(1991) 094 CTR 0263 :(1991) 192 ITR 0365 :(1991) 058 TAXMAN 0216

CIT v. Arvind Investments Ltd. ()

INCOME TAX

--Loss----SPECULATIVE LOSS--*Applicability of Explanation to s. 73--Attracted even where the entire business activity is in share dealing.--*

HELD:

The Departmental Circular No. 204 dt. 24-7-1976, on which reliance has been placed, does not advance the case of the assessee in any way. The object as stated in the Circular is to curb the device to manipulate and reduce the taxable income of a company under the management of a controlling group of persons. But the Circular has clearly stated in Paragraph 19.1 that "the business of purchase and sale of shares by companies which are not investment or banking company or companies carrying on business of granting loans and advances will be treated on the same footing as speculation `business". Therefore, the Circular does not leave any room for doubt that the Explanation will apply to the business of purchase and sale of shares of certain companies. Nowhere in the Circular any indication has been given that where the only business fo a company consists of purchase and sale of shares, the Explanation will not apply. Therefore the Tribunal is not correct in holding that the Explanation to s. 73 of the IT Act, 1961 has no application in the case on the view that the entire business of the assessee was in share dealing.

Income Tax Act 1961 s.73

INCOME TAX

--Loss----SPECULATIVE LOSS--*Carry forward and set off--Not permissible under the head `business'.--*

HELD:

The phrase "to the extent to which the business consisted of purchase and sale of such shares" also do not indicate that the legislature had several other actual and existing non-speculative activities of business in mind. It merely indicates that the business activity which consists of purchase and sale of shares will be treated as speculation business. But

if, apart from purchase and sale of shares the company has other business activities then those other the Tribunal is not correct in holding that the assessee is entitled to claim for the loss of Rs. 1,56,087 under the head `business'.

Income Tax Act 1961 s.73

COMMISSIONER OF INCOME-TAX v. ARVIND INVESTMENTS LTD.

Income-tax Reference No. 177 of 1984, decided on March 9, 1990.

JUDGMENT

SUHAS CHANDRA SEN J. - The tribunal has referred the following questions of law under section 256(1) of the Income-tax Act, 1961, to this court :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal is correct in holding that the Explanation to section 73 of the Income-tax Act, 1961, has no application in the case on the view that the entire business of the assessee was in share-dealing ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is correct in holding that the assessee is entitled to claim deduction of the loss of Rs. 1,56,087 under the head Business and that the finding that the loss was speculation loss has to be vacated ?"

In this proceeding, the assessment year involved is 1977-78 for which the relevant year of account is the year which ended on March 31, 1977.

The facts found by the Tribunal narrated in the statement of case are as under :

"The assessee is a company and the reference relates to the assessment year 1977-78 for which the accounting period ended on March 31, 1977. For the year under reference, the assessee-company disclosed a loss of Rs. 1,56,087 from share-dealings. The Income-tax Officer disallowed the loss and treated the same as a loss incurred in speculation business on the basis of the amendment by way of Explanation to section 73 of the Income-tax Act, 1961, which came into force with effect from April 1, 1977.

On appeal, the Commissioner of Income-tax (Appeals) confirmed the above action of the Income-tax Officer. The assessee filed a second appeal to the Income-tax Appellate Tribunal and it was contended on behalf of the assessee that the Explanation to section 73, on which reliance was placed by the lower authorities had no application, inasmuch

as the assessees only business was in share-dealings. It was claimed on behalf of the assessee that, in a case where the only business is in share-dealings, the Explanation can have no application and it applies when share dealing is only a part of the business carried on by the assessee. It was contended on behalf of the Revenue that the Explanation applies even if the business is only in share-dealings since "part" includes "whole." Secondly, it was contended that the assessee had also business in money-lending as held by the Commission of Income-tax (Appeals) in which case the Explanation is indisputedly applicable.

The Tribunal, after interpreting section 73, held that, where a part of the business of a company consists in the purchase and sale of shares, then alone the Explanation will come into play and that it will have no application in a case where the sole business of the company is in share-dealings. The Tribunal found that there was only one and single transaction of investing the surplus amount lying with the assessee in a concern temporarily for a brief period and, in that process, the assessee received interest of Rs. 1,740 only. From this fact, the Tribunal came to the conclusion that such a transaction did not amount to the carrying on of money-lending business and that it amounted only to a temporary investment of surplus funds and not with a view to carrying on business. According to the Tribunal, in order to constitute business, there should be an organised activity and not merely one isolated transaction. Finally, the Tribunal came to the conclusion that the only activity of the assessee was dealing in shares, that is to say, the entire business of the assessee was in share-dealings in which case the Explanation to section 73 has no application."

The application for reference of certain questions under section 256(1) of the Income-tax Act, 1961, made by the Commissioner was rejected by the Tribunal. The Commissioner applied to this court under section 256(2) of the Act. On that application, the questions mentioned hereinbefore were directed to be referred to this court.

The only contention of counsel appearing on behalf of the Revenue is that the assessee was engaged in money-lending business. This fact has been overlooked by the Tribunal. In any event, the Tribunals finding is vitiated in law.

Neither of the two questions that have been referred by the Tribunal challenges the findings of fact made by the Tribunal on the ground of perversity. The second question challenges the correctness of the Tribunals finding that the loss under head "Business" should be allowed. There is no allegation in the first question that the finding is vitiated by non-consideration of any material fact or failure to consider all relevant materials. There is no suggestion that the decision of the Tribunal is perverse in the sense that no reasonable man could come to the conclusion that the Tribunal had reached about the alleged money-lending transaction. The specific finding of the Tribunal is that "now, in this case, it has to be found out whether the sole business of the assessee is in share-dealings. The Commissioner of Income-tax (Appeals) held that there was money-lending business carried on by the assessee. The assessees counsel pointed out that there was only one and single transaction of investing the surplus amount lying with the assessee in a concern temporarily for a brief period and, in that process, the assessee received interest

of Rs. 1,740 only. This, according to counsel, does not amount to carrying on of money-lending buisiness. There is great force in this submission. Carrying on of a business is something different from mere investment of money. In order to constitute business, there should be an orgainsed activity and not merely an isolated transaction. In this case, the assessee merely lent some surplus amount lying with it to one party for a temporary period of hardly three months. I am clearly of the opinion that such a transaction does not amount to the carrying on of money-lending business. It amounted only to a temporary investment of surplus funds and not with a view to carrying on of business. In other words, the entire business of the assessee is in share dealings in which case, as has already been held, the Explanation to section 73 has no application."

The finding of fact that the assessee was not carrying on money-lending business and that the solitary transaction of money-lending did not amount to carrying on of money-lending business has not been challenged in any way. It is well-settled that "on the facts and circumstances of the case" means facts and circumstances as found by the Tribunal. Question No. 1 is based on the finding of fact made by the Tribunal and does not challenge the finding of the Tribunal in any way.

This, however, is not the end of the matter. The question raised by the Tribunal cannot be answered without referring to the actual wording employed in the Explanation to section 73 of the Income-tax Act. The provisions of the Explanation to section 73 have to be contrasted with the provisions of section 43(5), which defines "speculative transaction" to mean a transaction in which a contract for the purchase or sale of any commodity, including any stock and share, is periodically or ultimately settled otherwise that by the actual delivery or transfer of the commodity or scrips. The Explanation to section 73 treats any purchase and/or sale of shares by certain companies to be speculative for the purpose of section 73 only.

For the purpose of setting off and carrying forward of loss, buying and selling of shares of certain companies are regarded by the statute as speculation business, even though the transaction of purchase and sale was followed by delivery of scrips and as such cannot be treated as "speculative transaction" as defined in section 43(5) of the Income-tax Act.

The rules relating to set off and carry forward of losses are contained in sections 70 to 79 of the Income-tax Act. Section 70 provides for set off of loss from one source against the profit from another source under the same head of income. Section 71 permits setting off of loss under one head of income against the income under any other head. Section 72 lays down the rules for carry forward and set off of business losses. If the net result of the computation under the head "Profit and gains of business or profession" is loss and such loss cannot be or is not wholly set off against the income under any other head of income in accordance with the provisions of section 71, then the amount of loss which has not been set off can be carried forward to the following assessment year. Such losses carried forward from the previous year can be set off against the profits and gains of business in the subsequent assessment year. This rule is subject to the provisions that the business or profession in which the loss was originally incurred will have to continue to be carried on by the assessee in the previous year in which the loss is sought to be adjusted. In other

words, if an assessee suffers loss in any business and closes down that business, then such loss cannot be carried forward and adjusted against profits of some other business in the subsequent assessment year.

Section 72 specifically excludes loss sustained in speculation business from its ambit. That means that, when a loss is sustained in a speculation business, that cannot be carried forward to be adjusted against any other business loss.

Section 73 specifically deals with losses in speculation business and is as under :

"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 an investment company, as defined in clause (ii) of section 109, 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 purpose 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."

Sub-section (1) of section 73 restricts the scope of section 70 which permits the setting off of loss from one source against the profit from another source falling under the same head of income and sub-section (1) of section 73 categorically declares that any loss arising from speculation business shall not be set off except against profits and gains of another speculation business. In other words, if there is a speculation loss and also gain

from another source of non-speculation business, then such speculation loss cannot be set off against the profit from a non-speculation business.

Sub-section (2) of section 73 restricts the scope of section 72 which provides for carrying forward and setting off of business losses. If any loss computed in respect of a speculation business has not been wholly set off, such loss may be carried forward and set off against profits and gains of any speculation business in the following assessment years.

The Explanation to section 73 introduces a legal fiction. The section applies only to a company. It does not apply to individuals, firms, Hindu undivided families or associations of persons. The Explanation also does not apply to an investment company or a company whose principal business is banking or money-lending.

If the business of a company which does not fall within the excluded categories consists of purchase and sale of shares of other companies, then such a company shall be deemed to be carrying on speculation business for the purpose of section 73 to the extent to which the business consists of the purchase and sale of such shares.

Dr. Pals contention is that although the usual rule of construction is that "part" should include "whole", such construction should not be given to the Explanation to section 73 in view of the scheme of the Act and the wording of the statute. Dr. Pals further contention is that the opening words of the Explanation "where any part of the business of a company" go to show that the Legislature has in mind a company which had more that one business activity. If a part of the business activity consisted of the business of buying and selling of shares and another part of the business of the company was of non-speculative nature, then only will the Explanation be attracted ? He has also emphasised that the position was made clear by the concluding words of the Explanation "to the extent to which the business consists of the purchase and sale of such shares". That can only mean that, where a company has more than one business activity one of which is buying and selling of shares, the entire business loss of such a company will not be treated as a speculative loss but only to the extent to which the business consisted of purchase and sale of shares would the loss be treated as speculation loss. The phrase "to the extent to which the business consisted of purchase and sale of shares" will become meaningless if the only business activity of the company was purchase and sale of shares. In support of this contention, Dr. Pal has drawn my attention to the Departmental Circular No. 204, dated July 24, 1976 (see [1977] 110 ITR (St.) 21, 32), which is as under :

"Treatment of losses in speculation business-section 73 :

19.1 Section 73 of the Income-tax Act provides that any loss computed in respect of speculation business carried on by an assessee will not be set off except against the profits and gains, if any, of another speculation business. Further, where any loss, computed in respect of a speculation business for an assessment year is not wholly set off in the above manner in the said year, the excess shall be allowed to be carried forward to the following assessment year and set off against the speculation profits, if any, in that

year, and so on. The Amending Act has added an Explanation to section 73 to provide that the business of purchase and sale of shares by companies which are not investment or banking companies or companies carrying on business of granting loans or advances will be treated on the same footing as a speculation guiness. Thus, in the case of the aforesaid companies, the losses, from share dealings will now be set off only against profits or gains of a speculation business. Where any such loss for an assessment year is not wholly set off against profits from a speculation business, the excess will be carried forward to the following assessment year and set off against profits, if any, from any speculation business."

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.

Fry L.J. observed in the case of Duck v. Pitt (12 QBD 79) that "any" is a word which excludes limitation or qualification. In the case of Liddy v. Kennedy [1871] LR 5 HL 134, it was held that a power in a lease enabling the lessor to resume "possession of any portion of the premises demised" enables him to resume all the portion. In the case of Isle of Weight Railway Co. v. Tahourdin [1883] 25 Ch D 320, 332 (CA), it was held that the power to remove any of the present directors included the power to remove all the directors. If a municipality has a right to pull down "any part of a building" which has been built in contravention of municipal laws, then the municipality can pull down the entire building if it is found that the whole building has been built without any sanctioned municipal plan.

The word "any" or the phrase "any part" has a well understood legal connotation and has been explained in a number of cases both in England and also by the courts in India. A power to sell "any part" of an estate would authorise the sale of the whole of it (Cooke v. Farrand 7 Taunt 122). Similarly, a power to appoint or bequest "any part of an estate" enables the donee to take or appoint it all (1 Jarm, 8th Edn., 749).

In the case of Veerappa Shiddalingappa Virupathi v. State of Mysore, AIR 1965 Mys 227, a Full Bench of the Mysore High Court examined the provisions of rule 11(2) of the Rules framed by the Bombay Municipal Boroughs Act. It was held in that case that any person who was registered as a voter in any of the wards of a Municipal Borough could stand as a candidate for election in any of the wards of that Borough. In that case, it was observed by Hegde J., that (p.229) :

"The word any is a word which excludes limitation or qualification. It connotes wide generality. Its use points to distributive construction (vide Strouds Judicial Dictionary;

see also Veeraswamy v. State of Andhra Pradesh [1959] I An WR 308; AIR 1959 AP 413 [FB]. In Pershad Singh v. Ram Pertab Roy [1895] ILR 22 Cal 77, the expression in any case was interpreted as being qualified to in every case. In Mooler v. North Eastern Breweries [1910] 1 KB 247, the expression any agreement to the contrary was held to apply to any agreement whether made before or after the Act. In Keshav v. Jairam [1912] ILR 36 Bom 123, the Bombay High Court refused to apply the ejusdem generis principle in interpreting the word any. From these decisions, it is clear that the word any should be given a meaning as wide as possible in the context. Hence, in the case before us, the words any ward of the Municipal Borough should be understood to mean every ward of the Municipal Borough."

The Supreme Court in the case of Chief Inspector of Mines v. Lala Karam Chand Thaper, AIR 1961 SC 838, 847; [1961-62] 20 FJR 282, 296, [1962] 1 SCR 9, also came to the conclusion that "any one of the directors" in section 76 of the Mines Act, 1952, meant "every one of the directors". In that case, Das Gupta J. observed at pp.28-29 as follows :

"If one examines the use of the wordsa any one in common conversation or literature, there can be no doubt that they are not infrequently used to mean every one- not one, but all. Thus we say any one can see that this is wrong, to mean every one can see that this is wrong. Any one may enter, does not mean that only one person may enter, but that all may enter. It is permissible and indeed profitable to turn in this connection to the Oxford English Dictionary at page 378 of which we find the meaning of any given thus : in affirmative sentences, it asserts concerning a being or thing of the sort named, without limitation as to which and thus collectively of every one of them. One of the illustrations given is I challenge any one to contradict my assertions. Certainly, this does not mean that one only is challenged, but that all are challenged. It is abundantly clear, Therefore, that any one is not infrequently used to mean every one.....

Suppose, the illustration I challenge any one to contradict my assertions was changed to I challenge any one of my opponents to contradict my assertions. Any one of my opponents here would mean all my opponents- Not one only of the opponents."

In that case, the Supreme Court quoted with approval an old English decision in the case of Isle of Wight Railway Co. v. Tahourdin [1883] 25 Ch D 320, as follows (see AIR 1961 SC 838, 847; [1961-62] FJR 282, 297) :

"While the phrase any one of them or any similar phrase consisting of any one, followed by of which is followed in its turn by words denoting a number of persons or things, does not appear to have fallen for judicial construction in our courts or in England - the phrase any of the present directors had to be interpreted in an old English case, Isle of Wight Railway Co. v. Tahourdin [1883] 25 Ch D 320. A number of shareholders required the directors to call a meeting of the company for two objects. One of the objects was mentioned as to remove, if deemed necessary or expedient, any of the present directors, and to elect directors, to fill any vacancy on the Board. The directors issued a notice to convene a meeting for the other object and held the meeting. Then the shareholders, under the Companies Clauses Act, 1845, issued a notice of their own convening a

meeting for both the objects in the original requisition. In an action by the directors to restrain the requisitionists from holding the meeting, the Court of Appeal held that a notice to remove any of the present directors would justify a resolution for removing all who are directors at the present time. Any, Lord Cotton L.J., pointed out, would involve all.

It is true that the language there was any or the present directors and not any one of the present directors and it is urged that the word one, in the latter phrase makes all the difference. We think it will be wrong to put too much emphasis on the word one here. It may be pointed out in this connection that the Permanent Edition of the Words and Phrases, mentions an American case Front and Hintingdon Building and Loan Association v. Berzinski, where the words any of them were held to be the equivalent of any one of them."

Therefore, the legal implication of the phrase "any part of the business of a company" does not create any difficulty. Dr. Pal has not been able to cite any case where the word "any" has been used in a restrictive sense so as not to include "all." Moreover, we fail to see why "part" should not include "the whole" in this case as suggested by Dr. Pal. Such construction of statute always leads to absurdity. If the municipality is empowered to demolish a part of the building and if it is found to be dangerous, can it be rationally suggested that, if the entire building is dangerous, the municipality has no right to order demolition of the entire building ? There is no reason why the phrase "any part of the business" should be given a restrictive sense so that when a companys business consisted of purchase and sale of shares as well as some other business activities, such company should not come within the mischief of the Explanation to section 73. Plain words of the statute do not warrant the construction suggested by Dr. Pal.

The phrase "to the extent to which the business consisted of purchase and sale of such shares" also does not indicate that the Legislature had several other actual and existing non-speculative activities of business in mind. It merely indicates that the business activity which consists of purchase and sale of shares will be treated as speculation business. If the entire business activity of a company consists of purchase and sale of shares of other companies, then the entire business will be treated as speculation business. But, if, apart from purchase and sale of shares, the company has other business activities, then those other activities will not be treated as speculation business.

The circular on which reliance has been placed also does not advance the case of the assessee in any way. The object as stated in the circular is to curb the device to manipulate and reduce the taxable income of a company under the management of a controlling group of persons. But the circular has clearly stated in paragraph 19.1 that "the business of purchase and sale of shares by companies which are not investment or banking companies or companies carrying on the business of granting loans and advances will be treated on the same footing as speculation business".

Therefore, the circular does not leave any room for doubt that the Explanation will apply to the business of purchase and sale of shares of certain companies. Nowhere in the

circular has any indication been given that where the only business of a company consists of purchase and sale of shares, the Explanation will not apply.

Therefore, both the questions are answered in the negative and in favour of the Revenue.

There will be no order as to costs.

BHAGABATI PRASAD BANERJEE J. - I agree.

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