

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" DELHI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.8118/DEL/2018
Assessment Year 2015-16

Vinay Prakash (HUF) 132, Engineers Enclave, Pitampura, New Delhi.	v.	ACIT, Circle-42(1), New Delhi.
TAN/PAN: AABHV2104D		
(Appellant)		(Respondent)

Appellant by:	Shri Amit Goel, CA.		
Respondent by:	Shri Vijay Kataria, Sr.DR		
Date of hearing:	10	05	2022
Date of pronouncement:	26	05	2022

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)-XIV, New Delhi ('CIT(A)' in short) dated 30.10.2018 arising from the assessment order dated 30.10.2018 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2015-16. The substantive grounds of appeal raised by the assessee reads as under:

"1. That having regard to the facts and in circumstances of the case, Ld. CIT(A) has erred in law in holding the transaction in 'currency derivatives' made by the assessee and 'Speculative in nature' and thereby not allowing set off of same against other business income and income from other sources.

2. *Ld. CIT(A) has erred on facts and in law in binding decisions of courts and tribunals, and circular issued by SEBI and CBDT.*

3. *That the order dated 30.10.2018 passed by the CIT(A) is wrong, bad in law and illegal.*

4. *That the appellate craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing.”*

2. Briefly stated, the assessee is engaged in the share broking business and is also indulging in currency trading and other non currency business in derivative segment. During the Assessment Year 2014-15, the assessee claimed an amount of Rs.24,67,704/- as loss due to trading in currency transactions through a share and stock broker registered with SEBI; namely PEE AAR Securities Ltd. on BSE platform in currency derivatives segment. The assessee claimed the losses arising from currency derivatives as non speculative business and consequently claimed set off of such losses incurred against other non speculative business income declared by the assessee. The Assessing Officer however opined that such losses arising from currency derivative do not fall with the exceptions stipulated in Section 43(5) of the Act which defines expression ‘Speculative transaction’. The Assessing Officer accordingly held that the transaction currency derivatives would fall within the sweep of definition of Speculative transactions and consequently the losses arising from such transactions are speculative in nature and set off and carry forward of such loss would be governed by the restrictions provided in Section 73 of the Act. He accordingly denied the set off of loss arising from currency derivatives against income arising from non speculative

activities and allowed the loss arising from currency derivatives amounting to Rs.24,67,704/- be carried forward to the subsequent assessment year in terms of provisions of Section 73 of the Act and adjustable only against the speculative income in the subsequent assessment years.

3. Aggrieved, the assessee preferred appeal before the CIT(A) without any success.

4. Further aggrieved, the assessee preferred appeal before the Tribunal.

5. We have carefully considered the rival submissions and perused the assessment order as well as the order of the CIT(A) together with case laws cited and other documents referred to and relied upon as per Rule 18(6) of the Income Tax [Appellate Tribunal] Rules, 1963.

5.1 The solitary issue confronted in the present appeal is on treatment of loss arising from derivative transactions in currency segment in the matter of set off and carry forward. It is the case of the assessee that it has entered into derivatives transactions in currency segment of the recognized stock exchange, i.e., BSE and has complied with other conditions stipulated in Section 43(5) read with proviso (d) thereto. The contract for Currency Derivative Transaction (CDT) executed through the registered share broker on the platform of the stock exchange (recognized Exchange by SEBI) was referred to on a sample basis to demonstrate that CDT executed by the assessee falls within the definition of 'eligible transaction' as per Explanation-1 appended below Section 43(5) of the Act. It was thus contended that the

CDT being 'eligible transaction' falls within the exceptions carved out to Section 43(5) of the Act. The consequential effect would be that such CDT are outside the ambit of expression 'Speculative transaction' are thus non speculative in nature. Hence loss arising from such CDT being ordinary loss are eligible for set off against the profits arising from other non speculative business transactions, etc. in accordance with law.

5.2 It is contended on behalf of the assessee that clause (ac) of Section 2 of Securities Contracts (Regulation) Act, 1956 includes such transaction within the meaning of derivatives transaction and the transaction has been executed electronically on screen based systems through the stock broker registered under Section 12 of the SEBI Act, 1992. It is thus the case of the assessee that the loss arising from CDT being non-speculative, both the lower authorities have misdirected themselves in law in denying the relief towards set off and carry forward for loss arising from such non speculative transaction.

6. Section 43(5) of the Income Tax Act defines 'speculative transaction'. As per the Scheme of the Act, a transaction of speculative nature carries a differential treatment *qua* the non speculative transaction in the matter of set off and carry forward of losses arising therefrom. The proviso to Section 43(5) provides for certain exceptions in varied situation and where the transactions executed fall within any of such exceptions, profit/loss arising from such transactions will not be regarded as derived from speculative business and consequently, will not be deemed to be speculative transaction for the purposes of the Act.

7. We are presently concerned with clause (d) of such

exceptions annexed to Section 43(5) of the Act. In view of the clause (d) to Section 43(5), a transaction will not be regarded as 'speculative transaction' where an eligible transaction in respect of trading in derivatives referred to in clause (ac) of Section 2 of Securities Contracts (Regulation) Act, 1956 was carried out in a recognized stock exchange. Explanation-1 to Section 43(5), in turn, defines 'eligible transaction' for the purposes of clause (d) to mean a transaction carried out electronically on screen based systems through a stock broker registered under SEBI Act 1992.

8. Clause (ac) of Section 2 of Securities Contracts (Regulation) Act, 1956 defines expression 'derivative' in an inclusive manner as under:

“(ac) “derivative” includes-

- (A) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security.*
- (B) A contract which derives its value from the prices, or index of prices, of underlying securities;*
- (C) Commodity derivatives; and*
- (D) Such other instruments as may be declared by the Central Government to be derivatives.”*

9. CBDT also came out with instructions regarding allowability of losses on account of forex derivatives which takes cognizance of the question confronted to us. The relevant paragraph of the CBDT Instruction No.03/2010 dated 23.03.2010 is reproduced

hereunder:

In a case where a loss on a forex-derivative transaction arises on actual settlement / conclusion of contract and is not a notional or marked to market book entry, a further question will arise as to whether such a loss is on account of a speculative transaction as contemplated in Section 43(5) of the Income tax Act. For determining whether loss from a transaction in respect of a forex-derivative is a speculation loss or not, the Assessing Officers may refer to Proviso (d) below sub-section (5) of Section 43 inserted by the Finance Act, 2005, with effect from 1.4.2006. It lays down that any 'eligible transaction' in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956, that has been carried out in a recognized stock exchange shall not be treated as a speculative transaction. Further, an 'eligible transaction' for this purpose would be one that fulfils the conditions laid down in Explanation to Section 43(5)(d). Any loss in a speculative transaction can be set off only against profit from speculative transactions.

As the revenue implications of such transaction are large, the Assessing Officers need to examine the statements of accounts and the notes to accounts with a view to find out any reference to any loss on account of forex-derivatives. In some cases, these losses may be camouflaged under the 'financial charges' 'foreign exchange loss' or some similar head which may make it difficult to detect them. In such cases, the Assessing Officers should make a specific query asking the assessee to give a break up of any 'Marked to Market' loss on a forex-derivatives included in the Profit and Loss Account and examine whether such transactions are 'eligible transaction' in terms of Sec.43(5)(d). An adjustment to the taxable income may therefore be made, if necessary, keeping in view the provisions of law referred to above.

10. On facts and as per the contract notes, the assessee has entered into contract for transactions in currency derivatives segment of BSE Ltd. through registered share broker namely PEE AAR Securities Ltd. resulting in the impugned losses.

11. The definition of derivative under Securities Contract (Regulation) Act, 1956 reproduced hereinabove, defines the express 'derivative' in an inclusive manner and inter alia includes a security derived from a debt instrument, risk instrument and such other instruments as may be declared by the Central Government to be derivatives. The definition is thus very widely worded. The CBDT instruction no.3/10 clearly provides in the context of proviso (d) below sub Section (5) of Section 43 inserted by Finance Act, 2005 w.e.f. 01.04.2006 relevant to Assessment Year 2006-07 onwards that any 'eligible transaction' in respect of trading in derivatives referred to in clause (ac) of Section 2 of Securities Contracts (Regulation) Act, 1956 that has been carried out in a recognized stock exchange shall not be treated as speculative transaction.

12. Contextually, the Co-ordinate Bench of Tribunal in Nand Nandan Agarwal vs. DCIT, ITA No.349 and 350/Agra/2016 order dated 18th June, 2018 referred to and relied upon several other judgments and observed that derivatives include foreign currency and call option / put option executed in the derivative market. It was held that the trading of currency derivatives made by the assessee are covered by the definition of 'derivatives' and consequently stands excluded from the ambits of speculative transactions defined under Section 43(5) of the Act owing to clause (d) of the proviso to Section 43(5) of the Act. Similar view has been taken by the Co-ordinate Bench in Kamal Kishore vs.

ACIT in ITA No.4592/Del/2016 order dated 13th February, 2017.

13. In essence, an 'eligible transaction' [as defined in Explanation-I to Section 43(5)] in respect of derivatives transaction [as defined in clause (ac) to Section 2 of Securities Contract (Regulation) Act, 1956] carried out on a recognized Stock Exchange shall not be deemed as Speculative Transaction having regard to exception provided in clause (d) to proviso to Section 43(5) of the Act.

14. In the light of the factual and legal submissions canvassed on behalf of the assessee we are of the considered view that the assessee in the instant case has complied with all the conditions of clause (d) and Explanation-1 to Section 43(5) of the Act cumulatively so as to treat such currency derivative transaction as eligible transaction for the purposes of exclusion from the ambit of speculative transaction defined under Section 43(5) of the Act. This being the position, the loss arising from derivative transaction has been incorrectly disallowed by the Assessing Officer for being set off and carried forward against non speculative business income in accordance with law and wrongly confirmed by the CIT(A). The action of the CIT(A) is accordingly set aside and the Assessing Officer is directed to restore the claim of the assessee to be non speculative in nature.

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

Order pronounced in the open Court on 26/05/2022.

Sd/-
[SAKTIJIT DEY]
JUDICIAL MEMBER

DATED: /05/2022

Prabhat

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER