

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA 'C(SMC)' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member**

**I.T.A. No. 2064 /KOL/ 2014  
Assessment Year: 2010-2011**

**Income Tax Officer,.....Appellant  
Ward-5(4), Kolkata,  
Aayakar Bhawan, 8<sup>th</sup> Floor, Room No. 15,  
P-7, Chowringhee Square,  
Kolkata-700 069**

**-Vs.-**

**M/s. Fortune Interfinance Limited,.....Respondent  
19, British Indian Street, Ground Floor,  
Flat No. 2 & 3,  
Kolkata-700 001  
[PAN: AAACF 4069 R]**

**Appearances by:**

*Shri R.K. Kureel, JCIT, D.R., for the Department  
Shri D.S. Damle, FCA, for the assessee*

Date of concluding the hearing : June 09, 2016

Date of pronouncing the order : August 05, 2016

**O R D E R**

This appeal is preferred by the Revenue against the order of the Id. Commissioner of Income Tax (Appeals)-VI, Kolkata dated 25.08.2014 on the solitary ground, which reads as under:-

*"That on the facts and in circumstances of the case, the CIT(A) erred on facts as well as in law in holding that loss incurred in the purchase and sale of shares of other companies was wrongly treated as speculation loss, ignoring the fact that as per provisions of section 73, the case of the assessee did not fall in the exceptions of explanation to section 73, the brokerage income was earned in doing purchase-sale on behalf of customers is normal business income and the derivative income in view of insertion of the specific clause (d) in section 43(5),*

*therefore, the loss incurred in share dealing of other companies was rightly treated as speculation loss”.*

2. The assessee in the present case is a Company, which filed its return of income for the year under consideration on 22.09.2010 declaring total income at 'nil'. In the said return, loss of Rs.32,99,556/- suffered in the transaction of purchase and sale of shares was adjusted by the assessee against other income. During the course of assessment proceedings, it was noticed by the Assessing Officer that the business of the assessee-company mainly consisted of purchase and sale of shares, value of which computed to Rs.55 crores and 57.06 crores respectively. He also found that the assessee-company was engaged in the business of broking on Stock & Securities and shares and the income earned from brokerage was Rs.36.16 lakhs. Keeping in view these facts and figures of the assessee's case, the Assessing Officer was of the view that the loss suffered by the assessee in the business of purchase and sale of shares is liable to be treated as speculation loss as per Explanation to section 73, which could be adjusted only against speculation profit and not otherwise. He, therefore, required the assessee to explain as to why the said Explanation should not be invoked and applied in the facts of its case. In reply, a written submission was filed by the assessee offering its explanation in the matter in detail. The Assessing Officer, however, did not find the said explanation to be acceptable for the following reasons given in the assessment order:-

*“Assessee submitted details of income from operation during scrutiny proceedings. From these details the following things were noted. By recasting the P&L A/c. with respect to the business of the 'sales and purchases of shares' including that of 'opening stock & closing stock' and the related expenditure of transaction Charges and S T T the loss on share trading comes to Rs.32,99,556/- which is shown below in the following Trading Alc. recast for this purpose.*

Share Trading A/c. (Recast)

Opening Stock.....	2,90,97,773/-	Sales.....	57,05,65,854/-
Purchase.....	55,00,32,7641/-	Closing Stock.....	61,41,083/-
Transaction Charges.....	25,256/-	Loss.....	32,99,556/-
STT.....	8,50,700/-		

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58,00,06,493/-  
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58,00,06,493/-  
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b) In the P&L A/c and from the details of 'income from operation' it is found that the assessee declared an income of Rs.96,41,971/- by way of 'derivative trading' and 'share trading without taking delivery (i.e., speculation profit by intra-day trading)' of Rs.1,27.669/-.

c) The assessee company itself declared that it has the income from four following different segments with the following respective amounts of income -

Brokerage income from stock broking..... Rs.36,16,855/-  
Income from derivative trading..... Rs.96,41,971/-

Income from share trading  
without taking delivery..... Rs.1,27,669/-  
(speculation profit)

Shares and securities trading loss involving deliveries (-)Rs. 32,99,556/-.

d) Brokerage is earned by the assessee through its business as the member of BSE & NSE. When separation or the compartmentalisation of income under the business head is technically possible as admitted by the assessee, then it is clearly assessable under the head 'income from the business', which is also corroborated by Its own P/L account, Balance Sheet, computation of income and Tax Audit Report In its submission the assessee has tried to confuse the fundamentals of the compartmentalization of income under the different provision of Income Tax Act. As per I. T. Act and also in view of the facts and circumstances of the case, the income earned by its main 'business of broking in shares and securities' is income from business and that cannot be assessed as income from speculation by any stretch of imagination by invoking explanation to Section 73 of the I.T. Act as suggested by the assessee.

e) Similarly 'income on derivatives (F & O)' is clearly segregated by the assessee itself and It is assessable by invoking the proviso (d) to section 43(5) of I. T Act and is treated as 'income from business' wet AY 2006-07. In this respect also the assessee has tried to confuse the actual facts and circumstances of the case. The income from derivative (F & O) trading, which is clearly assessable under the head 'income from business cannot be assessed under tile head 'speculation income' specially after the incorporation of proviso (d) to the section 43(5), even if the assessee claim so.

f) The assessee contended that the business of the assessee company is one of single composite business, though technically it is possible for the assessee to segregate operational results of different transactional segments as narrated above in the para (1) above, yet in real term, the business of the assessee is composite and hence such segmentation will be artificial and arbitrary This is highly confusing. The assessee itself states that the segmentation is possible and In fact it has submitted its Income

*under different segments to the department through its financial statements, computation of income, tax audit report audited by Chartered Accountant and its own submission It IS also not acceptable that the segmentation as submitted by it is termed by itself as artificial and arbitrary.*

*g) The assessee submits 'that there is complete interlocking, interdependence and interconnection between capital market transactions. The funds utilized in the different transactional segments are interconnected and there is complete interlacing of funds. There is a common management and common administration with regard to all transaction of different segments of capital market operations. Expenses Incurred on common business establishment cannot be segregated amongst different activities conducted simultaneously on BSE/ NSE platform' There is no denial of fact that regarding the different segments of the assessee'' business and its allied activities but that does not mean that the different books of accounts cannot be maintained for different segments In fact the assessee company must have kept different books of accounts for different segments of its business activities, otherwise It would not have been possible for it to submit the documents before the department with clear bifurcation of its income into four different segments as narrated above Moreover, the onus of proof lies on assessee to substantiate its claim of different deductions, exemptions and losses. The assessee cannot express its inability to declare that all the segments are in composite in nature and the income from different segments cannot be worked out. Once the income is separated under different heads as filed by the assessee income of each and every segments will be assessed in pursuance to different provisions of Income Tax Act. If the income could not have been compartmentalized or segregated at all then the entire picture would have been different but the case is not so here.*

*h) The assessee submits that the interest on F 0 earned by itself is also to be assessed as speculation income but as per the different provisions of I.T. Act and also In view of the factual position as submitted by the assessee it can never be assessed as speculation profits and to be adjusted/ set off with the speculation loss The assessee's contention that this income also attracts applicability of explanation to Section 73 is not acceptable and hence rejected.*

*i) It is now clear that the assessee has brokerage income out of the transaction involved on behalf of its clients or the customers, whose transactions were maintained separately. The assessee also engaged in purchase and sale of shares with deliveries made on its own behalf and not on the behalf of its clients or customers. So as per explanation to Section 73, the loss generated out of it should be treated as speculation loss and cannot be set off with the income of any other head except the speculation profit.*

*j) The assessee itself admitted that the loss generated out of sale and purchase of shares of other companies is to be treated as speculation loss in the light of the explanation to section 73.*

*k) The assessee submits that 'in the light of the deeming fiction created by the explanation to section 73, all transactions by the assessee in connection with or consisting of purchase and sale of shares are to be considered as a part of speculation business' This Interpretation of law by the assessee is completely wrong because the explanation to section 73 is only applicable to that part of the transaction which involves purchase and sale of shares of other companies by taking delivery. No other transaction made in continuation of the assessee's business can be considered for the applicability of explanation to section 73.*

*l) The assessee submits that In present case each item of the income forms the part of assessee's deemed speculation business. It is wrong interpretation of the explanation to section 73.*

*m) The case laws cited by the assessee in its submission was clearly distinguishable in facts and circumstances of the cases in comparison to that of assessee's case".*

3. For the reasons given above, the Assessing Officer treated the loss of Rs.32,99,556/- suffered by the assessee from purchase and sale of shares as speculation loss and after adjusting the same against speculation profit of Rs.1,27,669, the balance amount of Rs.31,71,887/- was allowed to be carried forward by him as speculation loss. The claim of the assessee for adjustment of the said loss against other income thus was disallowed by the Assessing Officer in the assessment completed under section 143(3) vide an order dated 19.03.2013.

4. Against the order passed by the Assessing Officer under section 143(3), an appeal was preferred by the assessee before the Id. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record, the Id. CIT(Appeals) found that a similar issue involved in the case of the assessee for the immediately preceding year, i.e. A.Y. 2009-10 was decided by his predecessor in favour of the assessee. He accordingly followed the said decision rendered in the case of the assessee for A.Y. 2009-10 and directed the Assessing Officer to treat the income from brokerage, derivatives, trading, etc. also as speculative in nature apart from trading of shares and adjust or set off the same against each other. In other words, the Id. CIT(Appeals) held that the entire income/loss of the

assessee from share trading, brokerage, derivatives, trading, etc. should be treated as composite income/loss which is of speculative in nature. Aggrieved by the order of the Id. CIT(Appeals), the Revenue has preferred this appeal before the Tribunal.

5. At the time of hearing before us, the Id. representatives of both the sides have agreed that the issue involved in this appeal of the Revenue is squarely covered in favour of the assessee by the decision of this Tribunal rendered in assessee's own case for A.Y. 2009-10 vide its order dated 18.03.2016 passed in ITA No. 841/KOL/2013. A copy of the said order is also placed on record and perusal of the same shows that the similar issue has been decided by the Tribunal vide Paragraph No. 5.1 to 5.10 of its order, which read as under:-

*"5.1 We find from the facts available on record, the assessee is operating in one segment i.e., dealing in shares and securities and all the activities under this segment are interrelated. In this regard, we place reliance on the following decision of the coordinate bench of this tribunal in the case of **ITO s Sand Dune Credit Pvt Ltd in ITA Nos. 2075 & 2076 /Kol / 2008 for the Asst Years 2004-05 & 2005-06 dated 24.4.2009**, wherein the tribunal upheld the decision of the CITA with regard to deletion of the addition under Explanation to Sec.73 by making the following observations:-*

*"I have carefully considered the submission of the Id. A.R. The assessing Office has added Rs.10,06,974/- being loss suffered in trading in shares which as set off against brokerage income of shares of Rs.12,90,172/-. The appellant is a share broker, registered with SEBI and its entire activity in shares is to be treated as the activity of share business whether it was by way of trading of shares and/or by way of brokerage in shares. The activity which was conducted by the appellant on a/c of other parties in which brokerage income was earned and the activity of dealing in shares in their own a/c was treated as share trading business. The entire activity has to be treated as one and as such the explanation to section 73 is not applicable in the instant case. I hold that the statute has not made a distinction between purchase and sale of shares of Companies made on own behalf and/ or behalf of others, where entire business activity of the company consist of purchase and sale of shares of other companies in which some brokerage was earned and in some other loss or profit is earned. The entire business activity is inter linked and is to be treated as same activity. I am of the opinion that the case referred by the Id. A.R being CIT Vs. Nirmal Kumar & Co. 161 ITR 413 (Cal) is fully applicable in the present case. The addition of Rs.10,06,974/- under the head deemed speculation by applying the explanation to section 73 is, therefore deleted."*

*"Similarly, in case of M/s. Somany Stock Broking Pvt. Ltd Vs. Assistant Commissioner of Income Tax, Kolkata, **ITA No. 1914/Kol/2004**, it was held that:-*

*"The assessee company is engaged in a composite business of share broker, share trading etc during the year under consideration. The assessee has earned income from such composite business for taxation in Income Tax Return. There is a common management*

*inter-liaison of resources. There is a common work force as such bifurcation of such business is not possible. In this regard the reference can be made to the decision of the Supreme Court in the case of Prithvi Insurance Ltd reported in 53 ITR page 632 and 637 and in the case of Exchange Corporation Limited 77 ITR 739 (SC) in the case of Exchange Corporation Limited, it was held that the test is unit of control and not the nature of the two line of business. Hon'ble Supreme Court held that the tribunal was right in holding share business and other business carried by the appellant company constituting the same business within the meaning of Section 24(2). As thus before the amendment in 1955 while deciding the case the Hon'ble Supreme Court has applied the ratio of decision in the case of Prithi Insurance Ltd (supra). Thus this is now accepted as principle of law that once such activity are composite in nature, the income therefrom has to be assessed as a whole. Since the share broking activity, share dealing on own account all form an integrated business of the appellant company, the profit or loss from the same is required to be computed as a whole. In the instant case of the company, it is very difficult to segregate business activities and allocate respective amount of expenditure incurred for the purpose of earning the same. Since the activities are being carried out at common work place with a work force, the work staff, the expenses incurred are also common in nature. Hence, this expenses cannot be bifurcated to arrive at profit under separate heads. As such the Explanation appended to Section 73 will not be applicable in the present case."*

*In case of ITO, C.W 2(2) Vs. GDB Share & Stock Broking Service Ltd ITA No.235(Cal) of 2001 it was held that "The assessee has shown brokerage income of Rs.49.17 lacs, interest income of Rs.1.66 lacs & dividend income of Rs. 0.74 lacs. On the other hand the assessee has suffered loss of share dealing amounting to Rs.3.97 lacs in respect of which assessing officer has attracted the explanation to Section 73. The brokerage income earned by the assessee is out of its business of purchase & sale of shares and not in respect of any other activity being carried on by the assessee company. As per our considered view while arriving at the total profit on account of the said share dealing business, one has to take into account not only the profit or loss on sale and purchase of shares but also the brokerage earned on the purchase & sale of shares. As the brokerage income is inextricably related with the said share transaction business, the net profit of which work out to (Rs.49.40-Rs.3.97) Rs. 45.20 Lakhs. Thus, there is no merit in the action of the assessing officer in treating the loss of Rs.3.97 lakhs in isolation by disregarding income earned by the assessee by way of brokerage in the said share trading business itself. In view of the above, we are of the considered view that the assessing officer was not justified in attracting the explanation to Section 73 and holding that loss of Rs.3.97 Lacs was deemed to be speculation loss."*

*5.2 We also find that the decision of Kolkata Tribunal has been approved by the Hon'ble jurisdictional High Court in the case of CIT vs M/s Sand Dune Trade Pvt Ltd in ITAT NO. 146 of 2010 G.A.No.1982 of 2010 and G.A.No. 1983 of 2010 dated 21.7.2010, wherein it was ordered as below:-*

*"The Court: Being satisfied with the explanations as have been submitted we allow the prayer for condonation. The delay is condoned.*

*At this juncture the matter is taken up for admission hearing.*

*Since we have dismissed already an appeal being ITAT 147 of 2010 which has also been impugned here on the self-same facts and circumstances and in this case also it appears that assessing officer deleted the claim of Rs.10,06,974/- on account of loss in share trading operation. The assessee preferred appeal before the Commissioner of Income Tax(Appeal). The Commissioner of Income Tax(Appeal) held that loss incurred in the business of*

*transaction of share would not be speculation loss and has held that explanation to Section 73 would not be applicable to the case of the assessee company.*

*Therefore, the Commissioner of Income Tax (Appeal)) while relying on the judgment of this Court in case of [CIT vs. Nirmal Kumar & Co.] reported in 161 ITR 413 has granted relief and held that addition of Rs.10,06,974/- under the head deemed speculation by applying the Explanation to Section 73 is deleted.*

*The Learned Tribunal while noting the aforesaid findings of the Commissioner of Income Tax (Appeal) recorded that during the course of hearing departmental representative has not disputed the fact stated by CIT(A) (Supra). The Learned Tribunal also observed that income of the assessee in the assessment order under consideration from brokerage income of share of Rs.12,90, 172/- is more than the loss of Rs.10,06,974/- claimed by the assessee in respect of sale and purchase of the share by way of brokerage of share. It is recorded by the learned Tribunal further that there is no dispute to the fact that explanation to Section 73 does not apply to an investment company or a company whose principal business is banking or money lending. The learned Tribunal has, therefore, affirmed the order of the Commissioner of Income Tax (Appeal) in view of the judgment of this Court [CIT vs.Nirmal Kumar & Co.] (supra) reported in 161 ITR 413.*

*In view of the aforesaid findings and application of law in this matter we do not think it is a fit case for admission. It is not submitted that the decision rendered in the case of [CIT vs.Nirmal Kumar & Co.] reported in 161 ITR 413 (Supra) is not applicable in the facts and circumstances of this case nor it is argued that the said decision of this Court has been overruled.*

*Accordingly, the appeal is not admitted and the same is dismissed.  
The application being 1982 of 2010 is disposed of.*

*Certified photostat copy of this order be made available to the parties, if applied for, on compliance of usual formalities."*

*5.3 It is pertinent to get into the Explanation to Sec.73 of the Act at this juncture:-*

***"Section 73 : Losses in speculation business:***

***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 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 consist of the purchase and sale of such shares.]*

*We find that it is clear that in the case of a company whose business consists mainly or partly of purchase and sale of shares of other companies, it will amount to speculation business unless such company's gross total income consists mainly of income under the heads of "Interest on securities" and "Income from house property", "Capital Gains" and "Income from other sources", or where the principal business of the company is the business of banking or of granting loans and advances. Hence from this, the following points emerge:-*

- It applies to companies whose business consists of purchase and sale of shares of other companies.*
- It applies to all purchase and sale of shares.*
- It does not differentiate between 'Delivery based transactions' and 'F&O' operations.*

- It applies to the entire business of purchase and sale of shares, whether such trading is delivery based or non-delivery based and whether there is profit or loss from such business deemed as "speculation".

5.4 We find that the assessee had treated the entire activity of purchase and sale of shares which comprised of both delivery based and non-delivery based trading as one composite business before the application of deeming provision contained in Explanation to Sec.73 of the Act and accordingly, claimed set off of the loss incurred in delivery based trading with profit derived from derivative trading.

5.5 We hold that the transactions done by delivery as well as the transactions of derivatives are not hit by Sec.43(5) of the Act and hence the aggregation of the share trading loss and profit from derivative transactions should be done before application of the Explanation to Sec.73 of the Act. Reliance is placed on the following decisions:-

**a) Kolkata Tribunal in the case of DCIT vs M/s Baljit Securities Private Limited in ITA No. 1183/Kol/2012 dated 21.10.2014 for the Asst Year 2009-10, wherein it was held as below:-**

It is concluded that both trading of shares and derivative transactions are not coming under the purview of section 43(5) of the Act which provides definition of 'speculative transaction' exclusively for purposes of section 28 to 41 of the Act. Again, the fact that both delivery based transaction in shares and derivative transactions are non-speculative as far as section 43(5) of the Act is concerned goes to confirm that both will have same treatment as regards application of the Explanation to section 73 is concerned, which creates a deeming fiction. Now, before application of the said Explanation, aggregation of the business profit / loss is to be worked out irrespective of the fact, whether is from share delivery transaction or derivative transaction. Now, this view has been confirmed by the Hon'ble Jurisdictional High Court in assessee's own case in GA No. 3481 of 2013 and ITAT No. 215 of 2013 dated 12.3.2014, has held as under:-

"Clause (d) of Section 43(5) became effective with effect from 1st April, 2006. Therefore, prior to 1st April, 2006 any transaction in which a contract for the purchase or sale of any commodity including stocks and shares was periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrip was a speculative transaction.

Sub-section 1 of Section 73 provides as follows:

**'(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.'**

The resultant effect was that any loss arising out of speculative transaction could only have been set off against profits arising out of speculative transaction. In the present case, the assessee, as already indicated, has been dealing in shares where delivery was in fact taken and also in shares where delivery was not ultimately taken. In other words, the assessee has been dealing in actual selling and buying of shares as also dealing in shares only for the purpose of settling the transaction otherwise than by actual delivery. The question arise whether the losses arising out of the dealings and transaction in which the assessee did not ultimately take delivery of the shares or give delivery of the shares could be set off against the income arising out of the dealings and transactions in actual buying and selling of shares. An answer to this question is to be found in the explanation appended to Section 73 which reads as follows:

**'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 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 consist of the purchase and sale of such shares” In order to resolve the issue before us, the section has to be read in the manner as follows:

“ Explanation : where any part of the business of a company.....) consist 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 consist of the purchase and sale of shares. “

*It would, thus, appear that where an assessee, being the company, besides dealing in other things also deals in purchase and sale of shares of other companies, the assessee shall be deemed to be carrying on a speculation business. The assessee, in the present case, principally is a share broker, as already indicated. The assessee is also in the business of buying and selling of shares where actual delivery was not intended to be taken or given. Therefore, the entire transaction carried out by the assessee, indicated above, was within the umbrella of speculative transaction. There was, as such, no bar in setting off the loss arising out of derivatives from the income arising out of buying and selling of shares. This is what the learned Tribunal has done.”*

**b) Mumbai Tribunal, Special Bench in CIT vs Concord Commercial Pvt Ltd in (2005) 95 ITD 117 (Mum) (SB) , wherein it was held that :**

*“Before considering whether the assessee’s case is hit by the deeming provision of Explanation to Section 73 of the Act, the aggregate of business profit / loss has to be worked out based on the non-speculative profits, either it is from share delivery or from share derivative.”*

**c) Decision of Hon’ble Delhi High Court in the case of CIT vs DLF Commercial Developers Ltd in ITA No. 94/2013 dated 11.7.2013** wherein it was held that the Explanation to Section 73 does not differentiate between derivatives and delivery based shares.

*“11. The stated objective of Section 73-apparent from the tenor of its language is to deny speculative business the benefit of carry forward of losses. Explanation to Section 73(4) has been enacted to clarify beyond any shadow of doubt that share business of certain types or classes of companies are deemed to be speculative. That in another part of the statute, which deals with computation of business income, derivatives are excluded from the definition of speculative transactions, only underlines that such exclusion is limited for the purpose of those provisions or sections. To borrow the Madras High Court’s expression, **“derivatives are assets, whose values are derived from values of underlying shares, which fall squarely within the explanation to Section 73(4). Therefore, it is idle to contend that derivatives do not fall within that provision, when the underlying asset itself does not qualify for the benefit, as they (derivatives-once removed from it and ntirely dependent on stocks and shares, for determination of their value).***

*12. In the light of the above discussion, it is held that the Tribunal erred in law in holding that the assessee was entitled to carry forward its losses; the question framed is answered in favour of the revenue and against the assessee. The appeal is, therefore, allowed; there shall be no order as to costs.”*

5.6. From the provisions of section 43(5)(d) of the Act, it is clear that the definition of 'speculative transaction' as contained in section 43(5) of the Act is only for purpose of sections 28 to 41 of the Act. It does not apply to the other sections of the Act.

5.7 As per the definition of section 43(5) of the Act, trading of shares which is one by taking delivery does not come under the purview of the said section. Similarly, as per clause (d) of section 43(5), derivative transaction in shares is also not speculation transaction as defined in the said section. Therefore, both profit/loss from all share delivery transactions and derivative transactions have the same meaning as far as Section 43(5) of the Act is concerned. It thus follows that both will have the same treatment as far as application of the said section is concerned.

5.8 In view of the aforesaid facts and circumstances and judicial precedents relied upon hereinabove, we hold that the claim of the assessee for set off of loss from share dealing should be allowed from the profits from F & O in share transactions, the character of the income being the same and also hold that before application of the Explanation to section 73, aggregation of the business profit or loss is to be worked out irrespective of the fact whether it is from share delivery transaction or derivative transactions.

We also find that the similar situation arose before this Tribunal in the case of Sungrace Merchandise Pvt. Ltd. in **ITA No. 1454/Kol/2006**, wherein this Tribunal vide its order dated 28.09.2006 at para-12.3 has held as under:-

"now the contention of the Revenue is that Explanation to Sec. 73 would be applicable only if there is a loss in share trading business and this Explanation will not be applicable when there is profit from share trading business. We are unable to accept this contention of the Revenue. Explanation nowhere provides that the deeming provision of trading the share trading business to be speculation business would be applicable only when there is loss. In our opinion, when the conditions given in the Explanation are fulfilled the business of the assessee could be deemed to be speculative business irrespective of the result of the business."

5.9 We also find that both loss as well as profit earned from the transactions in purchase and sale of shares was not attributable to the speculative transactions as defined by Section 43(5) of the Act. while coming to such conclusion we find support from the order of this Tribunal in the case of **Bhartia Stock Broking Pvt. Ltd. vs. ITO** in **ITA No.2058/Kol/2006**, wherein it was held as under:-

"Even otherwise, if a transaction is not treated as speculative transactions it could be at par with a transaction for purchase and sale of shares when actually delivered is taken. Merely because a transaction does not fall within that definition of "speculative transaction" under Section 43(5) would be non ground for non application of the Explanation to **Section 73** the operation to Explanation to **Section 73** is independent of application or non-application at transaction being a speculative transaction or not under section 43(5). In view of the above, we direct the AO to treat the profit from a future and option difference capital market trade difference etc., as profits from speculative business within the meaning of the Explanation to **Section 73**."

From the above analysis of the above two decision of this Tribunal and the decision of the Hon'ble jurisdictional High Court, it is apparent that los in share trading and profit in share difference are both part of the business of purchase and sale of shares to which

*Explanation to Section 73 is applicable and therefore loss in purchase and state of shares quality for a set off against the profit derived from the same business.*

*5.10 Applying the ratio of the above decision, we are of the opinion that even the brokerage income and interest income for margin money are to be considered as integral part of cash share transaction business and come within the purview of Explanation to Section 73 as also held by this Tribunal in the case of MKM Share Broking Services Pvt. Ltd. v. ITO in ITA No. 1507/Kol/2005 dated 19.03.2007 by observing as under:-*

*"We have considered the aforesaid arguments of the both the sides. We find that this purchase and sale of shares with the other stock brokers and the customers constitute one business of purchase and sale of shares. Our view is fortified by the decisions of the Calcutta High Court in the case of CIT vs. Arvind Investment Ltd. (supra) and of the Calcutta Bench of the ITAT in TIO vs. Share & Stock Broking Services Ltd. (supra).*

*As there is only one Terminal one Demat A/c one Dealer one Books of A/c one Finance, one set of staff & other things and also deeming provision of Explanation to Sec. 73 does not provide any bifurcation of business of purchase and sale of shares into two, one for brokerage and the other for own a/c trading, we hold that the entire business of the Company for purchase and sale of shares on its own account or on the account of customers with other stock brokers is one and the same business of purchase and sale of shares and Explanation to Sec. 73 and the entire business of purchase and sale of shares should be taken as "speculative" and should not be bifurcated. Hence, the Assessing Officer is directed to treat the entire transactions of purchase and sale of shares as one business and treat the entire such business as speculative business."*

*We also find that the similar situation arose before this Tribunal in the case of M/s Guinness Securities Ltd. v. DCIT in ITA No. 894-895/Kol/2007 dated 29.06.2007, wherein it was held as under:-*

*"It is apparent that loss in share in trading and profit in share difference or both part of the business of purchase and sale of shares to which Explanation to Sec. 73 is applicable and therefore loss in purchase and sale of shares quality for a set off against the profit derived from the same business. Applying the ratio of the above decision, we are of the opinion, that even the brokerage income and interest income for margin money are to be considered as an integral part of such share transaction business and come within the purview of Explanation to Sec. 73 of the Act.*

*We therefore relying on the above decision of the co-ordinate Bench are of the opinion that the above income from share trading, brokerage, derivative and interest income on margin money should be considered as income derived from purchase and sale of shares and are therefore to be treated as to profit derived from speculative business as per the provision contained under Explanation to Sec. 73. We therefore dismiss the ground of appeal of Revenue".*

6. As the issue involved in the year under consideration as well as all the material facts relevant thereto are similar to that of A.Y. 2009-10, we respectfully follow the decision of the Coordinate Bench of this Tribunal

rendered for A.Y. 2009-10 and uphold the impugned order of the Id. CIT(Appeals) giving relief to the assessee on this issue.

**7. In the result, the appeal of the Revenue is dismissed.**

Order pronounced in the open Court on August 05, 2016.

**Sd/-  
(P.M. Jagtap)  
Accountant Member**

**Kolkata, the 5<sup>th</sup> day of August, 2016**

- Copies to :
- (1) **Income Tax Officer,  
Ward-5(4), Kolkata,  
Aayakar Bhawan, 8<sup>th</sup> Floor, Room No. 15,  
P-7, Chowringhee Square,  
Kolkata-700 069**
  - (2) **M/s. Fortune Interfinance Limited,  
19, British Indian Street, Ground Floor,  
Flat No. 2 & 3,  
Kolkata-700 001**
  - (3) **Commissioner of Income Tax (Appeals)-VI, Kolkata;**
  - (4) **Commissioner of Income Tax-** ,
  - (5) **The Departmental Representative**
  - (6) **Guard File**

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

**Laha/Sr. P.S.**