

IT : Loss incurred on account of derivatives would be deemed business loss under proviso to section 43(5) and not speculation loss, Explanation to section 73 would not be applicable

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[2018] 94 taxmann.com 450 (Ahmedabad - Trib.)

IN THE ITAT AHMEDABAD BENCH 'B'

Income Tax Officer, Ward-8(4), Ahmedabad

v.

Upkar Retail (P.) Ltd.*

**PRAMOD KUMAR, ACCOUNTANT MEMBER
AND MAHAVIR PRASAD, JUDICIAL MEMBER**

IT APPEAL NO. 2237 (AHD.) OF 2014

[ASSESSMENT YEAR 2011-12]

JUNE 18, 2018

Section 70, read with sections 43(5) and 73, of the Income-tax Act, 1961 - Losses - Set off from one source against income from other source under same head of income (Speculation business) - Assessment year 2011-12 - Calcutta High Court held that loss incurred on account of derivatives would be deemed business loss under proviso to section 43(5) and not speculation loss and, accordingly Explanation to section 73 could not be applied and as such, loss would be set off against income from business - However, Delhi High Court took a different view on this matter and decided same, in principle, against assessee - Whether, view taken by Calcutta High Court being favourable to assessee was to be followed - Held, yes [Para 5] [In favour of assessee]

CASE REVIEW

Tej International (P.) Ltd. v. Dy. CIT [2001] 118 Taxman 59 (Mag.) (Delhi) (para 5) and *Asian Financial Services Ltd. v. CIT [2016] 70 taxmann.com 9/240 Taxman 192 (Cal.)* (para 5) followed.

CASES REFERRED TO

Asian Financial Services Ltd. v. CIT [2016] 70 taxmann.com 9/240 Taxman 192 (Cal.) (para 2), *CIT v. Asian Financial Services Ltd. [2016] 75 taxmann.com 68/243 Taxman 147 (SC)* (para 3) and *Tej International (P.) Ltd. v. Dy. CIT [2001] 118 Taxman 59 (Mag.) (Delhi)* (para 4).

V.K. Singh for the Appellant. **Mehul K. Patel** for the Respondent.

ORDER

Pramod Kumar, Accountant Member - By way of this appeal, the Assessing Officer has challenged correctness of the Id. CIT(A)'s order dated 27th May, 2014 in the matter of assessment under section 143(3) of the Income-tax Act, 1961, for the assessment year 2011-12, on the following grounds:—

- "(1) **The Ld. CIT(A)-XIV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.45,11,271 made on account of treatment of future & options trading's derivative losses of assessee Company as speculation**

loss under section 73 of the Act.

- (2) **On the facts and in the circumstances of the case the Id. CIT(A)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.**
- (3) **It is therefore, prayed that the order of the Ld. CIT(A)-XIV, Ahmedabad may be set-a-side and that of the order of the Assessing Officer be restored."**

2. When this appeal was called out for hearing learned representatives fairly agree that the issue in appeal is covered, in favour of the assessee, by Hon'ble Calcutta High Court's judgment in the case of *Asian Financial Services Ltd. v. CIT* [2016] 70 taxmann.com 9/240 Taxman 192 wherein it is held that **the loss incurred on account of derivatives would be deemed business loss under proviso to section 43(5) and not speculation loss and, accordingly Explanation to section 73 could not be applied.** Their Lordships have further held that that the "**loss (on account of sale of derivatives) would be allowed to be set off against income arising out of proper business because derivatives were treated differently within meaning of Explanation to section 73(4) and not at par with the shares**". The very foundation of the grievance raised by the appellant Assessing Officer thus ceases to have a legally sustainable basis. There is no contrary decision, or any other binding judicial precedent, from Hon'ble jurisdictional High Court.

3. In all fairness, however, it is also noticed, from the text of Hon'ble Calcutta High Court's judgment in the case of *Asian Financial Services (supra)* itself, that Hon'ble Delhi High Court had taken a different view on this matter and decided the same, in principle, against the assessee. There are thus conflicting legal views of Hon'ble non-jurisdictional High Court and that, beyond any dispute or controversy, there is no judicial precedents are available from Hon'ble jurisdictional High Court. We have noted that Hon'ble Supreme Court has admitted SLP against the Asian Financial Services decision referred to above, *vide* judgment *CIT v. Asian Financial Services Ltd.* [2016] 75 taxmann.com 68/243 Taxman 147 (SC), but, as is the settled legal position, mere pendency of appeal in a higher judicial forum does not dilute the binding nature of a judicial precedent. There is also no request from the revenue authorities to keep the matter pending till adjudication on the aforesaid appeal by Hon'ble Supreme Court.

4. As to what should be the view to be taken in these circumstances, *i.e.* when there are conflicting decisions of Hon'ble Courts above and when we donot have the benefit of the guidance by Hon'ble jurisdictional High Court, we find guidance from the decision of a co-ordinate bench in the case of *Tej International (P.) Ltd v. Dy. CIT* [2001] 118 Taxman 59 (Mag) (Delhi) wherein the co-ordinate bench has, inter alia, observed as follows:—

6. We have considered the rival submissions and perused the records. It is not in dispute that two High Courts, namely, Gauhati High Court and Karnataka High Court, have expressed conflicting views regarding levy of interest under sections 234B and 234C on deemed income under section 115J. Hon'ble Gauhati High Court has opined that when legal fiction is to be created for an obvious purpose, full effect to it should be given. Quoting Lord Asquith who said, "the statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to inevitable corollaries of that state of affairs", Hon'ble Gauhati High Court has held that there is no statutory exception excluding the operations of section 115J of the Act. Hon'ble Karnataka High Court, on the other hand, has held that the words 'for the purposes of this section' in Explanation to section 115J(1A) are relevant and cannot be construed to extend beyond the computation of liability to tax. In the opinion of the Hon'ble Karnataka High Court, when a deeming fiction is brought under the statute, it is to be carried to its logical conclusions but without creating further deeming fiction so as to include other provisions of the Act which are not made specifically applicable. It is thus evident that views of these two High Courts are in direct conflict with each other. Clearly, therefore, there is no meeting ground between these two judgments

and we are also unable to accept the suggestion that we can follow earlier decisions of this Tribunal, or such views, whichever seem more reasonable of one of these High Courts.

7. It may be mentioned that some Benches of the Tribunal have either taken independent view on the issue in this appeal or have later on followed Hon'ble Gauhati High Court, referred to above. However, with the latest judgment of Hon'ble Karnataka High Court in *Kwality Biscuits Ltd.'s case (supra)* the situation is materially different. In the hierarchical judicial system that we have, better wisdom of the Court below has to yield to higher wisdom of the Court above and, therefore, one authority higher than this Tribunal has expressed an opinion on that issue, we are no longer at liberty to rely upon earlier decisions of this Tribunal even if we were a party to them. Such a High Court being a non-jurisdictional High Court does not alter the position as laid down by Hon'ble Bombay High Court in the matter of *CIT v. Godavari Devi Saraf* [1978] 113 ITR 589 (Bom.). Therefore, we do not consider it permissible to rely upon the earlier decisions of this Tribunal even if one of them is by a Special Bench. It will be wholly inappropriate to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints as such an exercise will *de facto* amount to sitting in judgment over the views of the High Courts something diametrically opposed to the very basic principles of hierarchical judicial system. We have to, with our highest respect of both the Hon'ble High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us.

8. We find guidance from the judgment of Hon'ble Supreme Court in the matter of *CIT v. Vegetable Products Ltd.* [1973] CTR (SC) 177 : [1972] 88 ITR 192 (SC) Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. In another Supreme Court judgment, *Petron Engg. Construction (P.) Ltd. & Anr. v. CBDT & Ors.* [1988] 75 CTR (SC) 20 : [1989] 175 ITR 523 (SC), it has been reiterated that the above principle of law is well established and there is no doubt about that. Hon'ble Supreme Court had, however, some occasion to deviate from this general principle of interpretation of taxing statute which can be construed as exception to this general rule. It has been held that the rule of resolving ambiguities in favour of tax payer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorised. This exception, laid down in *Littman v. Barron* 1952 (2) AIR 393 and followed by apex Court in *Mangalore Chemicals & Fertilizers Ltd. v. Dy. Commr. of CCT* [1992] Suppl. (1) SCC 21 and *Novopa India Ltd. v. CCE & C* 1994 (73) ELT 769 (SC), has been summed up in the words of Lord Lohien, "in case of ambiguity, a taxing statute should be construed in favour of a tax-payer does not apply to a provision giving tax-payer relief in certain cases from a section clearly imposing liability". This exception, in the present case, has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of *State of M.P. v. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd.* AIR 1972 (SC) 614. Therefore, what follows is that in the peculiar circumstances of the case and looking to the nature of the provisions with which we are presently concerned, the view expressed by the Hon'ble Karnataka High Court in the case of *Kwality Biscuits Ltd. case (supra)*, which is in favour of assessee, deserves to be followed by us. We, therefore, order the deletion of interest under sections 234B and 234C in this case.

5. In view of the above discussion, quite clearly, even when the decision of Hon'ble non-jurisdictional High Courts are in conflict with each other, the only objective criteria which followed by us is to take a view favourable to the assessee. Hon'ble Calcutta High Court's decision in the case of *Asian Financial Services Ltd. (supra)*, therefore, is required to be followed by us. Respectfully following the same, we uphold the conclusions arrived at by the learned CIT(A) and reject the grounds raised by the Revenue.

6. In the result, appeal filed by the Revenue is dismissed.

jyoti

*In favour of assessee.