

## Allotment of shares in public issue and their sale couldn't be held as speculative business

**Summary – The High Court of Gujarat in a recent case of AMP Spinning & Weaving Mills (P.) Ltd., (the Assessee) held that where assessee-dealer in chemicals applied in public issue of certain companies and was allotted shares which it sold and suffered loss, same could not be disallowed as speculation loss**

### Facts

- The assessee was a dealer in chemicals as also in shares. He applied in the Public Issue of certain companies and was allotted shares which it eventually sold and in the process suffered loss.
- The Assessing Officer rejected the contention of the assessee on the ground that the application of shares from the primary market and loss incurred on the sale of such shares doesn't fall within the purview of being categorized as speculated loss under the provisions of *Explanation* to section 73 thus, disallowed the claim of the assessee. Penalty under section 271(1)(c) was levied by the revenue.
- On appeal, the Commissioner (Appeals) confirmed the disallowance and penalty was levied.
- In quantum appeal, the issue before the Tribunal was referred to the Special Bench, which held that the loss on account of trading in shares was a speculative loss. Thus, the Tribunal deleted the penalty.
- On appeal, the High Court:

### Held

- The Special Bench of the Tribunal was constituted to decide the following question as to whether on the facts and in the circumstances of the case, loss arising from sale of shares applied for by a dealer and allotted to it in Public Issue is hit by *Explanation* to Section 73 of the Income-tax Act 1961.
- The Tribunal while deciding the said question has held that even the acquisition of shares by allotment on application in Public Issue and their eventual sale will be speculation business. Section 73 of the Income-tax Act, 1961 deals with carry forward and set off losses from speculation business. *Explanation* to Section 73 is a deeming provision wherein if specified conditions are satisfied, purchase and sale of shares are deemed speculation activities. This explanation becomes very important now a days in view of more and more NBFC activities.
- From the decision *Khoday Distilleries Ltd. v. CIT* [\[2008\] 307 ITR 312/\[2009\] 176 Taxman 142 \(SC\)](#) it is clear that allotment of shares by way of application in Public Issue been held by the Apex Court under the Gift Tax Act which is a direct tax not amounting to be a transaction. Thus, the Apex Court has held that the same shall not amount to be purchase. The Tribunal has wrongly relied upon the decision of the Apex Court in the case of *CIT v. T.N. Aravinda Reddy* [\[1920\] 120 ITR 46/2 Taxman 541](#)

[\(SC\)](#) which has nothing to do with the point at issue. As held in the decision in the case of *Khoday Distilleries (supra)* there is a vital difference between "creation" and "transfer" of shares. The words "allotment of shares" have been used to indicate the creation of shares by appropriation out of the unappropriated share capital to a particular person. Whichever rule of interpretation is followed, whether literal or object-wise or purposive, the transactions of the assessee cannot imaginably be deemed to be a speculative business. Therefore getting the shares by allotment on application in Public Issue is not purchase within the meaning of the word 'purchase' under *Explanation* to Section 73.

- When we have come to the conclusion that the allotment of shares cannot be termed as purchase, then the assessee cannot be said to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares. Thus, it shall not be covered under *Explanation* to Section 73 and therefore the sale of such shares would not become the speculation business under the said *Explanation*.