

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.7756/Mum/2019
(Assessment Year :2014-15)**

DCIT, CIR 4(2)(1) Room No.642, 6 th Floor Aayakar Bhawan M.K.Road Mumbai – 400 020	Vs.	M/s. Quant Securities Pvt. Ltd., 612-617, 6 th Floor Maker Chamber IV Nariman Point, Mumbai- 400 021
PAN/GIR No.AAACQ1648R		
(Appellant)	..	(Respondent)

Assessee by	Shri Jitendra Sanghvi & Shri Amit Khatiwala
Revenue by	Smt. Mahita Nair
Date of Hearing	25/08/2022
Date of Pronouncement	02/09/2022

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.7756/Mum/2019 for A.Y.2014-15 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-9, Mumbai in appeal No.CIT(A)-9/Cir-4/349/2016-17 dated 31/10/2019 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 26/12/2016 by the Id. Asst. Commissioner of Income Tax-4(2)(1), Mumbai (hereinafter referred to as Id. AO).

2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in treating the share trading loss as not speculative loss on the ground that provisions of Explanation to Section 73 of the Act are not applicable to the assessee in the facts and circumstances of the instant case.

3. We have heard the rival submissions and perused the materials available on record. We find that the assessee is engaged in the business of share broking. The return of income for the Asst Year 2014-15 was filed by the assessee on 26.11.2014 declaring total income of Rs 1,89,55,910/-. The Id. AO on verification of the profit and loss account of the assessee observed that the major activities of the assessee is from sale of equity shares which had resulted in loss of Rs 1,13,24,176/- in own trading in shares. This loss was sought to be treated as speculation loss in accordance with provisions of Explanation to Section 73 of the Act, by the Id. AO, for which show cause notice was issued to the assessee. The Id. AO also sought for the details of speculative and non-speculative expenses and show caused as to why the expenses attributable to speculation business be disallowed in the turnover ratio. The assessee vide letter dated 11.7.2016 submitted that it had incurred loss in trading of derivatives and that the said loss cannot be treated as speculative loss in terms of section 43(5) of the Act.

3.1. The Id. AO observed that the assessee is engaged in the business of share broking as well as share trading. As a share broker, the assessee company is an intermediary between the buyer and seller of the shares through stock exchange. The shares bought and sold by the assessee company are not owned by the assessee company but it merely executes the transactions on behalf of its clients. As a share broker, the assessee is

not liable for any profit earned or loss incurred out of the transactions in purchase and sale of shares on behalf of the clients. The only benefit which accrues to the assessee company from such transactions is the brokerage income earned by it from its clients for executing the transactions on behalf of them. Whereas, as a trader in shares, the role of the assessee is distinctly different from that of share broker and accordingly the entire profit or loss arising out of such transactions would come to the assessee.

3.2. The Id. AO observed that transactions carried out in the capacity of share broker would also fall within the purview of provisions of Explanation to Section 73 of the Act. The Id. AO in this regard placed **reliance on the decision of Hon'ble Supreme Court in the case of CIT vs Pangal Vittal Nair & Co** reported in 74 ITR 754 (SC) ; **decisions of Hon'ble Calcutta High Court in the case of Park View Properties P Ltd** reported in 261 ITR 473 (Cal) and **Eastern Aviation & Industries Ltd** reported in 208 ITR 1023 (Cal). Accordingly, the Id. AO concluded that the assessee transactions would be hit by the provisions of Explanation to Section 73 of the Act and hence he treated the loss on trading of shares (both cash and derivative segments) as speculation loss in the sum of Rs 1,13,24,176/- in the assessment. Having done so, the Id. AO resorted to apportion the expenses attributable to speculation activity in the turnover ratio as under:-

Total expenses debited to P&L account – Rs 4,25,97,495/-

Total Turnover in share transactions – Rs 62799,99,62,022/-

Assessee's Turnover in share transactions – Rs 38650,86,84,641/-

Percentage - 61.55%

Out of total expenses of Rs 4,25,97,495/-, the assessee had voluntarily disallowed a sum of Rs 18,20,496/- in the return of income, thereby remaining expenses works out to Rs 4,07,76,999/-, on which 61.55% was applied by the Id. AO and expenses incurred for speculation activity was arrived at Rs 2,50,98,243/- ($40776999 \times 61.55\%$). The Id. AO accordingly added this expenses of Rs 2,50,98,243/- to the disallowance of loss of Rs 1,13,24,176/-, thereby arriving at the total speculation loss of Rs 3,64,22,419/-. This speculation loss of Rs 3,64,22,419/- was disallowed by the Id. AO in the assessment.

3.3. We find that the Id. CIT(A) had granted relief to the assessee by appreciating the composition of gross total income comprising mainly of income from other sources of Rs 1,21,75,044/- which is much more than income from business. Accordingly, it was appreciated by the Id. CIT(A) **that the assessee's case falls under the exception clause provided in Explanation to Section 73 of the Act.** Aggrieved, the revenue is in appeal before us.

3.4. For the sake of convenience, the provisions of Explanation to Section 73 of the Act as it stood at the relevant time are reproduced hereunder: -

Section 73 – Losses in Speculation Business

Explanation.—Where any part of the business of a company (⁴³[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 ^{43a}[*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 business⁴⁴ to the extent to which the business consists of the purchase and sale of such shares.]

3.5. From the perusal of the aforesaid provisions, an exception has been carved out from the applicability of the Explanation. One of the exception

provided therein is if the composition of gross total income comprises mainly of income other than the business income. In the instant case, it is not in dispute that the income from other sources is Rs 1,21,75,044/- which is much more than income from business. Hence **the assessee's** case squarely falls under the exception clause provided in Explanation to Section 73 of the Act. We further find that the issue is also squarely **covered in favour of the assessee by the decision of the Hon'ble** Jurisdictional High Court in the case of CIT vs Darshan Securities (P) Ltd reported in 18 taxmann.com 142 (Bom HC) wherein it was held as under:-

6. The explanation to Section 73 introduces a deeming fiction. The deeming fiction stipulates that where any part of the business of a company consists in the purchase and sale of shares of other companies, such company shall, for the purposes of the section be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sales of such shares. The deeming fiction applies only to a company and the provision makes it clear that the deeming fixation extends only for the purposes of the section. The bracketed portion of the explanation, however carves out an exception. The exception is that the provision of the explanation shall not apply to 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 whose principal business is of banking or the granting of loans and advances.

7. The submission which has been urged on behalf of the Revenue is that in computing the gross total income for the purpose of the explanation to Section 73, income under the heads of profits and gains of business or profession must be ignored. Alternatively, it has been urged that where the income from business includes a loss in the trading of shares, such a loss should not be allowed to be set off against the income from any other source under the head of profits and gains of business or profession.

8. In our view, the submission which has been urged on behalf of the Revenue cannot be accepted. Leaving aside for a moment, the exception, which is carved out by the explanation to Section 73, the explanation creates a deeming fiction by which a company is deemed to be carrying on a speculation business where any part of its business consists in the purchase and sale of shares of other companies. Now, the exception which is carved out applies to a situation where the gross total income of a company consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources". Now, ordinarily income which arises from one source which falls under the head of profits and

gains of business or profession can be set off against the loss which arises from another source under the same head. Sub Section (1) of Section 73 however sets up a bar to the setting off of a loss which arises in respect of speculation business against the profits and gains of any other business. Consequently, a loss which has arisen on account of speculation business can be set off only against the profits and gains of another speculation business. However, for Sub Section (1) of Section 73 to apply the loss must arise in relation to a speculation business. The explanation provides a deeming definition of when a company is deemed to be carrying on a speculation business. If, the submission of the Revenue is accepted, it would lead to an incongruous situation, where in determining as to whether a company is carrying on a speculation business within the meaning of the explanation, sub section (1) of Section 73 is applied in the first instance. This would in our view not be permissible as a matter of statutory interpretation, because the explanation is designed to define a situation where a company is deemed to carry on speculation business. It is only thereafter that sub section (1) of section 73 can apply. Applying the provisions of Section 73(1) to determine whether a company is carrying on speculation business would reverse the order of application. That would be impermissible, nor, is it contemplated by Parliament. For, the ambit of Sub Section (1) of Section 73 is only to prohibit the setting off of a loss which has resulted from a speculation business, save and accept against the profits and gains of another speculation business. In order to determine whether the exception that is carved out by the explanation applies, the legislature has first mandated a computation of the gross total income of the Company. The words "consists mainly" are indicative of the fact that the legislature had in its contemplation that the gross total income consists predominantly of income from the four heads that are referred to therein. Obviously, in computing the gross total income the normal provisions of the Act must be applied and it is only thereafter, that it has to be determined as to whether the gross total income so computed consists mainly of income which is chargeable under the heads referred to in the explanation.

9. *Consequently, in the present case the gross total income of the assessee was required to be computed inter alia by computing the income under the head of profits and gains of business or profession as well. Both the income from service charges in the amount of Rs. 2.25 crores and the loss in share trading of Rs. 2.23 crores, would have to be taken into account in computing the income under that head, both being sources under the same head. The assessee had a dividend income of Rs. 4.7 lacs (income from other sources). The Tribunal was justified, in coming to the conclusion that the assessee fell within the purview of the exception carved out in the explanation to Section 73 and that consequently the assessee would not be deemed to be carrying on a speculation business for the purpose of Sec. 73(1).*

10. *The view, which we have taken, also accords with the judgments of this Court in CIT v. Hero Textiles & Trading Ltd. (IT Appeal No. 296 of 2001 decided on 29 January, 2008) and in CIT v. Maansi Trading (P.) Ltd. (Income Tax Appeal No.47 of 2001, decided on 29 January, 2008). The Tribunal has relied upon its earlier decision in the case of Concord Commercial Pvt. Ltd. of 18 March 2008. A Division Bench of this Court had dismissed Notice of Motion no. 1921 of 2007*

in Income Tax Appeal (Lodging) No.852 of 2007 for condonation of delay against the decision of Concord Commercial (P.) Ltd. (supra) holding that even otherwise on merits, the issue was covered by the decision rendered by the Division Bench in Hero Textiles & Trading Ltd. (supra).

11. For the aforesaid reasons, we answer the question of law in the affirmative. The Appeal is accordingly disposed of.

There shall be no orders as to costs.

3.6. Similar views were expressed by the Hon'ble Jurisdictional High Court

in the following decisions: -

- a) CIT vs Madona Commercial (P) Ltd reported in 96 taxmann.com 16
- b) CIT vs HSBC Securities & Capital Markets India (P) Ltd reported in 23 taxmann.com 377.

3.7. Since the issue in dispute before us is settled by the provisions of the **Act and by the aforesaid decisions of Hon'ble Jurisdictional High Courts**, we deem it unnecessary to go into the non-jurisdictional High Court decisions relied upon by the Id. DR before us.

3.8. Accordingly, we hold that the loss incurred on shares and derivatives in the sum of Rs 1,13,24,176/- cannot be treated as speculation loss in the instant case. Consequently, there is no need to apportion any expenses to the speculation activity in the sum of Rs 2,50,98,243/-. Hence we do not find any infirmity in the order of the Id. CIT(A) granting relief to the assessee. Accordingly, the ground raised by the revenue is dismissed.

4. In the result, the appeal of the revenue is dismissed.

Order pronounced on 02/09/2022 by way of proper mentioning
in the notice board.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 02/09/2022
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai