

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, AHMEDABAD**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR**

आयकर अपील सं./I.T.A. No. 2819/Ahd/2016

(निर्धारण वर्ष / Assessment Year : 2013-14)

Chirayu Exim Pvt. Ltd. 8, Kanchannagar, Nr. Juna Railway Crossing, Maninagar, Ahmedabad - 380008	बनाम/ Vs.	ITO Ward -1(1)(3), room No. 303, 3 rd Floor, Pratyaksh Kar Bhavan, Ambawadi, Ahmedabad-380015
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCC7238C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Written Submission
प्रत्यर्थी की ओर से / Respondent by :	Shri S. K. Dave, Sr.D.R.

सुनवाई की तारीख / Date of Hearing	01/08/2018
घोषणा की तारीख /Date of Pronouncement	17/09/2018

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the assessee against the order of the CIT(A)-1, Ahmedabad ('CIT(A)' in short), dated 29.09.2016 arising in the assessment order dated 30.09.2015 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning assessment year 2013-14.

2. As per the ground of appeal, the assessee has challenged the action of the CIT(A) in denying the set off of losses arising from derivative transaction amounting to Rs.99,35,507/- (futures and options) against other income of Rs.1,04,29,469/- earned by the assessee.

3. Briefly stated, the assessee company filed return of income for AY 2013-14, which was subjected to scrutiny assessment. In the course of the scrutiny assessment, the AO observed that the assessee has claimed losses arising from derivative transactions aggregating to Rs.99.35Lakhs against the profits arising of sale of land and interest income. The AO found that derivative loss in respect of shares amounts to Rs.75,49,467/- whereas Rs.23,66,362/- arises from commodity trading. No details for loss of Rs.19,678/- was stated to be provided by the assessee. The AO questioned the bonafides of the derivative transactions in shares on the ground that the contract notice furnished by the assessee contains only order no., trade no., trade time of securities which details are annexed and numbered with the first page of the contract note. Secondly, the contract notes were furnished to the AO in original which is imprudent and thirdly, the NSE has denied to have carried out any transactions by the assessee company. The AO accordingly held that the loss arising on transactions in the derivative segment of shares cannot be regarded as 'eligible transaction' under s.43(5)(d) of the Act. The AO further observed that the loss of Rs.23,66,362/- arose in commodity trading on the platform of the commodity exchange. The assessee has shown transactions of trading of sac on NMCEX. The AO observed that trading of sac is not covered by the definition of 'eligible transaction' under s.43(5)(d) of the Act. The AO also claimed that no details of losses of Rs.19,678/- was provided by the assessee. Consequently, the AO denied the set off of the loss against other income.

4. Aggrieved, the assessee preferred appeal before the CIT(A) without any success.

5. Further aggrieved, the assessee preferred appeal before the Tribunal.

6. The learned AR for the assessee appeared and filed written submissions to justify the claim of set off. The learned AR appeared in person and referred to the contract notes, ledger account appearing in the books of the stock broker and the written submissions.

7. The learned DR relied upon the order of the CIT(A).

8. We have carefully considered the submissions made on behalf of the assessee and Revenue as well as perused the orders of the authorities below and documentary evidences placed before us as well as the case law cited. The maintainability of loss arising from derivative transactions against the regular income is in question. The assessee has claimed derivative loss in equity segment as well as in commodity segment. As regards the loss arising from derivative segment in share, the AO himself has noted that contract note issued by the share broker carries the relevant details such as unique client identity no., time, order no., trade no. and trade time of the securities bought by the assessee in respect of transactions mentioned in the contract note. Thus, the contract note issued to the assessee is clearly as per SEBI guidelines. We also fail to understand as to how the production of the original bills to the AO gives rise to any kind of adverse inference. It may at best be taken as imprudent for which the assessee cannot be penalized. It rather carries ring of truthfulness. On perusal of the communication received from the Stock Exchange, it is observed that the Stock Exchange has merely shown its inability to provide the details based on the PAN number. The correct course possibly would have been to make inquiry with the contract issuing

broker through whom the transaction has been executed. The payment made to the share broker towards such losses is not in dispute. The specific order number and trade time is available on record. It is not the case of the Revenue that no transaction has been executed against the order number specified in the contract. Therefore, in these circumstances, it will be difficult to draw inference against the assessee for allowability of derivative loss in terms of Section 43(5)(d) of the Act. As regards the claim of losses arising in the commodity exchange platform the stand of the Revenue that the assessee's transaction is not an eligible transaction as contemplated in Section 43(5)(d) of the Act was firmly rejected by the Hon'ble Madras High Court in the case of CIT vs. M/s. Sri Vasavi Gold & Bullion Pvt. Ltd. in T.C.A. No. 853 of 2017 in identical facts and circumstances. The relevant operative para of the judgment of the Hon'ble Madras High Court is reproduced as hereunder:

“10. Main issue on which arguments were advanced before this Court is with regard to addition of Rs.60,66,466/- (loss on open market trading) made by the Assessing Officer to the income of the assessee. Assessment order dated 26.03.2014, reads as follows:

“The assessee company has not substantiated that the transactions were supported by Contract Notes and were carried on in a recognised stock exchange i.e., in MCX which is the recognised stock exchange as per SO 1327 (E) dated 22.05.2009. Thus the transactions cannot be considered as 'eligible transactions' as per section 43(5)(d).

In view of explanation to section 73, the assessee will not be eligible for set off and carry forward of the loss of Rs.60,66,466/- irrespective of the fact whether the transactions are covered by the definition of 'eligible transaction'.

Penalty proceedings under Section 271(1)(c) are initiated for furnishing inaccurate particulars of income.

The assessed income is computed as under:

Income from business as admitted :Rs.22,65,469/-

Add: Loss on open market trading :Rs.60,66,466/-

Assessed income : Rs.83,31,935/-

Tax as per computation sheet and demand notice enclosed should be paid."

11. *According to the Assessing Officer (i) as per Section 45(5)(d) of the Income Tax Act, the transaction carried out by the assessee cannot be considered as 'eligible transaction' and the same has to be treated as 'speculative transaction' and (ii) irrespective of the fact whether the transactions are covered by the definition of 'eligible transaction' and the assessee will not be eligible for set off and carry forward of the loss of Rs.60,66,466/- in view of Explanation to Section 73 of the Income Tax Act.*

12. *For better understanding of the relevant provisions relied on by the Assessing Officer, viz., Section 43(5)(d) and Explanation to Section 73 are extracted hereunder:*

"Definitions of certain terms relevant to income from profits and gains of business or profession.

43. In sections 28 to 41 and in this section, unless the context otherwise requires-

(1) "actual cost" means

(2) "paid" means

(3) "plant" includes

(4) (i) "scientific research" means

(5) "speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

Provided that for the purposes of this clause-

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or

(c) a contract entered into by a member of a forward market or a stock exchange in the course of any

transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; or

(d) an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange; or

(e) an eligible transaction in respect of trading in commodity derivatives carried out in a recognised association , which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013),

shall not be deemed to be a speculative transaction.

Explanation 1-For the purposes of clause (d), the expressions-

(i) "eligible transaction" means any transaction,-

(A) carried out electronically on screen-based systems through a stock broker or sub-broker or such other intermediary registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) and the rules, regulations or bye-laws made or directions issued under those Acts or by banks or mutual funds on a recognised stock exchange; and

(B) which is supported by a time stamped contract note issued by such stock broker or sub-broker or such other intermediary to every client indicating in the contract note the unique client identity number allotted under any Act referred to in sub-clause (A) and permanent account number allotted under this Act;

(ii) "recognised stock exchange" means a recognised stock exchange as referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed and notified by the Central Government for this purpose;”

x x x x x

“Section 73: Losses in speculative business:

(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.

(2) Where for any assessment year any loss computed in respect of a speculation business has not been wholly set off under sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no income from any other speculation business, shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and-

(i) it shall be set off against the profits and gains, if any, of any speculation business carried on by him assessable for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.

(3) In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section (2) of section 72 shall apply in relation to speculation business as they apply in relation to any other business.

(4) No loss shall be carried forward under this section for more than four assessment years immediately succeeding the assessment year for which the loss was first computed.

Explanation.- Where any part of the business of a company (other than a company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources", or a company the principal business of which is the business of trading in shares or banking or the granting of loans and advances) **consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares.**”(emphasis is ours)

13. Keeping the above provisions in mind, first let us consider whether Section 43(5) of the I.T. Act will apply to the facts and circumstances of the case. Section 43(5) deals with 'speculative transaction' and any income derived from the same will be computed under the head 'income from profits and gains of business or profession'. Proviso (d) to Section 43(5) gives

exemption to an eligible transaction in respect of trading in derivatives carried out in a recognised exchange.

14. Now, let us consider the kind of transaction, the assessee carried out in the instant case. The assessee's main business is in retail gold jewellery and for a short period of time viz., three months i.e., from 08.08.2010 to 25.10.2010, the assessee was also trading in derivatives through recognised Multi Commodity Stock Exchange and suffered loss to a tune of Rs.60,66,466/-. The said transactions were carried out by the assessee electronically on screen based systems and through approved stock broker and that the same is supported by Time Stamped Contract Note, issued by the stock broker indicating the unique identification number and PAN number in the contract note. The Authorised Representative of the assessee has explained and furnished the above details during assessment proceedings. However, an adverse assessment order has been preferred.

15. After considering the rival submissions, in the appeal filed by the assessee, the Commissioner of Income Tax (Appeals), vide order dated 16.12.2015, held as follows:

"5.1.6. For the transactions in F & O segments to qualify for being non-speculative transactions as per the definitions in Section 43(5) the transactions have to be eligible transactions and the transactions have to be carried out through recognised MCX stock exchange. The appellant has entered into transactions which are supported by contract notes having a unique client identity number. Such transactions were carried out through a stock broker on a screen based system. These transactions are eligible transactions. The transactions were carried out in a recognised stock exchange. The AO has held that the appellant failed to prove that the transactions were carried out through MCX Stock Exchange Ltd. which got notified by Notification No.46/2009 dated 22.05.2009. In terms of Explanation to Section 73(4) in the case of a company, business of purchase and sale of shares is deemed to be speculative business. A derivative is a financial instrument whose value depends on the value of other underlying financial instruments which requires no initial net investment or little initial net investment that is settled at a future date. Explanation to Sec.73(4) has been enacted to clarify beyond any doubt that share business of certain type or classes of companies are deemed to be speculative. Since derivatives are not shares, they are excluded from the ambit of explanation to Sec.73(4). Therefore, the transactions entered into by the appellant are eligible transactions and the AO is directed to delete the addition of Rs.60,66,466/-. These grounds of appeal are allowed."

16. Adverting to the submissions of the parties, extracted supra, Income Tax Appellate Tribunal, vide order dated 15.09.2016, held as follows:

""5. We have considered the rival submissions on either side and perused the relevant material available on record. In this case, the assessee is trading in derivatives in the Multi Commodity Stock Exchange, which was recognized. Therefore, the same cannot be treated as speculative transaction within the meaning of Section 43(5) of the Act. In other words, the transaction made in derivatives through Multi Commodities Stock Exchange was exempted under proviso (d) to Section 43(5) of the Act. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

6. In the result, the appeal filed by the Revenue is dismissed."

17. On the facts and circumstances of this case, the transaction done by the assessee is not a speculative transaction but it only comes under provios (d) to Section 43(5) of the Act thereby it is only a non speculative transaction and thus exempt from tax.

18. Section 73 of the I.T. Act deals with "losses in speculation business". Explanation to Section 73 categorically states that in the case of a company, business of purchase and sale of shares is deemed to be speculative business. Here, in the instant case, the assessee had suffered loss in trading of derivatives carried through Multi Commodity Stock Exchange. As derivative transactions being separate from trading in shares, provisions of Explanation to Section 73 will not be applicable to such transactions and hence, the loss incurred by the assessee in derivative transactions through recognised stock exchange has to be set off against other business income as per provisions of the Act.

19. In the light of the above discussions, we are of the view that the transaction carried out by the assessee is a non speculative transaction and thus Section 43(5) is not attracted to the facts of the instant case and likewise the assessee was trading in derivatives and not in shares, so the loss suffered by the assessee in trading in derivatives is excluded from the ambit of Explanation to Section 73.

20. Therefore, we concur with the decision taken by the Appellate Tribunal as well as the Commissioner of Income Tax (Appeals) in rejecting the view taken by the Assessing Officer to add Rs.60,66,466/- as loss, on open market trading to the income of the assessee."

9. Respectfully following the judicial fiat available in this regard, we find merit in the case of the assessee with reference to the derivative loss arising in the equity segment and commodity segment. As regards, loss of Rs.19,678/-, it is claimed on behalf of the assessee, the correct loss stands at Rs.23,86,040/- as against Rs.23,66,362/- assumed by the AO in the commodity segment. Considering the smallness of amount and having regard to the documentary evidences, we do not see any warrant to differ with the version of the assessee. Therefore, the loss claimed by the assessee in the derivative segment is found to be covered by the exception provided under s.43(5) of the Act and consequently, such loss requires to be allowed for set off against the regular income of the assessee.

10. In the result, the appeal of the assessee is allowed.

This Order pronounced in Open Court on 17/09/2018
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Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER
Ahmedabad: Dated 17/09/2018

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।