

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "D" : DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
ITA.No.853/Del./2020
Assessment Year 2015-2016

M/s. Kundan Rice Mills Ltd., E-4, Industrial Area, Panipat. State Haryana. PAN AAACK7098P	vs.	The ACIT, Panipat Circle, Panipat.
(Appellant)		(Respondent)

For Assessee :	Shri Ashwani Kumar, C.A. Shri Aditya Kumar, C.A. Ms. Udit Jain, C.A. Shri Rahul Chorasiya, C.A. Shri Bhavesh Jindal, C.A.
For Revenue :	Shri J.K. Mishra, D.R.

Date of Hearing :	30.06.2020
Date of Pronouncement :	09.07.2020

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Assessee has been directed against the Order of the Ld. CIT(A), Karnal, Dated 03.01.2020, for the A.Y. 2015-2016.

2. We have heard the Learned Representatives of both the parties through video conferencing and perused the material on record.

3. Briefly the facts of the case are that return declaring taxable income of Rs.8,71,34,240/- was filed by assessee. The case was selected for scrutiny. The questionnaire and statutory notices were issued. The assessee filed details time to time on the requisite information required by the A.O. The assessee company is engaged in the business of manufacturing and trading of rice, import and export of precise metals and stones, import of polymers chemicals etc., The A.O. passed the assessment order under section 143(3) Dated 28.07.2017 making the following additions.

1. Disallowance of loss on sale of stock option
Rs.15,28,20,110/-.
2. Disallowance under section 14A read with Rule
8D(2) Rs.4,28,556/-.

3.1. The assessee challenged the additions before the Ld. CIT(A). However, both the grounds of appeals were dismissed and appeal of assessee was ultimately dismissed.

3.2. The assessee in the present appeal has challenged both the above additions.

4. On Ground No.2 of the appeal, the assessee challenged the disallowance of Rs.4,28,556/- under section 14A of the I.T. Act, 1961.

4.1. The A.O. on perusal of the balance-sheet ending on 31.03.2015 noticed that under the head "*Current Investments*" the following were mentioned.

1. Share of Amtek India – Rs.1,10,92,321/-.
2. Canara Liquidity Collection – Rs.25,22,710/-.

Also under the head "*Advances*", assessee has included share application money – KEPL Rs.64,80,000/-.

Share application money AFPL – Rs.23,25,000/-.

4.2. The A.O. has mentioned that for equity investments, dividend income to the assessee is exempt from taxes under section 10(34) of the I.T. Act, 1961. The assessee has also received dividend income of Rs.1,80,717/- during the year under consideration which the assessee claimed as exempt. The A.O. following the provisions of Section 14A read with Rule 8D(2) of the I.T. Act, 1961, disallowed Rs.4,28,556/- and made the addition accordingly. The Ld. CIT(A) confirmed the addition.

5. Learned Counsel for the Assessee submitted that the addition may be restricted to the earning of the dividend income only.

6. The Ld. D.R. on the other hand relied upon the Orders of the authorities below.

7. We have considered the rival submissions. It is not in dispute that assessee has received dividend income of Rs.1,80,717/- only. The Hon'ble Delhi High Court in the case of Joint Investment Pvt. Ltd., 372 ITR 694 (Del.) held that *"the disallowance under section 14A cannot be more*

than to that of the exempt income.” Since in the present case the dividend income earned by assessee is of Rs.1,80,717/- which is claimed exempt under section 10(34) of the I.T. Act, therefore, disallowance under section 14A read with Rule 8D should not exceed the exempt income. We, therefore, set aside the Orders of the authorities below and restrict the addition to Rs.1,80,717/-. Ground No.2 of the appeal of Assessee is partly allowed.

8. On Ground No.1, assessee challenged the disallowance of Rs.15,28,20,110/- claimed by assessee company on account of loss in trading of stock option.

8.1. The A.O. on perusal of the financial statements of assessee company noticed that under the Head *“Other Expenses”*, assessee had claimed *“loss in trading from stock option”* Rs.15,28,20,110/- as on 31.03.2015. The Order was released by SEBI Dated 22.08.2015 on its website with the heading - *“Ex-parte ad-interim Order – under section 11(1)(4) and Section 11(B) of the Securities and Exchange Board of India Act, 1992 in the matter of ill-liquid stock options.”* In this Order which is made a part of the

assessment order, the name of the assessee company also figures in the list of entities who have entered into non-genuine, fraudulent trades to generate fictitious profits/losses for the purpose of tax evasion/facilitating tax evasion. In the Order of SEBI it is alleged that SEBI has come across several instances/internal alerts wherein a set of entities were consistently making losses by their trading in options on individual stocks (Stock Options) which are listed on Bombay Stock Exchange (BSE). Trading by these entities appeared abnormal because they were consistently making losses by their trades which were reversed with the same counter-parties. The SEBI in its Order has outlined the *modus operandi* used by such entities. The A.O. reproduced the interim ex-parte Order of SEBI above in the assessment order which highlighted that assessee company dealt with three parties/counter-parties.

8.2. The A.O. vide order sheet entry dated 22.03.2017 confronted the Order of the SEBI to the assessee in which it was alleged that assessee had made losses in indulging in suspicious trades including reversal trades. The Counsel for

Assessee was asked to provide a report including the following :

- “1. *Past history/practice of assessee in executing such trades. Whether the assessee as a business indulges in such trades.*
2. *It has been averred in the report that the assessee has even sold the products below their intrinsic value. Reasons for such unreasonableness & irrational financial behaviour ?*
3. *Details of all such trades entered in by the assessee and identification of counter party.*
4. *Provisions of IT act applicable for such losses/trades.”*

8.3. The assessee vide reply dated 19.04.2017 submitted reply of interim Order of the SEBI which is reproduced in the assessment order which is as under :

- “1. *Our Company is mainly dealing in different types of commodities like Chemicals, Industrial Solvents, Polymers, pulses, rice, precious metals including*

Gold and Silver, gold jewellery, pharmaceuticals, deals in shares, future & options etc besides having a rice sheller. We are into multiple trades since 1995, the date of incorporation of the company. We are member of MCX and other commodity exchanges since more than 10 years. We use to do business in these commodity exchanges through futures segments as hedging/trading tools as per requirement of the business. Moreover, we also deal in shares through members / brokers since number of years. We used to do physical trading as well as futures & options since number of years. So, this is not an isolation year where we have done the transactions in futures & options in stocks. We have duly accounted profits/loss earned/incurred from trade in commodity exchanges as well as stock exchanges in our financial statements.

2 Regarding Intrinsic value as mentioned in the interim order of SEBI, it is submitted that SEBI has calculated intrinsic value as difference between strike price and price of underlying scrip in cash market. Whereas intrinsic value is based on various factors like time factor, demand & supply, volatility in the underlying scrip and overall market, and market conditions domestically as well as globally, etc in addition to difference between strike price and price of underlying scrip in cash market. There is no set formula / law / rule / circular which defines intrinsic value or prohibits trading below intrinsic value. In fact, if orders are only allowed to be placed at intrinsic value then it is inexplicable as to why trading system permits orders to be placed at the prices other than intrinsic value. In options trading, by paying premium buyer has limited its loss whereas profits are unlimited and vice versa. As per Interim Order of SEBI, difference between underlying scrip in cash market and strike price in derivative segment ought to be correct price or premium for contract in option segment. However if the same is true, there is nothing for an investor to 'choose' at all and there would be no trading since there would be no variation in perception of market participants which is foundation of trading in option segment. In fact, if said assumption is correct, then trading system ought to permit orders to be placed only at fixed price. Instead, investors are allowed to bid whatever premium they deem fit and that too without any price filters/price bands like cash segment. We submit that Hon'ble SAT has held that price of options do not always move in tandem with underlying scrip's price in cash segment which is clearly indicative of fact that price of options are not just combination of 'intrinsic value' and 'time value'. Therefore, it cannot be considered that premium can only be offered at rate which is difference between strike price/rate and price of underlying scrip in

cash market We further submit that trading done by us in option segment was not outside 'permitted range'. The orders punched outside permitted range are automatically rejected by trading system. In fact no objection or questions were raised by BSE or SEBI at any point of time *w.r.t* our trading in option segment.

We submit that derivative market is 'zero-sum game' and thus in each and every case one party will inevitably make profit and counterparty will make loss. In capital market neither BSE nor SEBI can guarantee profit or loss to any individual/entity. In derivative trading, traders often make profit or loss over a period of time since the market does not always behave as per their prediction/expectation. Thus, profit or loss is concomitant to trading in derivative segment.

3. Please find enclosed the trade list executed by the assessee company. It is submitted that all the counter parties which are around 200 in numbers are independent. We state and assert that we have no 'connection' or 'relation' with any of counterparties to our trade. Our trading in said segment was independent of any other entities dealing in the same and based on our limited understanding of capital market. In fact, all our transactions have been carried out on the floor of stock exchange. All the pre-trade, trade and post trade activities were carried out on the trading, clearing and settlement system of stock exchange which itself has sophisticated on-line surveillance software and systems in place. Undisputedly, in case of screen based trading, the automated system itself matches orders on a price-time priority basis and hence it is not possible for anybody to have access over identity of counter party. Since counter party identity is not displayed; one can never have any choice with whom it wants to deal or not to deal. Further, all our trades in option segment were within prudential norms of exchange and as per procedures and guidelines as prescribed by regulator. At the relevant time, none of our trades were questioned by the brokers who are registered intermediary and frontline entities/gate keepers of stock exchange. Had we been alerted by the broker or stock exchange we would have taken prompt and immediate corrective measures at that point of time only. It is submitted that these types of transactions attract Security Transaction Tax (STT) as per Rules and Regulations and the same has been paid on all these transactions. We further wish to submit that at no point of time we were aware of any counter party with which our transaction got match since all our transactions got executed on normal screen based system of stock exchange. Our matching is done by automated online module. It is further submitted that all the transactions done in future & options in stock have been done through members / brokers / sub brokers

as we are not direct trading member in any stock exchange. We have paid amount of loss / receive the amount of profit only through broker / sub broker / member who in turn being settled by respective exchange only. All our trades are done in normal course of business. Further, we confirm that we have not received any amount whatsoever from any of the independent and unknown counter parties directly or indirectly in shape of loan/advance/capital etc. We have already submitted reply to SEBI and based on our reply we have been given certain relaxation by SEBI which includes allowing us to take hedging position in commodity exchanges etc. We had traded in options contracts of about 48 different scrips including large number of blue chip companies like JSW Energy Ltd, India Cements, Housing Dev. & Infra, Allahabad Bank, L&T, Power Fin Corp Ltd., Dabur India, Tata Power, Bank of India, Syndicate Bank, Bank of Baroda, OBC, HDFC, Coal India, Voltas, Reliance Infra and so on. It can be observed that underlying scrips in almost all aforesaid contracts were highly liquid in nature i.e. frequently traded in market. In fact, we submit with humility that underlying stock of all these contracts consists of companies which make up index of Bombay Stock Exchange. All our above trades have been done in BSE which is a national recognized regulated stock exchange and not any regional exchange.

4. Regarding allowability of loss in trading in future and options of stocks, it is submitted that the said loss is a business loss as per section 43(5) of the Income Tax Act. We hereby are producing the section 43(5) of the Income Tax Act for your kind reference.

SECTION 43(5) OF THE INCOME TAX ACT

5) "speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

Provided that for the purposes of this clause—

- (a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or
- (b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or
- (c) a contract entered into by a member of a forward market or a stock exchange in

the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; [or]

[(d) an eligible transaction in respect of trading in derivatives referred to in clause[(ac)] of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange; [or]]

[(e) an eligible transaction in respect of trading in commodity derivatives carried out in a recognised association [, which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013),]]

shall not be deemed to be a speculative transaction.

[Explanation 1].—For the purposes of [clause (d)], the expressions—

(i) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through a stock broker or sub-broker or such other intermediary registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) and the rules, regulations or bye-laws made or directions issued under those Acts or by banks or mutual funds on a recognized stock exchange; and

(B) which is supported by a time stamped contract note issued by such stock broker or sub-broker or such other intermediary to every client indicating in the contract note the unique client identity number allotted under any Act referred to in sub-clause (A) and permanent account number allotted under this Act;

(ii) "recognised stock exchange" means a recognised stock exchange as referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed and notified by the Central Government for this purpose;]

[Explanation 2.—For the purposes of clause (e), the expressions—

(i) "commodity derivative" shall have the meaning as assigned to it in Chapter VII of the Finance Act, 2013;

(ii) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through member or an intermediary, registered under the bye-laws, rules and regulations of the recognised association for trading in commodity derivative in accordance with the provisions of the Forward Contracts (Regulation) Act, 1952 (74

of 1952) and the rules, regulations or bye-laws made or directions issued under that Act on a recognised association; and

(B) which is supported by a time stamped contract note issued by such member or intermediary to every client indicating in the contract note, the unique client identity number allotted under the Act, rules, regulations or bye-laws referred to in sub-clause (A), unique trade number and permanent account number allotted under this Act;

(iii) "recognised association" means a recognised association as referred to in clause (j) of section 2 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and which fulfils such conditions as may be prescribed and is notified by the Central Government for this purpose;] So as per clause (d) of proviso of section 43(5) any profit or loss arise from trading in derivatives in recognized stock exchange is a business loss. We have done the trading in BSE which is a recognized stock exchange and hence the loss suffered on trading in future and option is a business loss as per Income Tax Act.

We hereby humbly summarize the bullet points:

- i. We acted as *bonafide* trader and have transacted in stock option segment in normal course of our business activity and our trading in the same was very much within our own financial and risk bearing capacity.
- ii. We humbly submit that while executing said transactions, we had followed and complied with all procedure and requirements as statutorily required.
- iii. We submit that in any business activity in stock market, one can either make profit or loss. We humbly submit that at the relevant time we had no idea of any profit or loss in said transactions and we traded in option segment taking into account our 'risk and reward' parameters.
- iv. We state that we had followed and complied with all the procedures and requirements of capital market while dealing through SEBI registered intermediary.
- v. We are not connected to counterparties of our trade and neither do we have any relation with promoters/directors/key management person of underlying parties.
- vi. We believe there has been no grievance by any investor, broker, stock exchange or any other agency concerned in the matter.
- vii. We have a clean and unblemished track record, this is the first time in our history that proceeding is initiated by any regulatory authority against us for our trading in the stock market.

Taking in view totality of the facts and circumstances of the case and particulars of our submissions and denials as aforesaid, we submit that no adverse inference may be drawn in our case.”

8.4. The Counsel for Assessee also submitted the list of counter-parties detailing the name of instrument, position taken by assessee, reversal of trade and counter party details and also explained that vide Order Dated 22.08.2016 SEBI further released confirmatory Order in the case of confirming the earlier Order and Order dated 22.08.2016 is also reproduced in the assessment order in which interim relief was provided to the assessee like permission to buy/sell and deal in commodities for taking hedging positions liquidating shares, mutual funds and liquid funds etc., In this Order in para-22 reproduced at page-67 of the assessment order it is mentioned that *“at this juncture, pending investigation SEBI is not inclined to take any cognizance of their submission that entities have paid the*

taxes. More over this issue will require detailed verification from the Income Tax Department.”

8.5. The A.O. vide order sheet dated 17.07.2017 has also asked the assessee to give additional reply on the evidences and facts collected during the assessment proceedings – SEBI report, SEBI reply to the notice under section 133(6) etc., On the issue of loss claimed by assessee on account of loss in trading from stock option, assessee filed reply before A.O, but, it was not accepted by the A.O. precisely on the following reasons :

- (i) Out of the 169 unique contacts traded an overwhelming 168 resulted into losses with only one trade being profitable.
- (ii) Assessee also entered into 239 universal trades wherein the same quantity of stock option was bought and subsequently sold to the same entity or vice versa.
- (iii) Out of the total turnover of Rs.31.8 crores, Rs.31 crores is in Universal Trades with accounts for

97.5% of the total turnover. As such, large portion of Universal Trade turnover is highly irrational, unreasonable, abnormal with no logical end in sight.

- (iv) There is a significant difference between buy value and sale value of the contracts as also the intrinsic value.

Buy Price was 10.6.

Sale Price 1.8

The A.O. did not accept the explanation of assessee on these because of difference in intrinsic value of instrument.

- (v) Almost all the trades have been executed by assessee within very short time and invariably on the same day.
- (vi) Also in the instruments for which assessee has traded for total number of 169 contracts in 153 – assessee contributed between 70-100% of the

contracts turnover. This highlight that in over 90% of the contracts traded by assessee, it was the only or main investor. It also shows the capacity of assessee to influence the market price of the trade.

(vii) The SEBI in its Order has identified entities which through deceptive, abnormal trades have generated losses as also the entities which have generated super normal profits. This order provides list of 25 such parties, out of such 25 parties, the assessee has also traded with three entities in a sum of Rs.48,91,000/-.

(viii) The A.O. reproduced the reply of assessee in this para, in which, assessee denied to have any connection or relation with any of the counter-parties to the trade because it was an independent of any other parties and transactions were carried out on the floor of the Stock Exchange. All the transactions were carried-out online through Sophisticated On-line

Surveillance Software and in case of Screen based Trading, Automated System itself match the Orders on a price time priority basis and hence, it is not possible for anybody to have access over identity of the counter party. Since counter party identity is not displaced one can never have any choice with whom it wants to deal or not to deal.

8.6. However, the A.O. did not accept the above contention of assessee and rejected the same by holding as under :

“The argument presented by the assessee is considered but not found acceptable. It is true that in screen based electronic trading ideally it is not possible to choose the counterparty for trade. But certain entities mentioned in the SEBI order manipulated the trading by participating in illiquid stock options. By controlling 70-100% of the turnover in these instruments these entities became the market makers for such trades. At such irrational, abnormal prices they had the option to choose their trading partners. In the case of assessee from the data provided by the SEBI it can be clearly noticed that majority of trades are

being executed with counter-parties with which assessee has participated in more than one trade.

Out of list of 315 trades provided by SEBI only in 43% trades the counterparty is unique whereas in majority of 57% cases the counter-parties had executed more than 1 trade with the assessee. This also establishes that assessee had the option to choose its trading partner since in more than 57% cases it chose its trading partner with whom it had transacted earlier. In screen based electronic trading it's a very remote and small possibility to be able to Trade with counterparty more than once, but assessee by managing the market through irrational, abnormal financial behavior and by controlling the turnover in trade of certain illiquid stock options somehow succeeded to at least choose its partner in 57% trades.”

8.7. The A.O. relied upon Judgment of Hon'ble Supreme Court in the cases of Durga Prasad More 82 ITR 540 (SC) and Sumati Dayal vs., Commissioner of Income Tax 214 ITR 801 (SC) and Judgment of Hon'ble Punjab & Haryana High Court in the case of Somnath Maini vs., Commissioner of Income Tax 306 ITR 414 (P&H) for considering the issue in the light of principle of human probabilities and surrounding circumstances and held that

“the loss on stock option claimed by assessee is to be disallowed”. The A.O. accordingly made the addition.

9. The assessee challenged the addition before the Ld. CIT(A). The assessee submitted before the Ld. CIT(A) that disallowance have been made simply relying upon SEBI report without carrying-out any investigation and bringing any evidence or material on record against the assessee. The assessee explained the findings of the A.O. that same are not sustainable in Law. The assessee filed the documents at the time of assessment with explanation on selling of product below intrinsic value, explanation on the trades entered by assessee and identification of counter-parties and explanation of provisions of Income Tax Act applicable for losses incurred by assessee. The assessee also made detailed written submissions taking the arguments against the position taken by the A.O. which is reproduced in the appellate order at pages 7 to 19 which are reproduced as under :

Arguments against the position taken by the learned AO

The assessee company is engaged in import and export of precious metals, import and trading of Chemicals, polymers, pulses, dyes, pharma and manufacturing & trading of Rice and also deals in shares, futures and options. The company is maintaining regular books of accounts. The Books of Accounts are being audited under section 44AB of the Income tax Act and the Companies Act 1956. The assessee company has originally filed the return of income on 28.09.2015 vide acknowledgement number 828471411280915 declaring total income of INR 87,134,240.

During the year under consideration, assessee transacted in various derivative contracts which includes securities contracts, commodities contracts and currency contracts. All these transactions were carried out in the normal course of business after complying with all the procedures and requirements as per the statute. The details of profit and loss on the same are provided hereunder:

S.No.	Particulars	Amount
1	Profit on Derivative Trading in Commodity Exchange	9,83,33,136
2	Loss in Derivative Trading from Stock Exchanges	(15,28,20,110)

During the assessment proceedings, the Ld. AO confronted the assessee with the ex-parte and interim order of SEBI in which it was alleged that assessee has made losses through indulging in suspicious

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trades including reversal trades. The order has termed the stock option transactions entered by these entities as deception, non-genuine and fraudulent.

It may be noted that ad interim stay order was vacated by Securities and Appellate Tribunal (SAT), who said the following:

“16. Based on the above, without going into the merits of the case, I am of the view that there is no need to continue the directions issued against the entities mentioned at Table 1 above vide Interim Order dated August 20, 2015 and Confirmatory Orders dated July 30, 2016 and August 22, 2016, and that the Adjudication Proceedings initiated by SEBI would adequately meet the ends of justice and regulatory objectives.”

In continuation of the order passed by Securities Appellate Tribunal (SAT) as above, investigation will be done by SEBI which will be then followed by adjudication proceedings, which will then determine the actual implications of the transaction. Till such time the matter is sub-judice.

Assessee duly replied to the Ld AO and provided all the details and documents as required. Assessee provided the books of accounts alongwith bills, vouchers which were duly test checked by the Ld. AO.

But, the Ld. AO while making the assessment order, ignored the submissions of assessee and relied on the contentions raised in the said order of SEBI and went ahead in passing an impugned assessment order. The impugned order was passed on the basis of information received and investigation done by SEBI in case of trading of stock options. It may please be noted that the Ld. **AO neither tried to check for the genuineness of the transactions nor evaluated the transactions as per the provisions of Income Tax Act. He has**

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merely relied on the reports of the SEBI, and accordingly passed an order on the basis of borrowed satisfaction.

The assessee wishes to draw your kind attention towards the following points:

✓ **Trading in Recognized Stock Exchange and payment of statutory dues:**

It may please be noted that the assessee has done the trading in Bombay Stock Exchange (BSE) which is a recognized stock exchange and has duly paid the Securities Transaction Tax on all the transactions.

All the transactions were carried out through registered brokers which were duly supported by contract notes. We are herewith submitting before your goodself the copies of contract notes issued by the brokers as **Annexure- 2** in order to prove the genuineness of the transactions.

✓ **Payment of Margin amount by assessee:**

The Ld. AO in his order has alleged that the loss incurred by the assessee was not genuine. In this regard kindly note that, the assessee has duly made the payments of margin to exchange through its brokers. The payment has been made from the bank account of the assessee regularly.

The same is evident from the daily obligation bills as issued by the broker. Further, the margin amounts have been duly paid to the brokers for undertaking the trading on behalf of assessee which is evident from bank statement of assessee.

(Bank statements of the assessee and Account of Brokers are enclosed for your records as Annexure 3 & 4).

✓ **No prior knowledge of or connection with counterparties:**

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The main reason for addition made by AO was based on the order issued by the SEBI. In its order, SEBI has pointed out the names of 25 counterparties who have made profits from the reversal trades. The orders mentions that

Quote:

"As the loss-making entities mentioned above were making huge loss by entering into reversal trades, transactions of the entities who had made consistent profit by entering into reversal trades were also examined. It was observed that some of these entities who made consistent profit were also counterparties to the loss making entities".

Unquote:

The SEBI has identified the 25 parties that were associated with alleged reversal transaction. The list of the same was inserted in the Assessment order.

The Futures and Options Trading System provides a fully automated trading environment for screen-based, floor-less trading on a nationwide basis and an online monitoring and surveillance mechanism. The system supports an order driven market and provides complete transparency of trading operations. Every day in the stock exchanges crores of transactions are being done and each second hundreds of orders are placed for each stock.

It may please be noted that any investor, who enters into any transaction in the stock exchange, does not know the detail of counterparty to the transaction. In the screen based transaction, the assessee enters his order which gets accepted by the stock exchange. The trading system of NSE and BSE ensures that neither the identity of counterparty nor the volume of transaction is known to anyone. Accordingly, making an illogical nexus is bad in the eyes of law.

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Further, all the counterparties which has been identified in the order, are not associated to the assessee in any way. The assessee does not have any other kind of financial or other dealing with any of the counterparties. Accordingly, the allegations are baseless.

In addition to above, the assessee, in order to check the allegations of similar set of counterparties, requested the SEBI to provide the data of the transactions entered onto by the assessee alongwith the name of counterparty to the transaction. The letter requesting the details from SEBI is attached as **Annexure-5**.

After this request, the SEBI provided the complete details including date, time, rate, quantity and counterparty of the transaction. The CD was provided on 3rd December, 2015 during the course of assessment. Please note that this was the first time where assessee got to know about the names of its counterparties. The assessee does not have any relation with any of the counterparties. The complete sheet depicting the details of transaction alongwith counterparty is attached as **Annexure-6**. All this information was on record of the Ld. AO.

✓ **Out of the list of 179 counterparties given by SEBI, only 3 formed part of the SEBI order:**

The trade detail provided by SEBI in the CD lists the names of 179 counterparties with which the assessee company bought and sold option contracts. The order of SEBI mentions the name of 25 counterparties which are alleged to be involved in reversal of trades as per interim order. However, further analysis by us depicts that merely 3 counter parties out of 25 entities have been matched with names of parties as mentioned in the Interim order of SEBI. **A sheet depicting the analysis of the same is attached as Annexure-7** to this submission.

S. No	LIST OF COUNTERPARTIES ALLEGED IN SEBI ORDER	Buy Value	Sell Value	Profit/ (Loss)
1	N M Impex Pvt. Ltd.	NIL	NIL	NIL

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2	Vision Sponge Iron Pvt. Ltd.	NIL	NIL	NIL
3	Umang Nemani	NIL	NIL	NIL
4	Vsp Udyog Pvt. Ltd.	NIL	NIL	NIL
5	Shir Commodities & Futures (P) Ltd	NIL	NIL	NIL
6	Jai Annanya Investments Pvt. Ltd.	NIL	NIL	NIL
7	SureshineVintrade Pvt Ltd	NIL	NIL	NIL
8	Motisons Commodities Pvt. Ltd.	NIL	NIL	NIL
9	Evergrowing Iron &Finvest Pvt. Ltd.	NIL	NIL	NIL
10	Rajbanshi Trading	NIL	NIL	NIL
11	Tradebulls Enterprise Pvt. Ltd.	NIL	NIL	NIL
12	AvijitSaha	NIL	NIL	NIL
13	KetanRamanlal Shah HUF	NIL	NIL	NIL
14	Steel Crackers Pvt. Ltd.	50,06,250	30,03,750	(20,02,500)
15	Prime Gold Internation Limited	NIL	NIL	NIL
16	Raj Ratan Smelters Pvt Ltd	NIL	NIL	NIL
17	Sourabh H Bora	NIL	NIL	NIL
18	Eden Trading Services Pvt. Ltd.	NIL	NIL	NIL
19	Mammon Concast Pvt. Ltd.	NIL	NIL	NIL
20	Bhawani Ferrous Pvt Ltd	21,58,800	1,65,200	(19,93,600)
21	Vsp Steel Pvt. Ltd.	NIL	NIL	NIL
22	Panem Steel Pvt. Ltd.	NIL	9,02,000	9,02,000
23	Deepak NatvarlalPankhiyani HUF	NIL	NIL	NIL
24	KirtiRamji Kothari	NIL	NIL	NIL
25	UmeshMalani	NIL	NIL	NIL
	Total Profit/(Loss)			(30,94,100)

The analysis of trade data provided in CD is summarized as follows:

Transaction Analysis				
Buy Transactions		Sell Transactions		Profit/(Loss)
Quantity	Value	Quantity	Value	

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Total Trade data of M/s Kundan Rice Mills Ltd for FY 2014-15 with 179 entities(counterparties) as mentioned in SEBI data	1,31,83,875	23,39,30,850	1,31,83,875	8,39,51,625	(14,99,79,225)
Quantity and Value of trade with the 3 entities identified by SEBI allegation as involved in manipulation	8,67,250	71,65,050	10,87,250	40,70,950	(30,94,100)
Quantity and Value of trade with the 22 entities identified by SEBI allegation as involved in manipulation	NIL	NIL	NIL	NIL	NIL

On the basis of trade data available with the assessee in CD as provided by SEBI , it is submitted that out of total buy value of Rs. 23,39,30,850 merely 71,65,050 (consisting 3.06% of total buy value) is allegedly matched with the entities mentioned/alleged to be undertaking reversal trades as per the Interim order of SEBI.

Further, out of total sales value of Rs. 8,39,51,625/- merely 40,70,950 (consisting 4.85% of total sell value) is allegedly matched with the entities mentioned/alleged to be undertaking reversal trades as per the Interim order of SEBI.

Accordingly, the loss of only INR 3,094,100 should have been in dispute as even SEBI is questioning only these trades. But the AO without even noticing the same went ahead and disallowed the complete loss of Rs. 15,28,20,110/-

It is inappropriate to allege that the assessee is connected and had prior arrangements with the entities named in the order merely because 3.06% of buy transactions and 4.85% of sale transactions allegedly matched with the entities who are debarred vide the interim order of SEBI.

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The Interim order does not delineate with whom the trades were allegedly 'reversed'. The assessee got to know about the counterparties only after the CD was provided to it during inspection where details of counterparties were made available by the SEBI. Thus, out of 179 counterparties, only 3 counterparties could have been part of the present proceedings.

It is again reiterated that the assessee at no point of time was aware of counterparty with which its transactions got matched since all the transactions were executed through normal screen based trading system of stock exchange Accordingly, one cannot predecide the counterparties. Even transactions with the said 3 parties were all genuine through stock exchange.

On the basis of above facts and trade data available in CD, the details of 3 counterparties mentioned or alleged to be to be undertaking reversal trades as per the Interim order of SEBI is as follows:.

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ID	Trade Date	Underlying Stock	Strike Price	Trade Intrinsic Value (IV)	Diff. between Trade Price & Intrinsic Price	Trade Price	Gross Buy Value	Gross Sell Value	Gross Traded Value	Client PAN	Client Name	Ctpy PAN	Ctpy Name	Ctpy Qty	Ctpy Price	Total Turnover in the contract	Underlying Price at Trade Timestamp *
123653	25-02-2015	HOUSING DEV. & INFRA. LTD.	115	0	3.8	3.8	1064000	0	1064000	AAACK7098P	KUNDAN RICE MILLS LIMITED	AACCB3369A	BHAWANI FERROUS PVT LTD	280000	3.8	2240000	112.15
123709	25-02-2015	ALLAHAB AD BANK	110	0	2.3	2.3	1094800	0	1094800	AAACK7098P	KUNDAN RICE MILLS LIMITED	AACCB3369A	BHAWANI FERROUS PVT LTD	476000	2.3	1904000	106.26
125182	25-02-2015	HOUSING DEV. & INFRA. LTD.	115	0	0.25	0.25	0	70000	70000	AAACK7098P	KUNDAN RICE MILLS LIMITED	AACCB3369A	BHAWANI FERROUS PVT LTD	280000	0.25	2240000	111.64
125237	25-02-2015	ALLAHAB AD BANK	110	0	0.2	0.2	0	95200	95200	AAACK7098P	KUNDAN RICE MILLS LIMITED	AACCB3369A	BHAWANI FERROUS PVT LTD	476000	0.2	1904000	106.26
231143	23-03-2015	ARVIND LIMITED	270	0	4.1	4.1	0	902000	902000	AAACK7098P	KUNDAN RICE MILLS LIMITED	AAACP8592R	PANEM STEEL PRIVATE LIMITED	220000	4.1	880000	269.48
257721	26-03-2015	PUNJAB NATIONAL BANK	200	45.56	-0.56	45	5006250	0	5006250	AAACK7098P	KUNDAN RICE MILLS LIMITED	AADCS6663F	STEEL CRACKERS PRIVATE LIMITED	222500	45	445000	154.44
262517	26-03-2015	PUNJAB NATIONAL BANK	200	45.69	-18.69	27	0	3003750	3003750	AAACK7098P	KUNDAN RICE MILLS LIMITED	AADCS6663F	STEEL CRACKERS PRIVATE LIMITED	1111250	27	445000	154.31

Therefore, it is bizarre to allege that the assessee is 'connected' and had 'prior arrangements' with the entities named in the order. The mere fact that the assessee company suffered losses cannot be a ground to rope the assessee into the present proceedings and pass harsh directions since the company has earned profit as well amounting to Rs. 9,83,33,136/- while dealing in trading of stock derivatives and commodities respectively. The same has been duly considered in the financial statements.

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✓ **Allegation of trading in illiquid stock is baseless:**

The Ld. AO in its assessment order has alleged that:

"The argument presented by the assessee is considered but not found acceptable. It is true that in screen based electronic trading ideally it is not possible to choose the counterparty for trade. But certain entities mentioned in the SEBI order manipulated the trading by participating in **illiquid stock options**. By controlling 70-100% of the turnover in these instruments these entities became the market makers for such trades. At such **irrational, abnormal prices** they had the option to choose their trading partners."

The Ld. AO has alleged that the assessee has dealt in illiquid stocks. In this regard, please note that as per the guidelines of SEBI, not all stocks are eligible for derivative trading. The top stocks in terms of liquidity and volume are eligible for derivative trading.

SEBI has issued a circular dated 23rd July, 2012 which prescribes the eligibility criteria for stocks to be covered in Derivative segment. It is pertinent to note that illiquid stocks do not qualify to be traded in derivative segment. The circular of SEBI is enclosed as **Annexure-8** to this submission.

Accordingly, the allegations that the stocks in which assessee dealt were illiquid is false.

It is pertinent to note that the stocks in which assessee traded were mostly of blue chip companies which were frequently traded in market. All these stocks make up the index of Bombay Stock Exchange. This is prevalent from the trade detail sheet of the assessee company.

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It was further alleged by the Assessing officer that out of the 169 scrips traded by the assessee, the assessee was the only or the main investor in over 90% of contracts traded by the assessee.

For this, assessee has performed an analysis of 10% of the total scrips as sample in which assessee has traded with the volume of transactions carried out in Bombay Stock Exchange on day, month and year basis. It will be important to note on the basis of scrip analysis done that the allegation of the Assessing Officer is completely false and based on surmises.

The analysis done on sample basis for some scrips have been attached as **Annexure-9** to this submission.

The working clearly shows that allegation of AO that "in over 90% of the contracts traded by assessee, it was only or main investor" is completely baseless and bad in the eyes of law. This also depicts that the AO has not carried out any analysis and failed to record his own findings and passed an order by merely relying over the order passed by SEBI.

In the sample of 17 cases, the % of trading done by the assessee in comparison to total trading of derivatives on BSE & NSE in all cases is very less.

*The source of this data is <https://www.bseindia.com/>

✓ **Trading was done within the price range prescribed by SEBI, accordingly, the allegation of irrational, abnormal prices are baseless:**

The AO has further alleged that the prices at which the transaction took place were irrational, abnormal prices. In this regard it may please be noted that for trading in stock option, the SEBI permits a range of price within which the transactions can be entered. Any orders placed

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beyond the permitted range are not allowed to be entered in the screen based trading.

Accordingly, the trading done by the assessee in the option segment was within the permitted range. The orders which are punched outside the permitted range are automatically rejected by trading system. Accordingly every transaction entered by the assessee was well within the price range and hence treating the same as irrational or abnormal is completely bad in the eyes of law.

Further, we have analyzed the price at which the trades were executed by the assessee and the prices range during the FY 2014-15 and month in which the trade was done by the assessee. The analysis of price range is enclosed with submission as **Annexure no. 10**.

It is clearly evident from the analysis that the assessee has carried out all its trade within the price range and hence the allegations of the Ld. Assessing Officer is baseless.

✓ **Allegation that trades are done below the Intrinsic Value**

The Ld. AO has alleged that the assessee is trading at significant difference from the intrinsic value of instruments. In this regard, please note that SEBI has calculated Intrinsic value as difference between strike price and price of underlying scrip in cash market. Whereas Intrinsic value is based on various factors like time, demand and supply, volatility in the underlying scrip and overall market and market conditions, etc. in addition to difference between strike price and price of underlying scrip in cash market. It is pertinent to note that if orders are only allowed to be placed at intrinsic value, then it is inexplicable as to why trading system permits orders to be placed at prices other than the intrinsic value.

As per Interim order of SEBI, difference between underlying scrip in cash market and strike price in derivative segment ought to be the

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correct price or premium for contract in option segment. However, if the same is true, there is nothing for an investor to choose at all and there would be no trading since there would be no variation in perception of market participants which is the foundation of trading in option segment.

Therefore, it cannot be considered that premium can only be offered at rate which is difference between strike price and price of underlying scrip in cash market. Thus, allegation of Ld. AO that assessee has done trades below intrinsic value is baseless.

Allegation that "The Loss making entities as well as the profit-making entities were seen trading repeatedly in deep in-the-money options and deep out-of-the-money options on individual stocks, which were thinly traded."

It may be noted that there are no instances and no such transactions done by the assessee which are deep-in-money options and deep out-of-money options on individual stocks. There are no such facts analysed or presented by the Ld. AO in the order."

10. The Ld. CIT(A) considered the issue in the light of findings of the A.O, SEBI Order and submissions of the assessee. The Ld. CIT(A) reproduced the findings of the SEBI in brief in the appellate order and objections taken by assessee before the authorities below. The Ld. CIT(A) also referred to Order of the Adjudicating Authority of SEBI in the case of Kasi Vishwanath Steel Pvt. Ltd., dated 10.08.2018 available on website with whom the assessee

was found to have indulged in non-genuine trading. The Order is reproduced in the appellate order. The Ld. CIT(A) noted that these are finding of fact of SEBI. The Ld. CIT(A) also referred to Judgment of the Hon'ble Supreme Court in the case of SEBI vs., Rakhi Trading Pvt. Ltd., Ketan Parikh vs., SEBI, Mc.Dowell & Co vs., CTO 154 CTR 148, Commissioner of Income Tax vs., Durga Prasad More (supra) and Sumati Dayal vs., Commissioner of Income Tax (supra) and held that "when the present case has to be considered in the light of human probabilities it is clear that losses claimed in these trades of stock option are non-genuine transaction. Moreover, SEBI being the Authority to prevent such malpractices has carried-out a detailed investigation in which the parties were found guilty. No separate investigation is required to be done by the A.O. to disallow the bogus losses. This ground was accordingly dismissed and appeal of assessee was dismissed.

11. The assessee is in appeal challenging the above addition.

12. The Learned Counsel for the Assessee reiterated the submissions made before the authorities below. He has submitted that authorities below have heavily relied upon ad-interim Order of SEBI dated 20/22.08.2015. However, vide subsequent Order dated 05.04.2018 (PB-298) the SEBI has vacated the interim Order dated 20/22.08.2015 because the adjudication proceedings had been initiated against the assessee company. All the transactions/trades are conducted through Bombay Stock Exchange (BSE) through banking channel. Out of 25 parties, assessee dealt with 03 parties only as per SEBI Order. Therefore, there cannot be a conclusion drawn that assessee dealt in similar transactions without conducting any investigation. The assessee paid Security Transaction Tax (STT) on all the transactions. All the transactions are supported by contract notes in respect of the impugned amount of derivative tradings. All margin money are paid. Copy of the bank statements of the assessee reflecting payment of requisite margin money to broker are filed before the authorities below which are also reflected in the books of account. At

the time of transactions/trades assessee was not aware of the other party with whom transactions have been carried out. There is no business transaction with other parties. The assessee subsequently filed letter to SEBI to seek details of the parties, copies of which are filed at page-140 of the PB. PB 150-158 are the details of the assessee company provided by the SEBI in response to the letter of the assessee. PB 159-162 are analysis of trade data submitted by SEBI to prove that assessee company has only carried-out transactions with 03 parties out of 25 parties mentioned in the Order of the SEBI. There is no prior arrangement known to the assessee. Their findings are simply based on surmises and conjectures without bringing any evidence on record against the assessee. Copy of the Circular of the SEBI dated 23.07.2012 is filed at pages 163-164 of the PB revising the referring the eligibility criteria for stocks in derivatives segment which assessee has fulfilled. PB 165 is the chart showing the proportion of the transactions carried out by the assessee in various scrips vis-a-vis total transactions carried out on the BSE on day, month and year

basis. No independent investigation have been carried out by the A.O. or the Ld. CIT(A) and thus the documents filed by assessee have not been rebutted by the authorities below. Learned Counsel for the Assessee submitted that the Revenue has relied upon Judgment of the Hon'ble Supreme Court in the case of Securities and Exchange Board of India vs., Rakhi Trading Pvt. Ltd., (supra), in which no findings have been given of avoidance of tax for Income Tax purposes. PB 24 is showing note 25 with regard to other expenses to show assessee suffered loss of Rs.18.81 crores in preceding assessment year ending 31.03.2014 on the same basis which have not been disputed by the Revenue Authorities. The transactions of the assessee with counter-parties have not been proved to be done in connivance with those parties. The assessee sold and then purchased the same items, but, assessee would not be knowing names of the parties because Stock Exchange was conducting the transactions through screen based electronic trading in which it is not possible to choose the counter-parties for trades. Thus, nothing is proved against the assessee. He has

submitted that since interim order of the SEBI have already been vacated and no investigation have been carried out by the authorities below, therefore, impugned orders are liable to be set aside and the business loss suffered by the assessee should have been allowed as deduction. Learned Counsel for the Assessee relied upon Order of the ITAT, Mumbai, Special Bench in the case of GTC Industries vs., ACIT 164 ITD 1 (SB) wherein the Tribunal observed as under :

“46. *“Ultimately the entire case of Revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money, It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on*

record. The theory of preponderance of probability is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favorable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumptions of facts that might go against the assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigations have been carried out then nothing can be implicated against assessee.

12.1. He has submitted that since initial burden upon assessee have been discharged by producing relevant and cogent documentary evidences, therefore, onus is shifted upon the Revenue to prove that assessee did not suffer genuine business loss and in this case the Revenue has not brought any evidence on record against the assessee, therefore, deduction on account of business loss is allowable. In support of this proposition, he has relied upon

Judgments of Hon'ble Delhi High Court in the cases of Commissioner of Income Tax vs., Gangeshwar Metals Pvt. Ltd., 361 ITR 10 (Del.), Commissioner of Income Tax vs., Kamdhenu Steel & Alloys Ltd., 361 ITR 220 (Del.) and Commissioner of Income Tax vs., Value Capital Services Pvt. Ltd., 307 ITR 334 (Del.).

13. The Ld. D.R. on the other hand relied upon the Orders of the authorities below. The Ld. D.R. submitted that SEBI is a statutory authority, therefore, their findings of fact are binding. He has submitted that Ld. CIT(A) has summarised the findings of the interim Order of the SEBI in his findings in which it is clearly borne-out that transactions were carried out at the price less than their intrinsic value and loss making entities have squared-up their position by reversing these from same counter-parties. Purchases were made at the price much higher than the initial price at which they were sold. The trade reversal was done in a majority of contacts traded by loss making entities. The majority of profit making entities had opened specific accounts for exclusively carrying out suspicion

transactions in stock option and mostly the transactions are carried out in last quarter of the financial year i.e., March. The assessee except in one transaction has suffered loss. The Ld. D.R. submitted that difference in reversal transactions was of few seconds. The Ld. D.R. in his written submissions has also heavily relied upon the Judgment of Hon'ble Supreme Court in the case of Securities and Exchange Board of India vs., Rakhi Trading Pvt. Ltd., (supra) and referred to many of the paras from the Judgment. The Ld. D.R. also relied upon Judgment of the Hon'ble Supreme Court in the case of McDowell & Co. Ltd., 154 ITR 148 (SC), Commissioner of Income Tax vs., Durga Prasad More 82 ITR 540 (SC) and Sumati Dayal vs., Commissioner of Income Tax 214 ITR 801 (SC) on the proposition that *"if test of human probability is applied in the case of assessee, it would clearly make-out a case that assessee did not suffer genuine business loss."* The Ld. D.R, therefore, submitted that no interference is required in the matter and appeal of the assessee may be dismissed.

14. We have considered the rival submissions and perused the material available on record. The assessee pleaded before the authorities below that it is in the same business and Member of Commodities Exchange ["MCX"] and other Commodities Exchanges since more than 10 years. The assessee used to do business in these Commodity Exchanges through futures segment as hedging /trading tools as per requirement of the business. The assessee dealt in shares through Members/Brokers since number of years. The assessee used to do physical trading as well as future and option since number of years. Therefore, it is not an isolated year where assessee has done the transaction in future and option stocks. All such transactions are recorded in the books of account. Profit and Loss earned/incurred from trade in Commodities Exchange are also part of the financial statements. It was explained before A.O. regarding intrinsic value as mentioned in the Order of the SEBI that SEBI has circulated intrinsic value as difference between strike price and price of underlying scrip in cash market. Whereas intrinsic value is

based on various factors like time factor, demand and supply, volatility in the underlying scrip and overall market and market conditions domestically as well as globally etc., in addition to the difference between strike price, the price of underlying scrip in cash market. There is no set Formula/Law/Rule/Circular which defines intrinsic value or prohibits trading below intrinsic value. The A.O. at page-80 of the assessment order has accepted that in Screen based Electronic Trading, ideally it is not possible to choose the counter party for trade. This para is also reproduced above. Thus, the identity of the counter-parties are not displayed on the Screen at the time of trades. It may be noted here that stock market is a highly volatile market, and keeping in mind the volatility, SEBI has set circuit breaker limits at 10%, 15% and 20% for the indices. If the 10% limit is hit, trading can be halted between 15-45 minutes depending upon the time of breach. The 15% limit leads to a halt in trading for 45-75 minutes, while 20% limit leads to closure of markets for the rest of the day. However, such circuit breaker limits are at present not applicable to F

& O segment, which makes the F & O segment highly volatile and a gambling den. A real example can explain the highly volatile F & O segment. On 30.10.2019, moments before YES Bank's exchange announcement, options of 60-call and 65-call were quoting at just around 10 paise. After announcement, this option zoomed to Rs.18.40p, making jump at a mind blowing profit rate of 18,400%. A person who has spent maximum of Rs. 300/-, within minutes made Rs. 40,000/-. It would not be out of place to mention that to check excessive price movements, capital markets regulator SEBI proposed a slew of measures including capping the maximum daily movement of up-to 20% for all stocks including that are part of the F & O segment. It is still a proposal as derivatives markets or F & O segment reflect expectation of spot prices in the future and currently price bands or circuit filters are generally not applied on them.

14.1. The A.O. in the assessment order has started doubting business loss suffered by assessee in trading because of the ad-interim order of SEBI dated 20/22.08.2015. The A.O. referring to and reproducing the

said order in the assessment order has asked for the explanation of assessee and directed the assessee to file details of past practice/practice of assessee in executing such trades, reasons for such unreasonableness and irrational financial behavior, details of all trades engaged in by assessee and identification of counter party and provisions of Income Tax Act applicable for such trades. The reply of assessee is noted above. The assessee explained before A.O. that it has acted as a bonafide trader as have been doing in past and complied with all procedures and requirements of the stock exchange. At the time of relevant transactions/trades assessee would not have any idea of any profit or loss in the said transaction. The assessee is not connected with the counter-parties in the trade and there is no grievance of any of the investor or BSE. The assessee in support of the explanation filed copies of the contract notes in respect of the transactions in question of derivative tradings [PB 69-109], copies of the bank statements of the assessee company reflecting payment of requisite margin money to brokers [PB 110-128], copies of

the statements of accounts of Brokers in the books of the assessee company [PB 129-139], copy of the letter dated 01.10.2015 filed before SEBI seeking details of trades conducted by assessee [PB 140-149], trade details of assessee company as provided by SEBI in response to such letter [PB 150-158], analysis of trade data supplied by SEBI to prove that assessee company has only carried out transactions with three parties out of 25 parties mentioned in the Order of the SEBI [PB 159-162], copy of the Circular dated 23.07.2012 issued by SEBI about eligibility criteria for stock in derivatives segments complied by assessee [PB 163-164], chart showing the proportion of transactions carried out by assessee company in various scrips through BSE [PB165], analysis of price on which trades were executed by the assessee company [PB 166-167] and copy of the Order of the SEBI dated 05.04.2018 disposing off the proceedings initiated vide Order dated 22.08.2015 [PB 298-306]. The subsequent Order of the SEBI dated 05.04.2018 in paras 16 and 17 held as under :

“16. *Based on the above, without going into the merits of the case, I am of the view that there is no need to continue the directions issued against the entities mentioned at Table-1 above vide Interim Order dated August 20, 2015 and Confirmatory Orders dated July 30, 2016 and August 22, 2016, and that the Adjudication Proceedings initiated by SEBI would adequately meet the ends of justice and regulatory objectives.*

17. *I, therefore, in exercise of the powers conferred upon me under section 19 of the Securities and Exchange Board of India Act, 1992 read with sections 11, 11(4) and 11B thereof, do hereby dispose of the proceedings initiated vide Interim Order dated August 20, 2015 as confirmed vide Orders dated July 30, 2016, and August 22, 2016, against all the entities mentioned in Table 1, with immediate effect without any further directions. The Adjudication Officer shall continue and conclude the proceedings in accordance with*

the SEBI Act, 1992 and SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995, and pass appropriate order on merits, at the earliest, uninfluenced by this order, since this order is, passed without examining the merits, in consonance with the regulatory objective that imposition of monetary penalty as per law in line with similarly placed entities would meet the ends of justice.”

14.2. The above Order clearly show that SEBI has subsequently directed that there is no need to continue with the directions issued against the assessee company and others vide Orders dated 20/22.08.2015 and dated 22.08.2016 relied upon by authorities below. Thus, in principle, the interim order and subsequent orders of the SEBI which is the basis of passing the assessment order in question have been vacated by the SEBI itself. The assessee filed complete documentary evidences before the authorities below and explained that in Screen based Electronic

Trading, it is not possible to choose the counter-party for trading and assessee paid STT on the same transaction and transactions are done with the Members/Brokers and sub-brokers which fact have not been disputed by the authorities below. The assessee has also proved that all the transactions are carried out through banking channel and as per guidelines issued by the SEBI by making payment of margin money and transactions are proved by contract notes. There is also no allegation made by BSE against any of the transactions carried out by the assessee company. All the transactions are carried out and settled through banking channel through BSE. No action have been taken by BSE against any of the party. The A.O. has further referred to the subsequent order of the SEBI dated 22.08.2016 in the assessment order and in para-22 of the aforesaid order of the SEBI, it is clearly directed that *“Therefore, at this juncture, pending investigation, I am not incline to take any cognizance of their submissions that the entities have paid the tax. Moreover, this issue will require detailed verification from the Income Tax Department.”*

However, the A.O. as well as the Ld. CIT(A) have not conducted any investigation in any on the documentary evidences filed by assessee. The Ld. CIT(A) has gone to the extent in holding that *“no separate investigation is required to be done by the A.O. to disallow the bogus loss”*. PB 24 shows notes No.25 with regard to other expenses to show that in preceding A.Y. 2014-2015 assessee has suffered loss on trading in Commodity Exchange in a sum of Rs.18,81,82,852/- which have not been disallowed by the authorities below as per submissions of the Learned Counsel for the Assessee. Thus, following the principle of consistency, the A.O. should not have disallowed the similar loss which is lesser amount in assessment year under appeal. We rely upon Judgment of Hon’ble Supreme Court in the case of Radhasoami Satsung 193 ITR 321 (SC). Thus whatever query was raised by the A.O. on the basis of the ad-interim order of the SEBI, assessee successfully explained all the issues supported by the documentary evidences in which no discrepancy have been found out by the authorities below.

14.3. The A.O. however relied upon ad-interim order of the SEBI dated 20/22.08.2015 in which it was found *prima facie* that profit making entities were deliberately making repeated losses through their reversal trading in stock option which do not make economic sense and facilitating their counter-parties, thus, contravening the provisions of SEBI Act and restrain such entities from buying or selling or dealing in the Securities Markets and their objections were called for. The A.O. further referred to the Order of the SEBI dated 22.08.2016 in which SEBI released the confirmatory order and interim order was diluted with permission to the assessee and others for dealing in the scrips. It was further directed in the said order that these directions shall continue to be in force till further directions. These facts clearly show that the ad-interim order of the SEBI was passed without hearing the objections of the assessee and when objections of the assessee were considered, the interim order was diluted by giving permission to the assessee to deal in the transactions. Ultimately, both the orders of the SEBI relied upon by the A.O. have been

vacated by the SEBI vide order dated 05.04.2018. Thus, there were no material available with the authorities below so as to conclude that assessee has entered into any dubious or other transactions deliberately to show business loss. In such circumstances, it was imperative on the part of the authorities below to examine the issue on merit and to decide whether assessee has suffered genuine business losses out of the transactions/trades in question. However, the authorities below did not examine the issue on merits and merely relying upon the ad-interim interim order concluded the issue against the assessee. It is also clear from these facts that the ad-interim order which was passed ex-parte - Whether would disclose any binding precedent or ratio which may be binding on the Income Tax Department?”. In our humble view, it would not be binding precedent. It may create some suspicion or doubt. It is well settled Law that *“suspicion howsoever strong may be but it cannot take place of legal proof.”* The Ld. D.R. submitted that if the test of human probability is applied to the facts and circumstances of the case, it would prove that assessee

has not suffered genuine business loss. However, such a principle is to be applied to weigh the evidences of either side and draw a conclusion in favour of the party which has more favourable factors in his side. Further in the present case the findings of the A.O./Ld. CIT(A) are merely based upon the findings given by the SEBI in ad-interim order and subsequent order which have been vacated subsequently by the SEBI. Even such orders cannot be relied upon at this stage as there were nothing against the assessee so as to conclude that assessee has not suffered genuine business loss because the SEBI itself have mentioned in its Orders that the issue will require detailed verification from the Income Tax Department. The issue before the SEBI Authorities were in fact violation of SEBI provisions and Rules and they have not adjudicated upon if there were any violation of the Income Tax provisions which they also were not competent to deal with it. Therefore, reliance placed by the A.O. of such Orders which are ultimately vacated was totally misplaced and cannot be read against the assessee.

14.4. The Ld. D.R. also relied upon the Judgment of the Hon'ble Supreme Court in the case of Rakhi Trading Pvt. Ltd., (supra). In this case the issue was against the Traders and Brokers for violation of Regulation of SEBI Act and relating to synchronized trading in which the penalty was imposed under section 15HA of the SEBI Act against the respondent company which was set aside by the Securities Appellate Tribunal ("SAT") and SEBI has preferred an appeal before the Hon'ble Supreme Court. It is a concurrent Judgment of the Hon'ble Judges of the Hon'ble Supreme Court Dated 08.02.2018. The appeal against the Traders were allowed and Orders of the SAT are set aside and the Order of the SEBI was restored. However, the appeals filed against the Brokers were dismissed. In paras 20 of the subsequent concurrent order, the Hon'ble Supreme Court held as under :

"20. The question whether there was fictitious transactions creating illegal synchronization has to be gathered from the facts and circumstances and intention of the parties. Acting in concert is something

about which it is difficult to obtain direct evidence. Proof of manipulation might depend upon inferences drawn from factual details. Such inferences could be gathered from pattern of trading data and the nature of the transactions etc.

14.5. In para-45 the Hon'ble Supreme Court further held as under :

“45. No grounds have been raised in the show cause notice alleging that the impugned fictitious transactions have been entered into with a view to avoid payment of tax and was an act of tax planning. Adjudicating officer also has not gone into this aspect. Hence, I am not inclined to go into this aspect, whether the impugned transactions were intended to reduce the brunt of taxation and an act of tax planning. The correctness of findings of SAT in the case of Viram Investment Pvt. Ltd. is left open.”

14.6. The issue in appeal regarding violation of provisions of SEBI Rule was decided based on the facts and

circumstances available on record and intention of the parties and ultimately the issue with regard to avoidance of payment of tax and act of tax planning was not adjudicated because the Adjudicating Officer has not gone into this aspect. However, in the present case, the A.O. / Ld. CIT(A) have not gone into the facts and material evidence on record and merely referring to the interim order of the SEBI and subsequent order have decided the issue against the assessee. Since in the case of Rakhi Trading Pvt. Ltd., (supra), the issue under Income Tax Act was also not adjudicated upon, therefore, in our humble opinion the decision in the case of Rakhi Trading Pvt. Ltd., (supra), would not support the case of Revenue.

14.7. Considering the totality of the facts and circumstances of the case in the light of material/evidences available on record and in the absence of any investigation carried-out by the authorities below, we are of the view that assessee has been able to establish that assessee company has suffered genuine business loss as had also been suffered in earlier years, therefore, authorities below should

not have disallowed the same against the assessee. In view of the above findings, we set aside the Orders of the authorities below and delete the entire addition. In the result, Ground No.1 of the appeal of Assessee is allowed.

15. In the result, appeal of the Assessee partly allowed.

Order pronounced in the open Court.

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

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 09th July, 2020

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'D' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.