

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

सर्वश्री विजय पाल राव,,न्यायिक सदस्य एवं नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य के समक्ष

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND

SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

आयकर अपील सं/ I.T.A. No.2138/Mum/2010

(निर्धारण वर्ष / Assessment Year : 2006-07

The DCIT, Range 9(1), Aayakar Bhavan, Mumbai-400 020	बनाम/ Vs.	M/s. Envision Investment & Finance Pvt. Ltd., 64/F, Tibra House, Ramkrishna Mission Marg, Santacruz (W), Mumbai-400 054
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C.O. No. 10/Mum/2011

(Arising out of I.T.A. No.2138/Mum/2010

(निर्धारण वर्ष / Assessment Year : 2006-07

M/s. Envision Investment & Finance Pvt. Ltd., 64/F, Tibra House, Ramkrishna Mission Marg, Santacruz (W), Mumbai-400 054	बनाम/ Vs.	The DCIT, Range 9(1), Aayakar Bhavan, Mumbai-400 020
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स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACE 2990G

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by:		Shri Randhir Kumar Gupta
प्रत्यर्थी की ओर से/Respondent by:		Shri Vijay Mehta

सुनवाई की तारीख / Date of Hearing :03.08.2015

घोषणा की तारीख /Date of Pronouncement :07.08.2015

आदेश / ORDER

PER N.K. BILLAIYA, AM:

These are appeal by the Revenue and cross objection by the assessee against the very same order of the Ld. CIT(A)-19, Mumbai dated 14.12. 2009` pertaining to Assessment year 2006-07. The appeal and the cross objection were heard together and are disposed of by this common order for the sake of convenience.

ITA No. 2138/M/2010 – Revenue’s appeal

2. The substantive grievance of the Revenue read as under:

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that provisions of section 43(5), clause (d) is applicable from 25.01.2006 being the date of notification of Bombay Stock Exchange (BSE) & National Stock exchange(NSE) as recognized stock exchange, ignoring the fact that the provisions of section 43(5), clause (d) is inserted w.e.f. 01.04.2006.*
2. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to allow set off of loss from trading in shares against profit earned upto 25.01.2006 without appreciating the fact that provisions of section, 43(5)(d) was inserted w.e.f. 01.04.2006 and hence set off of loss from shares against the income, is not allowable.*
3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to allow credit of Security Transaction Tax(STT) in computing rebate u/s.88E without appreciating the fact that the assessee’s income/loss from share transactions was held as speculative within the meaning of explanation to sub-section 4 of section 73 of the Income-tax Act, 1961.”*

3. Briefly stated the facts of the case are that the assessee is dealing in share and security. While scrutinizing the return of income, the

Assessing Officer noticed that the assessee has incurred loss from trading in securities /shares as under:

Profit on sale of shares	Rs. 24,25,505/-
Loss on fall in value of shares	<u>Rs. (92,46,676)</u>
Net figure	(-) Rs. 68,21,171/-

4. The assessee was asked to explain as to why this loss should not be treated as speculation loss invoking the provision of Explanation of Sec. 73 of the I.T. Act, 1961. The assessee filed a detailed reply which read as under:

“Application of provision of explanation to Sec. 73 in respect of fall in value of closing stock by Rs. 92,46,676/-.

From the perusal of the Profit & Loss a/c. Particularly schedule 7, your honour would find that following are the income from trading in securities, the break up in as under:

(a) Profit on sale of shares (As per Annexure 1)	Rs. 24,25,505/-
(b) Profit on sale of Derivative Future	Rs. 70,28,88,420/-
(c) Loss on fall in value of Share	<u>Rs. (92,46,676)/-</u>
Net Income	Rs. 69,60,67,249/-

In this regard, your honour proposed to treat Rs.92,46,676/- as speculation loss invoking the provision of explanation to section 73 of I.T. Act, 1961.

Our Submission

We may refer the provision of section 43(5), proviso (d), which is inserted by Finance Act, 2005, which has excluded derivative transaction from the definition of speculation.

The relevant part of section 43(5), proviso (d) is reproduced herein below.

(d)“ An eligible transaction in respect of trading in derivative referred to in clause (ac) of section 2 of securities contract (Regulation) Act 1956, (42 of 1956) carried out, in

a recognized Stock Exchange, shall not be deemed is to be a speculation Transaction"

From the perusal of above provision, we submit that derivative transaction shall not be treated as speculative, provided, the same are done on recognized Stock Exchange.

We may further submit that National Stock Exchange & Bombay Stock Exchange are notified for the purpose of section 43(5) proviso (d), only from publication of notification.

We may bring to your kind attention that the notification No..2 of 2006 Dt. 25/01/2006 is notified on 25/01/2006, recognizing both the exchanges, for the purpose of s.43(5), proviso(d) a copy notification is enclosed herewith.

In otherwords, the Profit /Loss on derivative transaction up to 24/01/2006 is speculative Profit/loss.

We submit that in F&O (Derivative) transaction, up to 25/01/2006, there is Profit of Rs.49,18,10,934/- where is nothing but speculative transaction. We submit that the profit up to 25/01/2006, is speculation income and the loss due to fall in value of share, i.e. speculation, is to be set off against profit of derivative transaction - vide section 73 of I.T. Act. 1961.

Without prejudice to above submission, we may also submit that as stated there in above in Para 1, there is also profit on sale of shares, of Rs.24,25,505/- which is also in nature of speculation profit, which has to be set off against the loss in fall in value of shares:"

5. After considering the detailed submission made by the assessee, the AO observed that the NSE and BSE were notified w.e.f. 24.01.2006 vide notification No. 2 of 2006 for the purpose of S. 43(5) proviso(d), according to which the profit/loss on derivative transaction upto 24.1.2006 is to be treated as speculative profit/loss therefore, the proviso(d) to Sec. 43(5) is inserted w.e.f. 1.4.2006 and is applicable from A.Y. 2007-08. Since the assessee's case is for A.Y. 2006-07, therefore, is not covered by this proviso. The AO further declined to entertain the

claim of the assessee to set off loss against profit on sale of shares as it was not claimed by way of a revised return. The AO further proceeded by considering the explanation to Sec. 73 of the Act and held that the assessee is carrying on business of trading in shares and does not fall in exceptions provided in Explanation to Sec. 73 of the Act therefore, the entire loss claimed by the assessee relating to share transactions as well as loss resulting on valuation of closing stock is treated as Speculation loss. The AO accordingly treated Rs. 68,21,171/- as speculative loss .

5.1. The AO further denied the rebate claimed u/s. 88E of the Act holding that assessee's income has been assessed under the head "Speculative income/loss" therefore the assessee is not entitled for rebate u/s. 88E of the Act.

6. Aggrieved by this, the assessee carried the matter before the Ld. CIT(A) and reiterated what has been stated/submitted during the course of the assessment proceedings. After considering the facts and the submissions qua the impugned notification, the Ld. CIT(A) observed as under:

“ However, the fact remains that until the publication of Notification No. 2/2006 dated 25th January, 2006 the National Stock Exchange and Bombay Stock Exchange, Mumbai were not recognized for the purpose of S. 43(5) proviso (d) and hence the trading through the said Exchanges upto 25.1.2006 are in the nature of speculation. A notification comes into effect from the date of its notification. Moreover, the Act has been amended w.e.f. 1.4.2006 and hence is applicable to A.Y. 2006-07 and onwards. Hence it is held that the profit upto 25.1.2006 is in the nature of speculation and is to be set off against loss incurred in trading in shares. The AO will verify and compute the profit earned upto 25.1.2006 and to that extent the appellant shall be allowed set off against loss from trading in shares. The AO will verify and compute the profit earned upto 25.1.2006 and to that extent the

appellant shall be allowed set off against loss from trading in shares.”

7. In so far as claim of rebate u/s. 88E is concerned, the Ld. CIT(A) held that since the income from trading in securities is taxable under the head business be it speculation business or not, the assessee is entitled for the claim of rebate u/s. 88E and accordingly directed the AO to allow the rebate.

8. Aggrieved by this, the Revenue is before us.

9. The Ld. Departmental Representative supported the findings of the AO.

10. Per contra, the Ld. Counsel for the assessee vehemently submitted that the grounds of appeal taken by the Revenue are contrary to the findings of the AO, which means that the department is trying to improve upon the findings of the AO, which is against the settled decision of law. Referring to the decision of the Tribunal in the case of ACIT Vs Ms. Aishwarya K. Rai, 127 ITD 204, the Ld. Counsel pointed out the observations of the Tribunal, wherein the Tribunal has held as under:

“ It is no doubt true that the Ld. DR can make any arguments in support of the stand taken by the Assessing Officer but there are certain inherent limits of his arguments inasmuch as he cannot transgress the boundaries made by the AO. In other words, the Ld. DR can support the action of the AO with any arguments, he can rely on any case law in support of the Assessing Officer’s case, but he cannot make out altogether a new case which was not the subject matter of consideration by the Assessing Officer or the Learned First Appellate authority.”

11. The Ld. Counsel pointed out that a similar view was taken by the Tribunal, Pune Bench in the case of ITO Vs Anant Y. Chavan 126 TTJ 984. Referring to the Special Bench decision of the Tribunal, Mumbai in the case of Mahindra & Mahindra 313 ITR (Trib.) 263 particular page 322 the Ld. Counsel pointed out to the observations of the Special Bench which read as under:

“In our considered opinion, the Ld. Departmental Representative has no jurisdiction to go beyond the order passed by the Assessing Officer. He cannot raise any point different from that considered by the Assessing Officer or the Commissioner of Income-tax (Appeals). His scope of arguments is confined to supporting or defending the impugned order. He cannot set up an altogether different case.”

11.1. These submissions of the Ld. AR, if read in the light of the decision of the Co-ordinate benches, we find that in the assessment order the AO has categorically held that the case of the assessee is for A.Y. 2006-07 and proviso(d) to Sec. 43(5) is applicable from 2007-08. This finding of the AO has been set aside by the Ld. CIT(A) by holding that the proviso is w.e.f. 1.4.2006, therefore, in our considered opinion by ground No. 1 taken by the Revenue, the Revenue wants to improve upon the assessment order which is not permissible as discussed elsewhere.

11.2. Having said all that on facts of the case, the Ld. Counsel heavily relied upon the decision of the Hon'ble Delhi High Court in the case of DLF Commercial Developers Ltd. 261 CTR (Del) 127 and stated that the loss even if it is treated as speculative loss has to be set off against the gains.

11.3. We have carefully perused the facts of the case in the light of the decision of the Hon'ble High Court of Delhi (supra) wherein in respect of the applicability of explanation to Sec. 73 vis-à-vis derivative transaction u/s. 43(5) of the Act, the Hon'ble High Court has held as under:

"Section 43 defines, for the purpose of Sections 28 to 41, certain terms. These latter provisions fall in Chapter IV, in Section D, which deal with computation of business income. The said provisions provide for matters relating to computation of such income, rent taxes, insurance of buildings, repairs of plant and machinery, depreciation, reserves for shipping business, rehabilitation fund, expenditure on certain eligible objects or schemes, deductions, amounts not deductible, profits chargeable to tax, etc. The assessee is no doubt correct in contending that the only definition of derivatives is to be found in Section 43 (5); yet the Court cannot ignore or overlook that the definition ' to the extent it excludes such transactions from the mischief of the expression "speculative transactions" is confined in its application. Parliamentary intendment that such transactions are also excluded from the mischief of Explanation to Section 73 (4), however, is not borne out. It is no doubt, tempting to hold that since the expression "derivatives" is defined only in Section 43 (5) and since it excludes such transactions from the odium of speculative transactions, and further that since that has not been excluded from Section 73, yet, the Court would be doing violence to Parliamentary intendment. This is because a definition enacted for only a restricted purpose or objective should not be applied to achieve other ends or purposes. Doing so would be contrary to the statute. Thus contextual application of a definition or term is stressed; wherever the context and setting of a provision indicates an intention that an expression defined in some other place in the enactment, cannot be applied, that intent prevails, regardless of whether standard exclusionary terms (such as "unless the context otherwise requires") are used - Vanguard Fire & General Insurance Co. Ltd., v. Fraser & Ross & Anr AIR 1960 SC 971 and N.K. Jain & Ors Vs C.K. Shah & Ors. AIR 1991 SC 1289 applied."

11.4. The following observation of the Hon'ble Delhi High Court is also worth mentioning.

" The stated objective of Section 73- apparent from the tenor of its language is to deny speculative businesses 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 assets"; in the present case, by all accounts the derivatives are based on stocks and 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 entirely dependent on stocks and shares, for determination of their value).Tribunal erred in law in holding that the assessee was entitled to carry forward its losses."

As no distinguishing decision has been brought on record by the Ld. DR in favour of the Revenue, respectfully following the decision of the Hon'ble High Court of Delhi and for the sake of completeness of adjudication, we direct the AO to allow the set off of loss against the gains. Ground No. 1 & 2 are accordingly dismissed.

12. Ground No. 3 relates to the allowance of rebate u/s. 88E of the Act.

13. A perusal of the assessment order shows that the claim has been denied merely because the AO has treated the transaction as speculative loss. In our considered opinion, this cannot be any reason for declining the claim of rebate u/s. 88E of the Act as the claim is allowable from the business income be it speculative or not. We, therefore, decline to interfere with the findings of the Ld. CIT(A).

14. In the result, the appeal filed by the Revenue is dismissed.

C.O. No.10/M/2011

15. Cross Objection of the assessee was not pressed by the Ld. Counsel for the assessee therefore it dismissed as not pressed.

Order pronounced in the open court on 7th August, 2015

Sd/-
(VIJAY PAL RAO)

Sd/-
(N.K. BILLAIYA)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :7th August , 2015

व.नि.स./ RJ , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई
/ DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai