

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

**BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI LALIET KUMAR, JM**

आयकर अपील सं. / ITA Nos.1675 to 1679/PUN/2018
निर्धारण वर्ष / Assessment Years : 2007-08 to 2011-12

Sunil Manakchand Kotecha,
4, Vardhaman Nagar,
Near Sagar Park,
Jalgaon-425001.

PAN : ABPPK2141Q

.....अपीलार्थी / Appellant

बनाम / V/s.

ACIT, Circle-1,
Nashik.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.1680 to 1684/PUN/2018
निर्धारण वर्ष / Assessment Years : 2007-08 to 2011-12

Sunil Manakchand Kotecha,
4, Vardhaman Nagar,
Near Sagar Park,
Jalgaon-425001.

PAN : ABPPK2141Q

.....अपीलार्थी / Appellant

बनाम / V/s.

Pr.CIT, Central-Nagpur
Nagpur.

Assessee by : Shri Hari Krishan &
Smt. Arrchena Shetty
Revenue by : Shri Deepak Garg

सुनवाई की तारीख / Date of Hearing : 12.02.2020

घोषणा की तारीख / Date of Pronouncement : 13.02.2020

आदेश / ORDER

PER BENCH :

There are **10 appeals** under consideration involving the assessment years 2007-08 to 2011-12 (i.e. five assessment years). Out of 10 appeals of

the assessee, 5 appeals pertain to the revision order passed by the Pr.CIT (Central), Nagpur u/s 263 of the Act dated 11.03.2016 for the assessment years 2007-08 to 2010-11 and 18.03.2016 for the assessment year 2011-12. The rest of 5 appeals pertain to the fresh assessment order made u/s 263 r.w.s. 143(3) of the Act.

2. The Pr.CIT passed the revision order dated 11.03.2016 for the assessment years 2007-08 to 2010-11 and 18.03.2016 for the assessment year 2011-12 whereas the CIT(A) passed a combined appellate order commonly dated 30.07.2018 involving the common issues for all the five assessment years.

**ITA Nos.1680 to 1684/PUN/2018 –
Revision Order u/s 263**

Preliminary Issue - Condonation of Delay of 884 days

3. Giving the background facts of the issue of condonation of delay, ld. Counsel for the assessee submitted that the regular assessment was made on 27.03.2014 and the revision order was made on 11.03.2016. The same was served on the assessee on 31.03.2016. However, the assessee filed the appeals against the revision order of the Pr.CIT dated 11.03.2016 before the Tribunal with the delay of 884 days on 23.10.2018. Otherwise, due date for filing of the appeal was 22.05.2016. Explaining the huge delay, ld. Counsel for the assessee brought our attention to the revised affidavit and submitted that the similar issue was the subject-matter of adjudication before the CIT(A) for the assessment year 2006-07 and the CIT(A) allowed the issue on merits

i.e. the loss claim is whether allowable as a speculation loss or not; applicability of the amended provisions of section 43(5)(d) of the Act; and, allowability of such set off was called as 'business loss' against the 'business profits' of the assessee etc. The CIT(A) granted relief on this issue for the assessment year 2006-07 vide its order dated 30.06.2009. The CIT(A) without going into the merits of the issue, merely respected the direction given by the CIT(A) to the Assessing Officer, who dutifully incorporated the fresh assessment order. Therefore, there is no adjudication of the issue on merits and the appeals of the assessee are dismissed. These orders were passed by the CIT(A) on 30.07.2018.

4. Before us, ld. Counsel for the assessee argued merely in favour of condonation of delay but in response to the query from the Bench what prevented steps took by the assessee for filing of the appeals before 22.05.2016, ld. Counsel, referring the revision proceedings and the orders thereof, relied heavily on the order of the CIT(A) for the assessment year 2006-07 and submitted that likely favourable relief given by the CIT(A) for this assessment year and further years under revision as well.

5. *Per contra*, ld. DR for the Revenue strongly contested the condonation issue and submitted that there is no reasonable cause for condoning such huge delay. In this regard, ld. DR relied heavily on the judgment of the Hon'ble Bombay High Court in the case of Kolte Patil Developers Ltd and strongly opposed the condonation issue.

6. On hearing both the sides on this limited preliminary issue i.e. condonation of delay of 884 days, we find the reasons given by the ld. AR for

the assessee are without merits. We further find, when there is a revision order and an adverse order against the assessee then why the assessee should not have filed the appeal in time, where the issue under consideration was undisputedly decided against the assessee. Considering the same, we are of the opinion that the delay is not condonable and the reasons given by the applicability of the judgment of the Hon'ble Bombay High Court in the case of Kolte Patil Developers Ltd. (supra) is directly applied to this case. Accordingly, the delay is not condoned. Thus, the appeals of the assessee in ITA Nos.1680 to 1684/PUN/2018 are dismissed being time barred.

7. In the result, all the five appeals in ITA Nos.1680 to 1684/PUN/2018 are dismissed as time barred.

**ITA Nos.1675 to 1679/PUN/2018 –
Fresh Assessment Order u/s 263 r.w.s. 143(3) r.w.s. 153A**

8. Now, come to the fresh assessment linked issue made by the Assessing Officer giving effect to the revision order of the Pr.CIT u/s 263 of the Act for the assessment years 2007-08 to 2011-12 vide ITA Nos.1675 to 1679/PUN/2018.

9. The only issue raised in these appeals relates to the nature of losses made by the assessee and the same constitutes a speculation loss or otherwise in the light of amended provisions of section 43(5)(d) of the Act. This is a common issue raised in all the five appeals for the assessment years under consideration. Giving background facts of the case, ld. Counsel mentioned that the similar issue came up for adjudication before the Tribunal

in the case of Madhuri Kotecha vs. ACIT vide ITA Nos.484 & 498/PUN/2019 dated 21.08.2019. The facts of the issue include that the assessee entered into Futures and Options (F&O) trading activities and earned loss. The said loss was claimed as 'speculation loss' and not claimed the same as 'business profits' of the assessee. However, during the assessment proceedings, relying on the findings of the first appellate proceedings for the assessment year 2006-07 i.e. immediate preceding assessment year, where the CIT(A) held that the said loss is a 'non-speculative loss', the Assessing Officer granted similar treatment of such sales of trading activities and was considered the same as 'non-speculative loss' and granted relief to the assessee.

10. Aggrieved with the said treatment of the Assessing Officer, the Pr.CIT assumed jurisdiction u/s 263 of the Act and passed an order directing the Assessing Officer to withdraw the said relief granted to the assessee. Therefore, the fresh assessment orders were made by the Assessing Officer and the loss was treated as 'speculative loss' denied the set off against the income of other heads. These facts are identical to that of the facts of Madhuri Kotecha (supra)'s case, who is spouse of the present assessee. The ld. Counsel filed a copy of the order of the Tribunal in the case of Madhuri Kotecha (supra) and read out the grounds as well as the decision of the Tribunal which is in favour of the present assessee. The ld. Counsel mentioned that the contents of para 9 to 15 of the said order of the Tribunal in the case of Madhuri Kotecha (supra) are relevant in this regard. Referring to the said paragraphs of the order of the Tribunal (supra), ld. Counsel mentioned that the provisions of section 43(5)(d) of the Act was amended and the said amendment is found to be operational prospectively useful to the

assessee. For the sake of completeness, the said para 9 to 15 of the order of the Tribunal (supra) are extracted hereunder :-

“9. In this appeal, the grounds raised by the assessee are as under :-

“1. The learned CIT(A) erred in holding that he had no jurisdiction to decide the issue on merits since the learned A.O. had merely followed the directions given by the learned Pr. CIT(C) in the order passed u/s. 263.

2. The learned CIT(A) failed to appreciate that in the order u/s 263 passed by the learned Pr. CIT(C), she had merely set aside the asst. order and had directed the A.O. to pass a fresh order and therefore, the assessee was justified in agitating the disallowance made by the learned A.O. in the order passed u/s 143(3) r.w.s. 263 and accordingly, the learned CIT(A) should have decided the appeal on merits.

3. The learned CIT(A) ought to have appreciated that in the order passed u/s 263 by the learned Pr. CIT(C), she had not given any direction to the learned A.O. for making any specific addition/disallowance and on the contrary, the asst. order was set aside with the direction to the A.O. to pass a fresh order and therefore, the learned CIT(A) erred in not adjudicating the issue on merits.

4. The assessee submits that the disallowance of set off of losses of Rs.94,26,738 incurred in the F & O Trading Activity against the regular business income earned by the assessee was not justified and the learned A.O. may be directed to allow set off of the losses of Rs.94,26,738/- against the regular business income of the assessee.

5. The assessee submits that the losses from F & O Trading Activity were not speculative losses and the same were part of the regular business losses and accordingly, the losses from F & O Trading Activity should have been set off against the regular business income of the assessee.

6. The learned CIT(A) has erred by defying the squarely applicable Judgement of Jaipur ITAT which have been relied upon by the appellant & the Learned CIT(A) has erred by not considered the said Judgement & also not taking the said Judgement on record & has thus defied principles of natural justice.

7. The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.”

10. Taking us through the above extracted grounds, ld. Counsel for the assessee submitted that the grounds no.1, 2, and 3 are **not pressed**. Accordingly, the same are dismissed as not pressed.

11. Referring to the grounds no.4, 5 and 6, ld. Counsel for the assessee submitted that the **main issue** raised in these grounds relates to the losses earned on trading activity of the Futures and Options (F&O). For the year under consideration i.e. A.Y. 2007-08, the said **losses constitute regular losses of the business** and not **speculative losses**. Therefore, the said losses eligible for set up against the regular business income of the assessee. In this regard, ld. AR relied on the various decisions including the decision of Jaipur Bench of

the Tribunal in the case of *P. S. Kapur vs. ACIT, 120 TTJ 0422 (Jaipur-Trib.)*. Referring to the contents of para 12 of the said decision of the Tribunal (*supra*), *ld.* Counsel submitted that the year under consideration by the Tribunal is the assessment year 2004-05 and the losses from such futures and options were considered as normal business losses in view of the prospective amendment to section 43(5)(d) of the Finance Act, 2005 w.e.f. 01.04.2006.

12. On hearing both the sides, we find it relevant to extract the said para 12 of the aforesaid decision of the Tribunal (*supra*) and the same are extracted hereunder :-

“12. We further agree with the submission of learned Authorised Representative that as per provisions of s. 73, speculative loss can be adjusted only against speculative profit. If cl. (d) to s. 43(5) is considered as a prospective amendment and transaction in derivatives as ‘speculative’, then the losses in derivative prior to amendment would be taken as speculative loss and profit after amendment as business income. This would negate the adjustment of loss in derivative prior to asst. yr. 2006-07 from the profit in derivative **in asst. yr. 2006-07** and subsequently. This would result in hardship and double jeopardy in as much as the earlier losses in derivative would not be available for set off against the subsequent profit in derivative. This position can be reconciled only if insertion of cl. (d) to s. 43(5) is taken to be **clarifying the law as it always exists**. Hence, on a harmonious interpretation of law, the derivative **transaction can’t be considered as speculative transaction**. In view of above it is clear that the transactions in derivative are normal business transactions. Accordingly the loss suffered in trading in derivatives can’t be considered as speculative loss.”

13. We further extract the conclusion of this decision of the Tribunal (*supra*) as under :-

“Clause (d) inserted in proviso to sub-s. (5) of s. 43 by the Finance Act, 2005 w.e.f. 1st April, 2006 is retrospective in application; loss claimed by the assessee in derivative transaction is allowable as a business loss as the same is not covered by s. 43(5).”

14. Considering the above settled legal proposition of law on this issue and the retrospective amendment of clause (d) of section 43(5) of the Act, we are of the opinion that the CIT(A) erred in treating the same as speculative losses and, therefore, the decision of the CIT(A) requires to be set-aside. The said retrospective amendments allow the impugned losses as the business losses only. Accordingly, the relevant grounds no.4, 5 and 6 raised by the assessee are allowed.

15. In the result, the appeal of the assessee in ITA No.484/PUN/2019 is partly allowed.”

11. On hearing both the sides, we find prima-facie the issue now stands covered in favour of the assessee. However, the facts are also similar with

that of the Madhuri Kotecha (supra) case. Further, we find the CIT(A) has not decided the issue on merits. He merely followed the directions of the Pr.CIT as per discussion given in para 3.1 of his order. For the sake of completeness, the said para 3.1 of the order of the CIT(A) is extracted hereunder :-

“3.1 I have considered the materials placed before me. Brief facts are that original return of income was filed by the appellant on 31.10.2007 declaring total income of Rs. 73,29,971/-. In the original return filed the appellant claimed Rs. 72,02,258/- as loss from speculative business which was carried forward. Consequent to search action the AO passed order u/s 143(3) rws 153A on 27.03.2014 wherein the while computing the total income allowed set off of speculation loss of Rs. 72,02,258/- against income of other heads. The Pr. CIT(Central), Nagpur vide order passed u/s 263 dated 11.03.2016 set aside the order passed by the AO u/s 143(3) rws 153A holding that the AO erred in allowing set off of losses from speculation business which was neither claimed by the appellant in the return filed u/s 139(1) nor in return filed u/s 153A. Further, the set-off was not allowable as per provisions of Income Tax Act. Consequent to this error being revised by the order u/s 263, the AO passed an order u/s 143(3) rws 153A rws 263 withdrawing the set off of loss from the speculative business as per directions given in the order passed u/s 263 by the Pr. CIT(Central) Nagpur. The appellant during the appellate proceedings contended that losses from trading in share derivatives are not speculative and should be allowed to set off.

Without going into the merit as to whether income from trading in share derivative falls under speculative business or not, it is important to note that the impugned order against which the present appeal lies was passed by the AO as per the directions given by the Pr. CIT(Central), Nagpur in the order passed u/s 263. The AO was duty bound to follow the instruction of the Pr. CIT, given in its order passed u/s 263. Therefore, there was no error on the part of the AO in following the directions given in the order u/s 263, which he was obliged under law to follow. For reasons best known to the appellant, he preferred not to file appeal before the tribunal against the order passed by the Pr. CIT u/s 263. Thus the adjudication of merits of the order passed u/s 263 by the Pr. CIT is outside the purview of this proceedings. This office can only examine whether the AO in the order passed followed the directions issued in the order passed by the Pr CIT u/s 263. The fact remains that the appellant neither in the return filed u/s 139 nor 153A nor during assessment proceedings claimed any set off of losses and the AO only followed the directions given by the Pr. CIT. I find no infirmity in the order passed by the AO u/s 143(3) rws 153A rws 263 in consequent to order passed by the Pr. CIT u/s 263 of the IT Act. Thus the addition made by the AO disallowing the set off of losses is hereby upheld. Grounds raised by the appellant are hereby dismissed.”

12. Considering the above common facts for all the five years under consideration and also considering the existing facts in the order of the Tribunal in the case of Madhuri Kotecha (supra), we are of the opinion that

these five appeals should be remanded to the file of the CIT(A) for fresh adjudication. The CIT(A) is directed to comply with the order of the Tribunal in the case of Madhuri Kotecha (supra). The assessee is also directed to demonstrate the comparability of the facts before the CIT(A). With these directions, all the five appeals of assessee in ITA Nos.1675 to 1679/PUN/2018 are allowed for statistical purposes.

13. To sum up, all the five appeals of the assessee in ITA Nos.1680 to 1684/PUN/2018 are dismissed as time barred and rest of five appeals of the assessee in ITA Nos.1675 to 1679/PUN/2018 are allowed for statistical purposes.

14. Resultantly, all the **10 appeals of the assessee** are disposed of as terms indicated above.

Order pronounced on this 13th day of February, 2020.

Sd/-

(LALIET KUMAR)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(D. KARUNAKARA RAO)

लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 13th February, 2020.

Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-12, Pune.
4. The Pr. CIT- Central, Nagpur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.