

आयकर अपीलुीय अधलकरण, C/'SMC' नुन्यायपीठ, चेन्नई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
C/"SMC" BENCH, CHENNAI

शुी. चंद्र पूजारी लेखा सदस्य , के समक्ष ।

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

I.T.A.No.2124/Mds./2017

(Assessment Year : 2008-09)

The Income Tax officer,
Corporate Ward 2(1),
Chennai.

**Vs. M/s.Euroflora Bioland Pvt
Ltd.,**
No.Q-67, 16th street, Anna
Nagar, Chennai-40.

PAN AABCE 4830 C
(अपीलार्थी /Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Mr.N.Madhavan,, ACIT, D.R
प्रत्यर्थी की ओर से/Respondent by : Mr.S.Sridhar, Advocate

सुनवाई की तारीख/ Date of hearing : 16.11.2017
घोषणा की तारीख /Date of Pronouncement : 05.12.2017

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal is filed by the Revenue , aggrieved by the order of the Learned Commissioner of Income Tax(A)-9, Chennai dated 26.05.2017 pertaining to assessment year 2008-09.

2. The only grievance of the Revenue in its appeal is with regard to treating loss on sale of securities of ₹38,65,615/- as speculative loss u/s.73(1) by the Id. Assessing Officer as against business loss claimed by the assessee.

3. The Brief facts of the case are that the AO noticed that as per the computation of income, the assessee has incurred loss of ₹5,24,494/- from business and short term capital loss or ₹15,61,126 / - from trading in shares during the year which resulted in a total loss of ₹20,86,620/- which has been carried forward to next year. The AO from the details of transaction in shares filed by the assessee and on verification of Form-10-DB issued by the broker of the assessee M/s. Religare Securities Ltd., noticed that the assessee has shown loss from delivery based transaction of ₹15,62,126/- under the head 'income from short term capital gains' and loss from non-delivery based transaction and future trading of ₹38,65,615/- under the head 'income from business'. The AO observed that as per Section 73(1) any loss computed in respect of a speculation business carried on by the assessee shall not be set off except against profits and gains if

any of another speculation business. The AO asked the assessee as to why explanation to Section 73 should not be invoked and the loss in share trading should not be treated as speculation loss to be adjusted only against profits and gains of speculation business of current year or subsequent eight years.

3.1 The assessee's AR vide letter dated 03.11.2003 submitted before the Id. Assessing Officer that the assessee's case is not covered by the provisions of explanation to Section 73 and relied on certain case laws. The AO distinguished the Hon'ble High Court of Calcutta decision relied on by the assessee in the case of CIT vs Park View Properties Ltd., 261 ITR 473 by observing that the loss incurred by the assessee from share trading of ₹38,65,615/- is more than the income under other heads and therefore provisions of Section 73 would be attracted in the assessee's case. The AO also observed that the loss from delivery based transaction amounting to ₹15,62,126/- offered under the head 'income from short term capital gains' by the assessee should also be treated under the head 'business'. Accordingly, the AO by relying on certain case laws, treated the entire loss of ₹54,27,741/- (₹38,65,615/- + ₹15,62,126/-)

as speculation loss from the business of purchase and sale of shares as income from business and allowed to be carried forward for four assessment years to be adjusted only against speculation profit. Aggrieved by the order of Id. Assessing Officer, the assessee carried the appeal before the Ld.CIT(A).

3.2 The Id.A.R contended before the Ld.CIT(A) that in the assessment order, the AO accepted that the principle business of the appellant company is in the business of trading in shares and therefore the provisions of Explanation to Section 73 will not be attracted. It is the contention of the appellant that the following heads of income are excluded in explanation to Section 73 of the Act:

- (i) that the principle business of which is in trading in shares,
- (ii) that the principle business of which is in banking or granting of loans and advances
- (iii) that the gross total consists mainly of income which is chargeable under the heads “interest on securities”, “income from house property”, “capital gains” and “income from other sources”.

Therefore, the contention of the Id.A.R is that because the AO himself had accepted that the assessee's principle business is trading in shares, the exception clause will apply and accordingly the explanation to Section 73 is not applicable.

3.3 On appeal, the Ld.CIT(A) observed that the exception clauses included only wherein the gross total income consisted mainly of income which is chargeable under the heads interest on securities, income from house property, capital gains and income from other sources or the principle business is banking or granting of loans and advances. The Finance Act 2014 with effect from 01.04.2015 also included the principle business of trading in shares as one of the exceptions. The assessment year involved in the case of the appellant is 2008-09 and the provisions existed at that time for the Assessment Year 2008-09 alone are applicable. The amendment made with effect from 01.04.2015 is not applicable for the Assessment Year 2008-09. For the Assessment Year 2008-09, even if the principle business was trading in shares, all transactions in the nature of purchase and sale of shares of other companies was deemed to be considered as speculation business and accordingly

the AO treated the entire transactions in purchase and sale of shares as speculation business. In the return of income, the assessee had shown income from non-delivery based trading at a loss of ₹38,65,615/- under the head business income and also offered loss under the delivery based purchase and sale of shares at ₹15,62,126/- under the head short term capital loss.

3.4 The loss on account of business of purchase and sale of non-delivery based transactions are adjusted against the income received from consultation and net business income of ₹5,24,494/- was arrived at. As per the appellant, the non-delivery based trading is not a speculation business as per clause (d) of Section 43(5) of the Act. Clause (d) provides that the trading in derivatives in a recognized stock exchange is excluded from the speculative transaction. Therefore the contention of the appellant is that because the derivative transactions are carried through a recognized stock exchange, the loss of ₹38,65,615/- should not be treated as speculation loss and must be considered as business loss eligible to be adjusted against other heads of income. As against this contention of the appellant, the AO mentioned in the assessment order that the

explanation to Section 73 will have precedence over Section 43(5) because explanation to Section 73 comes after Section 43(5). The Calcutta High Court in the case of Paharpur Cooling Towers Ltd., ITA No.256 of 2002 held that in the case of companies, the explanation to Section 73 which has been enacted for special purposes, overrides the other provisions of the Act; however the meaning given by the AO that Section 73 comes after Section 45, therefore it will have precedence is not a acceptable proposition.

3.5 As per Section 43(5)(d) the derivative transaction carried through a recognized stock exchange must not be classified as speculative transaction and accordingly the assessee is correct in arriving at the business loss of ₹5,24,494/-. The assessee arrived at business loss of ₹5,24,494/- after adjusting loss on trading of derivatives of ₹38,65,615/- as against the income earned from consultation business. The gross receipts from consultation business is ₹36,04,000/- against which administrative expenses of ₹2,59,629/-, preliminary expenses of Rs.3,250/- and loss on sale of derivatives of ₹38,65,615/- were adjusted to arrive at the business loss of ₹5,24,494/-.

3.6 As per the explanation to Section 73, even if the provision as it existed at that time is applied, the assessee falls under the exception clause because the income predominantly consists of income from capital gain and not income from business. The Bombay High Court in the case of Darshan Securities Pvt. Ltd., ITA No.2886 of 2009 dated 02.02.20 12 held that:

“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.

9. 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 the 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 Section 73(1).”

3.7 The above judgement was also followed by the Hon'ble Calcutta High Court in the case of Middleton Investment & Trading Co. Ltd.; ITA No.196 of 1999 dated 15.01.2014.

3.8 According to Ld.CIT(A), in the present case, the income from capital loss arrived by the assessee is ₹15,62,126/- and the loss from business is ₹5,24,494/-. The Calcutta High Court in the case of Eastern Aviation and Industries, 208 ITR 1023 held that profits and gains represent positive income whereas the losses represent negative income. Since in the case of the appellant, the negative income earned from capital gains is more than the negative income earned from business, the predominant part of income earned is from capital gains. Therefore the exception carved out in explanation to Section 73 of the Act is applicable. Accordingly, the purchase and sale of shares of other companies will not be treated as speculation business even as per the provisions of explanation to Section 73 of

the Act. Therefore, Ld.CIT(A) deleted the addition made by Id. Assessing Officer. Against the order of Ld.CIT(A), now the Revenue is in appeal before us.

4. I have heard both the parties and perused the material on record. In the present case, the assessee is engaged in the business of share trading and I.T. enables services. In this course of activities, the assessee earned the loss from short term capital gains of (-) 15,62,126/- and the business loss of (-) 5,24,494/-. While computing the business loss, the assessee included the loss on sale of securities at ₹38,65,615/-. The Id. Assessing Officer had taken out it from P&L A/c and considered it as speculative loss. Now the contention of the Id.A.R is that negative income earned from capital gains is more than the negative income from business, the main part of the income is earned from the capital gains. According to Id.A.R, the exception provided in Sec.73 r.w.s.43(5)(d) has to be applied. To answer to this question, I have to go through the P&L A/c prepared by the assessee as on 31.03.2008 which reads as follows:-

	SCH No.	CURR.YR
I. INCOME		
Sales	--	0.00
Consultation fees received		<u>36,04,000.00</u>
II. EXPNENDITURE		
Administrative expenses	(F)	2,59,629.15
Loss on sale of investments		0.00
Loss on sale of securities		38,65,614.81
Short term capital loss		15,62,125.70
Preliminary expenses written off	(E)	<u>3,250.00</u>
Loss Before Tax		<u>56,90,619.66</u>
LESS: provision for tax for FBT	622.00	<u>622.00</u>
Loss After Tax		<u>20,87,241.66</u>
Balance C/F to P&L A/c from Previous years		<u>24,37,282.36</u> <u>45,24,524.02</u>

As seen from the computation of income filed by the assessee along with the return of income, assessee declared the business income as loss at ₹ 5,24,493/- before adjusting the loss at sale of securities of ₹38,65,614.81. In my opinion, the Ld.CIT(A) has to arrive the business income of the assessee by excluding this amount, then he has to decide the main business of the assessee so as to decide whether the assessee has earned income from capital gains more than the income from business so as to apply the explanation in Sec.73 of the Act. Without carrying on this exercise, Ld.CIT(A) directly observe that the negative income earned from the capital

gains is more the negative income earned from the business, which forms the predominant part of the income earned by the assessee. On exclusion of this impugned amount of 38,65,614.81 being loss on sale of securities, the business income of assessee would be ₹33,41,120.85 (rounded off ₹33,41,121). Being so, business income of assessee is more than other income. Hence, there is no application of exemption provided in Sec.73 r.w.s. 43(5)(d) of the Act. Accordingly, the order of Ld.CIT(A) is reversed and the order of Id. Assessing Officer is restored. Therefore, the grounds raised in appeal of Revenue stands allowed.

5. In the result, the appeal of Revenue is allowed for statistical purposes

Order pronounced on 05th December, 2017.

Sd/-

(चंद्र पूजारी)

(CHANDRA POOJARI)

लेखा सदस्य /ACCOUNTANT MEMBER

Chennai,

Dated the 05th December, 2017.

K s sundaram.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |

