

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
Original Side

Present :- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Md. Nizamuddin

ITA 840 of 2008

Shankar Sales Promotion Pvt. Ltd.
VS.
Commissioner of Income Tax, Kolkata - II

For the Appellant :- Mr. R. K. Murarka, Sr. Adv.
Mrs. Sutapa Roy Choudhury

For the Respondent :- Mr. P. K. Bhowmick, Adv.

Judgment On :- 24.04.2019

I. P. MUKERJI, J.:-

The judgment to be delivered by brother Md. Nizamuddin, J. at my invitation, is to be treated as the first judgment of the Court. However, I would like to add a few words of my own.

What has assumed importance in this case is the interpretation that has to be given to the words 'principal business'.

Mr. Murarka submits that apart from the business of purchase and sale of shares the assessee company carries on the business of granting loans, advances etc. and has a significant income from other sources as shown in their profit and loss account for the relevant financial year. Therefore, the business of purchase and sale of shares is not their principal business. Hence

it is entitled to adjust the loss incurred by them by trading in shares against their business income.

Now, what is to be taken as the principal business of the assessee, is a purely technical matter. It involves principles in the field of general law, corporate law, accountancy, revenue law and so on.

In this case, the assessee is a limited company. It has a memorandum of association. It has to undergo audit. It is required to file its balance-sheet and profit and loss account with the Registrar of companies. It also files its income tax return.

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.

(I. P. MUKERJI, J.)

MD. NIZAMUDDIN, J.:-

Heard counsel for the parties.

This appeal of the assessee arises out of the impugned order dated 12th September, 2018 passed by the learned Income Tax Appellate Tribunal relating to assessment year 2004-05.

Though substantial questions of law have not been framed in a proper manner by the appellant but on considering the submission of the parties and on perusal of records the main issues emerge and requires adjudication in this appeal are as to whether principal business of the assessee was that of granting loans and advances and the case of the appellant comes within the exceptions to the Explanation under Section 73 of the Income Tax Act, 1961, and whether assessee is entitled to the benefit of set off of loss in shares dealing by treating the same as business loss.

Facts in brief in this case are hereunder:

The assessee filed return of income on 29.10.2004 at a total income of Rs. 8,61,240/-. The Assessing Officer as per order under Section 143(3) of the Income Tax Act, dated 29.12.2006 determined the assessed total income of Rs. 1,56,18,200/-. While finalizing the assessment, the Assessing Officer held that the loss of Rs. 1,48,61,635/- claimed by the assessee in the business of purchase and sale in shares was speculation loss as per the provisions of explanation to Section 73 of the Act. He, therefore, did not allow the set off of speculation loss of Rs. 1,48,61,635/- against the income from interest on granting loans and advances, house property and other sources declared by the assessee for the relevant accounting period by holding that neither of the exceptions provided in Explanation to Section 73 of the Act were applicable to the case of the assessee. The learned CIT (Appeals) allowed the appeal of the assessee by holding that the case of the assessee was covered by the exceptions provided in Explanation to 73 of the Indian Tax Act, 1961 and the loss of Rs. 1.48 crore suffered by the assessee in purchase and sale of shares is to be held as business loss and should be allowed to be set off as business loss.

Feeling aggrieved by the order of the CIT (Appeals) revenue preferred appeal before the learned Tribunal which allowed the appeal of the revenue and reversed the order of CIT (Appeals) and restored the order of the Assessing Officer on this issue against which the assessee has preferred the instant appeal

Assessee/appellant contends that impugned order of the Tribunal is erroneous for the reason that the assessing officer himself in assessment order has held that the deployment of funds in the business of granting of loans and advances was Rs. 13.03 crores whereas it was only Rs. 2.33 crores in shares dealing as such granting of loans and advances in the instant case should have been treated as principal business of the assessee and not the trading in shares dealing and case of the assessee clearly falls within the exception to the Explanation under Section 73 of the Indian Tax Act, 1961.

The assessee further contends that the aforesaid facts could be clearly established by the Auditors report and balance sheet and other documents which have not been discussed and considered by the learned Tribunal in its order.

Counsel for the revenue supports the assessment order and order of the Tribunal by contending that granting of loans and advances is not the principal business of the assessee and it is ancillary business activity and denies that the deployment of funds in granting of loans and advances is higher than the funds deployed in shares dealing.

The assessee/Appellant in support of its contention and on the ambit and scope of Section 73 and Explanation below it thereto under Income Tax Act, 1961, has relied on the following decisions:

- i) Unreported decision of this court dated 15th January, 2014 in the case of
Commissioner of Income Tax west Bengal-II Calcutta Vs. Middleton Investment & Trading Co. Ltd. (ITA No. 196 of 1999)
- ii) Unreported decision of this court dated 19th March, 2015 in the case of
Commissioner of Income Tax, Kolkata-II Vs. M/s. Savi Commercial Pvt. Ltd. (ITA No. 132 of 2007)
- iii) **PCBL Industrial Ltd. Vs. Commissioner of Income-Tax and Another**
reported in the **(2011) 337 ITR 536 (Cal)**

The Revenue/Respondent in support of its contention that the case of the assessee does not fall within the exceptions under Explanation to Section 73 of the Indian Tax Act, 1961, has relied on the following decisions.

- i) **Aryasthan Corporation Ltd. Vs. Commissioner of Income-Tax (2002)**
253 ITR 401 (Cal)
- ii) **Paharpur Cooling towers Ltd. Vs. Commissioner of Income-Tax**
(2011)338 ITR 295 (Cal)
- iii) **R.P.G. Industries Ltd. Vs. Commissioner of Income Tax and Another**
(2011) 338 ITR 313 (Cal)
- iv) **Prem Chand Shaw (Jaiswal) Vs. Assistant commissioner, Circle-38,**
Kolkata (2016) 67 taxmaun.com 339 (Calcutta)

In order to appreciate the issues involved herein, it will be profitable to refer to section 73 of the Act with the Explanation which is quoted below:

“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 and 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 provisions of this Chapter, be carried forward to the following assessment year, and-

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

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

(3) In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section (20) of section 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 four assessment years immediately succeeding the assessment year for which the loss was first computed.

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 .

The Statement of Objects and Reasons for the added Explanation to section 73 and the Notes on Clauses appended to the Bill explaining the proposed amendment are also quoted below 9[1973] 89 ITR (St.) 107)

“STATEMENT OF OBJECTS AND REASONS”

The object of this Bill is to amend the Income-tax Act, 1961, the Wealth-tax Act, 1957, the Gift-tax Act, 1985, and the Companies (Profits) Surtax Act, 1964. The proposals relating to the amendments to these enactments have been formulated after a detailed examination of the recommendations of the Direct Taxes Enquiry Committee (Wanchoo Committee) and the Forty-seventh Report of the Law

Commission on the Trial and Punishment of Social and Economic Offences, the latter in so far as they relate to direct taxes. Opportunity has been taken to sponsor some amendments on the basis of suggestions received from various other quarters as well. Technical difficulties arising in the operation of some of the provisions of these enactments have also been taken into account in formulating these proposals.

2. The main objectives of the amendments proposed to be made are to unearth black money and prevent its proliferation; to fight and curb tax evasion; to check avoidance of tax through various legal devices, including the formation of trusts and diversion of income or wealth to members of family; to reduce tax arrears and to ensure that in future, tax arrears do not accumulate; to rationalise to exemptions and deductions available under the relevant enactments, and to streamline the administrative set up and make it functionally efficient.”

3. The Notes on Clauses, appended to the Bill, explain the various provisions thereof.”

Treatment of losses in speculation business-section 73.

“19.1 Section 73 of the Act provides that any loss computed in respect of speculation business carried on by an assessee will not be set off except against the profits or gains, if any, of another speculation business. Further, where any loss, computed in respect of a speculation business for an assessment year is not wholly set off in the above manner in the said year, the excess shall be allowed to

be carried forward to the following assessment year and set off against the speculation profits, if any, in that year, and so on. The amending Act has added an Explanation to section 73 to provide that the business of purchase and sale of shares by companies which are not investment or banking companies or companies carrying on business of granting loans or advances will be treated on the same footing as a speculation business. Thus, in the case of the aforesaid companies, the losses from share dealings will now be set off any against profits or gains of a speculation business. Where any such loss for an assessment year is not wholly set off against profits from a speculation business, the excess will be carried forward to the following assessment year and set off against profits, if any, from any speculation business.

19.2 The object of this provision is to curb the device sometimes resorted to by business houses controlling groups of companies to manipulate and reduce the taxable income of companies under their control.

19.3 This provision will come into force with effect from April 1, 1977, and will apply in relation to the assessment year 1977-78, and subsequent years.”

Ambit and scope of Section 73 of the Income Tax Act, 1961 and Explanation under it can be summarized as follows:

- (i) Section 73 of the Act deals with carry forward and set off of losses from speculation business and Explanation to Section 73 of the Act is a

deeming provision wherein if specified conditions are satisfied, purchase and sale of shares are deemed speculation activities.

(ii) Explanation to Section 73 of the Act does not attract any company if the gross total income of the company includes income mainly from “Interest on securities,” “Income from House property,” “capital gains” and “Income from other sources Or the principle business of the company is the business of banking or the granting of loans and advances.

(iii) Explanation to Section 73 of the Act provides that a company if fulfills any one of the aforesaid two conditions shall be exempted from the purview of the provisions of explanation.

(iv) The Explanation to Section 73 of the Act is not applicable in case the whole of the business of a company consists of purchase and sale of shares.

All the Judgments cited by the parties in this case are on settled proposition of law and on interpretation of Section 73 of the Act and its Explanation.

Now we deal with the judgments relied upon by the parties:

The appellant relied on the case of Middleton Investment & Trading Co. Ltd. (supra) where it appears that the revenue had conceded that income of the assessee from other heads were more than the income from shares dealing and

the case of the assessee clearly fell within exceptions to the Explanation to Section 73 of the Income Tax Act and this court upheld the order of the Tribunal.

In the case of M/s. Savi Commercial Pvt. Ltd. (supra) relied upon by the assessee it has been held by this court that principal business of the assessee was of granting loans and advances in the light of explanation under Section 73 of the Income Tax Act.

In the case of PCBL Industrial Ltd. (supra) relied upon by the assessee it was held by this court that principal business of the assessee was of granting of loans and the assessee came within the exception to the Explanation under Section 73 of the Income Tax Act, 1961.

Revenue relied upon the decision of this court in the case of Aryasthan Corporation Ltd. (supra) where it has been held that the loss in shares dealing which is negative income was much more than the income under other headings as such shares dealing activity was treated as principal business and as such fact of the said case is different from the present case.

Revenue relied on the decision of this Court in Paharpur Cooling Towers Ltd. (supra) in that case there was specific finding by all the authorities below and this court upheld the said finding and it would appear that the facts of the said case as recorded below by this Court is different from the present case:

“We are of the view that this case on factual aspect as recorded by the learned Tribunal and other authorities admittedly the sale of shares has been effected by physical delivery of shares.

Therefore, the assessee-company cannot get the benefit of set off or carry forward of speculation loss as rightly held by all the authorities.”

The Revenue has relied on the decision of this court in the case of R.P.G. Industries Ltd. (supra) which is on interpretation of Section 73 of the Act, and Explanation below it where the court has interpreted the same in the following manner but that is not the issue in this case:

“ 26. In the case before us, we have already pointed out that by virtue of the legal fiction created by the added Explanation to section 73 of the Act, even the transactions which are not speculative transactions within the meaning of section 43(5) of the Act, should be deemed to be speculative one if those come within the purview of the Explanation to section 73 of the Act. We, thus, find that the above mentioned decision cited by Dr. Pal is of no assistance to his clients.”

Lastly revenue relied on the decision of this court in Prem Chand Shaw (Jaiswal) (supra) on similar proposition of law. It was also contended by the assessee in the aforesaid case that Explanation added to the main section cannot extend the ambit of main section and therefore court should ignore the Explanation to Section 73 of the Act altogether. This contention of the assessee was not accepted by our court. This is not the issue in the present case. Cases cited by the parties are on settled principle of law with regard to ambit and scope of Section 73 of the Act and Explanation below it. There is no reason to disagree with the propositions of law settled in the aforesaid decisions cited by the parties.

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.

No order as to casts.

ITA No. 840 of 2008 is disposed of accordingly.

(MD. NIZAMUDDIN, J.)