

*IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH "B" KOLKATA*
Before Shri Aby T. Varkey, Judicial Member and
Shri Manish Borad, Accountant Member

आयकरअपीलसं.य/ ITA No. 146/Kol/2020 Assessment Year: 2011-12

DCIT, Circle-8(1) AaykarBhawan, P-7 Chowringhee Square, 5 th Fl., Kolkata-700 069	<u>बनाम</u> V/s.	M/s. Baljit Securities Private Limited 7A Pretoria Street, Theatre Road, Kolkata- 700 069. PAN:AABCB0779P
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

Hearing through video Conferencing

अपीलार्थीकीओरसे/By Appellant	Smt. RanuBiswas, Addl. CIT, ld.DR
प्रत्यर्थीकीओरसे/By Respondent	Shri S.K. Tulsian, Advocate Ms. Puja Somani, CA, Ld. AR
सुनवाईकीतारीख/Date of Hearing	08-09-2021
घोषणाकीतारीख/ Date of Pronouncement	15-09-2021

आदेश /O R D E R

PER MANISH BORAD, AM:

This appeal filed by the revenue pertaining to the A.Y. 2011-12 is directed against the order of ld. Commissioner of Income-tax (Appeals)-8, Kolkata dated 09-09-2019 vide appeal no. CIT(A), Kol-8/10257/2014-15 which is arising out of the assessment

order framed u/s 143(3) of the Income Tax Act dated 18-03-2014 by DCIT, Circle-8, Kolkata.

2. Brief facts of the case as culled out from the records are that the assessee is a private limited company engaged in the business of trading in equity shares and derivatives and working as stock exchange broker. E- Return of income for the A.Y 2011-12 filed on 29-09-2011 showing loss of Rs.76,19,954/-. Case selected for scrutiny followed by serving of notices issued u/s. 143(2) and 142(1) of the Act. Learned Assessing Officer(in short Ld. AO)called for various details to which necessary submissions and documents were filed by the assessee. Ld. AO on observing held that the assessee has exempt income from the investments held and has incurred interest expenditure computed the disallowance u/s 14A of Rs. 33,40,274/-. The Ld. AO further on perusal of the transactions of purchase and sale of shares observed that the assessee has showing profit from share trading at Rs. 1,22,62,050/- incurred loss on derivatives amounting to Rs.2,62,66,074/-. The Ld. AO was of the view that share trading and income from derivatives is speculation in nature, which cannot be set off against normal business income. The Ld. AO also observed that the expenditure incurred by the assessee are not apportioned correctly on and he on his own motion apportioned the expenses and computed the speculation loss at Rs.5,63,23,387/- as against loss declared by the assessee at Rs. 2,62,66,074/- in following manner:

	Total turnover as per P&L a/c. (Rs.)	Income as per P&L a/c. (Rs.)	Apportioned expenditure (Rs.)(Establishment and other expenditure / Interest)	Income (Loss)
Sale of shares	34,69,82,039	1,22,62,050	3,93,41,281	(2,70,79,231)
Derivative loss	2,62,66,074	2,62,66,074	29,78,082	(2,92,44,156)
Expenditure relating to earning non speculative income	--	--	30,11,853	--

2.1. The Ld. AO also observed that contribution towards Provident Fund at Rs. 2,52,972/- was deposited beyond the due date as prescribed in the Act regulating Provident Fund and accordingly, disallowed the same. Total income assessed at Rs. 4,61,94,780/- after making the additions referred hereinabove. Book Profit u/s. 115JB of the Act assessed at Rs. 88,84,259/-.

3. Aggrieved, the assessee preferred an appeal before the Id. CIT(A) and partly succeeded.

4. Now, the revenue is in appeal before the Tribunal raising the following grounds of appeal:

“1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the loss incurred by the assessee in speculation business at Rs. 2,62,66,074/- against Rs. 5,63,23,387/- as determined by the Assessing Officer.

2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in treating the loss incurred by the assessee from trading in Future and Options as Business Loss and not as Speculation Loss.

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 2,55,972/- made by the assessing officer u/s 2(24)(x) r.w.s. 36(1)(va) of the Income Tax Act, 1961 in respect of employees contribution towards PF/ESI.

4. That the appellant reserves the right to amend, alter or add to any ground(s) of appeal before or at the time of hearing of the appeal.”

5. The Learned Departmental Representative (in short, the Ld. DR) vehemently argued supporting the order of the Ld. AO.

6. Per contra, the Learned Counsel for the assessee firstly took us through the written submissions running from pages 1 to 13 and the Paper book running from pages 1 to 56. Further, as regards ground no. 1, it was submitted that the ld. AO erred in apportioning the expenditure, as he did not took the figure of turnover on which brokerage commission/ income was earned and Ld. CIT(A) has rightly appreciated this aspect accepting the assessee's claim of loss from income from derivatives trading of Rs. 2,62,66,074/-.

6.1. As regards ground no. 2 regarding treatment of loss incurred by the assessee from trading in shares and derivatives as business loss and not as speculation loss. It was submitted that this issue is squarely covered by the decision of the Hon'ble ITAT, Kolkata in assessee's own case for the AY 2012-13 pronounced on 24-02-2021, wherein on identical facts derivative loss was held as business loss by virtue of exception in section 43(5) of the Act.

6.2. As regards ground no. 3 relating to disallowance made for delayed payment of employees' contribution towards P.F. at Rs. 2,55,972/-, it was submitted by the Ld. Counsel for the assessee that the alleged amount was duly deposited with the appropriate authority before the due date of filing of return for the A.Y 2011-12 and therefore, in view of the judgment of the Hon'ble Jurisdictional High Court at Calcutta in the case of ACIT vs. Vijay Shree Ltd., in ITA No. 245 of 2011, the assessee was eligible for deduction of this amount and the Ld. CIT(A) has rightly deleted the disallowance.

7. We have heard the rival contentions and perused the records placed before us and carefully gone through the decision as referred and relied on by the ld. Counsel for the assessee. Through ground nos. 1 & 2 the revenue has raised these two issues, both relating to the income earned from trading in Shares, Future and Options and derivatives. In the financial statement, the assessee claimed to have been incurred loss from derivatives trading of Rs. 2,62,66,074/- and profit from Share Trading and Future and Options at Rs. 1,22,62,050/-. The Ld. AO firstly re-calculated the loss by apportioning the expenditure incurred during the year, computing loss at Rs. 5,63,23,387/- and further, treated the alleged loss from trading of Shares, Future and Options and derivatives as speculative in nature, not liable to be set off from the other business income.

7.1. We observe that as regards the apportionment of expenditure incurred during the year, the Ld. AO erred to taking

note of the fact that the income from commission brokerage is computed on the basis of turnover carried out on recognised exchange of which the assessee is a member. If the turnover giving rise to the brokerage income, taken into consideration the resulted figure will be calculated in the following manner:-

Sl No	Particulars	Total Turnover as per P/L Account (Rs.)	Apportionment of Expenditure (Rs.)(establishment and other expenditure and interest exp)	Income as per P/L Account (Rs.)	Income/Loss (Rs.)
1	Sale and purchase of shares	346,982,039.00	3,24,934.76	12,262,050.00	11,937,115.24
2	Derivative loss	26,266,074.00	24,597.12	(26,266,074.00)	((26,290,671.12)
3	Turnover & Brokerage	48,033,755,074.88	44,981,684.12	51,721,934.00	6,740,249.88
	Total	48,407,003,187.88	45,331,216.00	37,717,910.00	(7,613,306.00)

7.2. On going through the above calculation, it is well evident that the assessee has shown better income from sale and purchase of shares and lower loss in derivative business and, therefore, in our considered view, the Ld. CIT(A) has rightly appreciated this aspect, thereby deleting the addition made by the Ld. AO wrongly apportioning of expenditure towards alleged speculation/business, which gave rise to higher speculation loss. Thus, ground no. 1 raised by the revenue stands dismissed.

8. As regards ground no. 2, wherein finding of the Ld. CIT(A) treating the loss/income incurred by the assessee for trading in shares, Future and Options and derivatives as business loss as against the finding of the Ld. AO treating the same as speculation loss, we find this issue has come up before this tribunal in assessee's own case for the A.Y 2012-13 dated 24.02.2021, wherein the Tribunal after placing reliance on the judgment of the Hon'ble Jurisdictional High Court in assessee's own case for the A.Y 2005-06 by order dated 12-03-2014, has held that the income from derivatives, Future and Options and Share trading carried out on recognised Stock Exchange is not in the nature of speculation and it is a business income. The Tribunal vide its order dated 24-02-2021 in ITA No. 346/Kol/2017 observed as follows:--

"It is noted that assessee is engaged in the business of share trading and assessee is also functions as a broker of securities and is a registered stock broker (stock exchanges i.e. NSE, BSE & forward exchange etc.). The assessee admits that it is involved in the purchase and sale of shares & securities of other companies on self account where the actual delivery is taken and given from which gross income has been shown at Rs.3,15,992/-. It is noted that the assessee is also engaged in derivative transaction [wherein the actual delivery is not taken or given] and it incurred gross loss from derivative transaction at Rs.37,48,335/- . The assessee has admitted to have earned gross income on brokerage at Rs. 1,52,68,296/-. . The assessee computed the gross income from the three businesses being composite in nature and has returned loss of Rs.2,57,18,558/-. The AO has not accepted this action of assessee and after scrutiny has accepted the assessee's income from brokerage as business income i.e. Rs.1,52,68,296/-. However, the AO apportioned some expenses and determined the business Income from brokerage as Rs.1,25,59,636/- and not Rs.1,52,68,296/-; And thereafter treated the income from share (delivery based) and derivative as speculation in nature u/s. 73 of the Act and has disallowed Rs.3,72,28,053/- (supra). Now the question is whether the action of AO is legally correct/sustainable i.e. whether the

income from share trading (delivery based) and derivatives can be treated separately and the loss from it is hit by section 73 (Explanation) of the Act. For answering this question let us look at the scheme of the Act. Under Chapter IV which is titled 'Computation of Total Income' and the business receipts/income is dealt under Group "D" i.e. under the Heads of Income 'D' - Profit and gain of business which consists of section 28 to 44 DB of the Act. It is trite law that profit includes losses because loss has been construed as negative profit and we note that Explanation (2) to section 28 provides in respect of "Speculative transactions" as follows:

"Explanation 2 - Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as "speculation business") shall be deemed to be distinct and separate from any other business. "

10. From a plain reading of the above Explanation (2) it can be discerned that speculative transactions carried on by an assessee may be of such a nature as to constitute a business, then such business shall be deemed to be distinct and separate from any other business. Subsection (5) of section 43 of the Act gives the definition of speculative transaction as under:

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

1 .

2 .

3 .

4 .

(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 J 956) 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; "

11. From a perusal of the above, it can be seen that this definition of speculative transaction is only for the purpose of section 28 to 41 of the Act. From a conjoint reading of Explanation 2 to section 28 of the Act and definition in section 43(5) of the Act it is understood that when an assessee is engaged in the business of purchase or sale of any commodity including stocks and shares which are periodically or ultimately settled otherwise than by actual delivery or transfer of the commodity or scrips will be termed as speculative transaction. So, non-delivery or transfer of the commodity or scrips would be treated as speculative transaction. However, the proviso exempts the transactions or activities appearing in clauses (a) to (e) which are not to be deemed to be speculative transactions. Since in this case, the derivative transaction falls in the exemption, therefore the profit or loss from derivatives cannot be deemed to be a speculative transaction. Since the loss from derivative transaction is not a speculative loss, it can be set off with the profit and gain of business. So, in this case, the derivative loss suffered by the assessee can be set off with the assessee's income from Brokerage and trading of shares (i.e. intra-head adjustment). This view of ours gets support from the decisions the Hon'ble jurisdictional High court in Asian Financial Services Ltd. Vs. CIT-3, Kolkata reported in 240 Taxman 192 (Kol) wherein it has held that the activities covered in clause (a) to (e) of section 73 of the Act even though are not deemed

as speculative business, however, these deemed businesses are distinct and separate from any other business. Thereafter, the Hon'ble High Court (supra) in similar circumstances observed that "now the question is whether the loss arising out of such being the business can be set off against the profit arising out of other business or businesses which may for clarity be called proper business. Under section 70 of the Act, the assessee is entitled to have the loss set off against his income from any other source under the same head unless otherwise provided. The question, however remains whether the explanation to sub-section (4) of section 73 relied upon by Mr.Lodh provides otherwise. A plain reading of the explanation quoted above cannot be said to have provided otherwise. In that case the irresistible conclusion is that the assessee is entitled to set off such loss arising out of deemed business against the income arising out of business proper."

8.1. On going through the above decision of this Tribunal, we find that the issue raised in the ground no. 2 of instant appeal is same and above stated decision of the Tribunal is squarely applicable on the issue raised before us in ground no.2. Ld. DR failed to controvert this fact and could not place any binding precedence in its favour. We, therefore, respectfully following the decision of this Tribunal in assessee's own case for the AY 2012-13, are of the considered view, the income from Share Trading in Future & Options and Derivatives earned by the assessee during the year under consideration has been rightly claimed as business income/loss. We, thus, find no infirmity in the finding of the Ld. CIT(A) on this issue. Accordingly, ground no. 2 raised by the revenue stands dismissed.

9. Through ground no. 3 the Revenue has challenged the finding of the Ld. CIT(A) deleting the addition of Rs. 2,55,972/- made by the ld. AO in view of the provisions of section 2(24)(x)

r.w.s. 36(1)(va) of the Act, 1961 in respect of employees' contribution towards PF/ESI.

9.1. We find that there was a delay on payment of employees' contribution to PF of Rs. 2,55,972/- as prescribed by the respective Act. However, the alleged sum was duly deposited with the respective authority before the due date of filing of return of income for the A.Y 2011-12 prescribed u/s. 139(1) of the Act. We find that the case of the assessee is covered by the judgment of the Hon'ble Jurisdictional High Court of Calcutta in the case of *Vijayshree Ltd* reported in (2014) 43 taxmann.com 396 (Cal). Further, this Tribunal in the case of *Harendra Nath Biswas* in ITA No. 186/Kol/2021 by order dated 16-07-2021 has dealt the issue holding as follows:-

"4. We have heard both the parties and perused the record. First of all we do not countenance this action of the Ld. CIT(A) for the simple reason that the Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021 and relevant assessment year before us is AY 2019-20. Therefore the law laid down by the Jurisdictional Hon'ble High Court will apply and since this Explanation-5 has not been made retrospectively. So we are inclined to follow the same and we reproduce the order of Hon'ble Calcutta High Court in the case of Vijayshree Ltd. supra wherein the Hon'ble Calcutta High Court has taken note of the Hon'ble Supreme Court decision in CIT vs. Alom Extrusion Ltd. reported in 390 ITR 306. The Hon'ble Calcutta High Court's decision in Vijayshree Ltd. supra is reproduced as under:

"This appeal is at the instance of the Revenue and is directed against an order dated 28th April, 2011 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata in ITA No. 10911Kol120JO relating to assessment year 2006-07 by which the Tribunal dismissed the appeal preferred by the Revenue against the order of CIT(A).

The only issue involved in this appeal is as to whether the deletion of the addition by the AO on account of Employees' Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not.

It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vo1.390 ITR 306, held that the deletion was justified.

Being dissatisfied, the Revenue has come up with the present appeal.

After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1 1988.

Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities. "

In the light of the aforesaid discussion we do not accept the Ld. CIT(A)'s stand denying the claim of assessee since assessee delayed the employees contribution of EPF & ESI fund and as per the binding decision of the Hon'ble High Court in Vijayshree Ltd. (supra) u/s 36(1)(va) of the Act since assessee had deposited the employees contribution before filing of Return of Income. Therefore, the assessee succeeds and we allow the appeal of the assessee".

9.2. We, therefore, under the given facts and circumstances of the case and respectfully following the said judgment of the

Hon'ble Jurisdictional High Court of Calcutta in the case of *Vijayshree Limited* (supra), find no infirmity in the finding of the Ld. CIT(A) deleting the disallowance of employees contribution towards PF/ESI of Rs. 2,55,972/- made by the Ld. AO. Accordingly, ground no. 3 raised by the revenue is dismissed.

10. Ground no. 4 is general in nature, which needs no adjudication.

11. In the result, the appeal of the revenue stands dismissed.

The order pronounced in the open Court on 15.09.2021.

Sd/-

Sd/-

(ABY T. VARKEY)

(MANISHBORAD)

JUDICIALMEMBER

ACCOUNTANT MEMBER

दनांक /Dated: September 15th , 2021

**PP/SPS

आदेशकीप्रतिलिपिअग्रेषित / Copy of Order Forwarded to:-

- 1.अपीलार्थी/Appellant/Department: DCIT, Cir-8(1),
AaykarBhawan, P-7 Chowringhee Square, 5th Fl.,
Kolkata-700 069.
2. प्रत्यर्थी/Respondent/Assessee: M/s. Baljit Securities Pvt. Ltd. 7A
Pretoria Street, Theatre Road, Kolkata-700 071.
3. संबंधितआयकरआयुक्त/ Concerned CIT
- 4.आयकरआयुक्त- अपील / CIT (A)
5. विभागीयप्रतिनिधि,आयकरअपीलीयअधिकरणकोलकाता / DR, ITAT,
Kolkata
6. गार्डफाइल / Guard file.

By order/आदेशसे,

/True Copy/

Senior Private Secretary/D.D.O
ITAT, Kolkata