(2006) 09 GAU CK 0028

In the Gauhati High Court

Commissioner of Income Tax APPELLANT

Vs

Micro India Ltd. RESPONDENT

Date of Decision : 15-09-2006

Acts Referred:
Income Tax Act, 1961 — Section 143, 260A, 28, 43, 72

Citation : (2007) 211 CTR 64 : (2007) 1 GLT 163 : (2007) 290 ITR 389 : (2008) 167 TAXMAN 278

Hon'ble Judges : D. Biswas, J;Brojendra Prasad Katakey, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.P. Katakey, J.—This appeal by the Revenue u/s 260A of the Income Tax Act, 1961 (in short "the Act"), is directed against the order passed by the Income Tax Appellate Tribunal, Gauhati Bench, dismissing the appeal filed by the Revenue. The appeal has been admitted on the following substantial questions of law:

1. Whether, on the facts and in the circumstances of the case and on a correct interpretation of the Explanation to Section 73 of the Income Tax Act, 1961, the Tribunal was correct in law in holding that the provisions of section are not applicable to the case of the assessee-company?

2. Whether, on the facts and in the circumstances of the case is the decision of the Tribunal perverse in holding that the income of the assessee mainly consisted of interest, dividend, hire charges, etc., and that ''Explanation'' to Section 73 of the Income Tax Act, 1961, is not applicable to the case of the assessee-company?

2. The assessee, which is a company, in the assessment year 1994-95 claimed loss on sale of shares amounting to Rs. 49,15,930 and set off the same against the "interest income", "dividend income", "hire charge income" and from "other income". The assessing authority in view of the provision contained in Section 73 of the Act has held that the loss suffered by the assessee in its share dealings is speculation loss within the meaning of Section 73 of the Act and hence

disallowed the claim of the assessee for set off. In appeal preferred by the assessee before the Commissioner of Income Tax (Appeals), Guwahati, u/s 143(3) of the Act, the order of the assessing authority was interfered with on the ground that in view of the Explanation to Section 73, loss claimed by the assessee cannot be said to be in respect of the speculation business as the same was in respect of granting advances. In appeal by the Revenue before the Income Tax Appellate Tribunal, Gauhati Bench, the same view has been taken by holding that the provisions of Section 73 are not applicable to the case of the asses-see-company. Hence, the present appeal before this court.

3. We have heard Mr. U. Bhuyan, learned standing counsel for the Revenue, and Mr. R. Goenka, learned Counsel appearing on behalf of the assessee-company.

4. Mr. Bhuyan, learned Counsel for the Revenue, referring to the provision contained in the Explanation to Section 28 as well as Section 43(5) and Section 73 of the Act has submitted that the assessee-company having claimed that the loss suffered by it to the tune of Rs. 49,15,930 being on the sale of shares, i.e., on speculation business, the said loss cannot be set off against the profits and gains from other business except against profits and gains, if any of another speculation business, as the assessee-company does not come within the exception stipulated in the Explanation to Section 73 of the Act. Mr. Bhuyan referring to the assessment order passed by the assessing authority pertaining to the assessment year 1994-95 has submitted that the assessing authority has rightly refused to set off the said loss in view of the provision contained in Section 73 of the Act. It has further been submitted that the Commissioner of Income Tax (Appeals) as well as the Income Tax Appellate Tribunal have deleted the addition of the said amount Rs. 49,15,930 made by the assessing authority without even discussing as to whether the assessee-company comes within the exception stipulated in Section 73 of the Act, in other words whether the loss, which is claimed to be set off is arising out of the principal business of the assessee of granting loans and advances. Mr. Bhuyan, therefore, submits that on the facts and circumstances of the instant case the assessee-company being not covered by the exception stipulated in the Explanation to Section 73 is not entitled to set off the loss sustained by it in speculation business and therefore, the Tribunal has wrongly held that Section 73 is not applicable to the case of the assessee-company as 81 per cent. of the total share capital and unsecured loans as on March 1, 1994, were utilised for the purpose of advancing loans and thereby earning interest on it, without there being any material to show to that effect.

5. Mr. Goenka, learned Counsel appearing on behalf of the assessee-company, on the other hand, has submitted that it being the clear finding of the Appellate Tribunal that 81 per cent. of the total share capital and unsecured loans were utilised for the purpose of advancing loans and thereby earning interest on it and the loss which was claimed to be set off by the assessee being against loss on the sale of shares, the assessee-company comes within the exception given in

the Explanation to Section 73 and therefore, is entitled to set off the said loss from the profits and gains from other sources which was rightly allowed by both the Commissioner of Income Tax (Appeals) as well as the Appellate Tribunal. Mr. Goenka has further submitted that though the loss which was claimed is relating to the share transaction and in respect of loans and advances given by the assessee-company, it cannot be termed as losses in speculation business in view of the exception given in the Explanation to Section 73 of the Act.

6. Learned Counsel for both the Revenue and the assessee-company relied on the provision of Section 73, more particularly the Explanation thereto, in support of their contention. For better appreciation Section 73 of the Act is quoted below:

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) Where for any assessment year any loss computed in respect of a speculation business has not been wholly set off under Sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no income from any other speculation business, shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and

(i) it shall be set off against the profits and gains, if any, of any speculation business carried on by him assessable for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.

(3) In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of Sub-section (2) of Section 72 shall apply in relation to speculation business as they apply in relation to any other business.

(4) No loss shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

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.

7. Section 43(5) defines "speculative transaction" which 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. Explanation 2 to Section 28 of the Act provides that where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business, i.e., the speculation business shall be deemed to be distinct and separate from any other business.

8. Section 73(1) provides that 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. The Explanation to Section 73 of the Act further clarifies the "speculation business" which provides that where any part of the business of the 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 a speculation business to the extent to which the business consists of the purchase and sale of such shares. However, there is an exception given in the said Explanation, which stipulates that a company whose gross total income consists mainly of income which is chargeable under the heads of 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 will not be covered within the purview of Section 73 of the Act.

9. In the present case admittedly the assessee-company is claiming loss in respect of the share transaction, which is the speculation business within the meaning of the Income Tax Act. Section 73 provides that the loss incurred in the speculation business shall not be set off except against the profits and gains, if any, of another speculation business. However, there is an exception given in the Explanation to Section 73 which stipulates that 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 not, for the purposes of Section 73 be deemed to be carrying on speculation business.

10. Learned Counsel for the assessee-company has submitted that the asses-see-company is entitled to set off the loss as the assessee-company is a company whose principal business is of granting loans and advances.

11. Therefore, to come within the exception stipulated in the Explanation to Section 73, the assessee-company has to prove that it is either a company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gain" and "Income from other sources" or a company the principal business of which is banking or the granting of loans and advances.

12. The learned Tribunal without discussing anything as to whether the assessee-company could prove that its principal business is of granting loans and advances

and thus comes within the scope of the exception stipulated in the Explanation to Section 73, has held that Section 73 is not applicable in the case of the assessee-company, by simply relying on the submission made by the assessee, without discussing the entire materials. The learned Tribunal, therefore, erred in law in dismissing the appeal filed by the Revenue by holding that Section 73 of the Act is not applicable, without deciding the aforesaid question, before recording the finding about the applicability or otherwise of Section 73 of the Act.

13. In view of the aforesaid discussions, we set aside the order passed by the Income Tax Appellate Tribunal dated May 29, 2002 and remit the same to the learned Tribunal for giving a fresh decision on the appeal preferred by the Revenue keeping in view the discussions made above.

14. The appeal is accordingly allowed to the extent indicated above. No costs.