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Case :- INCOME TAX APPEAL No. - 282 of 2000

Petitioner :- Commissioner Of Income Tax Kanpur

Respondent :- M/S Narain Properties Ltd. Kanpur

Petitioner Counsel :- Shambhu Chopra/Sc,A.Kumar,A.N.

Mahajan,B.J.Agarwal,D. Awasthi,G. Krishna,R.K. Upadhyay

Respondent Counsel :- R.R.Agrawal,Suyash Agrawal,Tarun
Agarwal

With

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Hon'ble Ashok Bhushan,J.

Hon'ble Prakash Krishna,J.

(Delivered on Hon'ble Ashok Bhushan, J.)

These two appeals under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as the Act) have been filed against the common judgment and order dated 30th June, 2000 passed by Income Tax Appellate Tribunal in Income Tax Appeal No.1075 of 1999 (for the assessment year 1998-99) and the Income Tax Appeal No.805 of 1999 (for the assessment year 1996-97).

Both the appeals raising same substantial questions of law, have been heard together and are being decided by this common judgment.

For deciding the questions of law in these appeals, it shall be sufficient to refer to the facts of Income Tax Appeal No.282 of 2000.

The assessee, a registered company, submitted return for the assessment year 1998-99 declaring net loss of Rs.1,53,198/-. The case was picked up for limited scrutiny and a notice was served on the assessee as to why the business of sale and purchase of shares may not be treated as speculation business as per Explanation to Section 73 of the Act. The assessee submitted before the assessing officer that its company is also doing business of sale and purchase of shares and earning mainly interest by granting loans and advances and income from interest has been shown in the profit and loss account. The assessee stated before the assessing officer that according to the memorandum of association its principal business is to deal and develop real estate. The assessee disclosed receipt of interest amounting to Rs.9,59,252/-. The assessing officer worked out the net profit as Rs.9,27,137/-. The speculation loss of Rs.10,80,336/- was not set off against the net profit and the assessing officer held that speculation loss will only be set off against the speculation profit in the subsequent years. Against the order of the assessing officer dated 22nd March, 1999, the assessee filed an appeal before the Commissioner (Appeals) who by its order dated 6th August, 1999 dismissed the appeal. An appeal was filed before the Income Tax Appellate Tribunal, which has been allowed by the judgment and order dated 30th June, 2000. The Tribunal found that principal business of the company being granting of loans and advances, its activities are covered under the exclusionary clause of Explanation to Section 73 of the Act, hence deeming provision for carrying of speculation business in respect of

purchase and sale of shares is not applicable. It was held that company was liable to set off losses against its other income by way of interest. The revenue against the order of the Income Tax Appellate Tribunal has come up in this appeal. The appeal was admitted on following three questions:-

“(1) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was correct in law in holding that notwithstanding the ‘object clause’ in the Memorandum of Association of the assessee company, the actual activity of the assessee had been granting of loans and advances which constituted the principal business of the assessee that its activities were covered under the exclusion category?

(2) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was correct in law in holding that losses incurred by the assessee in purchase and sale of shares were not speculation loss and were liable to be set off against other income of the assessee?

(3) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was correct in law in holding that because of exclusionary nature of assessee’s income, the orders of the authorities below could not be sustained?”

Sri Sambhu Chopra, learned counsel for the revenue in support of the appeal, contended that assessee is not covered under the exclusionary clause as contained in Explanation to

Section 73 of the Act. It is contended that principal business of the company is not granting loans and advances and the principal business of the company is to be looked into from the memorandum of association. It is contended that exclusionary clause of the Explanation being not applicable, the purchase and sale of shares is a speculation business, losses of which cannot be set off against other income of the assessee and speculation losses can be set off only against the profits of the speculation business which loss was rightly carried forward by the assessing officer in the next year. It is further submitted that for determining the principal business of a company, the profit and loss account of one year is not relevant and the said issue can be determined while taking into consideration the trend of business activities of last several years. Sri Sambhu Chopra has placed reliance on the judgment of the Bombay High Court in the cases of ***Commissioner of Income Tax vs. Amritlal and Co. Ltd.*** reported in (2012) 212 ITR 540, ***Commissioner of Income Tax vs. Darshan Securities P. Ltd.*** reported in (2012)341 ITR 556, judgment of Calcutta High Court in the case of ***Commissioner of Income tax vs. Arvind Investments Ltd.*** reported in (1991)192 ITR 365, judgment of the Bombay High Court in the case of ***Commissioner of Income Tax vs. Lokmat Newspapers P. Ltd.*** reported in (2010)322 ITR 43 and the case of the Calcutta High Court in the case of ***Commissioner of Income Tax vs. Park View Properties P. Ltd.*** reported in (2003)261 ITR 473.

Sri V.B. Upadhyaya, learned Senior Advocate, assisted by Sri Rakesh Ranjan Agarwal, appearing for the assessee, refuting the submissions of learned counsel for the revenue, submits that the principal business of the assessee being advancing loans and advances, it was fully covered by exclusionary clause of Explanation

to Section 73 of the Act. In any view of the matter, the income of the relevant year could have very well be treated to be income from other sources which again qualified for exclusion from the operation of Section 73 of the Act. It is submitted that Tribunal has rightly allowed the appeal by recording finding that principal business of the company is granting of loans and advances. The only income, which was received in the assessment year in question, was income from loans and advances which thus has to be treated as the principal business of the company. The loss suffered from purchase and sale of shares has been rightly set off against the income received from loans and advances. Sri V.B. Upadhyaya has placed reliance on the judgment of the Bombay High Court in the cases of ***Commissioner of Income Tax vs. Darshan Securities P. Ltd.*** (supra) and ***PCBL Industrial Ltd. vs. Commissioner of Income Tax and another*** reported in (2011)337 ITR 536.

We have considered the submissions of learned counsel for the parties and have perused the record.

After scrutiny, the assessing officer in the assessment order dated 22nd March, 1999 had determined the net loss of Rs.10,80,336/- from sale and purchase of shares which was termed by the assessing officer as "speculation loss". The net income was determined as Rs.9,59,252/- and net profit was determined as Rs.9,27,137/-. Thus the assessing officer has determined that the only income which was received by the company, was the interest income. The main object of the company as contained in the memorandum of association of the company, was noticed by the assessing officer, which is as under:-

"To carry on the business of acquiring,

holding and dealing in land, plantation of eucalyptus, teak, popular rubber trees.....”

The word “business” has been defined in Section 2(13) of the Act which reads as under:-

“2(13). ‘business’ includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture;”

Chapter-IV of the Act relates to computation of total income. Part-D of Chapter-IV bears the heading “profits and gains of business or profession”. Section 28 enumerates the income which is chargeable to income tax under the head “profit and gains of business or profession”. Section 28(1) mentions the profit and gains of any business or profession which was carried on by the assessee at any time during the previous year. Section 28(i), (ii) and Explanation-II, which are relevant for the purpose, are quoted below:-

“28. Profits and gains of business or profession. *The following income shall be chargeable to income-tax under the head “Profits and gains of business or profession,-*

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year:

(ii) any compensation or other payment due to or received by, -

- (a) ...*
- (b) ...*
- (c) ...*

(d) ...

(iii) income derived by a trade, professional or similar association from specific services performed for its members;

.....

Explanation 2.- Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as "speculation business") shall be deemed to be distinct and separate from any other business."

Section 73 of the Act provides for losses in speculation business. Section 73, which falls for consideration in the present appeals, is as follows:-

"73. Losses in speculation business.

(1) Any loss, computed in respect of a speculation business 932 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 assessable 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 (2) 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 eight 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."

Section 73 of the Act provides that any loss computed in respect of speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business. Section 73(1) of the Act uses the words "business carried on". The Explanation also uses the phrase "where any part of the business of the company..... consists in the purchase and sale of shares of other companies". Section 28(1) provides for charging of income tax on profits and gains of any business or profession which was carried on by the assessee at any time during the previous year. Section 28(1) read with Section 73(1) which also uses the words "business carried on" clearly indicate that what is chargeable to the income tax is the business actually carried on and profits and gains of the said business.

Explanation to Section 73 of the Act mentions “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 granting of loan and advances....”. The Explanation to Section 73 of the Act contains a deeming clause which is to the effect that where any part of the business of a company consists in the purchase and sale of the other companies, such company shall, for the purpose of this section, be deemed to be carrying on a speculation business. The Explanation to Section 73 of the Act contains an exclusionary clause, according to which following companies are excluded from the operation of the deeming clause – (i) 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”, (ii) or a company the principal business of which is the business of banking or granting of loans and advances”. In first category of exclusionary clause the phrase used is “whose gross total income consists mainly of income”. In second exclusionary category, the phrase used is “a company the principal business of which is the business of banking or granting of loans and advances”. The question to be considered is as to whether a company, which fulfils the conditions as mentioned in the exclusionary categories, as noted above, can be denied the benefit, if the income consists mainly of income as used in first category and the principal business of which as used in the second category from the activities and business which are not the part of the memorandum of association of the company. As noted above, Section 28(1), Section 73(1) and the Explanation to Section 73 of the Act indicate that the income which is chargeable is the

income in the relevant year arising from business or profession carried on by the company. The words "carried on" mean actual carrying of the activity. The words "carried on" has to be read in context of what actually was done by the company in the relevant year, rather than what was main object in the memorandum of association of the company. Thus the submission of counsel for the revenue that since in the memorandum of association the activity or business, which is shown to have been carried on by the assessee, is not included, it is not entitled to be considered in exclusionary clause, has to be rejected.

Now we come to the question as to whether the business of the assessee, as carried on in the relevant assessment year, falls in any of the exclusionary categories as mentioned in the Explanation to Section 73 of the Act. The details of the gross income has already been noted above as is delineated in the assessment order. For qualifying the exclusionary category, the condition to be fulfilled is that gross total income consists mainly of income which is chargeable under the heads – (a) "Interest on securities", (b) "Income from house property", (c) "Capital gains" and (d) "Income from other sources". The said provision uses the words "mainly of income". The words "mainly of income" and similarly in the second category the words "principal business of which" mean substantially or primarily. The said words came for consideration in the case of ***Commissioner of Income Tax vs. Amritlal and Co. Ltd.*** (supra). Following was laid down by the Bombay High Court in the said judgment:-

"Thus, in order to term a company an "investment company" its gross total income should consist "mainly" of income from securities, house property, capital gains, etc. The expression

"mainly" appearing in the definition of investment company in clause (ii) means "substantially" or "primarily". If the business of the company consists mainly in dealing in goods or merchandise, it cannot be held to be an "investment company" within the meaning of clause (ii) merely because, for one reason or the others, its income from business happens to fall short of its income from investments, etc. in a particular previous year. The decisive factor for determining whether a company is an "investment company" or any other company is, therefore, the true nature of the primary activities of the company. If the activities of the company are such that its total gross income "mainly" consists of income from securities, etc., it would be termed an investment company. The word "mainly" is somewhat akin to "wholly" and has been used to mean the whole or a substantial portion of the total gross income of the assessee. It cannot be construed to mean "not less than fifty-one per cent"."

As noted above, the total gross income of the assessee, which has been shown in the assessment order is interest income of Rs.9,59,252/-. The assessment order does not refer to any other income, hence the condition that income consists "mainly of income" is completely fulfilled. One of the heads of the income for exclusionary category is income from other sources.

The second category consists of the phrase "a company the principal business of which is granting of loans and advances". The income, which has been treated to be gross income, is income from interest of the assessee from granting loans and advances. Thus the assessee was covered by exclusionary clause of Explanation to Section 73 of the Act.

The Bombay High Court in the case of **Commissioner of**

Income Tax vs. Darshan Securities P. Ltd. (supra) had occasion to consider Explanation to Section 73. Following was laid down by the Bombay High Court in the said judgment:-

"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."

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 shares 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)."

The proposition as laid down by the Bombay High Court in the above case fully supports the submission of the assessee in the present case. In the said case during the relevant assessment year the assessee returned an income of Rs.2,25,04,588/- from service charges. The assessee had a loss of Rs.2,23,32,127/- in shares trading. The assessee had also dividend income of Rs.4,79,325/-. The assessee claimed that in computing the gross total income for the purpose of the Explanation to section 73, the income from service charges had to be adjusted against the loss in shares trading. The contention of the assessee was accepted by the Commissioner (Appeals) and the Tribunal. The revenue filed appeal before the High Court. The Division Bench in its judgment, as quoted above, held that words "consists mainly" are indicative of the fact that Legislature had in its contemplation that the gross total income consists predominantly of income from the four heads that are referred to therein. In the said case the Division Bench held that gross total income of the assessee was required to be computed by computing the income under the head of profits and gains of business or profession as well. The Division Bench further held that Tribunal was justified in coming to the conclusion that assessee fell within the purview of the exception carved out in the Explanation to Section 73 of the Act and that consequently the assessee would not be deemed to be carrying on a speculation business for the purpose of section 73(1) of the Act. The issue was answered in favour of the assessee.

Sri Sambhu Chopra, learned counsel for the revenue, placing reliance on the judgment of the Bombay High Court in ***Commissioner of Income Tax vs. Amritlal and Co. Ltd.*** (supra) has contended that for finding out true nature and character of a company the income of one assessment year only is

not relevant and it was necessary to take a broad view of the pattern of income of the company. In the aforesaid case the question which fell for consideration was as to whether provisions of Section 104(1) of the Income Tax Act apply in the case of the company as an investment company. The Bombay High Court made following observations in the aforesaid case:-

"From the definition of investment company set out above, it is evident that a company can be held to be an investment company only if its gross total income consists mainly of income which is chargeable under the heads specified therein. It is not the actual income arising in a particular year under those heads vis-a-vis income falling under other heads that is determinative of the real character of a company. The decisive factor is the nature of the activities of the company which give rise to the income. A company engaged mainly in business or industrial activities cannot be held to be an investment company merely because in a particular year its income from such business or industrial activity is insignificant or a negative figure and most of the income of that year turns out to be income from investment, income from securities, capital gains, etc. The definition nowhere says that if "in any assessment year" the income of the assessee which is chargeable under any of the heads specified in clause (ii) is not less than 51 per cent. of the amount of its gross total income, it will have to be treated as "investment company" for that assessment year. Had that been intent, the Legislature would have said so in specific terms as has been done in the Explanation to sub-section (4) of section 104 of the Act (as it stood at the material time) which provides that for the purposes of clause (a) thereof "the business of a company shall be deemed to consist mainly in the construction of ships or in the manufacture or processing of goods, etc., if the income attributable to any of these activities included in the gross total income of the relevant previous year is not less than fifty-

one per cent. of such income." There is no such deeming provision in the definition of investment company."

In the aforesaid case, the Division Bench had found that during a period of 27 years only in four year including the year in question, due to one reason or the other, its income from business fell short of fifty-one percent of its gross total income. The view of the Tribunal taking an overall view of the functioning of the company instead of confining its attention to the income of the year under consideration for the purposes of determining whether the assessee-company was an "investment company" was approved. In the appeals details of return income i.e. of two years (1996-97 and 1998-99) are before us. The Tribunal in paragraph 7 of the order impugned has referred to details of return of income, assessed income and speculation loss, which are to the following effect:-

"Assessment year	Returned Income	Assessed Income	Speculation loss directed to be carried forward
1996-97	9,94,300	17,51,290	9,91,073
1998-99	1,53,198	9,27,137	10,80,336"

In both the aforesaid assessment years, the assessed income was substantial which was an interest income as compared to loss in sale and purchase of the shares. Thus the income mainly consists of income from interest and the assessee-company was clearly covered under the exclusionary clause of Explanation to Section 73 of the Act. Thus the judgment of the Bombay High Court in the case of **Commissioner of Income Tax vs. Amritlal and Co. Ltd.** does not help the revenue.

Sri Sambhu Chopra has further placed reliance on the

judgment of the Calcutta High Court in the case of ***Commissioner of Income Tax vs. Arvind Investments Ltd.*** In the case before the Calcutta High Court, the assessee disclosed a loss of Rs.1,56,087/- from shares dealing which loss was disallowed by the assessing officer treating the same as loss incurred in speculation business. The Tribunal interpreting Section 73 of the Act held that where a part of business of a company consists of any purchase and sale of shares then alone Explanation to Section 73 of the Act comes into play and it shall not come into play where the sole business of the company is in shares dealing. The Tribunal held that Explanation to Section 73 had no application. The Tribunal made reference under Section 256(1) of the Act referring following two questions:-

*"(1) Whether, on the facts and in the circumstances of the case, the Tribunal is correct in holding that the **Explanation** to Section 73 of the Income-tax Act, 1961, has no application in the case on the view that the entire business of the assessee was in shares-dealing?"*

"(2) Whether, on the facts and in the circumstances of the case, the Tribunal is correct in holding that the assessee is entitled to claim deduction of the loss of Rs.1,56,087 under the head 'Business' and that the finding that the loss was speculation loss has to be vacated?"

The Calcutta High Court answered both the questions in favour of the revenue by making following observations:-

"The phrase "to the extent to which the business consisted of purchase and sale of such shares" also does not indicate that the Legislature had several other actual and existing non-speculative activities of business in mind. It merely indicates that the business activity which

consists of purchase and sale of shares will be treated as speculation business. If the entire business activity of a company consists of purchase and sale of shares of other companies, then the entire business will be treated as speculation business. But, if, apart from purchase and sale of shares, the company has other business activities, then those other activities will not be treated as speculation business.

The circular on which reliance has been placed also does not advance the case of the assessee in any way. The object as stated in the circular is to curb the device to manipulate and reduce the taxable income of a company under the management of a controlling group of persons. But the circular has clearly stated in paragraph 19.1 that "the business of purchase and sale of shares by companies which are not investment or banking companies or companies carrying on the business of granting loans and advances will be treated on the same footing as speculation business".

Therefore, the circular does not leave any room for doubt that the Explanation will apply to the business of purchase and sale of shares of certain companies. Nowhere in the circular has any indication been given that where the only business of a company consists of purchase and sale of shares, the Explanation will not apply.

Therefore, both the questions are answered in the negative and in favour of the Revenue."

The aforesaid judgment of the Calcutta High Court does not help the revenue in the present case since present is not a case where entire business of the assessee is purchase and sale of shares. Before the Calcutta High Court the finding that entire business of the assessee was sale and purchase of shares was not even challenged as was noticed by the Calcutta High Court.

The next judgment relied by Sri Sambhu Chopra, learned counsel for the revenue is the judgment of the Bombay High Court in the case of ***Commissioner of Income Tax vs. Lokmat Newspapers P. Ltd.*** (supra). In the said case the assessee during the course of assessment showed a profit on the sale of shares and securities. The profit offered by the assessee was set off against the speculation loss brought forward from the earlier assessment years. The assessing officer did not allow the claim of the assessee of set off, however, the Tribunal came to the conclusion that the profit which has been earned from the sale of shares, fell within the purview of the Explanation to section 73 and was to be set off against losses which have been brought forward. The Bombay High Court while approving the view of the Tribunal, laid down following:-

"... 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 another 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 express "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 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 of the losses carried forward from a speculation business arising out of a previous assessment year.

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."

The aforesaid judgment does not help the revenue in facts of the present case.

The last judgment, which has been relied by Sri Sambhu Chopra, is a judgment of Calcutta High Court in the case of ***Commissioner of Income Tax vs. Park View Properties P. Ltd.*** (supra). In the aforesaid case, the assessing officer disallowed the benefit of Explanation to Section 73 of the Act declining to set off the loss in share dealing on the ground that this share dealing is a speculation business carried on by the assessee. The Commissioner (Appeals) and the Tribunal reversed the order of the assessing officer and allowed the benefit of Explanation to Section 73 of the Act holding that the main source of income consists of income from interest of securities and income from house property. The Calcutta High Court while considering Explanation to Section 73 of the Act, laid down following:-

"It is abundantly clear from the said finding that the learned Tribunal had allowed the benefit of the Explanation to Section 73 after setting off of the speculation loss. In order to ascertain whether an assessee would be entitled to the benefit of the Explanation to Section 73, it is to be examined first whether the assessee comes within the exception provided in the said Explanation. It is to be found out as to how it

stands before the benefit of the Explanation of Section 73 is allowed. The expression ".....gross total income consists mainly of income chargeable under the heads" used in the Explanation is clear and unambiguous. It gives out the intent of the legislature. Section 73 restricts adjustment of speculation loss with speculation profit only. Speculation loss is not permitted to be adjusted against business profit. This restriction is relaxed and adjustment is made permissible by reason of the Explanation in respect of a company whose gross total income consists mainly of income chargeable under the heads specified. It is the gross total income, which is to be taken into account first. If this test is satisfied, then only setting off against business profit is permissible."

The Division Bench after considering the facts and the assessed income in the aforesaid case, held that test of exclusionary clause in explanation was not satisfied. Following conclusions were recorded by the Division Bench:-

"Therefore, in our view, both the CIT(A) and the learned Tribunal proceeded on an erroneous view of the proposition of law in respect of Section 73 which in Sub-section (1) makes it clear that speculation loss cannot be set off except against a speculative profit permissible of being carried forward for being set off in the subsequent years stretching to a period of eight years and not otherwise, unless the test of the Explanation is satisfied, which in our opinion, is not being satisfied in the present case."

In the aforesaid case the test of exclusionary clause as contained in Explanation to Section 73 of the Act being not satisfied, the question was answered against the assessee by the Calcutta High Court. But in the present case from the assessed income it cannot be said that the assessee does not come in the

exclusionary clause of the Explanation to Section 73 of the Act.

The Tribunal after considering the relevant materials on the record returned the finding that major activity of the company is granting of loans and advances. Following conclusions were recorded by the Tribunal in paragraphs 8 and 9 of the impugned judgment:-

"8. *From the above the conclusion that emerge is that the major activity of the company is granting of loans and advances, which is sufficient to hold that the principal business of appellant-company is granting of loans and advances and income from such activity has been assessed as business income in the assessment year before us and even the CIT(A) has held so, therefore, notwithstanding the "object clause", the actual activity of the appellant-company have been granting of loans and advances which constitutes the principal business of the company during these years.*

9. *In view of our irresistible conclusion is that the appellant-company's principal business being granting of loans and advances, therefore, its activities are covered under the exclusion category. Therefore, deeming provisions for carrying on of speculation business in respect of purchase and sale of shares and other companies are not applicable. Hence, we hold that the losses incurred in the purchase and sale of shares is not speculation loss. Therefore, the appellant-company is eligible to set off losses against its other income by way of interest, which has been assessed as business income and so upheld by the Id. CIT(A) also."*

In view of the foregoing discussions, we are of the view that the assessee was clearly covered by the exclusionary clause of Explanation to Section 73 of the Act and the Tribunal rightly set off

the losses from sale and purchase from the income of the assessee from loans and advances.

In result, all the three questions, as noted above, are answered in favour of the assessee.

Both the appeals are dismissed. Parties shall bear their own costs.

Date: May 30, 2012.
Rakesh