

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI RAVISH SOOD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5587/MUM/2018
Assessment Year: 2012-13**

Dy. CIT Central Circle 1(1),
R. No. 903, 9th floor, Old
CGO (Annexe) M.K. Road,
Mumbai-400020.

M/s Edelweiss Commodities
Services Ltd., 4th floor, Edelweiss
House, Off C.S.T. Road, Kalina,
Santacruz (East), Mumbai-400098.

Appellant

**PAN No. AAKCS7311R
Respondent**

Revenue by : Mr. R. Manjunatha Swamy, DR
Assessee by : Mr. Ravi Kanth Pathak, AR

Date of Hearing : 16/09/2019
Date of pronouncement : 25/10/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the Revenue. The relevant assessment year is 2012-13. The appeal is directed against the order of the Commissioner of Income Tax-16, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s. 144C(1) of the Income Tax Act 1961, (the 'Act').

2. The 1st ground of appeal

Whether on facts and in law, under the circumstances of the case the Ld. CIT(A)-16, Mumbai was justified in allowing loss on account of mark to

market to the tune of Rs.3,69,12,973/- without appreciating that the case laws relied upon in allowing this loss has been appealed against before the Hon'ble Bombay High Court.

3. Briefly stated, the facts of the case are that the assessee-company filed its return of income for the A.Y. 2012-13 on 29.11.2012 declaring total income of Rs.35,43,40,796/-. Subsequently, it filed a revised return on 31.03.2014 declaring total income of Rs.32,38,18,010/-. The assessee is a limited company engaged in the business of trading, settlement and other activities of commodities exchanges for itself and its clients; trading in physical commodities including derivative instruments and also earned rental and interest income.

During the year under consideration the assessee had made provision for mark to market loss on trading in derivative instruments of Rs.3,69,12,973/-. During the assessment proceedings, the assessee filed details of statement showing provision for mark to market loss and also submitted a detailed note on mark to market loss on outstanding position. Assessee submitted that it had made provisions for loss following accepted accounting principles as per the Guidance Note on "Accounting for Equity Index & Equity Stock Futures and Options" issued by the Institute of Chartered Accountants of India (ICAI) and claimed the loss as deductible business expenditure. However, the Assessing Officer (AO) was not convinced to the above explanation of the assessee and held that (i) as the derivative contracts are not accounted for in the books of accounts at the inception thereof at the time of purchase, they do not and cannot form a part of stock-in-trade

(ii) any contract to acquire a derivative at a future date is a forward contract to acquire a commodity; this contract as such is not a stock-in-trade and hence it cannot be valued at the time of preparation of balance sheet as stock-in-trade.

Observing as above, the AO held that the mark to market loss at best can be an unascertained liability or a provision for loss which may or may not incur at the time of settlement of the contract at a future date. Further, it is observed by him that the future contracts are in the nature of ready forward contracts and in such type of contracts, the profit or loss cannot accrue until and unless the contracts are settled.

The AO thus disallowed Rs.3,69,12,973/- treating as notional loss.

4. In appeal, the ld. CIT(A) following the decision in *Edelweiss Securities Limited v. Addl. CIT* [ITA 2193/MUM/2009], *DCIT v. ECL Finance Limited* [ITA 7656/Mum/2011], *DCIT V. Edelweiss Securities Limited* [ITA 7792/Mum/2012], *DCIT v. Edelweiss Securities Limited* [ITA 5939/Mum/2011], *Edelweiss Capital Limited v. ITO* [ITA 5324/Mum/2007], deleted the addition of Rs.3,69,12,973/- made by the AO.

5. Before us, the ld. Departmental Representative (DR) relies on the order of the AO, whereas the ld. counsel for the assessee supports the orders passed by the Ld. CIT(A).

6. We have heard the rival submissions and perused the material available on record. Similar issue arose before the ITAT "D" Bench, Mumbai in the case of *M/s. Edel Commodities Limited v. DCIT* [ITA

No.3426/Mum/2016] for A.Y. 2011-12. The Tribunal *vide* order dated 06.04.2018, held as under:

“32. When it is held that these derivatives held are stock-in-trade then there cannot be any reservation in valuation thereof as per the well settled practice of valuation of closing stock at market value or cost whichever is lower. No case has been made out by the Revenue that the valuation done is not correct or not properly explained. In these situations, the decisions of the Hon’ble Apex Court relied upon hereinabove in the case of Chainrup Sampatram vs. Commissioner of Income Tax, West Bengal (1953) 24 ITR 481 (SC), is quite germane. Furthermore, we find the Assessing Officer has totally erred in placing reliance upon the decision of the Hon’ble Apex Court in the case of M/S. Sanjeev Woolen Mills vs Commissioner Of Income-Tax (in Civil Appeal No. 6735- 6736/2003 vide order dated 24.11.2005). In the said decision, the Hon’ble Apex Court has analyzed the entire gamut of decisions on the issue of valuation of the stock. It has categorically held that recognized and settled accounting practice of accounting for the closing stock in the accounts is that it has to be valued on the cost basis or at the market value basis if the market value of the stock is less than the cost value. It was also expounded that the established and well settled practice in this regard should not be disturbed. Similar view was expressed by the Hon’ble Apex Court in the case of CIT vs. Woodward Governor 294 ITR 451 (SC). In this decision, the Hon’ble Apex Court has held that the accounts and the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the Assessing Officer comes to the conclusion for reasons to be given that the system does not reflect true and correct profits. In the said case, the Hon’ble Apex Court has held that the loss on account of fluctuation in the rate of exchange has to be allowed and the same has to be computed at each balance sheet date, pending actual payment of the liability. Hence, this decision also supports the proposition that even though the loss has not

finally crystallized if as per prudent and regular system of accounting, the loss has to be accounted for, the same should be allowed. Hence, in the background of the aforesaid discussion and precedent from the Hon'ble Apex Court decision, we find that the aforesaid CBDT Circular is in contradiction of Hon'ble Apex Court decision. Hence, we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals). We uphold the order of the Id. Commissioner of Income Tax (Appeals) that the mark to market loss in this case is allowable.”

6.1 Facts being identical, we follow the order of the Co-ordinate Bench and confirm the order of the Ld. CIT(A). Thus, the 1st ground of appeal is dismissed.

7. The 2nd ground of appeal

Whether on facts and in law, under the circumstances of the case the Ld. CIT(A)-16, Mumbai, was justified in directing the Assessing Officer to compute the disallowance u/s 14A of -the Income Tax Act, 1961, read with Rule 8D(2)(iii) of the Income Tax Rules, 1962, by netting -off the interest received/ receivable against the interest paid/ payable, and further holding that no disallowance is called for as interest received /receivable is more than the interest paid/ payable, and further relying on the decision of CIT v/s Jubilant Enterprises Limited and Aditya Birla Finance Ltd. v/s ACIT, wherein appeals against the relied upon decisions are pending before the Hon'ble Bombay High Court.

8. In the assessment order, the AO determined the disallowance u/s. 14A r.w. Rule 8D of the Income Tax Rules, 1962(the Rules) at Rs.19,60,69,838/-. As the assessee had made a *suo-motu* disallowance of Rs.2,28,809/-, the AO brought to tax the differential amount of Rs.19,58,41,069/-.

9. In appeal, the ld. CIT(A) followed the order of the ITAT in the case of the holding company of the assessee namely *M/s. Edelweiss Financial Services Limited* [ITA No. 4329/Mum/2014] wherein it has been held that for computing the disallowance under Rule 8D(2)(ii) of the Rules, net interest is to be considered. Similar, principle laid down by the Hon'ble Gujarat High Court in the case of *CIT v. Jubilant Enterprises Limited* [ITA No. 1512/2014] has been followed by the ITAT in the case of *M/s. Aditya Birla Finance Limited v. ACIT* [ITA No. 5732/Mum/2011].

Following the above decisions, the ld. CIT(A) held that the net interest is an income of Rs. 2,34,28,029/- [interest expenses of Rs.294,99,95,912/- and interest income of Rs.297,34,23,941/-]. Observing that there would not be any disallowance under Rule 8D(2)(ii), he directed the AO to delete the disallowance made u/s.14A of the Act.

10. Before us, the ld. DR relies on the order of the AO.

On the other hand, the ld. counsel submits that net interest is to be considered for making a disallowance as per Rule 8D(2)(ii) of the Rules. In this regard, reliance is placed by him on the decision in *PCIT v. Nirma Credit & Capital (P) Ltd* [85 Taxmann.com 72 (Guj)], *DCIT v. Edelweiss Capital Limited* [ITA 7654/M/11], *ITO v. Karnavati Petrochem Pvt. Ltd* [ITA 2228/Ahd], *DCIT v. Better Value Leasing & Finance Ltd* [ITA 2228/M/14], *CIT v. Jubilant Enterprises Ltd* [ITA 1512/2014 Bom] and *Aditya Birla Finance Ltd v. ACIT* [ITA 5732/M/11].

11. We have heard the rival submissions and perused the material available on record. In the case of *Nirma Credit & Capital (P) Ltd* (supra), it is held by the Hon'ble Gujarat High Court that for the purpose of applying factors contained in clause (ii) of sub-rule (2) of rule 8D, prior to its amendment w.e.f 02.06.2016, amount of expenditure by way of interest would be interest paid by assessee on borrowings minus taxable interest earned during financial year.

Similar view has been taken by the Hon'ble Bombay High Court in *Jubilant Enterprises Limited* (supra), which has been followed by the Tribunal in the case of *M/s. Aditya Birla Finance Limited* (supra).

Facts being identical, we follow the above decisions and confirm the order of the ld. CIT(A). Thus, the 2nd ground of appeal is dismissed.

12. The 3rd ground of appeal

Whether on facts and in law, under the circumstances of the case the Ld. CIT(A)-16, Mumbai, was justified in deleting the addition made to Book Profit computed u/s 115JB of the Income Tax Act, 1961, on account of disallowance made u/s 14A of the Income Tax Act, 1961, disregarding the clear provisions under Explanation (1)(f) to Section 115JB of the Income Tax Act, 1961, which does not prescribe any parameters for computing expenditure attributable to exempted income.

13. As mentioned earlier, the AO determined the disallowance u/s. 14A r.w Rule 8D at Rs.19,58,41,069/-. While computing the book profit u/s. 115JB, The AO made an addition of Rs.20,84,72,118/-.

In appeal, the ld. CIT(A), following the order of the Special Bench

of the Tribunal in *ACIT v. Vireet Investment Pvt. Ltd* 165 ITR 27 (Del-SB), deleted the above disallowance made by the AO.

14. Before us, the ld. DR relies on the order of the AO. On the other hand, the ld. counsel for the assessee relying on the decision in *Vireet Investment Pvt. Ltd* (supra) supports the order passed by the ld. CIT(A).

15. We have heard the rival submissions and perused the material available on record. In the case of *Vireet Investment (P) Ltd* (supra), it is held that computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to computation as contemplated u/s.14A r.w. Rule 8D.

Following the above order of the Special Bench of the Tribunal, we uphold the order of the ld. CIT(A) and dismiss the 3rd ground of appeal.

16. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open Court on 25.10.2019

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 25.10.2019
S. Samanta P.S.(On tour)

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT

5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai