

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
 (समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 2283/Kol/2007
Assessment Year: 2004-05

Income-tax Officer, Wd-5(1), Kolkata	Vs.	M/s. Shankar Sales Promotion (P) Ltd. (PAN: AAEC57550J)
Appellant		Respondent
Date of Hearing		29.07.2019
Date of Pronouncement		06.09.2019
For the Appellant		Shri Sanjit Kr. Das, Addl. CIT, Sr. DR
For the Respondent		Shri Akkal Dudhwewala, FCA

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the revenue is against the order of the Ld. CIT(A)-V, Kolkata dated 18.09.2007 for AY 2004-05.

2. Brief facts of the case are that the appellant during the relevant year was engaged in the business of share trading and financing. For AY 2004-05 the appellant had declared total income of Rs.8,61,245/- which inter alia comprised of loss of Rs.1,48,61,635/- incurred in the business of share trading and interest income of Rs.1,56,21,609/- declared under the head ‘Other Sources’. In the assessment completed u/s 143(3) the AO observed that the assessee company was engaged in the business of granting loans & advances, which it was carrying on by way of an organized business activity, and therefore assessed the interest income of Rs.1,56,21,609/- derived from the loans& advances under the head ‘Profits & Gains of Business’ as against the head ‘Other Sources’ under which the assessee had declared such income. After re-classification of interest income under the head ‘Profits & Gains of Business’, the AO invoked the Explanation to Section 73, which reads as under:

“Explanation.—Where any part of the business of a company other than a company whose gross total income consists mainly of income which is chargeable under the heads “Interest on securities”, “Income from house property”, “Capital gains” and “Income from other sources”, or a company the principal business of which is the

business of banking or the granting of loans and advances consists in the purchase and 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 and sale of such shares”

3. The AO observed that the Explanation to Section 73 notably has two exceptions and it does not apply to companies viz. (a) whose gross total income consists mainly of income which is chargeable under the heads “Interest on securities”, “Income from house property”, “Capital gains” and “Income from other sources” or (b) a company the principal business of which is the business of banking or the granting of loans and advances. According to AO, the assessee did not fall within the first limb of exception in as much as the aggregate of the sum assessable under the head ‘Business Income’ exceeded the aggregate of the sum assessable under the head ‘Other Sources’, ‘Capital Gains’ and ‘House Property’. The AO further held that even the second limb of exception was not applicable in the assessee’s case because in his view its activity of money lending could not be said to be company’s principal business activity because the majority of funds were deployed in Investment in shares rather than loans & advances. The AO therefore concluded that the Explanation to Section 73 was applicable in the given facts of the present case. Accordingly the AO disallowed the set off of share trading loss of Rs.1,48,61,635/- against normal business income treating it to be in the nature of deemed speculation loss. On appeal, the Id. CIT(A) deleted the impugned disallowance by observing that the case of the assessee fell within the first limb of the exception provided in Explanation to Section 73. Aggrieved by the order of the Id. CIT(A), the Revenue preferred an appeal before this Tribunal, which by its order dated 12.09.2008 in ITA No. 840/Kol/2008 reversed the order of the Id. CIT(A) and restored the order of the AO.

Para 14 of ITAT order

We, therefore, hold that since the business income is more than the income under the head house property, capital gain and other sources, the business loss of Rs. 1,48,61,635/- suffered in purchase and sale of shares by the assessee has been rightly held as speculation loss by the Assessing Officer. In our considered opinion, the decision of the Id. CIT(A) is based on the wrong reasonings that the interest income should be taken as ‘income from other sources’ on the basis of computation of income and not as income from business as per the finding given by the Assessing Officer in view of the detailed discussion in the assessment order. The decision of the Id. CIT(A) therefore, cannot be sustained for the reasons discussed above. The decision of the Id. CIT(A) is accordingly reversed and the decision of the Assessing Officer on this issue is restored.

4. Being aggrieved by the order of the Tribunal, the assessee preferred an appeal u/s 260A before the Hon'ble Calcutta High Court wherein the question raised was whether the principal business of the assessee was granting loans & advances and therefore the case of the assessee came within the exception set out in the Explanation to Section 73 and thereby whether the assessee was entitled to the benefit of set off of loss in share dealing by treating the same as business loss. After taking into consideration the contentions of both parties, their Lordships remitted the matter back to the Tribunal with the following findings & direction:

“Justice Md. Nizamuddin

Disputed issue sought for consideration by this Court in the present appeal is what is the principal business of the Assessee/Appellant? Whether it is granting of loans and advances or share dealing and whether case of the Assessee/Appellants falls within the exceptions to the Explanation under Section 73 of the Income Tax Act, 1961, which are mixed question of fact and law and to adjudicate this issue assessee wants us to look into certain facts and evidence like Audit Report, Balance Sheet etc. by alleging that the same have not been referred, discussed and considered by the Tribunal which is apparent on perusal of the impugned order of the Tribunal. According to us this allegation cannot be brushed aside in the present appeal simply on the ground of matter of facts and evidence because it is directly related to application of the provisions of law i.e. Section 73 of the Income Tax Act, 1961 and Explanation under it. We think Tribunal would be the appropriate forum to scrutinize the said relevant facts and evidence to come to a definite conclusion as to whether principle business of the assessee is of granting of loans and advances or dealing in shares and whether case of the assessee falls within the exception under Section 73 of the Income Tax Act, 1961 and whether loss from shares dealing was speculation loss or not in the facts and circumstances of this case. Accordingly we set aside the impugned order of the Tribunal and remand to it on the aforesaid issues with direction to decide the aforesaid issue afresh after hearing the parties and examining the relevant records including the records of the assessment proceeding but it would not allow the assessee to file any fresh or new document and on consideration of the same if the Tribunal comes to the conclusion that the principle business of the assessee is of granting of loans and advances and not dealing in shares in that event Tribunal would allow the set off of the loss in shares dealing as business loss as permitted under Section 71 & 72 of the Act. Tribunal shall dispose the appeal within 6 months from the date of communication of the this order.

Justice I.P. Mukherji

No authority has been shown to us which would give a guidance to determine the principal business of the assessee for the purpose of taking benefit under Section 73 of the Income Tax Act, 1961. Is the principal business of the assessee to be determined on the basis of the businesses mentioned in its memorandum of association? Whether turnover of the assessee is an indication of its principal business? Suppose an assessee makes substantial capital expenditure in a year for promotion of a particular business

which it claims to be its principal business but its turnover in that year is much less than the turnover from other business, could the assessee claim the former business to be its principal business? Suppose the assessee carries on more than one business and the turnover of one business is less than the others but the profit of that business is more because the expenses are less. Would that business become the principal business? In my opinion, all the above factors have to be judiciously analysed and assessed to determine the principal business of a Corporate assessee. There may be other factors also. Therefore, what is the principal business of the assessee is a very tricky question of fact which needs to be determined by the tribunal threadbare. With these observations, I entirely agree with the conclusions and the reasons by which those conclusions have been reached by my learned brother. I also agree with the final order that his lordship has passed.”

5. Pursuant to the judgment of the Hon’ble Calcutta High Court, opportunity of hearing was granted to parties. At the time of hearing, the Ld. AR appearing on behalf of the assessee submitted that the assessee was a non-banking financial company registered with the Reserve Bank of India. Accordingly the activity of money lending was one of its authorized business. He thereafter invited our attention to the impugned assessment order wherein a categorical finding was recorded by the AO that the main object of the assessee company as set out in the Memorandum of Association was granting of loans & advances. He also referred to Para 4 of the assessment order wherein while concluding that the assessee company was engaged in the business of granting loans & advances, the AO recorded a finding of fact that the funds deployed in share trading was only Rs.2.33 crores whereas the funds deployed in money lending was Rs.13.03 crores. The Ld. AR thereafter took us through the financial statements of the assessee company for the year ended 31.03.2004 and furnished the following summary statement of the fund deployment of the assessee for the year ended 31.03.2004:

Investible Funds Deployed in	Amount	Percentage
Stock-in-Trade of share dealing	2.33 crores	5.65%
Loans & Advances	13.03 crores	31.62%
Investment	25.22 crores	61.21%
Other Assets	0.63 crores	0.15%

6. Referring to the above table, the Ld. AR contended that during the year the appellant carried on two business activities viz. Trading in shares and granting loans. Out of these two

business activities, the funds deployed in the activity of money lending was significantly higher than the business of share dealing and hence under the fund deployment criteria, business of money lending constituted the principal business of the assessee. The Id. AR of the appellant argued that the AO had incorrectly compared the funds deployed in purchase of shares by way of Investments with the funds deployed in money lending. The Ld. AR argued that holding 'investments' did not constitute appellant company's 'business activity' and therefore funds utilized in acquiring Investments could not be taken into account in deciding as to what business constituted the appellant's 'principal business' for the purpose of application of the Explanation to Section 73. In support this proposition, he relied on the decision of this Tribunal in the case of ACIT Vs Apex Enterprises Ltd in ITA No. 1796/Kol/2008 dated 18.03.2016, where identical issue was adjudicated by the Co-ordinate bench.

7. The Id. AR thereafter invited our attention to the turnover achieved in the business of share trading & money lending to demonstrate that the total turnover of funds in money lending activity was far higher than the turnover in share dealings. He further submitted that even the income derived from the business of money lending was higher than the income (ignoring the negative sign) derived in business of share trading. He accordingly claimed that fund deployment criteria, turnover criteria as well as the income criteria when applied to the facts involved in the relevant year, it was the activity of money lending which was more significant than share dealing and therefore, the former constituted 'principal business' of the assessee company. The Id. AR also drew our attention to the comparative data for the immediately two preceding years as well the subsequent AY 2005-06, which was enclosed at Pages 5 & 6 of the paper book, to show that even in past years and succeeding year, the principal business of the assessee on fund deployment, gross turnover, and Income criteria was granting of loans & advances. It was accordingly claimed that assessee company fell within the exception carved out in the Explanation to Section 73 of the Act and the AO be therefore directed to allow the set off of loss from share dealing against income derived from other business income inter alia including interest income.

8. Per contra, the Id. DR supported the order of the AO. He submitted that the Explanation to Section 73 has to be read and understood as a whole. According to him the second limb of exception in the said Explanation which excludes company whose principle business is of granting of loans & advances is required to be read with the phrase “to the extent to which the business consists of purchase and sale of shares”. He therefore argued that in the given facts of the case, the assessee company was unable to demonstrate that the activity of granting loans & advances was inter-connected with its business of share dealing and in that view of the matter the provisions of Explanation to Section 73 had been rightly invoked by the AO.

9. We have given our thoughtful consideration to the rival submissions and the facts involved in the present case. On careful perusal of the order of the Hon’ble Calcutta High Court (supra), we note that the specific issue which has been remitted for our consideration is whether on the given facts, it can be said that the principal business of the assessee company was granting of loans & advances and accordingly whether the case of the assessee falls within the exception carved out in the Explanation under Section 73 so that the loss incurred in share trading can be set-off against other business income. The observations of their Lordships require that the ITAT should ascertain whether on facts found it can be held that principal business of the assessee was granting of loans and advances so as to take the assessee out of the mischief of the Explanation to Section 73. No additional rider or covenant has been attached by their Lordships which would in any manner suggest that such principal business of granting loans & advances must be inter-related with the business of share dealing so as to avail the benefit of the exception set out in Explanation to Section 73. In that view of the matter, we find that the Id. DR’s argument that the exception provided in Explanation to Section 73 i.e. “*a company the principal business of which is the business of banking or the granting of loans and advances*” is required to be read along with phrase ‘*consists in the purchase and sale of shares of other companies*’ and therefore only when the activity of granting loans & advances is inter-linked or inter-connected with business of purchase & sale of shares that the Explanation to Section 73 is not applicable, is wholly unsustainable. It is further observed that this contention of the Id. DR has also been specifically negated by the Special Bench of this

Tribunal at Mumbai in the case of ACIT Vs Concord Commercials Pvt Ltd in 95 ITD 117, wherein it was held as under:

“18.The said Explanation reads as under :—

‘Where any part of the business of a company [other than a company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources"]], or a company the principal business of which is the business of banking or the granting of (loans and advances) consists in the purchase and 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 and sale of such shares.

19. The law stated in the Explanation may be edited for our purpose in the following lines :

"Where any part of the business of a company consists in the purchase and sale of shares of other company 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 and sale of such shares".

20. The transactions of purchase and sale of shares would be held as speculation business only if the company was hit by the Explanation to section 73. The implication of the Explanation is that if a company incurs a speculation loss in a manner deemed in the Explanation, such loss shall not be set off except against profits and gains, if any, of another speculation business.

21. But the explanation has provided two exceptions. The first exception is available in the case of a company whose gross total income consists mainly of income which is chargeable under the heads "interest on securities", "income from house property", "capital gains" and "income from other sources". The second exception is in the case of a company whose principal business is the business of banking or the granting of loans and advances.

22. The first category of exception is identified by the composition of its gross total income. The words used in the statute [.....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" and "income from other sources"] provide thrust on the composition of the gross total income of that company. If the gross total income of the company mainly consists of income falling under the above-mentioned heads, Explanation to section 73 does not apply. If the gross total income of the company is mainly made up of income under the head "profits and gains of business or profession", it is caught by the mischief of Explanation to section 73. Therefore, we have to see that the first category of exception is made on the basis of the "character of its gross total income".

23. As far as the second category of exception is concerned, the thrust is made on the nature of business carried on by the company. If the company is carrying as its principal business, the business of banking or the granting of loans and advances, Explanation to section 73 does not apply. The company is excluded from the ambit of Explanation on the basis of the nature of the principal business carried on by it. (emphasis supplied)

10. In view of the above therefore, the issue which now requires our consideration is whether the 'principal business' of the assessee company can be said to be granting of loans & advances. What constitutes the 'principal business' has not been defined anywhere in the Act. Accordingly what constitutes principal business will essentially depend on the facts and circumstances of each case. We however note that certain guiding principles and factors have been laid down by the Special Bench of this Tribunal at Kolkata in the case of Dy. CIT Vs Venkateshwar Investment & Finance Ltd in 93 ITD 177, which are as follows:

"10. We hold that to decide whether the case of an assessee falls in exceptions provided in Explanation to section 73 of the Act or not and to decide whether the principal business of the assessee is that of granting of loans and advances, the decisive factor is the nature of the activities of the assessee and not the actual income from such activities during a particular year. Merely because the numerical value of the profit/loss in purchase and sale of shares is more than the interest income during the relevant period, does not mean that the principal business of the assessee ceases to be that of granting of loans and advances. What constitutes the "principal business" has not been defined anywhere in the Act. What constitutes the principal business will depend on the facts and circumstances of each case. The Memorandum and the Articles of Association of the company, past history of the assessee, current and past year's deployment of the capital of the assessee, break-up of the income earned during the relevant and past years and the nature of activities of the assessee will all help in determining the principal business of the assessee. If in any particular year, the assessee has nominal business income and has substantial interest income, it does not imply that the assessee's principal business is of finance or granting of loans and advances. Similarly the assessee, the principal business of which is the granting of loans and advances, may earn a comparatively high income from other activities in any particular year and still the principal business of the assessee may remain granting of loans and advances. The Explanation to section 73 is in the nature of a deeming provision and as such has to be strictly construed. The decisive factor is the true nature of activities of the company during the relevant period as well as in the past or succeeding periods. Considering the objects of the assessee-company as stated in the Memorandum of Association and the fact that the income from interest and lease rentals were the only income in the past years and the loss from share dealings was incurred only during the year under consideration and considering the position of deployment of funds in loans and advances and leasing business which is more than 3 times of the fund deployed in share business as on 31-3-1997 and taking into consideration the various decisions of the Hon'ble Courts (supra) and the totality of the facts and circumstances of the case, we hold that the principal business of the assessee is that of granting loans and advances and as such the case of the assessee falls in exception to Explanation to

section 73 of the Act and the provision of Explanation to section 73 are not applicable to the instant case. In this view of the matter, we hold that there is no mistake in the order of the CIT(Appeals) in holding that the case of the assessee-company is not hit by Explanation to section 73 and the loss so suffered shall be treated as business loss and not speculation loss and question referred to is answered in favour of the assessee and the grounds of appeal of the Revenue are dismissed.

11. The undisputed factual position in the present case is that the assessee company is a non-banking financial company so registered with the Reserve Bank of India. One of its main object is, granting of loans & advances. It can therefore be safely concluded that the assessee company is granting loans & advances as a part of his business activity and which is conducted in an organised manner regularly. From the financial statements, which are at Pages 7 to 18 of the paper-book, we note that the total funds available with the assessee company as at 31.03.2004 were Rs.41.21 crores. The funds deployed inter-alia consisted of loan and advances of 13.03 crores, 2.33 crores in stock-in-trade of shares and 25.22 crores in Investment in shares. In our considered view the AO erred in comparing the funds deployed in shares held by Investment which aggregated to Rs.25.22 crores as against loan & advance of Rs.13.03 crores and therefore he wrongly concluded that the activity of granting loans & advances was not the principal business of the assessee. On the other hand, we find merit in the Id. AR's contention that the correct comparison parameter was the funds deployed in the business of share dealing i.e. Rs.2.33 crores with the funds deployed in the business of loan and advance of Rs.13.03 crores. For better understanding, the details of the funds deployed by the assessee in earlier years as well as preceding years are given below:

Asst Year	Loans & Advances	Share Dealings
2002-03	1080.13 lacs	825.97 lacs
2003-04	1395.85 lacs	307.34 lacs
2004-05	1302.55 lacs	233.41 lacs
2005-06	1881.53 lacs	935.82 lacs

12. In view of the above table and going by the fund deployment position as prevailing over the years, we are of the considered view that the principal business activity of the assessee was granting of loans & advances. In this regard, we find support from the decision

of this Tribunal in the case of DCIT Vs Apex Enterprises Pvt Ltd (supra) wherein on similar facts and circumstances, this Tribunal compared the funds deployment position of the stock-in-trade of shares with the loans & advances, ignoring the funds deployed in shares held as Investment . Taking into account the fund deployment position over the years, this Tribunal held that the principal business of the assessee was granting of loans and advances.

13. We further note that the income of Rs.156.28 lacs derived by the assessee in the business of granting of loans & advances also exceeded the negative profit of Rs.148.61 lacs earned in the business of share trading. Even the turnover of funds in the business of granting of loans & advances amounted to Rs.41.44 crores which far exceeded the turnover of Rs.7.84 crores in the business of share dealings. From the comparative chart furnished at Page 6 of the paper book, it is noted that the turnover & income of the assessee in earlier AYs 2002-03 & 2003-04 as well as the subsequent AY 2005-06 was principally derived from the business of granting of loans & advances.

14. On the facts as discussed in the above paragraph, it is abundantly clear that amongst the two, the principal or dominant business of the assessee was granting loans & advances and thereby the assessee falls outside the ambit of the Explanation to Sec. 73 of the Act. Consequent thereto, the loss of Rs.1,48,61,635/- incurred by the assessee in the business of share dealing cannot be construed as speculation loss. We therefore have no hesitation in holding that the loss incurred by the appellant during the relevant year was assessable as business loss and which the appellant could set-off against its business income inter alia including interest income derived from the business of granting loans.

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

Order is pronounced in the open court on 6th September, 2019.

Sd/-
(Dr. A. L. Saini)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 6th September, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – ITO, Ward-5(1), Kolkata.
2. Respondent – M/s. Shankar Sales Promotion (P) Ltd., 16, N. S. Road, Kolkata-700 001.
3. CIT(A)-V, Kolkata (sent through e-mail)
4. CIT-, , Kolkata
5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy,

By order,

Assistant Registrar