

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, J, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES “J”, MUMBAI**

**Before Shri C.N. Prasad, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.4053/Mum/2013
Assessment Year: 2009-10**

J.G.A Shah Share Brokers P. Ltd. 24B, 3 rd Floor, Rajabhadur Manison, Hamam Street, Fort Mumbai- 400001	बनाम/ Vs.	DCIT CIR 4(3) Aayakar Bhavan, M.K. Road, Mumbai-400020
(Assessee)		(Revenue)
P.A. No.AAACJ3477H		

निर्धारिती की ओर से / Assessee by	Shri Sanjay Shah (AR)
राजस्व की ओर से / Revenue by	Shri Ajay, (DR)

सुनवाई की तारीख / Date of Hearing :	22/02/2016
आदेश की तारीख / Date of Order:	16/03/2016

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Assessee against the order of Ld. Commissioner of Income Tax (Appeals), Mumbai-8 {(in short ‘CIT(A)}}, order dated 18.03.2013 passed against assessment order u/s. 143(3) of the Act, dated 23.12.2011 for the Assessment Year 2009-10 on the following grounds:

“1. Learned Commissioner of Income Tax(Appeals) erred in confirming the order of Learned Assessing officer of applying the provisions of Explanation to Section 73 to alleged share trading activity ,thereby treating loss on alleged share trading activity to the tune of Rs.5694166/- as Speculation loss which is not allowed to be set off against Business Income of the Appellant.

Appellant submits that in view of facts and circumstances of the case as well as in law the said treatment of loss of Rs.5694166/- as loss from Speculation Business ,by invoking Explanation to Section 73, is bad in law and the said loss ought to be treated as normal business loss other than loss from Speculation Business of the Appellant.

2. Without Prejudice to the above, Learned Commissioner of Income Tax(Appeals) erred in confirming the order of the Learned Assessing officer in respect of segregating results of composite Arbitradge Business of the Appellant into 2 segments ,namely, Capital Market Segment and Futures and Options Segment , so as to derive loss in Capital Segment to the tune of Rs. 5694166/-separately thereby applying provisions of Explanation to Section 73 of Income Tax Act,1961 only on loss on Capital Market Segment ignoring profit from Future and Option Segment for the purpose of applying Explanation to Section 73 of Income Tax Act,1961 in an arbitrary manner.

Appellant submits in view of the facts and circumstances of the case as well as in law net result of Capital Market segment and Future & Option segment sprang out of composite single business called "Arbitrage Business" and thus, if at all Explanation to Section 73 has to be applied, the same ought to have been applied on results of entire Composite single Business called "Arbitrage Business" instead of results of only Capital Market Segment as carried out by Learned Assessing Officer and confirmed by Learned CIT(appeals).

3. Learned Commissioner of Income Tax (Appeals) erred in confirming the order of the Learned Assessing officer in apportioning a sum of Rs.12 Lakhs as direct expenses and a sum of Rs. 2 lakhs as indirect expenses for the purpose of computing loss in Capital Segment.

Appellant submits that in view of facts and circumstances of the case as well as in law the said apportionment of 12 lakhs as direct expenses and as sum of Rs.2 Lakhs as indirect Expenses to Capital Market Segment thereby enhancing loss from Capital Market segment is bad in law and deserves to be quashed.

Appellant accordingly submits that in view of the facts and circumstances of the case as well as in law no part of direct expenses or indirect expenses ought to have been apportioned to Capital Market segment for the purpose of computing loss from Capital Market Segment.

4. Learned Commissioner of Income Tax (Appeals) erred in confirming the order of learned Assessing officer

holding that disallowance u/s 14A has to be made in the assessment of the Appellant.

Appellant submits that in view of the facts and circumstances of the case as well as in law no disallowance u/s 14A of the Act ought to have been made and accordingly entire disallowance u/s 14A may please be deleted.

5. Learned Commissioner of Income Tax(Appeals) erred in confirming the order of the Learned Assessing officer in applying Rule 8D of Income Tax Rules, 1962 for the purpose of computing Disallowance u/s 14A of the Income Tax Act, 1961.

Appellant submits that in view of the facts and circumstances of the case as well as in law , disallowance u/s 14A / if at all applicable, has to be made in a reasonable manner and it is not mandatory to apply Rule 8D for the purpose of computing Disallowance u/s 14A of the Act.”

2. During the course of hearing, arguments were made by Shri Sanjay Shah, Authorised Representative (AR) on behalf of the Assessee and by Shri Ajay, Departmental Representative (DR) on behalf of the Revenue.

3. Ground Nos. 1 & 2: In these grounds the issue raised by the assessee is with regard to action of Ld. CIT(A) in treating part of the transactions of the business of the assessee as

speculative in view of Explanation to section 73 of the Act, and the other part as non-speculative, in view of u/s 43(5)(c).

3.1. The brief facts as borne out from the orders of the lower authorities are that during the year under consideration. The assessee company was engaged in the business of Stock Broking, borrowing moneys, depository participants and investment in shares and securities. The assessee was a member of two recognized Stock Exchange –BSE & NSE. Both Exchanges had two separate segments i.e. Capital Market Segment and Derivative Segment. In Capital market segment, assessee made trading of equity shares whereas in derivative segment, future and options. It was noted by the AO that a future contract does not result in actual delivery. The AO invoked explanation to section 73 of the Act and gave show cause to the assessee why loss in share trading should not be treated as speculative loss. In reply, the assessee responded that the assessee had carried out Arbitrage/Jobbing activities and the income of the assessee was not covered under explanation to section 73 but it was covered u/s 43(5)(c) of the Act and therefore, it was non-speculative. The AO did not accept the reply of the assessee and held that the transactions done by the assessee which were not covered u/s 43(5) shall be hit by explanation to section 73 and shall be treated as speculative in nature and accordingly he disallowed a sum of Rs.56,94,166/- as deemed speculative loss, applying explanation to section 73.

3.2. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) wherein detailed submission were filed. It was *inter-alia* submitted that transactions of the assessee cannot be broken into two parts. It was submitted that 'Future & Option segment' and share trading in capital segment (i.e. position in cash) are one leg of his share transactions and therefore these cannot be broken into different parts so as to give different treatment u/s 43(5) and section 73. It was further submitted that derivative transactions cannot be covered under the explanation to section 73 as there were specific provisions u/s 43(5) and on the other hand, arbitrage transactions done by the assessee should also be considered as non-speculative which have been assessed as business income. It was submitted by the assessee that purchase in cash market is accompanied by simultaneous sale in F & O market or vice versa. But Ld. CIT(A) did not accept the submission of the assessee and upheld the action of the AO. It was held by him that section 43(5)(d) and deeming fiction created by explanation to section 73 operate into two different directions. Both have to play their respective roles. Accordingly derivative transactions were covered by 43(5)(d) and therefore, could not be held as speculative transactions. On the other hand, share trading done in the cash market is hit by explanation to section 73, and therefore, any loss/profit arising there from shall be deemed to be speculative, and could only be set off against income of subsequent years. Thus, he dismissed the appeal of the assessee upholding the action of the AO.

3.3. Being aggrieved, the assessee filed an appeal before the Tribunal. Ld. Counsel of the assessee reiterated the arguments made before Ld. CIT(A) and fairly submitted that either entire transactions of the company will be speculative or entire transactions should be held to be non-speculative. Later on, it was submitted that since case of the assessee is hit by explanation to section 73, therefore, entire transactions of the assessee should be treated as speculative transactions. In support of his proposition, he relied upon various judgments. He submitted that case of the assessee was covered with the judgment of the coordinate Bench in the case of ITO v. Snowtex Investment Ltd. 129 DTR 203 (ITAT Kolkata). He further relied upon following judgment in support of his proposition that all the transactions have to be clubbed together before applying explanation to section 73:

1. CIT v. DLF Commercial Developers Ltd. 261 CTR 127(Cal)
2. CIT v. Baljit Securities P. Ltd. 275 CTR 335 (Cal)
3. ACIT v. Concord Commercials (P) Ltd. 95 ITD 117
4. Majestic Exports v. JCIT, ITAT Chennai 172 TTJ 504

3.4. He also drew our attention on page no. 72 of the paper book containing brief history of the assessee, showing that neither in the preceding years nor in subsequent years, business transactions of the assessee were broken into two parts and income has always been assessed as normal business income.

3.5. On the other hand, Ld. DR vehemently supported the orders of the lower authorities and submitted that the assessee cannot have benefits of the both set of the provisions. If the assessee is accepting that part of the transactions are speculative because of explanation to section 73, then whole income should be treated as income from speculative business.

3.6. We have gone through the orders of the lower authorities as well as judgments submitted before us. We find that issue before us is no more *res-integra*. In the case of ITO v. Snowtex Investment Ltd. (supra), Hon'ble Kolkata Bench has discussed the law in detail and held that in such kind of cases, aggregation of share trading transactions and derivative transactions should be done before applying explanation to section 73. Where the assessee is a dealer in shares, the entire business consists in sale purchase of shares, then, it should be treated as composite business. Similar view has been taken by Hon'ble Delhi High Court in the case of CIT vs. DLF Commercial Developers Ltd. (supra). In the case of CIT vs. Baljit Securities P. Ltd. (supra), it was held that in the case of an assessee who was a share broker dealing and buying shares for himself and also dealing in derivatives, the assessee shall be deemed to be carrying on speculative business and therefore, entire transactions carried out by the said assessee were within the umbrella of speculation transactions, and there was no bar in setting off the losses arising out of derivatives from the income arising out of buying and selling of

shares. Similar view has been taken by another Coordinate Bench of the Tribunal in the case of Majestic Exports (supra). It is further noted by us that the assessee's stand of treating the whole business as composite business has always been accepted by the revenue in earlier as well as subsequent years. Thus, keeping in view clear position of law as discussed above and history of the case, we find that for the purpose of setting off of losses, the whole business should be treated as one business. Both the parties agreed before us that the provisions of explanation to section 73 are applicable and therefore, it is directed that AO shall treat the entire business as speculative and shall assess the income as income from speculative business and shall grant the benefit of set off and carry forward of losses accordingly.

4. Ground no.3: This ground is not pressed by the Ld. Counsel and therefore, dismissed.

5. Ground Nos. 4 & 5: In these grounds the assessee has raised grievance with respect to disallowance made u/s 14A.

5.1. During the course of hearing it was submitted by the Ld. Counsel that similar issue came up in appeal before the Tribunal in assessee's own case for A.Y. 2007-08 wherein Hon'ble Tribunal vide its order dated 26th September, 2012 in ITA No.7874/M/2010, decided the issue in its favour.

5.2. He further submitted that facts are same in this year also therefore, in view of judgment of the Tribunal in assessee's own case, the disallowance made by the AO is to be deleted. On the other hand Ld. DR relied upon the orders of lower authorities.

5.3. We have gone through the orders of the lower authorities and judgment of the Tribunal of earlier years. The relevant portion of the Tribunal is reproduced herein:

4. We have considered the rival submissions and perused the relevant material on record. There is no dispute that the dividend income derived by the assessee on the shares which were held by the assessee in its share arbitrage business activity. There is no allegation or indication in the assessment order as well as in the order of the CIT(A) that the assessee has specifically incurred any expenditure for earning the dividend income.

4.1 Section 14A contemplates an implicitly notion of apportionment in the cases where the expenditure is incurred for a composite activity for which taxable and non-taxable income is received. But, when it is possible to determine the actual expenditure in relation to the exempt income or when no expenditure has been incurred in relation to the exempt income, then the principle of apportionment as embedded in section 14A has no application. The object of section 14A is not to allow to reduce the taxable income by debiting the expenditure incurred to earn the exempt income. The logic and scheme

of the provisions of section 14A is not to allow the expenditure incurred to earn the exempt income and the expenses shall be allowed only to the extent they are related to earn the taxable income. There should be proximity between the expenditure and the income which is not form part of the total income for applying the provisions of section 14A. Once such proximity of relation is accepted, the disallowance has to be affected. Therefore, in order to disallow the expenditure u/s 14A, there must be a live nexus between the expenditure incurred and the income not forming part of the total income.

4.2 When the expenditure, which is claimed by the assessee is incurred wholly and exclusively for earning taxable income arising from the business activity of the assessee in the arbitrage trading, then in the absence of any actual expenditure incurred by the assessee in relation to earning of dividend income, no expenditure can be apportioned for the purpose of earning exempt income. The shares are held by the assessee in the course of its business activity and not as investment; therefore, the decision of the Hon'ble Karnataka High Court in the case of CCI Ltd (supra) is applicable wherein the Hon'ble High Court has held in para 5 as under:

“5. When no expenditure is incurred by the assessee in earning the dividend income, no notional expenditure could be deducted from the said income. It is not the case of the assessee retaining any shares so as to have the benefit of dividend. 63% of the shares, which were purchased, are sold and the

income derived there from is offered to tax as business income. The remaining 37% of the shares are retained. it has remained unsold with the assessee. It is those unsold shares have yielded dividend, for which, the assessee has not incurred any expenditure at all. Though the dividend income is exempted from payment of tax, if any expenditure is incurred in earning the said income, the said expenditure also cannot be deducted. But in this case, when the assessee has not retained shares with the intention of earning dividend income and the dividend income is incidental to his business of sale of shares, which remained unsold by the assessee, it cannot be said that the expenditure incurred in acquiring the shares has to be apportioned to the extent of dividend income and that should be disallowed from deductions. In that view of the matter, the approach of the authorities is not in conformity with the statutory provisions contained under the Act. Therefore, the impugned orders are not sustainable and require to be set aside. Accordingly, we pass the following.”

5. Respectfully following the decision of the Hon’ble Karnataka High Court (supra), no disallowance is called for when no actual expenditure has been incurred by the assessee for earning dividend income.

5.4. Both the parties agreed during the course of hearing that facts in this year are same and there is no change either in facts or in law and therefore, respectfully following the judgment of the Tribunal, disallowance made by the AO u/s 14A is directed to be deleted. Thus, Ground nos. 4 & 5 are allowed.

6. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 16th March , 2016.

Sd/- (C.N. Prasad) न्यायिक सदस्य / JUDICIAL MEMBER	Sd/- (Ashwani Taneja) लेखा सदस्य / ACCOUNTANT MEMBER
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मुंबई Mumbai; दिनांक Dated : 16/03 /2016

Patel, P.S./नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
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