

Laxmi Feeds and Export Ltd. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-12-1997

Reported in : (1997)62ITD315(Mum.)

Appellant : Laxmi Feeds and Export Ltd.

Respondent : Assistant Commissioner of

Judgement :

1. These are cross-appeals by the assessee and the department against the order of the CIT (Appeals) dated 20-7-1989 for the assessment year 1986-87.
2. The first objection in the appeal of the assessee is that the CIT (Appeals) erred in not granting deduction for the amount of Rs. 16,500 being the provision made for payment of professional charges. The details are as follows :-Rs. 4,000 Professional fees for tax work for the year ended 30-6-1985 Rs. 7,500 Audit fee for the year ended 30-6-1985 Rs. 5,000 Tax Audit fee for the earlier accounting year, i.e., 1983-84.
3. The CIT (Appeals) mentioned that even under the mercantile system of accounting, deduction for a liability can be allowed only when the liability arises. We find in respect of the above items, the services were rendered by the concerned professional and so we have to hold that the liability for making the payment has arisen even if the relevant bills were not received by the end of the accounting year. In this view of the matter, we have to allow this ground.

4. The gist of the other objections is that the CIT (Appeals) erred in holding that the loss of Rs. 5,05,000 incurred on the sale of 1,00,000 shares of Express Leasing Ltd. is a speculation loss in terms of Explanation to section 73 of the I.T. Act and so, the assessee is not entitled for set off of such speculation loss against the normal business profit.

5. The assessee subscribed for 1,00,000 equity shares of the face value of Rs. 10 each to the public issue of the said company on 2-11-1984 and as the value of the shares was falling, they were sold off in June 1985 for a consideration of Rs. 4,95,000 thus incurring a loss of Rs. 5,05,000 which was claimed as a set off against the other profit. The Assessing Officer invoked the provisions of Explanation to section 73 and did not allow the claim. The CIT (Appeals) confirmed the order of the Assessing Officer. It was pleaded before the Revenue authorities that the assessee did not carry on the business of purchase and sale of shares and the acquisition of 1,00,000 shares in question and their subsequent sale on 2-11-1984 was a solitary transaction of this type during the accounting year and so, it cannot be said that there was purchase and sale of shares, much less of different companies, during the accounting year and so, in terms of the express language of the Explanation to section 73, the loss of Rs. 5,05,000 cannot be deemed to be a speculation loss. It was also claimed that the Board of Directors of the assessee-company passed a resolution at the time of the acquisition of 1,00,000 shares and as per the terms of the said resolution, acquisition of the said shares was only by way of investment and not by way of a trading transaction. This argument did not impress the Revenue authorities.

6. Before us, the learned counsel for the assessee has pleaded that the provisions of the Explanation to section 73 are attracted only when any part of the business of the company consists in the purchase and sale of shares of other companies and not when there is a solitary transaction of purchase and sale, whether by way of investment as claimed or by way of a trading transaction as held by the Revenue authorities. In other words, it is claimed that there should be a repetitive activity in purchase and sale of shares and then only the provisions of the Explanation to section 73 are attracted. The learned counsel went one step further. He claimed that the Explanation being a deeming provision should be

construed strictly and it can be invoked only when, firstly, as mentioned, there is a repetitive activity of purchase and sale of shares and that too of different companies and not simply of the shares of one company. In other words, the purchase and sale of shares should be in respect of shares of plurality of companies. In the present case, it is claimed that the acquisition of 1,00,000 shares does not amount even to purchase of shares because they were acquired by way of a subscription to the public issue and so, they were strictly speaking only acquired and not purchased. In this context, the learned counsel for the assessee relied upon the decision of the Hon'ble Supreme Court in the case of Sri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd. AIR 1964 SC 250. In this decision, it was held that the word 'purchased' cannot with propriety be applied to the legal transaction under which a person, by the machinery of application for and allotment of shares, becomes a shareholder in the company. He does not purchase anything when he does that. The learned counsel also invited our attention to the provisions of erstwhile section 80-CC and pointed out that there is an internal evidence in the I.T. Act itself to hold that there is a difference between the acquisition of the shares and purchase of shares. He has also relied on the decision of the Supreme Court in the case of Morgan Stanley Mutual Fund v. Kartik Das [1994] 4 SCC 225 in support of the proposition that the shares before their allotment were not 'goods' and so, the applicant for the shares or units cannot be regarded as having purchased goods so as to be covered by Consumer Protection Act, 1986.

He has also relied upon the decision of the Mumbai High Court in the case of CIT v. Indian Commercial Company (P.) Ltd. [1977] 106 ITR 465 in support of the proposition that a single transaction, though of a speculative nature cannot be regarded as a speculation business in terms of Explanation 1 to section 28. He has also relied upon the earlier decisions of the Tribunal in the following cases :- 1. S.S. Miranda Limited [IT Appeal No. 2692/B/1984 dated 31-10-1985 for the assessment year 1979-80].

2. Tiecicon (P.) Ltd. [ITA Nos. 1138 & 1139/B/1985 for the assessment years 1980-81 & 1981-82].

7. The learned D.R., on the other hand, relied upon the order of the CIT (Appeals) and has contended that the Explanation to section 73 does not stipulate that there should be a repetitive activity of purchase and sale of shares for attracting its provisions. It is attracted when any part of the business of a company consists in the purchase and sale of shares. In other words, purchase and sale of shares indulged in by a company need not by itself be the business of the company. The business of the company can be some other activity, but one of the activities undertaken should be the purchase and sale of shares of a company for the provisions of the Explanation to section 73 to be attracted. So, according to the learned Departmental Representative, the reliance placed by the learned counsel for the assessee on the decision of the Mumbai High Court in the case of Indian Commercial Company (P.) Ltd. (supra) is misplaced.

8. We find that the reliance placed by the learned counsel for the assessee on the decision of the jurisdictional High Court in the case of Indian Commercial Company (P.) Ltd. (supra) may not be quite apposite because in that decision, the Hon'ble Mumbai High Court was considering only the provisions of Explanation to section 28 which are differentially worded. Nonetheless, we have to allow this appeal because in terms of the decision of the Apex Court cited supra, there is only acquisition of shares and not purchase of shares, inasmuch as, the 1,00,000 shares in question were obtained only by way of subscription to a public issue. Further, we are of the view that a single transaction of purchase and sale of shares cannot attract the provisions of the Explanation to section 73, because it is attracted only when a part of the business of an assessee consists of purchase and sale of shares of companies and not of a company. The word used is 'companies' and not simply company. So, plurality of transactions and plurality of companies is a precondition for attracting the provisions of the Explanation to section 73. This precondition is not satisfied in the present case as there is only a solitary transaction of acquisition and sale of shares. There is no material to hold that this was not by way of investment. Sometimes, there can be an adventure in the nature of trade and so even without repetitive transactions, there can be a business, but we are of the view that this concept cannot be imported into Explanation to section 73. The Explanation can be invoked only when the conditions specified therein are satisfied and one of the conditions in terms of the

plain language of the Explanation is that there should be purchase and sale of shares of companies and the use of the word 'companies' in plural stipulates plurality of transactions and not a solitary transaction as in the present case. In this view of the matter, we find merit in the appeal of the assessee and so, we set aside the orders of the Revenue authorities and allow the appeal.

"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance under section 37(2A) relying on a self-serving certificate of the General Manager that out of total expenditure on entertainment of Rs. 18,834 only a sum of Rs. 4,000 related to expenditure on food and beverages.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in ignoring the provisions of Explanation 2 to section 37(2A) and holding that the balance amount of Rs. 14,834 spent on small gifts items given in meetings were not in the nature of entertainment as per section 37(2A)." 10. The learned counsel for the assessee has mentioned that the CIT (Appeals) has deleted the addition in question on the basis of an estimate. The Assessing Officer has given a finding that the preliminary scrutiny reveals that the real nature of the expenditure of Rs. 14,834 is of entertainment. He has worked the disallowance as follows :-As shown in tax Audit report 404As shown staff welfare expenses 619As claimed business expenses 18,834 -----Less : Basic Deduction 5,000 ----- Added In total income 15,857 (sic) ----- 11. We find that the CIT (Appeals) has not done any scrutiny on his own and he deleted the addition only on the basis of the certificate given by the General Manager, which the Revenue arraigns as self-serving. In principle, the CIT (Appeals) does not seem to be correct. However, considering the smallness of the issue and expenditure on gifts as claimed by the General Manager cannot be ruled out, we reduce the disallowance to Rs. 8,000 on estimate basis as against Rs. 15,857 effected by the Assessing Officer. The appeal is partly allowed.

12. In the result, the appeal of the assessee is allowed and that of the Revenue is partly allowed.