IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

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THE HONOURABLE MR.JUSTICE ASHOK MENON

THURSDAY, THE 21ST DAY OF FEBRUARY 2019 / 2ND PHALGUNA, 1940

I.T.A.No.1231 of 2009

**AGAINST THE ORDER IN ITA 7/COCH/2007 DATED 08-08-2007
OF INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN
[ASSESSMENT YEAR 2003-04]**

APPELLANT/S:

**THE COMMISSIONER OF INCOME TAX,
COCHIN.**

**BY ADVS.
SRI.JOSE JOSEPH, SC, FOR INCOME TAX**

RESPONDENT/S:

**HARRISONS MALAYALAM FINANCIAL SERVICES LTD.,
BRISTOW RD, WILLINGDON ISLAND, KOCHI.**

**BY ADVS.
SRI.P.BENNY THOMAS
SRI.E.K.NANDAKUMAR (SR.)
SRI.K.JOHN MATHAI
SRI.P.GOPINATH (SR.)**

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 21.02.2019, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Vinod Chandran,J.

The Revenue is in appeal challenging the order of the Income Tax Appellate Tribunal, Cochin Bench in I.T.A.No.7/Coch/2007 for the assessment year 2003-04 pertaining to the dismissal of the Revenue's appeal and confirming order of the first appellate authority.

2. The assessee is a non-banking financial company engaged in the business of sale and purchase of shares. The assessee filed original return of income for the assessment year 2003-04 on 31.10.2003 declaring a loss of Rs.5,39,19,380/-. On the return being processed under Section 143(1) of the Income Tax Act, 1961 [for brevity "the Act"], the assessee's case was selected for scrutiny and notice under Section 143(2) was issued to the assessee on 04.10.2004. A revised return was filed on 31.03.2005 by the assessee re-computing the loss at Rs.3,11,43,326/- and claiming a refund of Rs.1,72,011/-.

3. While completing the assessment, the A.O. resorting to the Explanation to Section 73 of the Act, treated the returned loss of Rs.3,19,13,970/- as speculation loss, as the assessee is a non-banking company whose income consists mainly of"income from business". The

assessee's business consists of trading in shares of other companies. The speculation loss, according to the A.O., could be set off only as per the provisions of sub-sections (1) to (4) of Section 73 of the Act.

4. The assessee filed an appeal before the Commissioner of Income Tax (Appeals), who vide order dated 19.10.2006 allowed the appeal and directed the A.O. not to treat the loss as speculation loss. The reasoning was that, as per CBDT circular No.204 dated 24.09.1976, non-banking finance companies have been taken out of the scope of application of Section 73 and hence trading loss of such companies shall not be treated as speculation loss. The Revenue preferred an appeal before the I.T.A.T. and vide the impugned order dated 08.08.2004 the appeal was dismissed, holding that Explanation to Section 73 is not applicable to the case of the assessee. It was so held, on the finding that the gross total income of the Company consists mainly of "interest on securities", "income from house property", "income from capital gains" and "income from other sources".

5. The following substantial questions of law arise for consideration of this Court in appeal:

"1. Whether, on the facts and in the circumstances of the case and also in the light of the decisions in 253 ITR 403, 261 ITR 473, 208 ITR 1023, ought not the Tribunal have restored the order of the assessing officer ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and in fact in holding that "the Assessee Company is covered in the first exception provided in the explanation, as its gross total income mainly consists of income under the head Interest on Securities, Income from House Property, Income from Capital Gain and Income from Other Source" ?

3. Whether, on the facts and in the circumstances of the case is the explanation to section 73 of Income tax Act applicable in this case ?"

6. We heard the learned Standing Counsel, Government of India (Taxes) appearing for the Revenue and the learned Counsel appearing for the assessee.

7. Section 73 with the Explanation, pertinent for this appeal, reads thus:

"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.

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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."*

8. The argument of the learned Counsel for the Revenue is that by virtue of the afore-cited Explanation, which is in the nature of a deeming provision, the loss of the assessee company having been occasioned in the business of buying and selling shares of other companies, it has to be treated as a speculation loss in view of the Explanation to Section 73. On the other hand, the argument of the learned Counsel for the assessee is that the assessee-company is a non-banking financial company, engaged mainly in the trading of shares. The purpose of the Explanation was to curb the device resorted to by business houses controlling a group of companies to manipulate and reduce the taxable income of the companies under their control, by involving in speculative investments; as clarified by the CBDT in Circular No.204 dated 24.07.1976.

9. The assessee for the subject year, being 2003-04, had a loss of Rs.1,68,674/- from the sale of shares. It also had a dividend income of Rs.31,93,299/-. In addition to this, the assessee had an expenditure from the earlier year; which, as per earlier orders of assessment,

was spread over for the subsequent years. The expenditure as applicable to the present year, as is seen from the assessment order produced as Annexure R-1(a); having been set off against the income from business for the year, there was a total loss of Rs.3,19,13,970/-. The assessee also had income from other sources at Rs.7,98,850/-, which was completely by way of refund of income tax for the earlier years. The assessee's claim is that the business loss which arose in this particular year could be set off against the income from other sources.

10. The Revenue, however, contends that the assessee being a company engaged in speculative business, the business loss suffered by such a company could be set off only as against speculative income as per Section 73. The learned Standing Counsel for Government of India (Taxes) also relies on the following three decisions - *Eastern Aviation & Industries Ltd*. *v*. *C.I.T.* [*(1994) 208 ITR 1023 (Cal.)*], *Aryasthan Corporation Ltd*. *v*. *C.I.T*. [*(2002) 253 ITR 401 (Cal.*] and *C.I.T.* v. *Park View Properties P. Ltd*. [*(2003) 261 ITR 473 (Cal.)*].

11. The facts in *Aryasthan Corporation Ltd*. were that the gross total income as computed by the A.O.; for AY 1982-83 comprised of speculation loss from share dealing of

Rs.4,50,779/- and income from other sources was at Rs.24,000/-. The Calcutta High Court with regard to the applicability of Explanation to Section 73, took the view that the case is fully covered by the decision in the case of *Eastern Aviation and Industries Ltd*. v. *CIT* [*(1994) 208 ITR 1023 (Cal)*] and held that the assessee cannot be said to be a company whose gross total income consists mainly of income chargeable under the heads "Interest on securities", "Income from house property", "capital gains" or "Income from other sources"; since the business loss exceeds income computed under the head "Income from other sources" and, as such the Explanation to Section 73 is clearly applicable.

12. We find from the aforesaid decisions that in similar instances where the assessees carried on speculative business, like dealing in shares, when suffered losses, the claim of set off against the income from sources other than the profits and gains of business or profession, was found to be not permissible going by Section 73.

13. We specifically refer to the facts in *Park View Properties P. Ltd*., one of the latest decisions cited by the learned Counsel for the Revenue. Therein, the assessee had income from other sources of Rs.5,73,701/- and

business income of Rs.3,33,670/-. The Tribunal found that since the income from other sources was more, the exemption as applicable under Explanation to Section 73 would apply. Hence, the business losses, though loss from speculative business, the same could be set off against income from other sources. However, the Division Bench of the Calcutta High Court found that there was a loss in the share dealing account, of Rs.8,98,799/-, and this being negative income, the same has to be taken for the purposes of the Explanation to Section 73. The said finding was on the well established proposition that the words "income", "profits" and "gains" represent a positive income, whereas the loss represents a negative income. All the three decisions cited by the Revenue took support from the decisions of the Hon'ble Supreme Court in *CIT* *v.* *Harprasad and Co. P. Ltd*. [*(1975) 99 ITR 118 (SC)*] and *CIT* *v.* *J.H.Gotla* [*(1985) 156 ITR 232 (SC)*].

14. The learned Counsel for the assessee, however, contends that there is an alternate argument, which has not been considered by the Calcutta High Court in any of the decisions. The Explanation specifically deals with a company whose gross total income consists mainly of income which is chargeable under other heads, ie: heads other than

"income from profits and gains of business or profession". Hence, what assumes significance is the chargeability to income. There is no charge created on the loss and there could only be charge on the income from other sources in the subject assessment year insofar as the assessee is concerned. Hence, for the assessment year the chargeable income being "income from other sources", the business losses though speculative in nature have to be allowed a deduction, despite Section 73, since the company falls under the exception as per the Explanation.

15. We are unable to countenance such a contention. Section 73 speaks of any loss in a speculation business being permitted set off only against the profits and gains of another speculation business. The Explanation provides 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 purpose 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 exception as provided in the Explanation is only to those companies whose gross total income chargeable to tax consists mainly of income arising 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. Admittedly the assessee is not a banking company nor is it involved in granting loans and advances. The assessee is an investment company, which carries on purchase and sale of shares of other companies., on which business substantial loss accrued over the years. There is no doubt that the assessee-Company is engaged in a speculative business. Hence its losses can only be set off against speculative business income unless the gross total income of the assessee is under heads of income, other than "income from profits and gains of business or profession".

16. In the present case for the subject assessment year the assessee had an income from other sources, which was a refund of income tax. It is against this refund of income tax that the assessee claims set off of business loss. If we accept the contention raised by the learned Counsel for the assessee, then the exception as provided in the Explanation in Section 73 has to be understood as being applied to each of the assessment years where there is a change in the gross total income from any other sources

other than the profits and gains arising from business or profession.

17. The question of chargeability for the purpose of exemption as argued by the learned Counsel for the assessee even if found to be acceptable, it has to be held that though the negative income would be chargeable; for reason of it being negative there could be no tax leviable since that would also be a negative figure. It could only be understood as, when there is a loss, then there would be no payability of tax at all. In such circumstances, we are of the opinion that there could be no set off of the speculative business loss as against the income from other sources for the year, since the exception under the Explanation to Section 73 does not apply to the Company.

18. The learned Counsel for the respondent-assessee also has a contention that sub-section (2) refers to the specific assessment year in which it has to be applied. We cannot accept the said contention also, since the prohibition is insofar as sub-section (1) of Section 73, which provides that any loss in a speculation business shall not be set off except against profits and gains, if any, of another speculation business. This does not provide for looking at the profits and gains arising in

each year in which the assessee is carrying on the business. Sub-section (2) of Section 73 is a provision for carry forward as found in Sections 70 to 72 itself. In fact, Section 73 culls out a particular type of business loss out of Section 72 and places it under Section 73, being one occasioned by a speculative business. Hence, the very same carry forward under Section 72 has been permitted with respect to speculation loss also, but subject to the condition under Section 73.

In the light of the findings above, we set aside the orders of the first appellate authority and the Tribunal, and restore that of the A.O. We answer the questions of law in favour of the revenue and against the assessee. The appeal would stand allowed, leaving the parties to suffer their respective costs.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
ASHOK MENON
JUDGE

APPENDIX

APPELLANT'S ANNEXURES:

ANNEXURE A	COPY OF ORDER U/S.143(3) DATED 30.01.2006 FOR THE ASST.YEAR 2003-04.
ANNEXURE B	COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 19.10.2006.
ANNEXURE C	COPY OF THE ORDER DATED 08.08.2007 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH IN ITA NO.07/COCH/2007.

RESPONDENT'S ANNEXURES:

ANNEXURE R(1)(A)	THE TRUE COPY OF THE ASSESSMENT ORDER DATED 30.11.2004 ISSUED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 1(1), ERNAKULAM FOR THE ASSESSMENT YEAR 2002-03.
ANNEXURE R(1)(B)	THE TRUE COPY OF THE ORDER DATED 12.04.2006 ISSUED BY THE COMMISSIONER OF INCOME TAX (APPEALS)-II, KOCHI.
ANNEXURE R(1)(C)	THE TRUE COPY OF THE CONSEQUENTIAL ORDER DATED 06.07.2006 ISSUED BY THE ASSISTANT COMMISSIONER OF INCOME-TAX, CIRCLE 1(1), ERNAKULAM.
ANNEXURE R(1)(D)	THE TRUE COPY OF THE PROFIT AND LOSS ACCOUNT FOR THE YEAR ENDED 31.03.2004.
ANNEXURE R(1)(E)	THE TRUE COPY OF THE REVISED COMPUTATION OF INCOME FOR THE YEAR ENDED 31.03.2003.

Vku/-

[true copy]