

CHAPTER - III

STATUTORY PROVISIONS REGARDING

SET OFF OF LOSSES AND

CARRY FORWARD OF LOSSES

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STATUTORY PROVISIONS REGARDING SET OFF OF LOSSES AND
CARRY FORWARD OF LOSSES :-

The provisions relating to set off & carry forward of losses are contained under Chapter-VI of the Income Tax Act, 1961 & they are contained u/s.70 to Sec.80 of the said Act. The detailed statutory provisions as they stand, the various amendments made from time to time, comments on each such section & relevant case law is discussed hereunder :-

¹ Set off of loss from one source against Income from another source under the same head of income -

Sec.70 - ²(***) Save as otherwise provided in this Act, where the net result for any assessment year in respect of any source falling under any head of income ³(***) is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head.

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- 1) Substituted by the Finance(No.2) Act,1962,w.e.f.1.4.1962.
 - 2) "(1) " omitted by the Finance Act,1987, w.e.f.1.4.1988
 - 3) " other than capital gains" omitted, ibid.

(2) ⁴(* * *)

COMMENT : Sections 70 to 80 concern with losses sub-
stained by an assessee & the circumstances under which such
losses may be set off or carried forward for future years
for the purpose of being set off provides for set off of loss
from one source; in the same year against income from another
source under the same head. Speculative losses cannot be set
off against non-speculative business profit even in the same
year.

The provisions of section 70(1) are newly enacted in
the sense that no such provisions were to be found in the 1922
Act, although the judge made law always held so. Loss in a
speculation business can be set off only against the profit in
a speculation business.

4) Sub-section(2) was omitted, *ibid.* Prior to its omission
sub-section(2) stood as under :

"(2)(1) where the result of the computation made for any
assessment year under section 48 to 55 in respect of any short-
term capital asset is a loss, the assessee shall be entitled to
have the amount of such loss set off against the income if any,
as arrived at under a similar computation made for the assessment
year in respect of any other capital asset.

5) Set off of loss from one head against income from another -

Sec.71- where in respect of any assessment year, the net result of the computation under any head of income is a ~~loss~~ loss, the assessee shall, subject to the provisions of this chapter, be entitled to have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head.

(ii) where the result of the computation made for any assessment year u/s.48 to 55 in respect of any capital asset other than a short-term capital asset is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being a short-term capital asset".

5) Substituted by the Finance Act,1987,w.e.f.1.4.1988
Earlier, sec.71 was substituted by the Finance (No.2) Act,1962, w.e.f. 1.4.1962 & its sub-section (2) was substituted by the Finance (No.2) Act,1967, w.e.f.1.4.1968. Prior to its substitution, sec.71 stood as under :

"71- set off of loss from one head against income from another-

(1) where in respect of any assessment year the net result of the computation under any head of income other than "Capital

COMMENT : This section provides for set off of loss from one head, in the same year, against income from another head. The first thing is that if losses from one source can be set off against income from another source under the same head of income for the same assessment year, If, however, such losses cannot be set off. Sec.71.,provides for set off against income for the same assessment year under any other head. Business loss to be set off only against assessable income. Losses from the business of owning & maintaining race horses & speculation business loss cannot be set off of other income.

 gains" is a loss & the assessee has no income under the head "Capital gains", he shall, subject to the provisions of this chapter, be entitled to have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head.

(2) where in respect of any assessment year, the net result of the computation under any head of income other than "Capital gains" is a loss & the assessee has income assessable under the head "Capital gains", such loss may, subject to the provisions of this chapter, be set off -

(1) against the income, if any, of the assessee assessable for that assessment year under any head including income assessable under head "Capital gains" (whether relating to

Inter head adjustment is their losses under the heads, "Salaries", "Income from house property" & "Income from other sources" cannot be carried forward.

short term capital assets or any other capital assets), or

(ii) if the assessee so desires, only against his income, if any, under the head "Capital gains", in so far as such income relates to short term capital assets & income under any other head.

3) where in respect of any assessment year the net result of the computation under section 48 to 55 in respect of capital gains relating to short-term capital assets is a loss & the assessee has income assessable under any head of income other than "Capital gains", the assessee shall, subject to the provisions of this chapter, be entitled to have such loss set off against the income aforesaid."

Carry forward & set off of business losses :

Sec.72 - ⁶(1) where for any assessment year, the net result of the computation under the head "profits & gains of business or profession" is a loss to the assessee, not being a loss sustained in a speculation business, & such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of sec.71, so much of the loss as has not been so set off or,

⁷(* * *) where he has no income under any other head, the whole loss shall, subject to the other provisions of this chapter, be carried forward to the following assessment year, and -

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- 6) substituted by the Finance(No.2) Act,1962,w.e.f.1.4.1962.
- 7) "where the assessee has income only under the head"Capital gains" relating to capital assets other than short-term capital assets & has exercised the option under sub-section (2) of that section or " omitted by the Finance Act,1987, w.e.f. 1.4.1988. In the omitted portion, expression in italics was inserted by the Finance (No. 2) Act , 1967, w.e.f. 1.4.1968.

(i) it shall be set off against the profits & gains, if any, of any business or profession carried on by him & assessable for that assessment year :-

Provided that the business or profession for which the loss was originally computed continued to be carried on by him in the previous year relevant for that assessment year ; and

(ii) if the loss can not be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year & so on :-

⁸Provided that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three year refered to in that section, such business is re-established, reconstructed or revived by the assessee, so much of the loss as is attributable to such business shall be carried forward to the assessment year relevant to the previous year in which the business is so re-established, reconstructed or revived, and -

8) Inserted by the Finance (No.2) Act, 1967,w.e.f.
1.4.1967.

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

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

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

(3) No loss ⁹(other than the loss referred to in the proviso to sub-section (1) of this section) shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

9) Inserted by the Finance (No. 2) Act, 1967
w.e.f. 1.4.1967.

COMMENT :

This section ~~4~~ provides that when & how the unabsorbed business loss other than speculation loss, can be carried forward to future years to be set off against business profits of future years. The provision relating to speculation losses existing in the said section 24(2) has, in the 1961 Act. No postponement of set off due to pendency of litigation.

For this purpose, business profits would also include profits derived from a business activity but assessable under the heads other than " profits & gains of business or profession". Despite the fairly exhaustive tests laid down, a decision whether two or more types of business activities carried on by the assessee constitute the same business; depends upon facts & circumstances of each case.

CASE LAW

Sec.72 - (1985)48 CTR(SC)176

In the supreme Court of India

V.D.Tuljapurkar, Sabyasachi Mukharji & Ranganath Misra JJ

Commissioner of Income Tax

V

Mother India Refrigeration Industries(Pvt)Ltd.

Civil Appeal No.1570-1571(NI) of 1973

August 14, 1985

Loss-Carried forward-priority for set off-current depreciation to have priority over carried forward business loss.

Depreciation-set off-current depreciation to have priority over carried forward business loss.

Set off-priority-current depreciation to have priority over carried forward business loss.

Statute-Legal Fiction-scop

Income Tax Act,1961,SS 32(2) & 72(2) - Income Tax Act,

1922, proviso(b) to S 10(2)(vi) & proviso(b) S.24(2)

Scheme of the Act is that only net profits & gains of of business after the specified deductions are made, can be subjected to tax-one of such deductions is the

current depreciation-As such current depreciation is to be first deducted before any question of either carry forward of unabsorbed depreciation or that of unabsorbed business losses of earlier years arises. No deviation from this normal Rule of Accountancy is contemplated either by proviso(b) to S.10(2)(vi) read with proviso (b) S.24(2) of the 1922 Act or by S.32(2) read with 72(2) of the 1961 Act-Sec.32(2) corresponding to proviso(b) to S.10(2)(vi) of 1922 Act provides firstly for carry forward of unabsorbed depreciation & secondly for clubbing the said carried forward depreciation with the current depreciation & deeming the aggregate to be current years depreciation & such deeming is specifically made subject to S.72(2) proviso (b) of S.24(2) of 1922 Act-Accordingly, where there is carried - forward depreciation allowance to be set off, effect has first to be given the set off of unabsorbed business losses-there is no requirement for the unabsorbed business losses getting priority over the current depreciation-the interpretation of the legal fiction in S.32(2) -Referred to above should not be extended beyond its legitimate field-purpose behind enactment of the legal fiction is to see to it that the unabsorbed business losses may not get-Deprived from being

set off in certain cases in view of the statute permitting there in carry forward only for a limited number of years as against provision of no such time limit in case of unabsorbed depreciations.

FACTS :

Under the scheme of the Act, it is the net profits & gains after the specified deductions are made that are subjected to tax, one of such deductions pertains to depreciation allowance at the prescribed rate of percentage of the written down value of the business asset, & this is provided in S.10 (2)(vi) of the 1922 Act & in S.32(1) of the 1961 Act. Up to this stage of computation no question of either carry forward of unabsorbed depreciation of the earlier years or carry forward of unabsorbed business losses of earlier years arises. In other words, the normal accountancy principle has to be applied in arriving to the net income from business for that year by debiting the current years depreciations. The question is whether any deviation from this normal rule of accountancy is contemplated by proviso(b) S.10(vi) read with Proviso(b) to S.24 of the 1922 Act or by S.32(2) read with S.72 of the 1967 Act & it is here that the aspect of proper construction of these provisions arises.

HELD :

(1) The proviso (b) to S.10(2)(vi), corresponding to the present S.32(2) of 1961 Act, is in two parts & provides for two things, its first part provides of a carry forward of unabsorbed depreciation with the current year's depreciation & deeming the aggregate to be the current year's depreciation. However, carrying forward of the unabsorbed depreciation & the deeming provision in(b) is not absolute but is subject to the proviso(b) to S.24(2) (corresponding to the present S.72(2) of the 1961 Act.) Had proviso(b) to S.24(2) not been enacted by the legislature the result would have been that the aggregate depreciation would have been deducted first out of the profits & gains in preference to unabsorbed business losses which might have been carried forward under S.24(2) but as such losses can be carried forward only for limited number of years, the assessee would in certain circumstances have in his books losses which he might not be able to set off even within the time limit during which set off is permitted. In order to prevent such a situation the legislature enacted proviso(b) to S.24(2) & proviso(b)

to S.24(2) corresponding to Sec.72(2) of the 1961 Act) expressly states "where depreciation allowance is, under Cl.(b) of the proviso to cl.(vi) of sub S.(2) of S.10 (the present S.32(2) also to be carried forward effect shall first be given to the provisions of this sub-section." In other words, it clearly provides that in the matter of set off the unabsorbed business losses of the earlier years will have preference over unabsorbed depreciation that is required to be carried forward under proviso (b) to S.10(2)(vi) & no preference over the current depreciation is intended.

(ii) It is true that proviso (b) to S.10(2)(vi) creates a legal fiction & under that fiction unabsorbed depreciation either with or without current years depreciation is deemed to be the current years depreciation. But legal fictions are created only for some definite purpose & these must be limited to that purpose & should not be extended beyond their legitimate field- vide *Bengal-Immunity co.Ltd. V State of Bihar* (1955) 2 SCR 603 at 606. Clearly, the avowed purpose of the legal fiction created by the deeming provision contained

in proviso (b) to S.10(2)(vi) is to make the unabsorbed carried forward depreciation partake of the same character as the current depreciation in the following year, so that it is available, unlike unabsorbed carried forward business loss, for being set off against other head of income of that year - CIT V. Jaipuria China clay mines (P) Ltd. 1966 59 ITR 555 at 561 & CIT V. Ravi Industries 1963 49 ITR 145 (Bom) cited in support -

(iii) Such being the purpose for which the legal fiction is created, it is difficult to extent ~~the~~ the same beyond its legitimate field & will have to be confined to that purpose.

It is, therefore, not possible to accept the contention of the assessee that because of the legal fiction the unabsorbed carried forward losses should be given preference not merely over the unabsorbed carried forward depreciation but also over the current year's depreciation. There is thus no modification of nor deviation from the basic & well recognised principle of commercial accountancy by the statute as is contended by the assessee -

(iv) Since the provisions of the 1961 Act are in pari material with the corresponding provisions under the 1922 Act, the same conclusion must follow under the 1961 Act namely that current depreciation must be deducted first before deduction the unabsorbed carried forward business losses of the earlier years in giving set off while computing the total income of any particular year -

Aluminium corporation of India Ltd. V.
CIT (1958) 33 ITR (Cal.)

¹⁰ Provisions relating to carry forward & set off of accumulated loss & unabsorbed depreciation allowance in certain cases of amalgamation

Sec.72A - (1) where there has been an amalgamation of a company owning an industrial undertaking or a ship with another company & the Central Government, on the recommendation of the specified authority, is satisfied that the following conditions are fulfilled, namely -

10) Inserted by the Finance (No.2) Act, 1977,
w.e.f. 1.4.1978

- a) the amalgamating company was not, immediately before such amalgamation, financially viable by reason of its liabilities, losses & other relevant factors;
- b) the amalgamation was in the public interest; and
- c) such other conditions as the Central Government may; by notification in the official Gazette, specify, to ensure that the benefit under this section is restricted to amalgamations which would facilitate the rehabilitation or revival of the business of the amalgamating company; then, the Central Government may make a declaration to that effect, and, thereupon, notwithstanding anything contained in any other provision of this Act, the accumulated loss & the unabsorbed loss & the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected & the other provisions of this Act relating to set off & carry forward of loss & allowance for depreciation shall apply

accordingly.

(2) Notwithstanding anything contained in ~~sub~~-section(1), the accumulated loss shall not be set off or carried forward & the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless the following conditions are fulfilled, namely -

(i) during the previous year relevant to the assessment year for which such set off or allowance is claimed, the business of the amalgamating company is carried on by the amalgamated company without any modification or reorganisation or with such modification or reorganisation as may Central Government to enable the amalgamated company to carry on such business more economically or more efficiently,

(ii) the amalgamated company furnishes, along with its return of income for the said assessment year, a certificate from the specified authority to the effect that adequate steps have been taken by that company for the rehabilitation or revival of the business of the amalgamating company.

¹¹(3) Where a company owning an industrial undertaking or a ship proposes to amalgamate with any other company & such other company submits the proposed scheme of amalgamation to the specified authority & that authority is satisfied, after examining the scheme & taking into account all relevant facts, that the conditions referred to in subsection (1) would be fulfilled if such amalgamation is effected in accordance with such scheme or, as the case may be, in accordance with such scheme as modified in such manner as that authority may specify, it shall intimate such other company that, after the amalgamation is effected in accordance with such scheme or, as the case may be, such scheme ~~as, sox~~ modified, it would make (unless there is any material change in the relevant facts) a recommendation to the ~~c~~entral Government under subsection (1).

11) Inserted by the Finance Act, 1978, w.e.f.

1.4.1978.

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EXPLANATION

In this Section -

a) "accumulated loss" means so much of the loss of the amalgamating company under the head "profits & gains of business or profession" (not being a loss sustained in a speculation business) which the amalgamating company would have been entitled to carry forward & set off under the provisions of section-72 if the amalgamation had not been effected.

¹²(b) "Specified authority" means such authority as the Central Government may, by notification in the Official Gazette, specify for the purposes of this section,

(c) "Unabsorbed depreciation" means so much of the allowance for depreciation of the amalgamating company which remains to be allowed & which would have been allowed to the amalgamating company under the provisions of this Act if the amalgamation had not been effected.

12) For specified authority, refer Taxmans's Direct Taxes Circulars, Vol.1, 1988, edn, P 504.

COMMENT -

An extracted the books of chaturvedies in this section concern with provides when & how the unabsorbed business loss other than speculation loss; can be carried forward to future years to be set off against business profits of future years. Loss sustained by a Hindu Undivided Family cannot be set off against the income of a firm constituted by the erstwhile members of the same family subsequently disrupted.

If, however, an individual partner dies & his widow becomes a partner in his place; the widow cannot have the benefit of set off in respect of ~~un~~absorbed loss of her deceased husband. No resident's Indian loss to be carried forward & not set off against foreign income.

Similarly, "unabsorbed depreciation" means so much of the allowance for depreciation of the amalgamating company which remains to be allowed & which would be allowed to ~~the~~ amalgamating company had not been effected.

CASE LAWSECTION 72-A - ITAT Delhi Bench 'B'

Kelvinator of India Ltd.

V.

Inspecting Assistant Commissioner
IT Appeal No. 2855 (Delhi) of 1985
February 29, 1988

K.C.Srivastav, Accountant Member
& S.S.Mehra, Judicial Member

Sec.72-A - of the Income tax Act, 1961-losses carry forward & set off of losses in certain cases of amalgamation. A certain company was amalgamated with assessee company on 1.7.1980, when certain loss & unabsorbed depreciation of that company were claimed to be carried forward & set off against profit of assessee - company for Ass.year 1982-83, whether even though adequate-steps for rehabilitation of revival of business of amalgamated company as contemplated u/s.72-A(2) were taken in a later year, set off could be allowed in year of amalgamation which was current year, held; yes;

FACTS :

A certain company was amalgamated with the

assessee-company with effect from 1.7.1980. At the time of such amalgamation, there were certain losses & unabsorbed depreciation which had been claimed to be carried forward & set off against the profit of the assessee-company for the Ass. year-1982-83. The IAC (Assessment) noted that under Sec.72A(2) the accumulated loss could be set off & carried forward if the amalgamated company furnished a certificate from specified authority to the effect that adequate steps had been taken for the rehabilitation or revival of the business of the amalgamating company. It was noted that it had not been possible for the assessee to implement the revival scheme in the years 1980-81 & 1981-82 & it was only in the Ass. Year 1982-83 onwards that the scheme was implemented. The IAC, therefore, held that since the specified authority had not issued the required certificate the carry forward of loss & unabsorbed depreciation could not be allowed in the year 1982-83 on appeal, the commissioner (appeals) referred to the requirements of the filling of the certificate & the satisfaction of the condition for taking adequate steps & held that the benefit of

carry forward & set off could not be taken unless adequate steps were taken & could not be set off in a year prior to the year when such adequate steps were taken. According to him the carry forward loss & unabsorbed depreciation would not be deemed as the loss & depreciation respectively of the year of amalgamation but the set off would be in the year in which adequate steps had considerably been taken by the assessee. He, therefore, directed that the unabsorbed loss & depreciation should be set off only in the year 1984-85 & not in this year on second appeal.

HELD ;

Sec.72A(1) clearly provides that the accumulated loss & the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or allowance for depreciation of the amalgamated company for the previous year in which amalgamation was effected. This process mainly depends on the declaration made by the Central Government as contemplated in sub-sec.(1) & the other condition which is placed in the statute for this purpose, is contained in sub-section(2).

These conditions are that during the previous year relevant to the Ass. Year for which set off allowance is claimed the business of the amalgamating company is carried on by the amalgamated company without any modification or reorganisation or with such modification or the reorganisation as may be approved by the Central Government to enable the amalgamated Company to carry on such business more economically or more efficiently & the amalgamated company furnishes along with its return of income for the said assessment year a certificate from the specified authority to the effect that adequate steps have been taken by that company for the rehabilitation or revival of the business of the amalgamating company. As far as the first condition laid down in sub-sec (2) was concerned that related to the situation during the previous year relevant to the Ass. year for which such set off of allowance was claimed, there was no dispute regarding the fulfilment of this conditions. The second condition was that the amalgamated company would satisfy the specified authority that adequate steps had been taken for rehabilitation or revival of the business of the ama-

gamating company & to that effect the certificate was furnished. This action of taking adequate steps for revival need not necessarily be taken in the year in which the amalgamation was effected & it might take more than one year to take such steps which might be considered to be adequate. Once it was found that in this case the amalgamated company had taken adequate steps for the rehabilitation or revival of the business of the amalgamating company, the amalgamated company became entitled for set off of the unabsorbed losses & unabsorbed depreciation on the basis that it became the loss & depreciation of the amalgamated company for the previous year in which the amalgamation was effected. In the present case, the amalgamation became effective from 1.7.1980 which fell in the accounting period relevant for the assessment year 1982-83. The set off for the carry forward losses of the amalgamated company had not to wait to be set off against the profits of that year when adequate steps were found to have been taken. It was true that up to the end of the previous year relevant

for the current assessment year adequate steps had not been taken & such steps were taken in the later year. Even, then, under the law, the set off had to be allowed in the year of amalgamation which was the current year. The order of the commissioner (Appeals) was, according, reversed

O.P.Vaish , Ajay Vohra & Vijay Vaish for
the Appellant B.D.Sinha for the Respondent.

Sec.73 - Losses in Speculation business -

(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits & gains; if any, of another speculation business.

(2) Where for any assessment year any loss computed in respect of a speculation business has not been wholly set off under sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no income from any other speculation business, shall, subject to the other provision of this chapter, be carried forward to the following assessment year, and



i) it shall be set off against the profit & gains; if any, of any speculation business carried on by him assessable for that assessment year, and

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

3) In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section(2) of sec.72 shall apply in relation to speculation business as they apply in relation to any other business.

4) No loss shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

13 Explanation -

Where any part of the business of a company (14 other than a company whose gross total income consists mainly of income which is chargeable under the head "Interest on Securities", "Income from house property", "Capital gains", & "Income from other sources", or a company the principal business of which is the business of banking or the granting of loans & advances) consists in the purchase & sale of shares of other companies, such company shall, for the purposes of this section be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase & sale of such shares.

COMMENT

This section provides that when & how speculation loss can be set off against speculation profits of the same or future year or future years. Sec.73 of the Income Tax Act, 1961, deals

- 13) Inserted by the Taxation Laws (Amendment) Act, 1975, w.e.f. 1.4.1977
- 14) Substituted for "other than in investment company, as defined in clause(ii) of sec. 109 " by the Finance Act, 1987 w.e.f. 1.4.1988.

separately with losses in speculation business which was, under the Act, dealt with inter alia, in Sec.24(2) along with other business losses. If, speculation losses of earlier year or years were carried forward & if in the year of account a speculation profits for the accounting year should be adjusted against the carried forward speculation losses of the previous year or years before allowing any other loss to be adjusted against those profits. Loss incurred in speculative business in banned items cannot be carried forward to the next year. Long term capital loss, as reduced above, can be set off against any income under the head "Capital gains". Long term capital loss will be reduced by the amount mentioned u/s.48(2) 10,000 + a proportion of the remaining amount

CASE LAW

SECTION 73 : (1986) 57 CTR(SC) 25

In the Supreme court of India

H.S.Pathak & Sabyasachi Mukharji, JJ
Brook Bond & Company Ltd.

V.

Commissioner of Income Tax
Civil Appeal No.2020(NT) of 1974
September 30, 1986

INCOME :

Head of Income-Business income or income
~~from~~ other source-Dividend income for shares in
subsidiary company.

LOSS

carry forward & set off - carrying on of
business

Income Tax Act, 1922, SS 6 & 24(2), corresponding
to SS14 & 72, 73, & 75 of the 1961 Act, when in-
come pertains to a certain head, the source of
such income is peculiar to that head- However, co-
mercial considerations may properly describe the
source differently, e.g. Securities held by a

banking company in the course of business constitute its Trading assets & income derived there from would, in commercial sense be regarded as business income but income from such securities are computable under the head, "Interest on Securities" & not under the head "Income from business" - In the present case, the assessee foreign tea company had hundred percent shareholding in an Indian subsidiary company-However, no material. Evident was produced indicating that the shareholding was necessarily incidental to the business of tea carried on by the assessee or that the holding was as business assets. Assessee failed to convince the Commissioner as well as the High Court except for the Indian Company there was nothing to show that the investments of the assessee in other tea companies were intended to bring or in fact brought about, some advantage or benefit to the business carried on by Assessee-mere fact that shareholdings related to tea companies was not sufficient - High Court was, therefore, justified in holding that the dividend income of the Assessee could not be regarded as business income. That being so,

Assessee could not raise the point that loss arising to it in the assesment year 1955-56 should be allowed to be carried forward & set off against income of subsequent year as this claim proceeded on the assumption that the shares held by the assessee are regardable as its, trading assets.

** Depreciation (unabsorbed) - carry forward & set off tentative new expressed by High Court & no final opinion expressed.

Income Tax Act, 1922, SS 10(2) & 33A(1), proviso(b) corresponding to SS.32(2) & 264 of the 1961 ACT, assessee foreign company, had hundred percent shareholding in an Indian Subsidiary company - Assessment for assessment year 1955-56 resulted in to a net loss assessee, in revision before the commissioner, claimed that the loss should be ascertained for the purpose of carrying it forward & that loss should be bifurcated between unabsorbed depreciation & other loss - High Court appeared to be of tentative new that the assessee was entitled to the carry forward of unabsorbed depreciation, but did not express any final opinion as it decided to decline relief

on the ground that assessment for year 1956-67 had already been closed & that the grant of relief would have its consequence on the assessment for the Assessment for the Assessment Year 1957-58, respect of which an appeal was pending - mere pendency of appeal could not bring the case within the proviso(b) to sub-sec.(1) of sec.33A but no opinion on the tentative view is expressed at this stage as the supreme Court is concerned merely with the correctness of the High Court refusing to grant relief after it reached the tentative finding regarding merits of assessee & claim-order of the commissioner ought to have been set aside by the high court & the commissioner ought to have been directed to consider the claim on merits - High Court not having done so, that direction is made now revenue will also be entitled now to contend that the assessee is not entitled to carry forward of unabsorbed depreciation.

Head of income & carry forward of loss

HELD :

(i) Ordinarily when income pertains to a certain head, the source of such income is peculiar to that head, but it is not unusual that commercial consi-

derations may properly describe the source differently. For instance, a banking concern may hold securities in the course of its business. The securities constitute its trading assets & income from them would in the commercial sense be regarded as business income. However, for the purposes of computation under the income tax law the income from such securities would be computed not under the head "Income from business" but under the head "Interest on Securities: Accordingly the mere circumstance that the appellant showed by dividend income under the head "Income from other Sources" in its returns cannot in law decide the nature of the dividend income. It must be determined from the evidence whether having regard to the true nature & character of the income it could be described as income from business, even though it is liable to fall for computation under another head.

(ii) In order that the shareholding in tea companies should be regarded as the business assets of the appellant there must be material evidence indicating that the ownership of the business of

tea carried on by the assessee or that the shareholdings are held as business assets. The commissioner was unable to draw any conclusion in favour of the appellant in this regard & the appellant failed to convince the High Court also.

Except for the Indian Subsidiary there is nothing to show that the investments of the appellant in the other tea companies were intended to bring, or in fact brought about, some advantage or benefit to the business carried on by the appellant. The mere fact that the shareholdings related to the tea companies is not sufficient by itself to support the submission that they were acquired to safeguard the appellants interest in the teabusiness carried by it. The matter is pending in appeal relating to the assessment year 1957-58 before the AAC & it will be open to the appellant to place further material before the AAC to enable him to come to an adequate & satisfactory decision, The High Court was, therefore, correct in his holding that the dividend income could not be regarded as income from business. Judgement of the Division Bench of the Calcutta High Court dt. 14.8.1973 affirmed.

(iii) The next point raised by the appellant is that loss should be carried forward under sub-5 (2) of S.24 from the asstt.year 1955-56 to the ass. year 1956-57. This point must also fail because it proceeds on the assumption that the shares held by the appellant be regarded as its trading assets

**** CARRY FORWARD OF UNABSORBED DEPRECIATION**

HELD :

(i) The High Court appeared to be of the tentative view that the appellant was entitled to carry forward claimed by it, but it did not express any final as it had decided to decline relief to the appellant on the ground that assessment. For the Asstt.Year 1956-57 had already been closed by the revenue when the assessment for the asstt.year 1955-56 was being made & the grant of relief would have its consequence on the assessment for the asstt.year 1957-58, in respect of which an appeal was pending merely because relief given by the commissioner in that regard in the proceeding for the asstt.year 1956-57 could have its consequence upon the proceeding for the asstt.

year 1957-58 then pending in appeal before the AAC, could not bring the case within proviso(b) to sub-sec.(1) of S.33A of the Indian IT Act, 1922.

(ii) No opinion at this stage can be expressed on the view tentatively expressed by the High Court. As the view taken by the High Court was tentative only & not its final opinion, the court is concerned merely with the correctness of the Division Bench refusing to grant relief after it reached the tentative finding that there was merit in the appellant's claim to the carry forward of unabsorbed depreciation. The order of the Commissioner disposing of the revision application for the asstt.year 1956-57 should have been set aside by the High Court & the Commissioner should have been directed to consider the claim on its merits. That is directed now. At the same time, it will be openin to the revenue to contend on the merits that the appellant is not entitled to the carry forward of unabsorbed depreciation.

Judgement of the Division Bench of the Calcutta High Court dt. 18.8.1973 set aside to the above extent.

15 Losses under the head "Capital gains" -

Sec.74-(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 & such loss cannot be or is not wholly set off against income under any other head of income in accordance with the provisions of Sec.71, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this chapter, be carried forward to the following assessment year, and -

a) It shall be set off against income, if any, under the head "Capital gains" assessable for that assessment year &

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

15) Substituted by the Finance Act, 1987, w.e.f. 1.4.1988. Earlier, sec.74, was substituted by the Finance (No.2) Act, 1962, w.e.f. 1.4.1962 & amended by the Finance (No.2) Act, 1967, w.e.f. 1.4.1968 & the

(2) No loss shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

(2) Any loss computed under the head "Capital gains" in respect of the assessment year commencing on the 1st day of April, 1987, or any earlier assessment year which carried forward in accordance with the provisions of this section as it stood before the 1st day of April, 1988, shall be dealt with in the assessment year commencing on the 1st day of April, 1988, or any subsequent assessment year as follows :-

a) in so far as such loss relates to short term capital assets, it shall be carried forward & set off in accordance with the provisions of subsection (1) & (2);

 Finance Act, 1986, w.e.f. 1.4.1987. Prior to its substitution, sec.74 stood as under⁷⁴. Losses under the head "Capital gains" - (1)(a) where in respect of any assessment year, the net result of the computation under the head "Capital gains" is a loss, such loss shall, subject to the other provisions

(b) in so far as such loss relates to long term capital assets, it shall be reduced by the deductions specified in sub-section(2) of sec.48 & the reduced amount shall be carried forward & set off in accordance with the provisions of sub-sec. (1) but such carry forward shall not be allowed beyond the fourth assessment year immediately succeeding the assessment year for which the loss was first computed.

of this chapter, be dealt with as follows :-

(i) such portion of the net loss relating to short-term capital assets as cannot be or is not wholly set off against income under any head in accordance with the provisions of sec.71 shall be carried forward to the following assessment year & set off against the capital gains, if any, relating to short term capital assets assessable for that assessment year & ; if it cannot be so set off, the amount thereof not so set off shall be carried forward to the following assessment year & so on .

(ii) Such portion of the net loss as relates to Capital assets other than short-term capital assets

COMMENT

This section deals with the losses under the head "Capital gains", their set off, etc. The expression "Capital loss," which means loss of capital

shall be carried forward to the following assessment year & set off against the capital gains, if any, relating to capital assets other than short-term capital assets assessable for that assessment year and, if it cannot be so set off, the amount thereof not so set off shall be carried forward to the following assessment year & so on ;

provided that where, in the case of any assessee not being a company, the net loss computed in respect of such capital assets for any assessment year does not exceed ten thousand ruppees, it shall not be carried forward under this section.

(b) Notwithstanding anything contained in the Indian Income-tax Act, 1922 (II of 1922), & loss computed under the head "Capital gains" in respect of the assessment year commencing on the 1st day of April, 1961, or any earlier assessment year which is

can not be equated with loss falling under the head "Capital gains".

 carried forward in accordance with the provisions of sub-sec.(2B) of Sec.24 of that Act, shall be dealt with in the assessment year commencing on the 1st day of April,1962, or any subsequent assessment year as follows :-

(i) in so far as it relates to short-term capital assets; it shall be carried forward & set off in accordance with the provisions of sub-clause (i) of clause (a) & sub-sec.(2); and

(ii) in so far as it relates to capital assets other than short-term capital assets, it shall be carried forward & set off in accordance with the provision of sub-clause (ii) of clause (a) & sub-sec.(2).

(2)(a) No loss referred to in sub-clause(i) of clause(a) of sub-sec.(1) or sub-clause(i) or sub-clause (ii) of clause (b) of that sub-section shall be carried forward under this section for more than eight assessment year immediately succeeding the assessment year for which the loss was first computed under this Act, as the case may be, the Indian Income-Tax Act,1922. (11 of 1922).

Sec.74 - corresponding to sec.24(2B) of the 1922 Act, concern only the loss falling under the head "Capital gains". (ibid)

If, in case of non-company assessee, the net loss in respect of such assets for any year in Rs.5000 or less it shall not be carried forward.

However, such loss cannot be carried forward for more than 8 assessment years. Unadjusted long term capital loss of the assessment year 1987-88 or earlier will be carried forward from the assessment year 1988-89 as follows .

1) Long-term capital loss; as reduced above, can be set off against only income under the head "Capital gains".

2) Long-term capital loss will be reduced by the amount mentioned u/s.48(2), i.e. first Rs.10,000 + a proportion of the remaining amount.

b) No loss referred to in sub-clause(ii) of clause (a) of sub-sec.(1) shall be carried forward under this section for more than four assessment years immediately succeeding the assessment year for which the loss was first computed under this Act.

¹⁶ Losses from certain specified Sources falling under the head "Income from other source-

Sec.74A - (1) ¹⁷(* * *)

(2) ¹⁸(* * *)

¹⁹ (3) ²⁰(* * *) In the case of an assessee, being the owner of horses maintained by him for running in horse races (such horses being hereafter in this subsection referred to as race horses), ²¹the amount of loss incurred by the assessee in the activity of owning & maintaining race horses in any assessment year

16) Inserted by the Finance Act, 1972, w.e.f. 1.4.1972

17) Omitted by the Finance Act, 1986, w.e.f. 1.4.1987.

Prior to its omission, sub-section(1), as amended by the Finance Act, 1974, w.e.f. 1.4.1975, stood as under '(1) where the net result of the computation made for any assessment year in respect of any source falling under the head "Income from other Sources" & being a source specified in sub-sec.(2), is a loss, such loss shall not be set off against income; if any; from any other source under that head or against income under any other head.'

18) Omitted by the Finance Act, 1986, w.e.f. 1.4.1987.

shall not be set off against income, if any, from any source other than the activity of owning & maintaining race horses in that year & 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 the income; if any,

²² from the activity of owning & maintaining race horse assessable for that assessment year-
provided that the activity of owning & maintaining race horses is carried on by him in the previous year relevant for that assessment year ; and

prior its omission, sub-sec.(2) stood as under .

" (2) The sources referred to in sub-sec.(1) are —

- (a) Lotteries ;
 - (b) Crossword Puzzles;
 - (c) races including horse races;
 - (d) Card games;
 - (e) Other games of any Sort;
 - (f) Gambling or betting of any form or nature
- Whatsoever not falling under any of the foregoing clauses."

19) Inserted by the Finance Act, 1974, w.e.f. 1.4.1975

20) "Where for any assessment year" omitted by the Finance Act, 1986, w.e.f. 1.4.1987.

(b) if the loss can not be wholly set off, the amount of loss not so set off shall be carried forward to the following assessment year & so on; so, however, that no portion of the loss shall be carried forward for more than four assessment year immediately succeeding the assessment year for which the loss was first computed.

EXPLANATION

For the purposes of this sub-section -

(a) "amount of loss incurred by the assessee in the activity of owning & maintainigg race horses" means-

(i) in a case where the assessee has no income by way of stake money, the amount of expenditure. (not being in the nature of capital expenditure) laid out or expended by him wholly & exclusively for the purposes of maintaining race horses.

21) Substituted for "the net result of the computation in respect of the source, specified in clause (c) of sub-sec.(2) is a loss, then, so much of the amount of such loss as does not exceed the amount of loss incurred by the assessee in the activity of owning & maintaing race horses" by the Finance Act, 1986 w.e.f. 1.4.1987.

(ii) in a case where the assessee has income by way of stake money, the amount by which such income falls short of the amount of expenditure (not being in the nature of capital expenditure) laid out or expended by the assessee wholly & exclusively for the purposes of maintaining race horses;

(b) "horse race" means a horse race upon which wagering or betting may be lawfully made;

(c) "Income by way of stake money" means the gross amount of prize money received on a race horse or race horses by the owner thereof on account of the horse or horses or any one or more of the horses winning or being placed second or in any lower position in horse races.

22) substituted for "from the source specified in clause (c) of sub-section (2)", *ibid.*

COMMENT *

This section concern with segregates losses from certain specified sources falling under the head, "Income from other sources," which may be set off only against income from that very source only in the same previous year. carry forward may be allowed only in case of losses to owners of race norses in certain circumstances.

Sec.74A makes provisions as to set off of losses from specified sources; namely lotteries; crossword puzzles; race; including horse races; card games; other games of any sort & betting or gambling of any form or nature not falling under any of the above categories. It may be noted that unabsorbed loss from no other activity, the income of which is taxable under the head, "Income from other sources," is permitted to be carried forward & set off against income of subsequent years.

²³ Losses of Registered Firms

Sec.75 -

(1) where the assessee is a registered firm, any loss which cannot be set off against any other income of the firm shall be apportioned between the partners of the firm & they alone shall be entitled to have the amount of the loss set off & carried forward for set off under sections 70,~~71~~,72, ²⁴73, 74 & 74A.

(2) Nothing contained in sub-section (1) of section 72, sub-sec.(2) of section 73, ²⁵ sub-section (1)
²⁶(or sub-section(3)) of sec.74 or sub-sec.(3) of sec.74A shall entitle any assessee, being a registered firm to have its loss carried forward & set off under the provisions of the aforesaid sections.

23) Reintroduced by the Direct Tax Laws(Amendment) Act,1989,w.e.f.1.4.1989. Earlier these section were omitted by the Direct Tax Laws (Amendment)Act,1987, with effect from the same date.

24) Substituted for"73 and 74" by the Finance Act, w.e.f.1.4.1972.

25) Substituted for"or sub-sec.(1) of sec.74" by the Finance Act,1974,w.e.f. 1.4.1975.

26) Inserted by the Finance Act,1987,w.e.f.1.4.1988.

COMMENT

This section deal, respectively; with the losses of registered & unregistered firms treated as registered firms, etc. The supreme court held that the expression "any such loss" & "any loss" in the second proviso referred to the loss computed for the purpose of the main part of sec.24(1) & do not comprise within their connotation speculation loss, and; therefore, any speculation loss of a registered firm could not be apportioned between the partners but had to be carried forward & set off against speculation profits of the firm itself.

This is because of the fact that investment allowance is allowed only to the extent required to reduce the total income to nil & there is no question of apportionment of nil income among partners. Therefore, the investment allowance has to be considered only in the hands of firm & not in the hands of partners.

CASE LAW - Sec. 75

(1987) 61CTR(SC) 269

In the Supreme Court of India
Sabyasachi Mukharji & S.Natarajan , JJ
Commissioner of Income Tax

V

Shah Sadiq & Sons
Civil Appeal No.1598(NT) of 1974
April 14, 1987.

Loss-speculative loss-carry forward & set off
Assessee registered firm - Assessment under 1922 Act-
Set off under the 1961 Act.

Statute - vested rights - Neither expressly nor by
implication, taken away by repealing statute.

Income Tax Act, 1922, S.24(2) - Income Tax Act, 1961
SS.75(2) & 297(2) - General clauses Act, 1897, Sec.6
Sec. 24(2) of the 1922 Act provided a vested right
to the assessee registered firm to carry forward &
set off its speculative losses-Sec.75(2) of the
1961 Act, dealt with a different scheme of carry
forward & set off of loss but it did not speak of



any vested right - unless there was any express or implied intendment in S.297 fo 1961 Act or within four corners of General Clauses Act, of destroying the vested right under S.24(2), that right cannot be said to have been destroyed - Sec.297 of 1961 Act does not indicate any intention of affecting that vested right - on the contrary, S.6(c) of General clauses Act indicates that right should be preserved - Through S.297 does not save expressly that right, it is not necessary to save a right expressly in order to keep it alive-Assessee was, therefore, entitled to carry forward & set off its losses for the years 1960-61 & 1961-62 against profits of 1962-63.

HELD :

(i) The right given to the assessee for the assessment year 1961-62 under S.24(2) of 1922 Act was an accrued right & a vested right. It could have been taken away expressly or by necessary implication. It has not been so done. Neither S.297 (2) nor other sub-clauses of sub-section(2) of S.297 indicated contrary intention of the legislature regarding any vested right of the assessee under the 1922 Act. On the contrary S.6(c) of the General clauses Act indicates that right should be preserved

The fact that the right created by the operation of S.24(2) is a vested right can not be disputed -Gujarat Electricity Board V. Shantilal R. Desai 1967(1) SCR 580 at 587 & Isha Valimohamad & Anr. V. Haji Gulam Mohamad & Haji Dada Trust 1975(1) SCR 720 at 723 relied on.

(ii) Sec.75(2) dealt with a different scheme of carrying forward of loss but it did not speak of any accrued right. It did not destroy either by express words or by necessary implication the vested right given to an assessee under S.24(2) of the Act of 1922. Therefore, unless one finds that in 2.297 or within the four corners of the General clauses Act any indendment express or implied ~~of~~ destroying the rights created by S.24(2) of carrying forward the losses to set off in subsequent years in case of speculation business that right cannot be said to be destroyed. There is nothing in any of the clauses of S.(2) of S.297 of the Act which indicates that accrued rights under 1922 Act lapsed in respect of the assessment to be made after coming into operation of 1961 Act. The right to carry forward losses which had accrued under the

repeated IT Act of 1922 is not saved expressly by S.257 of the IT Act, 1961. But, it is not necessary to save a right expressly in order to keep it alive after the repeal of the old Act of 1922 Sec.6(C) of the General clauses Act. Saves accrued rights unless they are taken away by the repealing statute. There is no such taking away of the rights by S.297 either expressly or by implication. The assessee, registered firm was, therefore, entitled to set off the speculation losses suffered in the assessment year 1961-62 against the speculation profits of the year 1962-63 - T.S. Baliah V. T.S.Rangachari(1969)72 ITR 787(SV) relied on Reliance Jute Mills Co. Ltd. CIT (1972) 86 ITR 570 (Cal.) & Helen Rubber Industries Ltd. V. CIT (1959)36 ITR 544 (Ker) distinguished.

27) Losses of unregistered firms assessed as registered firms -

Sec.76 - In the case of an unregistered firm assessed under the provisions of clause (b) of section 183 in respect of any assessment year, its losses for that assessment year shall be dealt with as if it were a registered firm.

27) Reintroduced by the Direct Tax Law (Amendment) Act, 1989, w.e.f. 1.4.1989. Earlier these sections were omitted by the Direct Tax Laws (Amendment) Act, 1987, with effect from the same date.

COMMENT :

This section deals; respectively; with the losses of registered & unregistered firms treated as registered firms, etc.

Sec.76 of the Income Tax Act, 1961, deals with the treatment of losses arising to an unregistered firm assessed as a registered firm under the provisions of Sec.183 in respect of any assessment year; its losses for that assess with verbal changes. Provisions; if an registered firm is treated; for the purpose of assessment; as a registered firm under the provisions of sec.183(b); sec.76 provides that its losses for that assessment year shall also follow for the purpose of set off & carry forward; etc, the pattern of losses of a registered firm. The tax rates between registered & unregistered firm, while an unregistered firm is liable to pay tax at the rate applicable to an individual, a registered is taxable at concessional rates.

28

Losses of unregistered firms assessed as registered firms :

Sec.77 -(1) Where the assessee is an unregistered firm which has not been assessed as a registered firm under the provisions of clause(b) of sec.183; any loss of the firm shall be set off or carried forward & set off only against the income of the firm.

(2) Where the assessee is a partner of an unregistered firm which has not been assessed as a registered firm under the provision of clause(b) of sec.183 & his share in the income of the firm is a loss, then, whether the firm has already been assessed or not -

(a) such loss shall not be set off under the provisions of sec.70, sec.71, ²⁹(Sub-section(1) of sec.73 or sec.74A);

28) Reintroduced by the Direct Tax (Amendment) Act, 1989, w.e.f. 1.4.1989. Earlier these sections were omitted by the Direct Tax Laws (Amendment) Act, 1987, with effect from the same date.

29) Substituted for "or sub-section(1) of sec.73" by the Finance Act, 1972, w.e.f. 1.4.1972.

b) nothing contained in sub-section(1) of Sec.72 or sub-section (2) of sec.73 or sub-section(1)³⁰(or sub-section (3)) of sec.74³¹ (or sub-section (3) of section 74A) shall entitle the assessee to have such loss carried forward & set off against his own income.

-
- 30) Inserted by the Finance Act,1987, w.e.f. 1.4.1988.
- 31) Inserted by the Finance Act,1975, w.e.f. 1.4.1975.

COMMENT

This section deals with the losses of unregistered firms, etc. On the other hand, provides that in the case of an unregistered (and not treated as a registered) firm, any loss of the firm shall be set off or carried forward & set off only in the file of unregistered firm itself. So far as non-resident assesseees are concerned, their total income, according to section 5(2), includes all income which is deemed to accrue or arise to them in India.

Thus, foreign losses are not ordinarily entitled to a set off, etc. against their Indian income. It may also be noted that share of loss of a retired partner in the unregistered firm can neither be carried by the partner nor by the firm.

Carry forward & set off of losses in case
of change in constitution of firm or an
succession

Sec.78 - 32 (1) Where a change has occurred in the constitution of a firm, nothing in this chapter shall entitle the firm to have carried forward & set off so much of the loss proportionate to the share of a retired or deceased partner computed in accordance with section 67 as exceed his share of profits, if any, of the previous year in the firm, or entitle any partner to the benefit of any portion of the said loss which is not apportionable to him under section 67.

(2) Where any person carrying on any business or profession has been succeeded in such capacity by another person otherwise than by inheritance, nothing in this chapter shall entitle any person other than the person incurring the loss to have it carried forward & set off against his income.

32) Restored to its original version by the Direct Tax Laws(Amendment)Act,1989,w.e.f.1.4.1989.
Earlier it was substituted by the Direct Tax Laws(Amendment)Act,1987, with effect from the same date.

COMMENT

An extracted in the books of chaturvedi & Pithisaries, this section deals with carry forward & set off of losses in case of change in constitution of firm, or an succession. The right to carry forward & set off losses belongs to the person who suffered the loss & not to a different person.

The operation of sec.78(2) is not confined merely to a firm but extends to all taxable entities. Change in constitution of a firm is said to take place -

- a) if one or more of the partners cease to be partners or one or more new partners are admitted, provided that at least one of the partners of the ^{power} first is dissolved on the death of any of its partners, or
- b) where all the partners continue with a change in their respective shares or a change in the shares of some of them.

In the previous year change in the constitution has occurred & the profit of the firm of the pre-change & post-change period are apportioned between the old & new partners who, in such previous year, were entitled to receive the same.

Carry forward & set off of losses in the
case of certain Companies -

Sec.79 - Notwithstanding anything contained in this chapter, where a change in shareholding has taken place in a previous year in the case of a company, not being a company in which the public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward & set off against the income of the previous year unless -

a) on the last day of the previous year the shares of the company carrying not less than fifty-one percent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one percent of the voting power on the last day of the year or years in which the loss was incurred.

33 (* * *)

33) "or" omitted by the Finance Act, 1988, w.e.f.

1.4.1987

34 Provided that nothing contained in this section shall apply to a case where a change in the said voting power takes place in a previous year consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift.

35(b) (omitted by the Finance Act, 1988, w.e.f. 1.4. 1989)

34) Inserted, *ibid*

35) Prior to its omission, it read as under :-
"(b) the * Assessing Officer is satisfied that the change in the shareholding was not effected with a view to avoiding or reducing any liability to tax."

* Substituted for "Income-tax " by the Direct Tax(Amendment) Act, 1987, w.e.f. 1.4.1988.

COMMENT -

This section provides for carry forward & set off of losses in the case of closely-held companies. As extracted by the Chaturvedies books, this section for new in the sense that there was no such provision in the 1922 Act, this implements the recommendation of the Direct Taxes Administration Enquiry Committee. The word "or" between clauses (a) and (b) shows that either of the two circumstances is enough to bring the case under the mischief of sec.79, so as to bar a carry forward & set off. The provisions of sec.79 are applicable only in the case of unabsorbed depreciation, investment allowance, development rebate & development allowance stands on altogether different footings, their carry forward & set off are not governed by sec.79.

Submission of return for losses -Sec.80 -

Notwithstanding anything contained in this chapter, no loss which has not been determined in pursuance of a return filed ³⁶(in accordance with the provisions of sub-section(3) of section 139); shall be carried forward & set off under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) ³⁷or sub-section(3) of sec. 74 ³⁸(or sub-section (3) of section 74A)

- 36) Substituted for "within the time allowed under sub-section (1) of sec.139 or within such further time as may be allowed by the Income Tax Officer" by the Direct Tax Laws (Amendment) Act,1987,w.e.f. 1.4.1989.
Earlier, the said expression was substituted for "under section 139" by the Taxation Laws (Amendment) Act,1984, w.e.f. 1.4.1985.
- 37) Inserted by the Finance Act,1987, w.e.f. 1.4.1988
- 38) Inserted by the Finance Act, 1974, w.e.f. 1.4.1975

COMMENT

This section provides that no loss can be carried forward if the return has not been filed in accordance with the provisions of sec.139.

Sec.80 of the Income-tax Act,1961, has been newly carved out of portions of sec.22(2A) of the 1922 Act. It incorporates that part of sec.22(2A) of the 1922 Act, which was germane to the set off of losses. The limitation intended has been extended so as to apply to carry forward, also, of loss under the head,"Capital gains".