

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX REFERENCE NO. 19 OF 2002

The Commissioner of Income-Tax
Bombay, City-VI, Bombay
v/s.

.. Applicant

M/s. Madona Commercial Pvt. Ltd.
84-A, Mittal Court, 224, Nariman Point,
Bombay

..Respondent

Mr. A.R. Malhotra a/w Mr. N.A. Kazi for the applicant
Mr. Madhur Agarwal a/w Mr. P.C. Tripathi I/b Raj Darak for the
respondent

**CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.**

DATED : 2nd JULY, 2018

P. C.

1. By this Reference under Section 256(1) of the Income Tax Act, 1961 (the Act) the Income Tax Appellate Tribunal (the Tribunal) seeks our opinion on the following question of law :-

“Whether on the facts and in the circumstances of the case and on a proper interpretation of the Explanation to Section 73 of the Income-Tax Act, the Tribunal was right in law in holding that the assessee was an investment company and therefore the loss in the share transactions was not a speculative loss within the meaning of the aforesaid Explanation ?”

2. This Reference relates to Assessment Year 1989-90.

3. The statement of case to the extent relevant to answer the question

as forwarded to us reads as under :-

“2. The question before Tribunal was regarding the applicability of the Explanation to Section 73 of the Act. The assessment year is 1989-90. In the assessment, the following income was brought to tax:

<i>(a) Income from Business</i>	<i>: Rs. 87,784/-</i>
<i>(b) Income from other sources</i>	<i>: Rs. 9,66,013/-</i>
<i>(c) Gross total income</i>	<i>: Rs.10,53,697/-</i>
<i>(d) Percentage of (b) to (c)</i>	<i>: Rs. 91.68%</i>

Whereas the assessing officer held that the assessee was hit by the explanation to Section 73 of the Act, the CIT(Appeals) held otherwise. Referring to the orders of the Tribunal reported in Shree Swamy Samarth Cement Depot Vs. 4th ITO (32 ITD 806)and Himalaya Co. Ltd. Vs. CIT(30 ITD 139)(Cal.), he accepted the assessee's contention and held that it was an investment company.

3. Before the Tribunal the Revenue contended that the CIT(A) had ignored the fact that the assessee's income mainly consisted of income from the business of trading in yarn, steel and shares etc. and therefore it ceased to be an investment company. It was also contended that the CIT(A) failed to appreciate that the gross total income of the assessee mainly consisted of business income and did not consist mainly of income chargeable under the head “interest on securities”, “income from house property”, “capital gains” or “income from other sources” and therefore the loss of Rs.2,74,09,727/- incurred by the assessee in shares was a speculative loss within the meaning of the Explanation to Section 73 of the Act.

4. The Tribunal rejected the contention of the Department since in its view the assessee's income mainly consisted of income from other sources, which constituted 91.68% of the gross total income. It was therefore held that the Explanation to Section 73 was not applicable.”

5. It is an agreed position between the parties that the question of

law herein stands concluded by the decision of this Court in ***Commissioner of Income tax Vs. Darshan Securities (P) Ltd.*** (Income Tax Appeal No.2886 of 2009) dated 2nd February, 2012. However, the bone of contention between the parties is in whose favour is the issue covered. The Revenue contends that on facts the Explanation to Section 73 of the Act applies as the assessee's gross total income does not mainly consists of income from other sources so as to fall in the exclusion provided is Section 73 of the Act. The assessee contends otherwise. Therefore, it would be appropriate to first reproduce the Explanation to Section 73 of the Act, which reads as under :-

“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 trading in shares or 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 Tribunal in the Statement of Case records as a fact found by the Tribunal that the assessee's income mainly consists of income from other sources. Therefore, held by the Tribunal as not being covered by the Explanation to Section 73 of the Act. Thus, making Section 73 of the Act inapplicable.

7. Mr. Malhotra in support of the appeal contends that if the statement of case as furnished by the Tribunal to this Court is read with the assessment order which is part thereof then the finding in the statement that income from business at Rs.87,784/- and income from other sources at Rs.9.66 lakhs is not correct. It is submitted that a loss of Rs.2.74 crores incurred by the respondent assessee on sale of shares, would necessarily be an income from business. This business income would then replace the status of “income from other sources” as being the main source of income in the gross total income. This according to him would result in the Explanation to Section 73 of the Act becoming applicable to the present facts and it not being considered as an investment company. In support of the same, he invited our attention to the assessment order which is at Exh.A to the Statement of Case.

8. On perusal of the assessment order, we find that in paragraph 3.4 it records that the gross total income as returned by the assessee consists of the following :-

(a)	Income from Business	Rs. 87,684/-
(b)	Income from other sources	Rs.9,66,013/-

It further records that the above is the result of the various

transactions which have been referred to therein as under : -

“3.4 However, the above is the result of following transactions :-

a)	<i>Profit from trading in yarn</i>	<i>Rs. 84,802</i>
b)	<i>Profit from trading in steel</i>	<i>Rs. 7,174</i>
c)	<i>Service charges received shown as business income</i>	<i>Rs.2,24,94,436</i>
d)	<i>Commission income shown as business income</i>	<i>Rs. 24,31,560</i>
e)	<i>Loss in trading of shares</i>	<i>Rs.2,74,09,727</i>
f)	<i>Dividend / interest</i>	<i>Rs. 11,40,097”</i>

This working evidences that the loss on trading in shares at Rs.2.74 crores has been taken into account to arrive at income from business.

9. Thus, the basic premises on the part of the Revenue that the respondent assessee's income mainly consisted of income from business is factually incorrect. Once it is found as a fact in the order dated 17th September, 1998 of the Tribunal that the assessee's income mainly consisted of income from other sources as it forms 91.68% of its total income, then in the absence of any challenge to the finding of fact, it cannot be a subject of inquiry. This has been so held by the Supreme Court in *K. Ravindranathan Nair Vs. Commissioner of Income Tax* 247 ITR 178 and *Patnaik & Co. Ltd. Vs. Commissioner of Income Tax*, 161 ITR 365. This was contested by the Revenue and reliance

was placed upon the decision of the Apex Court in *Sohan Pathak & Sons Vs. Commissioner of Income Tax*, 24 ITR 395 and *Khan Bahadur Ahmed Alladin & Sons Vs. Commissioner of Income Tax*, 68 ITR 573 to contend that as the statement of case is not clear, the Court should call for a supplementary statement of case from the Tribunal. We do not find that the statement of case is not clear. In any event, to satisfy ourselves, we went through the basis of the Revenue's contention viz. the assessment order and find no substance in the contention.

10. Therefore, once the finding of fact has not been challenged, it must follow that Section 73 of the Act which introduces a deeming fiction to define a speculation business will not apply as the bracketed portion in the Explanation carves out an exception so far as main income is from "Income from other sources". Thus, in our view, the question has proposed for our consideration stands concluded by the decision of this Court in *Darshan Securities Pvt. Ltd.* (supra).

11. In fact, Mr. Malhotra very fairly states that if the Revenue's submission that the assessee's income mainly consists of business income is not accepted, then on the basis of the principles laid down in *Darshan Securities Pvt. Ltd.* (supra), the question would have to be

answered in the affirmative i.e. in favour of the respondent assessee and against the appellant Revenue.

12. It is a settled position as held by the Calcutta High Court in *Eastern Aviation and Industries Ltd. Vs. CIT, 208 ITR 1023* and *Aryasthan Corporation Ltd. Vs. CIT, 253 ITR 401*, the expression “Investment Company” means a company whose gross total income consists mainly of income chargeable under the head Income from house property, capital gains and income from other sources. This is not disputed before us. Thus, in the present fact, the respondent is an Investment Company.

13. Therefore, the question of law referred to us for our opinion is answered in the affirmative i.e. in favour of the respondent assessee and against the appellant Revenue.

14. Reference is disposed of in the above terms.

(SANDEEP K. SHINDE J.)

(M.S. SANKLECHA, J.)