

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER,
& SHRI MAHAVIR PRASAD, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 635/Ahd/2018

(निर्धारण वर्ष / Assessment Year: 2014-15)

Magic Share Traders Ltd. 101, Akashganga Building, Nr. Gujarat College Road, Ellis Bridge, Ahmedabad- 380006	बनाम/ Vs.	ITO Ward- 2(1)(4) Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAE CM9 542 L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri S. N. Soparkar & Parin Shah, ARs
प्रत्यर्थी की ओर से / Respondent by :	Shri Mudit Nagpal, Sr. DR

सुनवाई की तारीख / Date of Hearing	07/08/2019
घोषणा की तारीख /Date of Pronouncement	11/09/2019

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed by the assessee against the order of the CIT(A)-6, Ahmedabad ('CIT(A)' in short), dated 12.01.2018 arising in the assessment order dated 16.12.2016 passed by the Assessing Officer under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning A.Y. 2014-15.

2. The grounds of appeal raised by the assessee reads as under:-

“1. The Ld. CIT(a) has erred on facts and in law in upholding and treating the business loss of Rs. 44,46,409/- from Future and Options and RS. 22,89,758/- Loss from Equity share Trading as speculation loss by applying explanation to section 73 of Income Tax Act, 1961. It may be treated as the business loss as claimed by the assessee and not the speculation loss as per order passed by the learned A.O. and upheld by the CIT(A).

*2. The learned CIT(A) has erred in not considering the vital submission that the assessee is engaged solely in the business of shares and securities trading and its **derivative products** and the mutual funds. The learned CIT(A) should have considered the submission for the same and should not have treated the business loss as speculation loss. No such treatment is called for. The loss of the appellant for **Future & Options** and Equity Share Trading be treated as the business loss and the order of the learned CIT(A) and learned A.O. be reversed.*

*3. The learned CIT(A) should have considered the factual aspects of the assessee and also the submission made by the assessee and should not have **misplaced** the reliance on the judgment of CIT vs. DLF Commercial Developers Pvt. Ltd. 35texman.com 280 (**page no 9 of the appeal order**). The loss of the appellant from F & O be treated as the business loss and the order of the learned CIT(A) and learned A.O. be reversed.”*

3.1 When the matter was called for hearing, the AR for the assessee submitted that the issue to be addressed is whether a company dealing in ‘derivatives’ could be considered as engaged in speculative business by virtue of Explanation to sec. 73 or not? In this context, it was submitted that identical issue has cropped up in the A.Ys. 2012-13 and 2013-14 in assessee’s own case. The issue is stated to have been set to rest by the Tribunal in A.Y. 2012-13 and has been adjudicated in favour of the assessee.

3.2 The Ld. DR relied upon the order of the authorities below.

3.3 The substantive question in controversy is whether loss incurred in eligible transactions viz. ‘derivative transactions’ within the meaning of Proviso (d) to Section 43(5) of the Act not involving any purchase or sale of shares *per se* can be regarded as ‘speculative

loss' for the purposes of set off in view of Explanation to Section 73 or not?

3.4 The Co-ordinate Bench of ITAT in ITA No. 770/Ahd/2016 concerning A.Y. 2012-13 order dated 31.10.2018 has adjudicated the issue in favour of the assessee. The relevant operative para is reproduced hereunder:-

“9. We have carefully considered the rival submissions and perused the respective orders of the AO and CIT(A). The substantive question that arises for adjudication is whether loss incurred in eligible transactions i.e. derivative transactions within the meaning of Proviso (d) to Section 43(5) of the Act not involving any purchase or sale of shares per se can be regarded as speculative loss for the purposes of set off in view of Explanation to Section 73 or not. The controversy involved in the present case is thus essentially legal in nature.

9.1 In the present appeal, the assessee seeks set off of losses arising from derivative losses as non-speculative business loss. In contrast, the Revenue has labeled the loss arising from derivative transactions as 'speculative loss' and has consequently denied set off of such losses from regular income of non-speculative nature etc. by applying Explanation to Section 73 of the Act.

9.2 We first advert to the pivotal contention on behalf of the assessee that Explanation to Section 73 of the Act cannot apply to loss arising from derivative transactions which are categorically excluded from being regarded as speculative business as defined under s.43(5) of the Act read with proviso (d) thereto. Identical issue arose before the Hon'ble Calcutta High Court in the case of Asian Financial Services (supra) relied upon. The Hon'ble Calcutta High Court held that once it is deemed to be a normal business loss on the basis of proviso appended to Section 43(5) of the Act, a question of applying Section 73 of the Act or the Explanation thereto for the purposes of refusing loss to be set off against business income is wholly incorrect. The Hon'ble Calcutta High Court after taking note of the decision of Hon'ble Delhi High Court in DLF Commercial (supra) took a distinct stand that derivatives cannot be treated at par with shares for the purposes of Explanation to Section 73 of the Act because the legislature has treated it differently. Thus, in view of the aforesaid position enunciated by the Hon'ble High Court in Asian Financial Services (supra), we find good deal of force in the case of assessee. The claim of the assessee thus requires to be allowed on this ground alone.

9.3 In view of the resounding conclusion drawn in favour of the assessee on the aforesaid legal position, we do not consider it necessary to advert to other alternative contentions raised on behalf of the assessee.

10. In the result, Ground No. 1 of the assessee's appeal is allowed."

3.5 The identical issue again came up in A.Y. 2013-14 before the Co-ordinate Bench in ITA No. 624/Ahd/2018 concerning A.Y. 2013-14 wherein the Co-ordinate Bench in its order dated 26.06.2019 has endorsed the claim of the assessee in continuity with the earlier order of the Co-ordinate Bench.

3.6 In consonance with the view taken in earlier years, the claim of the assessee towards ordinary business loss is allowed in so far as the loss from derivative transactions amounting to Rs. 44,46,409/- is concerned.

4. We now advert to another related issue of eligibility of set off of trading loss of Rs. 22,89,758/- from purchase & sale of shares in cash segment. The treatment of loss arising from delivery based purchase & sale of shares in the course of trading stands in variance with loss arising from 'derivative transactions' as enjoined by Explanation to sec. 73 of the Act. This aspect was not deliberated at the time of original hearing. Accordingly, the matter was re-fixed for taking note of the point of view on behalf of the respective sides.

4.1 In the context of allowability of share trading loss for set off under s. 73(1) of the Act, the Ld. Senior Counsel for the assessee referred to the 'computation of income' and submitted that the income under the head 'profit and gain of business' stands at a loss of Rs. (-) 65.43 lakhs. The income reported under the head 'capital gains' stands at a loss of Rs. (-) 8.77 lakhs. The income chargeable

under the head 'income from the other sources' has been reported at Rs.72.12 lakhs. The Ld. Senior Counsel thus made two fold submissions; firstly, the long term capital loss of Rs. 8.77 lakhs has been carried forward and thus not entered into computation. That being so, the income chargeable under the head 'income other than business' stands at a positive of Rs. 72.12 lakhs which is in excess of negative figure of the profit and loss account at 65.43 lakhs. In this situation, it was contended that the case of the assessee is covered by one of the exceptions provided in the Explanation to sec. 73 and consequently the loss arising from share delivery transactions in cash segment would be governed by the provisions of sec. 43(5) alone and Explanation to sec. 73 would have no application. For this proposition, the Ld. Senior Counsel for the assessee relied upon the decision of the Hon'ble Gujarat High Court in CIT vs. Paranjay Mercantile Ltd. (2014) 43 taxman.com 193 (Guj.) and CIT vs. Darshan Securities Pvt. Ltd. (2019) 18 taxman.com 142 (Bom.).

4.2 Secondly, and the alternative, the Ld. Senior Counsel for the assessee submitted that the 'principal business' of the assessee company is the business of trading in shares and therefore the Explanation to sec. 73 would not apply in the light newly inserted exception to the Explanation. In elaboration, it was pointed out that Explanation to sec. 73 has no application to the assessee where the principal business is trading in shares by virtue of amendment brought in by Finance (No.2) Act, 2014 w.e.f. 01.04.2015. The Ld. Senior Counsel submitted that although the amendment has been brought w.e.f. 01.04.2015, that is, A.Y. 2015-16, the amendment being curative in nature is applicable with retrospective effect for earlier years as well. Reliance was placed on the decision of Coordinate Bench in the case of *Fiduciary Shares and Stock Pvt. Ltd.*

159 ITD 554 (Mum.) for retrospective application of the amendment. The Ld. Senior Counsel thus submitted that in the light of alternative contention as well, the Explanation to sec. 73 has no application to loss arising from delivery based transactions in cash segments as well. The Ld. Senior Counsel thus submitted that there is no justifiable reason to hold the loss from trading in shares to be 'speculative loss' and consequently deny the set off of such ordinary business loss as per the normal provisions Act.

4.3 The Ld. DR, on the other hand, relied upon the order of the lower authorities and submitted that derivative transactions have been excluded from the definition of speculative transaction as per the express proviso (d) to s. 43(5) of the Act. But, however, the loss arising from share trading in cash segment would continue to be governed by the over-riding legal fiction contemplated in Explanation to sec. 73 of the Act as applicable to company assesseees. The Ld. DR thus submitted that the same treatment as given to the 'derivative losses' cannot be met in so far as loss from trading in shares arising in the cash segment is concerned.

5. We have carefully considered the rival submissions. The issue under consideration is whether loss arising from delivery based trading in shares is covered by certain exceptions provided in Explanation to sec. 73 or not and consequentially, whether the loss from share trading is to be regarded as non-speculative business loss for the purposes of set off under sec. 72 and sec. 73 of the Act.

5.1 Explanation to sec. 28 of the Act provides that where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as 'speculative business') shall be deemed to be distinct and

separate from any other business. This classification becomes pertinent because sec. 73 provides that loss in speculation business (unlike other business), cannot be set off against the profits of any business other than a speculation business. Likewise, a loss in speculation business carried forward to a subsequent year can be set off only against the profit and gains of any speculative business in the subsequent year. Hence, there is a perceptible difference in tax treatment to losses arising from speculative business and non-speculative business. Profits and losses resulting from speculative transaction must, therefore, be treated as separate and distinct from ordinary profits and gains of business and profession.

5.2 At this juncture, we further note that sec. 43(5) defines 'speculative transaction' which definition, of course, is for the purposes of sections 28 to 41. As per the said provision, 'speculative transaction' means the transaction in which contract for purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. In terms of provisions of sec. 43(5), the business of the assessee in delivery based trading in shares would not be regarded as speculative business. Even the Revenue does not contend that the set off of loss from share trading is not permissible under sub-section (1) of sec. 73 but for the *Explanation* which is added at the end of the section.

5.3 Sec. 73 deals with losses incurred by an assessee in his speculation business. Losses computed in respect of speculation business is not allowed to be set off against income other than speculation income. From the plain reading of the Explanation to sec. 73, it can be seen that the Explanation has introduced a deemed

fiction by which loss arising from any part of business of company comprising of purchase of sale and shares of other companies shall be regarded as 'speculative loss' regardless of delivery occurred. The test of settlement of transaction entered by delivery as provided under s. 43(5) is thus lost where the Explanation s. 73 applies in company assesseees. Consequently, such loss on sale of shares shall not be permitted to be set off except profit and gains arising from speculative business. Pertinent to say, the Explanation covers only shares and not other goods or commodities etc. and applicable to only company assesseees. Two exceptions were provided for non-applicability of the Explanation to sec. 73(1) of the Act prior to amendment brought in by Finance (No. 2) Act, 2014 w.e.f. 01.04.2015. First exception refers to composition of gross total income (GTI). As per this exception, explanation shall not apply where the aggregate income under which non-business heads ('Interest on securities', 'Income from house property', 'Capital gains' and 'Income from other sources') exceeds income taxable under which head business income. As per the second exception, the Explanation would also not apply where the principal business of the company is of banking or granting of loans and advances. A third exception has been inserted by Finance (No. 2) Act, 2014 w.e.f. 01.04.2015 whereby a company whose principal business is trading in shares would also fall within the beneficial exception and consequentially loss arising from delivery based trading in shares of such companies would be regarded as non-speculative business as per ordinary provisions.

5.4 It is the claimed on behalf of the assessee that the case of the assessee falls in first exception as well as third exception noted above. It is contended that the profits arising from non-business

heads (Income from other sources 72.12 lakhs) exceeds the negative income (loss Rs. 65.43 lakhs) reported under the head 'business income'. It is contention on behalf of the assessee that loss under the head capital gains (8.77 lakhs) cannot be clubbed with income from other source as the same has been carried forward and do not enter into computation at all. We do not see any substance in such line of argument on facts. The income from other sources (after set off unabsorbed depreciation) has been reported to be NIL as per the computation of income provided. Thus, the business loss clearly exceeds the aggregate of income/loss arising under non-business heads. The Hon'ble Calcutta High Court in the case of Eastern Aviation and Industries Ltd. vs. CIT 208 ITR 1023 has held that the expression 'income' or 'profits and gains' should be understood as including 'loss' also so that in one sense profits and gains represent positive income whereas losses represent negative income. The Hon'ble High Court thus observed that while judging the relative composition of GTI, one has to consider the absolute quantum of loss as against the other positive income. As per the decision, what one needs to consider and compare are the relative figures of loss and income. The ratio when applied, the chargeable amount under the head 'business income' far exceeds the chargeable amount aggregated under non-business head. Thus, the shelter in the form of first exception is not available to the assessee.

5.5 The alternative contention that the business of the assessee being mainly trading in shares and thus covered under third exception in view of the clarificatory amendment by Finance (No. 2) Act 2014 is also apparently bereft of any merits. The interpretation given by the Co-ordinate Bench in Fiduciary Shares and Stocks and Pvt. Ltd. (2016) 159 ITD 554 (Mum.) is no longer a good law in

view of the recent decision rendered by Hon'ble Supreme Court in the case Snowtex Investment Ltd. vs. PCIT judgment dated 24.06.2019. Hon'ble Supreme Court in the aforesaid judgment has held that amendment to Explanation sec. 73 by Finance (No. 2) Act 2014 w.e.f. 01.04.2015 is not clarificatory or retrospective. The view expressed by the Co-ordinate Bench is thus overturned. Consequently, loss occurred to the assessee as a result of its activity of trading in shares is a loss arising from business of speculation and is not capable of being set off against the profits which it had earned from non-speculative business.

6. We thus find no infirmity in the order of the CIT(A) to the extent it has concluded that loss amounting to Rs. 22,89,758/- arising from transactions of purchase and sale of shares as 'speculation loss' for the purposes of sec. 73 of the Act. The case made out by the assessee that such loss should be treated as non-speculative business loss as per its claim is thus without any force. We decline to interfere with the order of the CIT(A) to this extent.

7. Before we conclude, it may be pertinent to note that the assessee has *inter alia* referred to the decision of the Co-ordinate Bench concerning A.Y. 2013-14 in its own case where loss of Rs. 2,46,403/- arising from trading in equity shares was also regarded as non-speculative business loss. We find that the decision rendered by the Co-ordinate Bench in 2013-14 is simply made on the basis of decision rendered concerning A.Y. 2012-13 where the fact situation was converse and altogether different. In A.Y. 2012-13 there was a positive income from share trading activity with no fetters and therefore sec. 73(1) did not come into play at the first instance. We are also not privy to the relevant facts and composition of gross total

income concerning A.Y. 2013-14 and therefore it will be imprudent to adopt a sweeping conclusion drawn in A.Y. 2013-14 ignoring the peculiar facts of the present case and provisions of law.

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

This Order pronounced in Open Court on 11/09/2019

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Ahmedabad: Dated 11/09/2019

TANMAY

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5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।