

**आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"C" BENCH, AHMEDABAD**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER  
& SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR**

आयकर अपील सं./I.T.A. No. 770/Ahd/2016

(निर्धारण वर्ष / Assessment Year : 2012-13)

<b>Magic Share Traders Ltd.</b> 101, Akashganga Building, Nr. Gujarat College Road, Ellis Bridge, Ahmedabad - 380006	<b>बनाम/</b> Vs.	<b>Deputy Commissioner of Income Tax</b> Circle-2(1)(2), 1 <sup>st</sup> Floor, Navjivan Trust Building Office, Ashram Road, Ahmedabad - 380014
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAECM9542L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	Shri S. N. Soparkar, A.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri James Kurian, Sr. D.R.

सुनवाई की तारीख / Date of Hearing	08/08/2018
घोषणा की तारीख /Date of Pronouncement	31/10/2018

**आदेश/ORDER**

**PER PRADIP KUMAR KEDIA - AM:**

The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Tax (Appeals)-7, Ahmedabad ('CIT(A)' in short), dated 07.12.2015 arising in the assessment order dated 31.12.2014 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning assessment year 2012-13.

2. In the captioned appeal, the assessee has filed following concise/modified grounds of appeal for adjudication purposes:

- “1. Ld. CIT(A) erred in law and on facts in confirming action of AO to treat business loss of Rs.5,19,80,774/- as speculation loss by applying explanation to section 73 of the Act. Ld. CIT(A) ought to have considered submission of the appellant and ought to have treated business loss instead of treating same as speculation loss. It be so held now.*
- 2. Ld. CIT(A) erred in confirming action of AO in disallowing Rs.5,09,728/- u/s 14A of the Act ignoring fact that appellant suo-moto disallowed Rs.1,35,183/- without recording satisfaction on his part. Ld. CIT(A) ought to have considered the submission of the appellant and ought to have deleted the disallowances. It be so held now.*
- 3. Ld. CIT(A) erred in law and on facts in confirming action of AO for inclusion of bank charges in calculating disallowance u/s 14A. Ld. CIT(A) ought to have considered the submission of the appellant and ought not to have considered said amount in calculation. It be so held now.”*

3. Relevant facts relating to Ground No.1 are that the assessee company is engaged in the trading and investment in shares and securities, mutual funds and future & options i.e. F&O trading in shares and securities. Thus, during the assessment year in question, the assessee has carried out transactions in shares in cash segment as well as in derivative segment. As noted by the AO, the assessee has incurred losses of Rs.5,17,80,774/- from F&O business i.e. in derivative business and earned profits of Rs.1,21,60,169/- from share trading in cash segment. Thus, while the assessee incurred losses in derivative segment, it has earned profits in cash segment i.e. on account of ordinary action of purchase and sale of shares simplicitor. On these facts, the AO invoked the Explanation to Section 73 and held that losses arising from derivative transactions are in the nature of ‘speculative loss’ and thus not allowed to be set off against other streams of income reported in the return of income except income

arising in cash segment of speculative nature. For doing so, the AO relied upon the decision of the Hon'ble Delhi High Court in the case of CIT vs. DLF Commercial Developers Pvt. Ltd. 35 taxmann.com 280 (Del).

4. Aggrieved, the assessee preferred the appeal before the CIT(A).

5. The CIT(A) re-visited the various submissions made on behalf of the assessee but, however, found no merit therein. The CIT(A) observed that the provisions of Section 43(5) of the Act which provides definition of 'speculative transaction' applies only for the purposes of Section 28 of the Act and does not extend to other sections of the Act. On the contrary, the Explanation to Section 73 of the Act creates a deeming fiction by which the assessee, which is a company, as indicated in the said Explanation dealing with the transaction of shares and suffering losses, such transactions should be treated as speculative transactions for the purposes of set off within the meaning of Section 73 of the Act notwithstanding the definition of speculative transaction specified in Section 43(5) of the Act. The CIT(A) accordingly sustained the action of the AO towards denial of set off of losses arising in derivative segment from income arising in other streams of business except speculative income arising in cash segment.

6. Further aggrieved by the action of Revenue authorities for treating the loss from derivative transactions as speculative loss for the purposes of set off under s.73 of the Act read with Explanation thereto, the assessee knocked the door of the Tribunal.

7. The learned senior counsel for the assessee reiterated the submissions made before the lower authorities and contended that

business carried out in derivative segment is clearly a non-speculative business in view of the amendment carried out in Section 43(5) of the Act w.e.f. AY 2006-07. It was thus contended that where the derivative transactions are not be regarded as 'speculative transaction' defined under s.43(5) of the Act, it would inevitably follow that Explanation to Section 73 of the Act has no application in the facts and circumstances of the case. Elaborating further, it was submitted that in view of the exclusion made in sub-clause (d) to Section 43(5) of the Act which defines the expression 'speculative transaction', loss arising from derivative transactions are concerned, the trading in derivatives cannot be deemed to be speculative transaction at the first instance. Continuing further, the learned senior counsel for the assessee raised three broad legal contentions to prop up its case.

7.1 Firstly, Explanation to Section 73 of the Act cannot apply to loss in F&O activity which are expressly excluded from being regarded as 'speculative business' under s.43(5)(d) of the Act. For this proposition, the learned senior counsel relied upon the decision in the case of Asian Financial Services Ltd. 293 CTR 240 (Cal.) and Upkar Retail (P.) Ltd. 94 taxmann.com 450 (Ahd.).

7.2 Secondly, Explanation to Section 73 of the Act does not also apply because income under the head 'income from business & profession' is less than income under the other head of income. For this legal proposition, the learned senior counsel relied upon the decision rendered in the case of Darshan Securities (P.) Ltd. 341 ITR 556 (Bom); HSBC Securities & Capital Markets India (P.) Ltd. 23 taxmann.com 377 (Bom.) & A. K. Capital Markets Ltd. 65 taxmann.com 62 (ITAT, Delhi).

7.3 Adverting further, learned senior counsel raised third legal contention that amendment to Section 73 of the Act by the Finance Act (No.2), 2014 whereby the said Explanation is made inapplicable to the companies where principal business of the assessee is trading in shares, is essentially curative in nature and therefore has retrospective effect. For this proposition, the decision of the co-ordinate bench in the case of Fiduciary Shares & Stock (P.) Ltd. 159 ITD 554 (Mumbai) & Jalan Cement Works Ltd. 76 taxmann.com 230 (Kol.) was relied upon.

7.4 The learned senior counsel thus submitted that action of the Revenue has no legs to stand when tested on the touchstone on either of the legal position enumerated above. The learned senior counsel accordingly contended that both the AO as well as the CIT(A) misdirected themselves in failing to apply the position of law on the given set of facts. The learned senior counsel accordingly submitted the impugned action of the Revenue thus requires to be set aside and claim of the assessee requires to be allowed.

8. The learned DR, on the other hand, relied upon the order of the lower authorities.

9. We have carefully considered the rival submissions and perused the respective orders of the AO and CIT(A). The substantive question that arises for adjudication is whether loss incurred in eligible transactions i.e. derivative transactions within the meaning of Proviso (d) to Section 43(5) of the Act not involving any purchase or sale of shares *per se* can be regarded as speculative loss for the purposes of set off in view of Explanation to Section 73 or not. The controversy involved in the present case is thus essentially legal in nature.

9.1 In the present appeal, the assessee seeks set off of losses arising from derivative losses as non-speculative business loss. In contrast, the Revenue has labeled the loss arising from derivative transactions as 'speculative loss' and has consequently denied set off of such losses from regular income of non-speculative nature etc. by applying Explanation to Section 73 of the Act.

9.2 We first advert to the pivotal contention on behalf of the assessee that Explanation to Section 73 of the Act cannot apply to loss arising from derivative transactions which are categorically excluded from being regarded as speculative business as defined under s.43(5) of the Act read with proviso (d) thereto. Identical issue arose before the Hon'ble Calcutta High Court in the case of Asian Financial Services (supra) relied upon. The Hon'ble Calcutta High Court held that once it is deemed to be a normal business loss on the basis of proviso appended to Section 43(5) of the Act, a question of applying Section 73 of the Act or the Explanation thereto for the purposes of refusing loss to be set off against business income is wholly incorrect. The Hon'ble Calcutta High Court after taking note of the decision of Hon'ble Delhi High Court in DLF Commercial (supra) took a distinct stand that derivatives cannot be treated at par with shares for the purposes of Explanation to Section 73 of the Act because the legislature has treated it differently. Thus, in view of the aforesaid position enunciated by the Hon'ble High Court in Asian Financial Services (supra), we find good deal of force in the case of assessee. The claim of the assessee thus requires to be allowed on this ground alone.

9.3 In view of the resounding conclusion drawn in favour of the assessee on the aforesaid legal position, we do not consider it

necessary to advert to other alternative contentions raised on behalf of the assessee.

10. In the result, Ground No.1 of the assessee's appeal is allowed.

11. Ground Nos. 2 & 3 concern disallowance under s.14A of the Act. The AO has disallowed an estimated expenses pegged at Rs.5,09,728/- as attributable to exempt income by invoking Section 14A of the Act. The aforesaid action of the AO was confirmed by the CIT(A) in first appeal.

12. When the matter was called for hearing, the learned senior counsel for the assessee pointed out that the total exempt income by way of dividend was claimed at Rs.6,13,133/- during the year. Against the aforesaid income, the assessee has *suo moto* disallowed an amount of Rs.1,35,183/- out of expenses incurred. The AO has further disallowed Rs.5,09,728/- by invoking Rule 8D of the Income Tax Rules. As a result, the disallowance has exceeded the exempt income itself in contradiction to the judicial precedents. In this regard, the learned senior counsel thereafter adverted our attention to the financial statement and submitted that the Revenue from operations of chargeable nature stands Rs.406.59 Crores against which a paltry expense of about Rs.9.63 Lakhs has been incurred. Therefore, any further disallowance out of such expenditure is evidently unjustified.

13. While appreciating the fact in perspective, we observe that against the total expense of Rs.9.63 Lakhs, the turnover of the assessee in taxable stream stands at Rs.406.59 Crores whereas the tax free income stands a meager amount of Rs.6.13 Lakhs. Therefore, the *suo moto* disallowance by the assessee is *prima facie* sufficient to cover the possible expense attributable to tax exempt income.

Needless to say, the operation of Rule 8D is not automatic. It is hedged by Rules. Likewise, Section 14A of the Act inheres in it the concept of reasonableness. It is unconceivable to say that assessee has incurred Rs.6.44 Lakhs out of total expense of Rs.9.63 Lakhs to earn a paltry dividend income of Rs.6.13 Lakhs while the remaining expenditure attributes for generation of substantial revenue of taxable nature noted above. The action of the Revenue is therefore *prima facie* inexplicable. Consequently, we set aside and cancel the addition of Rs.5,09,728/- made by the AO under s.14A of the Act.

14. In the result, the assessee gets relief as claimed in Ground Nos. 2 & 3 of its appeal.

15. In the result, appeal of the assessee is allowed.

**This Order pronounced in Open Court on 31/10/2018**

Sd/-  
(MAHAVIR PRASAD)  
JUDICIAL MEMBER  
Ahmedabad: Dated 31/10/2018

Sd/-  
(PRADIP KUMAR KEDIA)  
ACCOUNTANT MEMBER

*True Copy*

*S. K. SINHA*

**आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-**

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /  
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण, अहमदाबाद ।