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Paharpur Cooling Towers Ltd. Vs Commissioner of Income Tax

ITA 256 of 2002

Court: Calcutta High Court

Date of Decision: Oct. 5, 2010

Acts Referred:
Companies Act, 1956 â€" Section 14, 2(7), 28, 3(4), 70#Income Tax Act, 1961 â€" Section 32, 32(2), 33B, 35, 35(4)#Securities Contracts (Regulation) Act, 1956 â€" Section 2

Citation: (2011) 239 CTR 394 : (2011) 198 TAXMAN 83

Hon'ble Judges: Kalyan Jyoti Sengupta, J; Kalidas Mukherjee, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Kalyan Jyoti Sengupta, J.
By an order dated 29th August 2003 above appeal was admitted for hearing following substantial questions:

(i) Whether in interpreting scope and meaning of the Explanation to Section 73 of the Act the statutory fiction introduced for treating the loss arising

from the business of purchasing and selling of shares as loss from speculation business is confined and restricted only for the purpose of Section 73

of the Act and whether the said fiction which is specifically created for the particular purpose can be extended or applied to other provisions of the

Act when the Parliament itself in clear and unambiguous terms restricted the portion of the said Explanation to Section 73?

(ii) Whether in a case as in the present one, the transaction arising from the business of purchasing and selling of shares does not come within the

ambit and scope of Section 43(5) of the Act defining speculative transaction, the loss arising from the purchase and sale of shares can be treated as

loss from speculation business applying Explanation to Section 73 of the Act and not sustain claim of for set off of such loss under Sections 70, 71

and 72 of the Act?

(iii) Whether the loss arising from the decrease in value of shares which are held as stock in trade of the Assessee can be treated as a loss of

speculation business within the meaning of Explanation to Section 73 of the Act?

2. Being aggrieved by and dissatisfied with the order dated 16th July, 2002 passed by the Income Tax Appellate Tribunal ""E Bench"" Calcutta in

appeal bearing No. 98 ITR 313 relating to the assessment year 1994-95 the above appeal was preferred by the Assessee.

3. Briefly stated facts are as follows:

The Assessee is a public limited company within the meaning of the Companies Act 1956. During the assessment year 1994-95 the Assessee

company was engaged in manufacturing of Cooling Towers and in the business of selling and purchasing shares. The gross total income of the

Assessee company is chargeable under the heads "Profit and Gains of Business of Profession", "Capital Gains" and "Income from other sources".

The Petitioner has filed return showing income under the head "Profits and Gains of business or profession" of Rs. 17,57,23,061/- and the income

from other sources of Rs. 80, 60,646/- for the assessment year 1994-95. During the assessment year the amount of loss of Rs. 1, 41,60,772/-

arising out of the purchase and sale of shares as stock in trade at the end of previous year relevant to the assessment year 1994-95 was not

allowed to be set off against the profit from business u/s 70 of the Act, by treating said loss arising from speculation business within the meaning of

explanation to Section 73 of the Act. The Appellant before us against the aforesaid decision of the Assessing Officer preferred appeal. The First

Appellate Authority while affirming the decision of the Assessing Officer has additionally held that on plain reading of relevant provision the case of

the Appellant falls within the ambit of explanation to Section 73 of the Act and, therefore, loss of Rs. 141.61 lakhs sustained in share dealing has to

be treated as deemed speculation loss which cannot be allowed to be a set off against the other income of the Appellant.

4. Being aggrieved by the CIT appeals the Appellant approaches the learned Tribunal who has affirmed the said decision of two authorities with

detailed reasons.

5. Dr. Pal, learned Senior Advocate appearing for the Assessee while assailing the said judgment and order submits that all these authorities erred

in disallowing set off applying the explanation of Section 73 of the Income Tax Act, 1961. On fact there is no finding nor any allegation that the

purchase and sale of shares were not effected by physical and actual delivery of shares. Hence, it will not be treated as a speculative transaction

within the meaning of Section 43(5) of the Act. It is nobodies case that purchase and sale of shares resulting in loss has been manipulated with the

object and device of creating certain artificial losses in order to reduce profits of the business of the Assessee. Hence the loss arising from the said

business of the Assessee is to be treated as its business loss and should be set off u/s 70 of the Act under the same head of income. If entire loss is

not so set off u/s 70 it shall be set off against the other heads of income u/s 71 and if there is any balance of the loss which cannot be so set off

under Sections 70 and 71, it will be allowed to be set off and carried forward u/s 72 of the Act and in this way such carry forward is to be made

on succeeding years.

6. According to him, expression "speculative transaction" has been defined in Section 43(5) of the Act. Going by the language employed therein it

will appear that it is an inclusive definition covering contract for the purchase or sale of any commodity, including stocks and shares which are

periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips.

7. Explanation 2 to Section 28 makes it clear that where speculative transactions carried on by an Assessee are of such a nature as to constitute a

business, the same 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 against

profits and gains, if any, of another speculation business. The whole scheme is that if the speculative transactions which constitute a business is to

be treated as a speculation business, and losses arising therefrom shall be set off against profit and gains of another speculation business. When

Section 73 was introduced by the Taxation Laws (Amendment) Act, 1975 the object clause appearing in 89 ITR 107 was to unearth black money

and prevent its proliferation, to fight and curb tax evasion to check avoidance of tax through various legal devices including the formation of trusts

and diversion of income or wealth to members of family, to reduce tax arrears and to ensure that in future, tax arrears do not accumulate to

rationalize exemptions and deductions available under the relevant enactments and to streamline the administrative set up and make it functionally

efficient.

9. He contends further that explanation to Section 73 which creates a fiction is to be only for the purpose of that section. The whole object for

introducing the explanation is not to treat all transactions of purchase and sale of shares, and loss arising therefrom as speculation loss. It does not

apply to assessable entities other than companies. It is only in the case of other companies where the purchase and sale of shares resulting in loss

even though such purchase and sale of shares are effected by physical delivery of shares for a consideration are treated as speculation business.

10. He further submits drawing supports from the following authorities Commissioner of Income Tax, Madras Vs. Ajax Products Ltd. through its

Liquidator, ; Commissioner of Income Tax, Kanpur Vs. Mother India Refrigeration Industries P Ltd., ; Commissioner of Income Tax,Madras Vs.

Express Newspapers Ltd., Madras, , that the statutory fiction should be applied for the very purpose or object for which the fiction has been

created and it cannot be extended for any other purpose.

11. The Court has to interpret the section in the light of the object. The literary textual interpretation may give rise to certain absurd and unintended

results. Hence court has to interpret the explanation in the light of the object of the clause. The circular was introduced on 24th July 1976 and it

was a contemporanea expositio. Therefore, the circular has to be adopted as guide to the interpretation of the explanation and this method is

recognized by the following judicial pronouncement:

K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, ; C.B. Gautam Vs. Union of India and Others, .

12. Thus if strict and literal interpretation results in absurdity or unintended result then provision is to be interpreted in conformity with the object

and purpose for which the said explanation has introduced.

13. He relies on Supreme Court decision on this legal concept reported in State of Bihar and others, etc. etc. Vs. Bihar Distillery Ltd., etc.,

14. That said circular of 1976 is to be treated not only as binding upon the authorities charged with the administration of Income Tax Act but

should also be taken as furnishing legitimate aid in the construction of explanation to Section 73 and this is permissible, according to him, by virtue

of the decision of the Supreme Court reported in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another,

15. He submits that explanation to Section 73 widens and enlarges of scope thereof which is not function of an explanation which merely explains

and does not expand. He has drawn our attention in this context to the Supreme Court decision reported in Bihta Co-operative Development

Cane Marketing Union Ltd., and Another Vs. The Bank of Bihar and Others, . He submits also with the support of the authority (S. Sundaram

Pillai and Others Vs. `R. Pattabiraman and Others,) that the explanation is inserted in the section of the statute book merely to explain or clarify

certain ambiguities which may have crept in the statutory provision. He contends that it is well settled legal principle of interpretation of taxing

statutes that reading of the section with explanation when two views would be emerging, the view which is favourable to the Assessee must be

accepted. This legal position is to be found amongst other from the following authorities:

Commissioner of Income Tax, Punjab Vs. Kulu Valley Transport Co. P. Ltd., ; M/s Mysore Minerals Limited, M.G. Road, Bangalore Vs. The

Commissioners of Income Tax, Karnataka, Bangalore, and The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products

Ltd.,

16. He submits that the learned Tribunal did not examine the core controversy, that is whether the explanation introduced by Taxation Laws

(Amendment) Act, 1975 with effect from 1st April, 1977 defeats the very object and purpose for which the said explanation was introduced. Next

question which has been literally overlooked by the learned Tribunal whether the explanation can widen or enlarge the scope of Section 73(1) to

include purchase and sale of shares which are bona fide entered into by physical delivery of shares for consideration. This aspect needs to be

examined by this Court. Entire approach of the Tribunal is erroneous as it has not considered principal questions which were agitated before it, and

agitated here, arising out of the said circular enunciating scope and purpose of introducing the explanation to Section 73. Therefore, he concludes

that the reasoning of the Tribunal is erroneous and vitiated by not deciding the matter in the proper perspective.

17. The learned Counsel for the Revenue counters this submission that all the authorities below have correctly decided the matter having regard to

the facts and circumstances of the case.

18. Learned Counsel for the Revenue submits that there are distinct and separate heads of income as it will appear from Section 14 of the said

Act.

19. The provisions of set off of loss from one source of income from another is to be found under Sections 70, 71, 72, 73.

20. His contention is that Section 70(1) refers to set off of loss from one source against income from another source under the same head of

income. The said Sub-section (1) of Section 70 starts with the expression save as otherwise provided in this Act. Section 71(1) refers to set off of

loss from one head against another. Section 72 provides for carry forward and set off of business losses. It expressly exclude loss sustained in

speculation business and by virtue of Sub-section (1) of Section 73 setting off of loss in speculation business is permissible against gains of another

speculation business only. The explanation 2 of Section 73 merely relates to a company Assessee only. Certain companies are expressly excluded

from the purview of the said explanation which creates a legal fiction.

21. He further contends that Section 43(5) read with explanation 2 of Section 28 defines "" speculative transaction or business"". It is general

provision/definition whereas Section 73 is special or specific one limited to speculation losses.

22. He further submits that the phraseology employed in Section 73(1) and the explanation thereof are clear, unambiguous and admit of no dispute

hence purposeful construction of the mischief rule as laid down in the judgments of the Apex Court shall not apply, particularly when the legislative

intent can be gathered plainly from the words of the statutory provision. One should not resort to internal or external aid to measure the scope or

effect or purport of explanation 2 Section 73. The said explanation is a proviso to general provision of Section 72 and should be treated as curving

out and explanation to the said general provision. According to the learned Counsel for the Revenue the CBDT circular No. 240 in view of the

decision reported in 131 ITR 593 is absolutely inapplicable. The principle of construction of statute is authoritatively settled by the Supreme Court

in 88 ITR 198 and Controller of Estate Duty, Madras Vs. Alladi Kuppuswamy,

23. He submits that the Division Bench of Apex Court in a case reported in Commissioner of Income Tax Vs. Arvind Investments Ltd., clearly

lays down that CBDT circular is of no help and that even when the entire business of the Assessee is purchase and sale of shares the said

explanation of Section 73 applies. He further submits that there is no conflict between the said explanation and Section 43(5) and the second

explanation to Section 28.

24. Learned Counsel further submits that the legal fiction is for the purpose of Section 73 only and must be applied in relation to the text thereof.

25. His next contention is that in construing explanation 2 of Section 2 Amendment of 1996 Act one has to look merely at what is clearly said as

observed by Three Judges Bench of the Supreme Court. There is no room for ascertaining intent of the legislation. In the judgment of the Supreme

Court reported in 1990(2) SCC 231 it is held that the purpose and intent of this explanation is not determined by any words but depending on its

language supplied or trend of something from the contents of the provision of this explanation not determined by any words and explanation

depending on its language might supply or trade of something from the contents of the provisions.

26. Under these circumstances, the judgment and decision of the learned Tribunal is well reasoned and interpretation arrived at is the only possible

interpretation. Therefore, this Court cannot substitute its own interpretation in place of that of the learned Tribunal.

27. After hearing submissions of the learned Counsel and considering their arguments and going through the impugned judgment and order of the

learned Tribunal it appears to us in order to give answer to the aforesaid questions this Court has to deal with the core issue having regard to the

nature of the business carried on by the Assessee whether provision of Section 73 with the explanation is applicable or not. It appears that all the

revenue authorities below including the learned Tribunal held that loss in sale and purchase of the share suffered by the Assessee shall not be set off

against the income from business treating the same as a speculation loss within the meaning of Section 73 Sub-Section 1 of the Income Tax Act.

Hence setting off was not allowed as against the other source of income nor it was allowed to be carried forward. Hence the learned Tribunal

disallowed the loss from purchase and sale of shares and securities of Rs. 1,41,60,772/- as speculation loss as per explanation of Section 73 of the

Act. Here admittedly the Assessee company has not been carrying on business of share transaction exclusively and its business is a mixed one.

28. We think before dealing with contention and rival contention of the parties we are to examine in which case and under what circumstances

setting off and carry forward is permissible.

29. In Chapter VI of the said Act Sections 70 and 73 deal with setting off and carry forward.

30. Section 70 provides for setting off loss from one source of income to another source under the same head of income. This Section provides

setting off of loss arising from source other than capital gains.

31. Sub-section (2) of Section 70 provides for setting off loss arising out of short term capital assets in connection with Sections 48 - 55 against

any other capital asset. Sub-Section 3 of Section 70 provides for setting off of loss against any other capital assets other than short term capital

asset .

32. Section 71 provides for setting off of loss arising out of any head of income other than capital gains. The same shall be and if the Assessee has

no income under the head capital gains, set off against his income if any, assessable for that assessment year under any other head. Sub-section (2)

of Section 71 also deals with setting off of loss under the head of income other than capital gains and the Assessee has no income under the capital

gains, he should be entitled to have the amount of such loss set off against his income, if any, assessable under any other head.

33. Section 71A provides for the specific head namely income from house property. Section 71B provides for carry forward and setting off of loss

from house property. Section 72 also provides for carry forward and setting off of business loss.

34. In this case Section 72 has some relevancy in the context of the argument of Dr. Pal and we need to set out the same.

Section 72

(I) Where for any assessment year, the net result (of the computation under the head ""Profits and gains of business or profession"" is a loss to the

Assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of

income in accordance with the provisions of Section 71, so much of the loss as has not been so set off or, where he has no income under any other

head, the whole loss 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 business or profession carried on by him and assessable for that assessment year;

(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:

Provided that where the whole or any part of such loss is sustained in any such business as is referred to in Section 33B which is discontinued in

the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such

business is reestablished, reconstructed or revived by the Assessee, so much of the loss as is attributable to such business shall be carried forward

to the assessment year relevant to the previous year in which the business is so re-established, reconstructed or revived, and-

(a) it shall be set off against the profits and gains, if any, of that business or any other business carried on by him and assessable for that assessment

year; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re-established, reconstructed or revived

continues to be carried on by the Assessee, be carried forward to the following assessment year and so on for seven assessment years immediately

succeeding.

(2) Where any allowance or part thereof is, under Sub-section (2) of Section 32 or Sub-section (4) of Section 35, to be carried forward, effect

shall first be given to the provisions of this section.

(3) No loss [(other than the loss referred to in the proviso to Sub-section (1) of this section)] 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.

35. From careful reading of Section 72 it appears to us that in order to get benefit of carry forward and setting off of business loss as mentioned

therein the nature of the business must not be a speculative one. In our view Section 73 has been provided specifically for dealing with loss in

speculative business. We therefore, set out the same in its entirety with explanation.

Section 73

(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 [four] 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.]

36. Much argument has been advanced from both the sides relating to scope, purport and purview of Section 73 with the explanation. We have

critically read the said Section with the explanation. While noting the argument of Dr. Pal we need to examine whether with explanation scope and

purport of Section 73 got extended or not. It is well settled as rightly argued by Dr. Pal in a catena of Supreme Court decisions that explanation of

any section cannot be read to extend or stretch the applicability of the said Section. The explanation creates fiction and it is well settled by the

catena of judgments of the Hon''ble Supreme Court that fiction cannot be read nor explained for any purpose other than for which it is created.

Some of the judgments as recorded below are cited before us and we accept the proposition laid down therein.:

Commissioner of Income Tax, Madras Vs. Ajax Products Ltd. through its Liquidator,

155 ITR 718

Commissioner of Income Tax,Madras Vs. Express Newspapers Ltd., Madras,

37. In the case of Commissioner of Income Tax v. Express Newspaper Ltd. 150 ITR 260 the Supreme Court stated that legal fiction is limited to

the purpose for which it is created and should not be extended beyond its limited field. Keeping in view of the said proposition of the law we find

on reasonable interpretation of Section 73 reading dominant part thereof and with the explanation it does not appear that fiction created in

explanation either abridges or extend the purpose incorporated in Section 73. We thus express our inability to endorse the contention of Dr. Pal

that the fiction created in the said explanation really takes away the real object and purport of Section 73. In this context Three-Judges-Bench of

the Supreme Court while following the earlier decision of the same Court in case of The Commissioner of Income Tax, Bombay City I, Bombay

Vs. Amarchand N. Shroff, by his heirs and Legal Representatives, that fiction should not be stretched beyond the purpose for which they were

enacted.

38. Subsequently in the case reported in Commissioner of Income Tax, Kanpur Vs. Mother India Refrigeration Industries P Ltd., following Bengal

Immunities Company''s case (The Bengal Immunity Company Limited Vs. The State of Bihar and Others, that the legal fictions are created only

for some definite purpose and this must be limited for that purpose and should not be extended beyond that legitimate field.

39. Section 73 generally provides that any loss arising out of speculation business can be set off only against another speculation business of

Assessee. Reading Sub-Section 1 the word ''Assessee'' covers all types of Assessee as mentioned in Section 2(7) of the said Act which includes

individuals and company. Sub-section (2) of the said Section provides that the loss arising out of speculation business which cannot be set off in a

particular assessment year fully the balance may be carried forward for the next assessment year and so on not exceeding eight five assessment

years immediately after succeeding year as provided in Sub-Section 4. Sub-Section 3 of the said Section is not applicable in this case.

40. In our opinion by the explanation all companies are not included within the word ''Assessee'' as mentioned in Section 73. The companies other

than a company whose gross total income contains mainly of income which is chargeable under the heads interest, security, 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 granting of loan

and advances consists in purchase and sale of shares of other companies, such company shall be for the purpose of this Section, be deemed to be

carrying on speculation business to the extent to which the business consists of the purchase and sale of shares. Thus the explanation has really

employed restricted meaning of the word ''Assessee'' as mentioned in Section 73.

41. It has only been explained about the nature of the company which shall be deemed to be carrying on speculation business. It is urged by Dr.

Pal that the said explanation is inconsistent with the object of introduction. We are unable to accept this as the explanation itself has made it clear

that those companies whose business consists of the purchase and sale of shares of other companies., therefore, the very object of curbing

manipulation resorted to by the business house controlling group of companies is sought to be served. We have no doubt in our mind this statutory

fiction is extended to achieve very purpose and object for which it has been created.

42. Dr. Pal''s next contention is that the Departmental Circular dated 24th July 1976 being a contemporaneous exposition should be taken as a

guide to interpret the explanation. We think that the Departmental Circular cannot be treated as guide for interpretation of the Section when the

same with explanation is very clear and free from any ambiguity. It has been held in the decision of the Division Bench of this Court reported in

Commissioner of Income Tax Vs. Arvind Investments Ltd., at pages 369, 371, 372 and 375 as appropriately brought to our attention that the

CBDT Circular is of no help when the Section is very clear. This decision has clearly dealt with the aspect that even when the entire business of the

Assessee is purchase and sale of shares the said explanation to Section 73 applies. In view of this decision of Division Bench of this Court we do

not think that the Circular is to be looked into at all, naturally decisions cited by Dr. Pal reported in K.P. Varghese Vs. Income Tax Officer,

Ernakulam and Another, are of no help.

43. In the context of the aforesaid discussion term and meaning of speculation business in the Act is to be considered for applicability of Section 73

of the Act. In Section 43(5) of the said Act the speculation transaction has been defined as follows:

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:

45. 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,

(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 recognized stock exchange]; shall not be deemed to be a speculative transaction. Subsequent transaction

means a transaction in which a contract for the purchase or sale of any commodity in which a contact for purchase or sale of commodity including

plots and shares is periodically or remotely settled otherwise than of actual delivery or transfer of the commodity or scrips

44. By virtue of explanation 2 to Section 28 of the said Act business of speculative transaction must be distinct and separate from any other

business. Thus any speculative transaction cannot be treated as speculative unless such a transaction takes place as a part of business activity of the

Assessee concerned. It is not necessary the Assessee must carry on speculative business exclusively it can be one of the businesses but this must

be distinct and separate from any other business. Here we find the Assessee is carrying on business of sale and purchase of shares but also other

business.

45. Accordingly in order to apply the Section 73 with explanation the business must be speculative business which in its turn must be a speculative

transaction. All speculative business is speculative transaction but not the vice versa. The definition of speculative transaction as above demands

that there must be actual delivery or transfer of commodity or scrips, this must be by way of paper transaction only then it can be said to be the

speculative transaction.

46. On reading of Section 73 with the explanation it would appear that speculation business as defined earlier will not be applicable in this case for

the reason explained hereinafter. Under the definition of the said speculative business includes the speculation transaction which must be in case of

purchase and sale of shares the same must be effected with the physical delivery of the same. Explanation to Section 73 will be applicable in

respect of the companies and companies alone and not any other Assessee namely individuals or other Assessees. However, part of the business

of the company other than a few category of companies as mentioned therein, shall be treated speculation business, if such part consists of the

purchase and sale of shares, not other category of speculative dealings total income consists mainly of income which is chargeable under the heads

interest from 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 of granting loans and advances. Hence in the case of companies which are excepted from the purview of Section 73 read

with the explanation will have the speculation business as defined in the said Act.

47. In the case on hand the Assessee admittedly is a company and does not fall within the excepted category of the companies as mentioned in the

said explanation. Therefore, the benefit of setting off and also carry forward of losses in speculation business as mentioned in Sub-Section 1 and

Sub-Section 2 of the said section is permissible in respect of other companies which are not excepted companies as against the other head of

speculation. In other words by virtue of the legal fiction mentioned in explanation the Appellant company will not be entitled to benefit of setting off

or carry forward except as against the other speculation business. Admittedly the Assessee company did not have any speculation business activity

other than mentioned in the returns and accounts.

48. Dr. Pal urged that the definition of business of speculation read with the speculation transaction has to be applied here even though the

Appellant has physically delivered the share scrips. We are unable to accept this contention just because physical delivery of share scrips is

effected for sale of the shares his client will get the benefit u/s 73 as by virtue of the said explanation containing deeming clause the said definition of

speculation business includes not only settlement on papers but also actual delivery of the said scrips. This argument advanced by Dr. Pal on earlier

occasion in the case of Commissioner of Income Tax Vs. Arvind Investments Ltd., while answering to a reference case the Division Bench of this

Court on discussion and reading Section 73 with explanation has observed as follows:

Any purchase or sale of shares by certain companies is to be speculation transaction for the purpose of Section 73 only. For the purpose of setting

off or carrying forward of loss the company selling of shares by certain companies are recorded by the statute as speculation business, even though

the transaction of purchase and sale was followed by delivery of scrips and such cannot be treated as speculative transaction as defined in Section

43(5). The definition in Section 43(5) of speculation transaction read with the second explanation of Section 28 it would appear in some extent

inconsistent with the speculation business mentioned in Section 73, as Section 43 Sub-Section 5, while defining speculation transaction exclude the

actual delivery or transfer of commodity or scrips and several speculation transactions constitute speculation business.

49. . We are of the view that this case on factual aspect as recorded by the learned Tribunal and other authorities admittedly the sale of shares has

been effected by physical delivery of shares. Therefore, the Assessee company cannot get the benefit of set off or carry forward of speculation loss

as rightly held by all the authorities.

50. Dr. Pal''s next contention is that since his client had and still has no intention to manipulate the business of income nor there is any device to

manipulate or reduce the taxable income hence his client has not defeated the very purpose of said Amendment of 1976 as per the statute .

51. We think that for the purpose of applicability of any provision of the law the Court need not look into the object and reason for enactment by

way of amendment. The Court will be looking at the provision of the statute, and on clear and plain reading if it appears that the same can be

applied without any difficulty or without any aid whatsoever, then the object and reasons need not be looked into.

52. Dr. Pal submits that the Circular dated 24th July 1976 which is contemporaneous exposition of the authority concerned should be a guide for

interpretation of the explanation. This point was argued on earlier occasion in the case cited above and the Division Bench has discussed in great

details as to the said Circular on earlier occasion. At page 372 of the said report it is dealt with by the Division Bench in the manner as follows:

On the strength of this circular, Dr. Pal has argued that the object of the statute was to curb the device of business houses to create an artificial loss

in share dealing so as to reduce income from other business activities. It has been contended that the Explanation should be understood in the light

of the aforesaid circular.

I am unable to uphold this contention for a number of reasons. The Explanation to Section 73 applies to certain categories of companies. The

opening words of the Explanation to Section 73 ""where any part of the business of a company"" also do not create any difficulty.

53. The departmental Circular in our view cannot be always a guide for interpretation and it can be guide when there is an ambiguity and if the

Court without any difficulty come to a conclusion that the provision of the Statute is workable and can be applied the Court need not look into any

material.

54. Factually it may be true that the Assessee company had no intention to manipulate the real assessable income nonetheless provision of fiscal

statute has to be applied even if it result in adverse effect.

55. In view of the discussions as above we think that decisions relied on by Dr. Pal reported in Commissioner of Income Tax, Madras Vs. Ajax

Products Ltd. through its Liquidator, Commissioner of Income Tax, Kanpur Vs. Mother India Refrigeration Industries P Ltd., and Commissioner

of Income Tax,Madras Vs. Express Newspapers Ltd., Madras, has no help as while applying the said provision in the case of the Assessee the

object is not at all defeated. Similarly the decision cited by Dr. Pal reported in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another,

and C.B. Gautam Vs. Union of India and Others, on the question of interpretation of the explanation taking the Circular as guide is also not

applicable.

56. In our view the explanation added to Section 73 does not bring about any inconformity with the object and purpose of Section 73 which has

been enacted for special purposes and for that Section only and the provision of this Section with explanation overrides the other provision. Thus

the decision cited by Dr. Pal of the Supreme Court reported in S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others, does not apply as

Section 73 read with the explanation do not bring about any ambiguity and it is very clear and admits of no uncertainty nor any absurdity. In view

of this findings we think that decisions cited by Dr. Pal reported in Commissioner of Income Tax, Punjab Vs. Kulu Valley Transport Co. P. Ltd., ;

M/s Mysore Minerals Limited, M.G. Road, Bangalore Vs. The Commissioners of Income Tax, Karnataka, Bangalore, and The Commissioner of

Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., are not applicable for the reason that the said Section does not appear to be

multiple views not even two. It is settled position of the law the interpretation of the fiscal statute should be literal and no liberal nor hypothetical

interpretation is permissible.

57. Under those circumstances we think that learned Tribunal is justified in rejecting the contention of the Assessee as we do not find any relevancy

of the submission of Dr. Pal in view of the judgment rendered in case of Commissioner of Income Tax Vs. Arvind Investments Ltd., .

58. Thus the appeal is dismissed.

59. No order as to costs.