



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No. 647/2012**

% **Reserved on: 27<sup>th</sup> August, 2013**  
**Date of Decision: 6<sup>th</sup> September, 2013**

CIT V ....Appellant  
 Through Mr. Sanjeev Rajpal, Sr. Standing  
 Counsel.

Versus

NASA FINELEASE P LTD. ...Respondent  
 Through Mr. Nageshwar Rao and Mr.  
 Sandeep S. Karhail, Advocates.

**CORAM:**  
**HON'BLE MR. JUSTICE SANJIV KHANNA**  
**HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

**SANJIV KHANNA, J.**

Revenue, by this appeal under Section 260A of the Income Tax Act 1961 (Act, for short), has raised a solitary issue relating to interpretation of clause (d) to Section 43(5) of the Act. For the purpose of record, we note that the appeal pertains to assessment year 2006-07.

2. The respondent-assessee is engaged in the business of dealing in securities and investment and was engaged by Kotak Mahindra Securities to manage their funds and earn income in nature of profits/gains or dividends from dealing with securities. The assessee



had received management fee as per contract with Kotak Mahind Securities.

3. The respondent-assessee had shown a loss of Rs.1,90,29,988/- in derivative transactions. The Assessing Officer held that the loss was speculative loss under Section 73 of the Act. Secondly, the derivative transactions were during the period July, 2005 to September, 2005 and proviso (d) to sub-section 5 to Section 43 was violated. The proviso (d) to section 43(5) inserted with effect from 1<sup>st</sup> April, 2006 stipulates that eligible transactions should have been conducted/carried out only in recognized stock exchange, to be notified. The said insertion was made by Finance Act, 2005. Rule 6 DDA and Rule DDB were subsequently enacted to prescribe conditions and procedure for notification of a recognized stock exchange. National Stock Exchange and Bombay Stock Exchange were notified vide notification dated 25<sup>th</sup> January, 2006. The transactions in question it is accepted and an admitted position were conducted in the National Stock Exchange.

4. Notification dated 25<sup>th</sup> January, 2006 does not state or specify the date from which the two stock exchanges were recognized. However, the memorandum stipulated that transactions in respect of trading in derivatives in the aforesaid two stock exchanges with effect



from 25<sup>th</sup> January, 2006 shall not be deemed to be speculative transactions. The Assessing Officer relying upon the explanatory memorandum observed that the transactions undertaken between July, 2005 to September, 2005 were before 25<sup>th</sup> January, 2006 and, therefore, the derivative loss was not eligible under proviso (d) to Section 43 (5) of the Act. The loss was disallowed.

5. CIT (Appeals) observed that Section 43(5)(d) was operative in the assessment year 2006-07, but the Rule 6 DDA and Rule DDB were notified on 1<sup>st</sup> July, 2005 and subsequently the two stock exchanges i.e. National Stock Exchange and Bombay Stock Exchange were notified with effect from 25<sup>th</sup> January, 2006. Hence, the derivative transactions between July, 2005 to September, 2005 were not eligible. He also observed that explanation to Section 73 was not applicable as assessee was an investment company and accordingly the respondent-assessee was not entitled to set off the said loss from derivative transactions.

6. On further appeal before the Income Tax Appellate Tribunal (tribunal, for short), the respondent has succeeded on the first issue and it has been observed that they were entitled to benefit under Section 43(5) proviso (d), even in respect of transactions carried out with effect from 1<sup>st</sup> April, 2006. Tribunal observed that Parliament



had enacted the provision with effect from the said date, and delay, any, in the issue of Rules and notification, cannot nullify the legislative mandate of the enactment. Delay was attributable to the Central Board of Direct Taxes, who had failed to issue necessary notification within time.

7. The factual position is not in dispute. Notification No.2/2006 dated 25<sup>th</sup> January, 2006, issued by the Central Board of Direct Taxes does not specify any particular date and simply notifies the National Stock Exchange India Ltd. and Bombay Stock Exchange, Mumbai under proviso (d) to clause (5) to Section 43 of the Act. The said proviso had become applicable with effect from 1<sup>st</sup> April, 2006. Issue of notification obviously had to take some time as it involved processing and examination of applications etc. This was a matter relating to procedure and the delay in issue of notification or even framing of the Rules was due to administrative constraints. We agree with the tribunal that the delay occasioned, as procedure and formalities have to be complied with, should not disentitle and deprive an assessee, specially, when the transactions were carried through a notified stock exchange. The aforesaid delay is not attributable to the assessee. The notification, therefore, merits acceptance and should be given retrospective effect. Notification was



procedural and necessary adjunct to the Section enforced with effect from 1<sup>st</sup> April, 2006. The rule and notification issued in the present case effectuate the statutory and the legislative mandate. There is no good ground or reason why the notification in question should not be given effect from 1<sup>st</sup> April, 2006. No reason or ground is alleged or argued to contend that National Stock Exchange India Ltd. could not and should not have been notified from 1<sup>st</sup> April, 2006.

8. A similar factual matrix had come up for examination before the Supreme Court in *S.A.L. Narayan Row and Another Vs. Ishwarlal Bhagwandas and Another*, (1965) 57 ITR 149. It was noticed that the rules were framed subsequently and on this ground it was submitted that the main provision itself should not be applied. The said contention was rejected by the majority decision recording as under:-

“The Attorney-General appearing on behalf of the Commissioner contended that to the fifth proviso to section 18A(6) no retrospective operation could effectively be given, because the rules, which alone could render the discretion operative, were framed for the first time in December, 1953. We are unable to agree with that view. The legislature has expressly given operation to the fifth proviso to section 18A(6), from April 1, 1952. It is true that the proviso operates only in respect of cases and under circumstances as may be prescribed, but as soon as the rules were framed, which effectuate the purposes for which the proviso was enacted, the proviso and



the rules became effective retrospectively from April 1, 1952.”

9. Reliance placed upon by the Revenue on *Shri Udai Punj Vs. CIT*, (2012) 348 ITR 98 (Del.) is not apposite as the factual matrix of the said case is entirely different. In the said case, transfer of shares was complete prior to 6<sup>th</sup> January, 2006 and the trading in the stock exchange had commenced only from 6<sup>th</sup> January, 2006. It was held that the transfer was not entitled to exemption under Section 10(38) as shares were not listed securities on the date of transfer. The “lapse” or “failure” was on the part of the company which had to get the shares listed after complying with the formalities and technical requirements. Further, there was no legal bar on sale of shares without listing and the question related to the rate of tax, which was lower on listed securities. The lapse in the present case was on account of delay on the part of the appellant in issuing the necessary notification, no act or cause is attributable to the respondent-assessee.

10. In view of the aforesaid, we do not think that there is any ground or reason to interfere with the findings of the tribunal.

11. However, during the course of hearing before us, learned counsel for the parties have accepted that the tribunal has not decided the other question i.e. applicability of *Explanation* to Section 73 of



the Act. Counsel for the parties agree that this aspect should have been examined and decided by the tribunal. Recording their consent, we frame the following substantial question of law:-

“Whether the Income Tax Appellate Tribunal has erred in not deciding whether or not the loss suffered was speculative loss in view of *Explanation* to Section 73 of the Income Tax Act, 1961?”

12. The said question is answered with an order of remit observing that the said issue should be decided and adjudicated by the tribunal. The parties will appear before the tribunal on 26<sup>th</sup> September, 2013, when a date of hearing will be fixed.

**(SANJIV KHANNA)**  
**JUDGE**

**(SANJEEV SACHDEVA)**  
**JUDGE**

**SEPTEMBER 6<sup>th</sup>, 2013**  
**NA**