

IN THE HIGH COURT AT CALCUTTA

ITA No.428 of 2004

M/s PCBL INDUSTRIAL LTD

Vs

COMMISSIONER OF INCOME TAX, KOL-II

Bhaskar Bhattacharya and Sambuddha Chakrabarti, JJ

Dated: June 16, 2011

Appellant Rep by: Dr. Debi Pal, Mr. Somak Basu

Respondent Rep by: Mrs. Sunita Das Dey

JUDGEMENT

Per: Bhaskar Bhattacharya:

This appeal is at the instance of the assessee and is directed against an order dated 6th August, 2003, passed by the Income-tax Appellate Tribunal, "C" Bench, Kolkata, in ITA No.1146(Kol) of 2001 relating to the Assessment Year 1997-98 dismissing the appeal preferred by the assessee.

Being dissatisfied, the assessee has come up with the present appeal.

The facts leading to the filing of this appeal may be summed up thus:

a) The appellant before us is a company incorporated under the Companies Act, 1956 as a Public Company limited by share.

b) For the Assessment Year 1997-98, the appellant on 30th November, 1997 filed its return of income along with Auditors Report and audited statement of account. In the said return for the abovementioned Assessment Year, the appellant disclosed a loss of Rs.15,61,89,342/- and the same was processed under Section 143(1) of the Act. On 30th June, 1998, the appellant filed a revised computation during the course of assessment showing a loss of Rs.14,29,96,467/-. The business loss was shown at Rs.18,41,11,592/-. During the previous year, the appellant derived income under the other sources by way of interest to the tune of Rs.2,33,23,779/- and dividend income to the tune of Rs.1,15,74,357/- and speculation profit of Rs.70,36,500/-.

c) A notice under Section 143(2) was served upon the appellant and pursuant to the said notice, the appellant's representative appeared and produced Books of Accounts, Bill, Vouchers and Bank Statements. The appellant contended that the loss incurred in share dealing business should not be taken as speculation loss as per explanation to Section 73 of the Income-tax Act.

d) By an order dated 1st March, 2000, under Section 143(3) of the Act, the Assessing Officer treated the business loss of Rs.18,41,11,592/- as speculation loss on the basis of explanation to Section 73 of the Act.

e) Being dissatisfied, the appellant preferred an appeal before the Commissioner of Income-tax (Appeals) and the grievance of the appellant before the said Appellate Forum was that the Assessing Officer should not have treated the business loss of Rs.18,41,11,592/- as speculation loss by invoking the explanation to Section 73 of the Act. In other words, according to the appellant, the Explanation to Section 73 of the Act was not applicable to the appellant and the same was purely a business loss and, therefore, the appellant was entitled to carry forward the same in the next Assessment Year.

f) The Commissioner of Income-tax (Appeals), however, by order dated 13th March, 2011 dismissed the appeal by affirming the order of the Assessing Officer.

g) Being dissatisfied, the appellant preferred an appeal before the Income-tax Appellate Tribunal and by the order impugned in this appeal the Tribunal has affirmed the order passed by the Commissioner of Income-tax (Appeals).

A Division Bench of this Court at the time of admission of this appeal has formulated the following substantial questions of law:

"1. Whether the Explanation to Section 73 which creates a legal fiction by which the purchase and sale of shares specified in the said Explanation which is specifically used for the purpose of Section 73 as deemed speculation business can be applied to Sections 70, 71 and 72 and in determining the gross total income the said Explanation to Section 73 can at all be applied while considering the set off of loss under Sections 70 and 71 and carry forward of such loss under Sections 70 and 71 and carry forward of such loss under Section 72 of the Act?"

"2. Whether the loss arising from the business of dealing in share not falling under the definition or speculative transaction appearing in Section 43(5) of the Act can be carried forward under Section 72 of the Act and whether in such a case the said claim can be disallowed by relying upon Explanation to Section 73 of the Act?"

"3. Whether on the facts and in the circumstances of the case the decision of the Income Tax appellate Tribunal was perverse in so far as the same directly applied the ratio of the decision in Re: RPG Industries Ltd. Case In ITA No.369 (Kol) of 1996 since reported in 85 ITD 105(Cal) without considering as to whether the said ratio applied to the present case and thereafter restored the matter to the file of the Assessing Officer for recomputation of loss?"

In this appeal, the appellant came up with an application under Order 41 Rule 27 of the Code of Civil Procedure for taking into consideration some additional evidence including the orders passed by the Tribunal of "B" Bench, Kolkata in ITA No.1086/Cal/2000 relating to Assessment Year 1995-96 of the appellant as also the order of "B" Bench of the Tribunal in ITA NO.1531(Kol) of 2005 relating to the Assessment Year 1996-97 showing that in those orders, it has been held that the principal business of the appellant was that of granting loans and advances and as such, the case of the appellant had fallen within the exceptions to Explanation to Section 73 of the Act. It appeared that against such orders the Revenue preferred

appeals before this Court but those were dismissed and those orders have attained finality.

This Court allowed such application for taking those orders as additional evidence and gave liberty to the Revenue to produce evidence in rebuttal if they so desired. The Revenue, however, did not file any further evidence to rebut those pieces of additional evidence filed by the appellant.

Consequently, this appeal was heard after taking into those subsequent decisions of the Tribunal as additional pieces of evidence.

Therefore, the only question that arises for determination in this appeal is whether the appellant comes within exception to the Explanation added to Section 73 of the Income-tax Act.

In order to appreciate the question involved herein, it will be profitable to refer to Section 73 of the Act with Explanation which is quoted below:

"Section 73. Losses in speculation business. - (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.

(2) Where for any assessment year any loss computed in respect of a speculation business has not been wholly so set off under sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no income from any other speculation business, shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and -

(i) it shall be set off against the profits and gains, if any, of any speculation business carried on by him assessable for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.

(3) In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section (2) of Section 72 shall apply in relation to speculation business as they apply in relation to any other business.

(4) No loss shall be carried forward under this section for more than four assessment years immediately succeeding the assessment year for which the loss was first computed.

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."

(Emphasis supplied by us).

After hearing the learned Counsel for the parties and after going through the additional document produced before this Court by way of additional evidence we find that in respect of the assessment of the appellant in respect of Assessment Years 1998-99, 1996-97 and 1995-96 the Tribunal held that the principal business of the appellant was granting of loan as would appear from the profit and loss account produced by the appellant. The Tribunal in those matters specifically held that the principal business of the appellant being grant of loans, the appellant comes within the exceptions to the Explanation under Section 73 of the Act and thus, it is a fit case where the Assessing Officer should be directed to allow the set off loss incurred in the purchase and sale of shares treating the same as business loss. It appears that while passing such orders, the Tribunal also took into consideration the balance sheet of the appellant for the Assessment Year 1997-98 with which we are concerned.

It further appears that the aforesaid orders of the Tribunal in respect of those three Assessment Years have attained finality as either the appeal preferred against such order in this High Court has been dismissed or the application for condonation of delay in preferring such appeal has been dismissed by this Court.

We, therefore, find that in the facts of the present case, the order passed by the Tribunal below should be set aside and the question formulated by this Court should be answered in the following way:

The first and third questions should be decided in the affirmative and in favour of the assessee. The second question should be answered in the negative and against the Revenue.

The appeal is, thus, allowed with a direction upon the Assessing Officer to treat the assessee as coming within the exception to the Explanation added to Section 73 of the Act.

In the facts and circumstances, there will be, however, no order as to costs.