

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.4191/Del./2012
(ASSESSMENT YEAR : 2009-10)**

DCIT, Circle 11 (1),
New Delhi.

vs. M/s. Flora & Fauna Housing and
Developers Pvt. Ltd.,
194 – A, Pocket – C,
Siddharth Extension,
New Delhi – 110 014.

(PAN : AABCF0441Q)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri G.C. Srivastava, Advocate
Shri Suvinay K. Dash, Advocate
Shri Parichay Solanki, CA

REVENUE BY : Ms. Ashima Neb, Senior DR

Date of Hearing : 15.07.2019

Date of Order : 22.07.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, DCIT, Circle 11 (1), New Delhi (hereinafter referred to as the 'assessee') by filing the present appeal sought to set aside the impugned order dated 28.05.2012 passed by the Commissioner of Income-tax (Appeals)-XIII, New Delhi qua the assessment year 2009-10 on the grounds inter alia that :-

“1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to treat derivative trading loss as business loss as per provisions of clause (c) and (d) of subsection (5) of section 43 and also allowed to set off the same against other business income.

2. The learned CIT(A) further erred in not appreciating the fact that Explanation to section 73 of the I.T. Act can override the provision of section 43(5) of the LT. Act, which is clearly attracted in assessee's case.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessee company is into the business of distribution of Alcoholic Liquor. Assessment was framed for AY 2009-10 at the loss of (-) Rs.2,08,52,679/- on Future & Option (F&O) derivative transactions as speculative loss and disallowance of set off of such loss against business income of the assessee. Assessing Officer (AO) has treated trading in derivative as speculation in nature and loss of derivatives trading of Rs.2,08,52,679/- has not allowed to be set off against the business income from the distribution of Alcoholic Liquor rather allowed the same to be carried forward for adjustment against speculative profit, if any derived in the subsequent years and thereby made an addition on account of speculation of loss in share trading at Rs.2,08,52,679/-.

3. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has partly allowed the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Ld. DR for the Revenue challenging the impugned order contended inter alia that the Id. CIT (A) has erred in trading loss on F&O derivative trading as business loss and allowing the same to be set off against the profit earned by the assessee from other business income derived by the assessee from distribution and trading of Alcoholic Liquor; that section 73 Explanation 2 is a deeming provision which overrides section 43(5)(c) and (d); that the assessee company sold certain shares then purchased the same shares for the same price and artificial loss has been created which no prudent businessmen will do and relied upon the decision rendered by the *Hon'ble High Court of Madhya Pradesh in CIT-I, Indore vs. Intermetal Trade Ltd. (2006) 285 ITR 536 (MP)*.

6. However, on the other hand, Id. AR for the assessee to repel the arguments addressed by the Id. DR for the Revenue contended

inter alia that the AO has relied upon the decisions rendered prior to the amendment made by Finance Act, 2005 w.e.f. 01.04.2006 which deals with trading in derivatives only; that section 73 Explanation 1 relied upon by the Id. DR for the Revenue does not talk of F&O and relied upon the decision rendered by Hon'ble Bombay High Court in *CIT, City 4 vs. HSBC Securities & Capital Markets India (P.) Ltd. (2012) 23 taxmann.com 377 (Bom.)* and coordinate Bench of the Tribunal in case of *ITO vs. M/s. Emperor International Ltd. in ITA No.2181/Del/2012 order dated 27.05.2015*. Ld. AR for the assessee also relied upon the impugned order passed by the Id. CIT (A).

7. Undisputedly, the assessee company has sold out derivative trading in shares during the year under assessment as under :-

<i>Name of scrip</i>	<i>Date of purchase</i>	<i>No. of shares</i>	<i>Amount (Rs.)</i>	<i>Date of sale</i>	<i>No. of shares</i>	<i>Amount</i>
	23.01.09	77,625	13,41,77,064	15.01.09	65,025	11,64,41,055
	13.02.09	29,400	5,71,39,851	19.01.09	12,600	2,49,91,596
	16.02.09	44,550	8,90,24,243	30.01.09	62,025	9,96,84,099
	24.02.09	2,400	38,40,960	02.02.09	14,325	2,22,93,231
	<i>Total</i>	<i>1,53,975</i>	<i>28,41,82,218</i>		<i>1,53,975</i>	<i>26,34,10,031</i>

8. In the backdrop of the aforesaid facts and circumstances of the case, arguments addressed by the Id. Authorized Representatives of the parties to the appeal, order passed by the Revenue authorities and case laws relied upon, the sole question arises for determination in this case is :-

“as to whether transaction of F&O derivative trading are covered under clause (c) & (d) of section 43(5) of the Act and such transactions if carried out in recognised stock exchange are not to be treated as speculative transaction?”

9. It is the case of the assessee that assessee company has made trading of F&O derivatives through M/s. DB (International) Brokers Ltd., Gurgaon, a branch of National Stock Exchange for doing F&O transaction is covered under CBDT Circular No.2/2006 dated 25.01.2006. Assessee company has brought on record entire details and contract notes of transaction done in F&O derivative trading before AO along with copies of ledger accounts running with the brokers to supports its contentions.

10. Ld. CIT (A) decided the issue in question in favour of the assessee by relying upon the decision rendered in ***Smt, Seema Jain vs. ACIT 6 ITR (Trib) 488 (Del.)*** wherein it is held that the trading in derivatives through a recognised stock exchange w.e.f. 01.04.2006 shall not be deemed to be speculative trading. In the instant case, National Stock Exchange was recognised as stock exchange by virtue of the CBDT Circular No.2/2006 dated 25.01.2006. Similarly, in case cited as ***G.K. Anand Bros. Buildwell (P.) Ltd. vs. ITO (2009) 34 SOT 439 (Delhi)***, the issue

in controversy has been decided in favour of the assessee by returning following findings:-

“Section 43 (5) defines ‘speculative transaction’ which means a transaction in which a contract for the purchase or sale of any commodity including stocks and shares is periodical or ultimately settled otherwise than by the actual delivery or the transfer of commodity or scrips. Proviso below section 43 (5) carves out exceptions to section 43 (5). AS per clause (d) of the said proviso “an eligible transaction in respect of trading in derivatives referred to in the Securities Contracts (Regulation) Act, 1956 carried out in a recognized stock exchange shall not be deemed to be a speculative transaction”. Clause (d) in the proviso was inserted by the Finance Act, 2005 with effect from 1-4-2006. Therefore, if a transaction falls within clause (d) of the proviso it will not be deemed to be a speculative transaction in respect of transaction pertaining to the assessment year 2006-07. Under clause (d) of the proviso, a transaction is not a speculative transaction provided it is an eligible transaction within the meaning of clause (i) of the Explanation and it is carried on at the recognized stock exchange as explained in clause (ii) of the said Explanation below proviso to section 43(5)(d). The recognized stock exchange means a recognised stock exchange as notified by the Central Government for this purpose. Therefore, even if the notification is from 25-1-2006 as per clause (d) inserted, the same will apply to all the transactions in relation to the assessment year 2006-07 and onwards. Clause (d) does not mention that unless the recognized stock exchange is notified, the transaction will not be deemed to be a speculative transaction. The power to notify the stock exchange is granted under the statute and, hence, once the recognized stock exchange is notified, the same will apply in respect of all eligible transactions carried out in relation to the financial year relevant to the assessment year 2006-07 and onwards. The notification dated 25.1.2006 is by way of a subordinated legislation but cannot override the principal legislation enacted by the Parliament. It only clarifies but will not override unless statutorily so prescribed. Since there was no dispute to the fact that the transactions, in the instant case, in future and option segment were the eligible transactions carried out in a recognized stock exchange, loss in such transactions could not be deemed to be loss in the speculation business. Therefore, the loss-in-question was to be treated as a business loss and not as loss in speculation business.”

11. In the case of *R.B.K. Securities (P.) Ltd. vs. ITO 118 TTJ (Mum.) 465*, coordinate Bench of the Tribunal also held that dealing in derivatives is a separate kind of transaction which does not involve purchase and sale of shares and as such loss on account of derivative trading cannot be treated as speculative loss to the assessee.

12. In case of *Gajendra Kumar T. Agarwal vs. ITO (2011) 11 taxmann.com 231 (Mum.)*, coordinate Bench of the Tribunal also decided the identical issue in favour of the assessee by returning the following findings :-

“Section 43(5), read with sections 72 and 73, of the Income-tax Act, 1961 – Speculative transactions – Assessment year 2006-07 – Whether profits and gains of business, for purpose of carry forward and set off of losses, as classified in two baskets (i) speculation business and (ii) non-speculation business – Held, yes – Whether two categories are mutually exclusive and losses incurred of each category can only be set off against profits of same category – Held, yes – Whether only purpose of segregating losses of speculation and non-speculation business is to ensure that losses incurred by assessee in speculation business, which lack sufficient transparency, and leave scope for generating fictitious losses through artificial transactions or shifting of incidence offrom one person to another, are not allowed to be set off against profits of another business other than a similar business – Held, yes – Whether in view of amendment made in section 43 (5) with effect from 1-4-2006 losses incurred in derivative trading are held to be eligible for being set off against normal business profits, as derivative trading itself is treated as a non-speculation business, and losses of any non-speculative businesses can be adjusted against profits of any non-speculative business – Held, yes – Whether by way of said amendment Legislative did not intend to take away brought forward losses of dealing in derivatives or make them ineligible for being set off against profits of same business in subsequent years – Held, yes – Whether whatever may be characterization of income for purpose of intra assessment were set off in relevant assessment year, and irrespective of fact that such a characterization has

achieved finality in assessment, losses and profits from dealings in derivatives must be characterized on a uniform basis in assessment year in which set off is claimed – Held, yes – Whether viewed in this perspective classification of business for limited purpose of set off of past losses, into speculative and non-speculative, is to be done on a uniform basis, and, whichever way looks at it, losses incurred in same business in earlier assessment years are to be treated as eligible for set off against profits of same business, subject to fulfillment of other conditions in subsequent assessment years – Held, yes – Whether the said reasons assessee would be granted set off of brought forward losses from business of dealing in derivatives, incurred in assessment years prior to assessment year 2006-07 against profits of same business in assessment year 2006-07 and subsequent assessment years – Held, yes.”

13. Coordinate Bench of the Tribunal in case of *ITO vs. M/s. Emperor International Ltd.* (supra) held the order passed by the ld. CIT (A) deciding the identical issue in favour of the assessee by returning following findings :-

“9. In the present case, it is an admitted fact that the assessee was engaged in the business of dealing in shares & securities and have incurred loss from dealing in derivatives (shares futures). It is not the case of the AO that the share futures in which the assessee was dealing were not recorded in recognized Stock Exchange, the loss incurred by the assessee was also not disputed by the AO. We, therefore, by keeping in view the provisions contained in clause (d) to Subsection (5) of Section 43 of the Act, are of the view that the ld. CIT(A) was fully justified in directing the AO for not treating the loss incurred by the assessee on derivatives and the profit earned if trading of the commodity as speculative in nature, For the aforesaid view, we are also fortified by the decision of the ITAT Mumbai ‘B’ Bench in the case of R.B.K. Securities (P) Ltd. Vs ITO reported in 118 TTJ 465 (supra).”

14. Aforesaid decisions have been duly discussed by the Id. CIT (A) in impugned order which are applicable to the facts and circumstances of the case. The only difference between the order passed by the AO and the impugned order passed by the Id. CIT (A) is, AO has ignored the amendment vide which clause (d) has been inserted in section 43 (5) of the Act by the Finance Act, 2005 w.e.f. 01.04.2006 and relied upon the decisions rendered prior to 01.04.2006 and which are applicable to the transactions done by the assessee after 01.04.2006.

15. So, we are of the considered view that when undisputedly assessee has entered into transaction of derivatives after 01.04.2006 in a recognised stock exchange as per Circular No.2/2006 dated 25.01.2006, loss arising in F&O transaction has to be treated as business loss and not loss in speculative business.

16. The Id. CIT (A) has rightly directed the AO to treat the derivative trading loss as business loss as per provisions contained u/s 43(5) clause (c) & (d) and the same has to be allowed to be set off against the other business income received by the assessee from the trading of Alcoholic Liquor. So, we are of the considered view that the contention raised by the Id. DR that section 73 Explanation 1 is a deeming provision applicable to the facts and circumstances of the case is not tenable as it does not talk of F&O transactions.

The case law of *CIT-I vs. Intermetal Trade Ltd.* (supra) relied upon by the ld. DR is also not applicable to the facts and circumstances of the case. Consequently, finding no illegality or perversity in the impugned order passed by the ld. CIT (A), present appeal filed by the Revenue is hereby dismissed.

Order pronounced in open court on this 22nd day of July, 2019.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 22nd day of July, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-XIII, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**