

आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री वी. दुर्गारत्न, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं. ITA No.1738/Chny/2019
(निर्धारण वर्ष / Assessment Year: 2009-10)

M/s. Total Securities Ltd. Eden Garden, First floor; Opp.to MCA Club, Near Pizza Hut Kandivali, West Mumbai-400 067.	बनाम/ Vs.	ACIT Corporate Circle-3(1), Chennai.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. AABCT-1302-N		
(आपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकी ओरसे/ Appellant by	:	Shri R. Thulasiram (Advocate) Ld. AR
प्रत्यर्थीकी ओरसे/ Respondent by	:	Shri AR.V.Sreenivasan (Addl CIT) Ld. Sr. DR

सुनवाईकी तारीख/ Date of Hearing	:	16-05-2023
घोषणाकी तारीख/ Date of Pronouncement	:	07-06-2023

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2009-10 arises out of order of learned Commissioner of Income Tax (Appeals)-11, Chennai [CIT(A)] dated 19-03-2019 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s.143(3) of the Act on 21-12-2011. The grounds taken by the assessee read as under: -

1. The order of the Commissioner of Income tax (Appeals) is contrary to law and facts and circumstances of the case.
2. The Commissioner of Income tax (Appeals) has erred in confirming the order of the Assessing Officer that disallowed expenses amounting to Rs.3,86,697/ u/s

14A of Income tax Act, applying rule 8D, without correlating any expenses being incurred to earn the tax free dividend income by the appellant, in spite of the fact that appellant itself has disallowed Rs.1,83,029/- u/s 14A of the Income Tax Act.

3. The Commissioner of Income tax (Appeals) has further erred in confirming the order of the Assessing Officer that ignored the applicability of Sec. 43(5) of Income tax Act and applying the provisions of sec. 73 of Income tax Act to the arbitrage/jobbing transactions, deeming the cash market delivery based trading loss in arbitrage activity as speculative loss.

4. The Commissioner of Income Tax (Appeals) has further erred in sustaining the order of the Assessing Officer which is not justified in treating the loss in cash market delivery based transactions of arbitrage activity of Rs.3,85,05,712/- as speculative loss.

5. The Commissioner of Income tax (Appeals) has further erred in confirming the order of the Assessing Officer which is not justified in making addition of Rs.56,64,235/- treating the same as speculation loss u/s 73 of Income tax Act.

6. For these grounds and such other grounds that may be adduced at the time of hearing, the order of the Commissioner of Income tax (Appeals) confirming the order of the Assessing Officer may be reversed and the additions made may be deleted.”

As is evident, the grievance of the assessee is two-fold i.e. (i) disallowance u/s 14A; (ii) Losses incurred by the assessee have been treated as speculative losses.

Having heard rival submissions and upon perusal of case records, the appeal is disposed-off as under. The assessee being resident corporate assessee is stated to be engaged in trading of securities and providing share brokerage services.

2. Disallowance u/s 14A

2.1 The assessee earned exempt dividend income of Rs.30.20 Lacs and offered suo-motu disallowance u/s 14A for Rs.1.83 Lacs in the return of income. However, Ld. AO, applying Rule 8D(2)(iii), computed additional disallowance of Rs.3.86 Lacs. The Ld. CIT(A) confirmed the same against which the assessee is in further appeal before us.

2.2 It could be seen that the assessee has offered suo-motu disallowance in the return of income. However, Ld. AO, without recording any objective satisfaction as to why said disallowance was not

acceptable, straightway applied Rule 8D(2) which run contrary to statutory provisions of Sec.14A r.w.r.8D(2). In our considered opinion, before applying the said rule, it was incumbent upon Ld. AO to record an objective satisfaction rejecting the computations made by the assessee. In the absence of such an exercise, the additional disallowance made by Ld. AO could not be sustained in law. We order so. This ground stand allowed.

3. Treatment of Losses as Speculative Losses

3.1 The assessee credited jobbing income of Rs.1799.10 Lacs which was computed as under: -

No	Particulars	Amount Rs.	Amount Rs.
1	Cash market		
	Square up transactions cash market, delivery based transactions	3,33,59,539 (5,18,062)	3,28,41,477
2	Arbitrage transaction		
	cash market, delivery based transactions F&O market arbitrage gain	(3,85,05,712) 5,81,37,133	1,96,31,421
3.	F & O Market		
	Jobbing income	12,74,37,288	12,74,37,288
	Total		17,99,10,186

The dispute is with respect to adjustment of loss of Rs.385.05 Lacs under arbitrage transactions.

3.2 The Ld. AO held that the assessee set-off share trading loss on equity based transactions against income from derivative trading. The income from derivative trading, in terms of Clause (d) of Sec. 43(5) was non-speculative in nature. Since the assessee was engaged in the business of share trading, the explanation to Section 73 would apply which provide that any income or loss arising from such transactions is

deemed to be speculative in nature. The said explanation read as under:-

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 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.

Therefore, the losses thus arising could be set-off only from speculative income only whereas the assessee has set-off share trading losses against non-speculative income from derivative trading which is impermissible.

3.3 The assessee defended the same on the ground that the assessee earned positive net income from Arbitrage / jobbing transactions. The provisions of Section 73 apply to loss in speculative transactions and not to profits. The trading business of the assessee constitutes only profit / loss in arbitrage / jobbing and these transactions were to be considered as normal business transactions only. The term 'Arbitrage would be an activity whereby arbitrageur's enter into transaction to make profit from price differentials existing in two markets by simultaneously operating in two different markets. Arbitrageur makes riskless profit by exploiting the price differentials on the same instrument or on the similar assets by trading on different exchanges. He buys from one market, when price is lower and, sells in another market when the price is higher. At times opportunities exist where he can buy in derivative market and sell in cash market or vice versa. Thus, in arbitrage transactions, when there is loss in one market, there will be profit in another market or segment or

vice versa. Hence the loss in cash market is arbitrage loss & the profit in F&O segment is also the very same arbitrage profit and vice-versa, which has arisen on the arbitrage / jobbing transactions carried on by the assessee. Further, the arbitrage transactions carried out by the assessee constitutes the normal business of the assessee, in view of the specific exception provided in section 43(5) to such transactions. The provisions of Explanation-2 to section 28 would not apply to arbitrage/jobbing business and consequently the provisions of Section 73 does not apply to the arbitrage / jobbing transactions. Such types of arbitrage / jobbing transaction has been carried out throughout the year and the whole of transaction constitutes arbitrage business by the assessee, which is the normal business profit / loss and therefore, loss could not be singled out for invoking the provision of Section 73 of the Income Tax Act. The assessee also submitted that 'speculative transaction' as defined under sub-section (5) of Section 43 exclude an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognized stock exchange from the ambit of speculative transaction. In the case of the assessee, the entire transaction of purchase and sale of securities constitutes arbitrage & jobbing transactions as a whole and hence these transactions are outside the purview of the speculative transaction. The effect of explanation to Sec.73 would be that the income of all companies which are either trading or manufacturing and deriving income from sale and purchase of shares would be treated as speculative income (profit) notwithstanding the fact that sale and purchase took place on actual

delivery basis. Further, the Explanation 2 to Section 28 of the act provides that where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business i.e., speculation business shall be deemed to be distinct and separate from any other business. However, the term 'speculation' has not been defined u/s. 28. The term speculative transactions have been defined in Section 43(5) which provides a special exception to certain transactions, amongst which is the arbitrage / jobbing income. The Sec. 73(1) provides that any loss of speculative business shall not be set off except against profits and gains of another speculation business. The explanation to Section 73 of the Act further clarifies the 'speculation business' which provides that where any part of the business of the 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. However, there is an exception given in the said explanation, which stipulates that a company whose gross total income consists mainly of income from house property, capital gains and income from other sources or a company the principal business of which is the business of banking or the granting of loans and advances will not be covered within the purview of Section 73 of the Act. In assessee's case, the arbitrage / jobbing transaction has been carried out throughout the year and the whole of transaction constitutes arbitrage business by the assessee, which is the normal business profit/loss, net result of which is Rs. 17.99 Crores profit and hence, the provisions of section 73 is not applicable to the case of the assessee in view of specific exclusions of the arbitrage/jobbing

transactions from the purview of speculative transaction u/s 43(5) of the Income Tax Act.

3.4 However, Ld. AO held that explanation to Section 73 would apply. The provision of Sec. 43(5) is applicable to all sets of assessees while explanation to section 73 is specific to the companies. The specific provisions override the general provisions and therefore, the provision of Sec.73 will override the provisions of section 43(5). Accordingly, Share trading income was determined as follows: -

No.	Particulars	Amount Rs.	Amount Rs.
1	Cash market		
	Square up transactions	3,33,59,539	
	cash market, delivery based transactions	(5,18,062)	
	cash market, delivery based transactions(loss)	(3,85,05,712)	(56,64,235)
2	Arbitrage transaction		
	cash market, delivery based transactions		
	F&O market arbitrage gain	5,81,37,133	5,81,37,133
3.	F & O Market		
	Jobbing income		
	Total		18,55,74,421

3.5 The Ld. CIT(A) confirmed the same by observing as under: -

9. As above, the courts have clearly held that any arbitrage income earned by combining cash and F & O segments is taken as speculative income only. Considering the above, the contention of the assessee is rejected and the F & O arbitrage income of Rs.5.81 Crores is treated as speculative income only. The action of the Assessing Officer in not setting off the F&O arbitrage income against delivery based share trading loss is upheld. The grounds of appeal on this issue are rejected.

Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

4. From the given factual matrix, it emerges that the assessee has incurred delivery based share trading loss of Rs.385.05 Lacs. The assessee claimed the set-off of the same against F & O Arbitrage

Income of Rs.581.37 Lacs. The Ld. AO has denied the same by invoking the provisions of Sec.73. It could be seen that the assessee's whole business is dealing in shares and securities. The entire income of Rs.1799.10 Lacs has resulted from the jobbing transactions carried out by the assessee. Overall, there is no loss and therefore, the provisions of Section 73, in our consider opinion, could not be applied to the assessee since these provisions would apply only if there was an overall loss in this business segment, the set-off of which was sought to be claimed by the assessee against other incomes. Proceeding further, as per the exceptions carved out by clause (d) of Sec. 43(5), an eligible transaction is not to be treated as a speculative transaction. One of the eligible transactions includes trading in derivatives because of systematic technological changes introduced by stock exchanges. We find that the trading business of the assessee constitutes only profit / loss in arbitrage / jobbing which are normal business transactions for the assessee. Under Arbitrage transaction, the assessee makes riskless profit by exploiting the price differentials on the same instrument or on the similar assets by trading on different exchanges. Under these transactions, when there is loss in one market, there will be profit in another market or segment or vice versa. Hence the loss in cash market is arbitrage loss & the profit in F&O segment is also the very same arbitrage profit and vice-versa, which has arisen on the arbitrage / jobbing transactions carried on by the assessee. These two types of transactions, in our opinion, are the two sides of the same coin and could not be treated separately. Therefore, the loss of one segment has to be allowed to be set-off against the other segment. In the case of the assessee, the entire

transaction of purchase and sale of securities constitutes arbitrage & jobbing transactions as a whole and hence, these transactions are outside the purview of the speculative transaction. The explanation to Sec.73 would not apply to the case of the assessee in view of specific exclusions of the arbitrage/jobbing transactions from the purview of speculative transaction u/s 43(5) of the Income Tax Act. We order so. The Ld. AO is directed to re-compute the income of the assessee. This ground of appeal stand allowed.

Conclusion

5. The appeal stand allowed in terms of our above order.

Order pronounced on 7th June, 2023

Sd/-
(V. DURGA RAO)
न्यायिक सदस्य /JUDICIAL MEMBER

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखक सदस्य /ACCOUNTANT MEMBER

चेन्नई/ Chennai; दिनांक/ Dated : 07-06-2023
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF