IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER AND

SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA no.1080 & 1081/Mum./2018
(Assessment Year : 2001–02)

Panther Industrial Products Ltd.
Radha Bhavan, 1st Floor
121, Nagindas Master Road ……. Assessee
Fort, Mumbai 400 023
PAN – AAACB2058G

v/s

Income Tax Officer
Ward–2(2)(4), Mumbai ……. Respondent

Assessee by : Shri Rajiv Khandelwal
Revenue by : Ms. Shreekala Pardeshi

Date of Hearing – 27.01.2021	Date of Order – 8.03.2021

O R D E R

PER S. RIFAUR RAHMAN, A.M.

The assessee's appeal being ITA no.1081/Mum./2018, is a quantum appeal against order dated 28th December 2017, passed by the learned Commissioner (Appeals)–5, Mumbai, and the appeal being ITA no.1080/Mum./2018 is against the order dated 29th December 2017, passed by the learned Commissioner (Appeals)–5, Mumbai, confirming penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 (for short "*the Act*") by the Assessing Officer for the assessment year 2001–02.

We first take up the appeal being ITA no.1081/Mum./2018.

2. The grounds of appeal raised by the assessee relate to disallowance of loss of ₹ 3,12,90,000, arising out of the impugned transactions in shares of Landmark Leisure Ltd. to be sham insomuch so that the same is non–genuine.

3. Brief facts of the case are, the assessee filed its return of income on 11th July 2002, declaring loss of ₹ 36,46,004. The return of income was processed under section 143(1) of the Income Tax Act, 1961 (for short *"the Act"*) and the same was selected for scrutiny and the statutory notices under section 143(2) and 142(1) of the Act were issued and served on the assessee. In response, the learned Authorised Representative of the assessee attended and filed the relevant information as called for by the Assessing Officer. During the assessment proceedings, the Assessing Officer observed that the assessee has declared gross total income (loss) at ₹ 36,46,004.

4. The Assessing Officer sought explanation on the applicability of the Explanation to section 73 of the Act to the loss from shares and securities incurred by the assessee. In response, the assessee filed the following submissions:–

> *"At the outset, it would be worth the while to refer to the composition of income of our abovenamed clients.*

Business income–Loss in share trading	*₹ (3,07,40,000)*	*₹*
Other Business	*2,67,48,996*	*(39,91,004)*
Capital Gains		*3,45,000*
	Gross total income::::::::	*36,46,004*

From the above, you would appreciate that the gross total income being negative, and capital gains being a positive figure, the matter falls in the excepted category. Consequently, the Explanation cannot be pressed into action on the facts of the case.

In connection with your another query, we submit that the share trading activity in which the loss has arisen is backed by delivery, the details of which has been given to you during the course of assessment proceedings, and hence, per se not speculative in nature within the meaning of sec,43(5) of the Act. Accordingly, for computing the gross total income the loss from share trading activity, has to be considered. The proposition that loss should be ignored to determine the applicability of the Explanation is fallacious in as much as you are intending to apply the provisions of the Explanation in order to determine whether the Explanation is applicable. Indeed, in order to determine the applicability of the Explanation, one cannot first start by applying the Explanation. The first step is to compute the gross total income completely ignoring the Explanation to sec.73. Then examine the composition of the gross total income. If the gross total income so computed comprise mainly of income under the heads other than business, then the question of applicability of the Explanation does not arise. Reliance is placed on the following decisions of Tribunals upholding the aforesaid view:–

Rajan Enterprises	*41 ITD 469 (Bom.)*
M. Gulab Singh & Sons	*43 ITD 208 (Chd)*
Bloom Trading Co. P. Ltd.	*ITA no.6229/Bom./91*

Further, section 73 comes into play only after income has been computed under various heads of income as defined in section 14 of the Act. The provisions of set off, or carry forward and set off contained in Chapter VI that is, section 70 to section 79 are applicable to the heads of income. Accordingly, loss arising on share trading has to be considered in computing the gross total income. Reliance is placed on the ratio of the Supreme Court in the following cases–

CIT v Kantilal Nathuchand Sami	*63 ITR 318 (SC)*

CIT v Jagannath Mahadeo Prasad 71 ITR 296 (SC)

In view of the above, Explanation to sec. 73 is not applicable to the facts of the case of our above named clients."

5. After considering the submissions of the assessee, the Assessing Officer rejected the contention of the assessee by observing as under:–

"2.3: The income side of the P&L A/c of the assessee company shows income from shares and securities at ₹ 3,07,40,000. However, this income is negative income. It is by 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 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. Reference in this context, may be made to the decision of the Supreme Court in CIT v. Harprasad and Co. P. Ltd. [1975] 99 ITR 118.

The Supreme Court in the case of CIT v. J.H. Gotla [1985] 156 ITR 323, in construing the word "income" in section 16(3) of the Indian Income-tax Act, 1922, held that the word "income would include loss.

The explanation to section 73 is produced below:

"Explanation:- Where any part of the business of a company (other than a company whose gross total income consists mainly of income which is chargeable under the heads 'Interest on securities', 'Income from house proper', 'Capital gains' and 'Income from other sources' or a company the principal business of which is the business of banking or the granting of loans and advances) consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares."

The operative word in the explanation is mainly". The legislature has deliberately used the word "mainly" while enacting the explanation, is so far as he same is not used, the meaning of the explanation would totally change.

The loss in shares dealing amounts to Rs.3,07,40,000/- needs to be treated as negative profit, then the income from other business of Rs.2,67,48,996/- is less. Therefore, the main income of the assessee consists of share trading.

2.4: I have carefully considered the submissions of the assessee company through its A.R and in view of the reasoning given in the foregoing paras, the toss of Rs.3,07,40,000/- is treated as speculation loss, to be set off only against speculation income. Further, reliance can be placed on the decision of the Calcutta High Court in he case of CiT v. Park View Properties P. Ltd 261 ITR at page 493."

6. Aggrieved with the above order, the assessee preferred appeal before the learned Commissioner (Appeals) and the Tribunal. Subsequently, the Tribunal restored the issue back to the learned Commissioner (Appeals) for deciding the issue raised by the assessee in the original appeal before the learned Commissioner (Appeals) afresh after giving sufficient opportunities to the assessee and after taking into consideration of the details and documents on record. Accordingly, the learned Commissioner (Appeals)–5, Mumbai, adjudicated the issues after giving opportunity to the assessee. Before the learned Commissioner (Appeals), the assessee filed similar submissions what was made before the Assessing Officer and in response to the further queries raised by the learned Commissioner (Appeals) the assessee filed further submissions dated 15th March 2004. For the sake of clarity, it is reproduced below:–

"Submissions dated 15.3.2003:–
(a) In this connection, at the outset, we would like to point out to you that you have not given any reasons for treating the

impugned transactions as bogus. In any view of the matter, we submit that the transactions of purchase and sale of shares of Landmark are not bogus as they have been executed by our above named clients in the course of business and all ingredients required for a valid contract are present in the said transaction. There is a purchase (debit note of classic credit ltd.) delivery of shares received (distinctive numbers with delivery letter filed) and payment for the purchase. Similarly, there is a sale (debit note of Panther Industrial Products Ltd.,) delivery of the same shares given and payment receive. We have filed letter dated 17.12.2003 giving all the relevant supporting of the transactions. The market quotation of Landmark on the date of purchase and sale are Rs. 152.40 and Rs. 48.10 respectively, which are the rates at which transactions have been executed, and hence are on the basis of real time rates. Only because the seller company and buyer company are associate companies of our above named clients, a doubt on the genuinity of the transactions cannot be raised.

In view of the above, we would like to impress upon you that the transactions are genuine and have been carried out in the course of business.

'b) The transactions are not speculative as our above named clients have received delivery (refer point no. 3 of our letter dated 12.11.2003) on purchase and have given delivery on sale. As such, the conditions of section 43(5) of contract being settled otherwise than by delivery not being satisfied, the transactions are not speculative.

(c) Explanation to section 73 is not applicable and in this connection, we would rely on the various decisions given to you during the course of proceedings.

Submission dated 17.12.2003:-

In this connection, as required by you we furnish the following:-

(a) Memorandum and articles of association of the company

(b)(i) The share of landmark leisure have been purchased on 25.06.2000 from classic credit Ltd, refer their debit note no. CcL/2606/2000-01 dated 26.6.2000.

(ii) The payment has been effected by Panther Fincap & Management Services Ltd. on behalf of our clients on 26.6.2000.

(c) (i) The shares of landmark leisure have been sold on 28,12.2000 to Panther Fincap & Management Services Ltd. refer our debit note no. PJPL/28 12/2000-01 dated 28.12.2000.

(ii) The payment has been effected by Priat her Fincap & Management Services Ltd. to our clients on 4. 12.2000 (Ps. 75 Lacs) - and 21.12.2000 (Ps. 100 Lacs) Page 5 find enclosed photo copy of bank statement evidencing clearance of aforesaid cheque.

There is no broker involve to effect the aforesaid transactions in (b) and (c) above.

(d) The Seller Company and Buyer Company are associates of the Assessee company.

Submission dated 30.3.2004:-

Further, with reference to your mention in the aforesaid letter of the transfer deeds evidencing the purchase not having been produced, we would like to impress upon you that the shares under reference having been sold by our clients to classic credit Ltd(CCL), our clients have given the delivery of the shares with the transfer deeds, being market delivery and valid for 1 year, and hence, not in possession. CCL in turn pledged the shares with Vidyut Investments Ltd. and the shares, after demat are, as of today, still lying in their demat account. As such the transfer deeds would have been used by the transferee, Vidyut in this case, to get the shares transferred in their name and after transfer being effected the deeds are retained by the company whose shares are under transfer namely, Landmark Leisure. As such our clients would not be in a position to furnish the transfer deed for verification and / or records.

Further, in connection with the sale of shares by our above named clients to Panther Fincap & Management Services LtcL(PFMS), you have observed that the consideration has been received by our clients in advance. We confirm that the amounts have been received in advance and are in proximity to the date of sale, these are payments in advance by the buyer, that is PFMS;

Further, as required by you, please find enclosed the following:-

(i) Ledger account of PFMS and CCL in the books of our clients and our clients' account in their respective books of account.

(ii) Evidence of market price of shares of Landmark Leisure on the date of purchase and sale have been enclosed in our letter dated 15.3.2O04."

7. After considering the submissions of the assessee, the learned Commissioner (Appeals) observed that the issue before him is whether the loss of ₹ 3,12,90,000, incurred on trading in 3,00,000 shares of Landmark Leisure Ltd. were genuine or not, is so, the same should be classified as business loss or speculation loss within the meaning of Explanation to section 73 of the Act. He observed that the assessee had purchased 3,00,000 shares of Landmark Leisure Ltd. @ ₹ 152.40 per share from Classic Credit Ltd. for an amount of ₹ 4,57,20,000 on 25th June 2020 and he observed that the assessee claims to have sold the same on 28th December 2000 at ₹ 48=10 per share to PFMS Ltd.

for a total amount of ₹ 1,44,30,000 and showed loss of ₹ 3,12,90,000, and claimed the same as business loss. The learned Commissioner (Appeals) observed the basic facts in his order relating to the transfer of shares. For the sake of clarity, it is reproduced below:–

> *"In order to appreciate the true nature of transaction some more information about purchase and sale of shares was obtained from the assessee. It is seen that the loss of Rs 3,07,40,000/- was arrived at as under:-*

Sr.	*Name of Scrip*	*Purchase*		*Sales*		*Profit*
		Quantity	*Amount*	*Quantity*	*Amount*	
1.	*Landmarki Leisure Ltd.*	*3,00,000*	*4,57,20,000*	*3,00,000*	*1,44,30,000*	*(3,12,90,000)*
2.	*Walchand Cricket next com.*	*2,75,000*	*6,38,000*	*2,75,000*	*6,43,50,000*	
	Total	*5,75,000*	*10,95,20,000*	*5,75,000*	*7,57,80,000*	

> *Thus, loss of Rs. 312,90,000/- was incurred by the assessee on purchase and sale of three lack shares of Landmark Leisure(LL) purchased at a cost of Rs. 4,57,20,000/- and sold to sister concern Panther Finvest Management Services(PFMS) at Rs.1,44,30,000/-. The assessee is a Ketan Parekh Group Company. The background of the transaction is that M/s Classic Credit Ltd(CCL) another Ketan Parikh Group company purchased 14,50,000 shares of Landmark Leisure on 27,01.2000 for Rs.7,27,90,000/- (at Rs. 50.20 per share) from Pratik Investment, Pune.*
>
> *6.1 Admittedly, these shares were not transferred in the name of M/s CCL. Subsequently, M/s CCL is stated to have sold three lacs shares to the Assessee company on 26.6.2000 vide debit note no. CCL/2606/200001 dated 26.6.2000 at a cost of Rs. 4,57,20,000/- i.e. Rs. 152.40 per share, This transaction was done outside the stock exchange. No payment was made by the assessee company to M/s CCL for purchases of shares. It was stated that the assessee was having a running account with M/s CCL and the amount of Rs. 4,57,20,000/- towards purchase of shares was credited to .CL's account in assessee's books. On the same day the account was debited with equivalent amount of Rs,4,57,20,000/- with the narration PFMS Pd to CCL for PIPL. On 28.12.2000 the Assessee*

company is stated to have sold these shares to another group company M/s PFMS at a price of Rs. 1,44,30,000/- i.e. Rs. 48.10 per share vide debit note No. PIPL/2812/2000-01 dated 28.12.2000. Thus, in the process the Assessee company is stated to have suffered a loss of Rs.3,12,90,000/-. As regards the payment by M/s PFMS to the assessee it was stated that M/s PFMS paid to the assessee on 4.12.2000 (Rs75 Lacs) and 21.12.2000 (Rs 100 lacs) (interestingly, both these dates are prior to alleged sale of shares by the assessee to M/s PFMS. Also, though the sale consideration was Rs.1,44,30,000/-, the assessee company claims to have received 175,00,000)."

8. The learned Commissioner (Appeals) observed in his order that the crux of the matter is whether the assessee has really purchased 3,00,000 shares of Landmark Leisure Ltd. for ₹ 4,57,20,000 on 26th June 2000 took delivery of the shares and shares were transferred in the name of the assessee and any real payment by movement of actual fund by way of cheque was made or not. Whether the assessee sold 3,00,000 shares of Landmark Leisure Ltd. to PFMS Ltd. and given delivery of shares. In this regard, he analysed the ledger of Classic Credit Ltd. in which the PFMS Ltd. made the payment to Classic Credit Ltd. along with other business transactions and he noticed that there was no specific payment was made for this transaction and observed that PFMS Ltd has made certain transaction with Classic Credit Ltd. during this year. Further, he observed that the same shares were claimed to have delivered to PFMS Ltd. by the assessee vide letter dated 30th December 2000 for ₹ 1,44,30,000. He further observed that all the three companies i.e., the assessee, Classic Credit Ltd. and PFMS Ltd. were managed and controlled by one group i.e., Ketan Parekh.

9. In substance, the learned Commissioner (Appeals) observed that it appears to him that the assessee gone about making book entries by resorting to purchase and sale of shares in December 2000 after having realized the earning of interest and brokage and interest, then to off–set the same and a plan was devised to pass book entries and create a paper trail to show that purchase and sale of shares were effected and payments were made and received by book entries. Therefore, there were no copies of transfer deeds available with the assessee and no cheque payment was either made for the purchase of shares from Classic Credit Ltd. no payments received for the sale of shares from PFMS Ltd. Accordingly, the learned Commissioner (Appeals) treated the purchase and sale of 3,00,000 shares of Landmark Leisure Ltd. as sham transaction and bogus share transaction and accordingly he came to the conclusion that it should be disallowed and rejected.

10. Further, he analysed the claim of loss as speculation loss by the Assessing Officer and affirmed by the learned Commissioner (Appeals)–II, Mumbai, as an alternative issue. Accordingly, he analyzed the issue and came to the following conclusion:–

> *"Prima facie it would appear that none of the two limbs of explanation to sub section 73(4) of the IT Act, 1961 which exclude the applicability of the explanation to companies, do not apply to the facts of the case4 and hence prima facie, provisions of explanation to sub section 73(4) of the IT Act 1961 are*

applicable to the assessee's case. Even though it has been held that "the loss of ₹ 3,12,90,000/– is a bogus loss and not allowable as per facts of the case and in law", it is reiterated here that "the loss of ₹ 3,12,90,000/– were held to be genuine and allowable, it will still be "speculation loss" within the meaning of explanation to sub section 73(4) of the IT Act 1961, and hence it will not be allowable as set off against "business income" and/or any other source of income except "speculation gain" within the meaning of IT Act 1961. It is therefore held that "notwithstanding the decision to treat the loss of ₹ 3,12,90,000/– as "bogus loss" and its rejection of it in earlier paragraphs", it is held that the AO was fully justified in treating the loss of ₹ 3,12,90,000/– as "speculation loss" within the meaning of explanation to sub section 73(4) of the IT Act 1961. In nutshell, assessee's appeal is rejected in facts of the case and in law."

The assessee being aggrieved by the aforesaid order of the learned Commissioner (Appeals), is in further appeal before the Tribunal.

11. Before us, the leaned Counsel for the assessee submitted with regard to ground no 1 that the CIT(A) in the first innings by order dated 25.03.2004 has held that the loss of Rs 3,12,90,000 is a non-genuine loss and further, held it to be a speculation loss as per the provisions of Explanation to section 73 of the Act. Then the Honourable Tribunal by order dated 9th November, 2005 set aside the order and restored the same to the CIT(A) for fresh adjudication (page nos 61 to 66 of the paper book).

11.1 He brought to our notice the loss incurred by the assessee and the details are:

Particulars	*Quantity*	*Amount (Rs)*
Sales	*3,00,000*	*4,57,20,000*
Purchase	*3,00,000*	*1.44,30,000*
Loss		*(3,12,90,000)*

11.2 He submitted that the shares of Landmark Leisure have been purchased on 26th June, 2000 from Classic Credit Ltd and brought to our notice the debit note no CCL/2606/2000-01 dated 26.06.2000 – (page no 22 of the paper book). The payment has been effected by Panther Fincap & Management Services Ltd on behalf of the Assessees on 26th June, 2000 (page no 23 of the paper book). Further he submitted that the shares of Landmark Leisure have been sold on 28th December, 2000 to Panther Fincap & Management Services Ltd, he brought to our notice Assessee-company's debit note no PIPIJ28 12/2000-01 dated 28.12.2000 (page no 34 of the paper book).

11.3 He submitted that the payment has been effected by Panther Fincap & Management Services Ltd to the Assessee-company on 4th December, 2000 (Rs 75 lacs) and 21" December, 2000 (Rs 100 lacs). He brought to our notice page nos 35 and 36 of the paper book and submitted there was no broker involved to effect both the aforesaid transactions and the seller-company (Classic Credit) and the buyer-company (Panther Fincap) are associates of the Assessee-company.

11.4 He further submitted that the transactions of purchase and sale of shares of Landmark Leisure are not bogus as they have been executed by the Assessee in the course of carrying on business and all ingredients required for a valid contract are present in the said transaction. There is a purchase contract (debit note of Classic Credit Ltd), delivery of shares received of the shares purchased (distinctive numbers with delivery letter filed) and payment for the purchase of shares. Similarly, there is a sale contract (debit note of the Assessee-company), delivery of the same shares given and payment received. Further, the market quotation of Landmark Leisure on the date of purchase and sale are Rs 152.40 (page no 42 of the paper book) and Rs 48.10 (page no 43 of the paper book), respectively, which are the rates at which transactions have been executed, and hence, are on the basis of real time rates. Only because the seller-company and buyer-company are associates of the Assessee-company, a doubt on the genuineness of the transactions cannot be raised.

11.5 Ld AR submitted that the Honourable Tribunal in the case of Panther Fincap for the year under reference by order dated 17.4.2013 has held that the transactions of sale and purchase carried out by Panther Fincap are genuine and not bogus, he brought to our notice copy of the decision and relevant para 93 of the order.

He submitted that as such, it is clear the sale of shares by the Assessee-company to Panther Fincap has been held to be genuine.

11.6 Finally he submitted that the aforesaid transactions are genuine and have been carried out in the normal course of business of the Assessee-company at prevailing market rates.

12. With regard to ground no 2, treating the aforesaid transactions as speculative under section 43(5) of the Act, he submitted that the aforesaid transactions cannot be said to be speculative under section 43(5) inasmuch as the Assessees have received delivery on purchase of shares, for that purpose he brought to our notice page nos 22 and 24 to 32 of the paper book. He submitted that the assessee have given delivery on sale of such shares (page nos 34 and 37 of the paper book).Further he submitted that the conditions of section 43(5) of contract being settled otherwise than by delivery are not satisfied, and hence, it cannot be said that the transactions referred above are speculative.

13. With regard to ground no 3, not allowing set-off of the loss of Rs 3,07,40,000 by invoking Explanation to section 73, he brought to our notice explanation to section 73 as it stood prior to the amendment w.e.f. 1.4.2015, which is reproduced below:

"Where any part of the business of a company (other than a

company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house properly", "Capital gains" and "Income from other sources", or a company the principal business of which is the business of banking or the granting of loans and advances) consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares".

13.1 Further be brought to our notice page no 21 of the paper book to highlight the loss incurred by the assessee and he brought to our notice the composition of the current assets at page no 6 of the paper book, which is reproduced below:–

Particulars	*31st March 2000*	*31st March 2001*
Investments	*₹8,48,000*	*₹ 2,72,56,000*
Stock–in–trade (shares)	*₹3,46,538*	*–*
Total:–	*₹11,94,538*	*₹ 2,72,56,000*
Loans and advances	*₹3,70,42,439*	*₹7,74,56,000*

13.2 From the above table, it is evident that the principal business of the Assessee company is of granting of loans and advances and submitted that an exception carved out in Explanation to section 73. As such, it is submitted that the provisions of Explanation to section 73 cannot be pressed into service in the case of the Assessee-company. In view of the above, the counsel of the assessee submitted that the set-off of Rs 3,07,40,000 ought to be allowed.

14. On the other hand, the learned Departmental Representative relied heavily on the findings of the learned Commissioner (Appeals)

and submitted that all these transactions were carried out within the group concern and this group concern belongs to M/s Ketan Parekh Group and he submitted that no doubt the transactions carried on by the group concern are on the rates as per market driven rates as on 27th July 2000, 26th June 2000 and 28th December 2000. He submitted that all these transactions shows that the assessee dealt on behalf of its sister concern i.e., Panther Fincap and Management Services. In this regard, he submitted that the payment for the shares purchased by the assessee was actually paid by PFMS Ltd., and the same shares were sold to PFMS, as it is only loss was booked in the books of the assessee. Therefore, it is not a genuine transaction. For that purpose, he brought to our notice Page–11 of the learned Commissioner (Appeals)'s order. The assessee has not submitted any new material before the learned Commissioner (Appeals).

15. In the rejoinder, the learned Authorised Representative submitted that the assessee has borrowed funds from sister concern to settle the payment to CCL merely because the assessee has sold the shares to PFMS. The learned Commissioner (Appeals) doubts the transactions if the same was sold to any other concern no one would have raised any doubt on these transactions. It is fact that in the year 2001, the share market crashed drastically. In order to manage fund requirement, it was sold to sister concern by CCL. For the similar

purpose, the assessee has sold the same to PFMS to tied over its financial requirement. Therefore, it is a genuine transaction.

16. Considered the rival contentions and perused the material on record. We notice that the assessee has purchased 3,00,000 shares of Landmark Leisure Ltd. from Classic Credit Ltd. on 26th June 2000 at the cost of Rs. 4,57,20,000 by taking physical delivery of shares. However, this amount was settled by PFMS which is a sister concern of the assessee, which is evident from the ledger copy of CCL (refer order of CIT(A)). On 28th December 2000, the assessee has sold the same shares to PFMS. The assessee has handed over the delivery of shares to PFMS. The assessee has accepted delivery of shares from CCL after settlement of fund by PFMS. The assessee has filed a copy of the letter in support of the receipt of physical delivery and similarly the assessee has handed over the physical copies of shares to PFMS at the time of sale, the proof is also placed on record at Page–34 to 37 of the paper book.

17. With this background, we noticed that the learned Commissioner (Appeals) observed in his order that the assessee has purchased shares from its sister concern CCL and the same was settled by PFMS on behalf of the assessee. Further he observed that CCL has raised a debit note to the assessee. For reaching his conclusion, he analyzed the ledger copy of the assessee in the books of CCL in which it is

narrated that **"PFMS paid to CCL"** Rs. 4,57,20,000. Since the payment was settled by PFMS and he observed that there is a debit entry for the payment of Rs. 2,01,63,250, towards payment by PFMS to CCL and two cheques of Rs. 50 lakh and Rs. 25 lakh from CCL to the assessee and there is a payment of Rs. 1 crore by the assessee to CCL and observed that there were certain other transactions between the assessee and CCL. With the above observation, the learned Commissioner (Appeals) came to the conclusion that there was no actual movement of funds from the assessee or its associate PFMS to CCL either on 26th June 2000 or subsequently. Since these transactions were carried out within the sister concern, he formed an opinion that the whole transaction was bogus. The ledger copy on which the learned Commissioner (Appeals) formed an opinion for the sake of clarity it is reproduced below:–

Sl.no.	*Document no.*	*Transaction date*	*Narration*	*Debit Amount*	*Credit Amount*	*Balance Amount*
Account : PANTHER IND. PROD. LIMITED						
	PIPL/2606	*26/06/2000*	*PFMS PD TO CCL FOR PIPL*		*45720000.00*	*–45720000.00*
	PIPL/26/06	*26/06/2000*	*BILL AMOUNT*	*45720000*		
	PIPL/2710	*27/10/2000*	*PFMS PD TO CCL FOR PIFL*		*20163250.00*	*–20163250.00*
	PIPL/03/00	*27/10/2000*	*BILL AMOUNT*	*6767750*		*–13395500.00*
	PIPL/04/00	*27/10/2000*	*BILL AMOUNT*	*13395500*		
000003	*540912*	*04/11/2000*	*ON A/C.*	*5000000*		*5000000*
000003	*540916*	*09/11/2000*	*ON A/C.*	*2500000*		*7500000.00*

000003	*1408*	*13/11/2000*	*ON A/C CMO NC.062071*	*–*	*100000000.00*	*–925000000.00*
	CCL/03/01	*30/03/2000*	*BILL AMOUNT*	*63800000*		*–28700000.00*
	PIPL/3103	*31/03/2001*	*SAME A/C*	*28700000*		
T O T A L S :				*162683250.00*	*165883230.00*	

18. After careful consideration of the above ledger, we observe that on 26th June 2000, PFMS has made a payment to CCL of Rs. 4,57,20,000 (the narration clearly indicates that **"PD TO CCL FOR PFMS"**) which means PFMS paid the above amount on behalf of assessee and further following that payment, bill amount for transfer of shares were recorded. Subsequently, on 27th October 2000, there was another payment was made by the PFMS to CCL on behalf of the assessee to the extent of Rs. 201,63,250. The purpose of this payment, it is not known. The assessee has carried on with the other transaction with CCL which is not relevant for our discussion. We observe that the learned Commissioner (Appeals) has not noticed the first payment of Rs. 4,57,20,000 instead he observed only Rs. 2,01,63,250 and formed an opinion that there is no settlement for the purchase of shares by the assessee or PFMS. In our considered view, the assessee has purchased the shares from CCL on 26th June 2000, by taking physical delivery of shares, the proof of which is already submitted in the paper book and the assessee has settled the above purchase consideration by taking loan from PFMS, the ledger copy of

CCL clearly indicates that the PFMS has settled the amount on behalf of the assessee. The purchase consideration was determined on the basis of market price prevailing on the date of purchase i.e., Rs. 152.04 per share. The learned Commissioner (Appeals) objected to the above mode of settlement/transaction just because the assessee has taken a loan from its sister concern to settle other sister concern. Since the delivery of shares were taken place in the name of the assessee on the date of transfer and there was no involvement of any agent in order to complete the transaction, the physical delivery of shares were carried out and the proof of which is properly submitted in the paper book. It is normal in case of closely held companies like this to borrow funds from the sister concern in order to complete the transaction or internal settlements. It is important to note that all the settlement of shares were carried out only thru banking channel. We do not understand the findings of learned commissioner (Appeals) that it is only book entries, how they can create book entries when the settlements were carried out by bank transfers. There is no improper way of settlement and it is one of the legal ways of completing the contract. With regard to sale of shares to PFMS, the assessee has submitted clearly proper payment challan to support that the assessee has actually received Rs. 1.75 crore from PFMS before handing over of the physical shares to them at the market price prevailing on the date of sale i.e., Rs. 48.10 per share. Since there is a loss incurred by the

assessee in these transactions, the learned Commissioner (Appeals) doubts the whole transaction merely because there is a loss. Otherwise in case the transaction was carried out with any third party, the doubt would not have arisen. In our considered view, merely because the assessee has taken advances from its sister concern to settle purchase consideration, it does not make the transaction a bogus transaction.

19. Coming to the next argument whether these transactions will fall under speculative transaction or not. We notice from the record that the assessee has taken delivery of shares on the date of purchase and similarly the assessee has made the physical delivery of shares to PFMS. Therefore, as per the definition of speculation transaction which means 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 actual delivery or transfer of the commodity or scrips. From the above definition, it is clear that the transaction can be considered as speculative only when the transaction is settled otherwise than by actual delivery. In the given case both purchase and sale transactions were carried out with actual delivery of shares on the specific dates and at the specific rate prevailing on the date of transfer. Therefore, this transaction can never be classified as speculation transaction.

20. Coming to the next issue whether the business of the assessee falls under the category specified in Explanation–2 to section 73 of the Act. As per Explanation prevailing at that point of time are given below:–

> *"Where any part of the business of a company (other than a company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house properly", "Capital gains" and "Income from other sources", or a company the principal business of which is the business of banking or the granting of loans and advances) consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares".*

21. From the above Explanation, it is clear that the companies which falls under exclusion which are the company mainly consist of income which is chargeable under the head interest on securities, income from house property, capital gain and income from other sources are companies the principal business of which is the business of banking or granting of loans and advances. It is brought to our notice by the learned Authorized Representative that the majority of the business of the assessee is lending of loans and advances, it is evident from the Balance sheet. In the year 31st March 2000 the loans and advances stood at Rs. 3,70,42,439, whereas at the similar period as on 31st March 2001, the loans and advances stood at Rs. 7,74,20,916. Therefore, 75% of the total assets consist of loans and advances.

Therefore, it clearly falls under category of the principal business of granting of loans and advances under exclusion category in the Expalanation-2 to Section 73. Therefore, Explanation–2 to section 73 of the Act will attract to the facts of the present case. Accordingly, the grounds raised by the assessee are allowed.

22. In the result, appeal filed by the assessee is allowed.

We now take the appeal being ITA no.1081/Mum./2018.

23. The sole dispute in this appeal is, whether or not the learned Commissioner (Appeals) was justified in confirming the penalty of ₹ 1,21,58,829, imposed under section 271(1)(c) of the Act by the Assessing Officer.

24. The aforesaid penalty under section 271(1)(c) of the Act imposed by the Assessing Officer and confirmed by the learned Commissioner (Appeals) was on the basis of quantum addition made by the authorities below. Since during the second appellate proceedings we have deleted the quantum addition made by the Assessing Officer and confirmed by the learned Commissioner (Appeals) for the detailed reasons stated from Para–14 to 18 as aforesaid, consequently, the penalty imposed under section 271(1)(c) of the Act becomes infructuous and the penalty order is liable to be quashed. Accordingly,

we set aside the impugned order passed by the learned Commissioner (Appeals) and allow the grounds of appeal raised by the assessee.

25. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 8.3.2021

Sd/-	**Sd/-**
PAVAN KUMAR GADALE	**S. RIFAUR RAHMAN**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

MUMBAI, DATED: 8.3.2021

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai