ITAT denies set-off of speculative loss when assessee misstated that it was connected with brokerage business

Summary – The High Court of Calcutta in a recent case of Eureka Stock & Share Broking Services Ltd., (the Assessee) held that where assessee incurred loss on account of sale and purchase of shares, which had no connection with its business as a share broker, said loss would be treated as speculation loss which could not be set off against brokerage income earned as sharebroker

Facts

- The assessee incurred certain loss on sale and purchase of shares. It claimed set off of the said loss against income earned by it on account of brokerage from its sharebroking business.
- The Assessing Officer initially allowed the assessee's claim but thereafter he issued a notice for re-assessment. It appeared to him that the entire business of the assessee company was not of purchase and sale of shares but only a part of it was, in which assessee had incurred loss and which had no connection with the business of assessee as a sharebroker. The Assessing Officer, thus, treated the impugned loss as speculating loss as per provisions of Explanation to section 73.
- On appeal, the Commissioner (Appeals) was of the opinion that the proceeding under section 147 was initiated merely on change of opinion by the successor Assessing Officer which according to him was not at all permitted in law.
- On appeal, the Tribunal affirmed the order of the Commissioner (Appeals).
- On appeal by revenue before the High Court:

Held

- The assessee, by its letter dated 8-2-2003, misrepresented the facts. It also actively misled the Assessing Officer into believing that 'in order to earn brokerage income, the assessee had to purchase or sale various shares on their own account also. But this did not mean that this was a loss to the assessee. The suggestion made by the assessee, was factually incorrect. The Assessing Officer realised that the assessee had misrepresented the facts to the earlier Assessing Officer. He in the circumstances issued the notice under section 148 and also recorded the reasons. It is not therefore a case of change of opinion. The facts have to be correctly understood by the concerned officer. When the concerned officer was under a misapprehension as regards the facts based on misrepresentation made by the assessee it cannot, in that case, be said that he subsequently changed his opinion when he issued notice seeking to disallow the loss earlier allowed expressly or impliedly to be set off against the income arising out of the brokerage of shares.
- It is not in dispute that originally the assessee had made a mis-representation of fact which misled the Assessing Officer in believing that the loss was suffered in the course of share broking business.

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Whereas the truth is that loss was suffered in sale and purchase of shares which had no connection with the business of the assessee as a share broker.

- In the case of *CIT* v. *Kelvinator of India Ltd.* [2010] 320 ITR 561/187 Taxman 312 (SC), the question for consideration was whether the concept of change of opinion stood obliterated with effect from 1-4-1989 after substitution of section 147 of the Income-tax Act, 1961 by the Direct Tax Laws (Amendment) Act,1987. That question was answered in the negative by the Apex Court. Far from helping the assessee, the judgment, militates against him. The court held that after 1st April, 1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.
- There is in fact tangible material to come to the conclusion that income escaped assessment. There is thus no question of any change of opinion.

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