

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER**

**ITA No.1281/Del./2018
(ASSESSMENT YEAR : 2013-14)**

Sucon India Limited,
C/o RRA Taxindia,
D – 28, South Extension Part 1,
New Delhi – 110 049.

vs.

DCIT, Circle – II,
Faridabad.

(PAN : AAGCS9603L)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Dr. Rakesh Gupta, Advocate
Shri Somil Agrawal, Advocate
REVENUE BY : Ms. Sangeeta Yadav, Sr. DR

Date of Hearing : 07.07.2022
Date of Order : 14.07.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal by the assessee is directed against the order of the ld.

CIT (Appeals), Faridabad dated 30.11.2017 for the AY 2013-14.

2. The assessee has taken the following grounds of appeal :-

“1) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of the Ld. A.O. in treating the loss of Rs.8,17,98,385/- from the share business as speculative allegedly in view of Explanation to section-73 of the Income Tax Act,1961.

2) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the addition of Rs.8,17,98,385/- as speculative loss is bad in law and against the facts and circumstances of the case.

3) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O. in passing the impugned order without giving adequate opportunity of being heard.”

3. Brief facts of the case are that during the year, the assessee had carried forward a loss of Rs.27,73,108/- "loss from Trading in Derivatives" on stock exchanges as Non-speculative in view of provisions of section 43(5) of, the Income Tax Act, 1961 and claiming that explanation to section 73 does not apply to derivatives. On the other hand the Assessing Officer has applied explanation to section 73 and allowed this loss to be carried forward only as speculative loss.

4. Upon assessee's appeal, Id. CIT (A) found that the issue was covered against the assessee by his own order in assessee's own case earlier and decision of Hon'ble Delhi High Court in CIT vs. DLF Commercial Developers Ltd. 218 Taxman 0045. He has held as under :-

“The only question relevant to the issue in question is whether "loss in Trading in Derivatives" on stock exchanges can be treated as "Speculative loss" in view of explanation to section 73 of the Act. The issue has been already adjudicated upon by me in the case of the appellant for the A.Y. 2012-13. Thus, following my own previous appellate order, my view on this issue from my appellate order dated 06.10.2015 vide appeal no. 5/2014-15 is reproduced here as below:

10. The issue is no more res-integra. Hon'ble Delhi High Court in the case of COMMISSIONER OF INCOME TAX DELHI vs. DLF COMMERCIAL DEVELOPERS LIMITED (218 Taxman 0045) has held that transactions in derivatives undertaken by the company assessee fall in the mischief of explanation to section 73 and thus are speculative. The relevant portion of the order is reproduced as below:

“11. The stated objective of Section 73- apparent from the tenor of its language is to deny speculative businesses the benefit of carry forward of losses. Explanation to Section 73 (4) has been enacted to clarify beyond any shadow of doubt that share business of certain types or classes of companies are deemed to be speculative. That in another part of the statute, which deals with computation of business income; derivatives are excluded from the definition of speculative transactions, only underlines that such exclusion is limited for the purpose of those provisions or sections. To borrow the Madras High Court's expression, "derivatives are assets, whose values are derived from values of underlying assets"; In the present case, by all accounts the derivatives are based on stocks and shares, which fall squarely within the explanation to Section 73 (4). Therefore, it is idle to contend that derivatives do not fall within that provision, when the underlying asset itself does not qualify for the benefit, as they (derivatives once removed from it and entirely dependent on stocks and shares, for determination of their value).

12. In the light of the above discussion, it is held that the Tribunal erred in law in holding that the assessee was entitled to carry forward its losses; the question framed is answered in favour of the revenue and against the assessee. The appeal is, therefore, allowed; there shall be no order as to costs."

11. The facts of the decisions relied by assessee's counsel are entirely different and do not correspond to facts of the case in appeal. On the other hand the decision of the Hon'ble Delhi High Court is directly on the issue. There is no contrary decision of any other High Court on the issue that has been quoted by the assessee's counsel. Respectfully, following the decision of Hon'ble Delhi High Court directly covering the case, it is held that no interference is called for in the order passed by the Assessing Officer on this account."

5. Against the above order, the assessee is in appeal before us. We have heard both the parties and perused the record.

6. Ld. counsel of the assessee submitted that the issue is squarely covered in favour of the assessee by ITAT decision in assessee's own case for AY 2012-13 in ITA No.6203/Del/2015 order dated 05.10.2018 as well as Hon'ble Supreme Court decision on the same issue. That the

Hon'ble Delhi High Court decision relied upon by the Id. CIT (A) has not been agreed with by the Hon'ble Calcutta High Court in the case of PCIT vs. Snowtex Investment Ltd. 87 taxman.com 356. That the aforesaid decision of Hon'ble Calcutta High Court has already been approved by Hon'ble Supreme Court in the same case referred in (2019) 414 ITR 227. That the Hon'ble Delhi High Court is not the jurisdictional High Court in this case. The jurisdiction of the assessee lies with Hon'ble Punjab and Haryana High Court. Furthermore, he submitted that the Hon'ble Bombay High Court decision which the Revenue has relied upon is also not applicable inasmuch as Hon'ble Bombay High Court in a recent decision in the case of Souvenir Developers (I) Pvt. Ltd. vs. UOI vide order dated 06.05.2022 wherein same issue has been decided by Hon'ble High Court in favour of assessee by relying upon the Hon'ble Supreme Court decision in the case of Snowtex Investment Ltd. (supra). He further submitted that the issue has been extensively dealt with by the ITAT Delhi Bench in the case of Mars Associates Pvt. Ltd. in ITA Nos.6228 & 6229/Del/2019 ORDER DATED 06.08.2021. The ITAT has applied the Hon'ble Supreme Court decision in the case of Snowtex Investment Ltd. v. PCIT (supra) on identical issue. Hence, he submitted that the issue needs to be decided in favour of the assessee.

7. Ld. DR of the Revenue relied upon the orders of Revenue authorities but could not dispute any of the proposition as submitted above.

8. Upon careful consideration, we find ourselves in agreement with the submissions as above by the ld. counsel of the assessee. For the sake of reference, we may gainfully referred to the decision of ITAT Delhi bench in the case of Mars Associates Pvt. Ltd. vs. DCIT as under :-

“9. The main controversy before us is whether loss on account of trade in Future and Derivatives is covered under Explanation to Section 73; and whether the loss can be set off against the business income of the assessee or not. For the sake of ready reference it will be appropriate to reproduce Section 73 r.w.s. as under:

73. (1) Any loss, computed in respect of a speculation business carried on by assessee, shall not be set off except against profits and gains, if any, of another speculation business.

(2) Where for any assessment year any loss computed in respect of a speculation has not been wholly set off under sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no income from any other speculation business, shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and-

(i) it shall be set off against the profits and gains, if any, of any speculation business carried on by him assessable for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.

(3) In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section (2) of section 72 apply in relation to speculation business as they apply in relation to any business.

(4) No loss shall be carried forward under this section for more than [four] assessment years immediately succeeding the assessment year for which loss was first computed.

(Explanation. -Where any part of the business of a company (other than a company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities», "Income from house property", "Capital gains" and «Income from other sources"), or a company (the principal business of which is the business of trading in shares or banking] or the granting of loans and advances) consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares.]

10. Thus, from the plain reading of Explanation, it can be seen that it encompasses purchase and sale of share and does not cover F&O and Derivatives. However, Hon 'ble Delhi High Court in the case of DLF Commercial Developers Ltd. (supra) made following observations:

“..... The International Accounting Standard (IAS) 39, defines 'derivatives: as follows:

(a) whose value changes in response to the change in a specified interest rate, security price) commodity price, foreign exchange rate, index of prices or rates, a credit rating or credit index, or similar variable (sometimes called the 'underlying);

(b) that requires no initial net investment or little initial net investment relative to other types of contracts that have a similar response to changes in market conditions; and

(c) that is settled at a future date.

Actually, derivatives are assets, whose values are derived from values of underlying assets. These underlying assets can be commodities, metals, energy resources, and financial assets such as share J bonds, and foreign currencies.

10. It is no doubt; tempting to hold that since the expression "derivatives" is defined only in Section 43 (5) and since it excludes such transactions from the odium of speculative transactions, and further that since that has not been excluded from Section 73, yet, the Court would be. doing violence to Parliamentary intendment. This is because a definition enacted for only a restricted purpose or objective should not be applied to achieve other ends or purposes. Doing so would be contrary

to the statute. Thus contextual application of a definition or term is stressed; wherever the context and setting of a provision indicates an intention that an expression defined in some other place in the enactment, cannot be applied, that intent prevails, regardless of whether standard exclusionary terms (such as "unless the context otherwise requires") are used. In *The Vanguard Fire & General Insurance Co. Ltd., Madras v. M/s Fraser And Ross & Anr* AIR 1960 SC 971 it was held that:

It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words similar to the words used in the present case namely, unless there is anything repugnant in the subject or context. Therefore in finding out the meaning of the word "insurer" in various sections of the Act, the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section, namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Similarly, in *N.K. Jain and Ors. v C.K. Shah and Ors.* AIR 1991 SC 1289, it was held that:

4. The subject matter and the context in which a particular word is used are of great importance and it is axiomatic that the object underlying the Act must always be kept in view in construing the context in which a particular word is used

11. The stated objective of Section 73- apparent from the tenor of its language is to deny speculative businesses the benefit of carry forward of losses. Explanation to Section 73 (4) has been enacted to clarify beyond any shadow of doubt that share business of certain types or classes of companies are deemed to be speculative. That in another part of the statute, which deals with computation of business income) derivatives are excluded from the definition of speculation transactions,

only underlines that such exclusion is limited for the purpose of those provision or sections.

To borrow the Madras High Court's expression, derivatives are assets, whose values are derived from values of underlying assets; in the present case) by all accounts the derivatives are based on stocks and shares, which fall squarely within the explanation to Section 73 (4). Therefore, it is idle to contend that derivatives do not fall within that provision, when the underlying asset itself does not qualify for the benefit, as they (derivatives - once removed from it and entirely dependent on stocks and shares, for determination of their value).

12. In the light of the above discussion, it is held that the Tribunal erred in law in holding that the assessee was entitled to carry forward its losses; the question framed is answered in favour of the revenue and against the assessee. The appeal is, therefore, allowed; there shall be nø order as to costs.

11. First of all, the stated objective of Section 73 which is apparent from its language is to deny speculative business the benefit of carry forward of losses. Explanation to Section 73(4) has been enacted to clarify beyond any doubt that share business of certain types or classes of companies are deemed to be speculative. In another part of the statute, which deals with the computation of business income, derivatives are excluded from the definition of speculative transactions. However, Hon'ble Delhi High Court has held that derivatives are based on stocks and shares which fall squarely within the Explanation to Section 73; therefore, it is ideal to contend that derivatives did not fall within that provision.

12. It is pertinent to note that Hon'ble Supreme Court in the case of M/ s. Apollo Tyres (supra) held units of UTI are not shares, and therefore, Explanation to Section 73 would not cover the loss, arising on the transfer of UTI. If legal inference can be drawn from the judgment of Hon'ble Supreme Court, then only the shares have to be construed strictly as given in Explanation to Section 73. This is more so, as fiction has been created in Section 73 and it is a settled law that a fiction cannot be enlarged to cover another fiction, therefore, when Future and Derivatives do not find mention and place in Explanation to Section 73 then there is no question of 'treating Futures and Derivatives to be hit by Explanation to Section 73. However, after decision of Hon'ble Delhi High Court in another case of DLF Ltd. dated 11.07.2013, the similar issue has come before the Hon'ble Calcutta High Court in the case of Snowtex Investments Ltd. (supra) wherein question no. 1 raised before the Hon'ble High Court, was whether profits on Futures by Derivatives is speculation profit; and whether Explanation to Section 73 should apply. The Hon 'ble High Court

answered this question in favour of this proposition that loss in shares are hit by Explanation to Section 73, whereas profits on derivatives are non speculative and thus are not covered under Explanation to Section 73. The Hon'ble High Court took into account the provision of Section 43(5)(d) and referred to memorandum explaining the provision in the Finance Bill, 2005, wherein it was held as under:

“18. In the case before us, we are concerned with the assessment year 2008-09 and the amendment carving out an exception in the Explanation to Section 73 for the companies, which have dealings in shares as their principal business, was made effective only on 1 st April, 2015, this is to say, almost 8 years after the assessment year under consideration. We, as such, are not inclined to take notice of the earlier submission: Further, it appears from the memorandum explaining the provision in the Finance Bill, 2005 (by which, inter alia, clause (d) to the proviso in sub-section (5) of Section 43 was proposed to be inserted) that the Legislature deliberately refrained from enacting a corresponding amendment to the Explanation in Section 73. The said memorandum with regard to the proposed insertion says as follows:

The proposed amendment, therefore, seeks to provide that an eligible transaction carried out in respect of trading in derivatives in a recognized stock exchange shall not be deemed to be a speculative transaction, the proposed amendment also seeks to notify relevant rules, etc., regarding conditions to be fulfilled by recognized exchanges in this regard.

Further, it is also proposed to amend sub-section (4) of Section 73 so as to reduce the period of carry forward of speculation losses from eight assessment years to four assessment years.

.....

21. We are unable to see how does this judgment have any application? both dealing in shares and dealing in derivatives were at one point of time within the umbrella of speculative transaction. In the year 2006, dealings in derivatives ceased to be a speculative transaction. But dealing in shares by a company, whose principal business was dealing in shares, were deliberately retained within the ambit of speculative transaction and has ultimately been lifted only in the year 2015. It cannot be said that this was a step to remedy any unintended consequences. The fact that in 2006 dealings in derivatives were

treated as deemed business, but the dealing in shares were not similarly treated, is a pointed to show that the legislative intended to treat them differently. There is, as such no question of any unintended consequences. Thus, Hon'ble Calcutta High Court did not agree with the ratio of the decision of Hon'ble Delhi High Court in the case of DLF Commercial Developers Ltd. (supra). But, Delhi High Court is the Jurisdictional High Court and in normal circumstances, that has to be followed. But, the decision of Calcutta High Court reached before Hon'ble Supreme Court and Hon'ble Supreme Court in Civil Appeal No.4483 of 2019 in the case of Snowtex Investments Ltd. Vs. Pr.CIT, 414 ITR 227 upheld, the order of Calcutta High Court by finding no error in the decision of Hon'ble High Court holding that Business of Futures and options did not constitutes profits and gains from speculative business.”

13. Thus, Hon'ble Kolkata High Court did not agree with the ratio of the decision of Hon'ble Delhi High Court in the case of DLF Commercial Developers Ltd. (supra). Though, Hon'ble Delhi High Court being the Jurisdictional High Court and in normal circumstances, the same has a binding judicial precedence, which needs to be followed. However, this decision of Hon'ble Calcutta High Court in the case of Snowtex Investment Ltd. (supra) has reached before the Hon'ble Supreme Court and the Hon'ble Supreme Court in Civil Appeal No.4483/2019 In the case of Snowtex Investments Ltd. vs. Pr.CIT has upheld the order of the Hon'ble Calcutta High Court by finding no error in the decision of Hon'ble Delhi High Court holding that business of Futures and options constituted profits and gains from speculative business.

6. The Revenue appealed before the High Court which by its judgment dated 22nd November, 2016 accepted its submission the High Court held that the profits which had arisen from trading in futures and option were not projects from a speculative business. Hence the loss or trading in shares could not be set off against the profits arising from the business of futures and options. 31. The consequence is that in Assessment Year 2008-09, the loss under which occurred to the assessee as a result of its activity of trading in shares (a loss arising from the business of speculation) was not capable of being set off against the business of futures and options since the latter did not constitute profits and gains of a speculative business.

32. For the reasons we have indicated, we find no error in the decision of the High Court, The appeal is accordingly, dismissed. There shall be no order as to costs.”

13. Now, in view of the authoritative pronouncement of Hon'ble Supreme Court, we hold that loss from Futures and Derivatives is not speculation loss under Explanation to Section 73. Thus, disallowance of amount of Rs.2,58,72,839/- in Assessment Year 2015-16 and Rs.55,96,812/- in Assessment Year 2016-17 is directed to be deleted.”

9. We find that the aforesaid proposition is fully applicable on the facts of this case. Hence respectfully following the precedents as cited above we set aside the orders of authorities below and decide the issue in favour of assessee

10. In the result, appeal by the assessee stands allowed.

Order pronounced in the open court on this 14th day of July, 2022.

**Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER**

**Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Dated the 14th day of July, 2022
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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A), Faridabad.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**
