

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri M. Balaganesh, AM & Shri S. S. Viswanethra Ravi, JM]

I.T.A No. 2736/Kol/2013
Assessment Year: 2006-07

G. M. Holding (P) Ltd.
(PAN: AABCG9349L)
(Appellant)

Vs. Income-tax Officer, Wd-7(4), Kolkata
(Respondent)

Date of hearing: 25.10.2016
Date of pronouncement: 18.11.2016

For the Appellant: Shri Dilip Kumar Patra, AR
For the Respondent: Shri Amitava Bhattacharya, JCIT

ORDER

Per Shri M. Balaganesh, AM:

This appeal by assessee is arising out of order of CIT(A)-VIII, Kolkata vide Appeal No. 309/CIT(A)-VIII/Kol/08-09 dated 18.09.2013. Assessment was framed by ITO, Ward-7(4), Kolkata u/s. 143(3) of the Income tax Act, 1961 (hereinafter referred to as the “Act”) for AY 2006-07 vide his order dated 31.12.2008.

2. The only issue to be decided in this appeal is as to whether the Id CITA is justified in upholding the action of the Id AO by treating the loss on account of shares amounting to Rs. 32,15,349/- as speculation loss and also upholding the addition of Rs. 3,41,408/- as expenditure related to speculation loss, in the facts and circumstances of the case.

3. The brief facts of this issue is that the Id AO observed that the assessee had shown loss from share trading at Rs. 32,15,350/-. The assessee had shown purchase of shares worth Rs. 12,88,76,454/- and shown sale of shares for Rs. 11,77,91,562/- with an increase of closing stock of Rs. 78,69,542/-. Simultaneously it had advanced loans for Rs. 4,13,21,902/- as at 31.3.2006 from which it had earned interest income of Rs. 47,49,739/-. The Id AO also observed that the assessee had expended interest of Rs. 18,41,149/- as per profit and loss account. The Id AO reduced the interest paid from the interest income and arrived at the net interest income of Rs. 29,07,590/-. Accordingly, the Id AO concluded that

the main business of the assessee company consisted of purchase and sale of shares of other companies in comparison with the other activities and held that provisions of Explanation to Section 73 of the Act would become applicable and treated the loss on account of purchase and sale of shares as speculation loss.

3.1. The assessee replied that the assessee had incurred net loss on account of share trading at Rs. 32,15,349/-. The assessee stated it is engaged in the principal business of granting loans and advances and accordingly falls under the Exception to Explanation to Section 73 of the Act. For this purpose, the position of fund deployment of the company was given as under:-

Share capital	4,23,40,000
Reserves & Surplus	2,60,59,910
Current Liab & Provisions	66,74,881
Secured Loans	90,93,101
Unsecured Loans	75,91,566

	9,17,59,458
Less:Cash & Bank Balance	83,00,973
Fixed Asset	4,60,048

Fund deployed in the Business	8,29,98,437

Fund deployed in the business of granting loans and advances – Rs. 4,13,21,902/- (49.79% of fund deployed)

Fund deployed in the business of Buying & selling of shares – Rs. 2,68,89,408/- (32.40% of fund deployed)

3.2. The assessee accordingly pleaded that the principal business of the assessee is only granting of loans and advances and accordingly would fall under the exception to Explanation to Section 73 of the Act. It also placed reliance on the *special bench decision of this tribunal in the case of DCIT vs Venkateshwar Investment & Finance Pvt Ltd reported in 93 ITD 177 (Kol) (SB)*, wherein it was held that :-

“What constitutes the principal business has not been defined anywhere in the Act. Therefore, what constitutes principal business will depend on other facts and circumstances of each case. The Memorandum & Articles of Association of the company, past history of the company, current deployment of the capital of the company, break up of the income earned during the relevant year will all help in determining the principal business of the company.”

It was pleaded that as per object clause of Memorandum, the main business of the company is granting of loans and advances. To find out the past history of the company, a chart was furnished for 3 preceding years, wherein the income from interest was more than the income / loss from share dealings. Further the funds deployed in the business of granting loans and advances was more than the funds deployed in business of buying and selling of shares. The current year fund deployment in granting of loans and advances was Rs. 4,13,21,902 whereas fund deployed in shares business was Rs. 2,68,89,408/-. Similarly in the current year, the interest income from loans and advances was Rs. 47,49,739/- whereas loss from purchase and sale of shares were Rs. 32,15,349/-.

3.3. The assessee produced the following chart :-

<u>Year ended</u>	<u>Capital Employed</u>	<u>Funds deployment in</u>	
		<u>Granting of loans</u>	<u>Shares business</u>
		<u>And Advances</u>	
	(Rs)	(Rs)	(Rs)
31.3.2003	3,35,74,767	1,45,14,177	1,16,96,951
31.3.2004	4,51,18,174	1,96,12,482	32,35,549
31.3.2005	7,25,33,973	3,52,68,516	2,06,68,343
31.3.2007	13,35,56,256	7,94,56,561	1,47,71,568
31.3.2008	14,88,88,071	9,07,02,750	2,92,57,251

Details of income in various years

<u>Year ended</u>	<u>Transactions from dealing in shares</u>		<u>Interest on loan</u>
	<u>Profit</u>	<u>Loss</u>	
	(Rs)	(Rs)	(Rs)
31.3.2003	NIL	14,80,579	19,32,597
31.3.2004	90,017	24,10,172	24,25,081
31.3.2005	1,64,172	25,29,698	33,06,673
31.3.2007	40,752	36,39,574	64,42,938
31.3.2008	1,85,538	25,16,432	98,45,970

3.4. The Id AO tried to deduct the interest payment in the year under appeal and arrived at the net interest income of Rs. 29,08,591/- and accordingly stated that the said interest income from loans and advances is less than the absolute figure of loss from dealing in shares of Rs. 32,15,349/- and hence the case would fall under the Explanation to Section 73 of the Act.

3.5. In response thereto, the assessee stated that the total income of the assessee is as under:-

Interest income (net)	29,08,591	
Dividend income	9,87,204	
Brokerage	14,320	
Profit on sale of investments	9,10,893	
Profit from share dealing	18,525	
Rent	8,52,150	
	-----	56,91,683

3.6. Hence it was pleaded that both on income criteria as well as fund deployment criteria, the assessee's case would squarely fall under the exceptions to Explanation to Section 73 of the Act. The Id AO held that since the funds deployed in granting of loans and advances were less than 50% thereon, the said activity cannot be construed as principal business of the assessee. Hence the assessee's principal business is not granting of loans and advances and accordingly concluded that the assessee's case falls under the purview of Explanation to Section 73 of the Act and treated the loss on shares as speculation loss to the tune of Rs. 32,15,349/-.

3.7. In the course of assessment proceedings, the assessee was also requested to furnish the details of expenses incurred in relation to share dealing business and details of expenses in relation to other activities with the reason for considering the same with such activities. However, the same was not provided by the assessee. Accordingly, the Id AO proceeded to calculate the expenses incurred for share trading on pro rata basis and found that assessee's share speculation loss of Rs. 32,15,349/- works out to 36.1% of total income. Assessee had incurred administrative expenses of Rs. 9,45,729/- and therefore applying 36.1% thereon would be the expenditure attributable to share dealing business which worked out to Rs 3,41,408/- and the same was disallowed by the assessee as expenditure relating to speculation loss.

4. The Id CITA confirmed the action of the Id AO by observing as under:-

"I have carefully considered the assessment order and submission of the Ld. A/R of the appellant Having considered the submission, I find that the first main object of the company is to carry out business of buyers, sellers, suppliers, growers, manufacturer, traders and dealing in shares of computer. Therefore the business of investment finance has been mentioned in Co

2 in Memorandum & Article of Association. Keeping in view, this fact, the two criteria are important to decide the issue. Firstly, to qualify the company as investment company, the income of the company from its investment activity should be more than 50% of its total income. Secondly, the deployment of fund for investment from which the company earned interest should be more than 50% of the total fund available. As regards, the appellant's contention that for comparison of income gross interest should be considered its argument is not acceptable. It is so because if the corresponding expenditure is ignored, it would distort the figure of profit and correct comparison cannot be made. Therefore, the A.O. was right in holding that the net interest income is less as compared to income of other activity of the appellant, mainly share speculation. In this case, the net interest income is Rs.29,08,591/- and speculation loss is Rs. 32,15,349/-. As regards, the deployment of funds investments were less than 50% of total fund available. Even in the earlier and subsequent years, the funds deployed in granting of loan were less than 50% of total available funds. Therefore, I am of the considered view that the A.O. was right in law and facts in invoking the explanation of Sec. 73 and in disallowing trading loss on sale of share of Rs.32,15,349 as speculation loss. As regards, disallowance of expenditure of Rs.3,41,408/- , the appellant has not produced any evidence. No explanation has been given to justify its allowability. Hence, disallowance of Rs.3,41,408/- is confirmed. Hence Gr. 1 of appeal is dismissed.”

5. Aggrieved, the assessee is in appeal before us on the following ground:-

“1) The Ld. CIT (A) has upheld the share loss of 32,15,349/- as deemed speculation loss w/s. 73 of the Income Tax Act, 1961 and also upheld the addition of Rs. 3,41,408/- as expenditure related to Deemed Speculation Loss. During the year the company has earned interest income from granting of loans & advances amounting to Rs.47,49,739/- which is more than that of loss arising from share trading (i.e. Rs.32,15,349/-). The past history of the company also revealed that the principle business of the company is that of granting of loan and advances. As the principle business of the company is granting of loans and advances hence the company is clearly out of purview of explanation to section 73 of the Income Tax Act, 1961, so the Ld. Assessing Officer was totally wrong in treating the share trading loss as deemed speculation loss by invoking explanation to section 73 of the Income Tax Act, 1961. Therefore the loss from share trading business shall be set off with interest income, and consequently addition of the expenditure in relation to deemed speculation loss to the extent of Rs.3,41,408/- should also be deleted.”

6. The Id AR argued that the fund deployed in loans and advances activity was 49.87% and that in shares activity was only 32%. He argued that the revenue had harped on requirement of minimum 50% of the total funds to be deployed in a particular activity and income to be derived therefrom which should also be more than 50% of total income . This requirement is not spelt out anywhere in the statute and is merely a bald statement from the lower authorities with a malign intention to treat the loss as speculation loss. Moreover, the assessee had earned interest income from loans and advances to the tune of Rs. 47,49,739/- which was much more than the total loss on account of shares. The Id AO without any rhyme or reason sought to reduce the interest paid in the sum of Rs. 18,41,149/- from the interest income and compared the net interest income thereon with the absolute figure of share trading loss and concluded that based on income criteria, the assessee's case falls

under the ambit of Explanation to Section 73 of the Act. He also argued that in all the earlier years, the loss arising on account of shares has been accepted by the revenue as business loss and this is the only year in which they had treated as speculation loss. He placed the scrutiny assessment orders for the Asst Years 2003-04 and 2004-05 completed u/s 143(3) of the Act by the Id AO accepting the business of the assessee as share trading and financing and treated the share trading loss as a regular business loss. Hence it could be presumed that the Id AO had accepted the principal business is granting of loans and advances in the earlier years based on income criteria as well as fund deployment criteria.

7. In response to this, the Id DR argued that it is true that the applicability of Explanation to Section 73 of the Act was looked into by the Id AO only in the year under appeal, but non-consideration of the same in the earlier years would not automatically make the action of the assessee valid in earlier years. He also stated that the dividend income being exempt should be excluded while considering the income criteria of the assessee for the applicability of Explanation to Section 73 of the Act. He further argued that the assessee did not produce any evidence to prove that it is a banking company or engaged in the principal business of loans and advances.

8. We have heard the rival submissions and perused the materials available on record. We find that the assessee had derived interest income from loans and advances to the tune of Rs. 47,49,739/- and the loss on account of share trading was Rs. 32,15,349/-. There is no justifiable reason to reduce the interest paid in the sum of Rs. 18,41,149/- from the interest income. There cannot be any presumption that the loans borrowed on which interest was paid were utilized only for the purpose of granting loans and advances. There is no categorical finding given by the lower authorities in this regard. We find from the charts mentioned hereinabove, that both on income criteria as well as fund deployment criteria, the assessee's case would squarely fall under the exceptions to Explanation to Section 73 of the Act. We also find that the revenue had accepted the stand of the assessee to be engaged in principal business of granting loans and advances in the earlier years under scrutiny assessment proceedings for the Asst Years 2003-04 and 2004-05 wherein similar facts and circumstances as that of the year under appeal existed. Hence there is no reason to deviate from the said stand. We are not inclined to agree with the argument of the Id DR that the

assessee had not adduced any evidence to prove that it was principally engaged in the business of loans and advances. This aspect has been elaborately dealt with by the Id AO in his order itself and mechanically concluded that the assessee had not deployed more than 50% of its funds in order to come under the ambit of principal business. We find that no such requirement is provided in the provisions of the IT Act. Accordingly, we direct the Id AO to treat the share dealing loss as a regular business loss. In view of this decision, the apportionment of Rs. 3,41,408/- towards bifurcation of expenses towards share dealing and non share dealing transactions would become infructuous. Hence the grounds raised by the assessee are allowed.

9. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 18.11.2016

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

Sd/-
(M. Balaganesh)
Accountant Member

Dated :18th November, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – G. M. Holding (P) Ltd., 8/1, Chowringhee Square, 3rd floor, Kolkata-700 017.
2. Respondent –ITO, Ward-7(4), Kolkata
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.