

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C" DELHI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER  
&  
SHRI YOGESH KUMAR US, JUDICIAL MEMBER**

I.T.As. No.2323 & 5089/DEL/2015  
Assessment Years 2009-10 & 2009-10

H.B. Leasing & Finance Co. Ltd., H-72, Connaught Circus, New Delhi.	vs.	ACIT, Circle-12(1), New Delhi.
TAN/PAN: AAACH0713N		
(Appellant)		(Respondent)

Appellant by:	Shri Amit Goel, CA Shri Pranav Yadav, CA		
Respondent by:	Mr. Waseem Arshand, CIT (DR)		
Date of hearing:	25	10	2023
Date of pronouncement:	13	12	2023

**ORDER**

**PER PRADIP KUMAR KEDIA, A.M.:**

The captioned appeal in ITA No.2323/Del/2015 is directed by the assessee against the first appellate order dated 27.02.2015 arising from the assessment order dated 30.12.2011 passed under Section 143(3) concerning Assessment Year 2009-10. Similarly, the captioned appeal in ITA No.508/Del/2015 filed by the assessee arises from the first appellate order dated 28.05.2015 wherein the CIT(A) has imposed the penalty under Section 271(1)(c) on the impugned enhancement on account of allegedly wrong claim of losses and understatement of income attributable to derivative transactions for Assessment Year 2009-10 in question.

2. We shall first take up the quantum appeal in ITA No.2323/Del/2015 for adjudication purposes.

**ITA No.2323/Del/2015 for Assessment Year 2009-10**

## 3. The grounds of appeal raised by the assessee read as under:

*“1. On the facts and circumstances of the case and in law, the order passed by the Commissioner of Income Tax (Appeal) and assessment order passed by Ld. Assessing Officer are bad in law.*

*2. On the facts and circumstances of the case and in law, the assessing officer erred in completing the assessment at income of Rs.27,75,76,563/- instead of income of Rs.33,52,536/- as returned by the appellant and Commissioner of Income Tax (Appeal) erred in not holding so. On the facts and circumstances of the case and in law, the CIT(A) should have deleted all the additions made by the assessing officer and should have directed the assessing officer to accept the income as returned by the appellant.*

*3a. On the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeal) erred in not deleting the addition of Rs.7,80,08,374/- made by the Assessing Officer on account of disallowance of loss in derivative trading.*

*b. On the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeal) erred in making enhancement to be appellant's income by computing alleged profit of Rs.5,30,39,742/- in derivative transactions instead of loss of Rs.7,80,08,374/- as returned by the appellant.*

*c. On the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeal) erred in making enhancement to the appellant's income in respect of derivative transactions. On the facts and circumstances of the case and in law, the action of Commissioner of Income Tax of making enhancement to the appellant's income is illegal, arbitrary & without jurisdiction.*

*d. On the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeal) erred in not allowing the loss of Rs. 7,80,08,374/- incurred by the appellant in derivative transactions which was disallowed by the assessing officer.*

*e. On the facts and circumstances of the case and in law, the remarks made by the Commissioner of Income Tax (Appeals) with regard to loss in derivative transactions as speculative loss are erroneous.*

*4. On the facts and circumstances of the case and in law the Commissioner of Income Tax (Appeal) erred in confirming addition to be extent of Rs.10,00,00,000/- on account of alleged unexplained investment u/s 69B of Income Tax Act, 1961.*

*4.1 On the facts and circumstances of the case and in law the Commissioner of Income Tax (Appeal) should have deleted the entire addition of Rs. 18,43,56,164/- made by the assessing officer on account of alleged unexplained investment.*

*5. On the facts and circumstances of the case and in law the Commissioner of Income Tax (Appeal) have erred in not specifically mentioning and holding that natural corollary of his action of confirming addition of Rs. 10,00,00,000/- u/s 69B of*

*Income Tax Act, 1961 (resulting into consequent increase in cost of acquisition), would be that the amount of Rs. 10,00,00,000/- returned by the appellant as short term capital gain will become NIL and therefore, sum of Rs. 10,00,00,000/- shown by the appellant as short term capital gain in its return of income was required to be excluded from the income of the appellant.*

6. *On the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeal) erred in confirming the action of assessing officer of rejecting the books of accounts of the company.*

7. *On the facts and circumstances of the case and in law, the various adverse inferences drawn / remarks made by the Commissioner of Income Tax (Appeal) and assessing officer are erroneous, arbitrary and against the principal of natural justice and therefore, such inference / remarks are not sustainable.*

8. *On the facts and circumstances of the case and in law, the interest has been wrongly charged u/s. 234B of Income Tax Act, 1961.*

9. *On the facts and circumstances of the case and in law, penalty proceedings u/s 271(1)(c) of Income Tax Act, 1961 has been wrongly initiated.”*

4. When the matter was called for hearing, the Id. counsel for the assessee submitted that Grounds No.4 and 5 are not pressed in view of the relief granted by the CIT(A). The Id. counsel further submitted that Ground no.3 is the only substantive ground for adjudication purposes. In view of the assertions made, Grounds No.4 and 5 of the grounds of appeal are dismissed as not pressed.

5. Ground No.3 concerns additions of Rs.7,80,08,374/- made by the Assessing Officer on account of disallowance of loss in derivative transactions on the platform of National Exchange of India (NSE).

6. Briefly stated, the assessee-company is a public limited company engaged in dealing in shares and securities etc. and other financial activities. In the course of scrutiny assessment, the Assessing Officer *inter alia* observed that the assessee has claimed business loss of Rs.7,80,08,374/- on account of transactions in derivative segment and consequently reduced the taxable income to this extent. On perusal of documents, the Assessing Officer observed that the derivative losses have been claimed with respect to future

segment transactions executed on the platform of NSE. The Assessing Officer alleged that the loss in derivative transactions claimed is not supported by documentary evidences. The Assessing Officer accordingly made a disallowance of derivative loss of business nature of Rs.7,80,08,374/- by a cryptic and nondescript observations in paragraph 4.6 of the assessment order.

7. Aggrieved, the assessee preferred appeal before the CIT(A). It was submitted by the assessee before the CIT(A) that the loss in derivative segment arose as a result of transactions made through registered brokers namely, M/s. RBB Master Securities Ltd. Delhi and M/s. Merwanjee Securities Ltd. on the platform of NSE which are duly verifiable from the records and the Assessing Officer has rejected the claim of loss cursorily without any opportunity to the assessee to corroborate its claim. The relevant copies of contract note issued by the respective brokers to support derivative loss arising to the assessee were produced before the CIT(A). The ledger accounts of the brokers (RRB and Merwanjee) were also produced. It was pointed out before the CIT(A) that no query relating to losses in derivative transactions were ever raised by the Assessing Officer as can be seen from the various questionnaires issued by the Assessing Officer. In its application under Rule 46A, additional evidences in the nature of brokers note and ledger account in support of claim of loss of derivative transactions of Rs.7,80,08,374/- were submitted before the CIT(A) for admission thereof. The CIT(A) forwarded the additional evidences to the Assessing Officer for comments and for examination for contents on merits. A remand report thereon was obtained by the CIT(A) from the Assessing Officer. A rejoinder thereon was furnished by the assessee. Having regard to the factual position that no details in relation to derivative loss were asked for in the course of the assessment, the additional evidences were admitted by the CIT(A) in the light of the various judgments for adjudication on merits.

8. The CIT(A) however on merits not only decided the issue against the assessee but also issued a notice proposing enhancement of income by another amount of Rs.5,30,39,741/-. The CIT(A) ultimately confirmed the disallowance of derivative loss of Rs.7,80,08,374/- claimed by Assessee and also further enhanced the assessed income by Rs.5,30,39,741/-. Resultantly, the addition of Rs.13,10,48,115/- were made towards derivative transactions in the hands of the assessee.

9. The relevant paragraph dealing with the issue by the CIT(A) reads as under:

*“Regarding Ground No.4 of the Appeal relating to disallowance of loss on trading of derivatives amounting to Rs.7,80,08,374, I find that the Ld. AO, in the assessment order, had acknowledged the fact of receipt of copy of account of M/s RB Masters Securities Ltd., Delhi, in which the total debit and credit balances were shown at Rs.16,06,65,074/- and Rs.15,89,53,696/-, respectively. Further, the AO also acknowledges that the Appellant had submitted copy of account of M/s Merwanjee Securities Ltd., in which a single transaction of Rs.1, 12,613/-was booked. I find that the AO had held that these accounts alone do not prove losses in derivatives and hence disallowed the same. The Appellant had submitted that the Ld. AO had never asked about the details in respect of the loss in derivatives during the assessment proceedings and the notice dated 11.7.2011, which was responded to by the Appellant vide letter dated 19.7.11, was also silent about the requirements to produce evidence in support of derivative trading.*

*6.4.2 The Appellant furnished before me copy of accounts of the aforesaid two brokers and the relevant contract notes in support of the claim of loss in derivative transactions, which have been admitted by me as additional evidences under rule 46A, on due consideration of the Remand report and the rejoinder thereon (Para 5.3.5 above).*

*6.4.3 I find that the Ld. AO has carried out no inquiry in the matter and has made disallowance of the derivative transactions in an arbitrary manner. However, keeping in view the quasi-judicial powers of the Commissioner of Income Tax (Appeals), which are co-terminus with an Income tax authority, I intend to examine the claim of the appellant on merit in the light of the additional evidences filed by the appellant, which have been admitted by me under Rule 46A, on due verification.*

*6.4.4 I find that the transactions shown in the contract notes from the brokers tally with the transactions recorded in their ledger account. Since these transactions were claimed to have been made through the National Stock Exchange (NSE), in order to verify the said transactions, resulting in losses aggregating to Rs.780,08,374/-, during the course of appellate proceeding, enquiries were got conducted from National Stock Exchange u/s 133(6). The NSE, in response, vide letter dated 6.3.2014 furnished*

detailed information in respect of each transaction of buyings and sellings made by the appellant during the FY 2008-09 in the form of a CD, which is placed on record.

On careful analysis of the data provided by NSE, using the Excel worksheet, it was noted that the appellant had transacted in respect of 10 scrips in the F&O segment as under:

Table-1 Derivative transactions during F.Y. 2008-09

(Source: National Stock Exchange)

S. No.	SCRIP NAME	TRADE AMOUNT (IN RS.)		
		BUY	SELL	DIFFERENCE
1	Bank of India	182621397.5	206452195	23830797.5
2	IFCI	9283526.5	9360258	76731.5
3	Ispat Ind.	11873980	11779982.5	-93997.5
4	JP Associates	301450237.5	318777525	17327287.5
5	JP Hydro	22032031.25	21988125	-43906.25
6	LT	1590550	1409590	-180960
7	Parsvanath	224224105.00	231591115	7367010
8	Powergrid	26395022.5	26637476.25	242453.75
9	Reliance	16561117.5	21203287.5	4642170
10	Unitech	5217570	5089725	-127845
	<b>Total</b>	<b>80,12,49,537.8</b>	<b>85,42,89,279.3</b>	<b>5,30,39,741.5</b>

Keeping in view of this, it is evident that during the period, 1.4.2008 to 31. 3.2009, in respect of all settlements recorded in the accounts of the appellant by the NSE, a net gain of Rs. 5,30,39,741.5 on all derivative transactions was made by it, whereas, the appellant had claimed net loss in this segment of Rs.7,80,08,374/-, (which was disallowed by the Ld. AO).

6.4.5 In view of the above, a notice for enhancement of demand was issued u/s. 251(2), vide letter dated 19.1.2015, which reads as under:

"During the course of appellate proceeding with regard your claim of losses in depravities transaction aggregating to Rs.780,08,374/-, enquires were got conducted from National Stock Exchange us 133(6). The NSC, in response, vide letter dated 6.3.2014 have furnished information of various buyings and sellings by you during the FY 2008-09. On careful examination of the same, the following details relating to gains/loss in derivatives were found out.

The above details clearly show that while you have claimed loss of Rs.780,08,374/-in respect of derivatives transactions during the year, however, as per the information furnished by the National Stock Exchange, you have earned gain of Rs.53039741/- during the year.

Keeping in view the above, you are required to explain as to why enhancement of R.s 53039741/- may not be made on this issue."

6.4.6 In response, the appellant, vide letter dated 28.01.2015, submitted as under:

*"In respect of the above, at the outset, it is most humbly submitted that there is no case for enhancement. The loss of Rs.7,80,08,374/- is the actual loss as claimed by the appellant in the return of income. In the data/details of buy & sell given in your notice, effect has not been taken of opening open/outstanding position as well as closing open outstanding position. It is apparent that you have asked National Stock Exchange for submission of buy & sell trades only for the financial year 2008-09. It has not been asked from NSE to provide the detail of opening and closing outstanding positions. Your honour will appreciate that position taken in March, 2008 which were outstanding as on 31.3.2008 and which got squared off in monthly expiry in the month of April, 2008. In this way only the sale of April, 2008 is appearing in the data provided by you. The corresponding buy made in March, 2008 have obviously been not considered in the figures mentioned in your notice. Similarly in respect of buy trades made in March, 2009, only the buy position have been considered and there closing outstanding position have not been considered. The difference (profit/loss) in derivative transaction is arrived at after considering the difference between the sell trade and corresponding buy trade."*

*It was submitted that in view of this, the claim of the appellant with regard the speculative losses in the derivative transactions of Rs. 7,80,08,374 was genuine and may be allowed by me.*

*6.4.7 I have carefully considered the facts of the case in the light of the submissions made by the appellant and the information requisitioned from NSE u/s.133(6). On careful consideration of the above, it is observed that as in the F&O segment, no delivery of Scrips are effectuated as these transactions are speculative in nature, the net amount of gain or loss, as the case may be, booked on different dates of settlement go towards computation of profits/losses in the derivative transactions during the relevant financial ear. The confirmed account of the appellant by M/ NSE for FY 2008-09 does not show any outstanding position, as claimed by appellant.*

*Therefore, the plea of the appellant is not justified, as speculative transactions are booked on the date of the net settlement, unlike the trading of shares on physical delivery basis, where, working of the losses/gains will require considering the unconcluded purchases made in the preceding year or the stock carried forward to subsequent year. It is seen that as against the aggregate buyings of Rs.80,12,49,537.80, the appellant has booked Sellings of Rs. 85, 42, 89,279.30 during the previous year 2008-09.*

*Keeping in view the same, the derivative loss of Rs.7,80,08,374 is being disallowed and enhancement to the extent of Rs.5,30,39,741.50, being the profit on the derivative transactions is being made to the total income. Such profits being from the speculative business cannot be set off against the business losses of the appellant. Penalty under Section 271(1)(c) is being initiated for incorrect filing of particulars of income to the extent of Rs.13,10,48,115.50."*

10. Further aggrieved, the assessee preferred appeal before the Tribunal both towards disallowance of derivative loss claimed and also further

enhancement thereof carried by the CIT(A) based on results of certain inquiries from the NSE.

11. Before the Tribunal, the ld. counsel for the assessee pointed out that both the Assessing Officer as well as the CIT(A) misdirected themselves in law and facts and proceeded against the assessee on gross misconception of facts concerning derivative transactions. The ld. counsel adverted to a tabular statement showing scrip-wise profits and losses derived by the assessee from derivative transactions reproduced hereunder:

	Opening Position as on 01.04.2008			Purchases as Show Cause	Sales as per Show Cause	Closing Position as on 31.03.2009			P&L	
	RRBMSD	HBSL	Total			RRBMSD	HBSL	Total		
Bank of India	22440900		22440900	182621397	206452195			0	1389898	
IFCI	1041340		1041340	9283527	9360258	305744		305744	-658865	
Ispat Ind.	1531230		1531230	11873980	11779983	542820		542820	-1112407	
JP Associates	3056400	57052800	60109200	301450238	318777525	1140750	5069993	6210743	-36571170	
JP Hydro	2193750		2193750	22032031	21988125	1100625		1100625	-1137031	
LT		756537	756537	1590550	1409590			0	-937497	
Parsvanath	31368120	14951160	46319280	224224105	231591115			0	-38952270	
Powergrid	2248785		2248785	26395022	26637476	2214135		2214135	207804	
Reliance		5106150	5106150	16561117	21203287			0	-463980	
Unitech	988920		988920	5217570	5089725	302850		302850	-813915	
<b>Total</b>	<b>64899445</b>	<b>77866647</b>	<b>142766092</b>	<b>801249537</b>	<b>854289279</b>	<b>5606924</b>	<b>5069993</b>	<b>10676917</b>	<b>-79049433</b>	
<i>Less: Position Closed (not showing in NSE File)</i>									1306607	
<i>Less: difference in buying position</i>									173438	
<i>Add: Brokerage, transaction charges, service tax, stamp charges, securities transaction tax</i>									-438983	
									<i>Net Loss</i>	-78008371
									<i>Loss claimed</i>	-78008374

11.1 Adverting to the tabular statement (supra), the ld. counsel pointed out that the assessee was holding open position at the beginning of the FY 2008-09 as on 01.04.2008 for the derivative contracts not matured in the preceding financial year 2007-08. The broker-wise and scrip-wise breakup can be discerned from the tabular statement. Similarly, the contracts which did not mature and close during the Financial Year 2008-09, the respective closing position were carried forward to F.Y. 2009-10. The loss incurred during the year for contract matured and also contract which remained open at the end of the year have been determined on 'mark to market basis' as per the

rudimentary accounting principles and practices. Such approach also have the endorsement of judicial dicta. The transaction entered into by the assessee in derivative segment is backed by contract notes of the brokers registered with SEBI. The Id. counsel thus submits that there can be no quarrel on the profit/loss arisen for the contracts which were entered into during the financial year and closed before the end of the financial year. The profit/loss on account of such derivative transaction stands at Rs.5,30,39,741/-. The difference in understanding of transaction by the Revenue Authorities arose solely on account of brought forward open position and carried forward unclosed (open) position. Consistent with accounting policy regularly employed, the profit/loss arising to the assessee in respect of contract notes remaining open from previous year were accounted in the preceding financial year on 'mark to market' basis. Meaning thereby, the loss incurred upto 31<sup>st</sup> March, 2008 in respect of unclosed contract were accounted for in the preceding financial year and the loss/profit arising to the assessee towards such contract were booked during the year only to the extent the profit/loss belonged to the number of days of contract period falling during the Financial Year 2008-09 relevant to Assessment Year 2009-10. On a similar footing, the profit/loss arising upto 31<sup>st</sup> March, 2009 in respect of contracts not matured have also been accounted for during the year on mark to market basis and the open position was carried forward to the next financial year for remaining number of days and the profits/loss corresponding to the remaining period were simultaneously booked in the subsequent financial year as per the usage of the trade, ordinary accounting practices and settled judicial view on the matter.

11.2 The Id. counsel submitted that while the Assessing Officer has disallowed the derivative loss claimed by the assessee at Rs.7.80 crore on wholesome basis without obtaining any evidence and without putting appropriate query to the assessee, the CIT(A), on the other hand, merely relied upon the transactions freshly entered and executed during the year as reported

by the NSE. The Id. counsel submitted that the mis-match between the losses reported by the assessee and the gains presumed by the CIT(A) is on account of the value of transactions remaining open at the beginning of the year as well as at the end of the year. The CIT(A) has omitted to take cognizance of such open position, i.e., derivatives contracts not matured in the preceding year as well as the contract entries during the year at about the end of the financial year and matured on the settlement date falling in the next year.

11.3 The Id. counsel referred to the broker-wise ledger account and scrip-wise profit/loss in derivative contracts. The Id. counsel thus essentially submitted that the CIT(A) misdirected himself in law in disallowing the derivative loss claimed by the assessee and further enhancing it by imaginary profit of Rs.5 crore solely based on the data provided by the NSE which were confined to the derivative transactions entered on behalf of the assessee and where the contracts stood matured. The open position was thus not taken into account while determining the correct profit/loss from derivative contracts.

11.4 The Id. counsel further referred to audited financial statement and adverted to note no.14 of the financial statement where the disclosure of 'open position' in the preceding financial year and open position carried forward during the year in future contracts (derivative) has been duly reported. The Id. counsel submitted that by the method of accounting adopted by the assessee consistent with the trade practices, no loss has resulted to the revenue *per se*. The whole exercise is revenue neutral. The profit/loss arising from a contract for the truncated period falling during the year has been duly accounted for on 'mark to market' basis where the open position has been brought forward from preceding year or carried forward to subsequent financial year. While the almost all contracts have matured during the year, the contracts entered at about the end of the financial year in the preceding year and similarly at the end of F.Y. in this year have given rise to the present controversy. The Id.

counsel also referred to guidance note on accounting for equity index and equity stocks, Futures and Options GN(A) 17 (issued 2003) to support the accounting method adopted by the assessee.

11.5 The Id. counsel next submitted that for the purposes of Section 43(5) defining speculative transactions, the profits/losses arising from derivative transactions fall outside the purview of Section 43(5) and consequently the loss arising on such transactions are to be regarded as normal business loss distinct from speculative loss in keeping with the factual position that assessee is predominantly engaged in share trading and other financial activities as NBFC company. The Id. counsel submitted that derivative transactions were carried out on the platform of NSE and such transactions are entitled to benefit under proviso (d) to Section 43(5) in the light of the judgment rendered in the case of *CIT vs. Nasa Finlease Pvt. Ltd. (2013) 38 taxmann.com 108 (Del)*.

11.6 The Id. counsel pointed out that as per the enhancement notice, certain inquiries were conducted by the CIT(A) from the NSE under Section 133(6) in relation to derivative loss claimed amounting to Rs.7,80,08,374/-. However, as per the information received from NSE, the total sale trade stands at Rs.85,42,89,279/- and the buy trade stands at Rs.80,12,49,537/-. The CIT(A) accordingly inferred that the difference of sale and buy comes to a gain of Rs.5,30,39,741/-. Based on such data, enhancement of the assessed income was proposed. To assail the view taken by the CIT(A), the Id. counsel pointed out that the loss of Rs.7,80,08,374/- claimed is sum of actual loss incurred in relation to derivative contracts which were entered during the year and also matured during the financial year 2008-09 in question together with the loss crystallized during the year in respect of opening outstanding position brought forward as well as year end 'open outstanding position' carried forward in relation to contracts not matured during the year. The Id. counsel submitted that CIT(A) proceeded at fallacious factual premise based on

limited data on buy and sale trade only in relation to F.Y. 2008-09 without seeking details of opening and closing outstanding positions. The Id. counsel submits that once the profit/loss arising from opening outstanding position as well as closing outstanding position are given effect, the loss resulted to the assessee in derivative contract matches with the reported loss in the audited financial statement and thus cannot be displaced. The Id. counsel thus submitted that the CIT(A) essentially proceeded on a wholly mistaken presumption of facts and on a totally wrong premise. The correct profit/loss on derivative transaction cannot be determined without giving effect to the profit/loss on unmatured (open) contract carried forward from preceding year and matured during the year and also the profit/loss accrued upto the end of the financial year where the contract obligations has remained open and remained unmatured and carried forward for settlement on the assigned date in the next year. These facts were submitted to the CIT(A) vide letter dated 28.01.2015. The CIT(A) however did not pay any heed to such factual submissions and proceeded with some preconceived mind to disregard the profit/loss arising from opening and closing outstanding position. The Id. counsel thus urged for reversal of disallowance of derivative loss as well as reversal of enhancement of assessed income.

12. The Id. DR for the Revenue, on the other hand, relied upon the stand taken by the CIT(A). In furtherance, the Id. CIT-DR submitted that the derivative loss reported in the profit and loss account, a part of which arises from open contracts carried forward are essentially of balance-sheet item. The loss accounted for on such open contract does not provide any legal basis to seek allowance thereof against the taxable income as per the Scheme of the Act. The loss accounted for towards such open position is merely for the purposes of reporting and disclosure and no more. Thus, an accounting entry by itself will not entitle the assessee to claim such loss as business loss. The Id. CIT-DR also pointed out that guidance note accounting for equity index and

equity stock, future and options referred to and relied upon has been either withdrawn or suspended as reported in website of ICAI. The Id. DR thus submitted that no interference with the order of the CIT(A) is called for in the instant case.

13. We have carefully considered the rival submissions and perused the material available on record.

14. The controversy in the present case revolves around correctness of derivatives losses claimed by the assessee at Rs.7,80,08,374/- on the platform of the Stock Exchange (NSE). The issue is essentially factual in nature.

14.1 As delineated in the preceding paragraphs, the assessee incurred losses in derivative trading of Rs.7,80,08,374/-. The Assessing Officer disallowed the aforesaid derivative loss without making any inquiry with the assessee. In the first appeal, however, the assessee filed the contract notes, the ledger account of the broker and other documentary evidences to support the derivative losses incurred by the assessee and claimed as allowable expense. The CIT(A) made inquiries with the Stock Exchange but however grossly misunderstood the elementary gamut of transactions. The CIT(A) observed that as per the information received from NSE the total purchases were for Rs.80,12,49,537/- and total sales were for Rs.85,42,89,279/-. The CIT(A) accordingly inferred that difference of sales and purchases, i.e., Rs.5,30,39,741/- was the profit earned by the assessee instead of loss of Rs.7,80,08,374/- as claimed by the assessee. The CIT(A) thus disallowed the loss claimed by the assessee and also made enhancement of taxable income by Rs.5,30,39,741/-.

14.2 The pith and substance of the case of the assessee is that the CIT(A) while rejecting the derivative losses and indulging in enhancement as acted in an ostensibly erroneous and arbitrary manner. The CIT(A) has failed to appreciate the factual position in correct perspective and made huge addition

in a casual manner. The CIT(A) has made reference to the total purchases position and total sale position entered into during the year in a rather simplistic manner without taking note of the factual position made available to him that derivative losses reported by the assessee also include the losses arising from brought forward open position of the earlier year in respect of unconcluded contracts exclude the carried forward open position to next year entered into during the year. The CIT(A) failed to appreciate that the derivative losses for the year was to be computed in the following manner.

Opening outstanding position as at the end of the beginning of the year  
Add: purchases during the year  
Less: sales made during the year  
Less: closing outstanding position at the year end.

14.3 In short, the CIT(A) has omitted to take into account the figures concerning opening outstanding position as a the beginning of the year and closing outstanding balance as at the year end. The exclusion of such open position militates against any possible reasoning. No rationale has been supplied by the CIT(A) for doing so.

14.4 The assessee has demonstrated the factual position with scrip wise tabular statement, contract notes, ledger account of the registered SEBI brokers and also the confirmation from the respective brokers. The details of opening and closing outstanding position is also available in the notes on accounts of the audited financial statement in the financial year 2008-09 relevant to Assessment Year 2009-10 in question. Thus, the factual position is abundantly clear from the records. The rejection of derivative loss and further enhancement of the returned income is clearly on account of omission of the CIT(A) to take note of respective open position as at the beginning of the year as well as at the end of the year. The assessee has demonstrated that once such open positions are taken into account, the derivative losses claimed by the

assessee tallies exactly with the audited financial statement. The assessee also contends that derivative loss determined and reported is in tune with accounting practices and accounting policies consistently applied over the years.

15. We find wholesome merit in the plea raised on behalf of the assessee. The derivative loss claimed by the assessee is supported threadbare by scrip-wise tabular statement. The mis-match between derivative loss claimed qua the working of the CIT(A) is found to be explained and is on account of unilateral omission on part of the CIT(A) to take cognizance of the losses arising on account of open position at the beginning of the year which matured during the year in question and likewise open position which remained unmatured and carried forward in the subsequent financial year. The approach of the assessee to recognize profits/losses in open contracts appears to be *prima facie* in tune with the accounting practices. The effect of open position if not taken will give rise to totally absurd conclusions. The profit/loss carried already reported for a part of the period in the preceding accounting year will get accounted for again during the year. Similarly, the profits/losses accounted for covering a part of the financial period during the year will again get accounted for in the subsequent year on termination of derivative contracts at the time of maturity. The action of the CIT(A) is apparently flawed and has lead to manifestly absurd results. The action of the CIT(A) cannot be justified in any manner and thus liable to be set aside. The derivative loss claimed by the assessee appears fully justified and requires to be accepted. The plea on behalf of revenue that such loss from open position has no effect on profit and loss is devoid of any merit. We thus set aside the order of the CIT(A) and direct the Assessing Officer to allow the claim towards derivative losses as business losses of the assessee as claimed.

16. In the result, the appeal of the assessee is allowed.

**ITA No.5089/Del/2015 Assessment Year 2009-10**

17. The captioned appeal relates to imposition of penalty under Section 271(1)(c) on the impugned derivative losses disallowed and consequent enhancement of taxable income thereon by the CIT(A) as discussed in ITA No.2323/Del/2015 supra.

18. In the light of our observations in quantum proceedings in ITA No.2323/Del/2015 where the correctness and propriety of derivative losses claimed by the assessee was found to be unquestionable, the consequential penalty under Section 271(1)(c) is without any legal foundation. The imposition of penalty under Section 271(1)(c) has thus lost the very premise to hold its sustainability. The penalty under Section 271(1)(c) in question thus cannot be sustained in law. Besides, the action of the assessee is fully supported by the documentary evidences, the confirmation from the registered SEBI brokers and the audited financial statement showing presence of open interest in derivative scrips both at the beginning of the year as well as at the end of the year. This being so, in the absence of any mistake or culpability in the action of the assessee, the imposition of penalty cannot be justified by any stretch of imaginations. We thus set aside the impugned first appellate order and delete the penalty.

19. In the result, the appeal of the assessee is allowed.

20. In the combined result, both the appeals of the assessee are allowed.

**Order pronounced in the open Court on 13/12/2023.**

Sd/-  
[YOGESH KUMAR US]  
JUDICIAL MEMBER

DATED: /12/2023

*Prabhat*

Sd/-  
[PRADIP KUMAR KEDIA]  
ACCOUNTANT MEMBER