

**Rohini Capital Services Ltd. Vs. Dcit**

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**Court :** Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Oct-18-2004

**Reported in :** (2005)92ITD317(Delhi)

**Judge :** K Singhal

**Appellant :** Rohini Capital Services Ltd.

**Respondent :** Dcit

**Judgement :**

1. The following grounds have been raised in this appeal by the assessee: "1. The Id. CIT(A) has erred in upholding the decision of the AO in treating the business loss of Rs. 2,53,417/- as deemed speculation loss and has also erred in not allowing set off of the business loss with the income under the head 'income from other sources' which is arbitrary, unjust, contrary to the facts and circumstances of the case and bad in law.
2. The Id CIT(A) has erred in concluding that proviso to Section 43(5) is not applicable whereas the Explanation to Section 73 has been applicable while considering the loss incurred as speculation loss which is contrary to the law, judicial pronouncements and arbitrary.
3. The Id CIT(A) has erred in stating that the proviso (c ) to Section 43(5) is not applicable to the present case by not making harmonious construction between the proviso (c ) to Section 43(5) and Explanation to Section 73 of the Act. " "The

assessee is a member of National Stock Exchange of India and deals in sale/purchase of share and securities on its own and as well as on the behalf of his clients. Apart from share broking activities, the assessee also derives income from dividend and interest. On going through the sale/purchase account of assessee it has been found that the assessee has incurred a loss of Rs. 2,53,417/-. Assessee was asked why this loss should not be treated as speculation loss. The assessee filed explanation on 4.2.2000 and the same has not been found convincing. Explanation to Section 73 is clearly attracted in this case and hence, the loss of Rs. 2,53,417/- is being treated as speculation loss. This will be carried forward and adjusted later on when the assessee might be having speculation profit. This amount of Rs. 2,53,417/- will however be added to the income declared by the assessee." 3. On appeal, the CIT(A) has confirmed the order of AO on this issue by observing that facts of the present case fall within the scope of the provisions of Explanation to Section 73. The contention of assessee that its case was covered by the proviso (c) to Section 43(5) was also rejected in view of the clear provisions of Explanation to Section 73.

Aggrieved by the same, the assessee is in further appeal before the Tribunal.

4. Both the parties have been heard at length. The main contention of learned counsel for assessee is that his case falls within the scope of proviso (c) to Section 43(5) which specifically excludes the transactions entered into by a member of stock exchange in the course of his regular business from the definition of speculative transactions. According to him once the legislature has excluded the transactions entered into by a stock broker, who is a member of stock exchange from the ambit of "speculative transactions" as provided in Section 43(5), it cannot be said by implication that legislature would have intended to include the same within the meaning of speculative transactions. Proceeding further, it was mentioned by him that the intention of the legislature in inserting the Explanation after Section 73 was not to take away the case of a member of stock exchange from the scope of the proviso (c) to Section 43(5) but to check the evasion of tax by the companies, who were dealing in purchase and sale of shares and claiming setting of the loss against other income. In this connection, he drew our attention to report of Wanchoo Committee prepared in December, 1971. He then pointed

out that on the basis of such report, the then Finance Minister moved the proposal in the Lok Sabha on 15.5.73 in Taxation Laws (amendment) Bill, 1973 After the debate, the matter was referred to Select Committee. Thereafter, on the basis of Select Committee Report, Explanation to Section 73 was introduced in Taxation Laws (Amendment) Bill, 1975 and finally it was brought on Statute Book w.e.f. 1.4.77. According to him, if the provisions of Explanation is construed in the context of Wanchoo Committee report, then provisions of Explanation to Section 73 cannot be said to include the transactions entered into by a stock broker covered by Clause (c) to proviso to Section 43(5).

5. In support of his above contention, he referred to the following propositions: 1. It is well settled that in interpreting an enactment the court should have regard not merely to the literal meaning of the words used but also take into consideration the antecedent history of the legislation, its purpose and mischief it seeks to suppress. {Bengal Immunity Co. Ltd. v. State Of Bihar (1955) 2 SCR 603 and Chamarbaugwalla (R.M.D.) v. Union of India 2. It is a well settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. {Varghese (K.P.) v. ITO 3. The intention of legislature is to curb certain devices adopted by certain companies holding shares in different group companies, as it is clear from the circular (Para 19 of the Circular No. 204 dt.

24.7.75)}.

4. If there is a conflict between two provisions of law, enacted for different purposes and at different times, the conclusion drawn from the interpretation of such provisions has to be harmonized according to the applicability, facts and circumstances of the case and above all the intent of legislature while enacting those provisions.

5. It may not be necessary to always cling to literalness and we should seek to endeavour to avoid an unjust and absurd result to make sense, where the purpose is apparent to the judicial eye even if some violence to the language is required and the language of the statute can be modified to accord with the intention of

legislature.

The reliance is placed on the case of Tamilnadu v. Kodaikanal Motor Union P. Ltd, (AIR 1986 SC 1973) & CWS (India) Ltd. v. CIT (1994) 208 ITR 649.

6. Once the legislature's intention is ascertained and the object and purpose of the legislation is known, it then becomes the duty of the court to give the statute a purposeful or a functional interpretation. For this purpose, where necessary, the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There must be no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing the written word of necessary. (Girdharilal & Sons v. Balbir Nath AIR 1986 SC 1499).

7. The legislature intention is not to classify a particular class of assessee and put them to disadvantageous position vis-a-vis the other class of assessee. If the explanation is interpreted in the way it has been done in the present case there is a danger of administering the provision of law in a discriminatory and unintended way.

8. Even if there is any conflict between the provisions of Section 43(5) Proviso (c) and the Explanation to Section 73, then such conflict should be resolved in favour of the assessee. Reliance was placed on decision of Delhi High Court in the case of C.S. Mathur v. CBDT, 235 ITR 769 and of Supreme Court in the case of India Engg. & Commercial Corporation (P) Ltd., 201 ITR 223.

6. On the other hand, the learned DR has strongly relied on the order of lower authorities by submitting that loss arising from the business of purchase and sale of shares cannot be allowed to be set off against other income in view of clear provisions of Section 73 Explanation.

7. After considering the rival submissions, I am not inclined to accept the contention of assessee's counsel. There is no dispute to the rules of interpretation

referred to by the learned counsel for the assessee.

However, if rules of construction and statute are to be applied to the present situation, then, in my opinion, there is no conflict between the provisions of Section 43(5) and Section 73. The relevant portion of such provisions are being reproduced for the benefit of this order, as under: "Section 43(5): 'speculative transaction' means a transaction in which a contract for the purchase or 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: (c) a contract entered into by a member of a forward market or a stock exchange .in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; shall not be deemed to be a speculative transaction. " 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", "Income from house property", "Capital gains" and "Income from other sources ", 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 and sale of such shares." A comparable study of both the provisions clearly shows that the legislature has defined the transactions which are speculative in nature in Section 43(5) except which are carved out in the proviso while Explanation to Section 73 declares certain transactions as deemed to be speculative which are otherwise not speculative. Hence, in my opinion, both the provisions hold the different fields.

9. The main provisions of Section 43(5) defines speculative transactions. According to this definition, it would include those transactions wherein purchase and sale of shares is effected without delivery and the contract is settled otherwise. It is the settled proposition of law that proviso simply carves out what is included in the main proviso. Therefore, the proviso would refer to only those transactions which are otherwise speculative in nature and, therefore, would not apply to those transactions which are effected with regular delivery of shares. The

sale of purchase of shares with delivery are already outside the ambit of Section 43(5) itself and, therefore, question of applying the proviso (c) to the section in such situation would not arise. It has never been the case of assessee that transactions of purchase and sale of shares were otherwise speculative within the meaning of the main provisions of Section 43(5). Hence, question of applying Clause (c) of the proviso does not arise.

10. Even otherwise, a bare look to the above provisions makes it clear that what is excluded from the definition of speculative transactions is that contract which is entered into by a member of stock exchange in the course of any transactions in the nature of Jobbing or Arbitrage to guard against loss which may arise in the ordinary course of his business as such member and not each and every transaction entered into by such person independently. If a transaction is not made in course of jobbing or arbitrage to safeguard against the future loss, then such transactions would not fall within the scope of Clause (c) of the proviso to Section 43(5). It has never been the case of the assessee either before AO or before CIT(A) that transactions of purchase and sale of shares, in which loss was incurred, were entered into in the course of jobbing and arbitrage to safeguard the future losses. Hence, the contention of assessee's counsel cannot be accepted even on this ground .

11. Further, the Explanation to Section 73 applies only to regular dealing in shares made in the normal course of business and not to speculative transactions falling Under Section 43(5). It is only by virtue of such Explanation that such normal non-speculative transactions are deemed to be speculative transactions. Since, the loss to the assessee has arisen in the normal course of business i.e.

purchase and sale of shares with delivery, the case of assessee would not fall Under Section 43(5) and consequently, would not be covered by Clause (c) of the proviso to Section 43(5). Accordingly, such transactions would fall within the scope of the provisions of Explanation to Section 73. It is not the case of assessee that his client falls within the exception provided in Explanation to Section 73 Therefore, in my opinion, the lower authorities were justified in holding the loss to assessee as speculative loss. The order of the CIT(A) is, therefore, upheld.

