

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH  
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER  
&  
SHRI PAVAN KUMAR GADALE , JUDICIAL MEMBER**

**ITA No.3568/Mum/2016  
(Assessment Year :2011-12)**

The Dy. Commissioner of Income Tax 14(1)(1) Room No.460, 4 <sup>th</sup> Floor Aayakar Bhavan M.K.Road, Mumbai-400020	Vs.	M/s. Blue Berry Trading Co. Pvt. Ltd., C/62, Vibgyor Tower 9 <sup>th</sup> Floor, Bandra Kurla Complex, Bandra (E) Mumbai – 400 051
<b>PAN/GIR No.AABCB5512E</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Nitesh Joshi
Revenue by	Shri Ajay Chandra
<b>Date of Hearing</b>	<b>10/05/2022</b>
<b>Date of Pronouncement</b>	<b>08/08/2022</b>

**आदेश / ORDER**

**PER M. BALAGANESH (A.M):**

This appeal in ITA No.3568/Mum/2016 for A.Y.2011-12 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-8, Mumbai in appeal No.CIT(A)-8/IT-328/14-15 dated 16/02/2016 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 14/02/2014 by the Id. DCIT-3(1), Mumbai (hereinafter referred to as Id. AO).

2. The Revenue has raised the following grounds:-

1. *"Whether on fact and in the circumstances of the case, the learned CIT(A) erred in holding that explanation to Section 73 of the I.T.Act, 1961 is not applicable to the facts of the case."*

2. *"Whether on fact and in the circumstances of the case, the learned CIT(A) erred in holding that loss of Rs.2,96,91,090/- and loss on account of Mark to Market amounting to Rs.1265977/- are not speculation loss in view of explanation Section 73 of the I.T.Act, 1961."*

3. *The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.*

4. *The appellant prays that the order of CIT(A) on the above ground be set-aside and that of the assessing officer be restored.*

*A copy of the Ld.CIT(A)'s order was received in the office of Pr.CIT-14, Mumbai on 29 03-2016. The last date for filing appeal is 27-05-2016. However appeal should be filed immediately.*

3. We have heard rival submissions and perused the materials available on record. We find that assessee is a private limited company engaged in the business of real estate development and leasing of constructed premises; investment and trading in shares, securities, futures and options. During the year under consideration, the assessee had entered into derivative transactions comprising of futures and options in addition to entering into trading transactions in equity shares. The assessee claimed total loss of Rs.8,28,91,018 comprising of:-

(a) Loss on future trading	-	Rs. 5,19,33,951/-
(b) Loss on options	-	Rs. 12,65,977/-
(c) Loss on share trading	-	<u>Rs.2,96,91,090/-</u>
<b>Total</b>		<b>Rs.8,28,91,018</b>

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3.1. The Id. AO in the assessment proceedings had sought to treat the loss on sale of aforesaid shares, futures and options amounting to Rs.8,28,91,018/- as speculation loss by applying the provisions of Explanation to Section 73 of the Act. In effect, the assessee had claimed the aforesaid loss as 'business loss' in the return of income which was treated as speculation loss by the Id. AO in the assessment proceedings.

3.2. The break-up of gross total income of assessee is as under:-

(a) Income from house property	-	Rs.5,73,65,001/-
(b) Income from business and profession (loss)-		(Rs.12,84,78,109)
(c) Income from capital gains	-	Rs. 3,03,512/-
(d) Income from other sources	-	Rs. 21,51,576/-
(e) Gross Total Loss	-	(Rs.708,09,596)

3.3. The Id. DR argued before us that the main component of gross total loss is business loss. The Id. DR vehemently argued that loss incurred on futures and options amounting to Rs.5,19,33,951/- and Rs.12,65,977/- respectively together with share trading loss of Rs.2,96,91,090/- are to be treated only as speculation loss which has been rightly treated by the Id. AO. He vehemently argued that assessee's case does not fall under the exceptions carved out in Section 73 of the Act as the main component of gross total loss is only business loss. The main emphasis of the case of the Revenue is that the assessee though engaged in the business of real estate development and leasing of premises and had also engaged in investment and trading in shares, derivatives and therefore, the provisions of Explanation to Section 73 of the Act would be squarely applicable to the assessee and accordingly, the loss is to be treated as 'speculation loss'. The Id. AO had also treated the

loss as speculation loss in view of the fact that the underlying assets in derivative transactions are also shares. In the opinion of the Id. AO, since the loss incurred on trading of shares is treated as speculation loss, the loss incurred on derivative transactions also (where the underlying assets are shares) would also only be speculation loss. This action of the Id. AO has been reversed by the Id. CIT(A).

3.4. The short point that arises for our consideration is whether the provisions of Explanation to Section 73 of the Act per se could be made applicable to the facts of the instant case. For the sake of convenience, the provisions of Section 73 together with its Explanation as it stood at the relevant point of time i.e. relevant to A.Y.2011-12 are as under:-

*“(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.*

*(2) Where for any assessment year any loss computed in respect of a speculation business has not been wholly set off under sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no income from any other speculation business, shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and—*

*(i) it shall be set off against the profits and gains, if any, of any speculation business carried on by him assessable for that assessment year; and*

*(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.*

*(3) In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section (2) of section 72 shall apply in relation to speculation business as they apply in relation to any other business.*

*(4) No loss shall be carried forward under this section for more than four assessment years immediately succeeding the assessment year for which the loss was first computed.*

*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 property", "Capital gains" and "Income from other sources", or a company the principal 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”.*

3.5. From the bare reading of the aforesaid provisions of Explanation to Section 73 of the Act, it is very clear that one of the exception carved out thereon is, if the gross total income consists mainly of income chargeable under the head “interest on securities”, “income from house property”, “capital gains” and “income from other sources” then the loss incurred on shares would not fall under the ambit of speculation business. In the instant case, admittedly the assessee is having income from house property, income from capital gains, and income from other sources apart from losses from business as is evident from the composition of gross total income of the assessee. The loss from business is on account of share trading loss as well as derivating transaction loss (future and options). Once the composition of gross total income mainly consists of the other heads of income other than business, then the Explanation to Section 73 of the Act would not come into operation at all. From the composition of income, we find that assessee’s gross total income mainly consists of income from house property amounting to Rs.5,73,65,001/-; capital gains amounting to Rs.3,03,512/-; income from other sources of Rs.21,51,576/- and income under the head business at Rs.4,55,87,091/- (excluding loss from trading in shares and derivatives amounting to Rs.12,84,78,109). From this, it could be safely concluded that substantial income of the assessee comprises of income from house property and capital gains. Hence, the case squarely falls under the exception provided in Explanation to Section 73 of the Act.

3.6. In any event, loss incurred on futures and options amounting to Rs.5,19,33,951/- and Rs.12,65,977/- can never be treated as speculation

loss in terms of provisions of Section 43(5)(d) of the Act. For the sake of convenience, Section 43(5) (d) is reproduced hereunder:-

5) "*speculative transaction*" 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 the actual delivery or transfer of the commodity or scrips:

**Provided** that for the purposes of this clause—

(d) *an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange; shall not be deemed to be a speculative transaction.*"

3.7. In our considered opinion, in terms of Section 43(5)(d) of the Act, the loss incurred on futures and options (derivative transactions) would have to be construed only as business loss and hence the provisions of Section 73 and its explanation thereon would not come into operation at all for the same. We also hold that Section 43(5)(d) of the Act should have to be first given effect while computing gross total income of the assessee before applying Section 73 and its Explanation thereon. In the instant case, there is no dispute that assessee had executed futures and options transactions in recognized stock exchange through SEBI registered share broker and had incurred loss of Rs.5,19,33,951/- and Rs.12,65,977/- thereon during the year. Accordingly, the said loss arising out of F & O transactions would get covered in Clause (ac) of Section 2 of Securities Contract (Regulation Act, 1956). Hence, the same would fall under the exception provided in the definition of "speculative transactions" in terms of Section 43(5)(d) of the Act. Hence, the same has to be treated as the regular business transaction. Accordingly, if the said derivative transaction results in loss, it has to be as a regular business loss and not speculative loss. The income under the head "business" is to be computed in accordance with provisions contained in Section 28 to 44D of the Act. The provisions of Section 43(5) comes in

between computation mechanism provided in Sections 28 to 44D of the Act. Hence, the assessee while computing its income under the head "profits and gains of business" had to first compute the profit or loss from different source under the head "profits and gains of business", within the ambit of provisions of Section 28 to 44D of the Act. Having done so, the assessee had to make intrasource adjustment within the same head u/s.70 of the Act. Accordingly, the set off of F & O losses with the regular business income done by the assessee is in order. Our understanding of this proposition and interpretation of provisions of Section 43(5) and Explanation to Section 73 of the Act have been fortified by the decision of the Hon'ble Calcutta High Court in the case of Asian Financial Services Ltd., vs. CIT reported in 70 taxmann.com 9 wherein it has been held that loss incurred on account of derivatives would have to be treated as business loss and not speculation loss and accordingly, Explanation to Section 73 of the Act could not be made applicable thereon.

3.8. Now what is left is only loss incurred on share trading of Rs.2,96,91,090/- and applicability of Explanation to Section 73 of the Act to the same. We have already held hereinabove that the gross total income mainly consists of income from house property, income from capital accounts and income from other sources for the assessee and thereby, the case of the assessee falls in the first exception carved out in Explanation to Section 73 of the Act. This view is further fortified by the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. HSBC Securities and Capital Markets India Pvt. Ltd., reported in 208 Taxman 439 (Bom). In this regard, it would be relevant to state the composition of gross total income in the case before the Hon'ble Bombay High Court referred to supra as reproduced in para 4 of the High Court order which is as under:-

(i) Business Profit	-	Rs.(-)1,72,31,711/-
(ii) Income from other sources	-	<u>Rs. 7,02,000/-</u>
		Rs.(-)1,65,29,711
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3.9. The assessee's case squarely falls in the same composition of gross total income with that of the Hon'ble Bombay High Court referred to supra. In the case before the Hon'ble Bombay High Court also the Assessing Officer of that case had applied provisions of Explanation to Section 73 of the Act and sought to treat the business loss as speculative loss. The Hon'ble Bombay High Court had adjudicated the dispute before it in the following manner:-

*"8. 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)."*

*9. In the circumstances, the appeal is dismissed but with no order as to costs.*

3.10. Hence, the ratio laid down by the Hon'ble Jurisdictional High Court becomes squarely applicable to the facts of the facts of the instant case before us.

3.11. The Id. DR vehemently relied on the decision of the Hon'ble Supreme Court in the case of Snowtex Investment Limited vs. PCIT reported 414 ITR 227 dated 30/04/2019. We have perused the judgement of the Hon'ble Supreme Court referred to supra. In the said case, that assessee had incurred loss in share trading activity and made profit from derivatives and had set off the losses with derivatives profit. We find from para 8 of the said judgement in page 240, the Hon'ble Supreme Court had addressed the issue in the line of first limb of exception provided in Explanation to Section 73 of the Act on the aspect of principal business being granting of loans and advances. In page 241 of the said judgement, the second limb of the exception provided in

Explanation to Section 73 of the Act was adjudicated by the Hon'ble Apex Court which talks about amendment brought in Explanation to Section 73 w.e.f. 01/04/2015 and to decide whether the said amendment is to be construed as retrospective in operation or not? The finding given by the Hon'ble Apex Court with regard to the first limb discussed in page 240 of the decision referred to supra is as under:-

*“22. The correctness of this aspect of the submission which has been urged by learned senior counsel need not be determined in the facts of the present aspect, since we are of the view that the High Court was justified in relying upon the specific admission of the assessee that during the assessment year in question, its sole business was of dealing in shares. We must also advert to the circumstance that while the assessee had furnished loans and advances of Rs 11.32 crores during the assessment year, this included interest free lending to the extent of Rs 9.58 crores. Having regard to these facts and circumstances, the specific admission of the assessee before the assessing officer assumes significance. The assessee made an admission on a statement of fact which in our view, must bind it. In this view of the matter, the principal business of the assessee was not of granting loans and advances during the assessment year. As a consequence, the deeming fiction under Section 73 would be attracted. Hence, the finding of the High Court, on the first aspect, cannot be faulted.”*

3.12. The aforesaid decision was rendered only on the aspect of principal business of the assessee, not being granting of loans and advances and thereby not eligible for exception and accordingly, the deeming fiction provided in Explanation to Section 73 would get attracted. The Hon'ble Apex Court had merely upheld the action of the Hon'ble High Court in this regard. With regard to the amendment brought in Explanation to Section 73 of the Act w.e.f. 01/04/2015, the Hon'ble Apex Court held that it should be given only prospective application. This has been discussed from para 23 page 245 onwards till the end of the judgement i.e. till para 33. Ultimately, the Hon'ble Apex Court had only upheld the order of the Hon'ble Calcutta High Court. We find the decision of the Hon'ble Apex Court referred to supra is completely and effectively distinguishable with that of the assessee before us. Hence, we have no hesitation in holding

that the said decision is not applicable to the facts before us and does not advance the case of the Revenue. On the contrary, the decision of the Hon'ble Bombay High Court relied upon by the Id. AR in 208 Taxman 439 is directly on the issue before us. Hence, the same would have to be followed in the facts and circumstances of the instant case. Accordingly, the ground No.1 raised by the Revenue is dismissed.

4. The ground No.2 raised by the Revenue is not an independent ground. It is also on applicability to Explanation to Section 73 of the Act only. The decision rendered by us in ground No.1 would be applicable for ground No.2 also as it is emanating from those common facts. Accordingly, the grounds raised by the Revenue are dismissed.

**5. In the result appeal of the Revenue is dismissed.**

Order pronounced on 08/08/2022 by way of proper mentioning in the notice board.

**Sd/-**  
**(PAVAN KUMAR GADALE)**  
JUDICIAL MEMBER

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

Mumbai; Dated 08/08/2022  
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.

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)  
**ITAT, Mumbai**