

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'SMC-I', NEW DELHI**

**BEFORE  
SHRI N. K. SAINI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

I.T.A. No.4993/Del/2014  
(Assessment Year 2009-10)

Paradise Merchants Pvt. Ltd., Vs. ITO, Wad 14(1),  
AD-97, Shalimar Bagh, New Delhi  
Delhi

**GIR / PAN :AAACP4847R**

(Appellant)

(Respondent)

Appellant by :Shri Ved Jain, CA

Respondent by :Shri Subhakant Sonu, Sr. DR

Date of hearing: 08.03.2016

Date of Pronouncement: 29.04.2016

**ORDER**

**PER BEENA PILLAI, JM:**

The present appeal has been filed by the assessee against the order of the ld. CIT(A)-XVII against the order dated 21/07/2014 for the assessment year 2009-10 on the following grounds of appeal.

*"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A) is bad both in the eyes of law and on facts.*

*2(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of the AO in disallowing an amount of Rs.35,76,559/- holding the same to be*

*speculative loss by invoking the provisions of section 73 of the Act.*

*(ii) That the said addition has been confirmed by arbitrarily rejecting the explanation of the assessee that the gross total income of the assessee consist mainly of income chargeable under the head 'Capital Gain' and 'Income from other sources' and hence the Explanation to section 73 is not applicable to the assessee company.*

*3. Without prejudice to the above and in the alternative the learned CIT(A) has erred in ignoring the fact that brokerage income of Rs. 15, 16,406/- is in the nature of sale / purchase of shares and the same has to be considered and set off against loss of Rs.35, 76,559.04 in purchase / sale of shares.*

*4. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in ignoring the fact that out of the total loss of Rs.35,76,559/- a sum of Rs.11,05,708/- is a loss in derivative transactions which is not considered to be speculative loss in view of the proviso (d) to section 43(5) of the Act as inserted by the Finance Act, 2005.*

*5. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in ignoring the fact that a sum of Rs.3,07,906/- out of the total loss of Rs.35,76,559/- is on account of the valuation of the shares as on the closing date of the year.*

*6(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of Rs.34,872/- under section 14A of the Act as against disallowance of Rs.15,986/- computed by the assessee under section 14A of the Act.*

*(ii) That the action of the CIT(A) in confirming the disallowance at Rs.34,872/- as against Rs.15,986/- is against the facts and the provisions of section 14A of the Act.”*

2. The brief facts of the case are as under;

2.1. The assessee is engaged in the business of share broking and electricity generation and its total revenue as per profit and loss account comprises of income from sale/purchase of shares, dividends earned and interest income. During the year under consideration the assessee filed its return of income on 29/09/2009 declaring a total business loss of Rs. 79,94,913. The assessee has also paid taxes under section 115 JE on the book profits. The case was selected for scrutiny assessment and statutory notices under section 143 (2) was issued to the assessee. The assessee accordingly filed the details start by the assessing officer which were books of accounts along with supporting bills/vouchers and other necessary documentary evidence this. These details filed by the assessee were examined on tests check basis.

2.2. After going through the details filed by the assessee Ld. AO invoked provisions of explanation to section 73 (1) and held that the main business of the assessee is share sub-broker and electricity generation, and since assessee is involved in the sale and purchase of the shares, assessee cannot claim the loss in view of explanation to section 73 (1) of the act and accordingly disallowed the loss of Rs.(-)85,76,559.04 claimed by the assessee treating the same as speculation business. The ld.AO also made addition under section 14 A of the act.

3. Aggrieved by the order of the Ld. AO assessee preferred an appeal before the Ld.CIT (A).

4. The ld. CIT(A) confirmed the additions were made by the Ld. Assessing Officer

5. Aggrieved by the order of the ld.CIT(A), assessee is an appeal before us now.

5.1 At the outset the Ld. A.R. submitted that ground No. 6 raised in the appeal for the year under consideration is not pressed, considering the smallness of the amount involved. Accordingly we are not inclined to adjudicate upon the issues of section 14A raised by the assessee in ground No. 6. This ground therefore stands dismissed unanswered.

5.2 In respect of ground No. 2 the ld. A. R. submitted that explanation to section 73 has been wrongly invoked to the facts and circumstances of the case before us. He submitted that this explanation would be applicable to a company other than a company whose gross total income mainly comprises of income from house property, capital gains or income from other sources.

5.3 Ld. A. R. submitted that the loss accrued by the assessee in purchase/sale of shares, is not to be considered while computing the gross total income of the assessee. He further submitted that the manner in which gross total income is to be reckoned is only by disregarding the loss incurred on the purchase and sale of shares. He submitted that for arriving at the gross total income the

constituents can only comprise of positive incomes. The Ld. A.R. relied upon judgments of various High Courts and coordinate benches of this Tribunal and the judgment of Hon'ble jurisdictional High Court.

5.4 On the contrary, Ld. D. R. relied upon the orders passed by the authorities below.

6. We have perused the orders passed by authorities below, the arguments advanced by both the parties and judgments relied upon by the Ld. A. R. The only issue that needs to be adjudicated, is in respect of treating the loss on account of sale/purchase of shares are speculated loss under provision to section 73 of the act.

6.1 It is observed that the assessee has calculated the total revenue as per the profit and loss account in the following manner:

Particulars		Amount (Rs.)
Income from sale/purchase of shares		(-) 35,76,559.04
Dividend	Rs. 55,955/-	
Interest	Rs. 21,484/-	
Profit on sale of long-term investments	Rs. 71,60,836.68	72,38,275.68

6.2 The authorities below has invoked explanation to section 73 to the facts of the present case and disallowed the laws treating the same as speculative business.

Explanation to section 73 of the income tax act 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 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 shares.]”*

6.3 On a plain reading of the above explanation, it is clear that in case of a company whose gross total income consists mainly of income from interest on securities, income from house property, capital gains and income from other sources, the loss from purchase and sale of shares of other companies, shall not be deemed to be carrying on a speculation business. In other words if the gross total income of the assessee comprises of any or all the heads of income, then the assessee will fall within the exception carved out in the explanation to section 73 and it could not be deemed to be carrying on a speculative business for the purposes of section 73 (1) of the act.

6.4 It is an admitted fact that the assessee is having income from interest, dividend income and income from capital gains from sale of long-term investment. Applying the law to the facts of the present case before us, the

assessee's case falls within the purview of exception carved out in the explanation to section 73 of the act and consequently the assessee shall not be deemed to be carrying on with the speculative business for the purposes of section 73 (1) of the act. This view has been supported by the various judgments relied upon by the assessee which are as under;

1. CIT City 4 vs. HSBC securities and capital markets India (P) Ltd (2012) 23 Taxmann.com 377 (Bom.)
2. A.K Capital Markets Ltd. Vs. DCIT, Central Circle-2 (2016) 65 Taxman.com 62 (Delhi-TRIB.)

6. In view of the above discussion and the ratio laid down by the Hon'ble court we are inclined to allow this ground of appeal raised by the assessee.

7. Accordingly the appeal filed by the assessee stands partly allowed.

Order pronounced in open court on 29.04.2016.

Sd./-

(N. K. SAINI)  
ACCOUNTANT MEMBER  
Date: 29.04.2016

Sp.

Sd./-

(BEENA PILLAI)  
JUDICIAL MEMBER

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order  
(ITAT, New Delhi)

S.No.	Details	Date	Initials	Designation
1	Draft dictated on			Sr. PS/PS
2	Draft placed before author	2/5/16		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	29/4/16		Sr. PS/PS
6	Kept for pronouncement	29/4		Sr. PS/PS
7	File sent to Bench Clerk	3/5		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			