of loss. He submitted that the long term capital loss carried forward thus has to be dealt with in two way i.e. it would be set off under the head 'Capital Gains' in the following assessment year and if not, it would be carried forward with no provision dealing specifically with set off. He contended that the relevant provisions of section 74 thus provide for both carry forward and set off in the immediately succeeding year; but the section provides only for carry forward and not for set off for the assessment year following the succeeding assessment year.

19. Shri Pawan Ved contended that it is settled law that no assessee has any vested right against the State and / or Parliament. Parliament can legislate both prospectively and retrospectively. Therefore it cannot be said that the current law would not apply to the assessee because of past vested right. Without prejudice to this main contention, he submitted that even if it is assumed that the assessee gets vested rights as per the provisions of section 74(1), it is only with respect to carry forward and not with respect to set off. He contended that by virtue of clause (a) of section 74(1), the assessee gets right of set off but not the manner of set off, because the section only provides for set off and not for the manner of set off. He contended that

similarly clause (b) of section 74(1) provides only for carry forward and it is totally silent regarding set off. He contended that since the case of the assessee falls under clause (b) of section 74(1), there is absolutely no vested right of the assessee of set off as per the provisions of the Act.

20. Shri. Pawan Ved submitted that this issue is squarely covered by the decision of Hon'ble Supreme Court in the case of Reliance Jute & Industries Ltd. 120 ITR 221. In that case, the assessee had right, in the year in which loss was incurred, to carry forward loss for any number of years. Later on, Law was amended providing for carry forward only for 8 assessment years. Thereafter, the assessee sought set off of loss. In the year in which set off was requested, the period of 8 years had already passed. The plea of the assessee was that such set off should be given because he had vested right of set off for any number of years as per the law of the year in which the loss was incurred. The Hon'ble Supreme Court did not agree and it was held that law as on the 1st day of the assessment year should be applied. Accordingly, loss for the period prior to 8 years was denied set off.

21. As regards the decision of Hon'ble Supreme Court in the case of Govind Das Vs. ITO 103 ITR 123 relied upon by the learned counsel for the assessee, Shr. Pawn Ved submitted that the said decision is based on interpretation of the provisions of Section 297(2)(d) of IT Act 1961. The Hon'ble Supreme Court has held that because of the relevant provisions of Section 297(2)(d), vested right of 1922 Act had been saved. He contended that similar is the position as regards the decision of Hon'ble Supreme Court in the case of Shah Sadiq & Sons 166 ITR 102 which also was based on the interpretation of provisions of section 297 of the I.T. Act, 1961. According to him, both these decisions referred to a situation where accrued rights were under 1922 Act and they were held to have been saved because of repeal of old legislature. He contended that the decision relied upon by him in

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support of the revenue's case in the case of Reliance Jute (supra), on the other hand, has nothing to do with the situation of repeal of whole Act and the same therefore should be held to hold the field. He also relied on the decision of Hon'ble Supreme Court in the case of General Finance Company vs. Asst. C.I.T. 257 ITR 338. In this case, the issue was regarding continuance of prosecution initiated u/s.276DD after omission of section 276DD from the Act. The Hon'ble Supreme Court held that once section is omitted, prosecution cannot continue. It means, new provisions should take over the old provisions. Finally, prosecution was quashed. Shri. Ved contended that the Hon'ble Supreme Court in this decision has explained the implication of omission of provisions and repeal of provision.

22. In the rejoinder, Shri. Irani submitted that in the decision of the Supreme Court in the case of General Finance Co. Vs. ACIT (supra) cited by the learned DR, it was held that Section 6 of the General Clauses Act does not apply to amendments but only to repeals. He contended that the principle of vested right, however, has been recognized de-hors Section 6 of the General Clauses Act by the Hon'ble Madras High Court in the case of S.S.C. Shoes (supra) and even by the Hon'ble Supreme Court in the case of Govind Das (supra). As regards the argument of learned DR that Section 74 does not speak of set off, Shri. Irani contended that a bare reading of Section 74 itself shows that it speaks not only of carry forward but also of set off. As regards the contention of the learned DR that the law as on the 1st day of April, 2003 is to be applied, Shri. Irani submitted that even if the same is accepted, it does not affect the right of the assessee to set off the LTCL of AY 2001-02 against the STCG of AY 2003-04 because there is nothing in Section 74, as it stood on 1st April, 2003, which denies such right. He contended that a bare interpretation of Section 74, as it stood on 1st April, 2003, clearly shows that it applies only to LTCL made in AY 2003-04 and onwards as already explained by him in detail and does not in any way affect LTCL made in earlier years.

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23. We have considered the rival submissions and also perused the relevant material on record. In the year under consideration, the assessee declared the short-term capital gain of ₹ 2,21,91,307/- and the brought forward long-term capital loss relating to AY 2001-02 to the extent of ₹ 42,91,526/- 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 AO as well as by the Ld. CIT (A) relying on the provisions of sec.74(1) as amended by the Finance Act, 2002 w.e.f. 1.4.2003 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 AY 2001-02 only against long term capital gain and not against short-term capital gain. While challenging this action of the authorities below in disallowing the assessee's claim for set off of long-term capital loss relating to AY 2001-02 against the short-term capital gain of the year under consideration i.e. 2003-04, the Ld. Counsel for the assessee has mainly raised three contentions in support of the assessee's case.

24. The first contention raised by the Ld. Counsel for the assessee is that the provisions of sec.74(1) as amended by the Finance Act, 2002 w.e.f. 01.04.2003 are applicable only in respect of long-term capital loss made in AY 2003-04 and subsequent years and the same cannot be relied upon to deny the claim of the assessee for set off of long-term capital loss made prior to AY 2003-04 against short-term capital gains of subsequent years as was permissible by virtue of the provisions of sec.74(1) prior to its amendment made w.e.f. 01.04.2003. In support of this contention, he has mainly relied on the language used in sec.74(1) as amended w.e.f. 01.04.2003 which reads as under:

> *"Losses under the head "Capital gains"*
>
> *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) in so far as such loss relates to a short-term capital asset, 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;

(b) in so far as such loss relates to a long-term capital asset, 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 a short-term capital asset;

*(c) **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;"*

25. Referring to the highlighted words "is", "carried forward" and "cannot be", the Ld. Counsel for the assessee has submitted that the provisions of sec.74(1) as amended w.e.f. 01.04.2003 apply only to the long-term capital loss made in AY 2003-04 and subsequent years. In support of this contention, he has mainly relied on the decision of Mumbai Special Bench of the ITAT in the case of Time Guarantee Ltd. (supra).

26. In the case of Time Guaranty Ltd. (supra) relied upon by the Ld. Counsel for the assessee, a similar issue arose in the context of amendment made in the provisions of sec.32(2) which was substituted by the Finance Act, 2001 w.e.f. 01.04.2002. The substituted provisions of sec.32(2) read as under:

> *"Where, in the assessment of the assessee, full effect **cannot be given** to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect **has not been given**, as the*

case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years."

27. After dissecting the aforesaid provisions and taking the note of the highlighted words used therein, the Special Bench of this Tribunal held that present tense has been used while referring to the allowance to which the effect cannot be and has not been given. It was held that the mention of the words "cannot be" and "has not been" indicate that the relevant provisions speak of the depreciation allowance for the current year. The Special Bench also took note of the language used in sec.71 dealing with the carry forward and set off of losses from house property, sec.72(1) dealing with carry forward and set off of business losses to hold that the present tense used therein in negative was to represent loss under the head "income from house property" or business loss of the current year. The Special Bench held that it is thus palpable that wherever there is a mention of the loss under the particular head in the current year which has sought to be set off, the present tense has been brought into play. It was held that the necessary corollary which therefore followed is that the engaging the same set of words in sec.32(1) fairly suggested that the reference to depreciation allowance u/s.32(1) which could not be adjusted due to inadequacy of profit, was for the current year alone starting from assessment year 2002-03 onwards. To further support this conclusion, the Special Bench referred to the provisions of sec.75 as substituted by the Finance Act, 1992 w.e.f. 01.04.1993 dealing with losses of funds and providing that where the assessee is a firm, any loss in relation to the assessment year commencing on or before 01.04.1992, which **could not be set off** against any other income of the firm and which **had been apportioned** to the partner of the firm,

and, **"could not be"** set off by such partner prior to the assessment year commencing from 01.04.1993, then, such loss shall be allowed to be set off against the income of the firm subject to certain conditions. The Special Bench also referred to the pre-amended provisions of sec.75, which provided that where the assessee is a registered firm and any loss which **can be set off** against any other income of the firm shall be apportioned between the partners of the firm and they alone shall entitled to have the amount of the loss set off and carried forward for set off. The Special Bench held that a conjoint reading of pre-amended provisions of sec.74 made it clear that when the reference was made to unabsorbed loss of firm for a current year getting apportioned between the partners of the firm, the words used were **"cannot be"** set off and when the reference was made to such losses of earlier years, the words used were **"could not be set off".** It was held by the special Bench that the words "cannot be" as used in sec.32(2) thus referred only to the current years depreciation and the brought forward unabsorbed depreciation of the earlier years cannot be included in sec.32(2). It was held that if the intention of the Legislature had been to allow such brought forward unabsorbed depreciation also at par with the deprecation of the current year, then sub-section would have been differently worded using the words "could not be given....".

28. In the present case, we are concerned with the provisions of sec.74(1) as substituted w.e.f. 01.04.2003 and as already noted on the basis of highlighted words, the present tense has been used, which, in our opinion, refers to the long-term capital loss of the current year. The said provisions thus are applicable to the long-term capital loss of AY 2003-04 onwards and not to the long-term capital loss relating to the period prior to AY 2003-04. We are therefore of the view that the provisions of sec.74(1) as substituted w.e.f. 01.04.2003 are not applicable to the long-term capital loss relating to the period prior to AY 2003-04 and set off of such loss is therefore governed by the

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provisions of sec.74(1) as stood prior to the amendment made by the Finance Act, 2002 w.e.f. 01.04.2003.

29. At the time of hearing before us, the Ld. DR has referred to section 74 as it stood prior to amendment made w.e.f. 01.04.2003 which read as under:

> *"(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."*

30. Referring to the above provisions, the Ld. DR has contended that the analysis of the said provisions clearly shows that the assessee gets write off carry forward in the year of loss if it is not set off fully in the year of loss. He has contended that such carry forward loss has been dealt with two ways; Firstly, it would be set off against the income under the head "capital gains" in the following assessment year and if not, it would be carried forward. He has contended that the pre-amended provisions of sec.74(1) thus provide for both carry forward and set off in the immediately succeeding year but in so far as the year following the succeeding year is concerned, the said section provides only for carry forward and not for set off. We find no merit in this contention of Ld. DR. In our opinion, the expression "and so on" used in clause (b) of section 74(1). as existed prior to amendment

made w.e.f. 01.04.2003, is sufficient to clarify that if the long-term capital loss cannot be wholly set off against long-term capital gain of the immediately succeeding year, the same shall be carried forward to the year following such succeeding assessment year and shall be set off against income if any under the head "capital gain" assessable for that assessment year. It appears that the Ld. DR while analysing the provisions of section 74(1), as existed prior to amendment made w.e.f. 01.04.2003, has ignored the important words "and so on" to contend that the said provisions are silent on set off in so far as the year following the succeeding assessment year is concerned and finding no merit in this contention of the Ld. DR, we reject the same.

31. 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. It is a well settled rule of construction that, in the first instance, the grammatical sense of the words is to be adhered to and as held by the Hon'ble Supreme Court in the case of New Piece Goods Bazar Co. Ltd. vs. CIT 18 ITR 516, the elementary rule is that the words used in a section must be given their plain grammatical meaning.

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32. As already noted by us, the provisions of sec.74(1) as amended w.e.f. 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 AY 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 AY 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 AY 2003-04 which shall be governed by the provisions of sec.74(1) as stood prior to amendment made w.e.f. 1.4.2003. The words used in the amended provisions of sec.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 sec.74(1) amended w.e.f. 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 AY 2003-04 and onwards.

33. 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. The assessee therefore

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succeeds as a result of acceptance of the first contention itself on the issue under consideration and it is really not necessary or expedient to consider the other contentions raised by the Ld. Counsel in support of the assessee's case on this issue which have become more of a academic nature. However, keeping in view that we have already heard the elaborate submissions made by both the sides, we may touch upon the remaining aspects also for the sake of completeness.

34. The other contention raised by the Ld. Counsel in support of the assessee's case on this issue is that the assessee was entitled to set off the long-term capital loss relating to AY 2001-02 against income of any subsequent year / years under the head "capital gains" as per the provisions of sec.74(1) prevalent at the relevant time. He has contended that the assessee thus had a vested right to set off the long-term capital loss relating to AY 2001-02 against short-term capital gain of any subsequent year including AY 2003-04 and such vested right acquired by the assessee cannot be negated or taken away except by a clear and specific legislative provision. In support of this contention, he has relied on various judicial pronouncements which we shall consider at appropriate stage. The Ld. DR, on the other hand, has contended that the assessee cannot have any vested right against the State and /or Parliament and the parliament has the power to legislate both prospectively and retrospectively. In support of this contention, he has relied mainly on the decision of Hon'ble Supreme Court in the case of Reliance Jute and Industries Ltd. (supra) to contend that a similar plea of the assessee that it had a vested right to carry forward and set off the business loss for any number of years as per the law applicable to the year in which the loss was actually incurred and that the same could not be taken away by the amendment made in the relevant provisions restricting the carry forward and set off only for eight assessment years, was not accepted by the Hon'ble Supreme court and the claim of the assessee for set off

was disallowed by the Hon'ble Supreme Court holding that the law as on 1st day of the relevant assessment year was applicable.

35. We have carefully gone through the judgment of Hon'ble Supreme Court in the case of Reliance Jute & Industries Ltd. (supra) cited by the Ld. DR in support of the revenue's case on this issue. In the said case, the unabsorbed business loss of AY 1950-51 was set off by the assessee against the business income of the assessment year 1960-61 which claim was disallowed by the AO relying on the provisions of section 24(2)(iii) of the Indian Income-tax Act, 1922 as amended w.e.f. April 1, 1957 restricting carry forward and set off of unabsorbed business loss only for 8 years. The stand of the assessee was that by virtue of section 24(2)(iii) of 1922 Act as it stood before its amendment w.e.f. April 1, 1957, it had acquired a vested right to have the unabsorbed loss carried from year to year until it was completely set off and the subsequent amendment limiting the period for carry forward the loss to 8 years can not divest the assessee from vested right which was thus accrued to him. It was pointed out by the assessee that the amendment effected in 1957 was not retrospective in operation. Hon'ble Supreme Court did not find any substance in this claim of the assessee observing that there was no question of the assessee possessing any vested right under the law as it stood before the amendment. It was held by the Hon'ble Supreme Court that right claimed by the assessee under the law in force in a particular assessment year is ordinarily available only in relation to the proceedings pertaining to that year. It was held by the Hon'ble Supreme Court the provisions of sec.24(1) as amended in 1957 would govern the assessment for the assessment year 1960-61 and the unabsorbed loss of the assessment year 1950-51 could not be carried forward for more than 8 years. The Hon'ble Supreme Court thus held that the law as prevalent on the 1st day of the relevant assessment year would be applicable to the proceedings pertaining to that year and the assessment for one assessment year cannot, in the absence of

a contrary provision, be effected by the law in force in another assessment year.

36. The issue involved in the present case, in our opinion, however is different inasmuch as there is no dispute about the fact that the provisions of sec.74(1) as amended w.e.f. 1.4.2003 are applicable to the assessment year under consideration that is AY 2003-04. The dispute however is that, having regard to the language used in the said provisions, whether section 74(1) as amended w.e.f. 1.4.2003 deal with carry forward and long-term capital loss for AY 2003-04 onwards or it governs the carry forward and set off of carry forward of such loss relevant to the period prior to AY 2003-04. In this regard, we have already held that going by the language used in the amended provisions of sec.74(1), the same are applicable only in respect of carry forward and set off of long term capital loss relating to AY 2003-04 and onwards and the carry forward and set off of such loss relating to the period prior to 2003-04 continued to govern by sec.74(1) as it stood prior to the amendment made w.e.f. 1.4.2003. In our opinion, this issue involved in the present case is more similar to the issue involved in the case of Govind Das and Others vs. ITO (supra) decided by the Hon'ble Supreme Court and relied upon by the Ld. Counsel for the assessee in support of the assessee's case. It is pertinent to note here that the said decision was rendered by the bench of three judges of Supreme Court and that too on 18th December, 1975 that is well before the decision rendered by the Bench of two judges of Hon'ble apex Court in the case of Reliance Jute and Industries Ltd on October 10, 1979.

37. In the case of Govinddas & Ors. (supra), the HUF was a partner in the export firm and in the mining firm. During the course of assessment proceedings for the AY 1957-58, the claim was made on behalf of the members of the HUF that they had effected the partial partition of their immovable property on 15th November, 1955. This

claim was accepted by the AO after due enquiry and finding was recorded by him in the order of assessment. Consequent to its partial partition, the HUF ceased to be a partner in the export firm and the mining firm and two Members of the HUF namely Gulabdas and his son Govinddas continued to be partners in these two firms in their individual capacity. The result was that from and after the assessment year 1957-58, no part of the income of the Export Firm or the Mining Firm was included in the assessment of the Hindu Undivided Family. The assessments of the Export Firm and the Mining Firm for assessment years 1950-51 to 1956-57 were reopened after the new Act came into force and reassessments were made enhancing the assessable income of the two firms in accordance with the procedure provided in the new Act. Consequent upon the reassessments, notices were issued to HUF for assessments of its income for assessment years 1950-51 to 1956-57 since it was a partner in these two firms during those years. The Income-tax Officer after following the requisite procedure passed an order of reassessment for each of the assessment years 1950-51 to 1956-57 enhancing the assessable income of the HUF. Consequent to the enhancement of assessable income of the HUF, the ITO determined the several liability of the members of the HUF u/s.171(7) of the New Act by apportioning the tax assessed on the HUF for assessment years 1950-51 to 1956-57. This lead to the filing of the petition by each of the Members of the HUF in the Bombay High Court. The Petitioner did not object to the recovery of tax liability of the HUF from out of the joint family property which had come to their hands on the partial partition. Their argument however was that they were not jointly or severally liable for the tax liability and the ITO was not entitled to proceed against them personally for recovery of any share of the tax liability as per the provisions and sub-sec.(6) and sub-sec.(7) of sec.171 of the New Act. The principle contention of the Petitioners was that the said provisions of the New Act had no application where the assessment of the HUF was made under the provisions of the Old

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Act of 1922 and at the time when tax was sought to be recovered, the family had already effected the partial partition. This contention was rejected by the Hon'ble Bombay High Court. The Hon'ble Supreme Court, however, accepted the claim of the assessee and held that the assessments of the HUF for the assessment years 1950-51 to 1956-57 having been completed in accordance with the provisions of the Old Act which included sec.25A, the AO was not entitled to avail the provisions enacted in sub-sec. (6) and sub-sec.(7) of sec.121 of the New Act for the purpose of recovery of the tax or any part thereof personally form any members of the joint family including the petitioner.

38. At the time of hearing before us, the Ld. DR has contended that the decision of Hon'ble Supreme Court in the case of Govinddas (supra) was rendered on the interpretation of the provisions of sec.297(2)(d)(ii) of 1961 Act and relying on these specific provisions, the Hon'ble Supreme Court held that the right vested in the assessee as per 1922 Act had been saved. He has contended that in the situation as obtained in the case of Govind Das, the rights were accrued under 1922 Act and they were held to have been saved because of repeal of old Legislature keeping in view the specific provisions contained in sec.297(2)(d)(ii).

39. After having perused carefully the entire text of the judgment of the Hon'ble Supreme Court in the case of Govinddas & Ors. (supra), we are unable to agree with this contention of Ld. DR. It is observed that the entire discussion in the case of Govinddas & Ors. was made by the Hon'ble Supreme Court without referring to the provisions of sec.297(2)(d) and even the issue was decided in favour of the assessee without any reference to the said provision as is evident from page no.133 of the report. It was only after deciding the issue in favour of the assessee that their Lordships of Supreme Court proceeded to deal with and discuss the contention raised by the revenue relying on the

provisions of sec.297(2)(d) of 1961 Act. The contention of the Ld. DR that the decision in the case of Govinddas & Ors. (supra) was decided by the Hon'ble Supreme Court on interpretation of provisions of sec.297(2)(d) of 1967 Act thus is devoid of any merit and the same cannot be accepted. As a matter of fact, the issue was decided by the Hon'ble Supreme Court on the basis of a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms 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 otherwise than as regards the matters of procedure. After referring this well settled rule on page no.132 of the report, the Hon'ble Supreme Court also made a reference to a general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Ed.) and reiterated in several decisions of the Supreme Court as well as English Courts that "all statutes other than those which are merely declaratory or which relate only to the matters of procedure or of evidence are prima facie prospective" and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. Applying this principle of interpretation, Hon'ble Supreme Court held that it is clear that Sub-section (6) of Section 171 applied only to a situation where the assessment of a Hindu undivided family is completed under Section 143 or Section 144 of the new Act and it could not have any application where the assessment of a HUF was completed under the corresponding provisions of the old Act. It was held that such a case would be governed by sec.25 of the old Act which did not impose any personal liability on the Members in case of partial partition and to construe sec.171(6) as applicable in such case with consequential effect of casting on the members personal liability which did not exist

under sec.25A, would be to give retrospective operation to the said provision which is not warranted either by the express language of that provision or by necessary implication.

40. In the present case, the provisions of sec.74(1) as amended w.e.f. 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 AY 2001-02 against short-term capital gain of the year under consideration and as already noted by us, the plain grammatical construction of the language of sec.74(1) as amended w.e.f. 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 AY 2003-04 and subsequent years. The right accrued to the assessee by virtue of sec.74(1) as it stood prior to the amendment made w.e.f.1.4.2003 thus has not been taken away either expressly by the provisions of sec. 74(1) as amended w.e.f. 1.4.2003 or even by implication.

41. The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed. After referring to this golden rule in its judgment in the case of Maharaja Chintamani Saran Nath vs. State of Bihar & Ors. AIR 1999 SC 3609, the Hon'ble Supreme Court also referred to Francis Benion's Statutory Interpretation, 2nd Edn. wherein the learned author commented that the essential idea of a legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such is the nature of law and the true principle is that l*ex prospicit non respicit* which means law looks forward and not back. As Willes, J. said, retrospective legislation is 'contrary to the general principle that

legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.

42 In the case of CIT vs. Shah Sadiq and Sons (supra), a similar issue again arose for the consideration of Hon'ble Supreme Court. In the said case, the assessee, a partnership firm, had claimed the set off of the speculation losses suffered in the assessment years 1960-61 and 1961-62 against the speculation profit of the previous year 1962-63 by virtue of sec.24(1) of the 1922 Act which gave a right to the assessee to carry forward the unabsorbed speculation losses to be set off against speculation profits of the future years. The claim of the assessee for such set off was disallowed by the ITO relying on the provisions of sec.75 of the 1961 Act which provided an entirely new scheme as follows;

> "sec.75 - losses of registered firms"
>
> (i) where the assessee is a registered firm, any loss which it cannot be set off against any other income of the firm shall be apportioned between the partners of the firm and the alone shall be entitled to have the amount of the loss set off and carry forward for set off u/s.70,71, 72,73, 74 & 74A.
>
> (ii) nothing contained in sub-section (1) of sec.72, sub-sec.(2) of sec.73, sub-sec.(1) of sec.74 and sub-sec.(3) of sec.74A shall entitled any assessee, being a registered firm, to have its loss carried forward and set off under the provisions of the aforesaid sections.

The matter was carried by the assessee in an appeal before the Tribunal which held that the assessee was entitled to set off the speculation losses suffered in the assessment years 1960-61 and 1961-62 against the speculation profits of the previous year 1962-63. The Hon'ble Allahabad High Court upheld the decision of the Tribunal

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and while disposing off the appeal filed by the revenue against the order of the Hon'ble Allahabad High Court, the Hon'ble Supreme Court held that under the Income-tax Act, 1922, the assessee was entitled to carry forward the losses of the speculation business and set off such losses against the profit made from that business in future years. It was held that the fact that right created by operation of sec.24(2) was a vested right could not be disputed and such a right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly. It is worthwhile to note here that in the case of Shah Sadiq and Sons (supra), reliance was placed on behalf of the revenue in support of its case on the decision of the Hon'ble Calcutta High Court in the case of Reliance Jute Mills co. Ltd. vs. CIT 86 ITR 570 (which was affirmed by the Hon'ble Supreme Court in 120 ITR 921) and it was opined by the Hon'ble Supreme Court that the principles enunciated therein will have no application to the controversy involved in the case of Shah Sadiq and Sons (supra).

43. It is no doubt true that the decision in the case of Shah Sadiq and Sons (supra) was rendered by the Hon'ble Supreme court on the basis of section 6 of the General Clauses Act of 1897 as well as sec.297(2) of the Income-tax Act, 1961 as submitted by the Ld. DR. However, as already noted by us, the decision in the case of Govinddas and Others (supra) which is a decision of the Bench of three Judges of Hon'ble Supreme court was rendered on this issue on the basis of well settled rule of interpretation hallowed by time and sanctified by judicial decisions that unless the terms 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 to impose a new liability otherwise than as regards matters of procedure.

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44. It is observed that the decision of Hon'ble Madras High Court in the case of CIT vs. SSC Shoes Ltd. 259 ITR 674 cited by the Ld. Counsel for the assessee further clinches this issue. In that case, the assessee had claimed set off of depreciation carried forward from AY 1987-88 and 1988-89 in the assessment year 1989-90 by virtue of the provisions of sec.80VVA. The said provisions had imposed certain restrictions on the allowability of certain deductions specified in sub-sec.(2) and the deductions were restricted in the sense that the same were granted to the extent of 70% of the amount of profits as computed u/s.80VVA(2). Sub-sec.(4) of sec.80VVA provided that where the deduction was not granted in respect of any provision specified in sub-sec.(2) by virtue of the restrictions, the amount remaining unallowed shall be added to the amount to be allowed in the next financial year and shall be deemed to be a part of the deduction admissible to the assessee under the said provision for that year. Sec.80VV(a) further provided that the deduction not be allowed shall be added to the deduction for the succeeding assessment years. Sec.80VVA was deleted by the Finance Act, 1987 w.e.f. April 1, 1988 and as a result of the said deletion, the AO held that the assessee was not entitled to carry forward and set off the deduction u/s.80HHC relating to AY 1987-88 and 1988-89 in the assessment year 1989-90. The Ld. CIT (A) confirmed the view taken by the AO. The Tribunal however took a different view that a vested right had accrued to the assessee to carry forward and set off the unabsorbed deduction u/s.80HHC to which it was entitled to during the subsequent years. The Hon'ble Madras High Court upheld the decision of the Tribunal holding that a vested right u/s.80VVA(4) of the Act had accrued in favour of the assessee and that right was not taken away either expressly or by necessary implication by deletion of sec.80VVA of the Act. For this conclusion, the Hon'ble Madras High Court relied on the decision of Hon'ble Supreme Court in the case of CIT vs. Shah Sadiq and Sons (supra). It was noted by the Hon'ble Madras High Court that the decision in the case of Shah Sadiq and Sons (supra) was

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rendered by the Hon'ble Supreme Court with reference to sec.6 of General Clauses Act and it was held by Hon'ble Madras High Court that though the Supreme Court was dealing with a case of repeal of enactment, the principles laid down in the case of Shah Sadiq and Sons (supra) would apply to carry forward of deduction provided u/s.80VVA(4) of the Act. It was held that there was no necessity to consider the larger question that sec.6 of General Clauses Act does not apply to the omission of a provision and the omission of a provision is different from "repeal" as the assessee had acquired a right to carry forward the unabsorbed depreciation deeming the same as deduction of the next following assessment year when sec.80VVA was in existence and in full force, which was not taken away by omission of the provision from statute book.

45. In our opinion, the position in the present case is similar to the one involved in the case of S.S.C. Shoes Ltd. (supra) inasmuch as provisions of sec.74(1) as amended w.e.f. 1.4.2003, going by the language used therein, expressly provide for and deal with carry forward and set off of loss under the head "capital gains" for assessment year 2003-04 and subsequent years and the right accrued to the assessee by virtue of sec.74(1) as it stood prior to the amendment made w.e.f. 1.4.2003 to set off brought forward long-term capital loss relating to the period prior to AY 2003-04 against short-term capital gain of subsequent year/s has not been taken away by the provisions of sec.74(1) substituted w.e.f. 1.4.2003.

46. In view of the above discussion, we are of the view that the provisions of sec.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, we answer the question referred to this Special

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Bench in favour of the assessee holding that the assessee is entitled to set off the long-term capital loss incurred in AY 2001-02 against the short-term capital gain made by it in AY 2003-04. Ground no.2 of the assessee's appeal is accordingly allowed.

47. As regards ground no. 1, it is observed that the issue involved therein relating to the head of income under which interest received by the assessee u/s 244A on income tax refund is chargeable to tax is covered against the assessee by the decision of Hon'ble Madras High Court in the case of Smt. B. Seshamma vs. CIT 119 ITR 314 wherein it was held that the interest paid being a statutory obligation with respect to an amount found refundable, it would be assessable under the head " Income from other sources". Following the said decision of Hon'ble Madras High Court, the coordinate bench of this Tribunal at Pune in the case of Sala Mining Industries Ltd. vs. Dy. CIT 61 ITD 105 held that once the income-tax has been paid by the assessee, it ceases to be the money of the assessee and whatever refund is issued after final adjustment it would be a general debt due to the assessee arising under the statute. It was held that the interest arising on such debt cannot be said to have any connection with the business activities carried on by the assessee and therefore such interest is assessable as income from other sources. Keeping in view these judicial pronouncements, we uphold the impugned order of the Ld. CIT (A) confirming the action of the AO in assessing the interest received by the assessee on income-tax refund as income from other sources and not as business income as claimed by the assessee. Ground no.1 of the assessee's appeal is accordingly dismissed.

48. As regards the issue involved in ground no.3 relating to levy of interest u/s.234D, it is observed that Explanation 2 has been inserted in sec.234D by the Finance Act, 2012 with retrospective effect from 1.6.2003 clarifying that the provisions of sec.234D shall also apply to the assessment year commencing before the first day of June, 2003 if

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the proceedings in respect of such assessment year is completed after the said date. In the present case the assessment year involved is AY 2003-04 and since the proceedings in respect of the said year has been completed on 30.11.2005, we are of the view that the assessee is liable to pay an interest u/s.234D as per Explanation 2 to sec.234D inserted by the Finance Act, 2012 with retrospective effect from 1.6.2003. In that view of the matter we uphold the impugned order of the Ld. CIT (A) confirming the interest charged by the AO u/s.234D and dismiss ground no.3 of the assessee's appeal.

49. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on this day of 10th August, 2012.

Sd/-	Sd/-	Sd/-
(**I.P. BANSAL**)	(**G.E. VEERABHADRAPPA**)	(**P.M. JAGTAP**)
JUDICIAL MEMBER	**PRESIDENT**	**ACCOUNTANT MEMBER**

Mumbai, Date: **10th August, 2012**

Copy to:-

1) The Appellant.
2) The Respondent.
3) The CIT (A)-III, Mumbai.
4) The CIT, MC-III, Mumbai.
5) The D.R. "A" Bench, Mumbai.
6) Copy to Guard File.

By Order

/ / True Copy / /

Asstt. Registrar
I.T.A.T., Mumbai

*Chavan