

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI

**BEFORE SHRI OM PRAKASH KANT, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA No.2041/Mum/2021
(Assessment Year: 2015-16)

Shri Sanjay Marotrao Modak F-503, Redwoods, Near Swap, Vasant Gardens, Mulund (W), Mumbai-400 080	Vs.	Dy. CIT, Circle 29(3), NFAC Mumbai
PAN/GIR No.		
(Appellant)	:	(Respondent)
Appellant by	:	Shri A. P. Sinha
Respondent by	:	Shri Hoshang B. Irani
Date of Hearing	:	25.08.2022
Date of Pronouncement	:	21.11.2022

ORDER

Per Kavitha Rajagopal, J. M.:

This appeal is filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short), passed u/s.250 of the Income Tax Act, 1961 ('the Act'), confirming the penalty levied by the Assessing Officer (A.O. for short) u/s.271B of the Act, pertaining to the Assessment Year ('A.Y.' for short) 2015-16.

2. The solitary ground of appeal raised by the assessee is that the Id. CIT(A) has erred in confirming the penalty of Rs.1,50,000/-, levied u/s.271B of the Act without considering the guidelines of ICAI in the working of turnover in future and option.

3. Brief facts are that the assessee is engaged in the business of trading, financing, reality and commodity etc. The assessee filed his return of income dated 04.04.2016, declaring total income of Rs.72,46,410/- for the impugned year. The assessee's case was selected for scrutiny and assessment order dated 24.11.2017 was passed u/s.143(3) determining total income at Rs.72,46,410/-.

4. The A.O. observed that the assessee has shown short term capital loss of Rs.3,74,357/- from trading in future and option, which was treated as 'business loss' instead of 'STCL', as the assessee was trading in future and option and not sale of asset. It is also observed that the assessee has declared total turnover from the impugned transaction in future and option of Rs.30,94,12,449/-. The A.O. levied penalty u/s.271B amounting to Rs.1,50,000/- on the ground that as the turnover of the assessee was beyond the limit prescribed u/s.44AB of the Act and that the assessee has failed to submit the report of the auditors and audited statement of accounts and that the same leads to contravention of provision of section 44AB of the Act.

5. The assessee was in appeal before the ld. CIT(A) as against the order of the A.O.

6. The ld. CIT(A) confirmed the penalty levied by the A.O. on the ground that the assessee has controverted the provision of section 44AB of the Act.

7. The assessee aggrieved by this was in appeal before us.

8. The ld. AR for the assessee contended that as per the CBDT Circular No. 6 of 2016 dated 29.06.2016, the assessee has got an option to either treat the income arising out of business from trading in shares and derivatives as 'business income' or as 'capital

gain' for computing tax. The assessee in this case has treated the same as 'business loss' and not 'STCL', pertaining to the transaction in future and option. The ld. AR relied on ICAI guidelines in calculating the turnover from future and option and as per the said guideline, the assessee's case would not fall under the limit for tax audit and that the levy of penalty u/s.271B was erroneous in the present case. The ld. AR relied on the decision of the Hon'ble Apex Court in the case of *CIT vs. Punjab Stainless Industries* [2014] 364 ITR 144 (SC) and in case of *CIT vs. Pact Securities and Financials Ltd.* [2003] 86 ITD 115 (Hyd.), which held that the method of accounting, prescribed by ICAI can be relied upon for computing turnover in case of shares and derivatives. The ld. AR also relied upon the decision of co-ordinate bench in case of *Sachin Maratrao Rangari vs. ACIT* [2022] 143 taxmann.com 318 (Rajkot – Trib).

9. The ld. Departmental Representative (ld. DR for short) controverted the same and stated that the assessee's turnover transaction in future and option was over and above the limit prescribed in section 44AB and that the assessee's failure to produce the report of the auditors and audited statement of accounts was liable to attract the penalty u/s. 271B of the Act. The ld. DR relied on the decision of the lower authorities.

10. Having heard the rival submissions and perused the materials on record, it is observed that the assessee has shown STCL of Rs.3,74,357/-, from trading in future and option, which transacts from business of trading in shares and derivatives. The A.O. has determined the total turnover from the said transaction as Rs.30,94,12,449/-, which according to the A.O. was beyond the limit prescribed in section 44AB of the Act which stipulates turnover above Rs.1,00,00,000/- for the impugned year (now enhanced to

Rs.2,00,00,000/- applicable from A.Y. 2021-22). It is pertinent to analyze the nature of transaction involving shares and derivatives. The most commonly prevalent derivative transaction is future and options commonly known as F & O and in case of calculation of tax for such transaction, the total turnover or gross receipts in the previous year are to be taken into consideration. Section 44AD of the Act prescribes a percentage of such total turnover as gross receipts to be calculated for levying tax. In the common parlance turnover as per Companies Act, 2013 means that aggregate value of the realization amount made from sale, supply or distribution of goods or on account of services rendered or both, by a company during the financial year. This interpretation does not hold good in case of F & O transactions where there are neither physical goods involved nor any delivery of shares or securities involved in the said transaction. The entries in the books of accounts of such transactions are not made on the contracted notes issued, but are made only of the differences. For the said purpose, the Institute of Chartered Accountant of India has prescribed the method of computing the turnover in such cases through 'Guidance Note on Tax Audit'. The following is the relevant extract for the said purpose:

Keeping in view the distinct features of an F and O transaction, the ICAI has prescribed that the turnover in such transactions should be computed as the sum of the following:

- (i) The total of favourable and unfavourable differences;*
- (ii) Premium received on sale of options;*
- (iii) Difference in respect of any reverse trades entered into*

Each transaction comprising "buy" and "sell" is to be considered as an independent transaction and the turnover in respect of each such transaction must be computed separately. The total turnover during a financial year would be the turnover of all such independent transactions for that financial year.

11. The issue involved in the present scenario is the legal sanctity of guidance note issued by ICAI, for which we would like to place our reliance on the decision cited by the

assessee in the case of *Punjab Stainless Industries* (supra) and *Pact Securities and Financials Ltd.* (supra), wherein it was held that the Hon'ble Apex Court has recognized ICAI as an expert body of accountants and the guidance note on tax audit issued by them can be relied upon in the absence of any statutory provision for computation of turnover in such cases.

12. From the above observation, we find that the validity of the ICAI guidance for calculating the turnover in case of derivatives has been reiterated by various judicial precedence. Upon consideration of the said method of calculating the turnover in transactions related to future and options, the assessee's case does not fall under the provisions of section 44AB of the Act which mandates auditing of books of accounts and furnishing audited statement of accounts. From the above cited decisions, and also decisions of the co-ordinate bench in case of *Sachin Maratrao Rangari* (supra) on identical issue, we find no merit in the order of Id. CIT(A) and we hereby delete the penalty levied u/s. 271B of the Act.

13. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 21.11.2022.

Sd/-

(Om Prakash Kant)
Accountant Member

Mumbai; Dated : 21.11.2022

Sd/-

(Kavitha Rajagopal)
Judicial Member

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai