

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER &  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

Sl. No.	ITA No.	A.Y	Appellant	Respondent
1	456/Mum/2012	2008-09	Darashaw & Company Pvt., Ltd, Flat No. 03, Rajesh Mansion, D. Vachha Road, Churchgate, Mumbai - 20	Dy. CIT, Range 4(1), Mumbai.
2	660/Mum/2012	2008-09	Dy. CIT, Range 4(1), Mumbai.	Darashaw & Company Pvt., Ltd, Mumbai - 20
3	225/Mum/2011	2007-08	Darashaw & Company Pvt., Ltd, Mumbai - 20	Dy. CIT, Range 4(1), Mumbai.
4	299/Mum/2011	2007-08	Dy. CIT, Range 4(1), Mumbai.	Darashaw & Company Pvt., Ltd, Mumbai - 20
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACR9134M				

अपीलार्थी ओर से/ <b>Appellant by</b> :	Shri Madhur Agarwal Shri Ryan Saldanha
प्रत्यर्थी की ओर से/ <b>Respondent by</b> :	Smt. Jyothilakshmi Nayak

सुनवाई की तारीख / <b>Date of Hearing</b>	07.01.2020
घोषणा की तारीख/ <b>Date of Pronouncement</b>	21.02.2020

**आदेश / ORDER**

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**PER SAKTIJIT DEY:**

These are two sets of cross appeals arising out of two separate orders of Ld. Commissioner of Income Tax (Appeals), Mumbai, pertaining to Assessment years 2007-08 and 2008-09.

ITA No. 456/Mum/2012 – Assessee’s appeal for the A.Y 2008-09.

2. In ground Nos. 1 and 2 assessee has challenged disallowance of Rs. 5,96,510/- representing marked to market loss on derivatives. Before we proceed to deal with the aforesaid issue it is necessary to briefly describe the background of the present appeal. The aforesaid appeal of the assessee along with Revenue’s appeal being ITA No. 660/Mum/2012 were earlier disposed of by the Tribunal vide order dated 12.06.2013. Against the said order of the Tribunal, the assessee filed an application u/s 254(2) of the Act seeking rectification / recall of the order. The Said application was dismissed by the Tribunal. Being aggrieved, assessee filed writ application before the Hon’ble Jurisdictional High Court. Simultaneously,

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both assessee and Revenue filed appeals against the order of the Tribunal before the Hon'ble High Court. While disposing of the writ application as well as the appeals the Hon'ble High Court set aside the order passed by the Tribunal and directed for disposal of the appeals afresh on merits. In pursuance to aforesaid direction of Hon'ble Jurisdictional High Court, the appeals have come up for hearing before us.

3. Briefly the facts relating to ground Nos. 1 and 2 are, the assessee, a resident company, is engaged in the business of shares and stock broking, trading in debt securities, mutual funds distribution and other financial services. The assessee has also made investments in shares and debt securities. For the assessment year under dispute, assessee filed its return of income on 29.09.2008 declaring loss of Rs. 11,44,66,190/- under the normal provisions and book profit of Rs. 3,03,45.502/- u/s 115JB of the Act. In course of assessment proceeding, the Assessing Officer noticing that the assessee has debited loss of

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Rs. 6,62,50,008/- on trading in derivative transactions, called upon the assessee to explain whether such loss includes any provision for loss on outstanding derivative contracts as on 31.03.2008. Further, he directed the assessee to explain why the loss on outstanding derivative contract as on 31.03.2008 should not be disallowed by treating it as notional loss. In response, the assessee submitted the details of loss claimed and also explained that the loss debited to the profit and loss account includes mark to market loss of Rs. 5,96,510/- on outstanding derivative contracts as on 31.03.2008. Justifying the claim of mark to market loss, the assessee submitted that as per the consistently followed accounting policy, loss on outstanding derivative contract at the end of the year is treated as mark to market loss, which is as per the accounting guidelines prescribed by the Institute of Chartered Accounts of India (ICAI). Thus, it was submitted, such loss cannot be treated as notional loss. In support of such contention, the assessee relied upon the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Woodward Governor

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India Pvt Ltd, [2007] 294 ITR 451, subsequently, confirmed by the Hon'ble Supreme Court. Further, the assessee relied upon various other case laws to justify its claim. The Assessing Officer, however, was not convinced with the submissions of the assessee. He observed, while the assessee has debited provision for mark to market loss to the profit and loss account, however, profits on account of mark to market have been ignored. Thereafter, referring to various decisions, the Assessing Officer held that mark to market loss claim by the assessee on outstanding derivative contracts which are open on the date of balance sheet is in the nature of notional loss, hence, cannot be allowed. Accordingly, he added back an amount of Rs. 5,96,510/-. Though, the assessee challenged the aforesaid addition before learned Commissioner (Appeals). However, he also sustained the disallowance made by the Assessing Officer.

4. Learned Authorized Representative submitted, the assessee is trading in derivatives. He submitted during the year under consideration, the assessee has

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carried out trading in Future and option segment of National Stock Exchange (NSE). At the year end, there was certain outstanding position on which there was a mark to market loss of Rs. 5,96,510/-. Whereas, he submitted, learned Commissioner (Appeals) has treated it as speculation loss as per Sec. 43(5) of the Act. He submitted, before coming to such conclusion, learned Commissioner (Appeals) has neither issued any show cause notice to the assessee nor has been put a query regarding treating the loss as speculation loss u/s 43(5) of the Act. Drawing our attention to Sec. 43(5)(d) of the Act. He submitted, transaction in respect of trading in derivatives carried out in a recognized stock exchange are excluded from the definition of speculating transaction. Further, he submitted, the observation of learned Commissioner (Appeals) that the assessee is engaged in trading of over the counter derivative is factually incorrect as the assessee has carried out all its derivative transactions through National Stock Exchange (NSE). He submitted, had learned Commissioner (Appeals) issued a show cause notice before treating the mark

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to market loss as speculation loss u/s 43(5) of the Act, the assessee would have certainly explained before him that the transaction cannot be treated as speculative transaction u/s 43(5) of the Act. He submitted, even the loss claimed by the assessee is not contingent as it is ascertainable as on the year end. Thus, he submitted, claim of loss amounting to Rs. 5,96,510/- should be allowed. In support of such contention, learned Authorized Representative relied upon the following decisions;

“1. *CIT Vs. Woodward Governor India P Ltd (2009) 179 Taxman 326 (SC).*

2. *CIT Vs. Pashupati Capital Services Ltd., (ITA 1622 of 2013) (Bom)*

3. *Edelweiss Capital Ltd Vs ITO (ITA 5324/M/2007)*

4. *DCIT Vs. Kotak Mahindra Investment Ltd (ITA 1502/M/2012).*

5. *ACIT Vs urudavan Investment & trading P Ltd., (ITA 6997/M/2011)*

6. *Mili Consultants & Investment (P.) Ltd. Vs DCIT [2016] 72 taxmann.com 141 (Mumbai -Trib)”*

4.1 Strongly relying upon the observations of learned Commissioner (Appeals), learned Departmental Representative submitted, since, the loss claimed by

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the assessee is not part of any trading transaction it has to be treated as speculation loss as per Sec. 43(5) of the Act.

4.2 We have considered the rival submissions in the light of decision cited before us and perused the material on record. Undisputedly, out of the total loss claimed of Rs. 6,62,50,008/-, the Assessing Officer has disallowed the loss of Rs. 5,96,510/- representing mark to market loss on outstanding derivatives by treating it as a notional loss. The Assessing Officer is of the view that, since, as on the date of balance sheet the contracts are still outstanding, the loss is not ascertainable, hence, in the nature of notional loss. Whereas, learned Commissioner (Appeals) has observed that the mark to market loss claimed by the assessee since is arising out of speculative transaction as per Section 43(5) of the Act, it is not allowable. While coming to such conclusion, learned Commissioner (Appeals) has observed that the assessee had entered into forward contracts which were to be settled in cash without

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actual delivery of derivative and are not eligible transaction in respect of trading in derivatives carried out in a recognized stock exchanges. In other words, learned Commissioner (Appeals) has held that the derivatives traded by the assessee or over the counter derivatives, hence, are not eligible transaction as per Section 43(5)(d) of the Act. Vehemently opposing the aforesaid finding of learned Commissioner (Appeals), learned Authorized Representative has submitted before us that the assessee has not entered into even a single over the counter derivative transaction in respect of which mark to market loss has been claimed. He has submitted that the entire derivative transactions were carried through National Stock Exchange (NSE). Therefore, he has submitted that assessee's transactions are covered under Section 43(5)(d) of the Act. Pertinently in the statement of facts filed with the memorandum of appeal in form No. 35 before learned Commissioner (Appeals), the assessee has specifically stated that it has carried out its transactions in derivatives in future and option segments of National Stock Exchange. From the

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impugned order if learned Commissioner (Appeals) it is patent obvious that he has completely overlooked the aforesaid factual position while observing that the assessee has entered into over the counter derivative transaction and not in any recognized stock exchanges, while treating it as speculative loss u/s. 43(5) of the Act. Keeping in view, the factual position arising out of the material on record, the contention of the assessee that the derivative transaction in respect of which it has claimed mark to market loss comes within the exception as per Clause (d) of the proviso to Sec. 43(5) of the Act appears to have substantial strength, hence, needs to be accepted. Now, it is fairly well settled by the ratio laid down by the Hon'ble Supreme Court in the case of CIT Vs. Woodward Governor India Pvt Ltd., [2009] 179 taxman 326 (SC), that mark to market loss as on the balance sheet date is allowable u/s 37(1) of the Act. Further, it has been brought to our notice by learned Authorized Representative that in subsequent assessment years the Assessing Officer has consistently allowed assessee's claim of mark to

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market loss. In view of the aforesaid, we hold that mark to market loss of Rs. 5,96,510/- is not in the nature of speculation loss, hence, has to be allowed. These grounds are allowed.

5. In ground No. 3, the assessee has challenged the decision of learned Commissioner (Appeals) in partly sustaining the disallowance made u/s 14A of the Act.

5.1 Briefly the facts are, in course of assessment proceeding, the Assessing Officer noticed that during the year under consideration the assessee has earned exempt income by way of dividend amounting to Rs. 44,91,580/-. Whereas, he has disallowed an amount of Rs. 1,75,583/- u/s 14A of the Act towards expenditure attributable for earning the dividend income. Noticing this, the Assessing Officer called upon the assessee to explain why disallowance u/s 14A of the Act should not be computed by applying Rule 8D. In response, the assessee submitted that the entire interest expenditure debited to the profit and loss account has been paid to banks and other parties for trading in debt securities. In support of

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such contention, the assessee also furnished sanction letters of banks stating the purpose for which such loans were taken. It was submitted, the assessee has earned interest income on the debt securities amounting to Rs. 7,47,26,425/- and also earned profit on purchase and sale of debt securities amounting to Rs. 9,51,45,792/-. Thus, it was submitted, in effect the assessee has offered a net profit of Rs. 3,44,35,470/- on debt security. Thus, it was submitted, no part of the interest expenditure can be attributed towards investment in dividend yielding assets so as to disallow the interest expenditure. Without prejudice to the aforesaid submission, the assessee furnished a working of disallowance u/s 14 r.w.r 8D, wherein, such disallowances were worked out to Rs. 39,19,175/-. The Assessing Officer, however, was not convinced either with the explanation or the working furnished by the assessee and proceeded to compute disallowance by applying Rule 8D. In the process, he disallowed an amount of Rs. 1,24,22,472/- comprising of direct expenditure of Rs. 1,75,583/-

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under Rule 8D(2)(i), Rs. 99,89,180/- towards interest expenditure under Rule 8D(2)(ii) and administrative expenditure of Rs. 22,57,709/- under Rule 8(D)(2)(iii). After adjusting the disallowance of Rs. 1,75,583/- made by the assessee, he made a net disallowance of Rs. 1,22,46,889/-. The assessee challenged the aforesaid disallowance before learned Commissioner (Appeals).

5.2 After taking note of the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) observed that while deciding similar issue in assessee's own case for the assessment year 2007-08, the first appellate authority directed the Assessing Officer to follow the said order, and if no borrowed fund is utilized for making investment in shares no part of interest expenditure should be disallowed.

5.3 The learned Authorized Representative submitted, the entire loan fund was invested in debt securities the income from which is not exempt. Therefore, no part of the interest expenditure can be

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disallowed under Rule 8D(2)(ii). Further, he submitted, during the year under consideration the assessee had sufficient interest free fund available with it. For that reason also no disallowance can be made out of the interest expenditure. Thus, he submitted, the Assessing Officer can only make disallowance of administrative expenditure under Rule 8D(2)(iii), that too, by only considering those investments which have yielded exempt income during the year under consideration. He submitted, the working of disallowance submitted by the assessee may also be considered for this purpose. In addition, learned Authorized Representative submitted, in subsequent assessment years the Assessing Officer has made no disallowance out of the interest expenditure. Thus, he submitted, even by applying the rule of consistency also no disallowance out of the interest expenditure can be made. In support of such contention, learned Authorized Representative relied upon the following decisions:

*“1. CIT Vs. Reliance utilities & Power Ltd [2009] 178 taxman 135 (Bom).*

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2. *CIT Vs. HDFC Bank Ltd [2014] 49 taxman.com 335 (Bombay).*

5.4 The learned Departmental Reprehensive submitted, merely because the loans were sanctioned towards investment in debt securities, it cannot be said that the loan funds were utilized for that purpose and no part of it was utilized in investment in shares. She submitted, the assessee has to establish the nexus between the borrowed fund and the investment made in debt securities. Further, she submitted, the assessee has to prove that it had sufficient interest free fund available for making the investment in shares.

5.5 We have considered the rival submission, and perused material on record. The dispute is mainly with regard to the disallowance of interest expenditure under Rule 8(D)(2)(ii). The contention of the assessee in this regard from the very beginning is, the borrowed funds were utilized for investment in debt securities which are not exempt income yielding assets. To support such claim the assessee has

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furnished sanction letters from banks and other documentary evidences. Additionally, the assessee has also furnished its financial statements as well as fund flow statement indicating that in the year under consideration it had sufficient interest free fund available to make the investment in shares. The aforesaid contention of the assessee has not been controverted either by the Assessing Officer or learned Commissioner (Appeals) with cogent reasoning. Rather, learned Commissioner (Appeals) has completely misconstrued the submissions of the assessee. From the material on record, prima-facie, it appears that the borrowed funds were sanctioned for specific purpose of utilization in debt securities. Unless, the Revenue brings any contrary material to dispute this fact, assessee's claim cannot be rejected. Moreover, the financial statement available on record clearly indicate that the assessee had sufficient interest free funds available with it. That being the case, it has to be presumed that the interest free funds were utilized in investment in shares. Thus, no part of the interest expenditure can be attributed for

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earning of exempt income. Therefore, the only disallowance which can be made u/s 14A of the Act is the administrative expenditure as per Rule 8D(2)(iii). Here also, while computing the disallowance the Assessing Officer has to consider only those investments which have yielded exempt income during the year, as held by the Income Tax Appellate Tribunal, Delhi (Special Bench) in the case of ACIT Vs Vireet Investments (P) Ltd., [2017] 82 taxmann.com 415. It is relevant to observe, the assessee has furnished a working of disallowance under Rule 8D(2)(iii) quantifying the disallowance at Rs. 13,04,383/-. Admittedly, the aforesaid working has been furnished by the assessee for the first time before us and was not available either before the Assessing Officer or learned Commissioner (Appeals). In view of the aforesaid, we direct the Assessing Officer to verify the aforesaid working furnished by the assessee and thereafter compute the disallowance under Rule 8D(2)(iii) keeping in view, the ratio laid down in the case of ACIT Vs Vireet Investments Pvt Ltd (supra). This ground is partly allowed.

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6. In view of our decision in ground No. 1,2 and 3, the ground Nos. 4 and 5 being of general nature do not require adjudication. Hence, assessee's appeal is partly allowed.

ITA No. 660/Mum/2012 – Department Appeal for the A.Y 2008-09:

7. The only dispute raised by the Revenue is with regard to disallowance made u/s 14 r.w.r. 8D. In view of our decision in ground No. 3 of ITA No. 456/Mum/2012 (supra), the grounds raised by the Revenue have become redundant, hence, dismissed.

8. In the result, the Revenue's appeal is dismissed.

ITA No. 225/Mum/2011 – Assessee's appeal for the A.Y 2007-08 & ITA No. 229/Mum/2011 – Revenue's appeal for the A.Y 2007-08:

9. The aforesaid cross appeals along with cross appeals for assessment year 2008-09 were disposed of by the Tribunal in a consolidated order dated 12.06.2013. Against the order of the Tribunal for A.Y 2007-08, the Revenue went in appeal before the

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Hon'ble Jurisdictional High Court. Whereas, the assessee accepted the decision of the Tribunal. As far as assessment year 2008-09 is concerned, both the assessee as well as the Revenue went in appeal before the Hon'ble Jurisdictional High Court. Simultaneously, the assessee also filed a writ application challenging the order passed by the Tribunal for assessment year 2008-09. The writ application as well as the appeals pertaining to assessment year 2007-08 were disposed of by the Hon'ble Jurisdictional High Court on 01.09.2017 in two separate orders. The Hon'ble Jurisdictional High Court while disposing of assessee's appeals and the writ application filed for assessment year 2008-09 restored the issue raised in the appeals for de-novo adjudication on merits by the Tribunal. In so far as, assessment year 2007-08 is concerned, the Revenue's appeal against the order of the Tribunal was dismissed by the Hon'ble Jurisdictional High Court in order dated 05.12.2016 passed in Income Tax Appeal No. 771/2014. Thus, the order of the Tribunal for assessment year 2007-08 attained finality. However,

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while disposing of the writ application filed by the assessee for the assessment year 2008-09, in the writ petition No. 1744 of 2014 along with assessee's appeal in income tax appeal No. 807/2014 for the very same assessment year, the Hon'ble Jurisdictional High Court in order dated 12.09.2017 restored the issues back to the Tribunal for fresh adjudication. However, while doing so, the Hon'ble Jurisdictional High Court inadvertently referred to the order of the Tribunal in ITA No. 225/Mum/2011 pertaining to the assessment year 2007-08, instead of the appeal number relating to assessment year 2008-09. This is evident from paragraph 11 of Hon'ble Jurisdictional High Court's order. Whereas, from paragraph 4 of the order, it is very much clear that the writ application and the appeal in consideration before the Hon'ble Jurisdictional High Court pertained to assessment year 2008-09. In view of the aforesaid, the order dated 12.06.2013 passed by the Tribunal in ITA No. 225/Mum/2011 and ITA No. 229/Mum/2011 pertaining to assessment year 2007-08 would remain intact. In fact, learned counsels appearing for the

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parties have reiterated the aforesaid factual position before us. Therefore, there is no need for fresh adjudication of the issues raised in aforesaid appeals. Accordingly, for statistical purposes alone, we are disposing of the appeals by partly allowing both the appeals in terms of the earlier order of the Tribunal, as referred to above.

9.1 In the result, both the appeals are partly allowed.

10 In the result, ITA No. 456/Mum/2012 is partly allowed, ITA No. 660/Mum/2012 is dismissed and ITA No. 225 & 229/Mum/2011 are partly allowed.

**This Order pronounced in Open Court on 21.02.2020**

Sd/-  
(RAJESH KUMAR)  
**ACCOUNTANT MEMBER**

Sd/-  
(SAKTIJIT DEY)  
**JUDICIAL MEMBER**

Mumbai, Dated 21.02.2020

KRK, PS

ITA Nos. 456 & 660/Mum/2012 &  
225 & 229/Mum/2011  
Darashaw & Company Pvt Ltd., Mumbai.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार ( Asst. Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Mumbai