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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.19 of 2009

M/s.Prasad Agents Private Ltd.)
having its address at 46, Jolly)
Maker Chamber II, 4th Floor,)
225, Nariman Point, Mumbai-20)..Appellant

Vs.

Income Tax Officer 3(2)(4))
Aayakar Bhavan, Maharishi Karve)
Marg, Mumbai-400 020.)..Respondent

Mr. Sanjiv M.Shah for the Appellant.
Mr. R.B. Upadhyay, fo the Respondent.

CORAM: F.I. REBELLO &
R.S.MOHITE, JJ.
DATED: 20TH MARCH, 2009
ORAL JUDGMENT (PER F.I. REBELLO, J.)

. The Appellant a non-banking financial company has approached this Court against the order dated 13th August, 2008 passed by the I.T.A.T. for the assessment year 2001-2002. The A.O. by his order had directed that loss of Rs.6,00,877/- in share trading, was a speculation loss by virtue of Explanation to Section 73 of the Income Tax Act, 1961. In respect of the said disallowance and on some other aspects, the assessee preferred an Appeal before C.I.T. (A). C.I.T. (A) by its order was pleased to observe that the business of the appellant consists of trading and investment in shares, debentures, bonds, mutual funds and other securities pursuant to its Memorandum of

Association. The Tribunal considering the arguments was pleased to place reliance on the order of the Delhi Bench in **Aman Portofolio Pvt. Ltd., 92 ITD 324 (Delhi)** as also the clarification issued by C.B.T.D.'s Circular No.204 dated 24th July, 1976 and held that the A.O. was not justified to treat the loss in shares as speculative loss and accordingly the disallowance on that count was deleted. Revenue aggrieved by the said order preferred an Appeal before the I.T.A.T. The Tribunal noted that the Tribunal had taken the decision in the case of High Power Motors Pvt. Ltd. in ITA No.2094/Mum/2004 vide order dated 8th May, 2008. It also placed reliance on the judgment of the Supreme Court in **Chainrup Sampathram 24 ITR 481** where the Supreme Court had taken a view that loss or profit on account of valuation of closing stock has to be treated as speculative loss and allowable as revenue loss or revenue receipt as the nature of these profits are similar to the nature of business in trading of shares and for that reason allowed the appeal filed by the Revenue and set aside the order of C.I.T. (A).

2. The assessee is in appeal on four questions. In our opinion the following two questions would arise for consideration:-

(i)Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in treating Rs.6,00,877/- as speculation loss by dint of the Explanation to Section 73 of the Act?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in treating the loss Rs.6,00,877/- originating from and traceable simply and barely to the valuation of stock of shares as covered by the ken of the Explanation to Section 73 of the Act?"

3. At the hearing of this Appeal on behalf of the Appellant-Assessee, learned Counsel submits that in so far as Question (i) is concerned, the Explanation has to be read with Circular No.204 and if so read it would be clear that the object of the provisions is to curb the device sometimes resorted to, by business houses controlling groups of companies to manipulate and reduce the taxable income of companies under their control. It is submitted that it is not the contention of the Revenue that the Assessee controls the group companies and the transactions were done to manipulate and reduce the taxable income of the

companies under their control.

. On the other hand on behalf of Revenue, learned Counsel submits that the language of the Explanation to Section 73 is clear. It is further submitted that no doubt the Circular has been issued. However, it is for the Court to decide the true effect of the Explanation to Section 73 and the effect of the Circular.

4. The explanation to Section 73 as introduced by the Taxation Law (Amendment) Act, 1973 read as under:-

> Explanation.-- Where any part of the business of a company (other than an investment company, as defined in clause (ii) of Section 109, or a company the principal business of which is the business of banking or the granting of loan 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."

4. The Statement of Objects and reasons provide as under:-

> "2. The main objectives of the amendments proposed to be made are to unearth black-money and prevent its proliferation; to fight and curb tax evasion; to check avoidance of tax through various legal devices, including the formation of trusts and diversion of income or wealth to members of family; to reduce tax arrears and to ensure that in future, tax arrears do not accumulate; to rationalise the exemptions and deductions available under the relevant enactments, and to streamline the administrative set-up and make it functionally efficient."

. The relevant provision of Section 73 as it now stands reads as under:-

> **Losses in Speculation business.**
>
> "73(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, if another speculation business.

(2) .....

(3) .....

(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 of 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."

5. A perusal of the explanation would, therefore, make it clear that where any part of the

business of the company consists in the purchase and sale of shares of other companies, for the purpose of Section 73 such company shall be deemed to be carrying on speculation business. On consideration of the said provision considering the language of the Explanation there is atleast no scope for ambiguity. The language of the Explanation is clear, in as much as a company carrying on business of purchase and sale of shares shall be deemed to be carrying on speculation business.

. Our attention was invited to Circular No.204. The Circular contains the explanatory notes to Taxation Laws (Amendment) Act, 1975. Para.19.1 deals with the treatment of losses in speculation business. In so far as this paragraph is concerned there is no dispute in respect of its language wherein it uses the following expression:-

> "The amending Act has added an Explanation to Section 73 to provide that the business of purchase and sale or shares by companies which are not investment or banking companies or companies carrying on business of granting loans or advances will be treated on the same footing as a speculation business."

Learned Counsel, however, relies on paragraph 19.2. Paragraph 19.2 reads as under:-

> "The object of this provision is to curb the device sometimes resorted to by business houses controlling groups of companies to manipulate and reduce the taxable income of companies under their control."

It appears from this paragraph in the explanatory note in respect of the amending Act that the argument advanced on behalf of the assessee by their Counsel may merit some consideration. In our opinion, however, a gainful reading of paragraphs 19.1 and 19.2 read with language of the Explanation would not bear out the submission as made on behalf of the Assessee. Para.19.1 as we have noted earlier does not refer to group companies, but refers to companies dealing with shares. It is in that context para.19.2 may be considered to mean that it also includes cases of such group companies. That does not mean that the explanation to Section 73 must be restricted only to group companies and not to other companies who carry on business of sale and purchase of shares either having no controlling interest in other companies or purchasing shares to control other companies. Once the language is clear the Court must give effect to the language for its

true interpretation. If the language is in conflict with the Circular then to that extent to ignore the circular. The Circular cannot be read in the manner sought to be argued on behalf of the assessee as that would defeat the very object as set out in the statement of object and reasons to the Taxation Laws (Amendment) Act, 1973. In the light of the above, the Tribunal was right in taking the view it has taken. The first question is accordingly answered against the assessee.

6. The learned Counsel then sets out that even if the question (i) is answered in favour of the assessee nevertheless the explanation specifically refers to purchase and sale of shares of any other companies and does not refer to losses suffered on account of book valuation. Our attention is invited to Section 43(5) which reads as under;-

> "speculative transaction" means 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."

Our attention is also invited then to Section 28

Explanation 2 which reads as under:-

> "Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as "speculation business") shall be deemed to be distinct and separate from any other business."

Explanation 2, to Section 28, therefore, treats the business in respect of speculative transactions to be distinct and separate from any other business. Section 43(5) holds those transactions to be speculation respect of which a settlement is otherwise periodically or settled other than by delivery or transfer of the commodity or scrips. Reading these provisions learned Counsel submits that the 'speculative value' would not fall within the explanation.

7. Our attention is first invited to the judgment of the Supreme Court in **Commissioner of Income Tax, West Bengal vs. Hind Construction Ltd., 83 ITR 211** to contend that if a person revalues his goods and shows higher value for them in his books he cannot be considered having sold his goods and made profits therein. The issue before the Supreme Court was in respect of sale of machinery. The

Court there held that there was no sale. That judgment, therefore, would really of no much assistance.

7. We next consider the judgment of the Supreme Court in **Chainrup Sampatram vs. Commissioner of Income-tax, West Bengal, 24 ITR 481,** where the Supreme Court observed that the valuation of unsold stock at the close of an accounting period is a necessary part of the process of determining the trading results of that period and can in no sense be regarded as the source of such profits. The Supreme Court in **Sanjeev Woolen Mills vs. Commissioner of Income Tax, 279 ITR 434 (S.C.)** considered the judgment in Chainrup Sampatram (supra) for the purpose of considering the rational behind valuation of the stock at market whichever is earlier.

8. On the other hand on behalf of the Revenue the learned Counsel has drawn our attention to the finding recorded by the Tribunal as also to the **observations in Sanjeev Woolen Mills (supra)** to contend that there is nothing inconsistent in the said judgment of the view taken by the Tribunal.

9. In our opinion there can be no difference between the losses suffered in the course of trading

by delivery and losses in terms of the book value. As long as the assessee is carrying on business of trading by way of purchase and sale of shares even if in respect of any financial year, there are no transaction and yet the company has stock in trade of shares, the book value will have to be considered for the purpose of considering the profit and loss in case of speculative business. There can be no doubt that the explanation to Section 73 cannot be read to mean only when there is a purchase and sale of shares in the course of the financial year. The explanation will cover both shares which are stock in trade and shares which are traded in the course of the financial year for the purpose of considering the loss and profit for that year. The Tribunal, in our opinion, has correctly answered the issue by holding that the loss of profit on account of valuation amounts to revenue losses or revenue receipt. The second question, therefore, also will have to be answered against the assessee and in favour of the Revenue.

10. For the aforesaid reasons we find no merit in this Appeal which is accordingly dismissed.

(R.S.MOHITE, J.) **(F.I.REBELLO, J.)**