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### Loss from trading in shares is speculative loss as amendment to Explanation to section 73 of the Act is not retrospective.

Prior to amendment to Section 73 of the Act, Loss from trading in shares cannot be set-off against profits from derivatives transactions.

#### Facts of the case:

Snowtex Investment Limited (the taxpayer) an investment company, registered as a non-banking financial company under the Reserve Bank of India Act, 1934, claimed set off of loss on trading in shares against profit derived from derivative trading.

However, the Assessing officer (AO) disallowed such set-off of loss by treating the same as loss in speculation business in view of Explanation to section 73 of the Income-tax Act, 1961 ('the Act'), which deemed purchase and sale of shares as being speculative business even if the transaction of purchase and sale is settled by delivery.

Explanation to section 73 was amended by the Finance (No.2) Act 2014 with effect from 1 April 2015 i.e. AY 2015-16 to provide for exception to a company, the principle business of which is the business of trading in shares.

On appeal to the first appellate authority, the CIT(A), the taxpayer emphasised that it was a non-banking financial company and traded in securities and so was an exception from the application of Explanation to section 73 of the Act.

#### Decisions of CIT(A), Tribunal and the High Court:

The CIT(A) held that the principal business of the assessee was of granting of loans and advances and so assessee was not hit by Explanation to section 73 of the Act. The Tribunal held that the claim for setting off the loss from share trading should be allowed against the profits from transactions in futures and options, since the character of the activities was similar. The High Court observed that the principle business of the taxpayer was not of granting loans and advance but was that of trading in securities and held that profits which had arisen from trading in futures and options were not profits from speculative business. Hence loss on trading in shares which is deemed to be speculative business could not be set-off against such profits from futures and options.

#### Supreme Court

##### Issue under consideration:

Whether the principal business of the taxpayer was grant of loans and advances and so deeming fiction under section 73 was not attracted?

Whether the amendment by the Finance (No 2) Act, 2014 in Explanation to section 73 of the Act to carve out an exception for company whose principle business is trading in shares, is retrospective or prospective?

### **Decision of the Supreme Court:**

The Hon'ble Supreme Court (SC) upheld the order of the High Court on the first question as the taxpayer had made specific admission before the AO "... In our case the share trading is our sole business during the assessment year under concern". The admission on a statement of fact binds the taxpayer. So the principle business of the taxpayer was not of granting of loans and advances for the assessment year and so deeming fiction under section 73 of the Act was attracted.

Further Supreme Court observed that Finance Act 2005 amended section 43(5) to exclude specific exchange traded derivative transaction from the definition of speculative transactions and also amended section 73(4) of the Act but did not introduce any specific amendment to the Explanation to section 73 of the Act, if it intended to bring about a parity between shares and derivatives. The amendment to the Explanation to section 73 to exclude trading in shares from speculation business was brought about by the Finance (No.4) Act 2014 with effect from 1 April 2015 only.

The SC referred to the decisions of the SC in the case of Allied Motors (P.) Ltd. v. CIT<sup>1</sup>, CIT v. Alom Extrusions Ltd.<sup>2</sup>, CIT v. Vatika Township (P.) Ltd.<sup>3</sup> and Vijay Industries v. CIT<sup>4</sup> and has summarized that date of commencement of a statute or provision is in the exclusive domain of the legislature and it can bring a legislation retrospectively by expressly providing for the same or prospectively.

However, the retrospective application of the statute can be made by express words or by necessary intent of Parliament.

The SC thus upheld the order of the High Court that the loss that occurred to the taxpayer as a result of its activity in shares was not capable of being set-off against the profits earned from the business of futures and options (derivatives), since the latter did not constitute profits of a speculation business.

### **Observation:**

A taxpayer's specific admission before the assessing officer and on the statement of fact binds the taxpayer and so the same is of great significance and should be carefully and correctly worded depicting the actual facts of the case.

The Notes on Clauses to the Finance Bill show that the legislature is fully aware of three concepts—

- prospective amendment with effect from a fixed date;
- retrospective amendment with effect from a fixed anterior date; and
- clarificatory amendments which are retrospective in nature.

Where an amendment was intended to take effect from the date stipulated by Parliament, the SC held that there was no reason to hold either that it was clarificatory or the intent of Parliament was to give it retrospective effect.

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<sup>1</sup> [1997] 91 Taxman 205/224 ITR 677 (SC) (para 9)

<sup>2</sup> [2009] 185 Taxman 416/319 ITR 306 (SC) (para 9)

<sup>3</sup> [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC) (para 12)

<sup>4</sup> [2019] 4 SSC 184 (para 12)



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