

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'DB': NEW DELHI**

**BEFORE,**

**SHRI M. BALAGANESH, ACCOUNTANT MEMBER  
AND  
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.4258/Del/2018, A.Y. 2008-09**

&

**ITA No.4259/Del/2018, A.Y. 2009-10**

Late Shri Chandra Prakash Chaudhary through Legal Heir Mrs. Anju Chaudhary B-1, First Floor, Saket, New Delhi <b>PAN : ACOPC6136F</b>	Vs.	DCIT, Circle-1, Dehradun
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	None
Respondent by	Sh. N.S.Jangpangi, CIT DR

Date of Hearing	12/12/2023
Date of Pronouncement	18/12/2023

**ORDER**

**PER YOGESH KUMAR U.S., JM:**

Both the appeals filed by the assessee are against the order of Learned Commissioner of Income Tax (Appeals)-Dehradun ["Ld. CIT(A)", for short], dated 28/03/2017 for Assessment Year 2008-09 & 2009-10 respectively.

Grounds taken in these appeals are as under:

**ITA No. 4258/Del/2018**

“1. The Order of the Ld. Commissioner of Income Tax (A) is bad in law and on facts.

2. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in

a) Classification of losses of Rs. 34,09,466 due to **trading of shares** from non-speculative business to speculative business and

b) Treated **commodity transactions** as speculative transactions, hence losses of Rs. 1,21,369 is classified under category of speculative business.

3. The Appellant states that: -

a) **Trading of Shares:-** During the assessment proceedings the assessee filed statement of accounts received from the stock broker i.e India Bulls Securities Limited which is recognized participant in NSE and BSE which shows that such transactions are delivery based. Hence losses due to trading of shares should be treated as normal business loss instead of speculative loss.

b) **Commodity Transactions:-** As per section **43 (5)** (e) of the Income Tax Act -**1961** states that an eligible transaction in respect of trading in commodity derivatives carried out in recognized stock exchange shall not be deemed to be a speculative transaction which is chargeable to commodities transaction tax under chapter VII of the Finance Act, hence commodity transaction loss should be treated as normal business loss.

4. The Appellant craves leave to add, alter or modify the aforesaid grounds of appeal either at or before the hearing of appeal.”

**ITA No. 4259/Del/2018**

1. *The Order of the Ld. Commissioner of Income Tax (A) is bad in law and on facts.*
  2. *That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in treated losses from the future and option (F&O) of Rs. 41,04,315 as speculation loss instead of normal business loss.*
  3. *The Appellant states that:-*
    - a) *The Assesse has Demat account with Kotak Securities and had done trading of shares with such D- MAT account.*
    - b) *All the transaction of sale and purchase were done with Kotak Securities through National Stock Exchange for the period 01/04/2008 to 31/03/2009.*
    - c) *The broker i.e. Kotak Securities also allotted client code **C68F9** to the assessee.*
    - d) *All the transactions done by the assessee during the such period are delivery based, hence loss of Rs. 41,04,315 should be allowed to the assessee as normal business loss.*
  4. *The Appellant craves leave to add, alter or modify the aforesaid grounds of appeal either at or before the hearing of appeal.”*
2. None appeared for the assessee in both the Appeals even after service of notice sent to the registered address of the assessee, therefore, we are compelled to decide the issues involved in the present Appeals on hearing the Ld. Departmental Representative and on perusing the material available on records.

**ITA No. 4258/Del/2018 (Assessment Year 2008-09)**

3. Brief facts as mentioned in the Assessment Order are that the Assessment Proceedings were completed u/s 153A(1)(b) r/w sec. 143(3) of the Act on a total income of Rs. 35,81,330/-. At the time of assessment the claim of set-off of the losses from the future and option (F&O) at Rs. 93,98,110/-, loss from trading in shares at Rs. 34,09,466/- and loss from commodity future at Rs. 1,21,369/- were disallowed and the income of the assessee was computed as under:

House Property income	Rs. 1,37,980/-
Business Income	Rs. 34,04,580/-
Short Term Capital Gain	Rs. 26,383/-
Income from other sources	<u>Rs. 12,388/-</u>
Taxable Income	<b>Rs. 35,81,330/-</b>

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld. CIT(A), Dehradun, who vide his order dated 17-01-2012 in Appeal No. 107/DDN/2010-11 dismissed the appeal of the assessee. The assessee filed second appeal before the ITAT, New Delhi. The Tribunal, vide its order dated 28-02-2013 in ITA No. 3264/Del/2012, restored the issue of disallowance of set off of losses to the file of AO with the direction to determine the nature of losses on the basis of documentary evidence and in view of amended section 43(5) of the Act should allow the set off of losses incurred by the assessee from futures and options segment of stock market, if they are eligible transactions as referred to in proviso (d) to Section 43(5) of the Act.

5. After the remand from the Tribunal, the assessment order came to be passed on 26/06/2014 by making additions as under:-

<i>House Property income</i>	<i>Rs. 1,37,980/-</i>
<i>Business Income</i>	<i>Rs. 34,04,580/-</i>
<i>Short Term Capital Gain</i>	<i>Rs. 26,383/-</i>
<i>Income from other sources</i>	<i>Rs. 12,388/-</i>
<i>Taxable Income</i>	<b><i>Rs. 35,81,330/-</i></b>

6. Aggrieved by the assessment order dated 26/06/2014 passed u/s 143(3)/153Ac(1)(b)/254 of the Act, the assessee preferred an Appeal before the Ld. CIT(A), the Ld. CIT(A) vide order dated 28/03/2017 treated the classification of losses of Rs. 34,09,466/- from non speculative business to speculative business and further treated the commodity transaction as speculative transactions hence loss of Rs. 1,29,369/- has been classified under category of speculative business. Aggrieved by the order of the Ld. CIT(A) dated 28/03/2017, the assessee preferred the present appeal on the grounds mentioned above.

7. We have heard the Ld. Departmental Representative and perused the material available on record and gave our thoughtful consideration. The Ld. CIT(A) while deciding the first issue of setting off of loss of Rs. 34,09,466/-, held as under:-

*“17. The Provisions of clause (5) of section 43 define 'speculative transaction' to mean a transaction in which a contract for the purchase or sale of any commodity including stocks and shares is settled otherwise than by the actual delivery or transfer of the commodity or scraps. The proviso to section 43(5) lists out certain*

*transactions which are not deemed to be speculative transactions. The amendment to section 43(5)(d) only excludes derivatives from speculative transactions to the extent that they fulfill certain conditions. No such exception is made for share trading. Hence unless share trading is evidenced by delivery of shares, it will continue to be regarded as a speculative transaction and any loss on this account as a speculative loss, which then could not be set off against business income, under the provisions of section 73. The Assessing Officer has submitted that the documents furnished are only a summary sheet and transactions reports but the counsel has not filed any evidence of delivery of shares. He has pointed out that since it is not ascertainable from the documents filed, whether after purchase of shares, delivery of shares were taken or not it is not possible to comment whether these were speculative or non speculative transactions. I have perused the said documents. Besides falling back on the earlier argument, that section 73 is not applicable to the assessee because he is an individual and not a company, which I have already rejected, it has also been argued that the look at the transaction statement would show that the transactions are delivery based. I have perused the said statement. There are references to "delivery amount against settlement number...." which would indicate that delivery may have taken place in some transactions but the legal heir has not filed contract notes or details of transactions, from where it could be ascertained as to what percentage of the loss claimed was on account of delivery based trade and what percentage was or account of intraday trade or other swaps. It was always for the assessee to file the details to show that the loss claimed was on account of trades that were delivery based trades and therefore not speculative transactions. Since such details have not been field from which the nature of the*

*transactions can be deduced and quantified the claim for setting off of loss of Rs. 34,09,466/- from trading of shares against business income is rejected for want of sufficient evidence.”*

8. The Ld. CIT(A) has rightly observed that the provisions of Section 43(5)(e) of the Act is not appealable for the year under consideration and elaborately discussed the issue and rejected the contentions of the assessee. The assessee has not appeared and put-forth any submission or propositions contrary to the findings and the conclusions of the Ld. CIT(A). Considering the above facts and circumstances and in view of the legal position, we find no error or infirmity in the order of the Ld. CIT(A), accordingly we dismiss the Ground No. 2 (a) and 3(a) of the assessee.

9. Issue No. 2 is regarding treating the commodity transaction as speculative transaction wherein loss of Rs. 1,21,369/-has been classified under the category of speculative business. The Ld. CIT(A) while deciding the issue against the assessee held as under:-

*“16. Now to discuss the issue on merits. We may first take the issue of commodities. It has been pointed out that section 43(5)(e) was not on the statue in Assessment year 2008-09 and therefore there was no question of allowing set off of loss on account of trading in commodities prior to introduction of section 43(5)(e). In turn, the counsel for the legal heir has contended that the amendment was retrospective and therefore the assessee was entitled to set off the loss against business income. The explanatory notes to the Finance Act, 2014 ( by which the provision was*

*introduced) clearly state that." This amendment takes effect from 1st April, 2014 and will accordingly apply, in relation to the assessment year 2014-15 and subsequent assessment years". In the circumstances. there is no doubt that in the year in question, trading in commodities were speculative transactions and any loss incurred thereon could not be set off against business income as per the provisions of section 73. In the circumstances, the assessee was not entitled to set off commodity losses of Rs. 1,21,369/-. At this point of time it is also important to dispel the notion that section 73 applies only to a company. Simply because there is an explanation included in the section with regard to certain types of companies, does not mean that the section is only applicable to companies and the remaining assesseees are spared from the prescription of set off of speculative losses specified in the Section."*

10. The Ld. CIT(A) has adjudicated the issues by considering facts and circumstances and the legal propositions and pointed out that Section 53(5)(e) of the Act was not on the statute in the Assessment Year 2008-09, thus, the Ld. CIT(A) was of the opinion that there is no question of allowing set off of losses on account of trading in commodities prior to introduction of Section 43(5)(e) of the Act. Since, the Amendment is not retrospective and the same amendment is applicable only from 01/04/2014 in relation to Assessment Year 2014-15 and subsequent year but not to the year under consideration i.e. A.Y 2008-09. As the Assessee did not appear before the Tribunal and brought any contrary view to the notice of the Bench, we find no error or infirmity in the

order of the Ld. CIT(A), accordingly, we find no merit in the Grounds No. 2(b) and 3(b) of appeal of the assessee.

11. In the result, Appeal filed by the assessee in ITA No. 4258/DDN/2018 is dismissed.

**ITA No. 4259/Del/2018 (A.Y. 2009-10)**

12. Brief facts emerges from the order of the CIT(A) are that Original assessment in this case was completed u/s 153A(1)(b) r/w sec. 143(3) of the Act on a total income of Rs. 52,04,810/-. At the time of assessment, the claim of set-off of the losses from the future and option (F&O) at Rs. 41,04,315 was disallowed and the income of the assessee was computed as under:

<i>House Property income</i>	Rs. 1,26,500/-
<i>Business Income</i>	Rs. 50,70,340/-
<i>Income from other sources</i>	Rs. 7,967/-
<i>Taxable Income</i>	<b><u>Rs. 52,04,810/-</u></b>

Aggrieved by the assessment order, the assessee preferred an appeal before the Ld. CIT(A), Dehradun, who vide his order dated 17-01-2012 in Appeal No. 108/DDN/2010-11 dismissed the appeal of the assessee. The assessee filed a second appeal before the Tribunal, New Delhi. The Tribunal vide its order dated 28-02-2013 in ITA No. 3265/Del/2012, restored the issue of disallowance of set off of losses to the file of AO, with the direction to determine the

nature of losses on the basis of documentary evidence and stated that in view of amended section 43(5) of the Act, the AO should allow the set off of losses incurred by the assessee from futures and options segment of stock market, if they are eligible transactions as referred to in proviso (d) to Section 43(5) of the Act.

13. After the order of the Tribunal, the assessment order came to be passed by making addition on account of house property income at Rs. 1,26,500/- business income at Rs. 50,70,340/- and income from other sources of Rs. 7,967/-, accordingly, passed assessment order on 26/06/2014 by computing the income of the assessee at Rs. 52,04,810/-.

14. Aggrieved by the assessment order dated 26/06/2014, the assessee preferred an Appeal before the Ld. CIT(A), the Ld. CIT(A) vide order dated 28/03/2017 treated the losses from future and option of Rs. 41,04,315/- as speculative loss instead of normal business loss as claimed by the assessee. As against the order of the Ld. CIT(A) dated 28/03/2017, the assessee filed the present appeal on the grounds mentioned above.

15. The only grievance of the assessee in the present Appeal that the CIT(A) has erred in treating the losses from the future and

option ( F &O) of Rs. 41,04,,315/- as speculation loss instead of normal business loss.

16. We have heard the Ld. Departmental Representative and perused the material available on records. The Ld. CIT(A) had called for the remand report from the A.O. and the legal heirs of the assessee has furnished the comments on the Remand Report of the A.O. which have been extracted at para 13 & 14 of the Ld. CIT(A) and the Ld. CIT(A) after considering the Remand Report and reply to the Remand Report and also the submissions made by the parties, ultimately the Appeal has been dismissed in following manners:-

*“15. I have duly considered the facts and circumstances of the case. To address the Assessing Officers objections regarding the furnishing of documents. I had already considered the entirety of facts before admitting them in the first place These were that the Hon ITAT had remanded the matter back for specific consideration of these documents For some unknown reason, the assessee did not make compliance with the Assessing Officer. However, the assessee had since died and the demand was now the liability of the legal heir. As the appeal before me was the first instance in which the legal heir could have produced these documents, there was no default on his part earlier. Therefore, after considering the surrounding circumstances, it was felt that since the*

*documents were required to be examined to carry out the mandate of the ITAT and do substantive justice, they should be admitted. I therefore see no reason, to not consider these documents.*

*16. The Provisions of clause (5) of section 43 define 'speculative transaction' to mean a transaction in which a contract for the purchase or sale of any commodity including stocks and shares is settled otherwise than by the actual delivery or transfer of the commodity or scraps. The proviso to section 43(5) lists out certain transactions which are not deemed to be speculative transactions. The amendment by way of introduction of section 43(5)(d) only excludes derivatives from speculative transactions to the extent that they fulfill certain conditions. For a transaction to be considered to be an eligible transactions the following conditions are required to be fulfilled. These are*

- 1. It must be done electronically on screen based systems.*
- 2. It must be transacted through a recognized broker or sub broker or by banks or mutual funds on a recognized stock exchange.*
- 3. It must be supported by a time stamped contract note indicating the client unique ID and Permanent Account number of the assessee.*

*17. thus, unless all these conditions are fulfilled, the transaction may not be described as an eligible transaction. We may therefore see how far the conditions are fulfilled in the case of the assessee.*

18. In the first place, NSDL is not a recognized stock exchange by SEBI. It is a Depository linked to several stock exchanges. Hence no Bank or Mutual funds can trade on NSDL. Secondly, the counsel for the legal heir has not furnished time stamped contract notes from the broker containing the client code of the assessee or his PAN number. What has been produced is a copy of the account maintained with Kotak Mahindra Bank, which has the DP ID of the bank and the client code of the assessee. The DP ID of the bank is a Depository Participant ID. Depository Participant is an agent of the Depository and functions as the interacting medium between the depository and an investor. He is responsible for maintaining the investor's security account with the Depository and maintains them as per the written instructions given by the Investor. He is linked to a broker who trades on behalf of the investor. To avail the services of a DP, an account has to be opened with them that is similar to a bank account. A client code is allotted in respect of each client of the DP. Thus a furnishing of a statement of the account maintained with a DP, does not fulfill the conditions whereby the transactions can be regarded as eligible transactions. There is no time stamped contract note issued by the broker or sub broker( Kotak securities Limited) which has been furnished containing the Client ID and PAN, which is mandatory for the transactions to be regarded as an eligible transaction. In the circumstances even if the maintaining of a depository account with a DP of NSDL were to be taken as indirect evidence of electronic screen based transaction

*with a stock exchange, through a registered stock broker, in the absence of the specific contract notes being furnished it is not possible to classify the transactions as eligible transactions coming within the purview of section 43(5)(d). In the absence of the contract notes, it is also not possible to quantify the losses claimed by the assessee, from the documents furnished. In view of the same, it is held that the documentation furnished by the counsel for the legal heir is insufficient for extending the benefits of section 43(5)(d) to him. In view of the same, the transactions must be regarded as speculative transactions, till proved otherwise and the loss stated to be incurred on their account is considered ineligible to be set off against business income of the assessee in view of the provisions of section 73: At this point of time, it is also important to dispel the notion that section 73 applies only to a company. Simply because there is an explanation included in the section with regard to certain types of companies, does not mean that the section is only applicable to companies and the remaining assesseees are spared from the prescription of set off of speculative losses, as specified in the section.”*

17. The Ld. CIT(A) has decided the issue after calling the Remand Report and on considering the reply on the Remand Report by the legal heirs of the assessee and dismissed the Appeal, the assessee has not appeared before us to controvert any of the findings and conclusion arrived by the Ld. CIT(A) and the Ld. A.O. In the

absence of any contradictory material available on records, in our considered opinion, the Ld. CIT(A) committed no error in dismissing the Appeal filed by the Assessee. Hence, we find no merit in the Grounds of Appeal of the assessee; accordingly, Appeal in ITA No. 4259/DDN/2018 is dismissed.

Order pronounced in open Court on 18<sup>th</sup> December, 2023

Sd/-  
**(M.BALAGANESH)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(YOGESH KUMAR U.S.)**  
**JUDICIAL MEMBER**

Dated: 18/12/2023  
*B.R./R.N, Sr. Ps.*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, NEW DELHI

