
**Abhashree Advisory (P) Ltd. Vs The Commissioner of Income Tax,
Kolkata-III.**

Special Jurisdiction (Income Tax) Original Side I.T.A. No. 737 of 2007

Court: Calcutta High Court

Date of Decision: Feb. 22, 2010

Citation: (2010) 3 CALLT 76

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

Bench: Division Bench

Judgement

Kalyan Jyoti Sengupta and Kalidas Mukherjee, JJ.

The Judgment of the Court was as follows:

1. The Court: This is an appeal against the judgment and order of the learned Income Tax Appellate Tribunal dated 16.11.2007 preferred by the

appellant unsuccessfully against the order of the Commissioner of Income Tax (Appeals) who also turned down the prayer of the appellant to

reverse the order of the assessing officer. We have gone through the judgment and order of the Learned Tribunal. We find the Learned Tribunal

did not give any reason as to why the appeal was dismissed and order of the first appellate authority is to be accepted. The relevant portion of the

order of the learned Tribunal is set out hereunder:

We have examined the rival submissions. We agree with the findings of the A.O. and the order of the CIT(A). We find no reason to interfere with

the orders of the lower authorities which are correctly based on the actual facts after appreciating the current legal position. We, accordingly,

confirm the order of the CIT(A) and dismiss the assessee's appeal on all the three grounds.

2. Having noted the ordering portion we thought at the first instance the learned Tribunal ought to decide the matter afresh with the reasons as to

why the order of all the authorities below appealed to its mind and why the assessee's contention did not register him to write judgment in its

favour. Therefore, those reasons were not there. At one point of time we minded to set aside the same and to remand the matter for fresh hearing.

However, having regard to the facts and circumstances of this case which is obviously an old one and particularly as we got all the materials before

us we thought that instead of sending it back we should decide the matter whether the decision of acceptance of the Tribunal of all the judgment

and orders of the authorities below is correct or not.

3. Here the question arises in order to ascertain the taxable income and the amount thereof. It appears that petitioner admittedly have been carrying

on mixed business which includes the business of purchase and sale of share of the companies and also having other income. The key point in this

matter is which should be the income in case of transaction for purchase and sale of the share of the companies. Mr. N.K. Poddar, appearing for

the assessee emphasized that income derived from the purchase and sale of the shares of the company in a particular year would the difference of

the sale price and also the cost of the purchase price of those shares. The sale price of a number of shares of a particular year cannot be the

income. We find considerable force in this submission and we note that assessing officer himself has accepted this position. He has taken note of a

negative income of the business of the share transaction. After computing everything the assessing officer came to a figure of Rs. 16,79,666/- as

being total income which is a greater figure than that of the income derived from share transaction being negative income of Rs. 7,51,065. Even

after coming to a conclusion the assessing officer did not assess income based on the said figure. The Commissioner of Income Tax (Appeals),

however, noted the aforesaid fact he has treated the entire sale figure of the share transaction namely Rs. 10,05,29,292.99p. as an income without

giving any deduction of the cost of purchase of those shares. As a result this income from the sale transaction of the shares has become greater

than that of other income. Therefore, deduction as allowed on account of loss was not set off.

4. Mr. Bhowmick, learned Counsel appearing for the Revenue submits that in a case of this nature the loss on account of speculation business

cannot be set off as in view of the fact that unless there is a finding that assessee comes within the purview of Section 73 Expl.(ii), such benefit

cannot be given. Here there is no case as has been made out for bringing the case within the purview of the Expl. (ii) Section 73 of the said Act.

He has cited three decisions in support of his submissions namely Commissioner of Income Tax Vs. Micro India Ltd., . Commissioner of Income

Tax Vs. Intermetal Trade Ltd., and another decision of this Court reported in Eastern Aviation and Industries Ltd. Vs. Commissioner of Income

Tax,

5. We have noted the fact finding arrived at by the assessing officer and there has been no challenge against those orders of fact finding. While

taking note of the fact we do not find any difficulty to give the benefit of the setting off as permissible u/s 73, Expl. (ii). The decision cited by Mr.

Bhowmick Commissioner of Income Tax Vs. Micro India Ltd., was rendered when there was no fact finding whether assessee was covered by

Expl.(ii) Section 73 unlike the case on hand wherein it is factually found that income from share transaction is a negative income and such figure is

less than the income from the sources. Similarly in 285 IT R 536 (MP) Commissioner of Income Tax v. Intermetal Trade Ltd is also distinguishable

on the fact that in that case there was no finding that income speculative business was less than the total income: As far as the decision of this Court

is concerned this judgment is not applicable in that case and factually it was noticed that income from the share business namely speculative income

is greater than that of the total income.

6. Under those circumstances, we are of the view that the Learned Tribunal ought to have noticed the aforesaid apparent mistake of the learned

Commissioner of Appeals, that total sale of the share in a business should not have been taken into consideration for arriving at figure of income

when the assessing officer himself has accepted the position of law that difference of purchase and sale of the shares of a company should be the

income We therefore, set aside all those orders and we direct the assessing officer taking note of the aforesaid judgment to pass a fresh order of

assessment and to do the needful in accordance with law. This exercise shall be done within a period of one month from the date of communication

of this order.

7. All parties are to act on a xerox signed copy of this order on the usual undertakings.