

आयकर अपीलीय अधिकरण
कोलकाता 'बी' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

श्री राजेश कुमार, लेखा सदस्य
एवं
श्री अनिकेश बनर्जी, न्यायिक सदस्य
के समक्ष

Before
**SRI RAJESH KUMAR, ACCOUNTANT MEMBER
&
SRI ANIKESH BANERJEE, JUDICIAL MEMBER**

**I.T.A. No.: 98/KOL/2023
Assessment Year: 2012-13**

***Megapode Vyapaar Pvt. Ltd.....Appellant
[PAN: AACCM 0727 D]***

Vs.

DCIT, Central Circle-1(2), Kolkata.....Respondent

Appearances:

Assessee represented by: Sh. Ritesh Goel, A/R.

Department represented by: Sh. P.P. Barman, Addl. CIT, Sr. D/R.

Date of concluding the hearing : March 6th, 2024

Date of pronouncing the order : March 12th, 2024

ORDER

Per Anikesh Banerjee, Judicial Member:

The instant appeal of the assessee was filed against the order of the Commissioner of Income-tax (Appeals)-20, Kolkata [in brevity ld. 'CIT(A)'] dated 08.02.2021 passed u/s 250 of the Income Tax Act, 1961 (in brevity the 'Act') for assessment year 2012-13. The impugned order was emanated from the order of the DCIT, Central Circle-1(2), Kolkata (in brevity the 'AO') passed u/s 144 of the Act dated 26.03.2015.

2. The Registry informed that the appeal was filed with a delay of 669 days. Ld. A/R explained that the delay is covered by the decision of Hon'ble **Supreme Court** in the case of **Suo Motu writ petition (c) no. 3 of 2020 date**

of order 10/01/2022. After considering this order of the Hon'ble Apex Court the assessee was also in delay with 270 days. The ld. A/R explained that due to the ill health of the assessee, the assessee was unable to submit the appeal before the forum. So, the delay should be condoned. The ld. D/R strongly made objection against the condonation of delay. We consider the submission of the assessee and the ld. D/R. There is a genuine medical ground and also the delay is covered by the order of the Hon'ble Apex Court. So, accordingly the delay for 669 days is condoned, and the matter is taken for adjudication.

3. The assessee has taken the following grounds of appeal:

- “1) That the order of the Ld CIT (A) is bad in law and on facts of the case.*
- 2) That the Ld CIT (A) erred in confirming derivative Loss of Rs 6179816/- alleging to be bogus loss.*
- 3) That the Ld CIT (A) erred in confirming Rs 5941789/- on account of trading loss in shares to be bogus loss.*
- 4) That the Ld CIT (A) erred in confirming Rs. 48000/-, being 20 % of total salary arbitrarily.*
- 5) That the Ld CIT (A) erred in confirming Rs. 54976/-, being 20 % of total other expenses arbitrarily.*
- 6) That the appellant craves to add or alter any grounds of appeal during the proceedings of appeal.”*

4. The brief fact of the case is that the assessee was assessed and the addition was made in the head of 'derivative loss' amounting to Rs. 61,79,813/-, trading loss in share amounting to Rs. 59,41,789/-, addition of Rs. 48,000/- being 20% of the total salary and addition of Rs. 54,976/- being 20% of the expenses. During the assessment proceedings the ld. A/R had explained the derivative loss and the addition was confirmed. But related to the other loss the ld. AO mentioned that the assessee was unable to submit documentary evidence in support of its claim of expenses. So, the entire addition was remained confirmed. Aggrieved assessee filed an appeal before the ld. CIT(A). The ld. CIT(A) upheld the assessment order. Being aggrieved assessee filed an appeal before us.

5. The ld. A/R first vehemently argued and invited our attention in the assessment order para 3.16. The relevant paragraphs are reproduced below which are read before the Bench:

“3.1. The assessee has claimed loss of Rs. 61,79,816/- as loss from future and option trading in currency. The said loss has been- adjusted against interest income of Rs. 1,32,01,291/- earned by the assessee. Loss in Trading in currency derivative is speculative loss as per definition of Speculative transaction provided in section 43(5) of the I. T. Act, which defines speculative transaction as under

Section 43(5) of the I. T. Act:

“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

(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;

(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 recognised stock exchange;

shall not be deemed to be a speculative transaction.

Explanation.—For the purposes of this clause, 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 recognized 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) "recognized stock exchange" means a recognized stock exchange as referred to in clause (f) of section 238 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed, and notified³⁹ by the Central Government for this purpose;

3.2 The assessee has claimed loss in trading in currency futures in which the contract was periodically or ultimately settled without the actual delivery of the underlying currency. Therefore, the loss claimed to have been suffered by the assessee is a speculative loss. Here, it is important to mention that the trading in derivatives in foreign currency is not covered in any of the exceptions provided in section 43(5) reproduced above including the exception provided in proviso (d) of section 43(5) as the exception mentioned here is with regard to the derivatives referred to in section 2 (ac) of the Securities Contract "Regulation" Act, 1956, which covers trading in derivatives relating to shares and debentures only. Therefore the loss of Rs: 61,79,816/- claimed by the assessee cannot be set off against any other income of the assessee including interest income earned by it.

3.3 It would further be important to mention here that the assessee has also failed to prove the genuineness of the loss in currency derivatives claimed by it. The assessee has only filed a copy of "Difference Bill" issued by Marigold Vanijya Pvt. Ltd. dated 30.03.2012. As per this bill, the assessee undertook trade in the currency futures on only 9 days during the year and on every day there was loss suffered by the assessee which is a very remote possibility. The assessee has failed to produce the supporting documents including contract notes and contract with the broker. The Difference Bill has purportedly been issued by M/s. Marigold Vanijya Pvt. Ltd. whose director has admitted on oath during the course of survey U/s. 133A of the I. T Act that he indulged in providing bogus entries to other parties.-The perusal of copy of difference bill submitted by the assessee also does not inspire confidence as it shows loss on everyday of the trade claimed to have been done by the assessee through Marigold Vyapaar Pvt. Ltd. Keeping in view all these facts,, it is held that the assessee has failed to prove the genuineness of the loss in currency derivative claimed by it and discharge the onus cast on it by issuance of several notices and letters as mentioned in para 2 above."

6. The ld. A/R in argument placed that the Revenue had taken wrongly the implication of Section 43(5) of the Act the normal loss as a trading loss as speculative loss. The ld. A/R submitted his argument that there is no question of any unidentified loss and the assessee had established the genuineness of the transaction. Related to other addition in ground no. 3, 4 & 5 the ld. A/R placed that the documents were not able to submit before the ld. AO and the assessment was completed u/s 144 of the Act. So prayed to return back the matter before the ld. AO.

7. The ld. D/R vehemently argued and specially emphasised that the transaction of the assessee related to derivative loss amounting to Rs. 61,79,816/- was not covered by actual delivery/physical delivery. So, the transaction is contravening the provision of 43(5) of the Act. So, the amount is treated as speculative transaction. Accordingly, he prayed to uphold the assessment and appeal order. Relevant part of the appeal order is duly reproduced as below:

“I have carefully considered the facts of the case and the submission of the appellant. On the legal issue whether the transactions in trading in currency derivatives are speculative or not, I don’t agree with AO’s view. There are several judgments / decisions wherein it has been held that the transactions in currency derivatives trading are not speculative. Some of such judgments are quoted as under:

i. Quality Engineering & Software Technology Pvt. Ltd. Vs. DCIT, Bangalore, (2014) 52 taxman.com 515 (Bangalore ITAT)

ii. Inventurus Knowledge Services Pvt. Ltd. ITO, 5(2)(1), Mumbai, (2016) 65 taxman.com 94 (Mumbai ITAT)

iii. Nand Nandan Agralwal Vs. DCIT-1(3)(1), Mathura (2018) 90 taxman.com 3(Agra ITAT)

Hence, in principle, I don’t agree with AO’s view on legal issue whether transaction in currency derivative trading are speculative in nature. But assessee would not get any relief because it has failed to establish the genuineness of the transactions. AO has pointed out several discrepancies in the only document issued by Marigold Vanijya Pvt. Ltd., which assessee had submitted in support of its claim. It is suspected to be not genuine as its director had accepted in survey proceedings that it was involved in providing bogus entries. Under the circumstances, the loss of

Rs.61,79,816/- claimed as loss in currency trading derivative, cannot be allowed. Hence, addition of Rs.61,79,816/- is confirmed.

iv. Grounds of appeal no. 3: Assessee had claimed loss of Rs.59,41,789/- in share trading. As documentary evidences in support of these transactions were not furnished, AO has disallowed the loss of Rs.59,41,789/-.

As mentioned above, assessee has not filed any written submission during appellate proceedings. Hence, the transactions relating to share trading remained unverified. Under the circumstances, assessee would not get any relief and addition of Rs.59,41,789/- is confirmed.

v. Grounds of appeal no. 4 & 5: Assessee had claimed salary expenses of Rs.2,40,500/- and other expenses of Rs.2,74,379/-. As supporting evidences regarding these expenses were not furnished, AO has disallowed 20% of these expenses and added Rs.1,02,976/- to the total income.

Assessee has not filed any supporting evidences in appellate proceedings. Hence, these expenses remained unverified. Under the circumstances, I don't have any option but to agree with AO's view on this issue. Hence, addition of Rs.1,02,976/- is confirmed.

vi. Grounds of appeal no. 6: This ground is pre-mature at this state."

8. We heard the rival submission and considered the documents available in the record. The addition was made in different heads specially in case of derivative loss amounting to Rs. 61,79,816/-. The ld. AO added back for the contravening of provision of Section 43(5)(d) of the Act. The Act is very specific and asked for clear explanation related to claiming of loss as non-speculative loss. The exemption sub-Section (d) of Section 43(5) of the Act is remained unconsidered both in appeal and assessment. The ld. A/R also tried to prove that the transaction is genuine and there is no question for addition the same. But in case of derivative transactions Section 43(5)(d) of the Act should be followed and the documents should be submitted accordingly. Both the Revenue and the assessee had not properly considered the Section 43(5)(d) of the Act during the assessment and appeal proceedings. Related to other additions for trading loss, 20% of the salary and expenses are added back in assessment for non-submission of the documents. The same observation also in case of ld. CIT(A) which is reflected in his order. In our considered view, we remit back the matter to the file of the ld. AO to verify the additions in the light of Section 43(5)(d) of the Act and in other additions allowed the assessee

for submitting the evidence and documents and considered it as per the Act. Accordingly, the matter is remit back to the file of Id. AO. Needless to say, the assessee should get a reasonable opportunity of hearing in set aside proceeding and the evidence and documents which will be filed during the proceeding should be accepted by the AO and should be considered as per the Act. Ground nos. 2, 3, 4 & 5 are allowed for statistical purposes.

9. Ground nos. 1 & 6 are general in nature which needs no adjudication.

10. In the result, **ITA No. 98/KOL/2023** is allowed for statistical purposes.

Order pronounced in the open Court on 12th March, 2024.

Sd/-

[Rajesh Kumar]

Accountant Member

Sd/-

[Anikesh Banerjee]

Judicial Member

Dated: 12.03.2024

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Megapode Vyapaar Pvt. Ltd., 17, Ganesh Chandra Avenue, Business Point, 5th Floor, Room No. 506, Kolkata-700 013.**
- 2. DCIT, Central Circle-1(2), Kolkata.**
3. CIT(A)-20, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata