

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA 'B' BENCH, KOLKATA****Before Shri P.M. Jagtap, Accountant Member and  
Shri S.S. Viswanethra Ravi, Judicial Member****I.T.A. No. 759/KOL./2017  
Assessment year: 2012-2013**

***M/s. Sadhana Stocks & Securities Pvt. Limited,.....Appellant  
Flat No. 2701/2702, Raheja Atlantis Society,  
Ganpatrao Jadam Marg, Lower Parel,  
Mumbai-400 013  
[PAN: AADCS 5139 E]***

***-Vs.-***

***Principal Commissioner of Income Tax-4, Kolkata,.....Respondent  
Aayakar Bhawan,  
P-7, Chowringhee Square,  
Kolkata-700 069***

**Appearances by:**

*Shri Rajesh S. Shah, C.A., for the assessee  
Md. Usman, CIT, D.R., for the Department*

Date of concluding the hearing : October 12 , 2017

Date of pronouncing the order : December 22, 2017

**O R D E R****Per Shri P.M. Jagtap, Accountant Member :**

This appeal filed by the assessee is directed against the order of Id. Principal Commissioner of Income Tax, Kolkata-IV, Kolkata dated 22.02.2017 passed under section 263 of the Income Tax Act, 1961.

2. The assessee in the present case is a Company, which is engaged in the business of processing and exports of sea-food items. The return of income for the year under consideration was filed by it on 29.09.2012 declaring loss of Rs.66,29,010/-. In the assessment completed under section 143(3) vide an order dated 02.03.2015, the loss as declared by the assessee-company in its return of income was accepted by the Assessing Officer.

3. Subsequently the records of the assessment in the case of the assessee for the year under consideration was examined by the Id.

Principal CIT and on such examination, he found the order of assessment passed by the Assessing Officer under section 143(3) as erroneous as well as prejudicial to the interest of the revenue. He accordingly issued a show-cause notice under section 263 to the assessee-company pointing out the said error as under:-

*"It was observed that the assessee derived its main income from Trading in shares. Other sources of income were Interest Brokerage. Dividend etc. Assessee, inter alia, declared Rs.1,45,405/- as Speculation profit under other income. In profit & Loss account the assessee debited Rs.1,75,12,686/- (included in schedule-13/14) under the head "Derivative Loss". To determine income from business, the assessee treated this loss "other than speculation" and the same was accepted in assessment. Hence actual loss from speculation business was Rs.1,73,67,281/- (1,75,12,686 - 1,45,405). As per the decision of the Honorable Delhi High Court in CIT vs. DLF Commercial (2013) 35 taxman 280]. loss in equity derivative is to be treated as speculative loss. Hence to determine income from business, this "Derivative Loss" was required to be disallowed".*

4. In reply to the notice issued by the ld. Principal CIT under section 263, the following explanation was offered by the assessee in writing:-

*"In the said assessment the Learned Officer allowed Derivative Loss of Rs.1,75,12,686/- against other Business Profit. It may be stated that the Assessing Officer has rightly interpreted the provision of Section 43(5) and relevant provisions of S. 73. The decision of the AO is supported number of judgments available at that time. Therefore the DCIT has rightly allowed the said loss. However, now your honour is proposing to revise under section 263 of the Act.*

*Before doing it, we would like to invite your attention to the recent Calcutta High Court decision (which is jurisdiction court of the assessee) in the case of Asian Financial Services Limited v. Commissioner of Income-tax-3, Kolkata[2016] 70 taxmann.com 9 (Calcutta) has held that Derivative Loss can be set off against other loss. The copy of the said judgment is attached herewith for your ready reference. It may also be stated that in the said judgment the decision of DLF Commercial which has been referred in our notice has been considered and held that Derivate Loss*

*is different from Share Loss and hence same can be adjusted against other profit.*

*In view of the above lie would request you to drop the proceedings initiated under Section 263 of the act. Conditions of s.263 are not fulfilled since there is no order which is prejudicial to the interest of revenue since there is no loss of revenue.*

*We would further like to state as under:-In this respect your attention is drawn to the provisions of section 43(5) of the Act-*

*43(5) "speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shores, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scraps:*

*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 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 ore cognized stock exchange, shall nor he deemed to be a speculative transaction.*

*[Explanation. -For the purposes of this clause, 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 recognized 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) "recognized stock exchange" means a recognized 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 23 by the Central Government for this purpose.]*

*In this respect your attention is also drawn to the following judgments.*

*G.K. Anand Brpos. Buildwell (P) Ltd. -vs.- ITO 34 SOT 439 (2009)*

*wherein it was held Whether loss arising in future and option transaction carried out in a recognized stock exchange is to be treated as a business loss and not as loss in speculation business held yes-*

*The similar findings have been appreciated in the following case laws:*

*Seema Jain vs. ACIT 6 ITR (Trib) 488 (Del)*

*"profit or loss from derivative trading will not be speculative profit or loss, therefore, the same will be eligible to be set off against the business income carried out by the assessee"*

*RBK Securities (P) Ltd. vs. ITO 118 TTJ (Mum) 465*

*"Dealing in derivatives is a separate kind of transaction which does not involve any purchase and sale of shares and*

*therefore loss on account of F&O transactions cannot be treated as speculative loss".*

*Dy. CIT -vs.- SSKL Investors Services (P) Ltd. (2008) 113 TTJ(Mumbai) 511-*

*"Dealing in derivatives is a separate kind of transaction which does not involve any purchase and sale of shares and therefore loss on account of F&O transactions cannot be treated as speculative loss".*

*In view of the above facts and the position of law in particularly considering the Calcutta High Court Decision, it is prayed that the proceedings initiated under section 263 may be dropped".*

5. The explanation offered by the assessee as above was not found acceptable by the Id. Principal CIT and he proceeded to revise the order of assessment passed by the Assessing Officer under section 143(3) by exercising his powers under section 263 for the following reasons given in paragraphs no. 4 and 5 of his impugned order:-

*"4. The power of revision by the CIT u/s 263 of the Act is very wide and it is in the nature of supervisory jurisdiction. The power u/s 263 can be exercised even in cases where the issue is debatable and such power is not comparable with the power of rectification of mistake u/s 154 or the Income Tax Act. It is well settled that incorrect assumption of facts or application of law satisfies the requirement of law i.e. order being erroneous & prejudicial to the interest of revenue. The order passed by the AO without application of mind or order showing apparent error of reasoning or the order where the A.O. simply accepts where the assessee stated in his return of income and fails to make the enquiries which are called for in the facts and circumstances of the case will also call for intervention u/s 263 of the Act by the CIT/Pr. CIT. It is a trite law that the disclosure of facts by the assessee in the return of income and for in the course of assessment proceedings cannot give immunity from revisional jurisdiction of the CIT/Pr. CIT u/s 263. The above position of the law has been reiterated by the Hon'ble Supreme Court in various decisions including that of Rampyari Devi Saraogi Vs. CIT (1968) 67 ITR 84 (se), Tara Devi Agarwal vs. CIT(1973) 88 ITR 323 (SC). Malabar Industries Co. Ltd vs. CIT (1991) 198 ITR 611 (Kerala) which was affirmed by Supreme Court in 243 ITR 83.*

5. *After having considered the position of law and facts and circumstances of the instant case, the assessment order passed by the A.O. is found to be erroneous and prejudicial of the interest of revenue because the assessment order has been passed and relief has been allowed without making inquiries or verification into the claim of the assessee company which should have been made by the Assessing Officer. Hence I am of the considered opinion that the assessment order passed by the' A.O. is erroneous in so far as it is prejudicial to the interest of revenue in accordance with the Explanation 2 below section 263 (I) of the Act. As a result, the assessment order passed by the AO is set aside in respect of the point stated in Para-2 above. The AO is directed to initiate fresh assessment proceedings & carry out necessary enquiries/verification & provide reasonable opportunity to the assessee company to produce documents & evidences which it may chose to rely upon for substantiating its own claim. Thereafter a fresh assessment order may be passed in accordance with the relevant provisions of law and in the light of the decision of the jurisdictional High Court in Asian Financial Services Ltd.-vs.CIT(2016) 70 taxmann.com 9(Calcutta). However, it is also made clear that SLP has been granted to the Revenue against the aforementioned order of High Court on 19-10-2016 in SLP No.19120 of 2016 & reported in (2016) 75 Taxmann.com 68(SC)/2016 243 Taxman 147 (SC). Hence, the AO is directed to take the status of appeal mentioned above into consideration while reframing the assessment”.*

Aggrieved by the order of the Id. Principal CIT passed under section 263, the assessee has preferred this appeal before the Tribunal.

6. The Id. counsel for the assessee contended that even though the order of assessment passed by the Assessing Officer under section 143(3) was found to be erroneous by the Id. Principal CIT in allowing the claim of the assessee for derivative loss on merit as mentioned in the notice issued under section 263, he finally revised the order of the Assessing Officer on the ground of alleged lack of enquiry by the Assessing Officer. He contended that the assessee-company in the written reply filed in response to the notice under section 263 had made a detailed submission to show that the claim of the assessee for derivative loss was rightly

allowed by the Assessing Officer by treating the same as non-speculation loss on merit, but no finding or conclusion was given by the Id. Principal CIT on the submission made by the assessee so as to show how the order of assessment passed by the Assessing Officer was erroneous on this issue on merit. He contended that he simply set aside the order of the Assessing Officer on this issue on the ground of lack of enquiry without even pointing out as to what was the enquiry or verification the Assessing Officer must have done which he failed to do. He contended that it is not permissible under section 263 for the Id. Principal CIT to direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed by him under section 143(3) was erroneous or not. In support of this contention, he relied on the decision of Hon'ble Delhi High Court in the case of ITO- vs.- D.G. Housing Projects Limited [343 ITR 329 ].

7. The Id. counsel for the assessee further submitted that the issue relating to the assessee's claim for derivative loss not being the speculation loss was examined by the Assessing Officer during the course of assessment proceedings and there was no lack of enquiry on the part of the Assessing Officer as alleged by the Id. Principal CIT in his impugned order passed under section 263. In this regard, he invited our attention to the relevant schedule forming part of the Profit & Loss Account of the assessee-company where the derivative loss was separately shown by the assessee and pointed out from the letter dated 27.01.2015 (copy at page no. 43 of the paper book) issued by the Assessing Officer during the course of assessment proceedings, that the assessee was called upon by the Assessing Officer to furnish a detailed note on derivative loss. He also invited our attention to the letter dated 12.02.2015 (copy at page no. 44 of the paper book) to show that the note on derivative loss as required by the Assessing Officer was duly furnished by the assessee. He contended that the issue relating to the assessee's claim for derivative loss thus was duly examined by the Assessing Officer during the course of assessment proceedings and after having satisfied himself, the same was accepted by the Assessing Officer as non-speculative loss. He contended that there

was thus no error in the order of assessment passed by the Assessing Officer as alleged by the Id. Principal CIT in his impugned order calling for revision under section 263.

8. The Id. D.R., on the other hand, submitted that the amount of derivative loss was not claimed by the assessee separately but the same was shown under the head "purchase/direct expenses". He submitted that the issue as to whether the derivative loss claimed by the assessee was in the nature of speculative loss or not was required to be examined by the Assessing Officer in the light of the provision of section 43(5) as well as Explanation to section 73 and since it was not done by the Assessing Officer, the order of assessment made by him was erroneous in so far as it is prejudicial to the interest of the revenue, as rightly held by the Id. Principal CIT. He contended that there is nothing on record to show that any query was specifically raised by the Assessing Officer on this issue and it was thus a case of lack of enquiry on the part of Assessing Officer which made the order passed by him under section 143(3) erroneous as well as prejudicial to the interest of the revenue.

9. We have considered the rival submissions and also perused the relevant material available on record. It is observed that in the assessment completed under section 143(3), the claim of the assessee of derivative loss being non-speculation loss was accepted by the Assessing Officer. The records of the said assessment was subsequently examined by the Id. Principal CIT and on such examination, he held that the said derivative loss was liable to be treated as speculative loss by relying on the decision of the Hon'ble Delhi High Court in the case of CIT -vs.- DLF Commercial [(2013) 35 taxmann 280]. Accordingly he treated the order of assessment made by the Assessing Officer as erroneous on this issue on merit as is clearly evident from the notice issued by him under section 263, the contents of which are extracted hereinabove in paragraph no. 3. In reply filed to the notice issued by the Id. Principal CIT under section 263, a detailed submission was made by the assessee to show that there was no error in the order of the Assessing Officer in accepting its claim of

derivative loss as non-speculation loss on merit. In this regard, reliance was placed by the assessee on the decision of the Hon'ble Calcutta High Court in the case of Asian Financial Services Limited -vs.- CIT [70 taxmann.com 9 (Calcutta)], wherein it was held that derivative loss can be set off against other profits. It was also brought to the notice of the Id. Principal CIT by the assessee that the said decision was rendered by the Hon'ble Jurisdictional High Court after considering the decision of the Hon'ble Delhi High Court in the case of DLF Commercial (supra), which was referred to in the notice issued under section 263. Reliance was also placed by the assessee on some other judicial pronouncements as well as the relevant provisions of section 43(5) in support of its contention that dealing in derivative was separate kind of transaction, which did not involve any purchase and sale of shares and, therefore, the derivative loss could not be treated as speculative loss. It is observed that although the Id. Principal CIT in his impugned order passed under section 263 reproduced the submission made by the assessee, he did not give any finding or observation thereon and without arriving at any conclusion to show how the order of Assessing Officer was erroneous on the issue on merit, he simply set aside the same on the ground that the claim of the assessee was accepted by the Assessing Officer without making enquiries or verification, which should have been made by him. In this regard, he relied on Explanation 2 to section 263 inserted in the Statute by the Finance Act, 2015 w.e.f. 01.04.2015. As per the said Explanation, an order passed by the Assessing Officer shall be deemed to be erroneous in so far as prejudicial to the interest of the revenue for the purpose of section 263 if, in the opinion of the Id. Principal CIT or Id. CIT, the same is passed without making enquiries or verification, which should have been made. It is observed that in the case of Sterling Biotech Ltd.-vs.- Principal CIT 9ITA No. 2750/MUM/2015 dated 29.06.2016), Mumbai Bench of this Tribunal has already considered the effect of Explanation 2 to section 263. In the said case, the contention raised on behalf of the assessee was that the Id. Principal CIT, before holding an order to be erroneous should have conducted necessary enquiries or verification in order to show that

the finding given by the Id. CIT is erroneous and the view taken by the Assessing Officer is unsustainable in law and this contention of the assessee was found to be duly supported by law interpreted by the various Hon'ble High Courts including Hon'ble Delhi High Court. Reliance in this regard was placed on behalf of the Revenue on Explanation 2 to section 263 inserted by the Finance Act, 2015 w.e.f. 1<sup>st</sup> April, 2015. The Tribunal, however, did not find merit in the same by holding that the said Explanation can be said to have overridden the law interpreted by the Hon'ble Delhi High Court. It is observed by the Tribunal that if the revenue's contention is accepted, the Id. CIT can find a fault with each and every assessment order without conducting any enquiry or verification in order to establish that the assessment order is not sustainable in law and order for revision. It was also observed that the Id. CIT then can force the Assessing Officer to conduct the enquiry in the manner referred by him prejudicing the independent application of mind of the Assessing Officer, which could not be the intention of the legislature inserting Explanation 2 to section 263. It was held that it could lead to unending litigation and there would not be any point of finality in the legal proceeding.

10. In the case of ITO -vs.- D.G. Housing Projects Limited (supra) cited by the Id. counsel for the assessee, the Hon'ble Delhi High Court has held that in cases of wrong opinion or finding on merits, the Id. CIT has to arrive at the conclusion and himself decide that the order is erroneous by conducting necessary enquiry, if required, before order under section 263 is passed. It was held that the Id. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. It was further held that in some cases, the Id. CIT can also show and establish that the facts on the record or inference drawn from the facts on record per se justified and mandated further enquiry or investigation, but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, un-ambiguous and not debatable and the matter cannot be remitted for a fresh decision to the Assessing

Officer to conduct further enquiries. It was held that in such matters, to remand the matter/issue to the Assessing Officer would imply and mean that the ld. CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide this aspect/question.

11. It is observed that the Coordinate Bench of this Tribunal has recently considered a similar issue in the case of Infinity Infotech Park Limited [58 ITR (Trib) 486]. In the said case, there was no allegation in the show-cause notice issued under section 263, like in the present case, that there was a failure on the part of the Assessing Officer to make proper and adequate enquiry before completing the assessment and the allegation was that the Assessing Officer has formed a wrong opinion or findings on merit. In reply to the notices issued under section 263, the assessee filed a written reply on January 12, 2017. On the very same day, the ld. Commissioner passed an order under section 263 setting aside the order of the Assessing Officer on the ground of lack of enquiry. In these facts and circumstances involved in the case of Infinite Infotech Park Ltd. (supra), the Coordinate Bench of this Tribunal held that the ld. CIT before exercising jurisdiction under section 263 of the Act for setting aside the order of the Assessing Officer ought to have given his own specific finding on the submission made by the assessee and without doing so, the ld. CIT could not exercise jurisdiction under section 263. It was also held by the Tribunal that the ld. CIT was not justified to invoke jurisdiction under section 263 of the Act on the ground of lack of enquiry by the Assessing Officer without putting the assessee on notice. Reliance in support of this conclusion was placed by the Tribunal on the decision of the Hon'ble Delhi High Court in the case of ITO -vs.- D.G. Housing Projects Limited (supra) and the order passed by the ld. CIT under section 263 was quashed.

12. In the present case, the relevant facts involved are materially similar to the case of Infinite Infotech (supra), inasmuch as, notice under section 263 was issued by the ld. Principal CIT pointing out the error in

the order of the Assessing Officer in treating the derivative loss as non-speculation loss and in a reply filed by the assessee to the said notice, a detailed submission was made by the assessee to show as to how its claim for derivative loss as non-speculation loss was rightly accepted by the Assessing Officer on merits. The Id. Principal CIT however passed the impugned order under section 263 without giving any finding or conclusion as to how the order of the Assessing Officer was erroneous on merits in respect of the issue raised in the notice issued under section 263 and set aside the same on the ground of lack of enquiry by the Assessing Officer without even putting the assessee on notice. In our opinion, the ratio of the decision rendered by the Coordinate Bench of this Tribunal in the case of Infinite Infotech Park Ltd. (supra) thus is squarely applicable in the present case and applying the same, we hold that the impugned order passed by the Id. Principal CIT under section 263 is liable to be quashed. We order accordingly and allow this appeal of the assessee.

**13. In the result, the appeal of the assessee is allowed.**

Order pronounced in the open Court on 22<sup>nd</sup> day of December, 2017.

**Sd/-**  
**(S.S. Viswanethra Ravi)**  
**Judicial Member**

**Sd/-**  
**(P.M. Jagtap)**  
**Accountant Member**

**Kolkata, the 22<sup>nd</sup> day of December, 2017**

- Copies to :*
- (1) **M/s. Sadhana Stocks & Securities Pvt. Limited,**  
**Flat No. 2701/2702, Raheja Atlantis Society,**  
**Ganpatrao Jadam Marg, Lower Parel,**  
**Mumbai-400 013**
  - 2) **Principal Commissioner of Income Tax-4, Kolkata,**  
**Aayakar Bhawan,**  
**P-7, Chowringhee Square,**  
**Kolkata-700 069**
  - (3) **CIT- , Kolkata,**
  - (4) **The Departmental Representative**
  - (5) **Guard File**  
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*By Order*

*Senior Private Secretary,*  
*Head of Office/DDO,*  
*Income Tax Appellate Tribunal*  
*Kolkata Benches, Kolkata*