

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “B”, MUMBAI  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND SHRI  
RAJESH KUMAR, ACCOUNTANT MEMBER  
ITA No. 7269/Mum/2011 (Assessment Year- 2008-09)**

ITO-9(2)(3), R. No. 225, Aayakar Bhavan, M.K. Road, Mumbai-20.	<b>Vs.</b>	M/s Natraj Financial & Services Pvt. Ltd. 12/D-1, Estee jeejay Co-op. Hsg. Soc., Sai Baba Nagar, Borivali(W), Mumbai-400092 <b>PAN: AABCN3770A</b>
(Appellant)		(Respondent)

Revenue by : Shri Suman Kumar (DR )  
Assessee by : Shri N.M. Porwal (AR)  
Date of hearing : 30.05.2018

Date of Pronouncement : 22.06.2018

**Order Under Section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. This appeal by Revenue is directed against the order of Learned Commissioner (Appeals)-20, Mumbai dated 23<sup>rd</sup> August 2011 for Assessment Year 2008-09, which arises from the assessment order passed by Assessing Officer under section 143(3) dated 27<sup>th</sup> of December 2010.
2. Brief facts of the case are that assessee is a private limited company and is in the business of investment and in dealing in shares and securities. Assessee-company filed its return of income for Assessment Year 2008-09 on 29<sup>th</sup> September 2008 declaring nil income. The assessment was completed on 27<sup>th</sup> December 2010 under section 143(3). The Assessing Officer while passing the assessment order noted that the assessee has shown loss in share transaction of Rs. 57,77,584/- which is more than the income by way of brokerage interest, short-term capital gain, long-term capital gain and other income. Therefore, the gross total income of the assessee consist mainly of income which is chargeable under the head

Capital Gain and Income from Other Sources was rejected by the Assessing Officer. The Assessing Officer treated the entire loss from purchase and sale of shares as 'Speculation Loss' and by invoking the Explanation in Section 73 of the Act not allowed the set off of loss from business income. On appeal before Id. Commissioner (Appeals), the assessee was allowed the set off of said loss by treating it as business loss and not speculative loss. Therefore, aggrieved by the order of Id. Commissioner (Appeals) the Revenue has filed the present appeal before this Tribunal. The Revenue has raised following grounds of appeal;

*(i) On the facts and in the circumstances of the case and in law, the learned Commissioner(Appeals) erred in not appreciating the correct working of taxable income worked by assessing officer as per explanation to section 73 where in speculation loss exceeds the income computed under the head other sources and capital gain. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals), while giving relief under section 73, has wrongly considered addition of long-term capital loss of Rs. 63,38,617/- in computation of cross total income.*

*(ii)The appellant prays that order of Commissioner (Appeals) on the ground be set aside and that of Assessing Officer be restored.*

3. We have heard learned DR for the revenue and the learned AR for the assessee and perused the material available on record. The Id. DR for the revenue supported the order of the assessing officer. The Id DR further submits that the Id Commissioner (Appeals) without giving the opportunity to the assessing officer accepted the revise computation of income. The revised computation furnished by the assessee before Id Commissioner (Appeals) was different than the computation furnished during the assessment proceedings. No remand report was sought by Id Commissioner (Appeals) before accepting the fresh computation of income under different head. In support of his submissions the Id DR for

the revenue relied on the decision of Tribunal in Yucca Finvest (P) Ltd Vs DCIT [2006] 101ITD 403(Mum). On the other hand the ld. AR for the assessee supported the order of ld. Commissioner (Appeals). The ld. AR for the assessee further submits that the ld. Commissioner (appeals) was satisfied with the computation of income furnished by assessee and that the comment of assessing officer was not required.

4. We have considered the rival submissions of the parties and have gone through the orders of authorities below. The Assessing Officer during the assessment proceeding while going through the Profit & Loss Account noted that the assessee has shown the following income.

Brokerage income	--	90,371
Dividend income	--	46,123
Interest	--	21,99,848
Bank Interest	--	7,397
LTC loss	--	(-)63,38,617
STC Gain	--	18,80,973
Other Income	--	1,42,000
Interest on I.T	--	1,159

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(-)9,70,746

(Gross total income excluding share trading)

The Assessing Officer further noted the share trading business; the assessee has shown the dealing of shares in the following manner:

Purchase of shares	50,86,48,965	Sale of shares	50,23,64,099
Loss (on account of misappropriation of Investment)	6,68,400	Closing stock	36,65,837
Expenses	17,27,289	Gross loss	57,77,584
Depn. as per I.T. Act.	7,62,866		
	51,18,07,520		51,18,07,520

5. On the basis of above observation, the Assessing Officer asked the assessee as to why provision of section 73 be not apply as loss from purchase and sale of share of Rs. 32,87,429/- along with business expenditure of Rs. 24,90,154/- aggregating to Rs. 57,77,584/-. The assessee furnished its reply and contended that the total income of the

assessee consist mainly income chargeable under the head 'Income from Other Sources' and Capital Gain''. The assessee is also engaged in granting of loans and advances as its principle business, therefore, deeming fiction under section 73 of the Act is not applicable on the assessee. The contention of assessee was not accepted by Assessing Officer. The Assessing Officer treated the loss as speculation loss under deeming fiction in Explanation to section 73 and not allowed set off of against the business income.

6. Before Id. Commissioner (Appeal), the assessee urged that the Assessing Officer erroneously computed the gross total income. The Assessing Officer committed mistake due to apparent error in computation of gross total income as the business income exceed non-business income from Capital Gain and Income from Other Source. The assessee further explained that computation of business loss of Rs. 67,13,222/- is erroneous and computation mistake. The disallowance on account of capital loss from theft of Rs. 6.68 Lakhs and other disallowances, if sustained would only reduce the loss. The Assessing Officer inadvertently increased the loss and allowed higher carry forward loss. It was further explained that the correct business loss as per computation of income adopted by Assessing Officer would be Rs. 48,41,946/- and not of Rs. 67,13,222/- as computed by Assessing Officer. The assessee submitted that non-business income from Capital Gain of Rs. 18,80,973/- together with Income from Other Sources of Rs. 34,40,775/- would exceed the business loss of Rs. 48,41,946/-. Therefore, when non-business income exceeds the business income, the Explanation to section 73 has no application. The Id. Commissioner (Appeal) after considering the fresh computation of income and the explanation furnished by assessee observed that gross total income of assessee-company mainly consist of income, falling under head other than profit and gain of business and

profession. The income of assessee under the head Business Income is higher than the assessable income. Therefore, the deeming fiction in section 73 would not apply. The Id. Commissioner (Appeal) also concluded that the assessee-company is not a part of any group company and rather traded in share and security of all types of companies. The assessee earned Capital Gain of Rs. 18,80,793/- together with the Income from Other Sources at Rs. 34,40,775/-, which exceed the business loss of Rs. 48,41,946/-, therefore, the assessee is clearly covered by first exception in Explanation to section 73 and deleted the disallowance of loss. The Id. DR for the Revenue failed to bring any contrary material or law to our notice to take a contrary view. Therefore, we do not find any illegality or infirmity in the order passed by Id. Commissioner (Appeal). The contention of Id. DR for the Revenue is that no remand report was sought from Assessing Officer has no legal force, as no fresh evidence or additional evidence was furnished by the assessee. The assessee has explained the computation of income under different head of income which was appreciated and accepted by Id. Commissioner (Appeal). In the result, ground of appeal raised by Revenue is dismissed. The case law relied by Id. DR is not helpful to the revenue. As we have seen that the Id Commissioner (Appeals) has given clear findings that deeming fiction in section 73 is not applicable on the assessee.

7. In the result, appeal filed by Revenue is dismissed.

Order pronounced in the open court on 22<sup>nd</sup> day of June 2018.

Sd/-

**(RAJESH KUMAR)**  
**ACCOUNTANT MEMBER**  
 Mumbai; Dated 22/06/2018  
 S.K.PS

Sd/-

**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**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.

**BY ORDER,**

**(Asstt.Registrar)  
ITAT, Mumbai**