

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction  
[Income Tax]

ORIGINAL SIDE

GA No. 3481 of 2013  
ITAT No. 215 of 2013

COMMISSIONER OF INCOME TAX, KOL III

Versus

M/S BALJIT SECURITIES PVT. LTD. .

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE SUDIP AHLUWALIA

Date : 12th March, 2014.

For Appellant : Mr. P. K. Bhowmick, Advocate

For Respondent : Mr. J. P. Khaitan, Senior Advocate with  
Ms. A. Banerjee, Mr. R.L. Mitra and  
Ms. P. Dhar, Advocates.

The Court : The appeal is directed against a judgment and order dated 19<sup>th</sup> June, 2013 by which the learned Tribunal expressed the following views:

“Under these circumstances, we are of the view that the assessee is entitled to the setting off of the loss on account of assessee’s transactions in respect of derivatives and the day trading of shares against its profits and gains from the purchase and sale of shares.”

The assessee basically is a share broker. The assessee also deals in buying and selling of shares for himself. The assessee is also dealing in derivatives. Dealing in derivatives has been excluded from the ambit of speculative transactions with effect from assessment year 2006-07. We are concerned with the assessment year 2005-06. The question arose whether the assessee was entitled to set off the loss arising out of business in derivatives against the income arising out of purchase and sale of shares. The question basically was as regards the meaning of the expression “speculative transaction”. The definition of the term “speculative transaction” appearing from Section 43(5) of the Act is as follows:

“(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 –

- (a) A contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of the contracts for actual delivery of goods manufactured by him or merchandise sold by him; or
- (b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or
- (c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of

jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; [or]

(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;”

Clause (d) of Section 43 (5) became effective with effect from 1<sup>st</sup> April, 2006. Therefore, prior to 1<sup>st</sup> 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 arose 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 consists 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 (.....  
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.....  
.....) 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.”*

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 for self where actual delivery is taken and given and also in 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.

The appeal preferred by the revenue is without any merit and is, therefore, dismissed.

(GIRISH CHANDRA GUPTA, J.)

(SUDIP AHLUWALIA, J.)

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