

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'एच', मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'H' MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Manoj Kumar Aggarwal, Accountant Member**

**ITA No.940/Mum/2017
Assessment Year: 2012-13**

DCIT-14(2)(1), Room No.432, 4 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020	बनाम/ Vs.	M/s Kalpana Madhani Securities Pvt. Ltd. 11/1102, Shanti Tower, Shanti Path, Near Garodia Nagar, Ghatkopar (East), Mumbai-400077
(राजस्व /Revenue)		(निर्धारिती /Assessee)
PAN. No. AABCK2968H		

C.O. No.139/Mum/2018
(Arising out of ITA No.940/Mum/2017)
Assessment Year: 2012-13

M/s Kalpana Madhani Securities Pvt. Ltd. 11/1102, Shanti Tower, Shanti Path, Near Garodia Nagar, Ghatkopar (East), Mumbai-400077	बनाम/ Vs.	DCIT-14(2)(1), Room No.432, 4 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020
(निर्धारिती / Assessee)		(राजस्व / Revenue)
PAN. No. AABCK2968H		

राजस्व की ओर से / Revenue by	Shri Rajat Mittal-DR
निर्धारिती की ओर से / Assessee by	Shri Ravindra Poojari

सुनवाई की तारीख / Date of Hearing:	21/06/2018
आदेश की तारीख / Date of Order:	21/06/2018

आदेश / ORDER

Per Joginder Singh(Judicial Member)

The Revenue is aggrieved by the impugned order dated 08/11/2016 of the Ld. First Appellate Authority, Mumbai and the assessee has preferred cross objection. First, we shall take up the appeal of the Revenue, wherein, the ground raised pertains to not appreciating that in the case of CIT vs Lokmat Newspaper is distinguishable with respect to brought forward losses adjusted against the income of the current year, whereas, in the present case, the losses sought to be

adjusted against current non-speculative income earned during the year and further ignoring section 73 r.w.s. 43(5) of the Income Tax Act, 1961 (hereinafter the Act).

2. During hearing, Shri Rajat Mittal, ld. DR advanced arguments, which is identical to the ground raised by defending the addition made by the Ld. Assessing Officer. On the other hand, Shri Ravindra Poojari, ld. counsel for the assessee, claimed that the impugned issue is covered in the case of assessee itself by the order of the Tribunal dated 23/10/2013 for Assessment Year 2009-10 (ITA No.4734/Mum/2012), which was affirmed by Hon'ble jurisdictional High Court, vide order dated 26/04/2017 (ITA No.816 of 2014). This factual matrix was not controverted by the Revenue.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the aforesaid order of the Tribunal dated 23/10/2013 for ready reference and analysis:-

“This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-21, Mumbai

(‘CIT(A)’ for short) dated 09.04.2012, partly allowing the assessee’s appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 (‘the Act’ hereinafter) for the assessment year (A.Y.) 2009-10 vide order dated 20.12.2011.

2.1 The appeal raises a single issue per its first and sole effective ground, i.e., the maintainability in law of the assessee’s claim in setting off the income from its regular business activities, viz. share trading, futures & options, commodity trading, and sub-brokers at Bombay Stock Exchange (BSE), returned and assessed at Rs.8,62,48,086/- and Rs.8,53,92,860/- respectively, against the speculative loss of Rs.9,04,05,576/-. The loss of Rs.9.04 crores, being in respect of intraday, i.e., non-delivery based, transactions so that they were speculative by definition (s.43(5)), the said transactions were considered by the Assessing Officer (A.O.) to constitute a separate business activity in terms of *Explanation 2* to section 28. The same would, thus, have to be regarded separately in view of section 73 of the Act. The assessee’s claim of the applicability of *Explanation* to section 73, so that its regular business, in-so-far as it relates to purchase and sale of shares of other companies, is also to be deemed as a speculative business, did not find favour with the A.O. inasmuch as the said *Explanation* was a deeming provision, and would have effect only for the limited purpose for which it was created, i.e., could not extend beyond its legitimate field. Section 73 of the Act would in any case apply only to the losses of the speculative business and not to the income arising there-from, so that even if the profit from its regular business was regarded as a speculative business, as contended, benefit thereof could not be extended to the assessee. The reliance by the assessee on the decision in the case of *CIT vs. Lokmat*

Newspapers Pvt. Ltd. (in ITA(L) No. 3005 of 2009 dated 16.02.2010), was also considered by him as distinguishable on facts and circumstances of the case.

2.2 In further appeal, the assessee found favour with the Id. CIT(A), relying on the said decision by the hon'ble Jurisdictional High Court, since reported at [2010] 322 ITR 43 (Bom). The hon'ble high court had clarified that where *Explanation* to section 73 is attracted, the same would apply regardless of whether the result of the said transactions is a profit or loss. He, accordingly, directed the A.O. to treat the income as covered by *Explanation* to section 73 as speculative income, and apply the provision of section 73 accordingly. Aggrieved, the Revenue is in appeal.

3. We have heard the parties, and perused the material on record.

3.1 As clarified by the hon'ble jurisdictional high court in the case of *Prasad Agents (P.) Ltd. v. ITO* [2009] 333 ITR 275 (Bom), relied upon by the assessee before us, the language of *Explanation* to section 73 is clear, providing no scope for any ambiguity. Alluding to the object of the section, as the A.O. does, would be to no consequence, even as the hon'ble court found no reference thereto in Circular No. 204 by the CBDT containing the explanatory notes to the Taxation Laws (Amendment) Act, 1975. Where and to the extent the assessee's business consists of purchase and sale of shares of other companies, the same is to be regarded as speculation business. Whether the same results in a profit or loss, which is even otherwise a matter subsequent, is irrelevant. In fact, nobody does business for a loss, which is only thrust upon one under the given facts and circumstances. That loss is only negative income is

trite law, for which we may refer to the decisions by the apex court in the case of *CIT vs. J. H. Gotla* [1985] 156 ITR 323 (SC) and *CIT vs. Harprasad & Co. (P.) Ltd.* [1975] 99 ITR 118 (SC). 'Loss', it may be appreciated, arises from the same computation process and mechanism that results in an 'income', so that the two clearly bear the same character.

As such, therefore, not only is the assessee's business of purchase and sale of shares a speculative business, it is the same speculative business which has resulted in a loss of Rs.9.04 crores for the year, i.e., in terms of *Explanation 2* to section 28, being only on account of intra-day transactions in purchase and sale of shares. This identity of business though is of little consequence, as the loss from one speculative business can, in terms of s. 73 of the Act, be freely adjusted against the income from another.

3.2 Continuing further, true, the deeming per *Explanation* to section 73 is only for the purpose of the said section, and cannot be extended beyond its legitimate field and scope. But that is precisely what the assessee's claim is, i.e., that the income of its business, in-so-far as it is covered by the said *Explanation*, is to be for the purposes of section 73 considered as speculation income. The Revenue's stand is misconceived. In fact, in our clear view, the assessee's case is fully covered in its favour by the decisions by the hon'ble jurisdictional high court in the case of *Prasad Agents (P.) Ltd.* (supra) and *Lokmat Newspapers Pvt. Ltd.* (supra). We may, however, clarify that it is only that part of the assessee's business that consists of purchase and sale of shares and, as such, covered by the *Explanation* to section 73, that is to be regarded as speculative. We state so as we observe

the assessee to be also deriving income from brokerage, derivative segment, etc. We decide accordingly.

4. In the result, the Revenue's appeal is dismissed in the above given terms."

2.2. It is also noted that the Department carried the aforesaid matter in appeal before the Hon'ble High Court, wherein, vide order dated 26/04/2017, it was held as under:-

1. This appeal challenges an order passed by the Income Tax Appellate Tribunal, Bench at Mumbai ('Tribunal'). By the order dated 23rd October 2013 for the assessment year 2009-10, the Tribunal dismissed the Revenue's appeal and upheld the order of Commissioner of Income Tax (Appeals), Mumbai, dated 9th April 2012.

2. The first appellate authority set aside the Assessing Officer's order only on the applicability of explanation to Section 73 of Income Tax Act, 1961 ('Act'). The Respondent-assessee claimed that this explanation is applicable to it as its regular business, insofar as it relates to purchase and sale of shares of other companies, is also deemed as a speculative business. That did not find favour with the Assessing Officer inasmuch as the explanation was a deeming provision and would have effect only for a limited purpose for which it was created. It could not extend beyond its legitimate field

3. Section 73 of the Act would, in any case, apply only to the losses of the speculative business and not to the income arising therefrom, so that even if the profit from its regular business was regarded as a speculative business, as contended, benefit thereof could not be extended to the assessee. The decision of this Court cited by learned counsel for Revenue in case of **Commissioner of Income Tax Vs/**

Lokmat Newspapers Pvt.Ltd.¹, would , therefore, have no application, was the finding of the Assessing Officer against the assessee.

4. The other judgment relied upon by Appellant is in case of **Prasad Agents (P) Ltd. Vs. Income Tax Officer'**. Relying on that, the Tribunal concluded that the Assessing Officer's stand cannot be sustained. This Court had clarified that where explanation to Section 73 of the Act is attracted, the same would apply regardless of the fact that transaction is for profit or loss. That is why the Commissioner of Income Tax (Appeals) directed the Assessing Officer to treat the income as covered by Explanation to Section 73 as speculative income and apply that provision accordingly. He, therefore, did not agree with the Assessing Officer. That view of the Commissioner of Income Tax (Appeals) was challenged before the Tribunal by the Revenue.

5. *The Tribunal by upholding this conclusion of the first appellate authority in paragraph 3.2, held that two decisions of this Court entirely cover the issue. However, the Tribunal clarified that it is only that part of the assessee's business that consists of purchase and sale of shares, could be covered by the Explanation to Section 73 of the Act and that is to be regarded as speculative.*

6. *All the more, therefore, the issue raised before us is squarely covered by two decisions of this Court. That the Revenue is aggrieved by the same and has taken up the matter to Hon'ble Supreme Court of India and where it is pending. Both the decisions referred above stand as of today and judicial discipline requires that we must apply them when facts are identical.*

7. As a result of the above discussion, there is no substantial question of law raised in this appeal. It is accordingly dismissed, but

with no cost.”

2.3. In the light of the above orders, now we shall examine the facts of the present appeal. The assessee is a private limited company engaged in the business of purchase and sale of shares declared loss of Rs.70,05,649/- in its return on 30/09/2012. While framing the assessment, the Ld. Assessing Officer observed that the assessee incurred speculative loss of Rs.2.05 crores, which has been set off against the business income, therefore, the ld. Assessing Officer held that intraday trading in which no delivery is taken is a speculation income under section 43(5) of the Act by further observing that explanation section 73 can only be applied in a case where there is a loss in share trading and not when there is an income i.e. profit, thus, he denied set off of speculation loss and computed the income at Rs.1,35,40,800/-.

2.4. On appeal before the Ld. Commissioner of Income Tax (Appeal), the factual matrix along with the decision of the Tribunal for Assessment Year 2009-10 was followed along with various other decisions including the decision from

Hon'ble Bombay High Court in CIT vs Lokmat Newspapers Pvt. Ltd. (2010) 322 ITR 43 (Bom.), the Assessing Officer was directed to allow set off of speculation loss of Rs.2,05,46,543/- from intraday trading against the share trading income from purchase and sale of shares. The Revenue is aggrieved and is in appeal before this Tribunal.

2.5. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, we find that on identical fact, the Tribunal has deliberated upon the issue in hand and held that deeming explanation to section 73 of the Act is only for the purposes of the said section and cannot be extended beyond its legitimate field and scope. This order of the Tribunal was affirmed by Hon'ble jurisdictional High Court. Considering the order of the Tribunal for Assessment Year 2009-10 and respectfully following the decision of the Hon'ble High Court, we find no infirmity in the impugned order, therefore, the appeal of the Revenue is dismissed.

3. So far as, cross objection of the assessee (C.O. No.139/Mum/2018) is concerned, the same is in support of the order of the Ld. Commissioner of Income Tax (Appeal). Since, we have dismissed the appeal of the Revenue, therefore, it has remained for academic interest only, therefore, dismissed as in-fructuous.

Finally, the appeal of the Revenue as well as cross objection of the assessee is dismissed.

This Order was pronounced in the open court in the presence of Ld. representatives from both sides at the conclusion of hearing on 21/06/2018.

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 21/06/2018

Shekhar, P.S.नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai