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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.2368 OF 2013

Commissioner of Income Tax-8 ..Appellant
Versus
M/s. Hertz Chemicals Ltd. ..Respondent

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Mr. Arvind Pinto for the Appellant.
Mr. Nitesh Joshi a/w Mr. Jas Sanghvi & Aansh Desai i/b. PDS Legal for the Respondent.

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CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 25TH APRIL, 2016

P.C.:

1. This Appeal under Section 260A of the Income Tax Act, 1961 (the Act) challenges the order dated 10th July, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2004-05.

2. The Revenue urges the following question for our consideration :-

"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in confirming th action of the CIT(A) in deleting the addition of Rs.4,95,13,114/- on account of speculation loss?"

3. For the assessment year 2004-05 the respondent-assessee offered its profit/loss from share trading as income from speculation for purpose of Section 73 of the Act and amounts received from mutual funds/bonds as business income. The bifurcation was as under:-

Particulars	Shares	Mutual Funds/Bonds
Opening Stock	10,182,418	56,736,083
Add : Purchases during the year	79,605,105	1,252,428,221
	89,787,523	1,309,164,304
Less : Closing stock	24,770,128	220,934,501
	65,017,395	1,088,229,803
Less : Sales	72,240,362	1,019,603,495
Profit/Loss	7,222,967	(68,626,308)

4. The Assessing Officer during the course of assessment proceedings observed that till the preceding assessment year i.e. A.Y. 2003-04 the respondent had offered profit/loss as speculative business on its income from share trading as well those from mutual funds. This was revealed by the fact that for the year ending 31st March, 2003 the respondent-assessee had shown closing stock of shares at Rs.6.69 crores while the opening stock on 1st April, 2003 for the subject assessment year was shown as Rs.1.01 crores and the balance of Rs.5.67 crores was shown as opening stock of mutual funds/bonds. This was done by the respondent-assessee in view of the decision of the Apex Court in ***Apollo Tyres Ltd. vs. CIT 255 ITR 273*** rendered on 2nd May, 2002. However, the Assessing Officer held

that the closing stock on the last day of the preceding assessment year should be the opening stock for the subject assessment year thus the bifurcation is not permissible. Consequently the activity of dealing in mutual funds/bonds was considered to be an activity of dealing of shares as speculation business by Assessment Order dated 30th December, 2010. This resulted in addition of Rs.4.95 crores.

5. Being aggrieved by order dated 30th December, 2010 the respondent carried the issue in appeal to the Commissioner of Income Tax (Appeals) (CIT(A)). By order dated 13th October, 2011 the CIT (A) allowed the respondent's appeal by following the decision of the Apex Court in Apollo Tyres Ltd. (supra). In the above decision, the Apex Court held that business of buying and selling of units of Unit Trust of India would not amount to speculation business. Therefore, the addition made by the Assessing Officer of Rs.4.95 crores was deleted.

6. Being aggrieved, the Revenue carried the issue in appeal to the Tribunal. The impugned order dated 25th April, 2016 of the Tribunal in turn also placed reliance upon the decision of Apex Court in Apollo Tryes Ltd. (supra) and dismissed the Revenue's appeal.

7. Mr. Pinto, the learned counsel appearing for the Revenue in support of the appeal submits that the decision of the Apex Court in Apollo Tyres

Ltd. (supra) would have no application to the present facts as it arose in the context of the Unit Trust of India Act. Therefore it was in that context that the Apex Court had held that units of Unit Trust of India could not be considered to be shares for the purposes of Section 73 of the Act. Thus according to him the decision of the Supreme Court in Apollo Tyres (supra) would not have application to units of mutual funds and bonds other then those of Unit Trust of India. Further reliance is placed upon a decision of the Delhi High Court in ***CIT Vs. DLF Commercial Developers Limited (Income Tax Appeal No.94 of 2013)*** rendered on 11th July, 2013 wherein the Delhi High Court held that the derivatives would be considered as shares under Section 73 of the Act in view of the fact that their value depended upon the value of its underlying financial instruments. In support of the aforesaid decisions Mr. Pinto submits that the value of the units of the mutual funds dealt with by the respondent-assessee also depended upon the value of the underlying instruments which according to him are only shares of companies.

8. We find that the decision of the Apex Court in Apollo Tyres Ltd. (supra) covers the issue in favour of the respondent-assessee. Before the Apex Court the Revenue placed reliance upon Section 32(3) of the Unit Trust of India Act which read as follows:-

"(3) Subject to the foregoing sub-sections, for the purposes of

the Income Tax Act, 1961, –

(a) any distribution of income received by a unitholder from the trust shall be deemed to be his income by way of dividends; and

(b) the trust shall be deemed to be a company."

9. On the basis of the above provision the Revenue contended that by virtue of the above definition the Unit Trust of India is a deemed company and income from units is also a deemed dividend. Therefore the contention on behalf of the Revenue was even the units have to be considered to be shares covered by Section 73 of the Act. The Apex Court in Apollo Tyres (supra) negatived the above submission on behalf of the Revenue holding that the provisions of UTI Act creates a fiction to make Unit Trust of India a deemed company and the income received on its unit by an assessee to be deemed dividend. However the Court held that there is no deeming provisions for unit to be considered as share. Thus units are not shares.

10. In the present facts also no specific provision has been pointed out to us which would deem the units in a mutual funds and/or bonds to be shares either for the purposes of the Act or for any other purposes. In that view of the matter, in our view, the decision of the Apex Court in Apollo Tyres Ltd. (supra) would cover the controversy arising for our consideration as units are not shares and therefore dealing in units cannot

be considered to be shares.

11. The decision of the Delhi High Court in DLF Commercial Developers Limited (supra) relied upon by the Revenue dealt with derivative and not with regard to units of mutual funds. In the facts before the Delhi High Court the underlying instruments were only shares. However, the mutual funds are invested in various types of securities and not limited only to shares in company as pointed out by the Revenue during the hearing by placing reliance upon an extract of SEBI Investor Education Programme. In the above view, the decision of the Delhi High Court in DLF Commercial Developers Limited (supra) would not apply to the facts of the present case.

12. Therefore the issue stands concluded in favour of the respondent-assessee by the decision of this Court in Apollo Tyres Ltd. (supra). In the above view, the question as framed does not give rise to any substantial question of law. Thus, not entertained.

13. Appeal dismissed. No order as to costs.

(A. K. MENON, J.) **(M. S. SANKLECHA, J.)**

Wadhwa