

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC : NEW DELHI

BEFORE SHRI C.M. GARG, JUDICIAL MEMBER

ITA No.2836/Del/2019
Assessment Year: 2015-16

Vishnu Kumar Aggarwal,
3762/64, Chawri Bazar,
New Delhi.

Vs. ITO,
Ward-46(5),
New Delhi.

PAN: AARPK3173D

(Appellant)

(Respondent)

Assessee by	:	None
Revenue by	:	Shri Om Prakash, Sr. DR
Date of Hearing	:	02.05.2022
Date of Pronouncement	:	18.05.2022

ORDER

This appeal has been preferred by the assessee against the order of the CIT(A)-16, New Delhi, dated 17.01.2019 for Assessment Year 2015-16.

2. A notice through speed post acknowledgement due was sent to the appellant on 03.02.2022, which has been returned un-served with a remark 'no such person'. Notice has been issued to the appellant/assessee on the address 3762/64, Chawri Bazar, New Delhi, Delhi – 11 0006 and the same address has been mentioned in Form 36 by the assessee in the column of 'complete address for sending notices'. As per judgment of Hon'ble Supreme Court in the case of

PCIT vs. M/s. I Ven Interactive Ltd. dated 18.10.2019 in Civil Appeal No. 8132 of 2019, in absence of any specific information to the Assessing Officer with respect to change of address and/or change of the name of assessee, Assessing Officer would be justified in sending the notices at the available address mentioned in the PAN database of the assessee. Respectfully following the same, I hold that when the assessee has filed return mentioning a particular address as per his PAN database, which has also been noted by the Assessing Officer as well as by the assessee himself in Form No. 36 as complete address for sending the notices and the assessee is not found available on-the same address and no information about change of address to the Assessing Officer by the assessee, then we safely presume that all possible efforts have been made regarding service of notice on the assessee on the address given in PAN data by assessee and assessee is not available, then we have no alternate but to proceed ex parte qua assessee to decide this appeal after hearing the submissions of Id. Sr. Departmental Representative (DR).

3. The sole controversy in this appeal is revolving around the claim of the assessee towards the setting off of the carried forward speculative business loss of Rs.1,48,54,803/- against the profit of the assessee from the business in the relevant assessment year when the said business cannot be treated as speculative business due to legislative amendment u/s 43(5) of the Act. It was also contended by the assessee that the Id.CIT(A) has erred in disallowing the benefit

of carried forward speculative business loss without going through the provisions of sections 72 and 73 of the Income-tax Act and various judgments of Hon'ble High Courts and coordinate Benches of the Tribunal.

4. The ld. Sr. DR vehemently supported the assessment as well as the first appellate order and submitted that the assessee is not entitled to claim benefit of clause (e) of proviso to section 43(5) of the Act to claim the set off of speculative business loss against income from business and profession for AY 2015-16. The ld. CIT, DR also submitted that the assessee, vide its statement dated 09.11.2017 at para 12 has requested that if, in any case, the speculative business loss is disallowed, then, set off of carried forward business losses from earlier year may be allowed and the AO has considered this second submission and found the same as acceptable and allowed set off of carried forward business loss from earlier years against the profit from business and profession for AY 2015-16. The ld. DR submitted that the AO was right in disallowing set off of speculative business loss against the income for AY 2015-16 and in allowing set off of business loss to the extent carried forward business loss from earlier assessment year as per relevant provisions of the Income-tax Act.

5. From the relevant part of assessment order, I note that in reply to show cause notice dated 09.11.2017, the assessee submitted as under:-

“it is submitted that the assessee has carried out commodity derivative transactions and incurred losses in certain years and earned profits in certain other year, and that since nature of transactions, being commodity derivatives trading, profits and loss is mutually adjusted and balance loss has been carried forward in earlier years, being on commodity derivatives transactions, current year’s profits, also being in commodity derivatives transactions, is thus entitled to be set off against such carried forward losses. In section 43(5), with effect from April, 2014 i.e A.Y. 2014-15, by virtue of which eligible transactions of dealing in commodity derivatives transactions were no longer hit by the definition of ‘speculative transactions’ and, accordingly were required to be treated as a normal non-speculative transactions.”

6. Further, I also noted that the Id. AO, by taking a balancing approach, allowed set off of business loss to the extent of carried forward business loss from earlier year, but, denied set off of speculative business loss against the income from business or profession for AY 2015-16 with the following observations and findings:-

“8. If the assessee is seeking benefit of clause (e) of proviso to Section 43(5) as in this case, then such benefit can be extended to assessee only in respect of assessment year 2014-2015 as the provisions of clause (e) of proviso to Section 43(5) are inserted by the Statute w.e.f. 1-4-2014. However, in the present case, the speculation transactions done by the assessee relate to A.Y. 2011-12, 2012-13 & 2013-14 in which a speculation loss of Rs. 1,48,54,803/- has been incurred by the assessee and has been set off against profits & gains of Business & Profession earned in the A.Y. 2015-16. For these transactions, there were no provisions in the statute to give the benefit to the assessee in respect of transactions of commodities, which are ultimately settled otherwise than by actual delivery or transfer of the commodity as per Section 43(5) of the Act.

9. The case (*Gajendra T Aggarwal Vs. ITO, ITA No. 1798/Mum/IT AT Mumbai*) relied upon by the assessee also do not support the case of the assessee since the facts of the case are different. In case of *Gajendra T Aggarwal Vs ITO*, the transactions relate to stock

exchange of India, which is MCX stock exchange, which was notified on 22-5-2009 and the transactions were governed by clause (d) of the proviso to Section 43(5), which was inserted by the Finance Act, 2005 w.e.f. 1-4-2006. Therefore, for the transactions, which were under consideration in that case, were held to be not of speculative nature under the provisions of clause (d) of the proviso to Section 43(5) of the Act and the said case relates to assessment year 2006-07, However, in the present case, as mentioned earlier, provisions of clause (e) of the proviso to Section 43(5) did not exist during the period when the assessee carried out the transactions.

In view of above discussion, I hold that assessee is not entitled to claim the benefit of clause (e) of the proviso to Section 43(5) of the Act

10. Hence, in view of the above discussion, I hold that the assessee is not entitled to claim the benefit of clause (e) of the proviso to Section 43(5) of the Act to claim the set off of speculation loss of Rs. 1,48,54,803/- against the income of Rs. 3,26,48,509/- from business & professions for the A.Y. 2015-16. Further, the assessee vide its submissions dated 09.11.2017 at para No.12 has requested that if in any case, the speculation loss of Rs. 1,48,54,803/- is disallowed, then set off of carried forward business losses from earlier years may be allowed. This submission of the assessee is considered and found acceptable. Therefore, set off of speculation loss of Rs. 1,48,54,803/- against the income for the A.Y. 2015-16 is disallowed and in place of this business losses are allowed to be set off to the extent carried forward business loss from earlier Assessment Years and as per Income Tax Act, 1961.

11. Further, I am satisfied that the assessee has concealed income by way of furnishing inaccurate particulars to the extent of Rs. 1,48,54,803/- by way of wrong claim of set off of speculation loss against income from business & profession for which penalty proceedings u/s 271(1) (c) of the Act is being initiated separately.

12. Assessed u/s 143(3) of the Act at a total income of Rs.4,86,370/- (as per discussion in para 10 above). However, since there is business loss carried forward in from the earlier Assessment Years beginning from A.Y.2011-12, same is allowed to be set off against the Income of Rs. 1,53,31,013/- to the extent of speculation loss disallowed and business income of the assessee i.e Rs, 1,48,54,803/-. Penalty proceedings u/s 271(1) (c) of the Act for

concealment of income by way of furnishing inaccurate particulars as discussed in the earlier para are being initiated separately. Interest u/s 234A, 234B, 234C & 234D charged as per ITNS 150 issued. Demand notice u/s 156 of the Act and penalty notice u/s 274 r.w.s.271 (1) (c) of the Act issued.”

7. In view of the above findings given by the authorities below, I am compelled to hold that the assessee is seeking benefit of clause (e) of proviso to section 43(5) of the Act which can be extended to the assessee only in respect of AY 2014-15 as the provisions of clause (e) to proviso to section 43(5) was inserted by the statute with effect from 01.04.2014. Undisputedly, in the present case, the impugned speculative business losses were accrued to the assessee out of speculative transactions undertaken during AY 2011-12, 2012-13 and 2013-14 and the assessee claims set off of such carried forward speculative losses against profit and gains of business and profession earned during AY 2015-16. We are in agreement with the findings given by the AO that there were no provision in the statute to give benefit to the assessee in respect of transactions of commodities, i.e., speculative transactions which were ultimately settled otherwise than by actual delivery or transfer of commodity as per section 43(5) of the Act. The AO was right in holding that the provisions of clause (e) of the proviso to section 43(5) of the Act was not in existence during AY 2011-12 to AY 2013-14 during which period the assessee incurred speculative business loss and which was carried forward for AY 2015-16. Therefore, the claim of the assessee was rightly denied by the authorities below by holding that the assessee is not entitled to

claim benefit of clause (e) of the proviso to section 43(5) of the Act which came into existence w.e.f. 01.04.2014 and applicable from AY 2014-15 onwards.

8. In view of the foregoing discussion, I am unable to see any perversity or any other valid reason to interfere with the conclusions arrived at by the AO as well as the ld. CIT(A).

9. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 18.05.2022.

Sd/-

(C.M. GARG)
JUDICIAL MEMBER

Dated: 18th May, 2022.

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Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi