

Bench: D D Chandrachud, J Devadhar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

INCOME TAX APPEAL (L) NO.3005 OF 2009

The Commissioner of Income Tax3. ...Appellant. Vs.

Lokmat Newspapers Pvt.Ltd. ...Respondent.

Mr.Vimal Gupta for the Appellant.

Mr.Percy Pardiwala, Sr.Advocate with Mr.Atul K.Jasani i/b.Ashok Bhoghani & Co. for the Respondent.

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CORAM : DR.D.Y.CHANDRACHUD &

J.P.DEVADHAR, JJ.

16th February, 2010.

ORAL JUDGMENT (Per Dr. D.Y. Chandrachud, J.) :

The office objections are waived. The Registry shall register the appeal. With the consent of Counsel appearing on behalf of the Revenue and the Assessee, the appeal is taken up for final disposal.

2. The appeal by the Revenue under Section 260A of the Income Tax Act, 1961 raises the following substantial questions of law :

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"1. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in allowing brought forward speculation loss to be set off against delivery based profits earned by the Assessee Company from sale and purchase of shares?"

2. Whether, on the facts and in the circumstances of the case and in law, the Explanation to Section 73 can be invoked in a case where there is a profit from transactions?"

3. The facts lie in a narrow compass. During the course of Assessment Year 200304, the assessee showed a profit of Rs. 28,37,382/ on the sale of shares and securities held as stockin trade. The profit was offered by the assessee as a profit of speculation business and was set off against a speculation loss of Rs.27,61,505/ brought forward from Assessment Year 199697 to 199899. After claiming a set off of the speculation loss, which was brought forward, the assessee showed a balance of Rs. 75,877/ as speculation income. The Assessing Officer did not treat the income which arose from the sale of shares as income from a speculation business on the ground that the assessee had settled its transaction of sale and purchase of shares through physical delivery. Consequently, the Assessing Officer did not 3

allow the claim of the assessee for seeking a set off of the income from the sale of shares against the loss on account of speculation business, brought forward from Assessment Year 1996-97 to 1998-99. The CIT (Appeals) confirmed the order of the Assessing Officer. The Tribunal, following its judgments in the case of Samba Trading and Investment Pvt. Ltd. vs. ACIT, 1 and in the case of Sucham Finance and Investments (I) Ltd., 2 (2007) 107 TTJ 315, came to the conclusion that the profit which has been earned from the sale of shares, fell within the purview of the explanation to Section 73 and to be set off against losses which have been brought forward.

4. Counsel appearing on behalf of the Revenue, while assailing the judgment of the Tribunal, urged the following submissions: (i) The profit of business has to be computed in accordance with the provisions of Section 28; (ii) Section 43(5) provides a definition of what constitutes a speculative transaction and explanation (2) to Section 28 provides a deeming fiction of when a business can be treated as a speculation business; (iii) 1 58 ITD 360

2 (2007) 107 TTJ 315 (Mum)

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Section 73 deals with losses of speculation business; a speculation loss can arise only from a speculative transaction; (iv) The explanation to Section 73 creates a deeming fiction of when an assessee can be deemed to be carrying on a speculation business; (v) The loss from a delivery based transaction will constitute a loss on account of speculation business as a result of the deeming provisions of the explanation to Section 73; (vi) The deeming fiction created by the explanation to Section 73 will, however, not apply when there is a profit from a delivery based transaction; and (vii) In the present case though the losses which were sustained by the assessee and were brought forward from the earlier Assessment Year pertain to a speculation business, they could not be set off against the profits which were earned by the assessee from the sale of shares during the Assessment Year in question, since the profits were earned from a delivery based transaction in the sale of shares.

5. In order to consider the tenability of the submissions which have been urged on behalf of the Revenue, a reference to the provisions of Section 73 would be in order. Section 73 provides as follows :

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"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 subsection (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 subsection (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 6

business to the extent to which the business consists of the purchase and sale of such shares."

6. Subsection (1) of Section 73 provides that the loss in respect of a speculation business can be set off only against the profits and gains of another speculation business. Subsection (2) of Section 73 enables an assessee to carry forward the loss arising out of a speculation business which has not been set off either wholly or partly under the provisions of subsection (1). A loss from a speculation business which has not been set off either entirely or in part, can be carried forward to the following Assessment Year and can be set off against the profits and gains, if any, of a speculation business carried on by the assessee and assessable for that Assessment Year. If the loss cannot be wholly set off, the amount of loss which is not so set off, can be carried forward to the following Assessment Year. However, a loss cannot be carried forward for more than four Assessment Years immediately succeeding the Assessment Year in which the loss was first computed.

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7. The explanation to Section 73 creates a deeming fiction. The explanation postulates a situation where the assessee is a Company and where any part of the business of the Company consists of the purchase and sale of shares of other Companies. In such a case, the assessee is for the purposes of Section 73 deemed to be carrying on a speculation business, to the extent to which the business consists of the purchase and sale of shares. The explanation carves out an exception in the case of a Company whose gross total income consists mainly of income 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. The exception carved out by the explanation, however, is not attracted to the facts of this case and its interpretation, therefore, does not call for consideration here. What is material for the purposes of this case is, that the explanation postulates a situation where any part of the business of a Company consists of the purchase and sale of shares of other Companies. Therefore, the explanation is attracted in a situation where something more than an isolated transaction involving sale 8

and purchase of shares is involved. A business postulates a systematic course of activity or dealing. Unless the business of a Company consists of the sale and purchase of shares, the deeming fiction would not apply. However, once the requirements of the explanation are satisfied, namely, in a situation where: (i) The assessee is a Company; (ii) Any part of the business of the Company consists in the purchase and sale of shares of other Companies, the consequence which is envisaged in the explanation, as a fiction of law, is brought into existence. The legal fiction is that the assessee is deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares.

8. Section 28 of the Act deals with the profits and gains of a business or profession. Explanation (2) to Section 28 provides that where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (which is to be referred to as a "speculation business") shall be deemed to be distinct and separate from any other business. Section 43 provides definitions of certain terms relevant to the head of income from profits and gains of business or profession. Subsection (5) of 9

Section 43 defines the expression "speculative transaction" to mean 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. The proviso to subsection (5) then describes certain categories of transactions which shall not be deemed to be speculative transactions. The proviso will not have a bearing on these proceedings.

9. The contention of the Revenue in the present case, in essence is that the definition of the expression "speculative transaction" in Section 43(5) must be read into the provisions of Section 73, because a business cannot be a speculation business unless there is a speculative transaction and a speculative transaction is defined by the former as one, not involving an actual delivery of shares. Hence, it was submitted that a transaction which involves an actual delivery of shares would not constitute a speculative transaction and the assessee who is engaged in a business involving the actual delivery of shares, cannot be regarded as being engaged in speculation business. 10

10. The submission which has been urged on behalf of the Revenue, cannot be accepted, having regard to the plain meaning of the explanation to Section 73. The submission of the Revenue is that a loss which arises on account of a transaction of the sale and purchase of shares would constitute a loss from a speculation business for the purposes of the explanation. But, that the profit which arises from a transaction involving the actual delivery of shares would not constitute a profit for the purposes of sub sections (1) and (2) of Section 73 in respect of which a set off can be granted. To accept the submission of the Revenue would be to introduce a restriction into the scope and ambit of the deeming fiction which is created by the explanation to Section 73, which is not contemplated by Parliament. Once a deeming fiction is created by law, it must be given full and free effect, of course, in relation to the ambit within which it is intended to operate. The deeming fiction created by the explanation to Section 73 defines when an assessee is to be deemed to be carrying on a speculation business for the purposes of the Section. The deeming fiction is, therefore, one which arises specifically in the context of the provisions of 11

Section 73 and is confined to that purpose alone. The explanation stipulates that where an assessee is a company whose business consists in any part of the purchase and sale of shares of other Companies, it shall be deemed to be carrying on a speculation business to the extent to which the business consists of purchase and sale of such shares. Whether or not it is a profit or loss that has resulted from carrying on such business, is a consideration which is alien to the meaning of what constitutes a speculation business by the explanation to Section 73. Once an assessee is deemed to be carrying on a speculation business for the purpose of Section 73, any loss computed in respect of that speculation business, can be set off only against the profits and gains of an other speculation business. Similarly, for the purposes of sub section (2), the loss in respect of a speculation business which has not been set off either in whole or in part, can be carried forward and can be set off against profits and gains "of any speculation business". The expression "any speculation business" means a speculation business of the assessee in respect of which profits and gains for the Assessment Year in question have arisen and there is no justification to restrict the content of that speculation business 12

where profits have arisen by excluding a business involving actual delivery of shares. No such restriction is found in the explanation. To impose one is a legislative function. In other words, once the assessee is carrying on a speculation business and the profits and gains have arisen from that business during the course of the Assessment Year, the assessee is entitled to set off the losses carried forward from a speculation business arising out of a previous Assessment Year.

11. In these circumstances, the view which has been formed by the Tribunal is consistent with the provisions of Section 73. The questions of law shall stand answered accordingly. The appeal shall stand dismissed. There shall be no order as to costs. (Dr.D.Y.Chandrachud, J.)

(J.P.Devadhar, J.)