

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA
[Virtual Court Hearing]**

**Before Shri P.M. Jagtap, Vice-President &
Shri Satbeer Singh Godara, J.M.**

**I.T.A. No. 57/KOL/2019
Assessment Year: 2014-2015**

**Deputy Commissioner of Income Tax,.....Appellant
Circle-8(2), Kolkata,
P-7, Chowringhee Square, 4th Floor,
Kolkata-700069**

-Vs.-

**M/s. Unisys Software And Holding Industries Limited,Respondent
75C, Park Street, Basement,
Kolkata-700016
[PAN: AABCC1191Q]**

Appearances by:

*Shri Ram Bilash Meena, CIT, D.R., for the Appellant
Shri Miraj D. Shah, Advocate, for the Respondent*

Date of concluding the hearing : October 06, 2020
Date of pronouncing the order : October 22, 2020

O R D E R

Per Shri P.M. Jagtap, Vice-President:-

This appeal is preferred by the Revenue against the order of Id. Commissioner of Income Tax (Appeals)-3, Kolkata dated 28.11.2018.

2. In Ground No. 1, the Revenue has challenged the action of the Id. CIT(Appeals) in deleting the disallowance of Rs.1,38,48,506/- made by the Assessing Officer under section 14A of the Income Tax Act, 1961 read with Rule 8D of the Income Tax Rules, 1962.

3. The assessee in the present case is a Company, which is engaged in the business of trading of computer software and mobile phones. The return of income for the year under consideration was filed by it on 22.09.2014 declaring a loss of Rs.20,49,919/-. During the course of

assessment proceedings, it was noticed by the Assessing Officer that the assessee has made substantial investment in shares, the income of which was exempt from tax. Since no disallowance on account of expenses incurred in relation to the said investment was offered by the assessee, the Assessing Officer applied Rule 8D to work out such expenses at Rs.1,38,48,506/- and a disallowance to that extent was made by him under section 14A of the Act.

4. The disallowance made by the Assessing Officer under section 14A read with Rule 8D was challenged by the assessee in the appeal filed before the Id. CIT(Appeals) and after considering the submissions made by the assessee as well as the material fact relevant on record, the Id. CIT(Appeals) deleted the said disallowance for the following reasons given in his impugned order:-

“Ground No.1 of this appeal is regarding the disallowance made by the A.O. u/s.14A read with 8D of Rs.1,38,48,506/-. It has been submitted by the A/R of the appellant that during the previous year they did not earn any exempted income. The appellant has relied on the decision of the Apex Court in the case of Chettinad Logistics Private Limited 95 Taxmann.com 250 (SC) for the proposition that no disallowance u/s.14A should be made when no exempt income has been earned. Further, the appellant has also relied on the decision of the jurisdictional High Court in the case of M/s Ashika Global Securities Ltd, ITAT 100 of 2014, order dated 11th June, 2018, for the proposition that no disallowance u/s.14A is warranted when no exempt income has been earned by the appellant.

In this case, as submitted by the AIR, no exempt income has been earned. Respectfully following the above cited decisions of the Apex Court and the jurisdictional High Court, disallowance made by the AO of Rs.1,38,48,506/- is hereby deleted”.

5. We have heard the arguments of both the sides and also perused the relevant material available on record. As agreed by the Id. Representatives of both the sides, this issue is squarely covered in favour of the assessee by the decision of the Hon’ble Calcutta High Court in the case of M/s. Ashika Global Securities Limited (supra), wherein it was held

that no disallowance under section 14A is warranted when no exempt income has been actually earned by the assessee during the relevant year. Since no exempt income was actually earned by the assessee in the present case during the year under consideration, we respectfully follow the said decision of the Hon'ble Jurisdictional High Court and uphold the impugned order of the Id. CIT(Appeals) deleting the disallowance made by the Assessing Officer under section 14A read with Rule 8D. Ground No. 1 of the Revenue's appeal is accordingly dismissed.

6. The issue raised in Ground No. 2 relates to the deletion by the Id. CIT(Appeals) of the disallowance of Rs.46,05,806/- made by the Assessing Officer on account of depreciation on software.

7. In the return of income, depreciation of Rs.46,05,806/- was claimed by the assessee on certain computer software, namely Standard ERP Farma, Server Configured with TEMS Software, Omnitech Business Work Engine Version 3.0 workflow Software for Registrars. As noted by the Assessing Officer in the assessment order, similar depreciation claimed by the assessee on the said computer software was disallowed in the assessment completed under section 143(3) in assessee's own case for A.Y. 2012-13. He accordingly followed the conclusion drawn in the assessment year 2012-13 on a similar issue and disallowed the claim of the assessee for depreciation on computer software to the extent of Rs.46,05,806/-.

8. The disallowance made by the Assessing Officer on account of depreciation on certain software was challenged by the assessee in the appeal filed before the Id. CIT(Appeals) and after considering the submissions made on behalf of the assessee and the relevant material available on record, the Id. CIT(Appeals) deleted the said disallowance for the following reasons given in his impugned order:-

"I have gone through the submissions of the appellant and the findings of the AO. The AO has not brought anything on record

to show that the software was not used for the business purposes of the assessee. In the written submissions the appellant has elaborated on the purposes for which the software had been utilised. Further, the AO himself has allowed depreciation on the software in the AYr.2013-14. On the same set of facts there can be no case for deviation on the stand taken by the AO in the earlier year. It has not been shown by the AO that there was any material difference in the facts in the impugned order. Depreciation has been allowed in AYr.2013-14. This year the allowance of depreciation is only consequential as the assets have already been put to use. Accordingly, the claim of the depreciation of Rs.46,05,806/- is hereby allowed”.

9. We have heard the arguments of both the sides and also perused the relevant material available on record. As per the specific finding recorded by the Id. CIT(Appeals) in his impugned order, depreciation on computer software in question was allowed by the Assessing Officer himself in the assessment completed in assessee's own case for A.Y. 2013-14 and there is nothing brought on record on behalf of the Department to rebut or controvert this finding of fact recorded by the Id. CIT(Appeals). As rightly submitted by the Id. Counsel for the assessee in this regard, when the depreciation was allowed by the Assessing Officer himself on software in question for the immediately preceding year, i.e. A.Y. 2013-14, the said software had entered into the concerned "Block of Assets" and the utilisation of said software for the purpose of assessee's business had become irrelevant for the purpose of allowing depreciation. Moreover as noted by the Id. CIT(Appeals) in his impugned order, there was nothing brought on record by the Assessing Officer to show that the said software was not used by the assessee-company for the purpose of its business. We, therefore, find no infirmity in the impugned order of the Id. CIT(Appeals) deleting the disallowance made by the Assessing Officer on account of depreciation on certain software in question and upholding the same, we dismiss Ground No. 2 of the Revenue's appeal.

10. In Ground No. 3, the Revenue has challenged the action of the Id. CIT(Appeals) in deleting the addition made by the Assessing Officer by

treating the share trading loss and commodity derivative trading loss as speculative in nature.

11. In the Profit & Loss Account filed along with the return of income, a loss of Rs.1,42,28,624/- was claimed by the assessee on commodities and share transactions. According to the Assessing Officer, the transactions in commodities were akin to transactions in shares and Explanation to Section 73 was applicable even in case of loss from the commodity transactions. He also noted that the assessee's main source of income was its business income from trading in hardware and software, mobile phones, and investment in shares & securities. He held that Explanation to Section 73 thus was applicable to the loss suffered by the assessee both in commodities and share transactions and invoking the said Explanation, he treated the loss amounting to Rs.1,42,28,624/- as speculation loss.

12. The action of the Assessing Officer in treating the loss from commodities and share transactions as speculation loss by invoking the Explanation to Section 73 was challenged by the assessee in the appeal filed before the Id. CIT(Appeals) and after considering the submissions made on behalf of the assessee as well as the material available on record, the Id. CIT(Appeals) directed the Assessing Officer to treat the said loss as normal business loss for the following reasons given in his impugned order:-

"The next ground of appeal is regarding the addition made by the AO of Rs.1,42,28,624/- on account of commodities derivative and share transaction loss by treating them a speculative transaction. In this case, there is commodity trading loss of Rs.45,82,560/- and share trading loss of Rs.96,46,064/-.

As regards the commodity derivative trading loss of Rs.45,82,560/-, the AR of the appellant has relied on the decision of the jurisdictional High Court in the case of Asian Financial Services Ltd 293 CTR 240 for the proposition that explanation to section 73 will not hit commodity trading loss. The Hon'ble High Court has held as under :-

"How can it be said that sub-sec. (5) of S. 43 is a general provision and the provision contained in S. 73 is specific in nature? On the contrary, the object of sub-s (5) of S. 43 is to define 'speculative business'. It would appear that the activities appearing in cls.(a) to (e) of proviso to s. 43(5) are not to be deemed to be speculative transactions. Therefore, this comes within the category of deemed business which is however distinct and separate from any other business. Now, the question is, whether loss arising out of such deemed business can be set off against the profit arising out of other business or business which may for clarity be called proper business. Under s.70, the assessee is entitled to have the loss set off against his income from any other source under the same head unless otherwise provided. Therefore, the assessee is entitled to have the loss arising out of deemed business set off against the income arising out of business proper unless otherwise provided. The question however remains whether the Explanation to s. 73 relied upon by Revenue provides otherwise. A plain reading of the Explanation cannot be said to have provided otherwise. In that case the irresistible conclusion is that the assessee is entitled to set off such loss arising that of deemed business against the income arising out of business proper. Shares fall squarely within the Explanation to s. 73 but derivatives cannot be treated at par with the shares because the legislature has treated them differently CIT vs DLF Commercial Developers Ltd (2013) 91 DTR (Del) 49: (2013) 261 CTR (Del) 127 dissented from,"

On perusal of the above, it is observed that the Hon'ble High Court has observed that derivatives cannot be at par with shares within the provision of explanation to section 73. Respectfully following the decision of the jurisdictional High Court, the AO is directed to treat the commodity derivative trading loss as normal business loss.

As regards share trading loss of Rs.96,46,064/- is concerned, it has been submitted that the appellant company has filed a return showing total of Rs.1,35,52,332/-. The loss under the head business income has been shown Rs.20,49,919/-. However, the income under the head other sources has been shown at Rs.1,56,02,2511-. As the income from House property, Capital gains and other sources (Rs.1,56,02,251/-) is more than the income under the head business(Rs.20,49,919/-), it has therefore been contended that the case of the appellant does not fall in the category as stipulated in the explanation to section 73. It is observed in this case that the dominant income has been earned by the appellant under the head other sources. The AIR of the appellant has placed reliance on the decision of the jurisdictional High Court in the case of Eastern Aviation & Industries 208 ITR(1 023) for the proposition that where the main business of the assessee does not comprise of purchase & sale of the share, explanation to section 73 will

not apply. In this case, it is observed that the appellant has earned income from other sources of Rs.1,56,02,251/- which is much more than the business loss of Rs.20,49,919/-. Hence, purchase & sale of share is not the dominant business. Therefore, respectfully following the decision of the jurisdictional High Court, in the case of Eastern Aviation & Industries (Supra), the addition made by the AO of Rs.96,46,064/- is hereby deleted”.

13. We have heard the arguments of both the sides and also perused the relevant material available on record. As regards the issue relating to the claim of the assessee regarding the loss in commodity transactions amounting to Rs.45,82,560/- being the normal business loss, it is observed that the same is squarely covered in favour of the assessee by the decision of the Hon'ble Calcutta High Court in the case of Asian Financial Services Limited (supra), wherein it was held that Explanation to Section 73 will not be applicable to the commodity trading loss. As regards the share trading loss of Rs.96,46,064/- is concerned, it is observed that Explanation to Section 73 is held to be not applicable by the Id. CIT(Appeals) after having found that the income of the assessee from other sources was much more than its income from business. At the time of hearing before us, nothing has been brought on record on behalf of the Revenue to rebut or controvert this finding recorded by the Id. CIT(Appeals). We, therefore, find no justifiable reason to interfere with the impugned order of the Id. CIT(Appeals) treating the loss from transaction in commodities and shares as normal business loss not being covered by Explanation to Section 73 and upholding the same, we dismiss Ground No. 3 of the Revenue's appeal.

14. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on October 22, 2020.

Sd/-
(Satbeer Singh Godara)
Judicial Member

Sd/-
(P.M. Jagtap)
Vice-President

Kolkata, the 22nd day of October, 2020

- Copies to :
- (1) **Deputy Commissioner of Income Tax,
Circle-8(2), Kolkata,
P-7, Chowringhee Square, 4th Floor,
Kolkata-700069**
 - (2) **M/s. Unisys Software And Holding Industries Limited,
75C, Park Street, Basement, Kolkata-700016**
 - (3) *Commissioner of Income Tax (Appeals)-3, Kolkata;*
 - (4) *Commissioner of Income Tax- , Kolkata*
 - (5) *The Departmental Representative*
 - (6) *Guard File*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.