

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “SMC-2” BENCH: NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 8108/DEL/2019

[Assessment Year: 2016-17

Naresh Sharma Prop. Of Shiv Shakti Textiles, 4280/2A, Jogiwara, Shiv Shakti Market, Nai Sarak, Delhi-110006. PAN- ABDPS5862Q	<u>Vs</u>	Income-tax Officer, Ward-46(2), New Delhi
APPELLANT		RESPONDENT
Appellant by		Sh. Naman Gupta, CA
Respondent by		Sh. Om Prakash, Sr. DR
Date of hearing		04.01.2022
Date of pronouncement		11.02.2022

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals)-16, New Delhi, dated 25.07.2019, pertaining to the assessment year 2016-17. The assessee has raised following grounds of appeal:

“1. That the order of the Ld. CIT(A) is arbitrary, biased, wrong and bad in law and in facts and circumstances of the case.

2. That the Ld. CIT(A) grossly erred in raising fresh and new ground of objection without giving proper notice to the appellant by just mentioning on

order sheet entry dated 18.06.2019.

3. *Moreover, the Ld. CIT(A) cannot go beyond the matters that arose out of the proceedings before the AO in gross contravention of judgment of Apex Court in CIT v. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC) and against the judgement of Hon'ble Delhi High Court in CIT v. Sardari Lai & Co. [2002] 120 Taxman 595.*

4.1 *That the Ld. CIT(A) grossly erred in treating a sum of Rs 584,093/- (out of total payment of Rs 975,000/- made to broker M/s Bezel Stock Brokers Pvt Ltd) as unexplained and out of unexplained sources and adding the same to the returned income of the appellant.*

4.2 *That the Ld. CIT(A) further erred in not taking the receipts as well as payments shown in cash flow chart into consideration. No question was raised on the authenticity of cash flow chart. Moreover, not even a single error/ objection has been pointed out in the Cash Flow Chart which clearly includes the deposit made in cash of Rs 800,000/- in HDFC A/c from which payment of Rs 975,000/- was made to broker M/s Bezel Stock Brokers Pvt Ltd.*

4.3 *That The Ld. CIT(A) further erred in considering only opening and closing balances of cash in hand. She has stated that the appellant used cash in hand amounting to Rs. 190,907/- i.e. the difference between of opening cash in hand of Rs 216,113/- and closing balance of cash in hand of Rs 25,216/- during the year. It is absolutely wrong and baseless.*

5. *That the Ld. CIT(A) further erred in not confronting any objections/dis-agreement with the appellant's explanations. In fact, no objections/dis-agreements are on record and the appeal order has been passed solely on her surmises and conjectures.*

6. *That the addition of Rs. 584,093/- may be deleted in full.*

7. *That the Appellant may be allowed to amend/add/delete the above grounds of appeal at the time of hearing."*

2. Facts, giving rise to the present appeal, are that in this case return of income was filed electronically on 16.10.2016, declaring income of Rs. 2,50,370/-. Thereafter, the case of the assessee was picked up for limited scrutiny on the basis whether the investment and income relating to securities (derivative) transactions were duly disclosed. The Assessing Officer, thereafter, proceeded to frame the assessment u/s 143(3) of the Income-tax Act, 1961, hereinafter referred to as the "Act". Thereby the Assessing Officer noticed that on perusal of computation of income and profit & loss account filed by the assessee it was observed that assessee had debited a sum of R. 9,35,983.75 as loss on sale of shares (derivatives). In response to the query, the assessee submitted that he had done share business with M/s Bezel Stock Brokers Pvt. Ltd. in future only and incurred loss, which was set off against business income of Rs. 12,40,535/-. It was stated before the Assessing Officer that speculative transaction has been defined u/s 43(5)(d) of the Act, according to which, loss in derivative trading was not a speculative loss. However, the Assessing Officer did not accept the contention and made addition of Rs. 9,35,983/-.

3. Further, the Assessing Officer noticed that as per broker's statement, the assessee had made investment of Rs. 18,99,028/- on 14.5.2015, which was peak purchase investment during the year. It was recorded by the Assessing Officer that

since the source of investment was not explained by the assessee and same was added back to the income of the assessee, thus the Assessing officer computed income at Rs. 30,85,561/- against the declared income of Rs. 2,50,370/-.

4. Aggrieved against it the assessee preferred appeal before the learned CIT(Appeals). The learned CIT(Appeals) in respect of the ground raised against addition of Rs. 18,99,208/-, partly allowed the appeal of the assessee and in respect of other addition it was stated before the learned CIT(Appeals) that in rectification order the Assessing Officer has given relief to the assessee. Aggrieved, against this the assessee is in appeal before the Tribunal.

5. The only effective ground against the decision of the learned CIT(Appeals) is in respect of sustaining the addition of Rs. 584,093/- on the basis of a new ground.

6. Learned counsel for the assessee reiterated the submissions as made before the learned CIT(Appeals). The submissions of the assessee are reproduced as under:

“1) That the present case is a small case and addition of only Rs 584,093/- has been made by the CIT(A), on issues not raised by AO. That the Ld. CIT(A) grossly erred in treating a sum of Rs 584,093/- (out of total payment of Rs 975,000/- made to broker M/s Bezel Stock Brokers Pvt Ltd) as unexplained and out of unexplained sources and adding the same to the returned income of the appellant.

2) *In the present case, a sum of Rs 975,000/- was paid to broker M/s Bezel Stock Brokers Pvt Ltd during the year from HDFC Bank A/c of the appellant by cheques. During the year, the appellant had deposited Rs 800,000/- from time to time during the year. Source of this cash deposit of Rs 800,000/- was duly examined by the AO wide appellant reply dt 26.12.2018 and order sheet entry dt 26.12.2018.(Copy attached). The AO was fully satisfied about the same and no adverse comment has been made by the AO in the assessment order. Moreover, this HDFC Bank a/c is duly appearing in the balance sheet of the proprietorship concern of the appellant which means all the entries of this HDFC Bank a/c were duly appearing in the books of the appellant's proprietorship concern. Hence, the source of deposit of Rs 800,000/- stands explained.*

3) *Now, the CIT(A) has again raised a question about the source of this Rs 800,000/- deposited in HDFC bank a/c which was beyond her power as this amounts to change of opinion. A cash Flow chart of the appellant was also asked. The appellant filed the cash flow chart (Copy attached). This chart clearly includes this payment of Rs 800,000/- on payment side. No question was raised on the accuracy and authenticity of this cash flow chart. Moreover, not even a single error/objection has been pointed out in the cash flow chart submitted by the appellant. This means that this cash flow chart was absolutely correct and duly accepted by the CIT(A). It means that the source of cash deposit of Rs 800,000/- was duly accepted by the Ld. CIT(A).*

4) *That the Ld. CIT(A) further erred in making wrong interpretation of Cash Flow Chart filed by the appellant. The Ld. CIT(A) has taken into consideration only opening and closing balances of cash flow chart. She has stated that the appellant used cash in hand amounting to Rs 190,907/- i.e. the difference between the opening balance of Rs 216,113/- and closing balance of Rs 25,216/-, ignoring all the receipts and payments of cash flow chart. It is obviously wrong and baseless and source of Rs 800,000/- is fully explained.*

Ground No.-5

That the Ld. CIT(A) further erred in not confronting any objections/dis-agreement with the appellant's explanations. In fact, no objections/dis-

agreements are on record and the appeal order has been passed solely on her surmises and conjectures.”

7. On the other hand, learned Sr. DR opposed the submissions and supported the orders of the authorities below. He contended that the learned CIT(Appeals) has examined the same issue which was before the assessing authority and there was no new issue. The issue related to investment relating to security transactions, for which the case was taken up for scrutiny assessment.

8. I have heard the rival submissions and perused the material on record. I find that the learned CIT(Appeals) has decided this issue by observing as under:

“Discussion & Decision

The facts of the case, the submission of the AR and the finding of the AO were examined at length. The brief facts of the case are that on perusal of the broker statement, the AO also noted that the assessee had made investment of Rs. 18,99,028/- on 14.05.2015, which was peak purchase investment during the year under consideration. As the nature and source of investment was not explained by the assessee, the AO treated the said amount as unexplained income in the hands of the assessee.

Before me, the AR of the appellant contended that AO has erred in making the addition as the broker's account was not disputed and all transactions made were duly verified and accepted by the AO. The AR of the appellant further contended that the appellant was engaged in intra-day trading so the appellant has not made payment for each and every purchase and that it is only the net purchase and sales of the day that have to be paid. The AR produced a copy of the Transaction summary account of the broker, which was also produced before the AO and duly examined by him. The contract notes to substantiate the transaction summary were also produced.

The claim of the appellant was examined. A perusal of the Transaction summary as also the contract notes shows that the appellant is engaged in intraday trading in Futures & options (F&Os). The AO has made an addition of peak purchase treating it as unexplained investment. The AO very clearly has little knowledge of the working of the Stock exchange. It is important to understand that in intra-day trading the buy/sell orders are squared off on the same day. Intraday trading, also called day trading, is the buying and selling of stocks and other financial instruments within the same day. In other words, all positions are squared-off before the market closes and there is no change in ownership of shares as a result of the trades. This is different from regular trading or delivery-based trading where a trade gets settled over a span of days if not longer. So, you get delivery of the shares you bought while the shares you sold move out of your demat account. It is also pertinent to examine the concept of margin trading which allows the trader to buy financial instruments on a margin without paying for the entire purchase. Purchase and sale are then squared off at the end of the day with a net purchase or loss that is adjusted against the margin money in the margin account of the trader with the broker.

This is what has happened in this case. The appellant on 14.05.2015 has purchased F&Os without paying for the purchase and then sold them on the same day at a net profit. This purchase has been made against the margin money deposited by the appellant with the broker. In fact, the AR of the appellant drew my attention to the bank account of the appellant which shows a payment of Rs 9,75,000/- made to the broker on various dates, during the year under consideration on various dates. A scanned copy of bank account is reproduced as under:

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It is, however, noted that all the debit entries of amounts paid to the broker are preceded by cash deposits in the bank account of the appellant. On being specifically asked about the source of cash deposits vide order sheet entry dated 18.06.2019, the AR stated that the investment in purchase of shares is being sourced from the cash available in the business. The AR stated that the appellant is maintaining regular books of account that have

been duly audited. He submitted that cash-in-hand was available as were the balances in bank account. This claim was examined. It is noted that as per Balance sheet as on 31.03.2015, cash-In-hand available with the appellant is Rs 2,16,113/- and cash in hand as on 31.03.2016 is Rs 25,206/-. Scanned copies of Balance sheet reflecting the aforesaid cash-in-hand is reproduced as under (overleaf)

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From a perusal of the above, it is noted that the appellant used cash-in-hand amounting to Rs. 1,90,907/- (Rs. 2,16,113/- less Rs. 25,206/-) during the period 01.04.2015 to 31.03.2016. This means the appellant's claim that investment purchase of shares was made from cash balances available in business can be allowed only to the extent of Rs 1,90,907/-. Benefit of bank balances available for investment cannot be allowed as the purchase of shares is being source from cash deposited in the bank account. The AR also pointed out that R 2,00,000/- was received from Shyam lehnga House on 21.11.2015 and was used for investment in purchase of shares on the same day. So, at best the appellant can be given the benefit of Rs 3,90,907/-, being available cash-in-hand of Rs 1,90,907/- and amount of Rs 2,00,000/- received from Shyam Lehnga house. However, the remaining investment of Rs 5,84,093/- (Rs 9,75,000/- less Rs 3,90,907/-) stands unexplained. Thus, investment in purchase of shares of Rs 5,84,093/- is evidently from unexplained sources. The addition made by the AO on account of unexplained expenditure in purchase of shares (F&Os) as per provisions of Section 69C, is therefore restricted to Rs 5,84,093/-.”

9. It is the contention of the assessee that investment was made out of cash deposits in HDFC bank account of the assessee. It is further averred that no doubt was raised and Assessing Officer duly verified the same. Moreover, the learned CIT(Appeals) sustained the addition altogether on different ground. I find merit into the contention of the assessee. It is seen that the Assessing Officer did not doubt about the cash flow submitted by assessee. He made addition on the basis of unexplained peak purchases. However, this action of Assessing Officer was found

not in accordance with law by the learned CIT(Appeals). Learned CIT(Appeals) proceeded to sustain the addition on the ground of unexplained source of investment. I find that the learned CIT(Appeals) did not confront the assessee regarding cash flow submitted by him. Under these facts when there is nothing on record to rebut the correctness of cash deposited in the bank account held with HDFC bank, the addition sustained by the learned CIT(Appeals) cannot be confirmed. Therefore, I hereby direct the Assessing Officer to delete the addition.

10. The grounds raised by the assessee are allowed.

11. Assessee's appeal is allowed.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Madan Pal

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI