

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “B”, MUMBAI
BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.2388/Mum/2013 (Assessment Year- 2009-10)**

Blueberry Trading Company Pvt. Ltd., 373, Konark House, Veer Savarkar Road, Ground Floor, Near Siddhi Vinayak Temple, Prabhadevi, Dadar (West), Mumbai-400028 PAN:AACB5512E	Vs.	DCIT -3(1) Aayakar Bhavan, M.K. Road, Mumbai-20.
(Appellant)		(Respondent)

Assessee by : Shri Nitesh Joshi (AR)

Revenue by : Shri Suman Kumar (DR)

Date of hearing : 31.01.2018

Date of Pronouncement : 14.03.2018

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee under section 253 of Income Tax Act is directed against the order of Ld. Commissioner of Income-Tax (Appeals)-5, Mumbai, [for short the ld. CIT(A)] dated 14.12.2012 for Assessment Year 2009-2010.
2. Brief facts of the case are that the assessee-company is stated to be engaged in business of Real Estate, Developing & Leasing of constructed premises and Investment & Trading in shares & securities. The assessee filed its return of income for relevant Assessment Year on 30.09.2009. The assessee again on 22.01.2010 filed revise return of income declaring loss of Rs. 19,23,31,589/-. The assessment was completed on 27.12.2011. The Assessing Officer while passing the assessment order treated the loss of Rs.

4,84,58,752/- in share trading as speculation loss and further added Rs. 10,00,000/- as expenses related with Share Speculation Business. On appeal before the Ld. CIT(A), the action of Assessing Officer was confirmed. Thus, further aggrieved by the order of Ld. CIT(A), the assessee has filed the present appeal before the Tribunal, raising the following grounds of appeal:

- 1)
 - (a) The learned Commissioner of Income-tax (Appeals) erred in upholding the action of the Deputy Commissioner of Income-tax, Mumbai (herein after referred to as "the Assessing Officer"), in treating loss on sale of shares amounting a sum of Rs. 4,84,58,752/- as loss from speculation business as against business loss treated by the appellant on the ground that Explanation to section 73 is applicable to the appellant.
 - (b) Without prejudice to what has been stated above, the appellant submits that the Assessing Officer failed to appreciate the fact that appellant falls within the exception as stipulated in Explanation to section 73 of the Act.
 - (c) Without prejudice to what is stated above, the appellant submits that the Assessing Officer erred in including loss of Rs. 4,84,58,752/- in business income to determine gross total income for applicability of Explanation to section 73 of the Act.
- 2) The Assessing Officer erred in adding a sum of Rs. 10,00,000/- on an adhoc basis being expenses related to speculation business income.
- 3) The appellant submits that the Assessing Officer be directed:
 - (a) to treat loss of a sum of Rs. 4,84,58,752/- arising on sale of shares as business income.
 - (b) Without prejudice to what has been stated above, to exclude loss on sale of shares amounting to Rs. 4,84,58,752/- for determining gross total income of the appellant.
 - (c) to delete additions of ad hoc expenses amounting to Rs. 10,00,000/- and to modify the assessment as per the provisions of the Act.
- 4) The appellant craves liberty to add, to alter and/or amend the grounds of appeal as and when given.

3. We have heard the Ld. Authorized Representative (AR) of the assessee and Ld. Departmental Representative (DR) for the Revenue and gone through the order of lower authorities. The Ld. AR of assessee argued that the primary object of the assessee-company is to earn income by letting of the premises. The total gross receipt consist mainly of “Income from House Property” of Rs. 5,41,88,829/- and “Capital Gain” of Rs. 6,99,58,575/-. The assessee suffered loss of Rs. 4,84,58,752/- on account of share transaction. The main income of assessee consists of other than the Business, thus, the assessee falls under the exception provided under Explanation to section 73 of the Act. The Ld. AR of the assessee further submits that in case, the Ground No.1 is allowed in favour of assessee. The Ground No.2 is consequential in nature. In support of his submission, the Ld. AR for the assessee relied on the decision of Hon'ble Bombay High Court in CIT Vs. HSBC Securities & Capital markets India (P) Ltd. [2012] 23 Taxman.com 377 (Bom.) and Delhi Tribunal in A.K. Capital Markets Ltd. Vs. DCIT [2016] 156 ITD 528/65 taxman.com 62 (Del. Trib.).
4. On the contrary, the Ld. DR for the Revenue supported the order of authorities below. The ld. DR for the Revenue submits that during the assessment, the assessee was asked to explain, as to why the loss should not be treated as speculation loss. The assessee failed to file any reply and substantiated the contention, and therefore, the Assessing Officer treated the loss on share business as speculation loss. The Ld. DR for the Revenue

relied on the decision of Mumbai Tribunal in Yucca Finvest (P.) Ltd. Vs. DCIT 258 ITR 198 (Mum. Trib.). The Ld. DR for the Revenue further submits that while considering the Explanation to section 73, one has to see the nature of business carried by the assessee.

5. We have considered the submission of both the parties and have perused the material available on record. The assessee has shown receipt of income from House Property of Rs. 5,41,88,829/- and Capital Loss of Rs. 6,99,58,755/-. The assessee has also shown the loss of Rs. 4,84,58,752/- on account of share business. The Assessing Officer denied the set off of loss on account of share business holding it to be a speculative loss as per Explanation to section 73 of the Act. The Assessing Officer also disallowed the expenses of Rs. 10,00,000/- on such speculative business. The Id. CIT(A) confirmed the action of Assessing Officer holding that the business loss is in excess of the income derived under other heads, therefore, the provisions of section 73 are squarely applicable. The Hon'ble Bombay High Court in CIT vs. HSBC Securities & Capital Market Ltd. (supra), while relying upon the its earlier decision in Darshan Securities Pvt. Ltd. (2012) 206 Taxman 68/18 taxman.com 142 (Bom.) held that Explanation to section 73 does not operate against the company whose gross total income consist mainly of income which is chargeable under heads 'Interest on Securities', 'Income from House Property', 'Capital Gain' & 'Income from Other Sources'. Further, the co-ordinate bench of Delhi Tribunal in A.K.

Capital Markets Ltd. vs. DCIT [2016] 65 taxman.com 62 (Del. Trib.) held that when the assessee during the year earned dividend income and interest income and claimed set off of loss arising out of trading in Future & Options/derivatives against other income, the assessee's case would fall within purview of exception carved out in Explanation to section 73 and, therefore, the assessee is entitled to set off of loss against other income. There is no dispute that the assessee shown Income from House Property, Short Term & Long Term Capital Loss. In our view, the assessee-company has income from other Heads like Income from House Property, Capital Gain, then the total income falls under all the specified heads, than the assessee will fall within the purview of exception carved out in the Explanation to section 73 and the assessee would be entitled to set off of loss suffered on share transactions and cannot be termed as carrying on speculative business. The ratio of decision relied by Id. DR for the Revenue in Yucca Finvest (P.) Ltd. (supra) is differ on the facts. In that case the Tribunal held that under Explanation of section 73 two exceptions have been provided. If the case of a company falls in either of these two exceptions then, it will not hit by the Explanation. First exception is about those companies whose gross total income consists of income chargeable under the heads "Income from house property", "Capital Gains" and "Income from other sources". The section provides thrust on composition of gross total income. Thus, if gross total income comprises of mainly of

incomes, chargeable under these heads, then Explanation to section 73 will not apply. Thus, the case law relied by Id. DR is not helpful to the Revenue. Even otherwise the decision of jurisdictional High Court has binding precedent on the Tribunal. The decision of Hon'ble Bombay High Court in HSBC Securities & Capital Markets India (P.) Ltd. (supra) is squarely applicable in the facts of the present case. In our view, the lower authorities failed to appreciate that the assessee falls within the exception provided in Explanation to section 73 of the Act. Thus, in view of our discussion, the assessee is entitled for set off of loss. In the result, the ground no.1 of the appeal is allowed.

6. The ground no.2 is consequential in nature. As we have allowed the ground no.1 of the appeal, the addition of Rs. 10,00,000/- on account of expenses on speculation business loss is also deleted.
7. In the result, appeal filed by assessee is allowed.

Order pronounced in the open court on 14th day of March 2018.

Sd/-

(B.R.BASKARAN)

ACCOUNTANT MEMBER

Mumbai; Dated 14/03/2018

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

BY ORDER
(Asstt.Registrar)
ITAT, Mumbai