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**(2008) 10 DEL CK 0127**  
**In the Delhi High Court**  
**Case No : ITA 1229 of 2008**

Commissioner of Income Tax

APPELLANT

Vs

Bhartesh Jain

RESPONDENT

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**Date of Decision :** 23-10-2008

**Acts Referred:**

Income Tax Act, 1961 — Section 143(3), 144, 260A

**Citation :** (2009) 310 ITR 82 : (2009) 176 TAXMAN 204

**Hon'ble Judges :** Rajiv Shakdher, J;Badar Durrez Ahmed, J

**Bench :** Division Bench

**Advocate :** J.R. Goel, for the Appellant; K.R. Manjani, for the Respondent

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## **Judgement**

Rajiv Shakdher, J.—The Revenue has preferred the present appeal u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") against the judgment dated 22.02.2008 passed by the Income Tax Appellate Tribunal (hereinafter referred to in short as ?Tribunal?) in ITA/762/Del/2006 pertaining to assessment year 1995-96.

1.1 The only issue which arises for consideration is whether the assessee should be permitted to set off brought forward losses amounting to Rs. 50,95,247/-, in respect of, sale and purchase of shares, pertaining to assessment years 1994-95 against income of assessment year 1995-96 assessed at Rs. 33,20,000/- u/s 144 of the Income Tax Act by the Assessing Officer.

1.2 The Assessing Officer vide assessment order dated 21.3. 2005, passed on remand, has disallowed the set off on the ground that the income earned by the assessee in assessment year 1995-96 is income in the nature of business income arising from sale and purchase of shares, as against, income from speculation. In appeal the Commissioner of Income Tax (Appeals) (hereinafter referred to as CIT(A)) has sustained aforesaid order of the Assessing Officer. However, the Tribunal by the impugned judgment has reversed the orders of the authorities below.

2. In order to dispose of this appeal the following facts require to be noticed: 2.1 On 30.10.1995 the assessee had filed a return declaring his income as "nil". The assessee failed to satisfy the queries raised by the Assessing Officer. The result was, that the Assessing Officer, completed the assessment u/s 144 of the Act. Consequently, assessee's income was assessed at Rs. 33,20,000/-.

2.2. Being aggrieved the assessee filed an appeal with CIT(A). By an order dated 17.3.1998 the CIT(A) restored the figure of Rs. 33,16,184/- being the income returned by the assessee against assessed income of Rs. 33,20,000/-. However, the CIT(A) treated the said income as business income.

2.3 Aggrieved the assessee preferred an appeal to the Tribunal. By an order dated 09.6.2003 the Tribunal remanded the matter to the Assessing Officer after, noting the contradiction in the assessment order whereby, the Assessing Officer, while refusing to allow adjustment/set off of brought forward losses of assessment years 1994-95 against income of the assessment year in question i.e., 1995-96 on the ground that income of assessment year 1995-96 did not arise from speculation, had in the same breath, in the last paragraph of the assessment order observed that the facts of assessment year 1995-96 were similar to 1994-95. The Tribunal even while making the said observations vide its order dated 9.6.2003 issued following directions to the Assessing Officer:

...The AO added that the assessee had not brought anything on record to show that his income of assessment year 1995-96 was for speculation. In this connection it is noted from the submissions made before the Id. CIT(A) that the books of accounts for the period upto July, 1995 were lying with the Department and in the absence of the same the assessee could not furnish the details required by the AO in the course of the assessment proceedings. The AO also did not examine the books of account suo moto to find out the exact nature and source of the income of the assessment year 1995-96. No material from the books of account were brought on record by the AO to support the view that the income was not from speculation. It will be wrong to disallow the assessee's claim of adjustment and set off of brought forward loss merely on presumption without looking into the books of account which could help verify the matter and come to a proper and just conclusion in the matter. In the interest of justice the assessee must be given opportunity to inspect the books of account and furnish details there-from in support of the claim of set off of the brought forward loss....

2.4. On remand the matter was taken up by the Assessing Officer. Before the assessing officer, the assessee filed the two letters dated 29.12.2004 and 15.3.2005. The sum and substance of the stand taken in these letters was:

(i) for assessment years 1992-93 and 1993-94 the Revenue had completed proceedings u/s 143(3) of the Act and the income for the said assessment years was assessed as business income;

(ii) there was no change in the nature of business in these years;

(iii) the books produced for inspection of the assessee on 29.12.2004 were incomplete and represented affairs of only part of the period in issue, as also, the fact that the accompanying vouchers were incomplete and;

(iv) lastly, the assessee claimed that he did not have details with him as it was an old matter.

2.5 On the other hand the Revenue contended that it had produced all such books for inspection of the assessee, which were, in their custody. The Revenue further contended that they had books available only for the period up to the date of the search i.e., 25.7.1994 and, therefore, they could not be asked to produce books for the latter part of the accounting year.

3. After recording the course of events and the submissions of the assessee, the Assessing Officer vide order dated 21.3.2005 disallowed the set off of brought forward losses. In the said order the Assessing Officer noted the fact, that, in the assessment year 1994-95, that is, assessment year immediately preceding the year under consideration, the assessee's income had been treated as income from "speculation" and that the said decision of the Revenue had been sustained right till the Tribunal. The Assessing Officer concluded that since the assessee in his return of income for assessment year 1995-96 had shown his income as business income, a fact which the assessee had not denied, the assessee could not be allowed to set off brought forward losses of assessment year 1994-95 against the income for assessment year 1995-96.

3.1 Once again the assessee, being aggrieved, preferred an appeal to the CIT(A). The CIT(A) sustained the order of the Assessing Officer after observing that assessee had failed to substantiate his claim that the income generated during the year under consideration was speculative in nature even while steadfastly adhering to his stand that there was no change in his activities in the current year when compared to the preceding year.

4. Being aggrieved, the assessee approached the Tribunal by way of an appeal. The Tribunal in para 5 of the impugned judgment reproduced the original assessment order dated 26th August, 1997 passed by the Assessing Officer in the first round. The extract as replicated in the impugned judgment, being significant, is reproduced hereinbelow:

...The assessee has claimed b/f losses of Rs. 50,05,047/- but in the assessment year 1994-95 it was held that the loss incurred by the assessee is a speculation loss which cannot be adjusted against current year's business income and same is to be c/f for set off against speculation income. The assessee has not brought anything on record to show that his income during the year is from speculation. Therefore, b/f speculation loss cannot be set off against current year's business income as the assessee has not brought anything on record to show that the income of the current year is from speculation. The facts are similar as in the assessment year 1994-95....

4.1. The Tribunal, similarly, in paragraph 8 of the impugned judgment also noted the fact that in the earlier round it had by an order dated 09th June, 2003, a reference to which is made hereinabove, directed the Assessing Officer to examine the books of accounts of the assessee available with him to determine the 'nature' and 'source' of income of the assessment year in issue i.e., 1995-96 after giving due opportunity to the assessee. The Tribunal noted with concern that the Assessing Officer despite the directions issued in the earlier round had not brought on record any material from the record available with him, to demonstrate that the income of the assessee was not in the nature of income from speculation. The Tribunal noted that there being no material on record to suggest that the activity of the assessee, that is, earning income from sale and purchase of shares was in any way different from the activity carried on by the assessee in assessment year 1994-95, the Revenue could not take a different view in respect of a similar activity carried out, in the year under consideration, till such time it had "solid and positive material". The Tribunal observed that in the absence of such material, the contrary stand of the Revenue, was not only against the principles of equity and justice, but was also contrary to law. The Tribunal in this regard applied the principles enunciated by the Supreme Court in the case of M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax,

5. Having heard the learned Counsel for the Revenue as well as the Counsel for the assessee we are of the view that the impugned judgment passed by the Tribunal has to be sustained for the following reasons:

5.1 In the first round the Tribunal had noted that the Assessing Officer had while disallowing the set off of brought forward losses with current year's income, i.e., assessment year 1995-96, returned a finding that the facts of the year under consideration i.e., assessment year 1995-96 were similar to those of assessment year 1994-95. In view of this patent contradiction, and given the fact, that the Assessing Officer had failed to examine the books of accounts which were in his custody, so as to ascertain the nature and source of the income of the assessee - the Tribunal remanded the matter to the Assessing Officer. Instead of repairing the damage, the Assessing Officer in the second round, continued in the same vein; he once again failed to examine the books of accounts even though so directed by remand order. The Assessing Officer merrily went by what was stated by the assessee in his return of income. The assessee's contention was obviously ignored which, in sum and substance was, that the activity which was carried on in the assessment year 1995-96 was no different from that, which was, carried on in assessment year 1994-95. On this aspect of the matter the Tribunal has, in the impugned judgment, made a careful note of the contentions of the assessee which were broadly as follows:-there was no change in facts and circumstances in the year under consideration, i.e., assessment year 1995-96, when compared to assessment year 1994-95 inasmuch as in assessment year 1994-95 the assessee's income had been treated as speculative in nature in view on his failure to establish he had taken and given physical delivery of shares traded by

him. Consequently, the Revenue could not treat the nature of income for assessment year 1995-96 differently till it was in a position to bring on record material to the contrary. To put it differently the assessee could not be called upon to prove the negative.

5.2 Thus, the Tribunal, keeping in mind the said submissions of the assessee, as also, the observations of the Assessing Officer in the original order of assessment dated 26.8.1997, wherein he had said that the facts of assessment year 1994-95 were similar to the year under consideration i.e., 1995-96, and given the fact that no endeavour, whatsoever, had been made by the Assessing Officer to bring on record material to establish that the income of the assessee was not speculative in nature despite a specific direction issued in the first round by the Tribunal - concluded that it had no option but to hold the Revenue to its stand which it had taken for the preceding assessment year, i.e., assessment year 1994-95 to the effect that the activity of the assessee of sale and purchase of shares was speculative in nature - even in respect of assessment year 1995-96.

5.3. We do not find any error in the approach adopted by the Tribunal. The Tribunal has returned a finding of fact based on appreciation of material before it. In these proceedings we cannot substitute our view with that of the Tribunal. No question of law, much less, a substantial question of law arises for our consideration. In the result, the appeal is dismissed.