



IN THE INCOME TAX APPELLATE TRIBUNAL "SMC", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI RAM LAL NEGI, JM

ITA No.5663/Mum/2017

(Assessment Year :2011-12)

ITO – 12(3)(1) Room No.147A, 1 <sup>st</sup> Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	M/s. Paritosh Trading Pvt. Ltd., (Now known as Kuvam Finvest Pvt. Ltd.,) 503, Arpita Apartment, 51, TPS Road, Borivali (W) Mumbai – 400 092
<b>PAN/GIR No.</b>		<b>AACCP8986B</b>
<b>Appellant)</b>	<b>..</b>	<b>Respondent)</b>

Revenue by	Shri Abdul Hakeem M
Assessee by	Shri Rahul Bagaria
<b>Date of Hearing</b>	<b>31/08/2018</b>
<b>Date of Pronouncement</b>	<b>31/08/2018</b>

**आदेश / ORDER**

**PER R.C.SHARMA (A.M):**

This is an appeal filed by the Revenue against the order of CIT(A)-9, Mumbai dated 06/06/2017 for A.Y.2011-12 in the matter of order passed u/s. 143(3) of the IT Act, 1961.

2. In this appeal, Revenue is aggrieved for deleting disallowance made by the AO by applying explanation to Section 73 of the IT Act.
3. Rival contentions have been heard and record perused.

4. Facts in brief are that assessee is mainly engaged in business of purchase and sales of shares. During the course of assessment the AO has disallowed share trading loss as "Business Loss" of Rs. 3,11,18,547/- (including proportionate expenses for the year to the tune of Rs.1,58,041/- as part of deemed speculation loss) applying explanation to section 73 of the act and treating the same as "Speculation Loss" allowed to be carried forward to set-off against speculation income in future years.

5. By the impugned order, CIT(A) deleted the disallowance after observing as under:-

*"5.3. I have considered the facts of the case as well as assessment order passed by the AO & the submissions made by the appellant. I have also considered the decision of Hon'ble Bombay High Court in the case of Darshan Securities (P) Ltd. (supra) and the decision of Hon'ble Jurisdictional IT AT Mumbai in the case of Fiduciary Shares & Stock Pvt. Ltd. The facts narrated by the appellant are similar to that of these two Judicial Pronouncements and applying the ratio of the judgment laid down by the Hon'ble Bombay High Court as well as IT AT, Mumbai in these cases, the above discussed loss in share is to be treated as business loss and not speculative loss. Accordingly, the total disallowance made by the AO as speculative loss amounting to Rs.3,11,18,547/- is directed to be deleted."*

6. We have considered rival contentions and found that CIT(A) has considered the proposition of law laid down by Hon'ble High Court in case of CIT vs. Darshan Securities(P) Ltd [2012] 18 taxmann.com 242, the Hon'ble Bombay High Court held that, *"Section 73 of the Income-tax Act, 1961 - Losses - In speculation business - Assessment year 1996-97 - Whether in order to determine as to whether exception carved out in form*

*of bracketed portion by Explanation to section 73 applies, firstly one has to compute gross total income of company under normal provisions of Act and it is only thereafter, it has to be determined .as to whether gross total income so computed consists mainly of income which is chargeable under any of heads referred to in Explanation - Held, yes - During relevant assessment year, the assessee returned an income of Rs. 2.25 crores from service charges - assessee had a loss of Rs. 2.23 crores in share trading - It also earned a dividend income of Rs. 4.79 lakhs - assessee claimed that in computing the gross total income for the purpose of the Explanation to section 73, income from service charges had to be adjusted against the loss in share trading - Assessing Officer disallowed share trading loss holding it to be a speculation loss - Tribunal, however, allowed assessee's claim - Whether in view of aforesaid legal position, while computing gross total income of assessee, both income from service charge? 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 that head, both being sources under the same head - Held, yes - Whether since assessee also had a dividend income of Rs. 4.79 lakhs (i.e. income from other sources), Tribunal was justified in holding 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 Sec. 73(1) - Held, yes [In favour of assessee.] "*

*"Further Under section 28, income which is chargeable to income tax under the head of profits and gains of business or profession includes the profits and gains of any business or profession, which was carried on by the assessee at any time during the previous year. Explanation (2) to section 28 provides that where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business shall be deemed to be distinct and separate from any other business. Section 43 which contains a statutory dictionary of definitions of certain terms relevant to income from profits and gains of business or profession defines the expression 'speculative transaction' in sub-section (5). That expression is defined to mean a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled, otherwise than by the actual delivery or transfer of the commodity or scrips. Consequently, where a contract for purchase or sale of shares is settled by actual delivery, it does not fall within the definition of the expression. Section 70(1) provides for a setting off of loss from one source against income from another source under the same head. Section 72 makes provision for carry forward and set off of business losses, under the head of profits and gains of business or profession other than a loss sustained in a speculation business. Sub-section (1) of section 73 provides that any loss, computed in respect of a speculation business carried on -by the assesses, shall not be set off except against profits and gains, if any, of another speculation business. As a result of the provision of sub-section (1) of section 73, a bar is introduced against the setting off of a loss which has arisen in respect of speculation business carried on by the assesses save and except against the profits and gains of another speculation business. [Para 5].*

*The Explanation to section 73 introduces a deeming fiction. The deeming fiction stipulates that where any part of the business of a company consists in the purchase and sale of shares of other companies, such company shall, for the purposes of the section be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sales of such shares. The deeming fiction applies only to a company and the provision makes it clear flint the deeming fixation extends only for the purposes of the section. The bracketed portion of the Explanation, however, carves out an exception. The exception is that the provision of the explanation shall rot apply to a company whose gross total income consists mainly of income which is chargeable under the heads 'Interest on securities', 'Income from*

*house property', Capital gains<sup>1</sup> and 'Income from other sources or a company whose principal business is of banking or the granting of loans and advances. [para 6]."*

7. We also observe from the computation of gross total income calculated by Ld. AO at page 9 of the assessment order at Rs.2,37,436/-, the said gross total income comes out of mainly "income from capital gains" calculated at Rs.7,21,835/- after setting off the same with loss of Rs.4,84,374/- under the head " income from business/profession". Hence applying the above ruling of the Bombay high court to the Ld. AO's case, the case of the assessee falls under carved out crises in the explanation to section 73 and therefore the explanation to section 73 is not to be applied to the case of the assessee company.

8. Furthermore, Hon'ble Jurisdictional Mumbai ITAT in Fiduciary Shares & Stocks Pvt Ltd vs. Assistant Commissioner of Income Tax [2016] 70 taxmann.com 23 held that, "*Section 73 of the Income-tax Act, 1961 - Losses - In speculation business (Shares) - Assessment year 2009-10 - Whether amendment inserted in Explanation to section 73 by Finance (No. 2) Act, 2014 with effect from 1-4-2015 is clarificatory in nature and would therefore operate retrospectively from 1-4-1977 from which date Explanation to section 73 was placed on statute - Held, yes - Whether a company whose principal business is less incurred by said company in share trading will not be treated as speculation business loss but normal business loss and, hence, said loss can be adjusted against other business*

*income or from any other sources of year under consideration – Held, yes  
[Para 5.6.11] [in favour of assessee].”*

9. It is clear from the record that assessee is mainly engaged in purchase and sale of shares, accordingly explanation to Section 73 is not applicable to it.

**10. In the result, appeal of the Revenue is dismissed.**

Order pronounced in the open court on this 31/08/2018

**Sd/-**  
**(RAM LAL NEGI)**  
JUDICIAL MEMBER

**Sd/-**  
**(R.C.SHARMA)**  
ACCOUNTANT MEMBER

Mumbai; Dated 31/08/2018

Karuna Sr.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.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)  
ITAT, Mumbai