

(2010) 12 P&H CK 0660
In the Punjab And Haryana At Chandigarh
Case No : IT Appeal No. 429 of 2007

Aravali Engineers (P.) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 09-12-2010

Acts Referred:

Income Tax Act, 1961 — Section 143(2), 23, 24, 24(1), 260A
Securities Contracts (Regulation) Act, 1956 — Section 2

Citation : (2011) 11 TAXMAN 291

Hon'ble Judges : Ajay Kumar Mittal, J; A.K. Goel, J

Bench : Division Bench

Advocate : Radhika Suri, for the Appellant; Urvashi Dhugga, for the Respondent

Final Decision : Dismissed

Judgement

Adarsh Kumar Goel, J.—This appeal has been preferred u/s 260A of IT Act, 1961 (hereinafter referred to as "the Act") by the assessee against order dated 4th May, 2007 of the Tribunal, Chandigarh Bench, passed in ITA No. 366/Chd/2002 in respect of assessment year 1997-98. The assessee derives income from business, from house property as also from speculative transactions. It claimed set off of loss suffered on sale and purchase of shares covered by the definition of speculative transactions u/s 43(5) of the Act against income from property. It also claimed deductions to the extent of brokerage paid out of income from property. Both the said claims were disallowed by the AO with the following observations:

Deduction of loss from speculative transactions

The assessee company has debited an amount of Rs. 3,02,050 on account of loss on shares. It was seen during the course of scrutiny that the loss had arisen to the assessee on sale/purchase of shares. In the assessee's case only a difference note was sent by the stock broker indicating the loss. It was clearly established that the delivery of shares had not actually taken place in the

assessee's case. The difference note was received from M/s. B.K. Khullar & Co. section 43(5) which specifies speculative transactions clearly says that where the transaction of purchase or sale including shares is ultimately settled otherwise than by actual delivery the same shall be a speculative transaction. Income or loss arising to the assessee from such a transaction has to be a speculative income or speculative loss only. The speculative loss of Rs. 3,02,050 is hence not debitable to the P&L a/c of the regular business of the assessee. Consequently this shall be considered separately as a speculative loss. Explanation to section 73 also says that where any part of the business of the company consists in the purchase and sale of shares then the company for the purpose of this section be deemed to be carrying on a speculation business to the extent to which the business consists of purchase and sale of such shares. This company has a business of trading in bran. It is not an investment company also. Consequently any income or loss arising from dealing in shares shall be treated as speculative income. On this account also the amount of Rs. 3,02,050 cannot be allowed as an expense to the company and the loss shall be treated as speculative loss only.

Deduction on account of brokerage

With regard to commission payment of Rs. 2,50,000 there is no eligibility under any section for the assessee company to claim this expenditure u/s 24. The deductions from house property are available only u/s 24 and have been clearly specified. The rent received in assessee's case for the full year is the annual letting value. As the commission is not eligible as a deduction u/s 24 it shall not be allowed as an expenditure under house property income.

2. The CIT(A) accepted the plea of the assessee on the question of brokerage but the Tribunal reversed the same and restored the order of the AO. The findings recorded by the Tribunal are as under:

We have given our careful consideration to the rival submissions. The finding of fact recorded by the Revenue authorities that the loss has been incurred by the assessee on the sale of purchase of shares without actual delivery of the scrips has not been challenged before us section 43(5) defines speculative transaction as under:

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:

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

The following clause (d) shall be inserted after clause (c) in the proviso to clause (5) of section 43 by the Finance Act, 2005 w.e.f. 1st April, 2006:

(d) an eligible transaction in respect of trading in derivatives referred to in clause (aa) of section 2 of the Securities Contract (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange. Shall not be deemed to be a speculative transaction.

On the basis of the findings of facts recorded by the Revenue authorities, not challenged even before us, there is no escape from the finding that the transactions entered into by the assessee in regard to purchase and sale of shares are speculative transactions sections 70 to 79 deal with set off and carry forward of losses from various sources of income section 73 provides that loss computed in respect of speculative business carried on by the assessee shall not be set off except against profits and gains, if any, of another speculation business. The assessee has pleaded even before us that the transactions of purchase and sale of shares was part of assessee's business. Since entire transactions undertaken by the assessee were of speculative nature, the loss suffered by the assessee was a loss in respect of speculative business carried on by the assessee. Explanation to section 73 provides certain circumstances under which companies partly carrying on the business of purchase and sale of shares of other companies would be treated as carrying on speculation business to the extent of the business consisting of purchase and sale of shares. The said Explanation is not applicable in respect of certain companies whose gross total income consists mainly of income which is chargeable under the heads interest on securities, income from house property, capital gains, income from other sources etc. So, however, in this case, Explanation to section 73 has not been invoked as the same is not applicable. The transactions undertaken by the assessee fall within the definition of speculative transactions as defined u/s 43(5) of the Act. Therefore, the Revenue was justified in treating the loss suffered by the assessee as a loss suffered in speculation business. The contention advanced on behalf of the assessee that Explanation to section 73 is not applicable need not be considered as the said Explanation has not been invoked by the Revenue authorities. We are, therefore, ignoring the contentions advanced by the learned counsel for the assessee and the counter-contentions advanced on behalf of the Revenue in regard to applicability of Explanation to section 73 of the Act. The brokerage paid by the assessee in regard to the speculative transactions has also not been allowed as a deduction against other income as the same is undisputedly connected with the business of the assessee in the purchase and

sale of shares which is treated as a speculation business.

We have given our careful consideration to the rival submissions. In our considered view, the commission paid by the assessee in respect of the letting out of the house property is not permissible as a deduction u/s 24 of the Act. Annual letting value of the property is defined u/s 23 of the Act and in case of property let out, if the actual rent received is more than the expected rental value, the actual rent is treated as the ALV of the property. Out of the said ALV, deductions permissible are specified u/s 24 of the Act. In this case, the rental value is not disputed. It is also not disputed that deduction of commission does not fall within the specified deductions u/s 24 of the Act. It is also pertinent to mention that section 24(1) provides deduction equal to 30 percent of the annual value without assessee having to establish the incurring of any expenditure. Thus, the expenditure which is incurred by the assessee can be said to be covered under the statutory deduction allowed to the assessee. Since the legislature in its wisdom has not provided any separate deduction on account of commission/brokerage paid to the property dealers, the CIT(A), in our view, was not justified in allowing the deduction to the assessee. We are fortified in our view by the decision of Delhi Bench of the Tribunal in the case of (2005) 94 ITD 267 . For the reasons given earlier by us in this regard and respectfully following the aforementioned decision of the Delhi Bench of the Tribunal, we restore the disallowance of Rs. 2,50,000. The ground of appeal raised by the Revenue is thus allowed.

3. It may also be mentioned that the assessee raised plea of the assessment being barred by limitation on the ground that notice u/s 143(2) of the Act was not served within the stipulated time. The Tribunal held that the assessee did not raise the plea earlier in spite of opportunity being available and on a question of fact, such a plea could not be allowed to be raised for the first time before the Tribunal. Reference was made to the judgments of the Hon''ble Supreme Court in National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, and Jute of Corporation of India Ltd. Vs. Commissioner of Income Tax and another,

4. The appeal was admitted by this Court to consider the following substantial questions of law claimed by the assessee:

(i) Whether in facts and circumstances of the case the Tribunal had fallen in error in disallowing the appellant from raising an additional issue, contrary to ratio of the Supreme Court in National Thermal v. CIT (supra) when all evidence for adjudicating the same was placed before it?

(ii) Whether in facts and circumstances of the case the provisions of section 73 could be invoked against the assessee when the assessee was squarely covered by Explanation of section 73 vide which the sale and purchase of shares by a company would not be speculative in nature in case its income was mainly derived from house property or capital gains or income of like nature?

(iii) Whether in facts and circumstances of the case the Hon''ble Tribunal was

right in law in holding that the brokerage paid was not an admissible expenditure u/s 24 of the IT Act even though the rent actually received by the assessee or the tenant was after deducting the brokerage paid?

5. We have heard learned counsel for the parties.

6. As regards question (i), we do not find any reason to take a view different from the view taken by the Tribunal. No doubt that an appellate authority can allow a question to be raised for the first time even if such a question was not raised at a lower forum but the discretion to do so has to be exercised in the interest of justice in the facts and circumstances and not mechanically. Normally a question of fact may not be allowed to be raised for the first time as it may prejudice the other side. If such question is raised at the earliest opportunity, the other side can lead evidence which it may not be able to do if such a question is raised for the first time before the appellate authority. Of course, there can be no total bar on such question being allowed, if interest of justice so requires. In National Thermal Power Ltd.'s case (supra) it has not been laid down that in every case a question of fact can be mechanically allowed to be raised for the first time. The Madhya Pradesh High Court in Commissioner of Income Tax Vs. Premium Capital Market and Investment Ltd., held that question of validity of notice may not be allowed to be raised for the first time in appeal. Subsequent legislative amendment adding section 292BB supports this principle. The question has, thus, to be answered against the assessee.

7. As regards question (ii), learned counsel for the assessee submits that the income of the assessee mainly being under the head of income from property, the assessee was not covered by Explanation to section 73 and in such a situation the assessee could set off loss in speculative transactions against income from house property. The bar against set off of losses in speculative transactions against income from other services applied only to assessees covered by Explanation to section 73.

8. This submission cannot be accepted. Under the scheme of the Act computation of income under different heads has been provided for. Business loss cannot be set off against income from other heads unless specifically provided. The business loss can be set off only against the business income as it is net income which is to be taxed. If business is partly of speculative transactions loss from such transaction cannot be set off against income from other business. The scope of section 73 r/w section 28 Expln. 2 is to deal with the situation where loss in speculative transaction is sought to be set off against other business income section 73 provides that such loss can be set off only against income from speculative business. The object of Explanation is to explain this scheme in the main provision to situations where part of business is from speculative transactions. To that extent the assessee will be deemed to be carrying on speculative business. Exclusion of categories of specified assessees i.e., where income is under the heads of interests on security, house property, capital gains and other sources or where main business is of banking or granting of loans and

advances etc. is to exclude the said assessee from consideration from the scope of provisions to limit the scope of adjustment of loss of speculative business against business income, from other business. In respect of excluded categories, there being no income from other business, such categories have been excluded. Explanation 2 to section 28 provides that speculative transaction shall be deemed to be distinct and separate from other business.

9. It will be appropriate to set out relevant provisions for ready reference:

28. Profits and gains of business or profession. - The following income shall be chargeable to income tax under the head "Profits and gains of business or profession",

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.

43. Definitions of certain terms relevant to income from profits and gains of business or profession.

(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 (aa) of section 2 of the Securities Contract (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange.

73. Losses in speculation business-(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.

(2) to (4)

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.

10. Thus, contention raised on behalf of the assessee that categories of assessee's excluded under the Explanation can be allowed to set off loss in speculative transactions against income from any other source cannot be accepted. As already discussed, even business loss in speculative transactions cannot be set off against other business income or income from other sources, except as may be expressly provided. If that is so, loss from speculative transactions could not stand on higher footing than the business loss so as to qualify for set off against other income.

11. The object of addition of Explanation was to check tax avoidance device resorted to for manipulation by share dealings and thereby avoid tax on business income in the light of recommendations of Wanchoo Committee Report (December, 1971 p. 78) which is as under:

A tax avoidance device often resorted to by business houses controlling groups of companies is manipulation of results from dealings in shares of the companies controlled by them. In our opinion, such manipulation in share dealings for the purpose of tax avoidance can be checked effectively if the results of dealings in shares by such companies are treated for tax purposes in a manner analogous to speculation. No doubt, companies whose main business activities centre around investment in shares will have to be left out. Accordingly, we recommend that the results of dealings in shares by companies, other than investment, banking and finance companies, should be treated in a manner analogous to speculation business.

12. In view of above, the question has to be answered against the assessee.

13. As regards question (iii), learned counsel for the assessee submits that rent to the extent of brokerage paid having never been received by the assessee, the assessee was not liable to include the said rent in the income. This submission cannot be accepted. Rent admittedly was payable to the assessee and brokerage was an independent transaction envisaging payment to the broker. Wherever deductions out of income from property are permissible, the same have been specified in section 24. De hors the said provision, deduction from income is not permissible. This view has also been taken by Delhi High Court in Commissioner of Income Tax, Delhi-I Vs. H.G. Gupta and Sons,

We are in agreement with the view taken in said judgment. Question No. (iii) is

thus answered against the assessee. Accordingly, the appeal is dismissed.