

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.744/Kol/2022
Assessment Year: 2013-14**

Aashirwad Vincom Pvt. Ltd. C/o Subash Agarwal & Associates, Advocates, Siddha Gibson, 1, Gibson Lane, Suite 213, 2 nd floor, Kolkata-700069. (PAN: AAHCA7511J)	Vs.	Income-tax Officer, Ward- 9(1), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Siddarth Agarwal, Advocate
Respondent by : Shri Abhijit Kundu, CIT, DR

Date of conclusion of Hearing: 17.10.2023
Date of Pronouncement : 18.10.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide order no. ITBA/NFAC/S/250/2022-23/1043864850(1) dated 15.07.2022 passed against the assessment order by ITO, Ward-9(1), Kolkata u/s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 29.03.2016, for AY 2013-14.

2. There is a delay of 98 days in filing the present appeal. Impugned order by Ld. CIT(A) is dated 15.07.2022. Assessee has placed on record a petition for condonation of delay in filing the present appeal stating the reasons relating to medical ailment of the professional who was engaged for the purpose of filing the appeal

which has resulted into this delay. Considering the petition filed by the assessee, we find it proper to condone the delay and take up the matter for adjudication.

3. Grounds of appeal taken by the assessee are reproduced as under:

"1. (a) For that the Ld. CIT(A) erred in confirming the addition of Rs. 85,62,453/- as against the claim of set off of loss of Rs. 35,62,453/- in commodity trading.

(b) For that on the facts and in the circumstances of the case, the Ld. CIT(A), having himself holding that the commodity transactions were speculative in nature, ought to have directed the A.O. to set off profit on commodity trading against the speculation loss of Rs. 3,03,14,480/-.

(c) In the alternative, claim is made before the Hon'ble Tribunal to direct the A.O. to set - off profit on commodity trading against the speculation loss of Rs. 3,03,14,480/-.

2. For that on the facts and in the circumstances of the case, the Ld. CIT(A) grossly erred in confirming the addition of Rs. 5,16,500/- u/s 14A r.w. Rule 8D."

4. Brief facts as culled out from records are that assessee is engaged in the trading of shares, securities, derivatives on the recognized stock exchanges. It has also earned interest income on loans. Further, assessee derives income from trading and investment. Assessee filed its return of income on 30.09.2013, reporting total income of Rs.9,620/- comprising of loss of Rs.3,03,14,480/- on sale of shares. In the year under consideration, assessee has also earned profit from commodity trading, amounting to Rs.35,62,453/-. For this profit from commodity trading, Ld. AO has taken the figure of Rs.85,62,453/- while passing the impugned assessment order.

5. We have perused the orders of both, the Ld. AO and the Ld. CIT(A) and find that at several places reference to correct set of facts is missing. We also note that correct provisions of the Act, more

particularly Explanation to Sec. 73 and provisions of section 43(5)(d) and (e) have not been applied in proper perspective on the correct factual matrix of the case. We also find that there are observations which are contrary to the conclusions drawn while passing the respective orders by the authorities below.

6. In the course of assessment, Ld. AO has proposed to treat the loss on sale of shares of Rs.3,03,14,480/- as loss from speculation business by applying explanation to sec. 73. On this proposal by the ld. AO, assessee agreed to the treatment with the claim that income from commodity trading with a correct amount of Rs.35,62,453/- be adjusted as set off since it is also a speculative income. Ld. AO, however, did not agree to this claim of the assessee for setting off income from commodity trading by holding it as non-speculative business profit. Ld. AO thus, assessed the loss on sale of shares as speculative income which was allowed to be carried forward as per the provisions of the Act. He subjected the income on commodity trading to tax as non-speculative business income for which he took the amount as Rs.85,62,453/-.

6.1. Ld. AO also made a disallowance of Rs.5,16,500/- u/s. 14A by applying Rule 8D(2)(iii). While disallowing u/s. 14A, Ld. AO noted that assessee had earned nil income from dividend during the year. He also observed that assessee has not offered any amount of expenditure to be disallowed u/s. 14A. He thus, computed the disallowance by applying provisions of Rule 8D(2)(iii). In this respect, we note that assessee has earned dividend income of Rs.4,38,489/- duly reported in its audited financial statements placed in the paper book, more particularly in Note 14, relating to disclosure of other income at page 14 in the paper book.

7. Before the Ld. CIT(A), assessee had taken five grounds of appeal. Assessee had withdrawn ground no.2, 3 and 5 which were dismissed as withdrawn by the Ld. CIT(A). The said grounds are reproduced as under:

“Ground no. 2.

This ground relates to challenging the order of AO, wherein, the AO has treated income from commodity trading as non speculative income.

Vide the written submissions dated 01.07.2022, the appellant has withdrawn the ground so taken, hence, the same deserves to be treated as dismissed.

Ground no. 3:

This ground relates to challenging the findings of the AO, wherein, the AO has not allowed to set off the loss in commodities trading of Rs.35,62,453/- against the profit/income of the commodity trading for the year under consideration.

Vide the written submission dated 01.07.2022, the appellant has withdrawn the ground so taken, hence, the same deserves to be treated as dismissed.

Ground no. 5:

This grounds relates to challenging the addition made in terms of section 14A r.w. rule 8D of I. T. Act/Rules.

Vide the written submission dated 1.7.2022 the appellant has withdrawn the ground so taken, hence, the same deserves to be treated as dismissed.”

7.1. From the perusal of finding given by Ld. CIT(A) on ground no. 4 for claim of set off of income from commodity trading, he has observed that in case of commodity trading, same day settlement has been done in respect of purchase and sale of the commodity security without having delivery of the commodity security in assessee's account which amply proves the fact that the impugned transaction squarely falls under the ambit of provisions of sec. 43(5) of the Act and, therefore, did not allow the set off.

8. From the above observations and findings of the authorities below, we note that these orders are cryptic, not based on appreciation of correct facts as well as correct provisions of law.

8.1. In respect of treatment of loss on sale of share as loss from speculation business, Ld. AO has applied provisions of explanation to sec. 73. The explanation to section 73 is extracted below for ease of reference:

“Sec. 73..

*[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]*”

8.2. On the above stated Explanation, we note that there was an amendment by the Finance (No. 2) Act, 2014 w.e.f. 01.04.2015 by which “the principal business of which is the business of banking” was substituted by “the principal business of which is the business of trading in shares or banking”. Thus, the business of trading in shares was included in the Explanation effective from AY 2015-16 so as to treat that part of the investments of a company as speculation business. The year under consideration in the present case before us is AY 2013-14 for which there was no such provision in the Explanation of determining the business of the assessee of trading in shares as speculation business.

8.3. Ld. CIT(A) has referred to the provisions of section 43(5) for treatment in the commodity which is extracted below for ease of reference:

“43.

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- (5) "speculative transaction" means a transaction in which a contract for the purchase 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 recognised association, which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013),

shall not be deemed to be a speculative transaction.

Provided further that for the purposes of clause (e) of the first proviso, in respect of trading in agricultural commodity derivatives, the requirement of chargeability of commodity transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013) shall not apply.

Explanation 1.—For the purposes of clause (d), the expressions—

- (i) "eligible transaction" means any transaction,—
 - (A) carried out electronically on screen-based systems through a stock broker or sub-broker or such other intermediary registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) and the rules, regulations or bye-laws made or directions issued under those Acts or by banks or mutual funds on a recognised stock exchange; and

(B) which is supported by a time stamped contract note issued by such stock broker or sub-broker or such other intermediary to every client indicating in the contract note the unique client identity number allotted under any Act referred to in sub-clause (A) and permanent account number allotted under this Act;

(ii) "recognised stock exchange" means a recognised stock exchange as referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed and notified by the Central Government for this purpose;

Explanation 2.—For the purposes of clause (e), the expressions—

(i) "commodity derivative" shall have the meaning as assigned to it in Chapter VII of the Finance Act, 2013;

(ii) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through member or an intermediary, registered under the bye-laws, rules and regulations of the recognised association for trading in commodity derivative in accordance with the provisions of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and the rules, regulations or bye-laws made or directions issued under that Act on a recognised association; and

(B) which is supported by a time stamped contract note issued by such member or intermediary to every client indicating in the contract note, the unique client identity number allotted under the Act, rules, regulations or bye-laws referred to in sub-clause (A), unique trade number and permanent account number allotted under this Act;

(iii) "recognised association" means a recognised association as referred to in clause (j) of section 2 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and which fulfils such conditions as may be prescribed and is notified by the Central Government for this purpose;”

8.4. Clauses (a), (b), (c), (d) and (e) of sub-section 5 of section 43 need to be considered in the present set of facts to determine the nature of transaction for their treatment, based on material available on record.

9. Since the orders by the authorities below have been passed on mistaken set of facts as well as improper application of the provisions of law, we find it proper to remit the matter back to the file of Ld. AO for de novo assessment on the issues raised before us, considering the correct set of facts with reference to the material on record as well as considering the appropriate provisions of the Act as referred above. Needless to say that assessee be given reasonable opportunity of being

heard. We also direct the assessee to furnish all the relevant documentary evidence to substantiate its claim.

10. While remanding the matter back to the file of the Ld. AO, we would make it very clear that we have not expressed any views on the merits of the case so as to limit the assessment procedure. The observations made hereinabove by us in remanding the matter back to the file of the Ld. AO will not impair or injure the case of the revenue nor will it cause any prejudice to the defence/explanation of the assessee on the merits of the case. Accordingly, in terms of the above, the appeal of the assessee is allowed for statistical purposes.

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

Order is pronounced in the open court on 18th October, 2023

Sd/-

(Sanjay Garg)
Judicial Member

Sd/-

(Girish Agrawal)
Accountant Member

Dated: October, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:.
 3. CIT(A), NFAC, Delhi
 4. CIT
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata

- 1.Date of dictation- 23/08/2023/17/10/2023
- 2.Date on which the typed draft order is placed before the Dictating Member and Other member 17/10/2023
- 3.Date on which the approved order comes to the Sr. P.S./P.S. - /10/2023
- 4.Date on which the file goes to the Bench Clerk /10/2023
- 5.Date on which the file goes to the O.S.
- 6.Date of Dispatch of the Order.....