



THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 15.02.2010

+ **ITA 115/2010**

COMMISSIONER OF INCOME TAX ... Appellant

- versus -

GORA MAL HARI RAM LTD ... Respondent

Advocates who appeared in this case:-

For the Appellant : Ms Rashmi Chopra
For the Respondent : Mr Satyen Sethi with Mr Johnson Bara

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

BADAR DURREZ AHMED, J (ORAL)

1. This appeal by the revenue is directed against the Income Tax Appellate Tribunal's order dated 19.02.2009 passed in ITA 628/D/2005 pertaining to the assessment year 2001-2002.

2. The Assessing Officer as well as the Commissioner of Income Tax (Appeals) held that the sum of Rs 13,33,688/-, which was treated by the assessee as a loss incurred on bargain settlement, amounted to a 'speculative transaction' falling within the meaning of Section 43(5) of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act'). Consequently, the



disallowed the claim of set off to the extent of Rs 13,33,688/-. The assessee had paid a sum of Rs 7,46,300/- to Raj Agro Mills Limited on account of bargain settlement for split fatty acid distillate and another sum of Rs 5,87,388/- to Kuok Oils and Grains Private Limited, Singapore on account of price difference on the basis of a wash out contract for palm fatty acid distillate. Both the Assessing Officer as well as the Commissioner of Income Tax (Appeals) found the said transactions to fall within the definition of 'speculative transaction' as defined in Section 43(5) of the said Act and not amounting to payments on breach of contract.

3. The Tribunal, however, had returned a finding that the loss claimed by the assessee had been wrongly disallowed by the Assessing Officer by applying the provisions of Section 43(5) inasmuch as, according to the Tribunal, the loss had been incurred by the assessee in the regular course of business with regard to breach of contract. The Tribunal directed that the loss, as claimed by the assessee, be set off against the regular business income.

4. We have heard the counsel for the parties and have also examined the papers on record including the impugned order. We find that no interference whatsoever is called for with the conclusion arrived at by the Tribunal that the transactions in question were not speculative transactions and resulted only from breaches of contract. The finding of the Tribunal that the said transactions did not fall within the definition of speculative transaction as defined in Section 43(5) of the said Act do not call for any interference.



5. Be that as it may, even if we assume for the sake of argument that the said transactions amounted to speculative transactions as defined in Section 43(5), the same would be of no help to the revenue inasmuch as Section 43(5) is merely a definitional clause defining as to what a speculative transaction is for the purposes of Section 28 to Section 41 of the said Act. It is only when the speculative transaction, as defined in Section 43(5), matures into a speculative business as appearing in Explanation 2 to Section 28 that any effects would flow from the said definition. In case the speculative transaction, as defined in Section 43(5) of the said Act, matures into a speculative business, then the loss in such a transaction can only be set off against the gains or profits of a speculative business in terms of Section 73 of the said Act. We find that this aspect of the matter has been dealt with by the Bombay High Court in the case of **CIT v. Kamani Tubes Limited**: **207 ITR 298**. In the said decision, the Bombay High Court, *inter alia*, held as under:-

“On a careful reading of the provisions of sections 72 and 73, *Explanation 2* to section 28 of the Act, it is abundantly clear that all these provisions are applicable only to treatment of profits and losses from a "speculation business". There is a perceptible difference between "speculative transaction" and "speculation business". An isolated transaction of settlement of a contract otherwise than by actual delivery of the goods might amount to "speculative transaction" within the meaning of section 43(5) of the Act but in the absence of something more to show that the nature of the transactions was such as to constitute a business, it cannot be termed as "speculation business" which has been treated as distinct and separate from other business.”

We entirely agree with the reasoning and the conclusion of the Bombay High Court in the said decision. Consequently, even if it is assumed for the



transactions, it would be of no help to the revenue inasmuch as neither the Assessing Officer nor the Commissioner of Income Tax (Appeals) has returned any finding that the transactions in question constituted a speculative business. As a result, no substantial question of law arises for our consideration.

The appeal is dismissed.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

FEBRUARY 15, 2010
SR