

Srj Securities Ltd. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jan-06-2003

Judge : T Chopra, Y Kapur

Appellant : Srj Securities Ltd.

Respondent : Assistant Commissioner of

Judgement :

1. The assessee being aggrieved by the order dated 19-10-2000 passed by the CIT(A) has invoked jurisdiction of this Tribunal and challenged the same on the grounds detailed below :-- "On the facts and in the circumstances of the case and in law the action of the authorities below in treating the business loss of Rs. 37,40,568 on delivery based purchase and sale transactions of shares as speculative is arbitrary, erroneous and illegal and must be quashed.
2. Further, the action of the authorities below in disallowing office expenses in a sum of Rs. 38,373 is arbitrary, improper and untenable must be quashed.
3. That the levy of interest is legally untenable and must be quashed." 2. To adjudicate the controversy involved in the present proceedings, we must at the threshold refer to certain relevant facts available on record.
3. The facts as available on the record are that the appellant is a company incorporated under the Companies Act. The appellant company claims to be the Member of the Delhi Stock Exchange as well as the National Stock Exchange. It is

also the case of the appellant that they are engaged in the sale and purchase of shares on behalf of their clients on which they earn brokerage and also are engaged in the sale and purchase of shares for themselves. For the assessment year 1997-98 for which the relevant accounting year is 1996-97, the assessee filed its return of income and in the return of income filed, the assessee claimed to have earned a gross commission from the activity of sale and purchase of shares on behalf of its clients amounting to Rs. 62,39,332.69. During the same year, the assessee claimed to have suffered a loss for a sum of Rs. 37,40,658. The said loss which was incurred by the assessee comprised of two amounts, namely, a sum of Rs. 2,40,957 which was suffered in purchase of those shares in which no delivery was taken while the balance amount of loss i.e., Rs. 34,99,611 was suffered in those scrips where the delivery was taken. The assessee while filing his return adjusted the loss suffered by him in the purchase of shares which amounted to Rs. 37,40,568 against the receipts of brokerage for the sale and purchase of shares undertaken by the assessee on behalf of his clients which amounted to Rs. 62,39,322.69 and in this manner the assessee claimed to have earned a gross profit of Rs. 24,98,674 (Rs. 62,39,332.69-37,40,658). It is also the case of the appellant that he had incurred an expense of Rs. 40,51,658 and, thus, reducing the expense i.e. Rs. 40,51,582 from the income earned i.e., Rs. 24,98,675, the appellant company claim that there was a loss of Rs. 15,52,818 (Rs. 24,98,675-40,51,582) though the appellant claim to have suffered a loss of Rs. 15,52,818 from the business in the manner indicated above, but the appellant declared an income under the head 'capital gains and income from other sources' to the tune of Rs. 16,17,224, The appellant in the return filed squared up the loss suffered to the tune of Rs. 15,52,818 against the income of Rs. 16,17,224. The appellant after set-off of the aforesaid loss declared a taxable income of Rs. 64,412 (Para 10 of the synopsis). Against the said income of Rs. 64,412 the appellant company set off brought forward losses of Rs. 71,860 and in this manner returned negative income of Rs. 7,450.

4. The Assessing Officer while finalizing the assessment asked for certain clarifications from the assessee in terms of the explanation to Section 73 of the IT Act. Explanation so called for by the Assessing Officer from the assessee was given by the assessee vide its letter dated 13-3-2000 (page 62 of the paper book)

as well as letter dated 18-3-2000 (page 54 of the paper book).

5. The Assessing Officer, it appears after considering the explanation so furnished by the assessee disallowed the set-off of the loans of Rs. 37,40,568 so sought by the appellant company. Apart from the disallowance of Rs. 34,40,568, the Assessing Officer made an addition of Rs. 49,818 on account of business promotion expenses so claimed by the appellant and in this manner proceeded to frame the assessment.

6. The assessee being dissatisfied with the order of the Assessing Officer, who had disallowed the set-off of losses of Rs. 37,40,568 and also made an addition of Rs. 49,818 filed an appeal before the CIT(A) which was heard and disposed of by the impugned order.

7. Having lost at two places, the assessee, as stated above, has invoked the jurisdiction of this Tribunal.

8. At the time of hearing of the appeal, the counsel for the assessee submitted that the appellant company is engaged in the sale and purchase of shares. It was stressed by the counsel for the assessee that in the process of sale and purchase of shares, certain clients do not honour their commitment and take deliveries as a result of which the assessee who is bound by the terms and conditions of the Stock Exchange and the rules framed by them has to take up the deliveries.

According to the assessee, it is on account of the failure on the part of the clients, the assessee had to purchase the shares and any loss incurred in the purchase of shares has to be taken as the business loss and the said loss is allowable to the Members of the Stock Exchange.

9. In the alternative, it was argued by the learned Counsel for the assessee that the business of the assessee being sale and purchase of shares, which includes the sale and purchase on behalf of the clients as well as the sale and purchase on his on behalf, the said business being a composite business, the loss, if any, occurred in one part of the business is allowable to be adjusted against the other part of the business.

10. Another argument that was raised during the course of hearing was that provisions of explanation to Section 73B are not applicable for the reason that the assessee is an investment company and, therefore, the losses that incurred to an investment company during the course of business dealings do not fall within the parameters of the explanation.

11. The learned Counsel for the assessee during the course of hearing stressed that the explanation does not qualify the expression 'purchase and sale of shares of other companies' with the expression 'on its own account.' According to the learned Counsel as the explanation does not make any clarifications, the entire business of the assessee which includes business consisting of sale and purchase of shares on behalf of the clients should be deemed as speculative business as per the explanation.

12. Learned Counsel for the assessee submitted that in the earlier years despite there was Explanation to Section 73 the identical claim of the assessee have not only been allowed by the Revenue, but accepted by the Revenue.

13. Lastly, according to the counsel, the business of share broking consists of both purchase and sale of shares on behalf of others as well as on his own behalf and there is no dividing line between the two, it was in these circumstances suggested once again that the entire business should be taken as composite business.

14. To the arguments raised by the counsel for the assessee, the learned DR during the course of hearing submitted at the outset that the assessee company is not that kind of a company whose gross total income consists mainly of income which is chargeable under the head 'interest on securities' income from house property, capital gain and income from other sources or a company, the principal business of which is the business of banking or granting of loans or advances. According to the learned DR, Explanation to Section 73 only protects those companies referred to in the Explanation. The learned DR submitted that the words 'mainly used' in the Explanation is very vital and the income of the company, which is the appellant before this Tribunal, has to be mainly from the heads mentioned in the Explanation, which is not the case here. After having said so, the learned DR drew our attention to the details furnished by the assessee

regarding the source of income and submitted that the income of the assessee is not mainly from the categories mentioned in the Explanation and, therefore, the assessee is not protected by or excluded from the Explanation.

15. After having said so, the learned DR submitted that the business of the assessee has two facets and one cannot be equated with the other.

The two facets of the business of the assessee, according to the learned DR were income from the share broking business and the income or loss on account of trading in the shares on his own account. The learned DR submitted that there is a distinction between the broker and the dealer. It was the case of the learned DR that the share broker is one who does sale and purchase on behalf of others. According to the learned DR it is the commandment of the others i.e., the clients on whose behalf the broker purchases the shares which prevails. The dictum of the client is to prevail when the assessee is working as a broker for his clients who says what to purchase, how many at what rate and of which company and sell what shares and at which rate. After having said so, the learned DR submitted that the broker cannot deviate from the dictum of the client and while in the case of own trading the person concerned which is the assessee in this case is a master of his own.

While advancing his arguments further, the learned DR submitted that in the case of share broker who buys and sells the shares on behalf of others, there is no risk involved for the reason that whether an individual who is a client suffers profit or loss, the broker is entitled to his commission. According to the learned DR, the element of commission is constant, be it an upward trend in the market or downward trend in the market, it is the client who loses or gains in the transaction, but the broker gets his commission which is fixed as per the norms laid down by the Stock Exchange. While advancing his arguments further, the learned DR sought to draw distinction that when an individual is acting as a dealer or working as a dealer, he is a master of his own what scrip to buy, when to buy and what quantity to buy are a decision of his own. The element of profit or loss is of his own. He cannot transfer the profit or loss to some one else, it is he who has to suffer it. On this analogy, the learned DR submitted that the two businesses i.e.,

the business of share broking and share dealing are two independent businesses.

16. After having said so, the learned DR submitted that Explanation to Section 73 applies with full force in the facts and in the circumstances of the case for the reason that since the assessee was purchasing and selling the shares of other companies, the assessee which is a company within the meaning of Companies Act, falls within the dictum of the Explanation which talks of 'such company shall, for the purposes of this section, be deemed to be carrying on speculation business to the extent to which the business consists of the purchase and sale of shares.'

17. Placing heavy reliance on the wordings in the Explanation to Section 73, the learned DR submitted that the amount of Rs. 62,39,332 has been received by the assessee in the form of commission from the sale and purchase of shares on behalf of the clients while the loss of Rs. 37,40,658 incurred by the assessee is on account of the speculative business undertaken by the assessee within the meaning of Explanation to Section 73 and since the spheres of both the businesses are different, the gain of one cannot be permitted to be squared up against the loss of others in view of the analogy of the Explanation. The learned DR also drew our attention not only to the Explanation to Section 73, but also to Section 43(5) of the IT Act as well as Section 73 to explain as to what is the speculative business and the loss in speculative business can only be set off or carried forward for set off against another speculative business.

18. While advancing his arguments further, the learned DR submitted that the submissions made by the counsel for the assessee that he has suffered losses on account of the fact that certain clients backed out is unfounded. According to the learned DR the admitted case of the assessee before the Assessing Officer was that the transactions in the sale and purchase of shares was made by the assessee in his own account and deliveries were taken in his own account and it was not the case of the assessee before the Assessing Officer that the clients refused to take delivery. In this regard, the learned DR drew our attention to the letter of the assessee dated 13-3-2000 placed at pages 62-63 of the paper book as well as 18-3-2000 at pages 54-55 of the paper book in substantiation of his submissions.

19. While replying to the arguments of the assessee's counsel that the identical claims were allowed in the earlier years, the learned DR submitted that merely because the claims have been allowed in earlier years is no good ground that the same cannot be reopened or re-examined. For this, learned DR submitted that as far as the principles of resjudicata are concerned, they are not applicable to the tax proceedings because each year under the IT Act is to be taken as an independent year. Both the sides very laboriously made submission and placed reliance on certain legal precedents. While the counsel for the assessee relied upon : (vi) CIT v. Nirmal Kumar & Co. [1986] 161 ITR 413 26 Taxman 382 (Cal.) (viii) Patnaik & Co. Ltd. v. CIT [1986] 161 ITR 365 27 Taxman 287 (SC) K.P. Varghese v. ITO (x) CIT v. Kelvinator of India Ltd. [2002] 256 ITR 1 123 Taxman 433 (Delhi) (xiii) Samba Trading & Investment (P.) Ltd. v. Asstt. Commissioner [1996] 58 ITD 360 (Mum.).

(i) CIT v. Arvind Investments Ltd. [1991] 192 ITR 365 58 Taxman 216 (Cal.) Aryasthan Corpn. Ltd v. CIT [2002] 253 ITR 401 124 Taxman 516 (Cal.) (iv) Eastern Aviation & Industries Ltd. v. CIT [1994] 208 ITR 1023 74 Taxman 641 (Cal.) 21. Though the aforesaid submission were made by both the parties on Ground No. 1 of the appeal, the learned counsel for the appellant assailed the order of the CIT(A) and submitted that no reasons have been given by the authorities below for disallowing the claim of the expenses to the tune of Rs. 38,373.

22. To the arguments of the learned counsel for the assessee on Ground No. 2, the learned DR relied upon the order of the authorities below.

23. After having made submissions on Ground Nos. 1 and 2, the counsel for the assessee while making his submissions on Ground Nos. 3 referred to the order of the assessment and submitted that there was no specific direction in the assessment order for levy of interest. According to the counsel, as there was no specific order to charge interest in the body of the order, interest under Sections 234A, 234B and 234C could not be charged on the appellant company because as per the submissions of the counsel, it is incumbent upon the Assessing Officer to say so with regard to charging of the interest and under what provision in the body

of the order. For this, the learned counsel for the assessee sought to draw strength from the judgment of the Apex Court in the case CIT v. Ranchi Club Ltd. [2001] 247 ITR 209 114 Taxman 414 and also two decisions of the jurisdiction of the High Court in case CIT v. Inchcape (I) (P.) Ltd. [IT Appeal No. 46 of 2002] and also CIT v. Goldtex Furnishing Industries [IT Appeal No. 80 of 2002].

24. To the said argument of the learned AR, the learned DR submitted that the Apex Court in the case of CIT v. Anjum MH Ghaswala [2001] 252 ITR 1 119 Taxman 352 has held that there is no power to waive interest vested with the tax authorities and, therefore, even if it is not in the body of the order, the same cannot be deemed to have been waived.

The reference by the learned DR was made to the orders of the authorities below in this regard.

25. We have heard the parties and taken ourselves through the record.

The moot question that arises for consideration in these proceedings pending before us is as to whether the assessee was dealing on his own account or on the account of his clients. When we say this, we are conscious of the fact that the assessee on the one hand is doing business of sale and purchase of shares on behalf of his own clients and on the other hand he is doing business of sale and purchase of shares on his account. We are concerned with the sale and purchase of shares on his own account, and, therefore, we are concentrating on these proceedings on this very line of the business carried out by the assessee. To adjudicate this controversy as to whether it was the sale and purchase of shares on behalf of the clients or on his own account, we must refer to the proceedings before the Assessing Officer and which ultimately culminated in the assessment order. When the assessee filed its return and the assessment proceedings emanating therefrom started, the Assessing Officer was not satisfied with the claims of the assessee on account of loss of dealing in shares made by the assessee and called upon the assessee to explain as to why the claim made on this account be not disallowed. To the query raised by the Assessing Officer, the assessee vide his letter dated 8-3-2000 nowhere informed the Assessing Officer having purchased the shares on behalf of their clients, who had backed out

resulting in the assessee to bear the load of these shares with respect to which the contracts have been breached by the clients.

Further to letter of 8-3-2000, the assessee vide another communication of 13-3-2002 admitted that these shares were purchased by him and his property and stock in trade belong to him. We must at this stage reproduce the letter of 13-3-2000 addressed by the assessee to the Assessing Officer :- With reference to your Notice, we have to submit that assessee-company is dealing in Purchase & Sales of Shares and broking business from last 3 years. The assessee-company is Member of the Delhi Stock Association Ltd. and National Stock Exchange of India, Bombay, The main object of assessee-company is also to deal in purchase/sale of shares and brokerage business. During the year underassessment, assessee-company is holding opening stock of shares 1126714.27 and during the year purchase of shares for Rs. 12839747.60 and sale of shares is Rs. 17003024.79 as compared to last year opening stock Rs. 27085530.25. Purchase of shares Rs. 36517252.86 and sale of shares is Rs. 4985104.44. Purchase and sale of shares is regular business of assessee-company since starting of business.

We confirm that all the shares in opening stock are transferred in the name of assessee-company and delivery of purchase of shares are taken during the course of business and sold during the year in the market on delivery basis partly in Delhi Stock Exchange and partly in National Stock Exchange.

All the details of purchase and sale of shares along with copy of bills had already filed at the time of hearing in which assessee-company incurred major losses. Mostly shares are transferred in the name of the company being opening stock and sold during the year in the market on delivery basis.

Details of purchase and sales of shares in 112 scrips i.e., ACC Ltd., Benzo Petro, Dewan Housing and Finance Ltd., GTC Ind. Ltd., Maral Overseas Ltd., Sanghi Polyester, Sterlite Communication, Uniplas Ltd., V.P. Polycon Ltd., Rathi Ispat Ltd., Spic Flutries Ltd., Vysya Bank Ltd., had already filed along with copy of Bills on earlier hearing. We have submit that out of 12 scrips for which details are filed, 11 shares scrips are in the opening stock of shares in hand of assessee-company. All the shares are transferred in the name of assessee-company and sold during

the year on delivery basis in market. Transaction of remaining one share is during the year under assessment and all the details for the same were also filed in earlier hearing.

Keeping in view of the abovesaid facts, it is confirmed that all the transaction are delivery basis, Purchase and Sale of Shares is regular business of the assessee-company and same is carried forward year to year and declared in income-tax return in earlier years.

Regarding loss in shares Trading we have to submit that purchase and sale of shares is part of regular business of Member Broker and the same is also carried forward from year to year and declared in Income-tax Return in earlier years.

Keeping in view of the abovesaid facts, it is requested that loss of Delivery basis purchase and sale of shares business and arbitrage should be allowed to the assessee-company which is regular trade of Member Broker.

26. After this communication which nowhere reflects that the shares were bought on behalf of clients, there is no other communication on the record made by the assessee to the Assessing Officer which could reflect that the shares were purchased by the assessee on behalf of his clients, who had backed out, as a result of which the assessee was left to bear the burden of these shares which has caused loss to the assessee. To the contrary it was the consistent stand of the assessee before the Assessing Officer that the shares which have caused loss was his property. This fact is fortified that the shares which according to the assessee caused loss formed part of his opening and closing stock.

Placing reliance on Explanation to Section 73 and some legal precedents, the Assessing Officer proceeded to reject the same.

27. Before the CIT(A), for the first time an argument was made in the communication of 19-10-2000 that the shares were purchased on behalf of the clients who had backed out and this resulted in the assessee to take the burden of those shares consequent thereto resulting in loss.

Though the argument was raised before the CIT(A) with regard to the clients having backed out, but it appears that neither any evidence in support of the arguments raised was placed, nor any permission to place the same was sought so much so as to who were the persons who placed orders for purchase of shares, how much shares were bought, when were the contract note was signed, at what rate the share were bought was absolutely missing before the CIT(A). This evidence was also not placed before the Assessing Officer and to the contrary, we must say that before the Assessing Officer it was a clear admission made by the assessee all these shares belonging to them. Ample evidence was placed before Assessing Officer which demonstrated clearly that these shares formed part of his trading stock, the details of which were filed before Assessing Officer.

28. As the assessee had no evidence to substantiate the arguments made and that too for the first time before the CIT(A) with regard to purchase of shares on behalf of clients, who did not take the delivery and no evidence was filed before either of the authorities below as well as before us, we feel that it is a ground taken by the assessee for the heck of a ground, and, therefore, not seriously pressed before the CIT(A). At no point of time either before us or before the authorities below, the assessee had made an attempt to produce any evidence in support of any breach of contract, if any, committed nor placed any contract notes before us in the absence of which we feel as stated above that though the ground was raised, but not seriously agitated before the CIT(A) any that is why there are no findings on this issue nor any serious grievance has been made before us to the order of CIT(A).

29. Before us also an attempt was made to persuade us that as the loss has been suffered on account of the breaches committed by the clients who have failed to take delivery of shares, the assessee/appellant company is entitled to square up the loss from the profits of the business, being a composite nature of business. Various judgments were sought to be relied upon which we will deal later, but we may at this stage say that after the assessment was completed whereby the loss was disallowed, the assessee for the first time made a half hearted attempt before the CIT(A) putting the blame on his clients. No evidence worth its name was placed before the CIT(A) as to who were the clients, how much quantum was

purchased, what is the address of the client. So much so, the contract note which is the fundamental documents in share business was not placed. On the one side this is the situation that the vital evidence has been withheld while on the other hand there is a categorical admission made by the assessee in the communication referred to and reproduced above that the shares belong to them. In the light of the categorical admission made in the letter of 13-3-2000, which has been extensively reproduced above as well as letter of 8-3-2000, we have no hesitation in saying that the shares against which the loss has been suffered were purchased by the assessee in his own account and for his own benefit. The story of the client having backed out of their commitment is devoid of merit and is not based on any evidence. In the light of the above discussion we have no hesitation in holding that the shares were purchased by the assessee on his own volition.

30. This brings us to another argument of the assessee that it is a composite business and being a composite business the entire business has to be taken as a whole, be it a business of dealing on behalf of clients or be it a speculative business. We are afraid, we cannot persuade ourselves to this arguments despite best efforts made by the counsel for the assessee. We are unable to persuade ourselves in this regard because of the reason that there is a distinction between a dealer and a broker and the distinction is that a dealer sells his own goods whereas a broker sells or arranges sale of goods of others. It is not something new that a person may be performing both the functions as a dealer and as a broker, but under no circumstances can it be said that dealer and broker have the same business though in certain situation it may be the one individual who may be performing the same.

Apart from this, we have very seriously considered the factual aspect of the matter and are persuaded to adopt the reason advanced by the learned DR during the course of hearing that the business of a dealer and a broker are different for the reason that in the case of a broker there cannot be any element of loss because he works on a confirmed order and a confirmed commission. In the case of broker he is not a master of his own, but he works at the dictum of the client. The element of risk is minimum, but in the case of dealer the situation is poles apart because of the fact that he is not guided by any one, the element of risk, the profits are more

the decision is of his own, etc., etc.

31. As the share broker and the share dealer are two independent persons, we have no hesitation in observing at this stage itself that the business of share broker and share dealings are not one and the same business, 32. The next question that arises for consideration is whether the business carried on by the assessee company on the one hand carries on the sale and purchase of shares on behalf of his clients and on the other hand purchase and sale of shares on his own can be said to be a speculative business as suggested by the appellant. When we examine this in the light of the explanation attached to the Section, the answer to this question is given in the statute itself. The statute lays down in the explanation that where the business of the company consists in purchase and sale of shares of other companies [other companies (assessee company) shall be deemed to be carrying on speculation business to the extent to which the business consists of business of purchase and sale of shares. A bare look at the explanation leaves no room to doubt that when a company like the appellant company before us enters into a transaction vis a vis the sale and purchase of shares to its own account, it is deemed to be into the speculative business. The commission earned by no stretch of imagination in the form of brokerage can be said to be his speculative business income for the various reasons stated above. Section 73 of the IT Act, more particularly Sub-clause 1 is categorical and mandates that the speculation loss has to be set off against a speculation profit and not otherwise. When the assessee earns commission through confirmed order from the parties, how can it said to be a speculative business. As the commission earned from the business carried out for the clients is not a speculative business, we are afraid it could not be set off against any speculative loss. When the Legislature mandates that a company entering into the sale and purchase of shares is deemed to be into speculative business the losses suffered has to be adjusted against the profits of the speculative business and not against any other business.

We, therefore, are of the opinion that the Assessing Officer was right and so was the CIT(A) when they disallowed the claim of the assessee on account of loss incurred by the purchase of shares.

33. This brings us to another argument raised at the bar by the learned Counsel for the assessee which has been reproduced above that as the main business of the assessee is the one of interest on securities, capital gain, etc., it is excluded by virtue of the provisions of the Explanation to Section 73. According to the assessee the main income of the assessee is from the interest and capital gains. When we examine the record, we find that the assessee though has earned some amount from the capital gains and interest the bifurcation or details of which are not there, but that is only very marginal than the income from the sale and purchase of shares. In this view of the matter, we have no hesitation in observing that the main income of the assessee is not from interest on securities, income from house property, capital gain and income from other sources and, therefore, the protection of Explanation to Section 73 is not available to the assessee.

When we examine further the nature of the business carried out by the assessee in the light of the Explanation to Section 73, we find that the assessee is not into the business of banking or granting of loan or advances. Consequent to the assessee's main income, not being from interest on securities, income from house property, capital gain or the assessee is not being in the business of granting loan or advances, we feel that the provisions of Section 73 have rightly been applied in the case of the assessee.

34. This brings us to another argument of the assessee where under it was argued that in the previous years identical claims of the assessee on account of losses suffered in similar manner have been allowed, and, therefore, there was no reason to deviate from the past practice in the year under consideration. According to the assessee, the law of consistency should prevail. The argument though raised at the bar was impressive, but while advancing the said argument the counsel for the assessee lost sight of the fact that the res judicata is not applicable to the tax proceedings as every year is independent.

As the principles of res judicata are to be applicable to the tax proceedings, we feel that even if a particular claim akin to the one raised by the assessee in the year under consideration has been allowed in earlier years, no advantage can be drawn by the assessee of earlier assessment orders passed allowing this kind of claim.

We must at this stage itself point out that we have examined this matter threadbare and have no hesitation in observing that even in the earlier years the assessee was not entitled to claim for losses having been suffered by him on account of speculative business, on which too much reliance has been placed and which, as stated above, is of no consequence.

35. We now proceed to examine the judgments relied upon by the assessee during the course of hearing : 36. Lallubhai Nagardas & Sons 'case (supra). The counsel for the appellant has relied upon the said judgment in support of his contention that share broker and share dealing are integral part of the same business and both the business can be conducted by one individual/person. There is no dispute on the proposition that one person can conduct both the business, but the question is whether the share broker and share dealing can be said to be one composite business.

This judgment does not advance the case of the appellant for the reason that in this case the issue before the Bombay High Court was as to whether the share broking business is a business or profession and it was in this context the Bombay High Court after drawing a distinction between a 'dealer' and a 'broker' held that share broker and share dealing is a business and not profession. Since the issue before the Bombay High Court was different, this judgment does not help the assessee.

37. Another judgment on which reliance was placed by the learned AR was the one in the case of Vadilal Lallubhai (supra) for the proposition that legal fictions are only for a definite purpose for which they are created and should not be extended beyond their legitimate field. We may observe that in this case in view of explanation attached to Section 73 wherein it has been mandated that where in part of a business of a company 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 the speculation business to the extent to which the business consists of purchase and sale of shares. All that the Legislature has mandated is that to the extent of sale and purchase of shares, the businesses of the company shall be deemed to be a speculative business. What the authorities below has

done is that they have segregated the two businesses and to the extent it related to the transaction with regard to sale and purchase of shares under the deeming provision they have taken as the same to be speculative business. We are, therefore, of the opinion that the judgment relied upon by the counsel for the assessee does not advance the case of the assessee for the reason that the authorities below have not extended the deeming provision beyond its legitimate field. This judgment does not in any manner advance the case of the assessee.

38. The next judgment on which reliance was placed by the counsel for the assessee was the one in the case of Padmasundara Rao (supra) for the proposition that the language employed in the statute is determinative fact of the legislative intent and the court cannot read anything into the statutory provision which is not there. We are afraid that the context in which the judgment is cited is not apt to the situation for the reason that the authorities below have only applied the provision of Explanation to Section 73 with respect to the shares purchased by the company pertaining to which it has suffered loss, and have applied the said provision in its true sense and perception. This judgment also does not support the case of the assessee.

39. The counsel for the appellant also placed reliance on the judgment of the Punjab & Haryana High Court in the case of Kanhaya Lal Puran Mal (supra) and in this case the issue before the Punjab & Haryana High Court was whether the assessee was entitled to set off the loss suffered by him in his speculative business against the profit earned by the assessee by way of commission in respect of transactions entered into on behalf of its constituents in the foreign exchange. The High Court answered the question against the assessee. We may in this respect refer to the observations of the High Court at page 354 of this report which are in the following terms :-- "Where the assessee who was a member of the foreign exchange and also carried on a speculative business on his own behalf claimed to set off the loss incurred by him in his own speculative business against the Commission received by him in respect of forward transactions entered into on behalf of his constituents as member of the foreign exchange : Held, that on a true interpretation of Section 10 and Section 24(1) and the first proviso thereto, of the Indian Income-tax Act, 1922, the assessee was not entitled to claim a set off of the

loss suffered by him in his own speculative business against the profits earned by the assessee by way of commission in respect of transactions entered into on behalf of his constituents in the foreign exchange as the speculative business of the assessee and the commission agency were distinct businesses." 40. The High Court in the aforesaid report also referred to a Full Bench decision in the case of CIT v. Ram Samp [1962] 45 ITR 248 (Punjab) wherein the Full Bench has held : "On a true interpretation of section 10 and sub-section (1) of Section 24 of the Income-tax Act and the first proviso thereto, an assessee is not entitled to claim a set off of the loss suffered by him in speculation business against the profits of the assessee in a business other than a business consisting of speculative transactions." 41. The aforesaid observations of the Full Bench find a place at page 356 of the report. We may observe that the observations of the High Court support the case of the Revenue than the case of the assessee.

The assessee during the course of hearing relied upon a judgment of the Calcutta High Court in Nirmal Kumar & Co.'s case (supra) in support of his argument that the speculative loss was entitled to be set off against the brokerage income. We may at this stage say that the assessment involved in this case is earlier to the incorporation of the Explanation to Section 73 and therefore, this judgment has no application to the facts of the case as the explanation was not considered. During the course of hearing emphasis was laid by the counsel for the assessee on a judgment in the case CIT v. V.S. Dempo & Co. (P) Ltd. [1994] 206 ITR 291 72 Taxman 134 (Bom.) in support of his proposition as to what are the factors for determining the business loss, but, we are afraid that even this judgment does not come to the rescue of the appellant for the reason that in the case before us the question is of the interpretation of Explanation to Section 73 of the IT Act which was not the, case in the said report. What we have to see is as to whether the assessee has carried out speculative business within the meaning of Explanation to Section 73 or not. Once we held that this was the speculative business the provisions of Section 73 would apply and, therefore, this judgment would not help the assessee at all. For the same reason we may also say that the reliance was placed by the assessee on Patnaik & Co. Ltd. 's case (supra) does not come to the rescue of the assessee.

42. Another line of argument of the assessee during the course of hearing was based on the circular issued by the authorities being Circular No. 201 dated 24-7-1976 and submitted that the circular gives the intention behind the incorporation of the explanation and is binding on the Revenue. Certain judgments in support of this were also cited including the one in Kelvinator of India Ltd.'s case (supra).

There cannot be any possible dispute either on the line of argument raised by the assessee or on the legal support drawn by him. But, when we examine the circular, we find that the circular is categorical in its terms and has been issued with the object of pinning down those companies who want to reduce the taxable income of the companies under their control. We are afraid that the circular is clear in its intent and also does not support the stand of the assessee.

43. Reliance placed by the counsel for the assessee on the judgment of the Mumbai Bench reported in Rajan Enterprises (P.) Ltd.'s case (supra) is also unfounded for the reason that in this case it was held that the assessee was an investment company which is not the case here and, therefore, the provisions of Section 73 are clearly applicable in this case.

44. Likewise in the case of M Gulab Singh & Sons (P.) Ltd. (supra); it has been held that the assessee was an investment company which is excluded from the application of the provisions of Section 73.

45. We, therefore, say that the judgments relied upon by the assessee do not advance the case further in his favour and have, therefore, no hesitation in saying that they are not applicable in the facts and circumstances of the present case.

46. Now, coming to the judgments relied upon by the learned DR, we may say that the observations of the Calcutta High Court in the case of Arvind Investments Ltd.(supra), relied upon by the Revenue during the course of hearing and also relied upon by the taxing authorities below with full force. The Calcutta High Court after discussing the Circular No. 204 has explained the Explanation to Section 73 in the following terms :-- "The provisions of the Explanation to Section 73 have to be contrasted with the provision of Section 43(5), which defines "speculative transaction" to mean a transaction in which a contract for the purchase or sale of

any commodity, including any stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. The Explanation to Section 73 treats any purchase and/or sale of shares by certain companies to be speculative for the purpose of Section 73 only. For the purpose of setting off and carrying forward of loss, the buying and selling of shares by certain companies are regarded by the statute as speculation business, even though the transaction of purchase and sale was followed up by delivery of scrips and as such cannot be treated as "speculative transaction" as defined in Section 43(5). The opening words of the Explanation to Section 73 are "where any part of the business of a company". "Any" is a word which excludes limitation or qualification. A restricted meaning should not be given to the phrase "any part of the business." The object of Circular No. 204 dated 24-7-1976, is to curb devices to manipulate and reduce the taxable income of a company under the management of a controlling group of persons. But the circular has clearly stated in paragraph 19.1 that "the business of purchase and sale of shares by companies which are not investment or banking companies or companies carrying on business of granting loans and advances will be treated on the same footing as speculation business." The phrase in the Explanation to Section 73 "to the extent to which the business consisted to purchase and sale of such shares" also does not indicate that the Legislature had several other actual and existing non-speculative activities of business in mind. It merely indicates that the business activity which consists of purchase and sale of shares will be treated as speculation business. If the entire business activity of a company consists of purchase and sale of shares of other companies, then the entire business will be treated as speculation business. But, if, apart from purchase and sale of shares, the company has other business activities, then those other activities will not be treated as speculative business." 47. In view of the observations of the Calcutta High Court referred to above and in view of the discussion made above, we have no hesitation in holding that the authorities below were absolutely justified in disallowing the loss claimed by the assessee being speculative in nature and hit by Explanation to Section 73 of the IT Act.

48. This brings us to the issue of chargeability of the interest on which we have been addressed. Some judgments were also cited in support of the contention

raised by the assessee but the moot question that arises in these proceedings is whether the assessee who has not raised the issue of chargeability of the interest by the Assessing Officer, before CIT(A), can he be permitted to raise the ground before us.

Before the CIT(A) the assessee had raised the following grounds :-- "1. In considering the loss of Rs. 37,40,568 on the sale and purchase of shares as speculative in nature and thereby and not setting it aside against the other income, is arbitrary, illegal, untenable and improper, and must be quashed.

2. In disallowing the office expenses in the sum of Rs. 49,818 is illegal, preposterous and unfair, and must be quashed.

3. In disallowing the interest paid to NSE is illegal and improper and must be quashed." A perusal of the aforesaid grounds leaves on grounds to doubt that the question of chargeability of interest was not raised before the CIT(A).

Once the question of charging of interest under the Act was not raised before the CIT(A) and no application for agitating this ground in the form of additional ground was raised before us, we are surprised as to how could we be addressed by the counsel for assessee on this ground.

In view of this, we have no hesitation in rejecting the said ground on this issue alone, in limine.

49. This brings us to Ground No. 2 pertaining to disallowance of office expenses. We have examined the order of assessment and more particularly para 3 wherein it has been observed as under :-- "3. During the course of the assessment proceedings, vide order sheet entry dated 22-11-99, details of the "office expenses" debited to the P&L account were asked for. From the details submitted on 14-12-99, it is seen that out of the above, Rs. 1,09,637 is on account of "business promotion" expenses and the same has been incurred on food, beverages, hosting of lunches/dinner in hotels, clubs and hospitality expenses of similar nature. The above being in the nature of entertainment expenses, statutory disallowance of Rs. 49,818 (50 per cent of the amount in excess of Rs. 10,000) is

hereby being disallowed." 50. The CIT(A) while considering the said disallowance have restricted it to 30 per cent. The observations of the CIT(A) in this regard are contained in para 4.2 of the order which are reproduced as under :-- "4.2. I have considered the submission of the appellant. The Assessing Officer is directed to treat 30 per cent of the expenses out of Rs. 1,09,637 towards employees participation and the balance as entertainment expenses in the light of Delhi High Court's decision in the case of Expo Machinery Ltd. (supra) and recalculate the disallowance under section 37(2A)." 51. In view of the judgment of the Delhi High Court in CIT v. Expo Machinery Ltd. [1991] 190 ITR 576 59 Taxman 182 we do not intend to interfere with the order of the CIT(A) and have, therefore, no hesitation in dismissing ground Nos. 1 and 2 of the appeal while allowing ground No. 3 of the appeal.

52. Before we part with, we must say that we have discussed some of the judgments in this order but that does not mean that the others were not considered.

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