

Case :- INCOME TAX APPEAL No. - 143 of 2003

Appellant :- Commissioner Income Tax

Respondent :- Sri Ram Kishan Gupta

Counsel for Appellant :- Shambhu Chopra, A.N. Mahajan, Ashok Kumar, Bharatji Agarwal, D. Awasthi, G. Krishna, R.K. Upadhaya

Counsel for Respondent :- S.D. Singh

Hon'ble Ashok Bhushan, J.

Hon'ble Mahesh Chandra Tripathi, J.

(Per Hon'ble Ashok Bhushan, J.)

This appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'Act') has been filed against the judgment and order of the Income Tax Appellate Tribunal dated 25.4.2003 by which the appeal of the assessee against the order of the Commissioner Income Tax Appeal has been allowed. It is sufficient to note the facts as noted in the order of the Tribunal to decide the questions raised in this appeal. In paragraph 2 of the order of the Tribunal, facts of the case have been noted in following words:

"In brief the relevant facts are that the appellant- assessee is a Member of the U.P. Stock Exchange Association Ltd. And is registered as Stock Broker and carries on the purchase and sale of shares and securities. On scrutiny of the trading profit and loss account filed along with the return of income of Rs. 81,050/-, the Assessing Officer found that a sum of Rs. 8,53,030/- is debited for which the claim of the assessee was that it incurred loss in respect of transactions done by him on the floor of stock exchange with other brokers. The Assessing Officer rated the same as speculation loss as the loss of Rs. 8,53,030/- was on account of transactions for which there was no physical delivery. The appellant- assessee submitted before the Assessing

Officer that the delivery had been effect at net basis as per the Stock exchange guidelines and no forward trading was allowed therefore there was no question of any speculation loss. The assessee's plea was also that otherwise the appellant-assessee's transaction was covered u/s 43(5)(c) of the Income Tax Act , therefore, the transaction carried out by the appellant-assessee were specifically exempted to be treated as speculative transactions but the Assessing Officer did not agree with the contentions of the appellant-assessee and disallowed the loss of Rs. 8,53,030/- being speculative in nature arising out of speculative transactions and the same could not be set off against other income and had to be carried forward and to be set off against speculative profit as per the provisions of Section 73(1). Therefore, after disallowing the loss of Rs. 8,53,030/-, the Assessing Officer computed the income of the appellant-assessee at Rs. 9,22,829/-. On appeal, the Id. CIT(A) agreed with the conclusions drawn by the Assessing Officer and dismissed the appeal of the appellant-assessee, therefore, the appellant-assessee is in present appeal before the Tribunal.”

This appeal has been admitted on the following questions of law:

“(1) Whether on the fact and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in not upholding the order of the Assessing Officer and the Commissioner of Income Tax (Appeals) treating the loss of Rs. 8,53,030/- as speculative loss?

(2) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct

in law in holding that the assessee's entire business is of non-speculative nature?

(3) Whether the Income Tax Appellate Tribunal was correct in holding that the assessee was engaged in jobbing although the fact remains that the assessee was not registered as a jobber?

(4) Whether Income Tax Appellate Tribunal was correct in law in holding that the loss incurred by the assessee was not speculative when the assessee could not give evidence of delivery of the scripts?"

We have heard Sri Shambhu Chopra, learned Counsel appearing for the appellant and Sri S.D. Singh, learned senior Advocate appearing for the assessee. The provisions of the Income Tax Act relevant for the issues raised in the appeal need to be noted first. Section 43 contains definition of certain terms relevant to income from profits and gains of business or profession. Section 43(5) deals with "speculative transaction". Section 43 (5) proviso (a) (b) and (c) which are relevant are quoted below:

"(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 scripts:

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 his 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;”

Section 73 deals with “Losses in speculation business”
Section 73(1) provides as follows:

“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, of another speculation business.”

The assessee a member of the U.P. Stock Exchange Kanpur filed its return of income for the Assessment Year 1998-99 showing income of Rs. 81,050/-. Assessee claimed Rs. 8,53,030/- as business loss which was disallowed by the Assessing Officer holding it to be speculative loss. The assessee claimed before the Assessing Officer that transaction is covered by Section 43(5) proviso (c) hence, the same cannot be treated as speculative business and the assessee was entitled for set off of the loss against the business income. The Commissioner of Income Tax (Appeals) confirmed the order of the Assessing Officer. The Commissioner held that transaction which have been settled otherwise than actual delivery of shares in question will have to be treated as speculative transaction as provided under section 43(5) of the Act. In the appeal filed before the Tribunal, the assessee reiterated his claim that transactions which were settled otherwise than by actual delivery of shares are fully covered by proviso (c) to

Section 43(5) of the Act. The assessee also pleaded before the Tribunal that he was asked to deposit turnover fee of jobbing to the SEBI. The submission was also raised by the assessee before the Tribunal that delivery has been effected at net basis as per the Stock Exchange guidelines hence, there was no question of any speculation loss. The Tribunal noticed the submissions and facts pleaded on behalf of the assessee in paragraph 3 of the judgment, which is to the following effect:

“On behalf of appellant- assessee Shri Rakesh Garg, Advocate submitted that the lower authorities have not appreciated the facts and circumstances resulting in loss of Rs. 8,53,030/- and have wrongly treated the same as speculative loss. With reference to comprehensive paper book including the written submission, which were filed before the Id. CIT(A) who called for a remand report from the Assessing Officer, Shri Garg invited the attention of the Bench towards the tax audit report and the consolidated trading profit and loss account as appearing on page 95 of the supplementary paper book and the details of transactions appearing on pages 36 and 96 to 99 of the paper book and submitted that if the entire transaction of purchases and sales as well as the provisions of Section 43(5) (c) of the Income Tax Act providing for that “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; shall not be deemed to be speculative transaction” are taken into consideration, the loss cannot be considered as speculation loss. In order to prove his point Shri Garg submitted that the appellant was asked to deposit

turnover fee for which he made reference to pages 40 to 43 of the paper book and he also referred to page 42 of the paper book being letter dated 1.4.02 from U.P. Stock Exchange Association Ltd. Giving the details of the turnover fee payable to SEBI and it specifically mentions fee on jobbing. In view of this, Shri Garg pleaded that since the SEBI was charging turnover fee which means there were purchases as well as sales and the same necessarily includes delivery therefore therefore it cannot be inferred that no actual delivery had taken place. Shri Garg further submitted that the entire trading activity of the broker for which licence has been obtained is subject to SEBI Rules and Regulations including the bye laws and accordingly the activities of a Stock Exchange Broker, inter alia includes purchase and sale of shares and securities at the floor of the Stock Exchange between the brokers, to transact business of purchase/sales of shares on behalf of the clients and also to do business of arbitrage. He reiterated that as the UP Stock Exchange Association does not permit forward trading and the transactions are compulsorily settled either by taking delivery of shares or enabling the delivery of shares at net basis and the transactions are through clearing house just like brokers clearing house and accordingly all transactions are settled on net basis and all these transactions are part and parcel of one business only which cannot be segregated. Shri Garg further elaborated the total transaction on purchase of shares by the assessee were in respect of 9,95,100 equity shares for an aggregate value of Rs. 22,28,36,534/- and the sale consideration of these shares was Rs. 22,19,83,515/- and accordingly the appellant- assessee suffered a loss of Rs. 8,53,030/- and

pages 96 to 99 of the paper book which gives date-wise transactions in respect of all the scripts reveal that in some transactions there was profit and in some there was a loss and overall there was a loss of Rs. 8,53,030/- In view of his submission, Shri Garg pleaded that the transactions carried on by the appellant- assessee are not of speculative nature and in the alternative, the transactions are otherwise covered in view of clause (c) of proviso to Section 54(5) of the Income Tax Act for which he placed reliance in 249 ITR 233 (Allahabad High Court) holding that transactions entered into by the brokers who are members of the stock exchange, Section 43(5)(c) is applicable. Therefore, unless the Department specifically proves that the transactions entered upon by the broker as a member of the stock exchange are not covered under Section 43(5) (c) onus lies on the Department to do so in the case of appellant- assessee; the Department has not proved that the provisions of Section 43(5) (c) are not applicable in the case of appellant- assessee. Therefore, the Id CIT(A) is not justified in upholding the conclusion of the Assessing Officer that the transaction resulting in a loss of Rs. 8,53,030/- is a speculative loss.”

The Tribunal held that the allegation that transactions were settled without actual delivery was not fully established by the Revenue. It was held that if the system provides settlement at net basis in respect of jobbing and the appellant- assessee had been found paying turnover fee on such transactions ever since 1991-92 the assessee's entire business was of non-speculative nature. The Tribunal also placed reliance on a Division Bench judgment of this Court reported in 249 ITR 233 **Commissioner of Income-Tax Vs. Shri Sharwan Kumar Agrawal**, in which judgment, this Court held

that the assessee who was a share broker was entitled for the exception covered by proviso (c) to Section 43(5). Following was held by the Tribunal in paragraph 7:

“7. The Tribunal found dial the assessee was entitled to the exception covered by the proviso, Clause (c) to Sub-section (5) of Section 43 of the Income Tax Act. The onus of proof was on the Department to establish that such exception was not applicable. It has placed reliance upon the decision of the Supreme Court in CIT v. Ramakrishna Deo [1959]35ITR312(SC).It further found that no material was collected al the appellate stage to show that the condition was fulfilled. Learned counsel for the applicant has not shown that there was any material to show that the assessee was not entitled to the exception, referred to above. It may also be noted that the applicant has not sought any question to be referred in regard to proviso, Clause (c) to Sub-section (5) of Section 43 of the Income Tax Act. In view of the above, the application is rejected.”

For answering the questions which have arisen in this appeal, two main issues have to be decided. Firstly as to whether the business carried out by the assessee which consist of various transactions of sale and purchase of shares was a speculative transaction and secondly as to whether the assessee is entitled for the benefit of proviso (C) to sub-section (5) of Section 43 of the Act.

The facts as emerged from statements of facts and the facts noted in the orders of the Assessing Officer, Commissioner (Appeals) and Tribunal, there is no dispute that assessee had claimed loss of Rs. 8,53,030/- on account of non delivery based transactions. The Assessing Officer has noted the above stand of

the assessee in its order in following words:

"In the reply dated 21/11/2000 Sales & purchases have been given. From this reply it is clear that the assessee has earned a profit of Rs. 508977.50 on account of delivery based share transactions and a loss of Rs. 8,53,030/- on account of non-delivery based transactions which were shown as sales purchases respectively in the trading account."

Section 43 (5) defines "speculative transaction" as 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. Thus, transaction in shares which is periodically or ultimately settled by actual delivery or transfer of the commodity or scrips is not a speculative transaction. Assessee's own case before the Assessing Officer was that he suffered loss of Rs. 8,53,030/- on account of non delivery based share transaction.

The apex Court had occasion to consider Explanation 2 to Section 24(1) of Indian Income Tax Act, 1922 which was pari-materia to Section 43(5) of the Act in 100 ITR 715 **Davenport & Co. P. Ltd. Vs. Commissioner of Income-Tax, west Bengal, II**. Explanation 2 to Section 24(1) was to the following effect:

"Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year."

Provided that in computing the profits and gains chargeable under the head 'profits and gains of business, profession or vocation', any loss sustained in speculative transactions which are in the nature of a business shall not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of speculative transactions:

Explanation 1: Where the speculative transactions carried on are of such a nature as to constitute a business, the business shall be deemed to be distinct and separate from any other business.

Explanation 2: A speculative transaction means a transaction in which a contract for purchase and 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"

In the aforesaid case, transaction carried out by the assessee involved transfer of delivery notes and not actual delivery of the goods. Assessee suffered a loss and claimed adjustment of loss in the computation of its income. The Assessing Officer held that the transaction was speculative transaction and could be set off only against speculation profits in future. The Appellate Assistant Commissioner held that transactions were not speculative. The Tribunal restored the order of the Income Tax Officer. The question was referred to the High Court "*Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the transactions described above entered into by the assessee were speculative transactions within the meaning of explanation 2 to section 24(1)?*" In the above case, it was held that the words actual delivery means real as opposed to notional delivery. Following was laid down at page 721:

“Explanation 2 defines a speculative transaction as a transaction in which a contract for purchase and sale of any commodity is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity. The words actual delivery in explanation 2 means real as opposed to notional delivery. For income tax purposes speculative transaction means what the definition of that expression in explanation 2 says. Whether a transaction is speculative in the general sense or under the Contract Act is not relevant for the purpose of this explanation. The definition of "delivery" in sec. 2(2) of the Sale of Goods Act which has been held to include both actual and constructive or symbolical delivery has no bearing on the definition of speculative transaction in the explanation. A transaction which is otherwise speculative would not be a speculative transaction within the meaning of explanation 2 if actual delivery of the commodity or the scrips has taken place; on the other hand, a transaction which is not otherwise speculative in nature may yet be speculative according to explanation 2 if there is no actual delivery of the commodity or the scrips. The explanation does not invalidate speculative according to explanation 2 if there is no actual delivery meaning to that expressing for purposes of income-tax only.”

Rajasthan High Court in 255 ITR 329 **Commissioner of Income-Tax Vs. Mangal Chand**, explaining Section 43(5) of the Act, laid down following at page 334:

“A perusal of aforesaid provisions goes to show that apart from the question falling in the proviso, settlement

of a transaction of sale and purchase otherwise than by actual delivery of the commodity, including stock and shares in respect of any transaction is essence of determining whether the transaction is to be termed as speculative transaction or non- speculative transaction.

The law has been well settled by judicial pronouncement that actual delivery for the purpose of Sub-section 5 of Section 13 means actual delivery as opposed to notional delivery. The definition of delivery in Section 2(2) of the Sale of Goods Act which has been held to include both actual and constructive and symbolical delivery has no bearing on the definition of speculative transaction in the Explanation.”

The Tribunal in paragraph 5 had observed that the allegation that the transactions were settled without actual delivery is not fully established by the Revenue. There being specific case of the assessee noted before the Assessing Officer that loss of Rs. 8,53,030/- was suffered on account of non delivery base transaction, the above observation of the Tribunal cannot be approved.

Now we proceed to consider the second issue i.e. as to whether the assessee was entitled to the benefit of proviso (c) to Section 43(5). The assessee has specifically claimed the benefit of proviso (c) to Section 43(5) of the Act stating that transaction of sale and purchase of shares was a part of jobbing. Appellant claimed that he had been paying turnover fee on such transaction to SEBI, thus, his transactions were fully covered by jobbing as contemplated under proviso (c) to Section 43(5) of the Act. The assessee has claimed that he has been carrying on sale and purchase of shares on behalf of different parties as well as on his

behalf. The Tribunal in paragraph 3 of the judgment has noted in detail the tax audit report, the consolidated trading profit and loss account and details of the transactions appearing on paper book. The Tribunal has returned finding in paragraph 5 that Assessing Officer has not pointed out any discrepancy and the bonafide of the transactions has also not been doubted. There is thus, no dispute that losses were suffered on account of various transactions relating to sale and purchase of shares, the details of which were filed in the paper book. Assessee has categorically claimed that those transactions are fully covered by the word “jobbing” as contemplated in proviso (c) to Section 43(5) of the Act. Word “jobbing” has been defined in Law Lexicon P. Ramanatha Aiyar in following words:

“The practice of a middleman or stock jobber [S. 43(5) (c), Income-tax Act].”

The word “jobber” has been defined in Black's Law dictionary 9th Edition in following words:

“1. One who buys from a manufacturer and sells to a retailer; a wholesaler or middleman. 2. A middleman in the exchange of securities among brokers.- Also termed stockjobber; stock-jobber. 3. one who works by the job; a contractor.”

We have already observed that purchase or sale of shares periodical or ultimately settled otherwise than by the actual delivery is a speculative transaction as provided under section 43(5). The assessee's categorical case is that losses were suffered on account of non-delivery transactions. Whether the assessee is still entitled to protection under proviso (c) to sub-section (5) of Section 43, which transactions are non delivery transactions and what is the scope of the proviso in context of speculative transaction have to be

examined.

Certain principles of statutory interpretation in context of the proviso has to be looked into for answering the issues. Justice G.P. Singh in 'Principles of Statutory Interpretation' 12th Edition, while explaining the principles for interpreting a proviso, laid down following:

“The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As stated by LUSH, J.: “ when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso.” In the words of LORD MACMILLAN: “ The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case.” The proviso may, as LORD MACNAGHTEN laid down, be “a qualification of the preceding enactment which is expressed in terms too general to be quite accurate.” The general rule has been stated by HIDAYATULLAH, J., in the following words “ As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating general rule.” And in the words of KAPUR, J. “The proper function of a proviso is that it qualifies the generality of the main enactment, by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall

within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment.” Further, a proviso is not normally construed as nullifying the enactment or as taking away completely a right conferred by the enactment. As a consequence of the aforesaid function of a true proviso certain rules follow.

(b) Not construed as excluding or adding something by implication.

Except as to cases dealt with by it, a proviso has no repercussion on the interpretation of the enacting portion of the section so as to exclude something by implication which is embraced by clear words in the enactment. Further, as stated by Lord Watson in an oft-quoted passage: “If the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. So, when on a fair construction the principle provision is clear, a proviso cannot expand or limit it.

The Madras District Municipalities Act, 1920 empowered a municipality to levy property tax on all lands and buildings at such percentage of the annual value as may be fixed by the municipal council. The Act by Section 82(2) defined annual value of lands and buildings in terms: 'shall be deemed to be the gross annual rent at which they may be reasonably expected to let from month to month or year to year-'. A proviso appended to Section 82(2) provided that in case of

certain classes of buildings the annual value of such premises was deemed to be 6 per cent of their capital value. Certain vacant land belonging to a Railway Company were assessed to property tax by the Bezewada Municipality and the method adopted in order to arrive at the annual value was first to ascertain their capital value and to fix 6 per cent of the same as annual value. The tax was levied at a certain percentage of the annual value so calculated. The contention before the Privy Council was that the proviso appended to section 82(2) indicated that capital value as basis for ascertaining annual value could be used only in case of specified classes of buildings in the proviso and that resort to this method was by necessary implication prohibited in every other case. It was not disputed that but for the proviso, section 82(2) would have permitted resort to any of the recognised methods of arriving at the rent which a hypothetical tenant might reasonably be expected to pay for the lands in question, including the method of taking a percentage of capital value. Rejecting the contention LORD MACMILAN observed: "The proviso does not say that the method of arriving at annual value by taking a percentage of capital value is to be utilised only in the case of the classes of buildings to which the proviso applies. It leaves the generality of the substantive enactment in the sub-section unqualified except in so far as concerns the particular subjects to which the proviso relates. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms."

The apex Court had occasion to consider the principles of statutory interpretation in (2004) 1 SCC 574 **Haryana State Cooperative Land Development Bank Ltd. Vs. Haryana State Cooperative Land Development Banks Employees Union and Another**, in context of Sections 3 and 10 of the Payment of Bonus Act, 1965. Section 3 of the said Act provided as follows:

“3. Establishment to include departments undertakings and branches:- Where an establishment consists of different departments or undertakings or has branches, whether situated in the same place or in different places, all such departments or undertakings of branches shall be treated as parts of the same establishment for the purpose of computation of bonus under this Act:

Provided that where for any accounting year a separate balance sheet and profit and loss account are prepared and maintained in respondent of any such department or undertaking or branch then, such department or undertaking or branch shall be treated as a separate establishment for the purpose of compensation of bonus under this Act for that year, unless such department or undertaking or branch was immediately before the commencement of that account year treated as part of the establishment for the purpose of computation of Bonus”

The issue which fell for consideration before the apex Court was as to whether the employees working with primary agricultural cooperative Bank are entitled to bonus at the same rate at which it was paid to employees working in the Apex bank i.e. Haryana State Cooperative Land Development Bank Ltd. The claim of union was resisted by the primary bank on the ground that they are separate

entities and have a distinct cooperative and corporate identity therefore, are not required to pay bonus at the same rate as the employees of the Apex Bank. The High Court allowed the writ petition against which the Apex bank went in appeal before the apex Court. In paragraphs 8 and 9, the apex Court laid down following :

“8. The proviso to Section 3 makes it clear that where for any accounting year, a separate Balance Sheet and Profit and Loss account are prepared and maintained in respect of any department or undertaking or branch, such department or undertaking or branch shall be treated as a separate establishment for the purpose of computation of bonus under the Act for that year, unless for the previous period such department or undertaking or branch was treated as a part of the establishment for the purpose of computation of bonus. Similarly, third proviso to Section 34 deals with modalities for working out entitlement for bonus.

9. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey [1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case

which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors. (AIR 1991 SC 1406), Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. (AIR 1991 SC 1538) and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P)Ltd. and Ors. (1994 (5) SCC 672).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146) "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (per Lord

Wrenbury in Forbes v. Git [1922] 1 A.C. 256).

A statutory proviso "is something engrafted on a preceding enactment" (R. v. Taunton, St James, 9 B. & C. 836).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances" (per Lord Esher in Re Barker, 25 Q.B.D. 285)."

The apex Court held that proviso to section 3 of the Act has full application.

Thus, the proviso to Sub-section (5) of Section 43 takes out those transactions which are covered by the speculative transactions as defined in section 43(5). The transactions which are claimed by the assessee would not fall within the purview of the Section 43(5) as speculative transactions. The Tribunal has placed reliance on a Division Bench judgment of this Court in 249 ITR 233 **Commissioner of Income Tax Vs. Shri Sharwan Kumar Agarwal**. In the above case, the assessee a share broker filed his return. Assessing Officer found that assessee had at times settled the share transactions by corresponding deliveries and at times settled the contract without effecting the delivery. It was held that speculative loss could not be allowed to be set off since the transaction was speculative transaction within the meaning of Section 43(5). The order was affirmed in appeal. The Tribunal in appeal held that assessee was entitled to the exception covered by clause (c) of the proviso to Section 43(5). The Division Bench rejected the application of reference and made following observations at page 235:

“ The Tribunal found dial the assessee was entitled to the exception covered by the proviso, Clause (c) to Sub-section (5) of Section 43 of the Income Tax Act. The onus of proof was on the Department to establish that such exception was not applicable. It has placed reliance upon the decision of the Supreme Court in CIT v. Ramakrishna Deo [1959]35ITR312(SC) . It further found that no material was collected al the appellate stage to show that the condition was fulfilled. Learned counsel for the applicant has not shown that there was any material to show that the assessee was not entitled to the exception, referred to above. It may also be noted that the applicant has not sought any question to be referred in regard to proviso, Clause (c) to Sub-section (5) of Section 43 of the Income Tax Act.

In view of the above, the application is rejected.”

Sri S.D. Singh, learned Counsel for the assessee pointed out that against the Division Bench judgment, the Department filed an appeal before the apex Court, which appeal was dismissed by following order:

“We agree with the High Court that no question of law was required to be referred albeit for reasons other than the reason expressed by the High Court. The appeal is accordingly dismissed.”

Sri Shambhu Chopra, learned Counsel for the appellant submitted that the Division Bench judgment of this Court in **Commissioner of Income Tax Vs. Shri Sharwan Kumar Agarwal** (*supra*) does not contain any ratio and can be said to be confined to the facts of that case and no question was sought to be referred regarding the proviso (c) to Section 43(5). He further submitted that

onus of proof was wrongly put on the Department in the said judgment whereas it was for the assessee to prove his case. Although the Tribunal relying on the judgment of this Court in *Sharwan Kumar Agarwal's (supra)* held that case is covered by the said judgment but we do not wish to rest our judgment on the above judgment.

Sri Shambhu Chopra, learned Counsel for the Department has placed reliance on judgment of the apex Court in 35 ITR 312 **Commissioner of Income-Tax Bihar and Orissa Vs. Ramakrishna Deo**. In the above case, the apex Court laid down that a person seeking exemption has to prove that the income sought to be taxed was the agricultural income. Following was laid down at page 317:

"The decisions of Indian Courts have likewise ruled and quite rightly that it is for those who seek exemption under s. 4 of the Act to establish it. Vide Amritsar Produce Exchange Ltd. In re (3) and Sm. Charusila Dassi and others, In re (4). So far as exemption under s. 4(3) (viii) is concerned, the matter is concluded by a decision of this Court given subsequent to the decision now under appeal. In Commissioner of Income-tax v. Venkataswamy Naidu (5), this Court held, reversing the judgment of the High Court of Madras, that it was for the assessee to prove that the income sought to be taxed was agricultural income exempt from taxation under s. 4(3)(viii). Bhacgwati, J., delivering the' judgment of the Court observed:

" ... the High Court erroneously framed the question in the negative form and placed the burden on the Income-tax Authorities of proving that the income from the sale of

milk received by the assessee during the accounting year was not agricultural income. In order to claim an exemption from payment of income tax in respect of what the assessee considered agricultural income, the assessee had to put before the Income-tax Authorities proper materials which would enable them to come to a conclusion that the income which was sought to be assessed was agricultural income. It was not for the Income-tax Authorities to prove that it was not agricultural income. It was this wrong approach to the question which vitiated the judgment of the High Court and led it to an erroneous conclusion."

Another judgment relied by Sri Chopra is 209 ITR 933 **Commissioner of Income-Tax Vs. Aditya Mills Ltd.**, in which case Section 43(5) of the Act fell for consideration. Following was laid down in the said judgment at page 943:

"From the facts as mentioned above, it would be evident that the assessee performed part of the contract and the dispute remained for the remaining part for which the supplies were not made. Section 43(5) refers to a speculative transaction which means, a transaction in which a contract for the purchase or sale of any commodity is periodically settled otherwise than by the actual delivery or transfer of the commodity. The said section is not restricted to a contract where the settlement is only in respect of the entire contract. The word "periodically" makes it clear that it could apply even to a part of a contract. Suppose, in a contract the supplies were to be made in equal instalments for 6 months and the supplies have been made for 5 months only, and the rest of the contract was settled without

actual delivery, in that case, it will be still a speculative transaction. The argument thus, that where a part of a contract is performed by actual delivery of the goods and part of the contract is settled otherwise than by actual delivery of the goods, the provisions of section 43(5) will not be attracted is not a correct interpretation of the provisions of section 43(5). The provisions of section 43(5) can be made applicable when there is a delivery of part of the goods and the part of the contract is settled otherwise than by actual delivery of the goods. That part where the settlement of the contract is without actual delivery of goods, it will fall under section 43(5).”

There cannot be any dispute to the proposition laid down by the Rajasthan High Court in the above case that that part where the settlement of the contract is without actual delivery of goods, it will fall under section 43(5). In the present case, the assessee is claiming benefit of proviso (c) to Section 43(5).

The judgment of Delhi High Court reported in (2004) 91 TTJ Delhi 57, **Assistant Commissioner of Income Tax Vs. Subhash Chand Shorewala** supports the assessee’s contention. In paragraph 7 of the judgment, the facts of the case were noted which is to the following effect:

“7. The brief facts are that the assessed is a member of the Delhi Stock Exchange engaged, inter alia, in the business as share broker, entering into transactions for and on behalf of its clients and has also done some trading on its own behalf. In the course of assessment proceedings, the assessing officer noticed that the assessed has received from the market a sum of Rs. 87,06,621 and as against this, the assessed has paid to

various clients a net amount of Rs. 90,48,581, thereby suffering a loss of Rs. 3,42,060 on such transactions. The assessed was asked to explain as to why the loss suffered by the assessed should not be treated as a speculative loss. The assessed explained by means of written submissions before the assessing officer that on some occasions, the loss on the share transaction was consequent to a breach of contract by the client and the same could not be said to be speculative loss. Secondly, it was also explained that in certain situations, a broker also acts as a jobber and the jobbing transactions are inherent in the business of share broking and the same is also not to be viewed as a speculative loss. The assessed also worked out the details of certain transactions, which resulted into excess of debit in the account of difference even in case where the actual delivery of shares took place. The assessed, in the said manner, contended that the said loss was not a speculative loss. The assessing officer, however, treated an amount of Rs. 3,42,060 as a net loss on account of speculation. Aggrieved, the matter was carried in appeal before the Commissioner (Appeals).”

In paragraphs 13 and 14, following was held:

“13. The two facets of the issue before us relate to : (a) loss as a result of the breach of contract by the clients; and (b) loss suffered on account of jobbing transaction. The order of the Commissioner (Appeals) on this issue is quite illustrative, a portion of which we reproduce as under :

'I have considered the arguments of the learned counsel.

As regards the loss on account of breach of contract, the Hon'ble Delhi High Court in the case of Bhagwan Dass Rameshwar Dayal (supra) held that one can visualise a number of situations in which there may be no delivery for various reasons, i.e., because of failure of the party on account of insolvency or frustration, e.g., banning of business or mere breach, i.e., to say non-supply. All these cannot be classified as speculative within the meaning of section 43(5). What the section visualises is a contract which is settled by means of a cross contract. If the contract is settled for some other reasons by payment of damages or even without payment of damages it may or may not be speculation transaction depending upon the circumstances of the case. The Hon'ble court further held that if a contract is broken, i.e., for any reasons one party is unable to give delivery order the other party is unable to take delivery, it is a case of breach of contract. A breach takes place on repudiation of contract or failure to perform it. When the obligation to supply or to take delivery comes to an end, it does not make the transaction speculative. The Hon'ble court clarified that if it was settled by mutual consent to avoid delivery then it would be speculative. But if it was settled because of inability of the assessed to supply or on account of the fact that it did not have necessary resources to give the, delivery then it would be a breach of contract and not the speculative transaction.

In view of the decision of the jurisdictional High Court, I hold that the loss suffered by the appellant on account of breach of contract falls outside the purview of speculative transaction. Accordingly, the assessing officer was not justified in treating the loss as speculative loss. He is

directed to treat the loss as business loss.

Even if the arguments of the assessing officer are accepted that such loss suffered by the appellant was on account of self-trading, still the loss cannot be termed as speculation loss. In normal terminology, the share trading business on behalf of oneself is known as jobbing. Section 43(5) defines the word speculative transaction, but there are three exceptions to it. The proviso (c) to section 43(5) reads as under : '

'A contract entered into by a member of forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to hedge against loss which may arise in the ordinary course of his business as a member.'

This proviso makes it very clear that any profit or loss on account of jobbing will not be in the nature of speculation profit or speculation loss. Thus, even if it is accepted that the loss suffered by the appellant was on account of self-trading in view of proviso (c) to section 43(5) such loss cannot be treated as speculation loss. The assessing officer is directed to treat the loss as normal business loss. Accordingly, I hold that the loss of Rs. 3,01,785 is normal business loss and not the speculation loss.'

14. *A perusal of the aforesaid leads to an inference that the legal aspect has been properly discussed and appreciated by the Commissioner (Appeals). Admittedly, the assessed, being in the business of broking, would be facing situations wherein some of the clients do not own up the transactions on anticipating losses. In such situations, the consequential loss incurred by the*

assessed to honour the commitments is to be viewed as an integral part of carrying on of assessee's business and is, therefore, not liable to be judged as a speculation loss. The decision of the jurisdictional High Court in the case of Bhagwan Das Rameshwar Dayal (supra) supports the stand of the assessed."

The Delhi High Court in the said judgment had held that in normal terminology, the share trading business on behalf of oneself is known as jobbing. The above judgment supports the assessee's case that a transaction carried on by the assessee for sale and purchase of the shares was fully covered by the term 'jobbing' and assessee is entitled for the extension of the benefit of proviso (c) to Section 43(5) of the Act.

The Tribunal having returned finding that the details of each and every transaction were disclosed by the assessee which were part of the paper book. No discrepancy in any of the transactions can be pointed out by the Assessing Officer nor the bonafide of the transactions were doubted, the transaction thus carried out were part of the 'jobbing' within the meaning of proviso (c) to Section 43(5).

We are thus of the view that the order of the Tribunal allowing the appeal of the assessee is to be upheld although confined to the ground that the losses suffered by the assessee cannot be termed to be speculative loss by virtue of proviso (c) to Section 43(5). In view of the foregoing discussions, all the questions are answered in favour of the assessee and against the Revenue. The appeal is dismissed.

Order Date :- 20.1.2014

LA/-