

HIGH COURT OF BOMBAY

Commissioner of Income-tax, City 4

v.

HSBC Securities & Capital Markets India (P.) Ltd.*

S.J. VAZIFDAR AND M.S. SANKLECHA, JJ.

IT APPEAL NO. 657 OF 2007†

JUNE 12, 2012

ORDER

1. This is an appeal under section 260-A of the Income Tax Act against the order of the Income Tax Appellate Tribunal (ITAT) dated 14.7.2005 partly allowing the respondent's appeal against the order of the CIT(A)/XXII. The matter pertains to the assessment year 1997-1998.

2. The appellant seeks to raise the following question as a substantive question of law :-

"Whether on the facts and in the circumstances of the case and in law the Hon'ble I.T.A.T. was justified in holding the trading loss of Rs. 84,51,000/- as Ordinary Business Loss as against Speculation Loss as held by the Assessing Officer by relying on the decision of the ITAT Delhi bench in the case of *Aman Portfolio Pvt. Ltd.* 93 ITD 324 ignoring the decision of the Divisional Bench of ITAT Delhi in the case of *Frontline Capital Services Ltd.* 96 TTJ 201 and also the decision of the ITAT Delhi Bench in the case of *Rohini Capital Services Ltd.* 92 ITD 317 while deciding that the Explanation to Sec. 73 of the Income-Tax Act, 1961 cannot be invoked in the case of the assessee ?"

3. It is not necessary for us to consider the submissions based on section 73, as raised, as the matter is covered in favour of the respondent on another aspect of section 73 by the judgment of a Division Bench of this Court dated 2.2.2012, to which one of us (M.S. Sanklecha, J. was a party) in the case of *CIT v. Darshan Securities (P.) Ltd.* [2012] 206 Taxman 68/18 taxmann.com 142.

4. On 1.12.1997, the respondent filed its return for the assessment year 1997-1998 declaring a total loss of Rs. 1,95,12,651/-. On 12.3.1998, the respondent filed a revised return declaring a total loss of Rs. 1,24,92,940/-. In the revised return, the assessee showed loss of Rs. 1,65,29,711/- arising out of the purchase and loss of shares.

The AO by an assessment order dated 29.3.2000 under section 143(3) inter alia recorded as under:-

"The assessee's gross total income as per the second revised return was loss of Rs. 1,65,29,711/-. The composition of the same is as under :-

Business Profit	(-) Rs. 1,72,31,711/-
Income from other sources	Rs. 7,02,000/-
	(-) Rs. 1,65,29,711/-"

5. The assessee filed an appeal against the assessment order. Ground XI (4) (b) of the memo of appeal reads as under :-

"4. He failed to appreciate and ought to have held that :-

(a) the explanation to Sec 73(1) of the act is in the nature of deeming provision and as held by various courts, the deeming provision needs to be construed strictly.

(b) the explanation refers to the words "income which is chargeable under the heads" and since in the Appellant's case, the only income which is included in gross total income is dividend income, the gross total income mainly consists of "Income from other sources" and therefore, explanation does not apply to Appellants case."

The CIT by an order dated 10.1.2001 partly allowed the appeal.

6. The respondent therefore, filed ITA No.3386/Mum/2001. By the impugned order dated 14.7.2005, the ITAT partly allowed the appeal. The respondent's contention based on section 73 was upheld. Following the judgment of the ITAT Delhi Bench in *Aman Portfolio (P.) Ltd. v. Dy. CIT* [2005] 92 ITD 324, it was held that section 73 could not be invoked against the respondent. This however, was on the basis that the explanations to section 73 applies only to the losses arising out of the transaction resorted to by the business houses controlling a group of companies. Whereas the transactions referred to by the respondent were not carried out with any interest of controlling group companies.

7. As we mentioned earlier, it is not necessary to consider this aspect of section 73.

8. In the present case, section 73 would not apply in view of the fact that the explanation thereto, does not operate in respect of a company whose gross total income consists mainly of income which is chargeable under the heads of "interest on securities", "income from housing property", "capital gains" and "income from other sources". We have set out the relevant part of the assessment order which indicates that in the relevant year, the income from other sources was the only chargeable income, as the respondent had suffered a business loss otherwise.

In that view of the matter, the judgment of the Division Bench of this Court in the case of *Darshan Securities (P.) Ltd. (supra)* supports the respondent's case. In that case, during the relevant assessment year, the assessee had a loss of about Rs. 2.33 crores in the share trading and had dividend income of about Rs. 4.80 lacs. The Division Bench held in paragraphs 6, 7, 8 and 9 as under :-

"6. The explanation to Section 73 introduces a deeming fiction. The deeming fiction stipulates that where any part of the business of a company consists in the purchase and sale of shares of other companies, such company shall, for the purposes of the section be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sales of such shares. The deeming fiction applies only to a company and the provision makes it clear that the deeming fixation (*sic*) extends only for the purposes of the section. The bracketed portion of the explanation, however carves out an exception. The exception is that the provision of the explanation shall not apply to a company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources" or a company whose principal business is of banking or the granting of loans and advances.

7. The submission which has been urged on behalf of the Revenue is that in computing the gross total income for the purpose of the explanation to Section 73, income under the heads of profits and gains of business or profession must be ignored. Alternatively, it has been urged that where the income from business includes a loss in the trading of shares, such a loss should not be allowed to be set off against the income from any other source under the head of profits and gains of business or profession.

8. In our view, the submission which has been urged on behalf of the Revenue cannot be accepted. Leaving aside for a moment, the exception, which is carved out by the explanation to Section 73, the explanation creates a deeming fiction by which a company is deemed to be carrying on a speculation business where any part of its business consists in the purchase and sale of shares of other companies. Now, the exception which is carved out applies to a situation where the gross total income of a company consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources". Now, ordinarily income which arises from one source which falls under the head of profits and gains of business or profession can be set off against the loss which arises from another source under the same head. Sub-Section (1) of Section 73 however sets up a bar to the setting off of a loss which arises in respect of speculation business against the profits and gains of any other business. Consequently, a loss which has arisen on account of speculation business can be set off only against the profits and gains of another speculation business. However, for Sub-Section (1) of Section 73 to apply the loss must arise in relation to a speculation business. The explanation provides a deeming definition of when a company is deemed to be carrying on a speculation business. If, the submission of the Revenue is accepted, it would lead to an incongruous situation, where in determining as to whether a company is carrying on a speculation business within the meaning of the explanation, sub-section (1) of Section 73 is applied in the first instance. This would in our view not be permissible as a matter of statutory interpretation, because the explanation is designed to define a situation where a company is deemed to carry on speculation business. It is only thereafter that sub-section (1) of section 73 can apply. Applying the provisions of Section 73(1) to determine whether a company is carrying on speculation business would reverse the order of application. That would be impermissible, nor, is it contemplated by Parliament. For, the ambit of Sub-Section (1) of Section 73 is only to prohibit the setting off of a loss which has resulted from a speculation business, save and accept against the profits and gains of another speculation business. In order to determine whether the exception that is carved out by the explanation applies, the legislature

has first mandated a computation of the gross total income of the Company. The words "consists mainly" are indicative of the fact that the legislature had in its contemplation that the gross total income consists predominantly of income from the four heads that are referred to therein. Obviously, in computing the gross total income the normal provisions of the Act must be applied and it is only thereafter, that it has to be determined as to whether the gross total income so computed consists mainly of income which is chargeable under the heads referred to in the explanation.

9. Consequently, in the present case the gross total income of the assessee was required to be computed inter alia by computing the income under the head of profits and gains of business or profession as well. Both the income from service charges in the amount of Rs. 2.25 crores and the loss in share trading of Rs. 2.23 crores, would have to be taken into account in computing the income under that head, both being sources under the same head. The assessee had a dividend income of Rs. 4.7 lacs (income from other sources). The Tribunal was justified, in coming to the conclusion that the assessee fell within the purview of the exception carved out in the explanation to Section 73 and that consequently the assessee would not be deemed to be carrying on a speculation business for the purpose of Sec. 73(1)."

9. In the circumstances, the appeal is dismissed but with no order as to costs.