

**IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI**

**BEFORE SHRI ABY T. VARKEY, JM AND MS. PADMAVATHY S, AM**

आयकर अपील सं/ I.T.A. No.3175/Mum/2022

(निर्धारण वर्ष / Assessment Year: 2013-14)

Varun Batra Flat 5, 5 <sup>th</sup> Floor, La Mer, Mistry Park, Kadeshwari Temple Road, Bandra West, Mumbai-400040.	<b>बनाम/</b> Vs.	National Faceless Appeal Centre (NFAC), Delhi.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AEZPB9157L</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	None	
Revenue by:	Ms. Vranda U Matkari (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 15/06/2023

घोषणा की तारीख /Date of Pronouncement: 28/06/2023

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi dated 23.08.2022 for assessment year 2013-14.

2. Though, the matter was listed for seven (7) times, no one represented/appeared on behalf of the assessee. However, we find that written submission has been filed on behalf of the assessee. Therefore, after hearing the Ld. DR, and after perusal of the written submission, we proceed to dispose off this appeal. The main grievance of the assessee is against the action of the Ld. CIT(A) confirming the action of the AO by which the assessee's claim of loss of Rs.15,23,598/- to be set-off against the income from other heads (apart from salary) was disallowed by the AO.



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3. Brief fact of the case are that the assessee had filed his return of income on 01.08.2013 declaring total income of Rs.2,30,52,930/-. Later on, the case of the assessee was selected for scrutiny under CASS. The AO noted that the assessee had income from salary other sources, house property, business income and capital gain. The AO noted that the assessee has shown loss from business and profession to the tune of Rs.15,23,598/- and the loss to the extent of Rs.14,41,815/- has been set-off with the following income (i) Income from house property Rs.84,000, (ii) Income from other sources Rs.13,51,033/- and (iii) Income from capital gains Rs.6,782/- total of Rs.14,41,815/-. The AO after going through the TAR and other documents such as the brokers note etc, was of the view that the assessee has traded in commodity derivatives and in the process has incurred loss of Rs.(-) 15,23,598/-. According to AO, since the transactions are in the nature of forward trading, the AO asked assessee to explain as to why these transactions should not be treated as speculative transaction and the assessee's reply has been reproduced by the AO at para no. 5 of his order. And thereafter, the AO has held as under: -

"1. Loss from trading in shares/derivatives is a business loss

During the year under consideration the assessee was engaged in trading in shares/derivates and has incurred a loss to the tune of Rs.15,23,598/-. The assessee has got his accounts audited in respect of the share trading/derivative trading business and the copy of the tax audit report has been submitted with your good self in the last reply. The question raised by your good self is whether this loss is a business loss or a speculative loss. In this regard, we would like to draw your attention towards the



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provisions of the section 43(5) of Income Tax Act, 1961 which have been reproduced as under: -

(5) “speculative transaction” means a transaction in which a contract for the purpose or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

**Provided** that for the purposes of this clause-

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him: or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or

(c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; or

(d) 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 (or).

(e) an eligible transaction in respect of trading in commodity derivatives carried out in a recognized association [which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013)].



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4. Aggrieved by the aforesaid action of AO, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the same by stating that the case laws cited by the assessee before him (reproduced at para no. 6.4 of his order) doesn't apply since the amendment made in the Finance Act, 2013 is applicable for FY. 2013-14 i.e. AY. 2014-15. And since, the instant appeal was pertaining to AY. 2013-14, amendment inserting clause (e) u/s 43(5) of the Income Tax Act, 1961 (hereinafter "the Act") was not applicable in the facts of the assessee. Therefore, he dismissed the appeal of the assessee. Aggrieved, the assessee has preferred the instant appeal before us.

5. We have heard the Ld. DR and perused the records. We note that only issue in the present appeal is that during the year the assessee has shown loss from business and profession to the tune of Rs.15,23,598/-. The AO was of the opinion after going through the TAR and other documents such as brokers note etc that the assessee had traded in commodity derivatives and incurred loss of Rs.15,23,598/-. According to him, these transactions are in nature of forward trading and accordingly was of the opinion that it was speculative transactions. Therefore, he issued show cause notice to the assessee as to why the transaction should not be treated as speculative transaction and the loss of Rs.15,33,598/- not be allowed to be set-off with other heads of income and instead allowed to be carry forwarded for set-off with speculative income, if any in future. The assessee's replied (relevant portion of reply only) is as under: -

“During the year under consideration the assessee was engaged in trading in shares/derivates and has incurred a loss to the tune



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of Rs.15,23,598/-. The assessee has got his accounts audited in respect of the share trading/derivative trading business and the copy of the tax audit report has been submitted with your good self in the last reply. The question raised by your good self is whether this loss is a business loss or a speculative loss.”

**6.** And thereafter reproduced section 43(5) of the Act and then explained as under: -

“On the perusal of the definition of “speculative transaction” read with the 1<sup>st</sup> Proviso and 2<sup>nd</sup> explanation we would to submit that since the trading in commodities was carried out by the assessee at a recognized stock exchanging and the transactions are duly supported with stamped contract notes, the said transaction was not a speculative transactions consequently giving it the nature of normal business transaction was not a speculative transaction the above provisions trading in derivative then consequently the profit/loss incurred from carrying out such transaction would business profit/loss. In the instant case the assessee has incurred loss of Rs.15,23,598.00 during the year under consideration and since it qualifies as a normal business loss it has been set off against income of other head apart from salary as mandated by the provisions of section 72 of IT Act 1961 read with the provisions of section 71 of the said Act.”

**7.** And thereafter reproduced section 71 & 72 of the Act and thereafter replied as under: -

“In view of the above deliberation and the perusal of the sections reproduced above, we would like to humbly submit with your good self that since the profit / loss from trading in shares / derivatives itself qualifies as a business profit / loss per



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section 43(5) consequently in lines with this the assessee has claimed the business loss of Rs.15,23,598.00 incurred during the year and has set off the same against other income other than salary as per the provision of section 71 of the IT Act, 1961. We have already - submitted the details of the computation of loss along with sample copies of the contract notes for your reference in the earlier replies and hope you would have the same in order.”

8. However, the AO being not satisfied with the reply of the assessee has treated the loss as speculative loss and he allowed it to be carried forward for set-off with speculative income if any in future and thus disallowed the claim of assessee to set-off the loss with gains under other heads (except salary). On appeal, the Ld. CIT(A) confirmed the action of AO. The main grievance of the assessee is that the assessee had incurred trading loss of Rs.15,23,598/- while trading in “*derivatives*”. According to the assessee, the AO as well as the Ld. CIT(A) has erred in referring the transaction carried out by assessee of derivative under clause (e) of section 43(5) of the Act instead of correctly referring it to clause (d) of section 43(5) of the Act. Assessee asserts that since he was engaged in “*trading in derivative,*” the ibid transaction falls in clause (d) of section 43(5) of the Act. And instead according to assessee, the Ld. CIT(A) as well as the AO erred in treating the same as “*trading in commodity derivatives*” as per clause (e) of section 43(5) of the Act. Thus, according to the assessee, the AO as well as the Ld. CIT(A) mis-directed themselves by stating that the amendment brought into by Finance Act 2013-14 which inserted clause (e) to section 43(5) of the Act was not applicable. According to



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the assessee, both authorities have ignored the contention of the assessee that he was engaged in trading derivatives and has not bothered to go through the relevant brokers note, contracts etc filed before them. After having gone through the impugned order of the Ld. CIT(A), we find that the disputed question of fact is whether the assessee was engaged in trading of derivatives as claimed by assessee or assessee was engaged in “trading in Commodity derivatives”. And, we note from a perusal of impugned order that there is no finding of fact as to whether the assessee was engaged in trading of derivatives or whether he has engaged in trading of commodity derivatives. The main thrust of the contention of the assessee, it that he was engaged in the trading of derivatives and so clause (d) of section 43(5) of the Act would be attracted and then according to assessee, the transaction in question cannot be termed as speculative transaction. Therefore, since the disputed question of fact has not been answered by the Ld. CIT(A), we set aside the impugned order of the Ld. CIT(A) and restore the issue back to his file with a direction to first answer the question of fact as to whether the assessee was trading in “*derivatives*” or as held by the AO, assessee was into trading in *commodity derivatives*. And after giving a finding of fact, the Ld. CIT(A) to decide the claim of assessee and examine the legality of action the AO, after going through the records and assessee is given liberty to file relevant documents to substantiate his claim and the Ld. CIT(A) to decide after hearing the assessee and if necessary call for remand report from AO in accordance to law.



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9. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 28/06/2023.

Sd/-

(PADMAVATHY S)  
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)  
JUDICIAL MEMBER

Mumbai; Dated 28/06/2023.  
Vijay Pal Singh, (Sr. PS)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai