

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.517/Del/2011
(Assessment Year: 2006-07)

ITO, Ward-7(4), Room No. 305, CR Building, New Delhi	Vs.	Vikramendra Prasad Bhalla, C-2, Greater Kailash Enclave-I, New Delhi PAN:AANPB8241P
(Appellant)		(Respondent)

Assessee by :	Sh. KVSR Krishna, CA
Revenue by:	Sh. Umesh Chand Dubey, Sr. DR
Date of Hearing	10/11/2016
Date of pronouncement	07/02/2017

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the revenue against the order of the Id CIT(A)-XXIII, New Delhi dated 29.09.2010 for the Assessment Year 2006-07.
2. The revenue has raised the following grounds of appeal:-
 - "1. *On the facts and circumstances of the case the Id CIT(A) erred in law as well as on merits in holding reopening of assessment u/s 147 invalid while the AO reopened the case with the application of mind and following the due procedure provided in the Act.*
 2. *On the fact and circumstances of the case the Id CIT(A) erred in law as well as on merits in deleting the addition of Rs. 5484520/- made by AO by disallowing brought forward speculative loss."*
3. To state the facts in nutshell, assessee is an individual earning income from salary, house property, business and other sources. He filed his return of income on 31/10/2006 showing income of Rs. 3584069/- and agricultural income of Rs. 1005010/- . The return was processed under section 143 (1) of the Income Tax Act on 31/01/2008. Subsequently

notice under section 148 of the Income Tax Act was issued on 13/01/2009. In response to that notice, assessee submitted that original return filed by him may be considered as return in response to notice under section 148 of the income tax act. The reasons for reopening were given to the assessee. However assessee submitted before him that assessment has already been completed under section 143 (3) of the income tax act on 24/12/2007 in the hands of the assessee by income tax officer – IIA (3) Lucknow for A Y 2005 – 06 where in this issues was examined. Later on during the course of assessment proceedings the assessee did not furnish the requisite reply and then the Ld. assessing officer passed an assessment order under section 143 (3) read with section 144 read with section 147 of the income tax act 1961 holding that a sum of Rs. 5484520/- which is speculation loss cannot be set off or adjusted against the business income during the year. The reason given for the same is that that the loss has arisen to the assessee as speculative loss which has been mentioned by the assessee himself In assessment proceedings for assessment year 2005 – 06 vide letter dated 20.12.2007 addressed to then assessing officer. Therefore speculative loss cannot be adjusted against the regular business income such loss was disallowed. Consequently the income was assessed at Rs. 9068590/- against returned income of Rs. 3584069/-. The assessee preferred an appeal before the Ld. 1st appellate authority against the order of the Ld. assessing officer. The Ld. CIT (A) vide its order dated 29/09/2010 held that reopening is devoid of essential requisite as per the provisions of section 147 of the income tax act and therefore held to be invalid. On allowability of the set off of speculative loss against the business income he held that though the loss for the assessment year 2005 – 06 was assessed as speculation loss the same is eligible for set of against the business income for assessment year 2006 – 07. Therefore on the merit also he allowed the appeal of the assessee. Revenue being aggrieved by the order of the Ld. CIT- A has preferred an appeal before us raising effectively two grounds of appeal.

4. The 1st ground of appeal of the revenue is that the Ld. CIT – A erred in holding reopening of assessment under section 147 of the income tax act

- tax as invalid while the assessing officer has reopen the case with due application of mind and following the due procedure provided in the act.
5. The Ld. departmental representative submitted that the reopening has been quashed by the Ld. CIT appeal for the reason that the reasons recorded by the assessing officer to reopen the reassessment are not related to the formation of the belief regarding escapement of income. He submitted that original assessment has been completed under the provisions of section 143 (1) of the income tax act therefore the reassessment has been rightly initiated.
 6. The Ld. authorized representative of the assessee relied upon the order of the Ld. CIT appeal and stated that as mentioned in para No. 2 of the order of the Ld. CIT – A the reopening has been rightly quashed.
 7. We have carefully considered the rival contentions. In the present case return has been processed under the provisions of section 143 (1) of the income tax act as stated in the assessment order. In the present case the reopening has been initiated within 4 years of the end of the assessment year. On issue of reopening when the return is processed under section 143 (1) of the income tax act Hon'ble Delhi High Court in case of [2016] 384 ITR 337 (Del) INDU LATA RANGWALA v. DEPUTY COMMISSIONER OF INCOME-TAX has held that Where the return initially filed is processed under section 143(1) of the Act, and an intimation is sent to an assessee, it is not an "assessment" in the strict sense of the term for the purposes of section 147 of the Act. In such event, there is no occasion for the Assessing Officer to form an opinion after examining the documents enclosed with the return whether in the form of balance-sheet, audited accounts, tax audit report, etc. The first proviso to section 147 of the Act applies only (a) where the initial assessment is under section 143(3) of the Act and (b) where such reopening is sought to be done after the expiry of four years from the end of the relevant assessment year. In other words, the requirement in the first proviso to section 147 of the Act being a failure on the part of the assessee "to disclose fully and truly all material facts", it does not apply where the initial return has been processed under section 143(1) of the Act. In view of this we reverse the finding of the Ld. CIT appeal in holding that reopening of the proceeding

is invalid. In the result ground No. 1 of the appeal of the revenue is allowed.

8. Coming to the second ground of the appeal of the revenue where the Ld. CIT – A erred in deleting the addition of Rs. 5484520/- made by the Ld. assessing officer by disallowing brought forward speculative loss. During the assessment year 2005 – 2006 the assessee has shown in the computation of total income speculative loss of Rs. 5484520/- to be carried forward for the next year. The assessment was framed by the Ld. assessing officer for assessment year 2005–06 on 24.12.2007 however in the assessment order there is no reference of the carry forward losses to be set off by the assessee on account of speculation loss suffered in AY 2005- 2006. During the year assessee has set of this speculation loss against the business income of the assessee. The Ld. assessing officer disallowed the claim of the assessee whereas the Ld. CIT appeal allowed the claim of the assessee relying on the decision of the coordinate bench in case of PS Kapoor versus ACIT 29 SOT 587(jaipur) wherein it has been held that loss from derivative transactions on for assessment year 2004 – 05 is not speculative in nature though the provisions of section 43 (5) (d) was inserted by the finance act 2005 w.e.f. forced April 2006 but it is retrospective in application by necessary implication. Therefore it was held therein that the loss claimed by the assessee in derivative transaction is therefore allowable as business loss as the same is not covered by the provisions of section 43 (5) of the income tax act as speculation loss.
9. The Ld. departmental representative submitted that the assessee has himself stated in the previous year that the loss arising to the assessee is in speculation business. Therefore the claim made by the assessee during the year considering the same speculation loss which was determined in last assessment year u/s 143 (3) of the income tax act as business income is incorrect. He further submitted that the loss is not incurred during the year and therefore the decision cited by the CIT – A is not applicable. He therefore vehemently supported the order of the learned assessing officer stating that the loss incurred by the assessee in assessment year 2004 2005, which was determined by the assessee

himself, is not allowable for set off during the year against the business income.

10. The Ld. authorized representative relied upon the order of the Ld. CIT – A and stated that the issue is squarely covered by the decision of the tribunal. He vehemently supported the order of the learned CIT –A.
11. We have carefully considered the rival contentions. It is undisputed that in assessment year 2005 – 06 the assessee has incurred loss of Rs. 5484520/- as speculative loss arising out of the future and option, which were shown by him in the computation of income. We are also fully in agreement with the decision of the coordinate bench in PS Kapoor versus ACIT holding that assessee is eligible to set off the loss which has been incurred by him in assessment year 2005 -2006 which was then classified as speculative. However such set-off is available when the transaction carried by the assessee is eligible transaction as at stated in 43(5)(d). Apparently it could not be demonstrated that such exercise has been done by the Ld. CIT appeal before allowing the appeal of the assessee of the Id AO in AY 2005-06. The provisions of section 43(5)(d) defines eligible transactions as under:-

(ii) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through member or an intermediary, registered under the bye-laws, rules and regulations of the recognised association for trading in commodity derivative in accordance with the provisions of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and the rules, regulations or bye-laws made or directions issued under that Act on a recognised association ; and

(B) which is supported by a time stamped contract note issued by such member or intermediary to every client indicating in the contract note, the unique client identity number allotted under the Act, rules regulations or bye-laws referred to in sub-clause (A), unique trade number and permanent account number allotted under this Act ;

(iii) "recognised association" means a recognised association as referred to in clause (j) of section 2 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952), and which fulfils such conditions as may be prescribed and is notified by the Central Government for this purpose.

Therefore if the transactions are carried out electronically at recognised stock exchange in shares and securities then the assessee is eligible to claim that the loss incurred by it in assessment year 2005 – 06 was not speculative in nature. Hence to determine this aspect we set aside ground

No. 2 of the appeal of the revenue to the file of the learned assessing officer to determine whether loss incurred by the assessee is satisfying the conditions of eligible transactions or not such as whether transactions are carried out at recognised exchange for the respective trade or not. Needless to say that it is for the assessee to establish that the transactions carried out by him on which the losses are incurred are eligible transactions by production of trading notes of exchange, and therefore Ld. Assessing officer is also directed to grant adequate opportunity of hearing and adducing evidence in support of the claim to the assessee. In the result ground No. 2 of the appeal of the revenue is allowed with above direction.

12. In the result appeal of the revenue is partly allowed.

Order pronounced in the open court on 07/02/2017.

-Sd/-

(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 07/02/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi