

IN THE INCOME TAX APPELLATE TRIBUNAL GAUHATI BENCH, “VIRTUAL HEARING” AT KOLKATA

(समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य)

[Before Shri A. T. Varkey, JM]

I.T.A. No. 87/GAU/2020

Assessment Year:2014-15

M/s. Poddar Rubber Industries (PAN: AAIFP1157D)	Vs.	Deputy Commissioner of Income-tax, Circle-3, Guwahati
Appellant		Respondent

Date of Hearing	13.01.2021
Date of Pronouncement	15.01.2021
For the Appellant	Shri Akkal Dudhewala, AR
For the Respondent	Shri Arup Chatterjee, Addl. CIT, Sr. DR

ORDER

This appeal is preferred by the assessee against the order of Ld. CIT(A), Guwahati-2, dated 31-01-2020 for assessment year 2014-15.

2. The only ground of appeal raised by the assessee is against the action of the Ld. CIT(A) confirming the addition of Rs.29,65,952/- made by the AO on account of loss claimed by the assessee in Future & Options (in short 'F&O').

3. Brief facts of the case as noted by the AO are that the assessee has debited loss on account of transaction in Stock Exchange of F&O to the tune of Rs.29,65,952/-. According to the AO, from the details furnished by the assessee it could be seen that the F&O transactions were carried out by the assessee from end of January, 2014 i.e. at the near end of the financial year. According to the AO, the transaction to the tune of Rs.39,91,078/- was made through one broker namely M/s. Kayan Securities Pvt. Ltd. (in short 'M/s. KSPL) and according to the AO information was available with him that one of the directors Shri Harshvardhan Kayan of M/s. KSPL through which company the assessee has transacted the F&O has admitted in his statement recorded u/s. 133A of the Income-tax Act, 1961 (hereinafter referred to as the "Act") on 28.01.2015 that this company M/s. KSPL has indulged in providing bogus Long Term Capital Gain (in short LTCG). Thereafter, in the

assessment order he reproduced certain portions of the statement of Shri Harshvardhan Kayan as under:

*“Q.9. Please explain the business activity of the above mentioned jamakharchee companies.
Ans. The companies are engaged in providing accommodation entry in different forms as bogus long term capital gain or loss.*

*..
Q.14. Please explain the details of business activity done by M/s. Kayan Securities Pvt. Ltd., M/s. Ashok Kumar Kayan.*

Ans. The main business activity is that of buying and selling of share and securities commissioned earned by the through various “jamakharchee companies” registered with us as client...”

4. Thereafter according to the AO from the aforesaid admission of Shri Harshvardhan Kayan it is clear that M/s. KSPL is engaged in providing accommodation entries and since the assessee has also transacted with this broker at the fag end of the financial year which resulted in loss, so, the AO asked the assessee to explain as to why this loss claimed by assessee should not be treated as bogus. Thereafter, in the assessment order he also referred to the statement of Shri Mukesh Agarwal recorded u/s. 133A of the Act who was looking after the share trading activity and accounting of M/s. KSPL. According to the AO, Shri Mukesh Agarwal has also admitted that the main business of M/s. KSPL was buying and selling of shares and securities for commission through jama-kharchee companies registered with them as client and he reproduced certain portion of the statement of Shri Mukesh Agarwal as under:

“Q.7. Please explain the business activity of M/s. Ashok Kumar Kayan and M/s. Kayan Securities Pvt. Ltd.

Ans. The main business activity is that of buying and selling of shares and securities commission earned by the same through various ‘jamakharchi companies’ registered with us as client.

...

Q.9. It is seen that the contact no. of all scrip operators have been stored in your mobile, please state what sort of instruction received from the scrip controller/operator.

Ans. The details of scrip to be traded, price on the day of trade, name of the clients, amount of share to be traded, mode of payment etc. are received on call from the scrip controller/operator.”

5. According to the AO, the statement of Shri Harshvardhan Kayan, director of M/s KSPL and Shri Mukesh Agarwal was shown to assessee and thereafter the AO asked the assessee to show cause as to why the said transaction made by the assessee in F&O which resulted in loss to the tune of Rs.29,65,952/- be disallowed. According

to the AO, no satisfactory explanation was given by the assessee other than the submission that the scrip/derivatives were transacted through recognized stock exchange with CTT paid and transactions were done through on-line with payments and receipt made through banking channel. This reply of assessee was repelled by the AO by opining that bogus transactions like LTCG/LTCL were also carried out meticulously through stock exchange online and so the assessee's contention *that the scrip/derivatives were transacted through recognized stock exchange with CTT paid and transactions were done through on-line with payments and receipt made through banking channel* cannot come to the aid of the assessee and, therefore, he treated the loss from F&O as nothing but bogus and added back Rs.29,65,952/- Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who confirmed the same. Aggrieved, the assessee is before this Tribunal.

6. I have heard rival submissions and gone through the facts and circumstances of the case. I note that the assessee is into rubber manufacturing/tyre related business. Assessee had shown total income of Rs.16,50,480/-. During the scrutiny proceeding, the AO noted that the assessee had debited loss on account of F&O trading to the tune of Rs.29,65,952/-. From the details filed in respect of this claim of loss, the AO noted that the assessee had transacted F&O business to the tune of Rs.39,91,078/- through one broker M/s. KSPL and according to AO, one of the directors of M/s. KSPL Shri Harshvardhan Kayan has admitted during survey u/s. 133A of the Act on 28.01.2015 that this broking company M/s. KSPL has indulged in providing bogus LTCG. The AO after reproducing certain portions of Shri Harshvardhan Kayan as well as the statement of Shri Mukesh Agarwal, the director and Accountant of M/s. KSPL (supra) respectively, had treated the claim of the loss on F&O transaction of assessee as bogus and made the addition. On appeal, the Ld. CIT(A) has confirmed the same by noting that assessee could not prove any past or future record of such transactions; and that there is no proof that assessee was aware of the share trading or mechanism pertaining to the trading of F&O; and further observed that the assessee has entered into this transaction at the later part of the year in order to mitigate the tax liability and so it was intended to defraud the revenue. Thus, according to the Ld. CIT(A), the assessee's case falls into the realm of *suspicion and dubious transaction* and, therefore, he confirmed the order of the AO.

7. Assailing the action of the Ld. CIT(A) as well as that of the AO, it was pointed out by the Ld. AR Shri Akkal Dudhewala that the assessee is a partnership firm dealing in manufacturing of tyre retreading etc; and it claimed loss on F&O transaction to the tune of Rs.29,65,952/- which the assessee has transacted through recognized stock exchange for which CTT was duly remitted and transactions were carried out online on electronic platform of recognized stock exchange of BSE & NSE and the payments and receipts were made through banking channel. And despite the assessee providing supporting evidence of the transactions, the AO as well as the first appellate authority without finding any fault in the documents produced has simply discarded the same by relying on the purported statement of Shri Harshavardhan Kayan (director of M/s. KSPL) the broker as well as that of Shri Mukesh Agarwal through whom the assessee has transacted the F&O. According to the Ld. A.R, the AO failed to even give the assessee the entire statement of Shri Harshavardhan Kayan and Shri Mukesh Agarwal; and it was pointed out by him that on a perusal of these statement (supra) it can be discerned that the AO has only extracted selected few lines/words from the statement and moreover even the so called admission by Shri Harshavardhan Kayan & Shri Mukesh Agarwal was only regarding certain share transactions which gave rise to LTCG/STCL and nothing to do with the transactions regarding F&O and there is no whisper in these statements which casts any wrong doing on the part of assessee. Therefore, according to Ld. A.R, the statements of both these persons are not incriminating against the assessee in any manner. Further, according to Ld. A.R, statement of both these persons cannot be relied upon for various other legal infirmities like the statements were recorded during survey and in violation of Natural justice. According to the Ld. AR, the AO himself admits in the assessment order that the statements of Shri Harshavardhan Kayan as well as Shri Mukesh were recorded u/s. 133A of the Act (survey) and the Hon'ble Supreme Court has held in CIT Vs. S. Kader Khan & Son (2013) 352 ITR 480 (SC) that survey statements are weak evidence and cannot be the sole basis on which adverse findings can be drawn against the assessee. Further according to the assessee, the statement of Shri Harshavardhan Kayan as well as that of Shri Mukesh Agarwal cannot be relied upon because the assessee was not given an opportunity to cross examine these two persons, and since their statements have not been tested on the touch-stone of cross-examination, the veracity of their allegation/statements against the assessee if any cannot be acted upon. For that proposition he relied on the order of the Hon'ble Supreme Court in

M/s. Andaman timber Industries Vs. Commissioner Central Excise, Civil Appeal No. 4228 of 2006. Thus according to Ld AR, looking from any angle, the statement of these two persons cannot be relied upon to draw adverse finding against assessee's the claim of loss in F&O and therefore he pleaded for allowing this claim. Per contra, the Ld. DR , Shri Arup Chatterjee vehemently opposed the contentions of Ld. AR and submitted that assessee in order to reduce the tax liability had ventured into this F&O transactions for the first time and that too at the fag end of the AY; and without any experience in this field goes on to show that assessee had colluded with the broker who had bad track record in facilitating bogus LTCG and so, the AO & Ld. CIT(A) took a plausible view disallowing the claim of loss which need not be interfered.

8. It is noted that the assessee has traded in F&O through recognized stock exchanges of BSE & NSE which admittedly happens through electronic platform; and when the transactions are finalized the payments are made through banking channel/online. All the supporting documents to prove the F&O transactions were produced before the lower authorities which has been discarded by them without assigning any reason. Other than the suspicion which has been raised by the AO on the strength of the purported statement of Shri Harshavardhan Kayan (director of M/s. KSPL) as well as that of Shri Mukesh Agarwal, the accountant of M/s. KSPL that too of selected extracts, (supra) there are no other material against the assessee. On a careful reading of the statement of Shri Harshavardhan Kayan and Shri Mukesh Agarwal which has been relied upon by the AO/Ld. CIT(A) to disallow the claim, it is discerned that they have not made any allegation against the assessee's involvement in any bogus transactions. It is noted that these statements does not refer anything in respect of any bogus transaction in F&O. Their statement only says about the certain jamakharchi companies which were their clients facilitating bogus LTCG/LTCL. Other than that there is no other material. From their statements it is not discernible which are these jamakharchi companies. Further, the AO failed to bring out any nexus of assessee's transactions with the so called jamakharchi companies referred to by these two persons. The AO failed to expose any dealing by the assessee company through its broker M/s KSPL with these so called jamakharchi companies referred to by these two persons. The AO has neither summoned these persons (Shri Harshvardhan Kayan and Shri Mukesh Agarwal) and himself questioned them. It is noted that without bothering to even

summoning them and questioning them, the AO by extracting selectively certain portions of their statement [*which does not even say anything about F&O transaction*], had drawn adverse finding against the assessee. In this background, the question is whether this statement of Shri Harshavardhan Kayan as well as that of Shri Mukesh Agarwal can be a basis to draw adverse inference/finding against the assessee in respect of its claim of loss suffered in F&O transactions. According to me, the assessee had discharged its primary onus in proving the transaction on F&O by producing the corroborating evidence before the AO/Ld. CIT(A). Both the authorities could not find any infirmity on these documents. However, the AO discarded the primary documents produced by the assessee to establish the veracity of the transaction in F&O, by bringing in the statement of director and accountant of M/s KSPL which was the broker of the assessee in the transaction of F&O. The statement of both Shri Harshavardhan Kayan and Shri Mukesh Agarwal extracted by the AO neither bring out any wrong doings on the part of assessee nor say anything about F&O transactions. It only says about facilitation of bogus LTCG through jamakharchi companies which were their clients. However, if the AO had any doubts lingering in his mind, then he should have summoned these persons and questioned them and un-earthed the truth. Rather than doing so, he simply relied upon the statements of both these persons during survey of a third party and without any incriminating oral statements/documentary evidence or material against the assessee or the F&O transactions carried out by the assessee, based on suspicion only has drawn adverse inference/finding against the assessee which action of both AO as well as Ld CIT(A) cannot be countenanced. Moreover, it is noted that there are other legal infirmities against the statements. It is noted that the AO himself has admitted that the statement of Shri Harshavardhan Kayan as well as that of Shri Mukesh Agarwal has been recorded during survey u/s. 133A of the Act and it is noted that the statement is not incriminating against the assessee since its name or the transaction of F&O has not been negatively commented upon by them. Further, it is trite that the statement recorded during survey u/s. 133A of the Act cannot be the sole basis on which adverse inference can be drawn against the assessee. Moreover, the assessee has been kept in the dark and has not been given the entire copy of the statement of Shri Harshavardhan Kayan as well as that of Shri Mukesh Agarwal; and no opportunity has been granted to the assessee to cross examine Shri Harshavardhan Kayan as well as that of Shri Mukesh Agarwal. Therefore, the veracity of the statements could not be tested, so their statement cannot be relied on as held by the

Hon'ble Supreme Court in Andaman Timbers Industries (supra). Therefore, the statement of Shri Harshavardhan Kayan as well as that of Shri Mukesh Agarwal cannot be looked into for drawing an adverse inference against the assessee. And though their statements are not incriminating against the assessee, any way if both their statements reproduced (supra) are kept aside for the legal infirmities, there are no other material against the assessee in respect of its transaction in F&O. In such a scenario, based on the supporting evidence produced by the assessee to validate its transaction of F&O in recognized stock exchange, the loss suffered in the said transaction has to be allowed and it is ordered accordingly.

9. In the result, the appeal of assessee is allowed.

Order is pronounced in the open court on 15th January, 2021

Sd/-

(Aby. T. Varkey)
Judicial Member

Dated: 15.01.2021

JD(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Poddar Rubber Industries, C/o Rahul Raj Jain & Co. H No. 15, 1st floor, Bye Lane-2, Shaktigarh path, Bhangagarh, G. S. Road, Assam-781005.
- 2 Respondent – DCIT, Circle-3, Guwahati
3. CIT(A), Guwahati-2, Guwahati
4. CIT- Guwahati
5. DR, ITAT, Guwahati

/True Copy,

By order,

Senior Pvt. Secy.