

**IN THE INCOME TAX APPELLATE TRIBUNAL "E"  
BENCH, MUMBAI**

**BEFORE HON'BLE SH. R. C. SHARMA, AM &  
HON'BLE SH. SANDEEP GOSAIN, JM**

आयकरअपीलसं./ I.T.A. No. 4689/Mum/2013

S. M Holding & Finance Pvt. Ltd. SM House, 11, Shankar Rd, Vile Parle (east), Mumbai-400 057	<b>बनाम/ Vs.</b>	ACIT Cir 8(3) Mumbai Pin-
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAACS5234K		
(अपीलार्थी/Assessee)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Assessee by	:	Shri F. B. Andhyarujina, AR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Ashish Kumar, DR

सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	25.07.2018
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	11.10.2018

आदेश / ORDER

**Per Sandeep Gosain, Judicial Member:**

The present Appeal filed by the assessee is against the order of Ld. CIT (A), Mumbai dated 14.03.16 on the grounds mentioned herein below:-

*Ground No. 1 :*

*On the facts and in the circumstances of the case, the Learned CIT (A) erred in confirming the action of AO in treating the loss of Rs.1,43,90,506/- on sale of shares as the speculation loss by invoking the Explanation to Section 73 of the Act. The appellant prays that the said disallowance may please be deleted*

*Ground No. 2:*

*Without prejudice to the Ground No. 1, the Learned CIT(A) erred in confirming the double disallowance with respect to share trading business to the extent of Rs. 3,86,726/- ignoring the fact that disallowance u/s 14A also covered expenses pertaining to share trading business. The appellant prays that the ad hoc disallowance of Rs 3,86,726/- already forms a part of the disallowance u/s 14A read with Rule 8D and thus may please be deleted.*

*The appellant craves leave to add, omit or alter grounds of appeal before or during the hearing of the appeal.*

2. The brief facts of the case are that the assessee is engaged in the business of dealing in shares and securities. The return of

income for the year under consideration was filed on 29.09.09 declaring total income at Rs. 65,84,941/-. Subsequently the case was selected for scrutiny and after serving statutory notices and providing opportunity of hearing, assessment order u/s 143(3) of the I.T. Act was passed by AO thereby making addition/disallowance under different provisions of Income Tax.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties, **dismissed** the appeal of the assessee.

Now before us, the assessee has preferred the present appeal on the grounds mentioned above.

**Ground No. 1.**

3. This ground raised by the assessee relates to challenging the order of Ld. CIT(A) in confirming the action of AO in treating the loss of Rs.1,43,90,506/- on sale of shares as the speculation loss by invoking the Explanation to Section 73 of the Act.

4. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 4 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 4.3 to 4.4 of its order and the same is reproduced below:-

*4.3 I have considered the submissions of the appellant, order of the AO and facts of the case carefully. It is noticed that assessee Company has derived business income of Rs.78,99,444/-, interest income of Rs.12,12,850/- and loss from share trading activity of Rs.1,39,92.682/-. The AO has given show cause notice to the assessee to explain why explanation to section 73 may not be invoked. In response to this the AR of the appellant has submitted its reply. After considering the same and relying on the decision of Hon'ble Calcutta High Court in the case of Aryasthan Corporation Ltd and in case of Eastern Aviation and*

*Industries Ltd (supra) the AO has treated the loss of Rs.1,39,02,682/- as speculation loss. The AO has also estimated the expenses debited to P & L account @ 20% amounting to Rs.4,87.824/- and computed the speculation loss to Rs.1,43,90,506/- as per Explanation to section 73 of the I.T. Act. On the other hand the AR of the appellant has submitted that the assessee company has acquired shares which were converted from investment to stock in trade during the F.Y.2006-07. These shares were sold during the assessment year under consideration and the company has incurred loss. The AO had added an amount of Rs.4,87,824/- by way of allocation of expenses to this loss and the amount of Rs. 1,43,90,5067-was treated as speculation loss by invoking Explanation to section 73. It was further submitted that in terms of section 45(2) of the IT. Act, the profit or loss arising from the transfer by way of conversion by the owner of the capital asset in to or it is deemed by him as stock in trade of the business carried on by him shall be chargeable to income tax as the income of the previous year in which such stock in trade is sold and for the purposes of the section 48, the fair market value of the asset on the date of such conversion or shall be deemed to be full value of the consideration received as a result of the transfer of capital asset. Thus the AR has argued that the sale of shares during F.Y.2009-10 have to be*

*divided into 2 portions i.e. loss from capital gains and loss from business. It was further argued that the complete loss incurred by the assessee has to be treated as loss from capital gains. Thus loss from the share trading activity under the provision of Income tax Act is Nil. Thus it was argued that no loss can attract the provisions of explanation to section 73. The AR of the appellant has also relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Darshan Securities Pvt Ltd.*

*4.4 From the perusal of the submissions of the appellant and facts of the case it is undisputed issue that the assessee is engaged in the business of trading in shares. It is undisputed that the assessee has made sale proceeds of shares during the year under consideration and suffered a loss of Rs. 1,39,02,6827-. The assessee has earned business income of Rs.78,99,4447- and interest income of Rs. 12,12,8507-. The decision of Hon'ble Calcutta High Court in the case of Aryasthan Corporation Limited vs. CIT (253 ! ITR 401) and in the case of Eastern Aviation and Industries Ltd vs. CIT 208 ITR 1023 are squarely applicable to the facts of the case where it is held as under:*

*ARYASTHAN CORPORATION LTD. VS.  
COMMISSIONER OF INCOME TAX.*

*"Assessee-company having incurred loss in share dealings far in excess of income computed under the head "income from other sources\* during the relevant previous year, it could not be held to be an investment company within the meaning of s. 109(ii) and therefore, Explanation to s.73 was clearly applicable and loss was speculative loss."*

**EASTERN AVIATION AND INDUSTRIES LTD. VS. COMMISSIONER OF INCOME TAX.**

*If the total income of assessee-company is computed in accordance with the provision of the IT Act, 1961, without first giving effect to the Expln.to s. 73, it would be found that as against the income by way of dividend amounting to Rs.3,87,603 assessable under the head "Income from other sources", it had a net business loss in its share dealing transactions aggregating to Rs.7,95,447 which, in any event, is to be carried forward in view of the provisions of s. 73. In other words, the business loss of Rs.21,11,545 is clearly more than the income by way of dividend amounting to Rs.3,87,603. It is now well-settled that the words "income" or "profits and gains" should be understood as including losses also so that in one sense "profits and gains" represent "positive income" whereas "losses" represent*

*"negative income". In other words, "loss" is "negative profit". Both positive and negative of profits are of revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. In this view of the matter, it must be held that the assessee for the year under reference cannot be said to be 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' and 'Income from other sources'," since business loss exceeds income computed under the head "Income from other sources". As such, the Expin. to s. 73 is clearly applicable and loss suffered by the assessee-company in its share trading transactions inclusive of interest paid on borrowed monies attributable to that business was rightly treated by the Tribunal as a loss in speculative business.-CIT vs. Harprasad & Co.(P) Ltd. 1975 CTR (SC) 65: (1975) 99 ITR 118 (SC) and CITvs J.H. Gotla (1985) 48 CTR (SC) 363: (1985) 156 ITR 323(SC) applied.*

*However, the AR of the appellant has relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Darshan Securities Pvt. Ltd. As per the*

*decision of Bombay High Court both income from service charges and loss in share trading activity would have to be put into account in computing the total income. Even as per the decision of Bombay High Court if the business income and interest income are adjusted against loss in share activity even then it gives the figures of loss which means the case of the appellant is covered under the Explanation to section 73 of the IT. Act. Had there been a positive income after adjusting the business income, interest income and loss of share activity only then the decision of Bombay High Court was helpful to the assessee company. The AR of the appellant has also argued that the computation as per Rule 45(2) may be adopted. However, even then the resultant income is a loss. Therefore, the decision of Hon'ble Bombay High Court is not helpful to the assessee since the facts of the present case are squarely covered by the decision of Hon'ble Calcutta High Court (supra). Therefore, it is held that the case of the appellant is covered by Explanation to section 73 and the AO has rightly computed the speculation loss of Rs.1,43,90,506/-. Hence, no interference is called for to the order of the AO and the ground of appeal is dismissed.*

After having gone through the facts of the present case as well as orders passed by revenue authorities, we find that the AO had noticed that the assessee company had derived business income, interest income and loss from share trading activities of Rs. 1,39,92,682/-. After considering the reply of the assessee and while relying upon the decision of Hon'ble Calcutta High Court in the case of **Aryasthan Corportation Ltd** and in the case of **Eastern Aviation and Industries Ltd**, the AO treated the loss of Rs. 1,39,92,682/- as speculation loss. Although, Ld. AR reiterated the same arguments as were raised by him before Ld. CIT(A) and also submitted that the assessee company had acquired shares which were converted from investment to stock-in-trade during F.Y 2006-07. It was further submitted that those shares were sold during the year under consideration and the assessee had incurred loss. The AO treated the same as speculation loss by invoking explanation to section 73. From the records, we also noticed that it is an undisputed that assessee was engaged in the share trading business and had made sale proceeds of share during the year under consideration and suffered loss of Rs. 1,39,02,684/-. The assessee had earned business income and

interest income as well and thus the decision of **Aryasthan Corportation Ltd Vrs. CIT (253 ITR 401) and Eastern Aviation and Industries Ltd (2008) ITR 1023**, were fully applicable as it was held that in the case of **ARYASTHAN CORPORATION LTD. VS. COMMISSIONER OF INCOME TAX.**

*"Assessee-company having incurred loss in share dealings far in excess of income computed under the head "income from other sources\* during the relevant previous year, it could not be held to be an investment company within the meaning of s. 109(ii) and therefore, Explanation to s.73 was clearly applicable and loss was speculative loss."*

In the case of **EASTERN AVIATION AND INDUSTRIES LTD. VS. COMMISSIONER OF INCOME TAX.**

*If the total income of assessee-company is computed in accordance with the provision of the IT Act, 1961, without first giving effect to the Expln.to s. 73, it would be found that as against the income by way of dividend amounting to Rs.3,87,603 assessable under the head "Income*

*from other sources", it had a net business loss in its share dealing transactions aggregating to Rs.7,95,447 which, in any event, is to be carried forward in view of the provisions of s. 73. In other words, the business loss of Rs.21,11,545 is clearly more than the income by way of dividend amounting to Rs.3,87,603. It is now well-settled that the words "income" or "profits and gains" should be understood as including losses also so that in one sense "profits and gains" represent "positive income" whereas "losses" represent "negative income". In other words, "loss" is "negative profit". Both positive and negative of profits are of revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. In this view of the matter, it must be held that the assessee for the year under reference cannot be said to be 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' and 'Income from other sources'," since business loss exceeds income computed under the head "Income from other sources". As such, the Expin. to s. 73 is clearly applicable and loss suffered by the assessee-company in its share*

*trading transactions inclusive of interest paid on borrowed monies attributable to that business was rightly treated by the Tribunal as a loss in speculative business.-CIT vs. Harprasad & Co.(P) Ltd. 1975 CTR (SC) 65: (1975) 99 ITR 118 (SC) and CITvs J.H. Gotla (1985) 48 CTR (SC) 363: (1985) 156 ITR 323(SC) applied.*

Although Ld. AR also relied upon the decision of Hon'ble Bombay High Court in the **CIT Vrs. Darshan Securities Pvt. Ltd.** but the said decision relied upon by the assessee was distinguished by Ld. CIT(A). We have also noticed that the decision relied upon by the assessee is not applicable to the facts of the present case because as per the decision of Hon'ble Bombay High Court both income from service charges and loss in share trading activity would have to be put into account in computing the total income. Even as per the decision of Bombay High Court if the business income and interest income are adjusted against loss in share activity even then it gives the figures of loss which means the case of the appellant is covered under the Explanation to section 73 of the IT. Act. And in case had there been a positive income after adjusting the business

income, interest income and loss of share activity only then in that eventuality, the decision of Hon'ble Bombay High Court was applicable in the case of the assessee. Although, the assessee had submitted that the computation as per Rule 45(2) may be adopted, but , even then the resultant income is a **loss**. Therefore, in such circumstances, the decision of Hon'ble Bombay High Court is not helpful to the assessee and thus the case of the assessee is squarely covered by the decision of Hon'ble Calcutta High Court (supra) and covered by Explanation to section 73 of the Act.

No new facts have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the assessee stands **dismissed**.

**Ground No. 2.**

5. This ground raised by the assessee relates to challenging the order of Ld. CIT(A) in confirming the double disallowance with respect to share trading business to the extent of Rs. 3,86,726/- ignoring the fact that disallowance u/s 14A also covered expenses pertaining to share trading business.

6. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 3 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 3.3 to 3.4 of its order and the same is reproduced below:-

*3.3 I have considered the submissions of the appellant, order of the AO and facts of the case carefully. It is noticed that the assessee has shown investment in shares and also shown the opening and closing stock of shares as on 31.3,2009. The AO has*

*asked the assessee to explain why disallowance may not be made as per the provisions of section 14A of the IT. Act. In response to this show cause notice the AR of the appellant has submitted that no expenditure was incurred hence no disallowance was made but the AO has not accepted the argument of the appellant and by relying on the decision of Hon'ble Delhi Tribunal Special Bench in the case of **Cheminvest Limited vs. ITO** and the decision of the Hon'ble Bombay High Court in the case of **Godrej and Boyce Manufacturing Co. Limited** and other cases cited above the AO has computed the disallowance u/s.14A at Rs.386726/-. On the other hand the AR of the appellant has submitted that as per the decision of Hon'ble Supreme Court in the case of **Wallfort Shares and Stock Brokers Ltd** it was held that there has to be a proximate cause for disallowance which is in relationship with the tax exempted income. Regarding the investment it was submitted that the assessee has neither made any fresh investment nor disposed off any investments during the year. Hence, there can be no question of any expenditure being incurred for expenditure at all for investment. However, the loss on sale of any investment cannot be equated with any expenditure.*

*3.4 From the perusal of the submission and facts of the case it is undisputed issue that the assessee*

*company is engaged in the business of dealing in shares and securities. Secondly, it is also undisputed that assessee has shown investments of Rs.39376999/- as on 31.3.2009. Further, it is also undisputed that the closing stock of shares was shown at Rs. 3,04,5Q,730/- , From these facts it is clear that assessee is dealing in share trading and investment and earning income which is exempt u/s. 10(34) of the I.T Act. Although in the year under consideration the assessee has not earned any exempt income but this business activity of trading and investment shares cannot be carried out without incurring any expenditure. The Hon'ble Delhi Tribunal in the case of Cheminvest Limited vs. ITO has held that the disallowance u/s. 14A can be made even if no exempt income is actually earned or received during the year from the investments in stock, shares, tax free bonds, tax free schemes of UTI, other mutual funds and agricultural land, investments in 10A/10B eligible units by the main non-eligible units. Similarly, the Hon'ble Chennai Tribunal in the case of Southern Petro Chemicals Industries (supra) has held that proportionate management expenses are required to be deducted while computing the exempt income. The Hon'ble Mumbai Tribunal in the case of Citicorp Finance (India) Limited has held that the provisions for quantification of disallowance as contained in sub-sections (2) and (3) of section 14A are procedural and*

*therefore would apply to all pending matters. The Hon'ble Tribunal in the case of Godrej and Boyce Manufacturing Co. Ltd has also held that the provision of section 14A r.w.r.80 are applicable for A.Y. 2008-09 onwards. In view of these facts and circumstances, the disallowance made by the AO at Rs.3,86,7267- u/s. 14A r.w.r. 8D is upheld and ground of appeal is dismissed.*

After having gone through meticulously the facts of the present case as well as orders passed by revenue authorities and judgments cited by the parties, we find that it is an undisputed fact there was no exempt income earned by the assessee during the year under consideration and the said fact also found mentioned in para no. 3.3 of the order of AO as well as para no. 3.4 of the order of Ld. CIT(A). It is a settled law that when once no exempt income has been earned by the assessee during the year under consideration, then in that eventuality, no disallowances u/s 14A can be made. Therefore under these circumstances, we directed the AO to delete the disallowance

made u/s 14A of the I.T. Act. Resultantly, this ground raised by the assessee stands **allowed**.

7. In the net result, the appeal filed by the assessee stands **partly allowed** with no order as to cost.

*Order pronounced in the open court on 11<sup>th</sup> Oct., 2018*

<i>Sd/-</i> (R. C. Sharma) लेखासदस्य / Accountant Member मुंबई Mumbai; दिनांक Dated : <i>Sr.PS. Dhananjay</i>	<i>Sd/-</i> (Sandeep Gosain) न्यायिकसदस्य / Judicial Member 11.10.2018
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**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Assessee
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायकपंजीकार**  
(Dy./Asstt.Registrar)  
**आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**