

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1132 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

SD/-

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

SD/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

M/S. RATNAMANI SEAMLESS PVT. LTD.....Appellant(s)

Versus

INCOME TAX OFFICER....Opponent(s)

Appearance:

MRS SWATI SOPARKAR, ADVOCATE for the Appellant(s) No. 1

MR NITIN K MEHTA, ADVOCATE for the Opponent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 29/06/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

By way of this appeal, the appellant-assessee has challenged the order of the ITAT made in ITA No.1791/Ahd/2000 dated 20/01/2006, whereby allowing the appeal filed by the revenue, the ITAT has reversed the order passed by the CIT(A) and uphold the order of the A.O. and rejected the claim of the assessee claiming loss in valuation of the shares and has disallowed the same as added to the income.

2. While admitting the present appeal, the following questions were framed for consideration:

“(i) Whether in the facts and circumstances of the case, the Income Tax Tribunal was right in law in treating the business loss suffered by the appellant as speculation loss by applying the provisions of Explanation to Section 73 of the Act?”

“(ii) Whether in the facts and circumstances of the case, the Income Tax Tribunal was right in law in holding that even valuation loss can be treated as speculation loss within the meaning of provisions of Explanation to Section 73 of the Act?”

3. Learned Counsel for the appellant has contended that the assessee has not disclosed any opening stock of the share and he has relied upon the profit and loss account as per the audited accounts of the assessee which reads as under:

<u>Expenditure</u>		<u>Income</u>	
Opening Stock	NIL	Sales	1850
Purchases of Shares	11989650	Commission	4000000

Administrative Expenses	35610	Closing stock of shares	8566540
Interest	455153		
Net Profit	87977		
	12588390		12588390

3.1 Learned Counsel for the appellant has also relied upon the computation of taxable income under the head of business income which reads as under:

<u>Business Income</u>	
Net profit as per profit and loss account	87997
Less: Items not considered	NIL
Preliminary expenses	4033
Less : Unabsorbed Depreciation of earlier years:	8689
Total Income	75255

3.2 Learned Counsel for the appellant has further contended that the A.O., has wrongly held that loss arising from the appellant's transaction from shares is not the business loss but speculation loss and therefore the total income determined at Rs.39,73,505/- is not correct.

3.3 Learned Counsel for the appellant has taken us to the order passed by the CIT (A), more particularly, paragraph No.4 and contended that provisions of Explanation to Section 73 shall not be applicable to the share transactions of the appellant and therefore the claim of the appellant of loss of

Rs.38,94,219/- as business loss is justifiable and the same should be allowed to be set off against the other income of the assessee.

3.4 Learned Counsel for the appellant has further contended that the learned Tribunal has also not correctly interpreted the provision of Explanation to Section 73 of the Act in view of the decision in case of **Commissioner of Income-tax-3 v Darshan Securities (P.) Ltd. [2012] 341 ITR 556 (Bombay)**. He has relied upon the discussion made in paragraph No.8 of the aforesaid decision which reads thus:

*"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 :::
Downloaded on - 09/06/2013 18:08:07 ::: 8 ITXA 2886-09
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 :::: Downloaded on - 09/06/2013 18:08:07 :::: 9 ITXA 2886-09 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."

3.5 Learned Counsel for the appellant has further contended that, if the gross income is taking into consideration, then it will squarely cover by the decision of the Hon'ble Bombay High Court in case of **Darshan Securities (P.) Ltd. (supra)** and therefore the appeal of the assessee is required to be allowed and answer may be given in affirmative in faovur of the assessee.

4. On the other hand, learned Counsel for the revenue Mr.Mehta has mainly contended that this will fall under Explanation to Section 73 of the Act and it is a speculative business and the very purpose of Section 73 is to give effect of loss on speculation and it cannot give set off against business income and therefore, there is no speculation income and this aspect has rightly been considered by the A.O., as well as by the Tribunal in its order.

4.1 Learned Counsel for the revenue has taken us to paragraph No.12 of the order passed by the Tribunal and contended that the assessee had incurred loss on account of valuation of shares and therefore the entire loss is to be held as speculative loss.

4.2 In support of his submission, learned

Counsel for the revenue has relied upon the decision in case of **Prasad Agents (P) Ltd. Vs. Income Tax Officer (2011) 333 ITR 0275** and has relied upon paragraph No.10 which reads thus:

"10. In our opinion there can be no difference between the losses suffered in the course of trading by delivery and losses in terms of the book value. As long as the assessee is carrying on business of trading by way of purchase and sale of shares even if in respect of any financial year, there are no transaction and yet the company has stock in trade of shares, the book value will have to be considered for the purpose of considering the profit and loss in case of speculative business. There can be no doubt that the explanation to Section 73 cannot be read to mean only when there is a purchase and sale of shares in the course of the financial year. The explanation will cover both shares which are stock in trade and shares which are traded in the course of the financial year for the purpose of considering the loss and profit for that year. The Tribunal, in our opinion, has correctly answered the issue by holding that the loss of profit on account of valuation amounts to revenue losses or revenue receipt. The second question, therefore, also will have to be answered against the assessee and in favour of the Revenue."

4.3 Learned Counsel has also relied upon the decision in case of Commissioner of **Income-Tax V. Lokmat Newspapers P. Ltd. [2010] 322 ITR 43 (Bom)** and relied upon the following paragraphs:

"9. The contention of the Revenue in the present case, in essence is that the definition of the expression "speculative transaction" in Section 43(5) must be read into the provisions of Section 73, because a business cannot be a speculation business unless there is a speculative transaction and a speculative transaction is defined by the former as one, not involving an actual delivery of shares. Hence, it was submitted that a transaction which involves an actual delivery of shares would not constitute a speculative transaction and the assessee who is engaged in a business involving the actual delivery of shares, cannot be regarded as being engaged in speculation business.

10. The submission which has been urged on behalf of the Revenue, cannot be accepted, having regard to the plain

meaning of the explanation to [Section 73](#). The submission of the Revenue is that a loss which arises on account of a transaction of the sale and purchase of shares would constitute a loss from a speculation business for the purposes of the explanation. But, that the profit which arises from a transaction involving the actual delivery of shares would not constitute a profit for the purposes of sub-sections (1) and (2) of [Section 73](#) in respect of which a set off can be granted. To accept the submission of the Revenue would be to introduce a restriction into the scope and ambit of the deeming fiction which is created by the explanation to [Section 73](#), which is not contemplated by Parliament. Once a deeming fiction is created by law, it must be given full and free effect, of course, in relation to the ambit within which it is intended to operate. The deeming fiction created by the explanation to [Section 73](#) defines when an assessee is to be deemed to be carrying on a speculation business for the purposes of the Section. The deeming fiction is, therefore, one which arises specifically in the context of the provisions of [Section 73](#) and is confined to that purpose alone. The explanation stipulates that where an assessee is a company whose business consists in any part of the purchase and sale of shares of other Companies, it shall be deemed to be carrying on a speculation business to the extent to which the business consists of purchase and sale of such shares. Whether or not it is a profit or loss that has resulted from carrying on such business, is a consideration which is alien to the meaning of what constitutes a speculation business by the explanation to [Section 73](#). Once an assessee is deemed to be carrying on a speculation business for the purpose of [Section 73](#), any loss computed in respect of that speculation business, can be set off only against the profits and gains of an other speculation business. Similarly, for the purposes of sub-section (2), the loss in respect of a speculation business which has not been set off either in whole or in part, can be carried forward and can be set off against profits and gains "of any speculation business". The expression "any speculation business" means a speculation business of the assessee in respect of which profits and gains for the Assessment Year in question have arisen and there is no justification to restrict the content of that speculation business. 11 where profits have arisen by excluding a business involving actual delivery of shares. No such restriction is found in the explanation. To impose one is a legislative function. In other words, once the assessee is carrying on a speculation business and the profits and gains have arisen from that business during the course of the Assessment Year, the assessee is entitled to set off the losses carried forward from a speculation business arising out of a previous Assessment Year.

11. In these circumstances, the view which has been formed by the Tribunal is consistent with the provisions of [Section 73](#). The questions of law shall stand answered accordingly. The

appeal shall stand dismissed. There shall be no order as to costs."

4.4 Learned Counsel has also relied upon the decision in case of **Commissioner of Income Tax v. Sun Distributors & Mining Co. Ltd. (1993) 68 TAXMAN 0223** and has relied upon following paragraph of the said decision which reads as under:

"Sec, 73 of the Act deals With loss in speculation business. It provides as follows:

'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, " any, of another speculation business."

S. Sub-s. (2) of s. 73 lays down that where any loss in respect of a speculation business has not been wholly set off under sub-s. (1), so much Of the loss as has not been set off shall be carried forward to the following assessment Year. It is also further provided that such carried forward loss In speculation business shall be set off against profits and gains of any speculation business of the subsequent assessment year. No loss shall be carried forward under this section for more than succeeding eight assessment years. There IS an Explanation to s. 73 which provides as follows :

"Explanation : Where any part of the business of a company (other than an investment company, as defined in cl. (ii) of s. 109, 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."

6. The section Will apply where any part of the business of the company 'consists' in the purchase and sale of shares of other companies. Therefore, it has to be seen whether the assessee-company has such a business. It may be that in a particular year shares were only sold or in a particular year the shares were only purchased. The section does not require that both sale and purchase should take place in the same year. What is to be seen is whether the business of the company consists in purchase and sale of shares. In the instant case, the assessee-company had a business of buying and selling the shares. The shares are treated as stock-in-trade. The closing stock of tho shares have been valued Just as any other stock- in-trade IS valued by a company. There were small lots of sale of shares in this year. But that

Will not make any difference to the main question, which is, whether the company was engaged in the business of sale and purchase of shares. If it is found that any part of the business of the company consists in the purchase and sale of shares, then for the purpose of s. 73 such a company shall be deemed to be carrying on a speculation business to the extent the business consisted of purchase and sale of such shares. It is not the requirement of the section that both purchase and sale of shares should take place in the same year. But what the section requires is that there will be business of sale and purchase of shares and the assessee-company will carry on that business in the relevant year of account. The very fact that shares were valued as stock-in-trade and the loss was disclosed, as a result of the valuation of the shares, goes to show that the business of share purchase and sale of

shares was carried on by the company. To the extent such business was carried on, the business of the assessee-company must be treated as speculation business.

7. In that view of the matter, the question is answered in the negative and in favour of the Revenue. There will be no order as to costs. "

4.5 Learned Counsel for the revenue has also relied upon the decision in case of **R.P.G. Industries Ltd. vs. Commissioner of Income Tax & Anr. (2011) 338 ITR 0313** and has relied upon paragraph Nos.15, 25, 27 and 35 which reads as under:

"15. After hearing the learned counsel for the parties and after going through the aforesaid provisions quoted above, we find that in case of an ordinary assessee, who has suffered loss from his business, is entitled to have adjustment from other heads as provided in [Sections 71 and 72](#) of the Act except the case of speculation business as provided in [Section 43\(5\)](#) of the Act. In the case before us, undisputedly the loss suffered by the assessee resulted from a transaction of share where there was actual delivery of share scripts and therefore, the same could not be a speculative transaction as provided in the definition. However, by the added Explanation to [Section 73](#), a legal fiction has been created by which 14 among the assessees who is a company, as indicated in the said Explanation, deals with the transaction of share and suffers loss, such transaction should be treated to be speculative transaction within the meaning of [Section 73](#) of the Act notwithstanding the fact that according to the definition of speculative transaction mentioned in [Section 43\(5\)](#) of the Act, the

transaction is not within its purview as there has been actual delivery of the scripts of share.

25. In the case before us, on the other hand, if we are required to accept the contention of Dr. Pal, the explanation added should be totally ignored and thus, the only interpretation of the added Explanation is that a limited class of 18 assesseees would come under the said provisions although in accordance with the other provisions of the Act those are not doing speculation business.

27. 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 19 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.

35. In the case before us, it is the intention of the legislature that 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 and if the assessee is a company indicated in the explanation to [Section 73](#), for such an assessee, there shall be a different definition of Speculation business than the one applicable to other types of the assessee. In our view, 29 there is nothing illegal for the legislature to enact two different definitions of Speculation business applicable to the two different categories of the assessee in a taxing statute. Thus, the factors which weighed with the Supreme Court in the above case are not present in the facts and circumstances of the case and we propose to adopt the only possible interpretation of the Explanation added to [Section 73](#) of the Act. The above decision thus is not applicable to the facts of the present case."

4.6 Learned Counsel for the revenue has also relied upon the decision in case of **Commissioner of Income Tax vs. Intermetal Trade Ltd., (2006) 285 ITR 0536** and has relied upon paragraph No.8 thereof which reads as under:

"8. The provisions of the Explanation to s.73 have to be contrasted with the provisions of s.54 (5), which defines "speculative transaction" to mean a transaction in which a contract for the purchase or sale of any commodity, including any stock and share, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. The Explanation to s.73 treats any purchase and/or sale of shares by certain companies to be speculative for the purpose of s.73 only. For the purpose of setting off and carrying forward of loss, buying and selling of shares of certain companies are regarded by the statute as speculation business, even though the transaction of purchase and sale was followed by delivery of scrips and as such cannot be treated as "speculative transaction" as defined in s.43 (5) of the IT Act."

4.7 Taking into account the aforesaid decisions of various High Courts as relied upon, learned Counsel for the revenue has contended that the view taken by the AO and Tribunal is just and proper and therefore, the findings arrived at by the Tribunal and A.O. may not be disturbed and answer may be given in favour of the revenue.

5. We have heard learned Counsel appearing for the respective parties.

6. At the outset it is required to be noted that taking into account the facts on record and the question which have been posed for consideration of this Court as to whether the business loss suffered by the appellant is to be treated as speculation loss by applying the provisions of Explanation to Section 73 of the Act and will govern under Section 73 or Section 43 (5) of the Income Tax Act, this Court has

considered the various decisions of different High Courts cited by the learned Counsel for the revenue.

6.1 In this regard, the decision in case of **R.P.G. Industries Ltd. (supra)** is relevant and has rightly been relied upon by the learned Counsel for the revenue. This Court is of the opinion that the explanation to Section 73 will have a bearing on the issue since the company is dealing with the purchase and sale of the shares and even considering the loss on different valuation of the shares, it will govern under the definition of the speculation loss, as also the assessee is doing the trading of the shares, which has been rightly held by the A.O. and confirmed by the Tribunal and it cannot get settle as business income with the other trading. Thus, this Court is in agreement with the view taken in the case of **R.P.G Industries Ltd., (supra)** that the loss suffered by a company in share transactions is to be treated as a speculative loss within the meaning of Section 73 of the Act.

7. On consideration of the entire materials on record including the decision cited, as well as, order passed by the AO and the Tribunal, we hold that the learned Tribunal took the correct view of the law and we accordingly answer the question formulated in this appeal in favour of the Department and against the assessee.

8. In the result, the appeal is dismissed. In the facts and circumstances, there will be, however, no order as to costs.

(K.S.JHAVERI, J.)

(G.R.UDHWANI, J.)

sompura

