

IT: Both delivery based transaction and derivative transactions are non-speculative as far as section 43(5) is concerned and, thus, they will have same treatment as regards application of Explanation to section 73 is concerned

IT: Where assessee, a property dealer, received interest from GIDA on cancellation of auction plots under direction of Supreme Court, since interest was emanating from amount paid by assessee and not directly from its business activities, it could not be considered as business income

IT: Interest received by assessee from deposits given for obtaining bank guarantee was to be assessed as income from other sources

IT: Rule 8D not applicable for assessment year 2007-08

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[2018] 92 taxmann.com 235 (Cochin - Trib.)

IN THE ITAT COCHIN BENCH

Dewa Projects (P.) Ltd.

v.

Assistant Commissioner of Income Tax, Circle-1 (1), Kochi*

**CHANDRA POOJARI, ACCOUNTANT MEMBER
AND GEORGE GEORGE K., JUDICIAL MEMBER
IT APPEAL NOS. 150, 151 & 219 (COCH.) OF 2014
[ASSESSMENT YEAR 2007-08]
MARCH 19, 2018**

I. Section [73](#), read with section [43\(5\)](#) of the Income-tax Act, 1961 - Losses - In speculation business (Shares) - Assessment year 2007-08 - Assessee was a property dealer - It was also dealing in huge volume of speculative share transactions - During relevant year assessee set off loss incurred in share transactions against other business income - Assessing Officer treated said loss as speculative loss and disallowed setting off same against business income of assessee - Whether since both delivery based transaction and derivative transactions are non-speculative as far as section 43(5) is concerned, they will have same treatment as regards application of Explanation to section 73 is concerned - Held, yes - Whether, therefore, before application of Explanation to section 73, aggregation of business profit/loss is to be worked out irrespective of fact, whether it is from share delivery transaction or derivative transaction - Held, yes - Whether in view of aforesaid, impugned disallowance was to be set aside and matter was to be remanded back to Assessing Officer to bifurcate speculative loss and normal business loss as indicated above - Held, yes [Paras 8.1 and 8.4] [In favour of assessee/Matter remanded]

II. Section [56](#), read with section [28\(i\)](#) of the Income-tax Act, 1961 - Income from other sources - Chargeable as (Interest) - Assessment year 2007-08 - Assessee was a property developer - During relevant year, assessee received interest from GIDA on cancellation of auction plots under direction of Supreme Court - Assessee's case was that interest so received had to be taxed as business income - Assessing Officer,

however, brought interest income to tax under head 'Income from other sources' - Whether since interest was emanating from amount paid by assessee and not directly from its business activities, it could not be considered as business income of assessee - Held, yes - Whether, therefore, impugned order passed by Assessing Officer was to be upheld - Held, yes [Para 10.4] [In favour of revenue]

III. Section [56](#) of the Income-tax Act, 1961 - Income from other sources - Chargeable as (Interest) - Assessment year 2007-08 - Whether interest received by assessee from deposits given for obtaining bank guarantee was to be assessed as income from other sources - Held, yes [Para 11.4] [In favour of revenue]

IV. Section [14A](#), of the Income-tax Act, 1961, read with Rule 8D of the Income-Tax Rules, 1962 - Expenditure incurred in relation to income not includible in total income (Applicability of) - Assessment year 2007-08 - Whether rule 8D could not be applied for assessment year 2007-08 - Held, no [Para 9.1] [Partly in favour of assessee]

FACTS-I

- The assessee was a property developer. It was also dealing in huge volume of speculative share transactions.
- The assessee set off the loss of Rs. 803.03 lakhs with the other business income. The Assessing Officer treated said loss as speculative loss and disallowed setting off same against the business income of the assessee.
- The Commissioner (Appeals) confirmed the order of the Assessing Officer.
- On second appeal:

HELD-I

- The assessee's case was that the loss in derivatives cannot be treated as speculative loss in view of the special provision of section 43(5)(d) of the Act. The assessee is also engaged in buying and selling of shares. It incurred loss of Rs. 803.03 lakhs in dealing of shares and claimed it as business loss to be set off against the business income of the assessee. The Assessing Officer treated the same as speculative loss. The contention of the assessee is that section 73 has no application. As per section 43(5), trading in derivatives of shares which is not done by taking delivery does not come into the purview of speculative transactions.
- Similarly, as per clause (d) of section 43(5), derivative transaction in shares is not a speculative transaction as defined in the said section. Therefore, both the profit and loss from share delivery transactions and derivative transactions are having the same meaning, as far as section 43(5) of the Act is concerned. In view of the fact that both delivery transactions and derivative transactions are non-speculative as far as section 43(5) is concerned, it follows that both will have same treatment as per application of *Explanation* to section 73 of the Act. Therefore, aggregation of the share trading profit and loss from derivative transaction should be done before *Explanation* to section 73 is applied. The above view has been taken by the Special Bench of the ITAT, Mumbai in the case of *Asstt. CIT v. Concorde Commercial (P.) Ltd.* [2005] 95 ITD 117/146 Taxman 64. [Para 8]
- From the above, it is concluded that both trading of shares and derivative transactions are not coming under the purview of section 43(5) of the Act which

provides definition of 'speculative transaction' exclusively for purposes of section 28 to 41 of the Act. Again, the fact that both delivery based transaction and derivative transactions are non-speculative as far as section 43(5) is concerned goes to confirm that both will have same treatment as regards application of the *Explanation* to section 73 is concerned, which creates a deeming fiction. Now before application of the *Explanation* to section 73, aggregation of the business profit/loss is to be worked out irrespective of the fact, whether it is from share delivery transaction or derivative transaction. [Para 8.1]

- In view of above, the issue is remitted to the file of the Assessing Officer to bifurcate speculative loss and normal business loss as indicated above. This ground of appeal of the assessee is partly allowed for statistical purposes. [Para 8.4]

FACTS-II

- During relevant year, the Assessing Officer made addition to the assessee's income in respect of interest received from Goshree Island Development Authority (GIDA) on cancellation of auctioned plots to the assessee under the direction of the Supreme Court. The Assessing Officer treated the interest paid by the GIDA on cancelled plots as income from other sources.
- The Commissioner (Appeals) confirmed the addition made by the Assessing Officer.
- On second appeal:

HELD-II

- In the instant case, interest was received by the assessee from GIDA on cancellation of auction plots to the assessee under the direction of the Supreme Court. GIDA paid interest to the assessee apart from the value of land on cancellation of the plots allotted to the assessee. According to the assessee the interest received by the assessee on cancellation of plots allotted is to be treated as business income of the assessee as the purchase of plots is the business activity of the assessee and the income derived from the said transaction is also business income of the assessee.
- The plot allotted to the assessee is the business asset of the assessee. However, interest received on cancellation of the plots is a step removed from the business activities of the assessee. The derivation of interest from GIDA cannot be said that it is emanating from the business activities carried out by the assessee. On the other hand, it was emanating from the amount paid by the assessee and not directly from its business activities of the assessee. Therefore, said interest cannot be considered as business income of the assessee. In other words, it should be treated as income from other sources. Hence, this ground of appeal is rejected. [Para 10.4]

CASE REVIEW-I

Dy. CIT v. Baljit Securities (P.) Ltd. [[2015\] 55 taxmann.com 191/68 SOT 82 \(URO\) \(Kol. - Trib.\)](#) (para 8.2) followed.

CASE REVIEW-III

Pandian Chemicals Ltd. v. CIT [[2003\] 129 Taxman 539 \(SC\)](#) (para 11.4) followed.

CASES REFERRED TO

Dy. CIT v. Aiswarya & Co. (P.) Ltd. [IT Appeal No. 86 (CHNY) of 2014, dated 29-5-2015] (para 6.3), *Shree Capital Services Ltd. v. Asstt. CIT* [2009] 121 ITD 498 (Kol.) (SB) (para 6.3), *Dy. CIT v. Madanlal Ltd.* [2012] 51 SOT 188/21 taxmann.com 444 (URO) (Kol.) (para 6.3), *Dy. CIT v. Paterson Securities (P.) Ltd.* [2010] 127 ITD 386 (Chennai) (para 6.3), *Dy. CIT v. SSKI Investors Services (P.) Ltd.* [2008] 113 TTJ 511 (Mum.) (para 6.3), *RBK Securities (P.) Ltd. v. ITO* [2008] 118 TTJ 465 (Mum.) (para 6.3), *CIT v. Vegetable Products Ltd.* [1973] 88 ITR 192 (SC) (para 6.4), *CIT v. Podar Cement (P.) Ltd.* [1997] 226 ITR 625/92 Taxman 541 (SC) (para 6.4), *Apollo Tyres Ltd. v. CIT* [2002] 255 ITR 273/122 Taxman 562 (SC) (para 6.6), *CIT v. DLF Commercial Developers Ltd.* [2013] 35 taxmann.com 280/218 Taxman 45 (Delhi) (para 7), *CIT v. Intermetal Trades Ltd.* [2006] 285 ITR 536/156 Taxman 21 (MP.) (para 7.1), *CIT v. Arvind Investments Ltd.* [1991] 192 ITR 365/58 Taxman 216 (Cal.) (para 7.1), *Eastern Aviation & Industries Ltd. v. CIT* [1994] 208 ITR 1023/74 Taxman 641 (Cal.) (para 7.1), *Asstt. CIT v. Concorde Commercials (P.) Ltd.* [2005] 95 ITD 117/146 Taxman 64 (Mum.) (SB) (para 8), *Dy. CIT v. Baljit Securities (P.) Ltd.* [2015] 55 taxmann.com 191/68 SOT 82 (URO) (Kol. - Trib.) (para 8.2), *Cambay Electric Supply Ind Co. v. CIT* [1978] 113 ITR 84 (SC) (para 10.2), *CIT v. Sterling Foods* [1999] 237 ITR 579/104 Taxman 204 (SC) (para 10.2), *CIT v. Bokaro Steel Ltd.* [1999] 236 ITR 315/102 Taxman 94 (SC) (para 10.4), *CIT v. Jaypee DSC Ventures Ltd.* [2011] 335 ITR 132/204 Taxman 169/17 taxmann.com 257 (Delhi) (para 11.4) and *Pandian Chemicals Ltd. v. CIT* [2003] 262 ITR 278/129 Taxman 539 (SC) (para 11.4).

T.M. Sreedharan, Sr. Adv. and Smt. Vandana Menon, Adv. for the Appellant. Swapna Nanu Ambat, AD CIT for the Respondent.

ORDER

Chandra Poojari, Accountant Member - The first appeal in ITA No. 150/Coch/2014 filed by the assessee is arising out of the order of the CIT (A) dated 18/12/2013 which in turn is emanating from the assessment order passed u/s. 143(3) of the I.T. Act. The appeals in ITA Nos. 151 & 219/Coch/2014 are cross appeals which are emanating from the order of the CIT (A) dated 18/12/2013 which in turn are emanating from the assessment order passed u/s. 143(3) r.w.s. 147 of the I.T. Act.

ITA No. 150/Coch/2014

2. The first ground in assessee's appeal in I.T.A. No. 150/Coch/2014 is with regard to the disallowance made u/s. 40(a)(ia) of the Act amounting to Rs. 5,40,500/-. This ground was not pressed by the Ld. AR and accordingly is dismissed as not pressed.
3. The next ground is with regard to rejection of loss of Rs. 8.03 crores by treating the same as speculative loss.
4. The facts of this case are that the assessee is a property developer. The assessee was also dealing in huge volume of speculative share transaction amounting to Rs. 199028.81 lakhs out of the total share transaction amounting to Rs. 202816.73 lakhs. The assessee has netted off the loss of 803.03 lakhs with the other business income of the assessee. The Assessing Officer treated the loss of Rs. 803.03 lakhs as speculative loss and disallowed by setting off against the business income of the assessee.
5. Against this, the assessee carried the matter in appeal before the CIT (A). The CIT (A) confirmed the order of the Assessing Officer.
6. Aggrieved by the order of the CIT (A), the assessee is in appeal before us. The Ld. AR submitted that the sum of Rs. 8,03,03,000/- consists of loss from futures and options amounting to Rs. 519.82 lakhs and loss from cash market transaction amounting to Rs. 283.21 lakhs. The Ld. AR submitted that the break

up of the transaction showed that the loss from dealing in derivatives amounting to Rs. 592.82 is not speculative loss in view of the Special Provision contained in Section 43(5)(d) of the Act. Section 43(5) defines "speculative transaction" as a transaction in which a contract for the 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. According to the Ld. AR for the purpose of the above clause as per clause (d) of the proviso, an eligible transaction in respect of trade in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 carried out in a recognized stock exchange shall not be deemed to be a speculative transaction. In this connection, it was also submitted that as per section 29 of the Act, income from profits and gains of business, profession, as per section 28, shall be computed in accordance with the provisions contained in section 30 to 43D. The Ld. AR submitted that the Assessing Officer treated the entire transaction as speculative transaction without making any distinction between transaction in derivatives and cash transactions. The Assessing Officer held that the whole share transaction business resulted in a loss of Rs. 8,03,03,000/- with other income of the assessee and speculative transactions in the case of the assessee, if part of the business consisted of dealing in shares, then all the derivatives whether delivery based or non-delivery based would be treated as speculative loss.

6.1 Referring to section 43 of the Act, the Ld. AR submitted that certain terms in respect of computation of income for the purpose of section 28 to 43D of the Act are defined. It was submitted that section 43(5)(d) is a special provision which is to be considered while computing business income as per section 29 of the Act. The Ld. AR submitted that Section 43(5)(d) specifically defines speculative transaction for the purpose of computation of business income whereas section 73 refers to set off and carry forward and loss and these provisions operate in different fields. Further it was submitted that sub-sec (5) of sec. 43 refers to an eligible transaction in respect of trading and derivatives referred to in clause(ac) of section 2 of Securities Contracts (Regulation) Act, 1956 carried in recognized stock exchanges and eligible transaction is defined in Explanation 1A.

6.2 According to the Ld. AR an option is a type of derivative instrument whereby a person gets right to buy or sell at an agreed amount an underlying asset on or before the specified future date. It was submitted that "Futures and Options" are both standardized derivative instruments traded on a stock exchange. Futures and Options are also derivatives, i.e., the instrument whose value depends on an underlying source or asset.

6.3 The Ld. AR relied on the decision of the ITAT, 'C' Bench, Chennai in the case of *Dy. CIT v. Aiswarya & Co. (P.) Ltd.* [IT Appeal No. 86 (CHNY) of 2014, dated 29-5-2015] wherein it was held that explanation to sec. 73 cannot apply to derivatives but only to purchase and sale of simplicitor. Moreover, a speculative transaction as per sec. 43(5) means a transaction in which the contract for the purchase and sale of any commodity, including stocks, shares is periodically or ultimately settled., otherwise than by way of actual delivery or transfer of commodity or scrips. The Tribunal also relied on the following decisions to hold that the transactions in derivatives are treated as regular business transactions and not speculative transactions:

- (i) *Shree Capital Services Ltd. v. Asstt. CIT* [\[2009\] 121 ITD 498 \(Kol.\) \(SB\)](#)
- (ii) *Dy. CIT v. Madanlal Ltd.* [\[2012\] 51 SOT 188/21 taxmann.com 444 \(URO\) \(Kol.\)](#).
- (iii) *Dy. CIT v. Paterson Securities (P.) Ltd.* [\[2010\] 127 ITD 386 \(Chennai\)](#)
- (iv) *Dy. CIT v. SSKI Investors Services (P.) Ltd.* [\[2008\] 113 TTJ 511 \(Mum.\)](#)
- (v) *RBK Securities (P.) Ltd. v. ITO* [\[2008\] 118 TTJ 465 \(Mum.\)](#).

6.4 The Ld. AR submitted that the Tribunal also held that where two views are possible on a point of decision, the one in favour of the assessee should be followed. For this proposition the Ld. AR relied on

the judgment of the Apex Court in the case of *CIT v. Vegetable Products Ltd.* [\[1973\] 88 ITR 192](#) and *CIT v. Podar Cement (P.) Ltd.* [\[1997\] 226 ITR 625/92 Taxman 541](#).

6.5 The Ld. AR submitted that the AO did not look into the provisions of section 43(5)(d) inserted by the Finance Act, 2005 with effect from 01/04/2006 which states that an eligible transaction in respect of trading in derivatives referred to in clause (ac) of Section 2 of the Securities Contract (Regulation) Act, 1956 carried out in a recognized Stock exchange shall not be deemed to be speculative transaction. The Central Govt. had issued Notification No. 2/2006 (SO 89E) dt. 25/01/2006 notifying the stock exchange for the purpose of the said clause of section 43(5). Thus, according to the Ld. AR the loss from dealing in derivatives Rs. 519.82 lakhs is not speculative loss in view of the special provision of section 43(5)(d) of the I.T. Act. The Ld. AR submitted that since the assessee is a company section 73 would apply. From the provisions of the Act and particularly the Explanation to Section 73 of the Act, it is very clear that the explanation deals with the purchase and sale of shares and not with derivative transactions carried on account of 'Future and Options' through any recognized Stock Exchange as in the present case of the assessee. According to the Ld. AR, the transactions of 'Future & Options' are not shares although underlying assets for determining the prices of futures and options which are shares, commodities, currencies etc. Futures and options are in themselves the items, which are traded through stock exchange and not the underlying items to which 'Future and Options' relate. It was submitted that 'Future and Options' are not covered by Explanations to Section 73 of the Act for the reasons that this is specifically excluded by way of clause (d) to section 43(5) of the Act w.e.f. 01-04-2006 by Finance Act 2005. In the present case of assessee, according to the Ld. AR, the assessment year involved is 2007-08, hence it is fully covered by the amended clause (d) of Section 43(5) of Act.

6.6 The Ld. AR relied on the decision of the Kolkata Bench of the ITAT in *Madanlal Ltd. Kolkata v. Department of Income Tax* on 04-05-2012 wherein it was held that the explanation to Section 73 of the Act refers to the business of purchase and sale of shares and not the business of derivatives transactions carried out through recognized stock exchange by the assessee. The Ld. AR further relied on the Hon'ble Supreme Court in *Apollo Tyres Ltd. v. CIT* [\[2002\] 255 ITR 273/122 Taxman 562](#) wherein it was held that units of UTI are not shares as contemplated in Explanation to Section 73. According to the Apex Court "if the legislative had contemplated making the units also a deemed share then it could have stated so. In the absence of any such specific deeming provisions in regard to the units as share it would be erroneous to extend the provision of Section 32(3) of the UTI Act to the units of UTI for the purpose of holding that the unit is a share". By the same analogy, derivatives are different from shares since they have been so expressly defined by the Securities Contract (Regulation) Act 1956:

"Thus out of the total loss of Rs. 803.03 lakhs, the loss pertaining to derivatives Rs. 519.82 is to be treated as 'non-speculative' and the same can be set off against other income."

6.7 The Ld. AR submitted that out of total loss of Rs. 8.03 crores, loss from dealing in derivatives was Rs. 5.91 crores and loss from cash marketing transactions was to the tune of Rs. 2.83 crores. The Ld. AR submitted that it is covered under eligible transactions in respect of trading and derivatives in terms of section 43(5)(d) and hence this loss in derivatives cannot be treated as speculative loss and the same should be allowed to be adjusted against the business income.

7. The Ld. DR relied on the judgment of the Delhi High Court in the case of *CIT v. DLF Commercial Developers Ltd.* [\[2013\] 35 taxmann.com 280/218 Taxman 45](#) wherein it was held that determination of stock derivatives value is dependent on shares hence the provisions of section 73 of the Income Tax, 1961 are applicable to the derivative business. Accordingly, it was submitted that the loss on account of derivative transactions is not allowed to be carried forward and set off against (non- speculative) business income. The Ld. DR submitted that Explanation to section 73 categorically provides that where any part of the business of the company includes purchase and sale of shares of other company, it shall

be deemed to be carrying on speculation business to the extent to which the business consists of that activity.

7.1 Further, the Ld. DR submitted that the intention of section 43 of the Act, was to define certain terms in respect of classification of income and for purposes of section 28 to section 41 of the Act. It was submitted that section 43(5)(d) of the Act restricted application since it defines speculative transaction and excludes transactions and derivatives only for a limited purpose. On the other hand, the Ld. DR submitted that section 73 of the Act has wider application and deals with circumstances under which carry forward of such losses can be permitted. For this proposition, the Ld. DR relied on the judgments in the case of *CIT v. Intermetal Trades Ltd.* [2006] 285 ITR 536/156 Taxman 21 (M.P.), *CIT v. Arvind Investments Ltd.* [1991] 192 ITR 365/58 Taxman 216 (Cal.), *Eastern Aviation & Industries Ltd. v. CIT* [1994] 208 ITR 1023/74 Taxman 641 (Cal.). Thus it was submitted that derivatives of the kind and nature traded by the assessee were relatable to stocks and shares and accordingly, the assessee was not entitled to the benefit of section 73 of the Act.

7.2 The Ld. DR relied on the judgment of the Delhi High Court in the case of *DLF Commercial Developers Ltd.* (*supra*) wherein it was held as under:

"The term 'speculative transaction' has been defined only in Section 43(5) of the Act and it is qualified i.e. that the scope of the definition is restricted in its application to working out the mandate of Sections 28 to 41 of the Act. In terms of the Explanation to Section 73 of the Act, in case of a company, business of purchase and sale of shares is deemed to be speculation business.

The taxpayer's contention that the Parliament intended that such transactions are also excluded from the mischief of Explanation to Section 73 of the Act, is not substantiated.

Though the expression 'derivatives' is defined only in Section 43(5) of the Act and it excludes such transactions from the scope of speculative transactions, derivative has not been excluded from Section 73 of the Act since a definition enacted for only a restricted purpose or objective should not be applied to achieve other ends or purposes.

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. Also the intent prevails regardless whether standard exclusionary terms (such as 'unless the context otherwise requires') are used."

7.3 Thus according to the Ld. DR, the explanation to Section 73 deems that the companies which are into business of purchase and sale of shares, even if delivery based are treated to be carrying on speculative business. Further, according to the Ld. DR, the explanation (d) to section. 43(5) provides that the eligible derivative transaction on recognized stock exchange is not treated as speculative transaction for business income computation. In the present case the High Court held that the stock derivative derive their value from underlying shares and hence they are not different from shares. Therefore, the exclusion of derivative transaction from the definition of speculative transaction is not proper for interpreting the provisions dealing with set-off and carry forward of loss. Thus according to the Ld. DR, in view of the decision of Delhi High Court (*supra*), the assessing officer has rightly treated this transaction as speculative transaction and loss not to be adjusted against any other kind of income.

8. We have heard the rival contentions and perused the material on record. The Ld. AR submitted that the total derivatives loss is Rs. 519.82 lakhs and other trading loss (cash market) was Rs. 283.21 lakhs. According to the Ld. AR, at worst, Rs. 283.21 lakhs is to be considered as speculative loss and Rs. 519.82 lakhs is to be considered as business loss only in view of the special provision of section 43(5)(d) which was inserted by Finance Act, 2005 with effect from 1.4.2006 which states that eligible transaction

in respect of trading in derivatives referred in clause (ac) of section 2 of the Securities Contract (Regulation) Act, 1956 carried out in a recognized Stock Exchange shall not be deemed to be speculative transaction. He drew our attention to clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956. Thus he submitted that the loss in derivatives cannot be treated as speculative loss in view of the special provision of section 43(5)(d) of the Act. The assessee is also dealing in buying and selling of shares. It incurred loss of Rs. 803.03 lakhs in dealing of shares and claimed it as business loss to be set off against the business income of the assessee. The Assessing Officer treated the same as speculative loss. Before us, the contention of the Ld. AR is that section 73 of the I.T. Act has no application. As per section 43(5), trading in derivatives of shares which is not done by taking delivery does not come into the purview of speculative transactions. Similarly, as per clause (d) of sec. 43(5), derivative transaction in shares is not a speculative transaction as defined in the said section. Therefore, both the profit and loss from share delivery transactions and derivative transactions are having the same meaning, as far as section 43(5) of the Act is concerned. In view of the fact that both delivery transactions and derivative transactions are non speculative as far as section 43(5) is concerned, it follows that both will have same treatment as per application of Explanation to section 73 of the Act. Therefore, aggregation of the share trading profit and loss from derivative transaction should be done before Explanation to section 73 is applied. The above view has been taken by the Special Bench of the ITAT, Mumbai in the case of *Asstt. CIT v. Concorde Commercials (P.) Ltd.* [\[2005\] 95 ITD 117/146 Taxman 64 \(Mum.\) \(SB\)](#). The Special Bench held as under:

"Before considering whether the assessee's case is hit by the deeming provision of Explanation to sec. 73 of the Act, the aggregate of the business profit/loss has to be worked out based on the non-speculative profits; either it is from share delivery or from share derivative."

8.1 From the above, it is concluded that both trading of shares and derivative transactions are not coming under the purview of section 43(5) of the Act which provides definition of "speculative transaction" exclusively for purposes of section 28 to 41 of the Act. Again, the fact that both delivery based transaction and derivative transactions are non-speculative as far as section 43(5) is concerned goes to confirm that both will have same treatment as regards application of the Explanation to section 73 is concerned, which creates a deeming fiction. Now before application of the said Explanation, aggregation of the business profit/loss is to be worked out irrespective of the fact, whether it is from share delivery transaction or derivative transaction.

8.2 This view has been confirmed by the Hon'ble Calcutta High Court in the case of *Dy. CIT v. Baljit Securities (P.) Ltd.* [\[2015\] 55 taxmann.com 191/68 SOT 82 \(URO\) \(Kol. - Trib.\)](#) and held as under:—

"Clause (d) of Section 43(5) became effective with effect from 1st April, 2006. Therefore, prior to 1st April, 2006 any transaction in which a contract for the purchase or sale of any commodity including stocks and shares was periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrip was a speculative transaction. Sub-section 1 of Section 73 provides as follows:

'(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 resultant effect was that any loss arising out of speculative transaction could only have been set off against profits arising out of speculative transaction. In the present case, the assessee, as already indicated, has been dealing in shares where delivery was in fact taken and also in shares where delivery was not ultimately taken. In other words, the assessee has been dealing in actual selling and buying of shares as also dealing in shares only for the purpose of settling the transaction otherwise than by actual delivery. The question arise whether the losses arising out of the dealings and transaction in which the assessee did not ultimately take delivery of the shares or give delivery of the shares could

be set off against the income arising out of the dealings and transactions in actual buying and selling of shares. An answer to this question is to be found in the explanation appended to Section 73 which reads as follows:

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", 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. In order to resolve the issue before us, the section has to be read in the manner as follows:

"*Explanation* : Where any part of the business of a company (... ..) consist 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."

It would, thus, appear that where an assessee, being the company, besides dealing in other things also deals in purchase and sale of shares of other companies, the assessee shall be deemed to be carrying on a speculation business. The assessee, in the present case, principally is a share broker, as already indicated. The assessee is also in the business of buying and selling of shares for self where actual delivery is taken and given and also in buying and selling of shares where actual delivery was not intended to be taken or given. Therefore, the entire transaction carried out by the assessee, indicated above, was within the umbrella of speculative transaction. There was, as such, no bar in setting off the loss arising out of derivatives from the income arising out of buying and selling of shares. This is what the learned Tribunal has done."

8.3 From the above decision of the Calcutta High Court in the case of *Baljit Securities Pvt. Ltd.* cited *supra*, the issue stands covered in favour of the assessee.

8.4 Accordingly, we remit the issue to the file of the Assessing Officer to bifurcate speculative loss and normal business loss as indicated above. This ground of appeal of the assessee is partly allowed for statistical purposes.

9. The next ground in the assessee's appeal in I.T.A. No. 150/Coch/2014 is with regard to the disallowance made u/s. 14A of the I.T. Act.

9.1 The facts of the case are that the Assessing Officer disallowed the sum of Rs. 8,40,000/- u/s. 14A of the I.T. Act as the assessee earned exempt income at Rs. 8.97 lakhs. In our opinion, Rule 8D was inserted in Income Tax Rules with effect from 24/03/2008 by Income Tax (5th Amendment) Rules, 2008. Being so, Rule 8D cannot be applied for the assessment year 2007-08. However, there is every chance to incur certain administrative expenditure. Accordingly, we direct the AO to disallow 2% of the exempt income as expenditure incurred for the purpose of earning exempt income. This ground of appeal of the assessee is partly allowed. Thus the appeal in ITA No. 150/Coch/2014 is partly allowed for statistical purposes..

10. In the assessee's appeal in I.T.A. No. 151/Coch/2014, the only ground is with regard to treatment of income of Rs. 4,04,11,610/- as income from other sources.

10.1 The facts of the case are that the Assessing Officer made an addition of Rs. 4,04,11,610/- as this amount was received as interest from Goshree Island Development Authority (GIDA) on cancellation of

auctioned plots to the assessee under the direction of Supreme Court. The Assessing Officer treated the interest paid by the GIDA on cancelled plots apart from the value of land as income from other sources.

10.2 On appeal, the CIT (A) confirmed the addition made by the Assessing Officer by observing that the provisions of the I.T Act are very clear. The CIT (A) observed that there are specific heads for charging various kinds of income and the "income from other source is actually residual head where income from bank interest, dividends etc. are charged to tax. The CIT (A) relied on the judgments of the Supreme Court in the case of *Cambay Electric Supply Ind Co. v. CIT* [1978] 113 ITR 84 and *CIT v. Sterling Foods* [1999] 237 ITR 579/104 Taxman 204 wherein the Apex Court held that there are specific heads of income and given the major source of income, if a particular income falls under the head income from other sources, the same should be treated as interest income chargeable under income from other sources and not as business income, unless the same can be shown as derived from such business. According to the CIT (A), in this case although the assessee received this interest on the cancellation of its plot but the fact remains that the amount was received as interest on the payments made by the assessee towards the cost of the land and hence interest received from GIDA is nothing but income from other sources and the Assessing Officer had rightly treated the same under this head. The CIT (A) held that the income was not derived from the business activities of the assessee. Accordingly, he confirmed the addition made by the Assessing Officer.

10.3 Against this the assessee is in appeal before us. The Ld. AR submitted that since the assessee had taken term loans from various banks for the purchase of the land that was allotted by GIDA, therefore when these plots were cancelled and the amounts were returned to the assessee with interest, interest on this refund should be treated as business income and should be allowed to be reduced from its work in progress account as earlier interest that was being paid to various banks for raising the term was also part of work in progress account of the assessee. The Ld. AR claimed that since this refund was on the loan/plots which were used by the assessee in its business, the interest thereon should not be treated as income from other sources and rather it should be included in the contract work in progress which was capitalized by the assessee till the commencement of the project.

10.4 We have heard the rival contentions and perused the material available on record. The Ld. AR relied on the judgment of Supreme Court in the case of *CIT v. Bokaro Steel Ltd.* [1999] 236 ITR 315/102 Taxman 94. Income received from letting out quarters to employees of contractors who were engaged in construction of assessee's plant, hire charges for letting out plant and machinery through contractors, interest on account of advances made to the contractors by the assessee and royalty received from them for excavation of stones etc. are all inextricably connected with the construction activity and capital receipts should be deducted from the cost of capital assets. In the present case, interest was received by the assessee from GIDA on cancellation of auction plots to the assessee under the direction of the Supreme Court. GIDA paid interest to the assessee apart from the value of land on cancellation of the plots allotted to the assessee. According to the Ld. AR the interest received by the assessee on cancellation of plots allotted is to be treated as business income of the assessee as the purchase of plots is the business activity of the assessee and the income derived from the said transaction is also business income of the assessee. In our opinion, the plot allotted to the assessee is the business asset of the assessee. However, interest received on cancellation of the plots is a step removed from the business activities of the assessee. The derivation of interest from GIDA cannot be said that it is emanating from the business activities carried out by the assessee. On the other hand, it was emanating from the amount paid by the assessee and not directly from the business activities of the assessee. Therefore, in our opinion, that interest cannot be considered as business income of the assessee. In other words, it should be treated as income from other sources. Hence, this ground of appeal is rejected. The appeal in ITA No. 151/Coch/2014 is dismissed.

11. In the Revenue's appeal in ITA No. 219/Coch/2014, the Revenue's grievance is with regard to

treatment of interest income earned on margin money paid by GIDA.

11.1 The facts of the case are that the Assessing Officer made an addition on interest received on margin money deposits as income from other sources. Accordingly, the interest income of Rs. 52,38,137/- was treated as interest income in the hands of the assessee.

11.2 On appeal, the CIT (A) gave direction to the Assessing Officer to treat the amount as business income.

11.3 Against this, the Revenue is in appeal before us.

11.4 The Ld. AR submitted that the issue is covered by the judgment of Delhi High Court in the case of *CIT v. Jaypee DSC Ventures Ltd.* [\[2011\] 335 ITR 132/204 Taxman 169/17 taxmann.com 257](#) wherein it was held that interest received from fixed deposits which are in Bank for bank guarantee should be treated as business income of the assessee. The interest received shall go towards adjustment against the project expenditure and the same cannot be assessed as income from other sources. In our opinion, interest derived from deposits in Bank which was given for getting bank guarantee cannot be treated as capital receipt or business income and it is to be treated as interest income to be assessed under the head income from other sources in view of the judgment of the Supreme Court in the case of *Pandian Chemicals Ltd. v. CIT* [\[2003\] 262 ITR 278/129 Taxman 539](#). Accordingly, this ground raised by the Revenue is allowed.

12. In the result, the appeals filed by the assessee in ITA No.150/Coch/2014 is partly allowed for statistical purposes, the appeal filed by the assessee in ITA No.151/Coch/2014 is dismissed and the appeal filed by the Revenue in ITA No. 219/Coch/2014 is allowed.

sunil

*Partly in favour of assessee/Matter remanded.