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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [INCOME TAX]
ORIGINAL SIDE

ITA/51/2013
IA NO: GA/2/2013(Old No:GA/435/2013)

THE COMMISSIONER OF INCOME TAX, KOLKATA -II, KOLKATA
VS
M/S. MADANLAL LIMITED

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)
DATE : 28th July, 2025.

Appearance :
Mr. Aryak Dutt, Adv.
Mr. Prithu Dudhoria, Adv. …for appellant.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Sanjay Bhaumik, Adv.
Mr. Saumya Kejriwal, Adv.
Ms. Ananya Rath, Adv.
Mr. Navin Mittal, Adv.
Mr. Debarghya Banerjee, Adv. …for respondent.

The Court : - This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 4.5.2011 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (the Tribunal) in ITA/1033/Kol/2011 for the assessment year 2008-09.

The revenue has raised the following substantial questions of law for consideration :

> *"1. Whether on the facts and in the circumstances of the case the learned Tribunal was justified in law in holding that the loss on trading in future and options is business loss of Rs.51.71 crore which can be set off against business income disregarding the explanation below Sec.73 and Circular No.204 dated 24.7.1976 under which such loss has to be treated as speculative loss which cannot be set off against other business income."*

We have heard Mr. Aryak Dutta, learned senior standing counsel assisted by Mr. Prithu Dudhoria, learned advocate for the appellant/department and Mr. J. P. Khaitan, senior counsel assisted by Mr. Sanjay Bhaumik for the respondent/assessee.

The substantial question of law raised by the revenue in the instant case was considered by the Hon'ble Division Bench of this court in the case of *Asian Financial Services Ltd. vs. Commissioner of Income Tax-3, Kolkata; [2016] 70 taxmann.com 9 (Calcutta)*. In the said appeal filed by the assessee identical question of law was raised in questions of law (b) and (c) in paragraph 1 of the said reported decision. The Hon'ble Division Bench allowed the assessee's appeal.

Before us, the learned senior standing counsel placed reliance on Section 73 of the Act stating that the said provision is a specific provision whereas what was relied on by the assessee and accepted by the appellate authority namely, section 43(5) is a general provision and submitted that a company dealing in purchase and sale of shares amongst others, which does not come within the exceptions carved out in the explanation itself, is hit by the mischief of the explanation under Section 73(4) of the Act. Further, it is submitted by the learned senior standing counsel that when the business consisting of purchase and sale of shares of other companies amounts to a speculation business, can it be said that the business in derivatives, which depend upon the value of the underlying shares, is anything other than a speculation business.

Identical submissions were made before the Hon'ble Division Bench in *Asian Financial Services Ltd*. and the argument of the revenue was rejected. At this juncture, it will be beneficial to refer to the relevant paragraphs of the said judgment.

"8. We have not been impressed by the submissions advanced by Mr.Lodh. How can it be said that Sub-section (5) of Section 43 is a general provision and the provision contained in Section 73 is specific in nature? On the contrary, we are inclined to think that the object of Sub-section (5) of section 43 is to define 'speculative business'.

9. Group-D of Chapter-IV of the Income Tax Act consists of Sections 28 to 44DB. When the statute talks of profit, it also talks of losses because loss has been construed as a negative profit. Sections in Group-D of Chapter-IV evidently deal with profits and losses of business or profession. Explanation 2 to Section 28 provides as follows:

> *Explanation 2.-Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as "speculation business") shall be deemed to be distinct and separate from any other business.*

10. From a plain reading of the Explanation 2, the following deductions can be made:-

(a) Speculative transactions carried on by an assessee may be of such a nature as to constitute a business:

(b) Such speculation business carried on by an assessee shall be deemed to be distinct and separate from any other business.

We can thus arrive at a conclusion that speculation transaction may partake the character of deemed business where statute so provides. Definition of "speculative transaction" has been provided in Sub-section (5) of Section 43, which in so far as material for our purposes, is as follows:-

> *(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:*
>
> *Provided that for the purposes of this clause-*

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or

(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, [or]

(d) an eligible transaction in respect of trading in derivatives referred to in clause [(ac)] of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange; [or]

(e) an eligible transaction in respect of trading in commodity derivatives carried out in a [recognised association, which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013)] shall not be deemed to be a speculative transaction;'

11. It would appear that the activities appearing in Clauses (a) to (e) are not to be deemed to be speculative transactions. Therefore, this comes within the category of deemed business which is however distinct and separate from any other business. Now, the question is, whether loss arising out of such deemed business can be set off against the profit arising out of other business or businesses which may for clarity be called proper business. Under Section 70 of the Act, the assessee is entitled to have the loss set off against his income from any other source under the same head unless otherwise provided. Therefore answer to the question is that the assessee is entitled to have the loss arising out of deemed business set off against the income arising out of business proper unless otherwise provided. The question however remains whether the explanation to Sub-Section (4) of Section 73 relied upon by Mr. Lodh provides otherwise. A plain reading of the explanation quoted above cannot be said to have provided otherwise. In that case the irresistible conclusion is that the assessee is entitled to set off such loss arising out of deemed business against the income arising out of business proper.

12. The learned Tribunal has supported the contention of the revenue relying upon the judgement of the Delhi High Court quoted above. The views expressed by the Hon'ble Delhi High Court are contained in a part of the sentence, which is as follows:

> *"by all accounts the derivatives are based on stocks and shares, which fall squarely within the Explanation to Section 73(4)."*

13. We are inclined to think that the clause of the sentence 'which fall squarely...., qualifies the word 'shares 'and not the word 'derivatives'. We have no difficulty in accepting the views of the Delhi High Court when they say that shares fall squarely within the Explanation to Section 73(4) but we are unable to agree when derivatives are treated at par with the shares because the legislature has treated them differently."

Thus, applying the law laid in the above decision, it is to be held that the loss incurred on account of derivatives would be deemed to be business loss under the proviso to section 43(5) and not speculation loss and, hence, Explanation to Section 73 could not be applied; as such, loss would be set off against income from business.

Thus, following the above decision, the appeal filed by the revenue is dismissed and the substantial question of law is answered against the revenue.

Consequently, the application, IA NO: GA/2/2013(Old No:GA/435/2013) also stands dismissed.

(T.S. SIVAGNANAM, CJ.)

(CHAITALI CHATTERJEE (DAS), J.)

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