

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

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.3903/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2009-10)

The Dy. Commissioner of Income Tax-11(2)(1) Room No.477, Aayakar Bhavan, M.K. Marg, Mumbai-400020.	बनाम/ Vs.	M/s. Shree Mother Capfin and Securities Pvt. Ltd. A-11/2, S.V. Road, Shree Ram Nagar, Andheri (W), Mumbai-58
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCR4418F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Chaudhary Arun Kumar Singh (SR. AR)	
Assessee by:	None	

सुनवाई की तारीख / Date of Hearing: 22/07/2019
घोषणा की तारीख /Date of Pronouncement: 26/07/2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 28.02.2017 passed by the Commissioner of Income Tax (Appeals) -18, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2009-10 in which the penalty levied by AO has been ordered to be deleted.

2. The revenue has raised the following grounds: -

"1. On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the penalty u/s 271(1)(c) levied by the AO amounting to rs.29,95,000/- without appreciating the fact that the Department has not accepted the decision of the Hon'ble ITAT

on the quantum addition and appeal before the Hon'ble High Court has been preferred, which is pending for adjudication.

2. *The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the AO be restored.*
3. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

3. The brief facts of the case are that the assessment of the assessee was completed on 14.12.2011 determining total income to the tune of Rs.71,67,670/- u/s 143(3) of the I.T. Act, 1961 as against the returned loss of Rs.30,53,483/-. The difference between the returned income and assessed income was on account of disallowance of speculation loss of Rs.1,01,46,356/- and disallowance of Rs.74,792/- u/s 14A of the Act. The penalty proceeding u/s 271(1)(c) of the Act was initiated. After the reply of the assessee, the penalty in sum of Rs.29,95,000/- was levied. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who deleted the penalty, therefore, the revenue has filed the present appeal before us.

5. We have heard the argument advanced by the Ld. Representative of the Department and has gone through the record carefully. Before going further, we deem it necessary to advert the finding of the CIT(A) on record.:-

“Decision

Ground No.1 & 2

Under these Grounds of Appeal, the Appellant has agitated penalty u/s 271(1)(c) of Rs.29,95,000/- levied by the A.O. I have considered the submissions of the Appellant as well as the penalty order. In the assessment order u/s 143(3), the A.O. has disallowed the loss of Rs.96,90,815/- claimed by the assessee from share trading activities in view of provisions of explanation to section 73 of the I.T. Act. The A.O. treated the loss from share trading as Speculation Loss. Further, the A.O. allocated 20% of the expenses debited to P & L Account (including

depreciation) to share trading activities and further disallowed Rs.4,55,541/-. Thus, total Speculation Loss disallowed by the A.O. is Rs.1,01,46,356/-. The A.O. in the penalty order has mentioned that CIT(A) has upheld the disallowance of speculation loss to the extent of Rs.96,90,815/-.

During the course of Appellate proceedings, the AR of the Appellant has filed a copy of order of ITAT dated 17th October, 2014 in the Appellant's own case for A.Y. 2009-10 itself, wherein the Hon'ble ITAT has allowed assessee's appeal relying upon the decision of Hon'ble Bombay High Court in the case of CIT Vs. HSBC Securities as Capital Markets India (P) Ltd. reported in [2012] 23 taxman.com 377 (Born), wherein the Bombay High Court while relying on the another decision of the Bombay High Court in the case of CIT Vs. Darshan Securities Pvt. Ltd. [2012] 206 Taxman 68 has held that section 73 would not apply to a company whose gross total income consists mainly of income, which is chargeable under the heads of interest, securities, income from house property, capital gains & income from other sources. The Bombay High Court has held that section 73 was not applicable to the facts of the case observing as under:-

"In the present case, section 73 would not apply in view of the fact that the explanation thereto, does not operate in respect of a company whose gross total income consists mainly of income which is chargeable under the heads of "interest on securities", "income from housing property", "capital gains" and "income from other sources". We have set out the relevant part of the assessment order which indicates that in the relevant year, the income from other sources was the only chargeable income, as the respondent had suffered a business loss otherwise. In that view of the matter, the judgment of the Division Bench of this Court in the case of Darshan Securities (P.) Ltd. (supra) supports the respondent's case. In that case, during the relevant assessment year, the assessee had a loss of about Rs. 2.33 crores in the share trading and had dividend income of about Rs. 4.80 lacs. The Division Bench held in paragraphs 6, 7,8 and 9 as under :-

"6. 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 that the deeming fixation (sic) 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 not 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" and "Income from other sources" or a company whose principal business is of banking or the granting of loans and advances.

7. The submission which has been urged on behalf of the Revenue is that in computing the gross total income for the purpose of the explanation to Section 73, income under the heads of profits and gains of business or profession must be ignored. Alternatively, it has been urged that where the income from business includes a loss in the trading of shares, such a loss should not be allowed to be set off against the income from any other source under the head of profits and gains of business or profession.

8. In our view, the submission which has been urged on behalf of the Revenue cannot be accepted. Leaving aside for a moment, the exception, which is carved out by the explanation to Section 73, the explanation creates a deeming fiction by which a company is deemed to be carrying on a speculation business where any part of its business consists in the purchase and sale of shares of other companies. Now, the exception which is carved out applies to a situation where the gross total income of a company consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources". Now, ordinarily income which arises from one source which falls under the head of profits and gains of business or profession can be set off against the loss which arises from another source under the same head. Sub-Section (1) of Section 73 however sets up a bar to the setting off of a loss which arises in respect of speculation business against the profits and gains of any other business. Consequently, a loss which has arisen on account of speculation business can be set off only against the profits and gains of another speculation business. However, for Sub-Section (1) of Section 73 to apply the loss must arise in relation to a speculation business. The explanation provides a

deeming definition of when a company is deemed to be carrying on a speculation business. If, the submission of the Revenue is accepted, it would lead to an incongruous situation, where in determining as to whether a company is carrying on a speculation business within the meaning of the explanation, sub-section (1) of Section 73 is applied in the first instance. This would in our view not be permissible as a matter of statutory interpretation, because the explanation is designed to define a situation where a company is deemed to carry on speculation business. It is only thereafter that sub-section (1) of section 73 can apply. Applying the provisions of Section 73(1) to determine whether a company is carrying on speculation business would reverse the order of application. That would be impermissible, nor, is it contemplated by Parliament. For, the ambit of Sub-Section (1) of Section 73 is only to prohibit the setting off of a loss which has resulted from a speculation business, save and accept against the profits and gains of another speculation business. In order to determine whether the exception that is carved out by the explanation applies, the legislature has first mandated a computation of the gross total income of the Company. The words "consists mainly" are indicative of the fact that the legislature had in its contemplation that the gross total income consists predominantly of income from the four heads that are referred to therein. Obviously, in computing the gross total income the normal provisions of the Act must be applied and it is only thereafter, that it has to be determined as to whether the gross total income so computed consists mainly of income which is chargeable under the heads referred to in the explanation. 9. Consequently, in the present case the gross total income of the assessee was required to be computed inter alia by computing the income under the head of profits and gains of business or profession as well. Both the income from service charges 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. The assessee had a dividend income of Rs. 4.7 lacs (income from other sources). The Tribunal was justified, in coming to the conclusion 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)."

In the circumstances, the appeal is dismissed but with no order as to costs"

Since the facts and issue involved in the present appeal are identical to the case of HSBC Securities (supra), respectfully following the decision of the Hon'ble Bombay High Court, I direct the AO to delete the penalty of Rs.29,95,000/- levied u/s 271(1)(c)."

4. On appraisal of the order passed by CIT(A), we noticed that the Hon'ble ITAT in the assessee's own case in ITA. No.3339/M/2013 dated 17.10.2014 has deleted the quantum, therefore, the CIT(A) has deleted the penalty. The contention of the Ld. Representative of the Department is that the Department has not accepted the decision of the Hon'ble ITAT on the quantum deletion but it is a matter on record that at this stage, the quantum nowhere exists. Since the quantum has been deleted by Hon'ble ITAT in the assessee's own case (supra), therefore, we are of the view that the CIT(A) has rightly deleted the penalty. Accordingly, we uphold the decision of the CIT(A) in question and dismissed the appeal of the revenue.

5. In the result, the appeal filed by the **revenue is hereby ordered to be dismissed.**

Order pronounced in the open court on 26/07/2019.

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :26/07/2019

Vijay

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**