

IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH "A" KOLKATA

Before **Shri Waseem Ahmed, Accountant Member** and  
**Shri S.S.Viswanethra Ravi, Judicial Member**

**ITA No.1112/Kol/2013**  
Assessment Year :2008-09

M/s. Jalan Cement Works Ltd 2 <sup>nd</sup> Floor, Room No 202, 81, Netji Subhas Road, Kolkata-700 001 [PAN No.: AAACJ6788R]	V/s.	CIT, Kolkata-1 Aayakar Bhawan, P-7, Chowringhee Square, Kolkata- 700 069
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Miraj D.Shah, AR
प्रत्यर्थी की ओर से/By Respondent	Shri Sandip Chobey, CIT,-DR
सुनवाई की तारीख/Date of Hearing	12-08-2016
घोषणा की तारीख/Date of Pronouncement	24-08-2016

**आदेश /O R D E R**

**PER Waseem Ahmed, Accountant Member:-**

This appeal has been filed by the assessee relating to assessment year (AY) 2008-09) is against the order passed by Commissioner of Income Tax-I, Kolkata under the provision of Section 263 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide order dated 15-03-2013. Assessment was framed DCIT, Circle-2, Kolkata u/s 143(3) of the Act vide his order dated 10-12-2010. In this appeal various grounds have been raised and out of which **Ground No.5** was not pressed therefore, same is dismissed as not pressed. **Ground No.7** is general nature and does not require separate adjudication. Remaining grounds raised by assessee per its appeal are as under:-

1) *For that on the facts and in the circumstances of the case. the CIT, Kolkata-I erred in law in passing the order u/s 263 of the I T Act setting aside the assessment order and directing AO to pass a denovo assessment even though the show cause notice was issued only for 2 specific reasons,*

2) *For that on the facts and in the circumstances of the case. the CIT. Kolkata-I was grossly unjustified in law and on facts in holding the assessment order u/s. 143(3) dated 10.12.2010 was erroneous and prejudicial to the interest of the revenue even though the AO did not commit any error while passing the order u/s. 143(3).*

3) *For that on the facts and in the circumstances of the case, the CIT, Kolkata-I was grossly unjustified in law in holding that Explanation to Sec 73 of the IT Act was applicable to the appellant and therefore the loss incurred by the assessee in purchase & sale of shares was assessable as loss derived from "**speculation business**".*

4) *For that on the facts and in the circumstances of the case, the CIT, Kolkata-I failed to appreciate that on the facts of the appellant's case Explanation to Sec 73 of the IT Act was not applicable and in that view of the matter the order of the AO was neither erroneous nor prejudicial to the interest of the revenue.*

6) *For that on the facts and in the circumstances of the case, the order of the CIT. Kolkata-I passed u/s 263 be set aside and the AO's order u/s 143(3) dated 10.12.2010 be restored."*

Shri Miraj D Shah, Ld. Authorized Representative appeared on behalf of assessee and Shri Sandip Chobey, Ld. Departmental Representative appeared on behalf of Revenue.

2. Though the assessee has raised as many as seven ground, but the solitary issue in this appeal is that the impugned order passed by ld. CIT erred u/s 263 of the Act by holding the order of the Assessing Officer as erroneous and prejudicial to the interest of revenue.

3. Facts in brief, in the present case are that the assessee is a Limited Company and engaged in the business of dealing in shares and finance. For the year under consideration, assessment was completed at a loss of Rs.2,09,20,997/- and loss comprises of income from share trading business and Short Term Capital Gain (STCG for short). Thereafter, the Id.CIT in his impugned order passed u/s. 263 of the Act opined that the order passed by the AO u/s. 143(3) of the Act was erroneous and prejudicial to the interest of revenue. The Id. CIT observed that the loss was on account of share dealing business is for Rs.2,55,17,410/-, which was set off by an amount of STCG of Rs.45,86,417/-. The Id.CIT was of the view that the loss arising from sale/purchase of shares is a speculation loss by virtue of provisions of Explanation to Sec. 73 of the Act. Therefore, the loss cannot be set off against STCG. Thus, the Id.CIT issued notice on 23-01-2013 u/s. 263 to the assessee. In response to such notice, it was submitted that the assessee is a registered company with the Reserve Bank of India as Non Banking Financial Institution vide Certificate No. 05.02805 dated 04-09-1998. The main objects of the company are to lend loan and advance. The major income of the assessee was the source from interest, dividend and capital gains. Therefore, the assessee is falling under the exception clause of the Explanation to Sec. 73 of the Act. However, the Id. CIT disregarded the claim of assessee on the ground that the income chargeable to tax is only from the source of STCG and income from the source of Long Term Capital Gain / dividend shall not be considered while applying the provisions of Explanation to Sec. 73 of the Act. In the instant case, the assessee has granted loans of Rs.1,20,57,818/- and the closing stock of share is of Rs.20,31,84,422/- as evidenced from the balance sheet of the assessee. In view of above, the impugned order of Id.CIT u/s. 263 set aside the order of the AO with the direction to examine the books of account, documents, evidences and then to pass *de-novo* assessment order.

4. Aggrieved by the order of the Id.CIT, assessee is in appeal before us by raising the above mentioned grounds of appeal.

5. Before us the Id.AR for the assessee filed a paper book containing pages 1-16 and submitted that for applying the deeming provisions of Explanation to Sec.73, overall conduct of assessee needs to be examined. He submitted that the assessee in the preceding and succeeding assessment years has not made any purchase/sale of shares. The composite income of assessee was mainly consisted with interest on capital gains and dividend income. Thus, simply for the current year there was share transaction and loss was suffered by the assessee that will not change the character of business. Therefore, the loss claimed by the assessee from dealing of shares cannot be termed as speculation loss by invoking the deeming provisions of Sec. 73 of the Act. Finally, he prayed before us that the impugned order passed by Id.CIT u/s. 263 be set aside and that of the order of AO passed u/s. 143(3) datd. 10-12-2010 be restored.

6. On the other hand, the Id. DR submitted that the case of the assessee had been scrutinized u/s143(3) of the Act and an order passed on 10.12.2010. The nature of business as per the said order - which information has evidently been obtained from the return of income of the appellant himself - is "*Dealing in Shares & Finance*". In the aforesaid order, the AO examined several issues and made several additions to the returned income of the assessee. Nowhere in the said order is there even the slightest of murmurings of the fact of examination of two issues, viz., Applicability of Section 73 of the Act to the computation of taxable income and while computing book profit u/s 115JB, the b/f unabsorbed depreciation of Rs 71,732/- was reduced although the b/f profit/loss as per books is positive. As per Explanation -1 of Section 115JB, b/f loss or unabsorbed depreciation whichever is less is to be reduced. It is an admitted fact that these issues were not examined by the AO in the said assessment order.

He further submitted that the explanation to Section 73 was amended on 01.04.2015 by substitution of the phrase "*the principal business of which is the business of banking*" by "**the principal business of which is the business of trading in shares and banking**". Therefore, short of being clairvoyant, there was no method by which the AO could have anticipated that companies that traded in shares would at some time in the future, be taken out from within the mischief of Section 73 of the Act. Thus, the AO, being fully aware of the fact the assessee- company was dealing in shares - substantively or not, is not a relevant issue here - and that in such a condition the Explanation to Section 73, as it stood before him at that point of time was admittedly applicable, omitted to make inquiries in this direction. This would automatically render the order u/s 143(3) of the Act "*erroneous*". This proposition derives its strength from the explanation 2 to Section 263 of the Act, which itself was introduced on 01.06.2015, but being clarificatory of procedure in nature, is fully applicable retrospectively. The relevant portion of this explanation - 2 is reproduced below: -

For the purposes of this section, it is hereby declared that an order passed by an Assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of revenue, if in the opinion of the Principal Commissioner or Commissioner -

A. the order is passed without making inquiries or verification which should have been made.

B. The order is passed allowing any relief without inquiring into the claim.

7. In the light of above, it was plain that at the time of the passing of the order u/s. 143(3) of the Act, that is on 10.12.2010, the said order was erroneous as well as prejudicial to the interests of revenue. As regards, the contention of the appellant that he could claim exemption from applicability of Section 73 by

suggesting that he was a company that was not dealing in shares but was actually deriving its income from interest, Dividend and Short Term and Long Term Capital Gains, the appellant's contention are not tenable, mainly, on the following counts:

- The appellant himself has mentioned in his Return of Income that he deals in Shares and Finance as evidenced by even the erroneous 143(3) Order where in nature of business it has been mentioned as "Dealing in Shares and Finance".
- As per appellant's own admission his composition of income mainly consisted of interest, Capital Gain and Dividend. A perusal of a chart submitted by him brings forth the following interesting points:
  - That starting from the impugned assessment year, for three successive years the appellant has consistently been showing a small amount of Speculation Income.
  - That in the earlier years as well as the subsequent years the appellant shows no STGC. In the year in question, the appellant has shown a sudden surge in STGC showing STGC of almost Rs.46 lakhs. Strangely it is in this year itself that the appellant started showing a Profit/Loss on account of dealing in shares. In the instant year, the loss on Share Trading amounted to over RS.1.80 crores. In the subsequent year again the profit on account of share trading was shown at almost Rs.48 lakhs. It is interesting to note that since LTCG and Dividend are mainly exempted from levy of tax we are left with only three aspects of income for taxation, that is, Interest Income, Short Term Capital Gain and Profit from Trading in Shares. If we remove Interest Income from consideration since that emanates mainly from loans we are left with Short Term Capital Gains. In this year, we have seen a surge in STCG and the loss from trading in shares has been used to offset this STCG.
  - In the impugned year, the total income chargeable to tax was Interest, STCG and Profit/Loss from trading in Shares. The total income accruing from the first two counts on which tax is leviable amounts to a little over Rs.47 lakhs whereas the loss from trading in shares is a little over RS.1.80 crores. The absolute quantum of the share trading component is, therefore, over 3.8 times that of the other two put together. This ratio reaches almost thirteen (13) times when we take into account the subsequent year. Thus to say that income from trading in shares constitute a minuscule part of the income of the appellant would be patently inaccurate.

8. It was in this backdrop, that the Ld. CIT, upon examination of the records, formed an opinion, that the said order of the AO was erroneous and prejudicial to the interests of revenue on the above two counts. While in the first part, the revenue involved was large, in the second, it was smaller. But

undoubtedly, the prejudice to revenue seemed to exist. He therefore, issued a notice to the assessee.

The assessee has submitted his explanations to the Ld. CIT along with a chart showing comparative incomes from various sources over several years. It may be noted from a comparison of the chart produced before the Hon'ble Tribunal and that submitted before the Ld CIT that the assessee had deliberately omitted the mention of income earned through the trading in shares before the Ld CIT. The assessee had argued before the Ld CIT that the income from shares in the relevant year was minuscule in comparison with the rest of the income. This, we have seen, is not true at all. Even if the quantum involved in the sum of all incomes from various heads - taxable or not - is compared to the profit/loss from trading activity in shares, we find that the ratio is not very small - it comes to almost 17% as per the letter submitted by the assessee before the Ld CIT. This can hardly be considered a small percentage either in absolute or comparative terms. Further, the Ld CIT has passed impugned order u/s 263 on 16.3.2013.

9. This was a good two years before the amendment to explanation to Section 73 was introduced in which dealing in shares was also included for claiming exemption from the mischief of Section 73 of the Act.

Now, it is only logical to conclude that the Ld CIT could only have been guided by the Act as it existed before him at the time of passing the impugned order. If, however, the Ld CIT had crystallized his findings as to the applicability of Section 73 to the case of the appellant, then questions as to the retrospective applicability of the said amendment could have assumed relevance. As such, the Ld. CIT has done only one thing; he has sent it back to the AO for examination of the issue afresh. In these circumstances, it is clear that at the point of time - that of passing the order u/s 263 - the Ld CIT could have come only to one *bona fide* belief, that the appellant did not fall within the explanation to Section

73. At his point of time, whether the said amendment is retrospectively applicable or not is not a question to be addressed at all. This question may or may not come up during appeal against the order u/s 143(3) which may be passed as a consequence of the impugned order u/s 263, provided, of course, said addition has been made. At this juncture, the only question is whether there was *bona fide*, lawful opinion that had been formed in the mind of the Ld CIT that, based on the records before him, the order of the AO was erroneous and prejudicial to the interests of revenue - as per law as it existed before him at that point of time. The answer from a plain reading of Section 263 as applied to the records of the appellant is undoubtedly a yes.

10. In addition to the above, the second point raised by the Ld CIT has to do with the observation of the Ld CIT that while computing book profit u/s 115JB, the b/f unabsorbed depreciation of Rs 71,7321- was reduced although the b/f profit/loss as per books is positive. As per Explanation -1 of section 115JB, b/f loss or unabsorbed depreciation whichever is less is to be reduced.

11. The Ld CIT has raised this issue upon the assessee in his show cause letter and the appellant has duly replied to it.

12. It is pertinent to note that the assessee has, while arguing his appeal before the Hon'ble Tribunal, on 10.8.2016 clearly stated that assessee is not pressing the ground number 5 of assessee's grounds of appeal before the Tribunal. Therefore, this ground, which challenges the second part of the Ld CIT's objections based on which the order u/s 143(3) has been called erroneous, has been accepted by the appellant as being meritorious.

13. It may be mentioned that Section 263, while talking about orders that are "*erroneous and prejudicial to the interests of revenue*" does not differentiate between substantial matters of revenue or smaller matters of revenue. In this

case, it is submitted that if there are more than issues on which the Ld. CIT finds in his impugned order u/s 143(3) of the Act in error and in prejudice to the interest of revenue, and sets the order u/s 143(3) aside; and if hypothetically, the opinion so formed by the Ld. CIT fails on anyone of the counts, even then the order setting aside the order of the AO will continue to stand - especially, since the opinion has not been crystallized by the Ld. CIT and he has merely sent it back for re-examination. The fact, even if one of the issue on which the opinion was based, continues to stand, will allow the action of the Ld. CIT to be correct.

14. In this case, we find that the assessee has accepted the opinion voiced by the Ld CIT in his impugned order u/s 263 of the Act. In these circumstances, even if the said order would have failed on the first count, the order setting aside the order u/s 143(3) would have stood. In view of the above, it is humbly submitted that the impugned order of the Ld CIT u/s 263 stands as per law and the appeal of the assessee may kindly be dismissed.

15. We have heard the rival contentions of both the parties and perused the material including the details available on record. From the aforesaid discussion, we find that the assessee has claimed loss from share trading business of Rs.2.55 crores along with income under following heads:-

- a. Income from long term capital gain of Rs.14,15,78,290/-
- b. Income from short term capital gain u/s. 111A of Rs.45,86,417/-, and
- c. Dividend income of Rs.22,65,340/-

16. The Id.CIT while applying the provisions of u/s 263 has made a comparison of the business loss with the short term capital gain on the ground that the income shown by the assessee from the source of LTCG and dividend is not chargeable to tax. Accordingly, he directed the AO to invoke the provisions of Explanation to Sec.73 of the Act by holding that the impugned order of the AO is erroneous and prejudicial to the interest of revenue. At this juncture, we

find important to reproduce the provisions of Section explanation to Section 73 of the Act which reads as under:-

**“73. Losses in speculation business**

*[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.]*

From the above provisions we find that there are 3 exceptions given in the explanation to Section 73 of the Act. Firstly the provisions to explanation to Section 73 of the Act is not applicable to the assessee having income mainly from interest on securities, House property, capital gains and income from other sources. In the instant case the income of the assessee is mainly from long term capital gain, therefore it is out of the purview of the Explanation to Section 73 of the Act. Income here means the net income. In this connection we rely in the order of Hon’ble High Court of Calcutta in the case of *CIT Vs. Middleton Investment & Trading Co. Ltd.* in ITA 196 of 1999 where the issue was decided in favour of assessee after having the reliance in the case of *CIT Vs. Darshan Securities (P) Ltd.* reported in 341 ITR 556. The relevant extract is reproduced below:-

*“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 except 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 share 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 lakhs (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 section 73(1).”*

Secondly the provisions to explanation to section 73 of the Act are not applicable to the assessee the principal business of which is the granting of loans and advances. Now the principal business of the assessee needs to be determined either on the basis of income or fund deployment over a certain number of years. We have seen from the chart of the business activities of the assessee placed on page 7 of the paper book and conclude that the principal business of the assessee is of granting loans & advances. The chart is enclosed as **Annexure-1** in the order. In this connection we rely in the order of the Hon’ble High Court of Calcutta in the case of CIT Vs. M/s Savi Commercial Pvt. Ltd. in ITA No. 132 of 2007 where the issue was decided in favour of assessee on the basis of fund deployment. The relevant extract is reproduced below:-

*“He submitted that under sub-section 1of section 73 it has been provided that speculation loss shall be set off only from out of income arising out of speculation. The aforesaid stipulation has, however, been qualified by the Explanation wherein two exceptions have been made. The two exceptions are really two distinguishing factors. One is a factor based on income and the other is a factor based on activity as would appear from the explanation underlined by us. The submission Advanced by Mr. Poddar, prima facie, appears to be correct.*

*Mr. Nizamuddin was unable to make any suitable reply to the aforesaid submission of Mr. Poddar. Speaking for ourselves we are inclined to*

*accept the submission advanced by Mr. Poddar. Because both income and business activity, according to the legislative mandate, are distinguishing factors. Therefore income alone cannot be taken into account in deciding whether the assessee is entitled to make a departure from the mandate appearing in sub-section (1). In the case before us the activity of granting loans and advances is on a larger scale than the business of buying and selling shares. Both profit and loss are matters of chance in both the activities. Therefore profit alone was not made the distinguishing factor. Since business activity is also a distinct factor, we are inclined to think that the principal business of the company/assessee is granting loans and advances as would appear from the volume indicated in the chart above for a number of years.”*

Thirdly the provisions to explanation to section 73 of the Act are not applicable to the assessee the principal business of which is the business of trading in shares. This amendment was incorporated in the Finance Act 2014, w.e.f. 1.4.2015 but its effect came retrospectively w.e.f. 1.4.1988 held in ITA 321/Mum/2013 dated 13.05.2016 of “F” Bench of ITAT Mumbai. The relevant extract is reproduced below:-

*“5.6.3 The insertion of the amendment in the Explanation to section 73 of the Act by the Finance (No.2) Act, 2014, in our view, is curative and classificatory in nature. If the amendment is applied prospectively from AY 2015-16, a piquant situation would arise that an assessee who has earned profit from purchase and sale of shares in AY 2015-16 would be treated as normal business profit and not speculation business profit in view of the exception carried out by the amendment in Explanation to section 73 of the Act. in these circumstances, speculation business loss incurred by trading in shares in earlier years will not be allowed to be set off against such profit from purchase and sale of shares to such companies in AY 2015-16. For this reason also, the amendment inserted to Explanation to section 73 of the Act by Finance (No.2) Act, 2014 is to be applied retrospectively from the date of the insertion to Explanation to section 73 of the Act. in coming to this view, we draw support from the decision of the Hon’ble Apex Court in the case of CIT vs. Alom Extrusions Ltd. (319 ITR 306) wherein their Lordships were considering the amendment made by Finance Act, 2003 by omitting the second proviso to section 43B of the Act w.e.f. 01.04.2004 and bringing about uniformity in the first proviso by equating tax, duty, cess and fees with contribution to welfare funds (viz. Provident Fund, etc.). the Hon’ble Apex Court held that the aforesaid amendment in section 43B of the Act by Finance Act, 2003 is curative in nature and would therefore apply retrospectively w.e.f. 01.04.1988.”*

In the instant case, the principal business of the assessee is trading in shares as held that there was loss of Rs. 1.80 crores from the trading of the shares and

income from the other activities are lower than the loss claimed by the assessee. Therefore we conclude that principal business of the assessee is the business of trading in shares.

In view of above, we find that order passed by AO is neither erroneous nor prejudicial to the interest of revenue, therefore we find the impugned revision order unsustainable in law, and we, therefore, quash the same. The issue gets the relief accordingly.

**17. In the result, assessee's appeal stands allowed.**

Order pronounced in the open court on 24/08/2016

Sd/-  
(S.S.Viswanethra Ravi)  
Judicial Member

Sd/-  
(Waseem Ahmed)  
Accountant Member

दिनांक:/Date 24/08/2016

कोलकाता / Kolkata,

\*PP/SPS/\*Dkp

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी / Appellant M/s Jalan Cement Works Ltd 2<sup>nd</sup> Floor, Room No.202 81 Netaji Subhas Road, Kolkata-700 001.
2. प्रत्यर्थी / Respondent- The CIT, Kolkata-1, Aaykar Bhawan P-& Chowringhee Square, Kolkata-69.
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
कोलकाता ।

## ANNEXURE-I

**M/s JALAN CEMENT WORKS LIMITED**  
81,N.S. Road, 2<sup>nd</sup> Floor, Room No. 202, Kolkata-700 001

S.No	Particulars	(FY) 09-10	(FY) 08-09	(FY) 07-08	(FY) 06-07	(FY) 05-06	(FY) 04-05
A	Share Capital Including Reserve	268,356,528.73	267,970,908.40	265,799,197.08	154,696,686.45	141,293,536.52	133,540,489.80
B	Loans Take		- -	30,495,150.90	-	-	-
C	Investments	241,412	-				
D	Share Application	800,000.00	- -	-	-	-	-
E	Closing Stock	11,000,000.00	8,000,000.00	203,184,422.38	- -	-	600,000.00
F	Loans given	10,128,673.00	18,390,058.00	12,057,818.00	200,000.00	21,151.00	15,676,687.00
G	Speculation Income	(1.20)	(1,918.85)	2,854.40	- -	-	-
H	Interest Income	1,944,506.00	374,096.00	156,800.00	- -	524,948.00	2,745,273.00
I	Short Term Gain	-	-	4,586,416.66	- -	4,604,812.98	4,167,116.17
J	Long Term Gain	22,999.33	(35,996.92)	145,178,290.97	13,831,282.50	2,980,947.45	-
K	Dividend	15,954.00	1,806,644.70	2,265,340.0	1,727,219.00	730,375.00	-
L	Share Loss/Profit	-	4,764,371.50	(18,035,603.19)	-	-	-
M	Net Profit	541,377.33	2,224,431.32	125,053,134.63	14,999,312.46	8,366,256.90	5,867,454.56
N	Total Income	1,983,458.13	6,907,196.43	134,154,098.84	15,558,501.50	8,841,083.43	6,912,389.17