

**IN THE INCOME TAX APPELLATE TRIBUNAL “B”
BENCH, MUMBAI**

**BEFORE HON’BLE SH. G. S. PANNU, VP &
HON’BLE SH. SANDEEP GOSAIN, JM**

आयकरअपीलसं./ I.T.A. No. 3572/Mum/2013
(निर्धारणवर्ष / Assessment Year: 2009-10)

M/s Mesh Stock Brokers Pvt. Ltd. 701, Samrock Apartments Juhu Lane, Andheri (w), Mumbai-400058	बनाम/ Vs.	JCIT 4(3) (OSD) R. No. 649, 6 th floor, Aayakar Bhavan, Mumbai-400020
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAECM5212F		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Sanjay Parikh, AR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri T. A. Khan, DR

सुनवाईकीतारीख/ Date of Hearing	:	20.07.2018
घोषणाकीतारीख / Date of Pronouncement	:	12/10/2018

आदेश / ORDER

Per Sandeep Gosain, Judicial Member:

The present Appeal filed by the assessee is against the order of Ld. CIT (Appeal) – 8, Mumbai dated 19.03.13 for AY 2009-10 on the grounds mentioned herein below:-

- 1. The learned CIT(A) has erred in not appreciating the nature of arbitrage business carried on by the appellant and applying explanation to section 73 in respect of share trading, which otherwise would be part and parcel of arbitrage activity.*
- 2. The learned CIT(A) has erred in not accepting the plea of the appellant of modifying the revised return ! to the extent ignoring Rs 97,38,113/- as speculative loss and treating the same as a part of the arbitrage j activity.*
- 3. The learned CIT(A), as a consequence of the treatment of share trading as speculative in terms of \ explanation to section 73, has erred in disallowing expenses relating to the same being STT of Rs. 32,44,048/- and other expenses of Rs. 28,90,831/-*
- 4. The appellant craves leave to add, to alter, to withdraw or to amend any or all the ground of appeal on or before the hearing of the appeal.*

2. The brief facts of the case are that assessee filed its return of income on 24/9/2009 declaring total of Rs.11,99,81,910/-. The Assessing Officer issued notice u/s. 143(2). Thereafter, the assessee filed a revised return on 9/7/2010 declaring income at

Rs. 1,57,34,871/-. The Assessing Officer issued notice u/s. 142(1) and after hearing the assessee assessed the income of the assessee u/s. 143(3) at Rs. 2,16,77,100/- for the A.Y 2009-10. During the course of assessment proceedings, the Assessing Officer observed that the assessee has shown loss in share trading of Rs 1,06,18,0287- which was set off against the profit in futures and options of Rs. 15,63,62,230/- brokerage income of Rs. 68,26,768/- and speculation profit of Rs. 71,27,563 thus showing Rs. 1,19,81,9107- as income in the original return. Thereafter in revised return of income, the assessee treated the share trading loss as speculation loss after setting off against speculating income carried forward as speculation loss of Rs. 34,90,4657- revising the income to Rs. 1,72,3707-. During assessment proceedings, the appellant again claimed that the share trading was in the nature of arbitrage and therefore should be treated as non speculative transaction u/s 43(5) of the Act. But the claim of the assessee was not accepted by the AO.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties *dismissed* the appeal of the assessee.

Now before us, the assessee has preferred the present appeal by raising the above grounds.

Ground No. 1 to 3

3. Since all the grounds raised by the assessee are inter connected and inter related and relates to challenging the order of Ld. CIT(A) in not appreciating the nature of arbitrage business carried on by the assessee and applying explanation to section 73 in respect of share trading, which otherwise would be part and parcel of arbitrage activity, therefore we thought it fit to dispose of the same by this common order.

4. Ld. AR appearing on behalf of the assessee submitted before us that the present case is fully covered by the order of Hon'ble ITAT in ITA No. 3654 & 3660/Mum/14 for AY 2009-10 in the case of M/s J. M. Financial Services Ltd. Vrs. JCIT, wherein the identical grounds raised in the present appeal have already been decided on merits.

5. On the other hand, Ld. DR fairly agreed to the contention of Ld. AR that the issue is covered in favour of assessee.

6. We have heard both the parties and we have also perused the material placed on record as well as the orders passed by revenue authorities. We find that the identical ground has already been decided by the Coordinate Bench of Hon'ble ITAT in ITA No. 3654 & 3660/Mum/14 for AY 2009-10 in the case of M/s J. M. Financial Services Ltd. Vrs. JCIT. The operative portion of the order of Hon'ble ITAT passed in ITA No. contained in para no. 21 & 22, which is reproduced below:-

21. We have considered the rival contentions. In this case, the peculiarity of the business of the assessee is that the assessee so manages his transactions of sale and purchase in shares in cash segment and in future segment that the final outcome will be a profit. The transactions of the assessee, therefore, cannot be segregated to arrive at profit and loss in both these transactions independently or separately. The nature of the business of the assessee is such that the transactions of the assessee in both segments are part of composite business of the assessee and the

transactions are so managed that the resultant figure will be a profit. We, therefore, do not find any justification on the part of the lower authorities to interpret the provisions of the Income Tax Act to the disadvantage of the assessee and to segregate the transactions in cash and future segment which, in our view, will be against the spirit of the taxation laws. Even otherwise the case of the assessee is squarely covered by the decision of the Hon'ble Delhi High Court in the case of "CIT vs. DLF Commercial Developers" (supra) wherein the Hon'ble Delhi High Court has categorically held that in terms of explanation to section 73, by all accounts, derivatives are based on stocks and shares which fall squarely within explanation to section 73 and therefore loss from sale-purchase of such derivatives would be speculative loss. The Hon'ble Delhi High Court has, thus, held that though under provisions of section 43(5), the transactions in derivatives at certain stock exchanges are deemed to be non-speculative, however, as per the explanation to section 73 for the purpose of computation of business loss the derivative transactions squarely fall within the scope of explanation to section 73. Under the circumstances, both the transactions i.e. the transactions in the derivative and transactions in the cash segment can be treated as speculative transactions as per explanation

to section 73 and hence the profit or loss against both the segments can be adjusted or set off against each other.

22. Even otherwise as discussed above, the peculiarity of the business of the assessee is such that the transactions carried out by the assessee in cash segment and in future segment cannot be segregated. The business of the assessee survives on the ultimate resultant figure arrived at after setting off/adjusting of the profit and loss from each segment. It cannot be said that the transactions in each segment done by the assessee are independent of each other. Before parting we would like to further add that certain exceptions have been carved out under section 43(5) vide which certain transactions in derivative named as 'eligible transactions,' done on a recognized stock exchange, subject to fulfillment of certain requirements, are deemed to be nonspeculative. The said provisions have been inserted in the Act for the benefit of the assessees keeping in view the fact that in such type transactions on recognized stock exchange, the chance of manipulating and thereby adjusting the business profits towards speculative losses by the assessee is negligible because such transactions are done on recognized stock exchange and there are less chances of manipulation of figures of profits and losses. These

provisions have been inserted for the benefit of the assessee so that the assessee may be able to set off and adjust his profit and losses from derivatives in commodities against the normal business losses. These provisions are intended to ease out the assessee from the difficulties faced due to the stringent provisions separating the speculative transactions from the normal transactions. However, these exclusions given to the assessee cannot be allowed to be so interpreted to the disadvantage of an assessee so as to give it a different meaning and thereby denying the assessee the set off of otherwise eligible business loss from one segment as against the other segment, especially when the activity done by the assessee is a composite activity and profit and loss in one segment not only depends but the very transaction is done taking into consideration not 'expected' but certain future profit or loss in other segment.

After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and Hon'ble ITAT as mentioned above, we are of the view that in the present case the matter was remanded back to the file of ACIT for verifying the facts that the transactions entered into by the

assessee constitute arbitrage operation or not. The remand report confirms the factual aspect of the transaction as to purchase of shares in cash segment is coupled with simultaneous sale in the F & O segment and vice versa. The transaction in cash segment and future segment are part of single transaction and both the transaction are hedged transaction with each other, therefore two separate tax treatment cannot be given to two legs of an arbitrage transaction. We find that the identical issues have already been decided by the Hon'ble ITAT in ITA No. 3654 & 3660/Mum/14 for AY 2009-10 in the case of M/s J. M. Financial Services Ltd. Vrs. JCIT (supra). Therefore, respectfully following the decision of the Coordinate Bench of Hon'ble ITAT and in order to maintain judicial consistency, we apply the same findings in the present case which are applicable *mutatis mutandis* in the present case. Therefore, we order accordingly.

Ground No. 4

7. This ground is general in nature, thus requires no specific adjudication.

8. In the net result, the appeal filed by the assessee stands **Partly allowed** with no order as to cost.

Order pronounced in the open court on 12 October, 2018

Sd/-
(G. S. Pannu)
Vice President

Sd/-
(Sandeep Gosain)
Judicial Member

मुंबई Mumbai;दिनांक Dated : 12.10.2018
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार
(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai