IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
[Before Shri M. Balaganesh, AM & Shri K. Narasimha Chary, JM]

I.T.A No. 1994/Kol/2013
Assessment Year: 2009-10

Deputy Commissioner of Income-tax, Circle-5, Kolkata. (Appellant)	Vs.	M/s. Raima Equities Pvt. Ltd. (PAN: AABCE2177Q) (Respondent)

Date of hearing: 08.08.2016
Date of pronouncement: 11.08.2016

For the Appellant: Shri Divakar Chakraborty, JCIT, Sr. DR
For the Respondent: ShriAshok Kr. Tulsyan, FCA &
Shri Amit Kumar, ACA

ORDER

Per Shri M. Balaganesh, AM:

This appeal by revenue is arising out of order of CIT(A)-VI, Kolkata vide appeal No. 78/CIT(A)-VI/Cir-5/2011-12/Kol dated 07.01.2013. Assessment was framed by DCIT, Circle-5, Kolkata u/s. 143(3) & 115WE(3) of the Income tax Act, 1961 (hereinafter referred to as the "Act") for AY 2009-10 vide his order dated 28.09.2011.

2. At the outset, we find that there is a delay of 63 days in filing the appeal before us by the revenue which is supported with condonation petition. In view of the concession given by the ld AR for condonation of delay, we hereby condone the delay and admit the appeal of the revenue for adjudication.

3. The only issue to be decided in this appeal is as to whether the ld CITA is justified in treating the share trading loss of Rs. 2,07,38,602/- as normal business loss instead of speculation loss in the facts and circumstances of the case.

4. The brief facts of this issue is that the assessee is a member of the National Stock Exchange (NSE) having its main business as stock broking. In addition to the broking business, it also deals in shares and derivatives for self. During the year, the assessee has incurred loss in delivery based share transactions and profits in the transactions in the

derivatives segment and jobbing. The assessee reported the following income from share transactions as below:-

Income from Brokerage	85,55,143
Profit from derivatives (F&O)	4,11,05,676
Profit from Speculation in share trading (without delivery)	86,34,063
Loss from delivery based transactions in share trading	(2,86,80,084)

The ld AO invoked the provisions of Explanation to Section 73 of the Act and treated the loss incurred on delivery based share trading as speculation loss. The ld AO placed reliance on the decision of the *Hon'ble Bombay High Court in the case of Prasad Agents (P) Ltd vs ITO reported in (2009) 180 Taxman 178 (Bom) wherein their Lordships had observed that the losses incurred by a company carrying on business of purchase and sale of shares shall be deemed to be carrying on speculation business as per Explanation to Section 73 of the I.Tax Act. It was further held that Explanation to Section 73 cannot be read to mean only when there is purchase and sale of shares in course of a financial year but it will cover both, shares which are stock in trade and shares which are traded in course of financial year for purpose of considering loss and profit for that year.*

5. The assessee submitted that the Explanation to Section 73 of the Act is not applicable in the facts of the case as it has not incurred any business loss which it intends to set off or carry forward. The assessee had not incurred any operational loss during the year as is evident from the audited profit and loss account. All the four segments of the business on own account of the assessee considered together resulted in operational profit of Rs. 2,10,59,656/-. It was further submitted that for the purpose of Explanation to Section 73 of the Act, it is necessary to arrive at the result of purchase and sale of shares and derivatives taken together for the following reasons :-

i) The assessee's primary and only business is to deal in shares and securities including derivatives for clients and also for self.

ii) Both purchase & sale of shares by physical delivery and purchase & sale of shares of F&0 (derivative) does not come under speculation as per Sec. 43 (5) of the I. Tax Act .

iii) The transactions of purchase and sale of shares and derivatives are carried out by the broker and payments are settled in a consolidated manner considering the debit/credit in one segment (Purchase & Sales) with the credit/debit with the other segment (derivatives).

iv) The results of both Shares and derivatives are inter dependent for the primary reason, that derivatives are used as a tool for protecting the losses in the stock of shares and securities. The CBDT also for the similar reason has treated the derivative transactions at par with the purchase and sale of shares.

v) From the accounts, it is clear that the loss on purchase and sales of shares is Rs.2,86,80,084/- against that there is a profit on futures and options of Rs. 4,11,05,676/- and profit from speculation transaction of Rs.86,34,063/-. The net result of the profit from shares comes to Rs. 2,10,59,655/-.

As apparently there is no loss on share trading activities, since both trading of shares as well as futures and options are of the same nature so far as Income Tax Act is concerned, assessee's case is not hit by the Explanation to Sec. 73 of the I. Tax Act.

As delivery based share trading as well as trading in F&O (Derivatives) are not hit by the provision of Sec 43(5) of the Income Tax Act, both are non-speculative share trading activities. Hence both are to be considered on the same footing. As per Income Tax Act, both are of the same nature and therefore income from both the transactions is to be clubbed to work out the share trading income of the assessee. Explanation to Sec. 73 of the I. Tax Act will hit only in case of aggregate of share trading is loss. In the case of the assessee, the aggregate of share trading is profit and hence, there is no question of application of Explanation to Sec. 73 of the Act. So far as allocation of expenditure is concerned, nowhere in the Act, it is provided that expenditure should be allocated with respect to such transactions.

The ld AO, however, held that only the loss derived from share trading activity was in the nature of loss from speculation business under Explanation to Sec. 73 of the Act. The ld CITA appreciated the contentions of the assessee and granted relief to the assessee. Aggrieved, the revenue is in appeal before us on the following grounds:-

> *"1. That the Ld. CIT(A) has erred in treating the net loss arising out of share transactions as share trading loss instead of speculation loss.*
>
> *2. That the Ld. CIT(A) has erred in holding the loss of Rs.2,07,38,602/- as share trading loss instead of speculation loss. The said carry forward loss can be set off against speculation income only in subsequent years."*

6. We have heard the rival submissions and perused the materials available on record. We find that the assessee had derived income from the following categories:-

a) Stock Broking

b) Derivative trading – Future and Options (F&O)

c) Speculative trading involving non delivery

d) Trading involving deliveries

We find that the primary and only business of the assessee is to deal in shares and securities including derivatives and work as broker on behalf of clients and earn brokerage thereon. We find that all these activities cumulatively relate to purchase and sale of shares. We find that the assessee has incurred loss in delivery based share transactions and profits in the transactions of derivatives segment , profit from speculation transactions and had also derived brokerage income. The ld AR had argued that both purchase and sale of shares by physical delivery and purchase and sale of shares in derivative (F&O) segment does not come under speculation as per section 43(5) of the Act. The ld DR vehemently supported the order of the ld AO.

6.1. We find that the transactions of purchase and sale of shares and derivatives are carried out by the assessee and payments are settled in a consolidated manner considering the debit / credit in one segment (purchase & sale of shares) with the credit / debit with the other segment (derivatives). The results of both shares and derivatives are inter dependent for the primary reason, that derivatives are used as a tool for protecting the losses in the stock of shares and securities. The CBDT also for the similarly reason has treated the derivative transactions at part with the purchase and sale of shares. We find that the arguments of the ld AR are acceptable as the capital market operations of the assessee consists of two distinct and separate parts. The first part of his business relates to trading in shares. The second part of his business relates to F&O operations. The assessee has maintained separate trading accounts for this purpose. The ld AO invoked Explanation to Section 73 of the act to the first part, namely , dealing in shares. Thereby the loss arising from such operation was treated by him as loss from speculation. He also applied clause (d) of proviso to section 43(5) to the F & O operations (derivatives) and treated the profits from such operations as normal business profits. Thus, he did not permit the set off of the loss from dealing in shares with profits from operations in Futures. The profits from F&O in

shares operations amounted to Rs. 4,11,05,676/- and loss from trading in shares amounted to Rs. 2,86,80,084/-.

6.2. We are in agreement with the arguments advanced by the ld AR that in the case of a stock broker, there is a common terminal, one membership of the stock exchange, common bank account and the common work force with the help of which the business of proprietary trading as well as trading on behalf of the clients are conducted. Therefore it could be safely concluded that the entire business of the stock broker constituted as one single composite indivisible business and therefore income or loss cannot be artificially bifurcated. The assessee had maintained one single indivisible and composite business establishment for carrying on the business transactions involving purchase & sale of shares & securities. Even though for the purpose of accounting different nomenclatures and segment heads of accounts were used, yet the underlying transactions giving rise to income chargeable under the head profits & gains of business involved purchase & sale of shares. In the impugned order the AO observed that in the activity of purchase & sale of shares (involving delivery of shares) the assessee had incurred loss. Entire such loss was treated by the AO to be loss incurred in "speculation business" within the meaning of Explanation to Sec 73. It is not in dispute that the assessee conducted transactions in shares both in cash segment and futures segment. The ld AR argued that as per the prudent practice followed by share traders, the trading bets are hedged by the traders by taking contrary or opposite positions in cash and future segments. By simultaneously executing the trades in the shares/securities of the same company in cash and futures segments, a trader hedges his trading risks by taking opposite position in the two market segments. However the transaction in cash and futures segments are intrinsically related to each other because the share / security transacted in cash segment forms or constitutes underlying security for the transaction carried out in the futures market. The transactions in the futures segment are carried out by the traders as "hedge" for the risks taken in the cash segment. It is for this reason it was claimed that the assessee's trading transactions and derivative transactions could not be considered in isolation of each other. It was submitted that for tax purposes the character of trading transactions in both cash and futures segments should be considered cumulatively. Once the income/loss earned in cash and futures segment is considered on aggregate basis, the Explanation to Sec 73 will have no application to the assessee's case. The ld AR further submitted that in respect of share broking activity, the underlying transactions giving rise to income involved purchase & sale

of shares. We find that Explanation to Sec 73 of the I T Act is applicable not to income or loss. The said Explanation defines the terms "speculation business" to mean that part of the assessee's business which consists of purchase & sale of shares. Since the assessee's business of stock broking consisted "purchase & sales of shares", the income arising from the said activity was liable to be considered as profit or loss arising from deemed speculative business and therefore the income arising from stock broking was also integral part of assessee's deemed speculative business entitled for set off against loss arising deemed speculation business. We find that amendment has been brought in the Finance Act 2005 w.e.f. 1.4.2006 wherein transaction in respect of trading in derivatives carried out in a recognized stock exchange shall not be treated as speculative transaction. The *Co-ordinate Bench of this Tribunal in the case of ITO vs Arena Textiles & Industries Ltd in ITA No. 1019/Kol/2011 dated 29.12.2011* has held that the transaction done by delivery as well as the transaction of derivative of shares , profit /loss is not hit by section 43(5) of the act and therefore held that the aggregation of share trading loss and profit from derivative transactions should be done before the application of the Explanation to Section 73 of the Act. We also find that the *Special Bench of Mumbai Tribunal in the case of CIT vs Concord Commercial Pvt Ltd reported in (2005) 95 ITD 117 (Mum) (SB)* had held that before making application of Explanation to Section 73 of the Act, set off of all business income should be allowed. The ld AR argued that the income from share trading, speculative transactions and derivative transactions (F&O) are to be held cumulatively as speculative transactions and the profit and loss to be adjusted among those heads of income. From the analysis of above decisions, it could be safely concluded that for an assessee who is in the business of shares , the net profit is to be determined by considering the derivative and non derivative transactions as different modes of carrying out the said business which is one and inseparable. We hold that before Explanation to Section 73 of the Act is applied, the share trading loss and profit from derivative transactions are to be aggregated as they are of the same nature. Hence the share trading loss from delivery based transactions are to be set off from the profit from derivative transactions. Once this is done, the resultant figure is only surplus and hence in the absence of any loss, the application of Explanation to Section 73 of the Act does not come into play at all.

6.3. We find that similar issue was also adjudicated by the *Hon'ble Delhi High Court in the case of CIT vs DLF Commercial Developers Ltd reported in (2013) 35 taxmann.com*

280 (Del HC) wherein it was held that the Explanation to Section 73 does not differentiate between derivatives and delivery based shares. The Hon'ble High Court noted that the derivatives were assets whose values were derived from the underlying assets. Derivatives were transacted where the underlying assets were shares of other bodies corporate. The Hon'ble High Court held that if the loss incurred in purchase and sale of underlying assets was hit by provisions of Explanation to Section 73 , then by equal measure, loss incurred in the derivative transactions where shares constituted the underlying assets, were equally hit by the Explanation to Section 73. The High Court accordingly held that loss incurred by the assessee in derivative transaction was liable to be assessed as loss of deemed speculation business even though for the purpose of section 43(5) the transactions in derivatives were not 'speculative transactions'.

At this stage it is pertinent to note that section 73 provides that the speculation business loss can be set off only against profit earned from any other speculation business. A business which falls within the scope of 'speculation business' under the Explanation to Section 73, remains so, irrespective of the fact whether the assessee incurs loss or earns income in such business. In the circumstances, if the loss incurred in derivatives is held by the Delhi High Court to be loss in speculation business then by equal measure, profit derived from derivative transactions would constitute profit derived from 'speculation business'. Accordingly, the assessee is entitled to set off the loss incurred on share trading business with the profit earned from derivative transactions.

6.3.1. From the aforesaid findings and the ratio laid down in the aforesaid judicial precedents relied upon, it could be safely concluded that the provisions of Explanation to Section 73 of the Act would not be applicable in the instant case in the absence of speculation loss if consolidated business income is considered.

6.4. The ld AR also made an alternative argument that the assessee's case falls under the second limb of the exception to Explanation to Section 73 of the Act by stating that the principal business of the assessee is dealing in shares. He argued that though this amendment was brought in by the Finance (No. 2) Act, 2014 w.e.f. 1.4.2015, he said that the same is to be construed as retrospective in operation. In this regard, we hold that it is not in dispute that the principal business of the assessee is trading in shares. We find that the amendment was brought by Finance Act 2014 w.e.f. 1.4.2015 by insertion of the

expression – principal business of which is the business of '**trading in shares'** or banking ……

6.4.1. It would be pertinent to refer to the recommendations of Wanchoo Committee Report of December 1971 pursuant to which the Explanation to Section 73 of the Act was inserted by the Taxation Laws (Amendment) Act, 1975 w.e.f. 01.04.1977 , the relevant portion of which is extracted hereunder:-

> *"A tax avoidance device often resorted to by business houses controlling groups of companies is manipulation of results from dealings in shares of the companies controlled by them. In our opinion, such manipulation in share dealings for the purpose of tax avoidance can be checked effectively if the results of dealings in shares by such companies are treated for tax purposes in a manner analogous to speculation. No doubt, companies whose main business activities centre around investment in shares will have to be left out. Accordingly, we recommend that the results of dealings in shares by companies, other than investment, banking and finance companies, should be treated in a manner analogous to speculation business."*

6.4.2. We find that in order to achieve the real objective of curbing tax avoidance methods resorted to by business houses controlling their group companies, the legislature by inserting an amendment to Explanation to Section 73 of the act by Finance Act 2014 , has extended the exception carved out in the Explanation by putting all the companies, the principal business of which is the business of trading in shares into the exception. We find that the amendment brought in by the Finance Act 2014 in Explanation to Section 73 of the Act appears to be made in order to clarify the real intention behind the insertion thereof, by removing the obvious hardship caused to various assessees whose main business in trading in shares. The amendment has removed the anamoly and brought the ambit of the Explanation to Section 73 of the Act in line with the intention of the legislature by placing the companies whose principal business is trading in shares as part of the exception to Explanation to Section 73 of the Act, because such companies were not the companies for whom the Explanation was inserted.

6.4.3. We find that though this amendment is made effective only from Asst Year 2015-16 onwards, the real intention behind introduction of this amendment, in our opinion, is curative in nature. In our considered opinion, the amendment, if not held retrospective, would result in hardship to the assessee in the following manner:-

(a) The assessee engaged in trading of shares would be treated as speculation business upto Asst Year 2014-15. That assessee might be having losses eligible to be carried forward under the head 'speculation business'.

(b) The provisions of section 73 of the Act provides that the brought forward speculation loss could be set off only against speculation profits.

(c) Pursuant to the amendment by Finance Act 2014 supra, the loss derived from the principal business of trading in shares would not be construed as speculative in nature. The logical corollary is profit derived thereon also would be treated only as normal business profits and not speculative profits.

(d) In this situation, the brought forward speculation loss could never be eligible to set off against the profits when there is absolutely no change in the business activities of the assessee (i.e trading in shares as its principal business) . That loss would get lapsed for no fault of the assessee thereby creating genuine hardship to the assessee. We feel that the insertion in Explanation to Section 73 of the Act by the Finance Act 2014 should be looked into from this perspective which would create genuine hardship to the assesese if not held to be curative in nature. Hence we hold that the said amendment should be given retrospective effect only. In our considered opinion, the amendment would not serve its object in the instant case unless it is construed retrospective in operation.

6.4.4. We draw support from the decision of the *Hon'ble Apex Court in the case of CIT vs Alom Extrusions Ltd reported in 319 ITR 306 (SC)* wherein their Lordships were considering the amendment made by Finance Act 2003 by omitting the second proviso to section 43B of the Act w.e.f. 01.04.2004 and bringing about uniformity in the first proviso by equating tax, duty, cess and fees with contribution to welfare funds (viz provident fund etc) . The Hon'ble Apex Court held that the aforesaid amendment in section 43B of the Act by Finance Act 2003 is curative in nature and would therefore apply retrospectively w.e.f. 01.04.1988.

6.4.5. In the case of *Allied Motors Pvt Ltd vs CIT reported in 224 ITR 677 (SC),* the question before the Hon'ble Apex Court was whether sales tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the

relevant sales tax law should be disallowed u/s 43B of the Act. The ITO disallowed the deduction of sales tax collected by the assessee for the last quarter of the accounting year as the same was paid in the subsequent year. The aforesaid difficulty was cured by the insertion of the first proviso w.e.f. 01.04.1988. The Hon'ble Apex Court held that when a proviso is inserted to remedy unintended consequences and to make the provision workable, the proviso which supplies an obvious omission in the section and which is read to be read into the section to give it a reasonable interpretation, it could be read as retrospective in operation to give effect to the section as a whole. The Hon'ble Apex Court held that the first proviso to section 43B of the Act was curative in nature and hence retrospective in operation, i.e. w.e.f. 01.04.1984 from when the section was brought on the statute.

6.4.6. The Hon'ble Apex Court in the case of *CIT vs J.H.Gotla reported in (1985) 156 ITR 323 (SC)* at page 339 and 340 had observed as under:-

> *"In the case of K P Varghese vs ITO (1981) 131 ITR 597 , this court emphasized that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided.*
>
> *Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the legislature, the court might modify the language used by the legislature so as to achieve the intention of the legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by Judge Learned Hand that one should not make a fortress out of the dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning.*
>
> *We have noted the object of s.16(3) of the Act which has to be read in conjunction with s.24(2) in this case for the present purpose. If the purpose of a particular provision is easily discernible from the whole of the scheme of the Act which in this case, is to counteract the effect of transfer of assets so far as computation of income of the assessee is concerned, then bearing that purpose in mind, we should find out the intention from the language used by the legislature and if strict literal construction leads to an absurd result, i.e., result not intended to be subserved by the object of the legislation found in the manner indicated before, then another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers , attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. Furthermore, in the instant case, we are dealing with an artificial liability created for counteracting the effect only of attempts by the assessee to reduce tax liability by transfer. It has also been noted how for various purposes the business from which profit is included or loss is set off is treated in various situations as the assessee's income. The scheme of the Act as worked out has been noted before."*

6.5. Respectfully following the judicial precedents relied upon hereinabove, Wanchoo Committee report of December 1971 and our findings given in Para 6.4.3 above , we hold

that the amendment brought in by the Finance Act 2014 should be construed as curative in nature and hence to be given retrospective applicability. It is not in dispute that the principal business of the assessee in the instant case is trading in shares. If the amendment supra is given retrospective effect, then the same would automatically fall under the exception provided in the Explanation to Section 73 of the Act and accordingly the loss incurred on delivery based share transactions should not be construed as speculation loss. Hence the grounds raised by the revenue in this regard are dismissed.

7. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 11.08.2016.

Sd/-	Sd/-
(K. Narasimha Chary)	(M. Balaganesh)
Judicial Member	Accountant Member

Dated : 11th August, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – DCIT, Circle-5, Kolkata.
2. Respondent –M/s. Raima Equities Pvt. Ltd., 1, R. N. Mukjherjee Road, Martin Burn Building, 1st floor, Kolkata-700 001..
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.