

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

**BEFORE JUSTICE (RETD.) C V BHADANG, HON'BLE PRESIDENT &  
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

**ITA NO.6466/MUM/2018  
Assessment Year 2014-15**

M/s. Prism Share Trading Services Private Limited,  
701, Vasant Vaikunth,  
M.G.Road, Cross Rd. No.4,  
Kandivili West, Mumbai 400 067.  
PAN:AAECP-4061-D

- Appellant

Vs.

Income Tax Officer -13(1)(4), Mumbai  
Room No.216B, 2<sup>nd</sup> Floor,  
Aaykar Bhavan, M.K. Road,  
Mumbai 400 020.

- Respondent

Appellant by : Shri Bhupendra Shah  
Respondent by : Shri Ashok Kumar Ambastha

Date of Hearing : 19/04/2024  
Date of Pronouncement : 29/04/2024

**ORDER**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER :**

The assessee has filed this appeal challenging the order dated 21/08/2018 passed by Ld CIT(A), Mumbai and it relates to the assessment year 2014-15. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the addition of Rs.1.09 crores relating to off-market F & O transactions in commodities (silver) as unexplained cash credit u/s. 68 of the Act and also in not allowing set off of business loss against aforesaid income.

2. This appeal was initially disposed of by the co-ordinate bench on 12.08.2022. Subsequently, the above said order was recalled in pursuance

of order dated 16.08.2023 passed against the Miscellaneous application no,228/Mum/2023 filed by the assessee.

2. The facts relating to the case are stated in brief. The assessee is engaged in the business of share and commodity trading. During the year under consideration, the assessee declared profit of Rs.1,09,38,870/- in off market F & O transaction in commodity. The assessee had incurred loss in F&O transaction in shares to the tune of Rs.1,05,44,428/- and earned speculation profit of Rs.17,18,214/- in share transactions. The assessee set off the loss in F&O transaction in shares against the profit in F&O transaction in commodities.

3. During the course of assessment proceedings the Assessing Officer asked the assessee to provide documents relating to F&O transaction in commodities. The assessee furnished copies of contract notes issued by a broker named M/s. Kaynet Commodities Pvt. Ltd. The Assessing Officer conducted enquiries with Multi Commodity Exchange of India Ltd and found that the above said transactions were not carried out in their platform. The AO noticed that the assessee had declared similar kind of profit in Asst. Year 2013-14 also and in that year, the AO had conducted enquiries with the director of M/s Kaynet Commodities P Ltd and he had stated that the his company has not made any off market transactions. Hence, the Assessing Officer took the view in this year that the assessee has adopted colourable device of creating fictitious documents and created the profit. Accordingly, he held that the profit declared by the assessee in F&O transactions in commodities is not genuine. The AO also observed that the said transactions carried outside the stock exchange platform are not permitted and hence illegal. Accordingly, the Assessing Officer assessed the profit of Rs.1,09,38,870/- as unexplained cash credit u/s. 68 of the Act. The Assessing Officer also rejected the claim for set off of loss from F&O transaction in shares against the above said addition by taking the view that the losses cannot be set off against the income assessed u/s 68 of the Act.

In this regard, the AO placed reliance on the decision rendered by Chennai bench of Tribunal in the case of Akr Poly Industries (ITA No.1042/Mds/2012 dated 29-01-2013), which in turn had placed reliance on the decision rendered by Hon'ble Gujarat High Court in the case of Fakir Mohamed Haji Hasan vs. CIT (2001)(247 ITR 290)(Guj)

3. Aggrieved against the order passed by Assessing Officer, the assessee preferred appeal before ld. CIT(A). Before Ld CIT(A), it was submitted that there was corresponding buyer named M/s Sneha Metals, which has purchased the commodities sold by the assessee. However, the Ld CIT(A) did not agree with the contentions of the assessee and affirmed the order passed by Assessing Officer. The Ld CIT(A) also agreed with the view of the AO that the loss incurred in F & O transactions in shares cannot be set off against the income assessed u/s 68 of the Act. Hence, the assessee has filed this appeal before the Tribunal.

4. We have heard the parties and perused the record. We notice that the assessee had declared profit from Off market F & O transactions in commodities in AY 2013-14 also. In that year also, the Assessing Officer held that those transactions are not genuine and accordingly made identical addition on identical reasoning. However, in AY 2013-14, the CIT(A) has allowed the claim of the assessee and hence, the Revenue filed appeal before the Tribunal challenging the order passed by Ld CIT(A). The co-ordinate bench of Tribunal, vide its order dated 30/11/2018 passed in ITA No.5650/Mum/2017, has dismissed the appeal of the revenue by upholding the order passed by Ld CIT(A). Since the facts are identical in this year, we are of the view that the decision taken by the co-ordinate bench in AY 2013-14 in the assessee's own case can be conveniently followed in this year also. Accordingly, we extract below the decision rendered by the Tribunal in Assessment Year 2013-14:-

“5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The assessee agitated the order passed by the A.O on two grounds viz. (i) that the income from commodity transactions of Rs.5,73,96,307/- shown by the assessee in its return of income had wrongly been held by the A.O as an unexplained cash credit under [Sec. 68](#) of the Act; and (ii) that the A.O had erred in declining the 'set off' of the loss suffered by the assessee against the aforesaid deemed income under [Sec.68](#) of Rs.5,73,96,307/-.The CIT(A) after deliberating at length on the contentions advanced by the assessee was persuaded to subscribe to the same. It was observed by the CIT(A) that the A.O had erred in invoking [Sec. 68](#) and therein characterising the profit shown from commodities trading business of Rs.5,73,96,307/- as an unexplained cash credit under [Sec.68](#) of the Act. Further, it was observed by the CIT(A) that as per [Sec. 115BBE](#) that was brought on the statute by the [Finance Act, 2012](#) with effect from 01.04.2013, and was applicable to the year under consideration i.e A.Y. 2013-14 did not contemplate any restriction on 'set off' of loss against the income therein assessed. In the backdrop of his aforesaid deliberations, the A.O was of the considered view that the declining on the part of the A.O to allow 'set off' of the losses against the income assessed by him under [Sec.68](#) clearly militated against the mandate of law as was then so available on the statute. It was observed by the CIT(A) that the restriction on 'set off' of losses against the income referred to in [Sections 68, 69, 69A, 69B, 69C and 69D](#) was made available on the statute by the legislature on the basis of amendment to [Sec.115BBE](#) by the [Finance Act, 2016](#) only with effect from 01.04.2017. In order to fortify his aforesaid view the CIT(A) took support of the CBDT circular No. 3/2017, dated 20.01.2017 which explained the amendment on the basis of which [Sec. 115BBE](#) was prospectively amended by the [Finance Act, 2016](#) with effect from A.Y. 2017-18. In the backdrop of his aforesaid deliberations the CIT(A) vacated the characterization by the A.O of the profit shown by the assessee from commodities trading business of Rs.5,73,96,307/-, as an unexplained cash credit under [Sec.68](#) of the Act. Apart therefrom, the CIT(A) vacated the observation of the A.O that the 'set off' of loss of Rs.5,56,42,339/- suffered by the assessee in F&O transactions was not permissible against the income of Rs.5,73,96,307/- that was assessed by him as an unexplained cash credit under [Sec.68](#) in the hands of the assessee. On the basis of his aforesaid observations the CIT(A) partly allowed the appeal of the assessee.

6. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Departmental Representative (for short 'D.R') relied on the order of the A.O. It was submitted by the ld. D.R that as the assessee had entered into commodity transaction activities to avail the artificially engineered gain created by the aforesaid transactions with a purpose to 'set off' the loss incurred in F&O transactions, therefore, the A.O rightly appreciating the facts of the case had held the alleged gain of Rs.5,73,96,307/- as an unexplained cash credit under [Sec.68](#) of the Act. Further, it was submitted by the ld. D.R that the A.O rightly taking support of the judgment of the Hon'ble High Court of Gujarat in the case of [Fakir Mohmed Haji Hasan Vs. CIT](#) (2001) 247 ITR 290 (Guj) had rightly concluded that the

loss from F&O transactions of the assessee could not be 'set off' against the addition made in the hands of the assessee under [Sec.68](#) of the Act.

7. Per contra, the ld. Authorized Representative (for short 'A.R') for the assessee submitted, that the A.O had on flimsy grounds dislodged the profit shown by the assessee from commodities trading business of Rs.5,73,96,307/-, and had wrongly characterised the same as an unexplained cash credit under [Sec.68](#) of the Act. It was submitted by the ld. A.R that the assessee had earned the commodities profit by carrying out offline transactions. Alternatively, it was submitted by the ld. A.R that the A.O had erred in not allowing 'set off' of the loss suffered by the assessee from F&O transactions against the income that was allegedly brought to tax under [Sec.68](#) of the Act. In support of his aforesaid contention the ld. A.R relied on the order of the ITAT, Jaipur in the case of ACIT, Central Circle -2, Jaipur Vs. M/s Sanjai Bairathi Gems Ltd. (ITA No. 157/JP/2017; dated 08.08.2017). It was submitted by the ld. A.R that [Sec. 115BBE](#) as was amended vide the Finance Bill, 2016 had only prospectively with effect from A.Y. 2017- 18 put a restriction on the 'set off' of losses against the income that was brought to tax under [Sec.68](#), or [Sec. 69](#), [Sec.69A](#), [Sec. 69B](#), [Sec.69C](#) or [Sec.69D](#). It was submitted by the ld. A.R that in the absence of any such restriction in [Sec. 115BBE](#) as was available on the statute for the year under consideration i.e. A.Y. 2013-14, as regards 'set off' of losses against the income assessed under [Sec.68](#), the A.O was in error in declining to allow the 'set off' of loss suffered by the assessee from F&O transactions against the income that was allegedly assessed by the A.O under [Sec. 68](#) of the Act.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the revenue by preferring the present appeal has sought our indulgence on two issues viz. (i) that as to whether the CIT(A) is right in law and facts of the case in concluding that the profits from the commodities transaction claimed by the assessee could not be assessed as an unexplained cash credit under [Sec.68](#) of the Act; and (ii) that as to whether the CIT(A) has rightly concluded that the loss suffered by the assessee from F&O transactions could validly be 'set off' against the income assessed in the hands of the assessee under [Sec. 68](#) of the Act.

9. We shall first advert to the observations of the CIT(A) that the profit from commodities trading business of Rs.5,73,96,307/- could not have been held as an unexplained cash credit under [Sec.68](#) of the Act. Insofar the application of [Sec.68](#) is concerned, the same comes into play where the assessee fails to explain the 'nature' and 'source' of any sum found credited in his 'books', or explanation offered by him is not, in the opinion of the A.O satisfactory. In the present case as the assessee had offered the amount of Rs.5,73,96,307/- as income from commodities trading business along with complete details supporting the same, therefore, in our considered view the same cannot be termed as an unexplained cash credit. Rather, the assessee had placed on record the complete details i.e. name and address of the counter party viz.

*M/s Sneha Metal Pvt. Ltd. with the A.O, but the latter had not deemed it fit to make any enquiry with the said party. We have deliberated at length on the adverse inferences drawn by the A.O as regards the genuineness and veracity of the commodities transactions carried out by the assessee, and are unable to persuade ourselves to subscribe to the same. We find that as the commodities transactions were carried out by the assessee throughout the year, thus the same clearly dislodges the observation of the A.O that the profit generated therefrom was prompted with an intent to 'set off' the same against the loss suffered by the assessee in the F&O transactions. Insofar the adverse inferences that had been drawn by the A.O as regards the genuineness and veracity of the commodities transactions on the ground that the assessee had settled its account with the broker M/s Kaynet Commodities Pvt. Ltd. ('sister concern' of the assessee) only through journal entries, the same is found to be absolutely misconceived. We find from a perusal of the records that though an amount of Rs.2,42,00,000/- was adjusted through journal entries, however, the payment of Rs.3,21,50,000/- was received through account payee cheques, which thus clearly established the movement of actual funds in respect of the aforesaid transactions. Apart therefrom, the observations of the A.O that as the transactions in the commodities were carried out by the assessee off market, thus the same did not inspire any confidence as regards the veracity of such transactions, in our considered view is also an observation arrived at by the A.O on the basis of a half hearted approach and premature observations. In case the A.O had any serious doubts as regards the identity and creditworthiness in respect of the counter party which was identified in the course of the assessment proceedings, then it was open for him to have made further enquiries, which we find has not been done by him. On the basis of our aforesaid observations, we are of the considered view that as the assessee has duly substantiated that it had earned a profit of Rs.5,73,96,307/- from commodities transactions, therefore, the same in our understanding cannot be held as an unexplained cash credit under [Sec.68](#). The Ground of appeal No. 1 raised by the revenue is dismissed.*

*10. We shall now advert to the observation of the CIT(A) that the loss suffered by the assessee from F&O transactions could be 'set off' against the income of Rs.5,73,96,307/- assessed by the A.O under [Sec. 68](#) of the Act. We find that [Sec.115BBE](#) was brought on the statute by the [Finance Act, 2012](#) with effect from 01.04.2013. On a perusal of the said statutory provision, as was then so available on the statute and was applicable to the case of the assessee for the year under consideration i.e A.Y. 2013-14, no restriction was placed as regards 'set off' of losses against the income referred to in [Sec.68](#), [69](#), [69A](#), [69B](#), [69C](#) and [69D](#). Rather, the legislature in all its wisdom by amending [Sec. 115BBE](#) vide [Finance Act, 2016](#) w.e.f 01.04.2017 had only w.e.f A.Y. 2017-18 placed a restriction on 'set off' of losses, in addition to raising of any claim of expenditure and allowance against such income. The fact that the aforesaid amendment of [Sec. 115BBE](#) by the [Finance Act, 2016](#), w.e.f 01.04.2017 is prospective in nature can safely be gathered from a perusal of the CBDT Circular No. 3/2017, dated 20.01.2017. In the backdrop of our aforesaid observations, it can safely be gathered that there was no embargo to claim 'set off' of losses in the year under consideration i.e*

*A.Y. 2013-14. We thus in terms of our aforesaid observations are persuaded to subscribe to the view taken by the CIT(A) that the loss suffered by the assessee from F&O transactions could be 'set off' against the income of Rs.5,73,96,307/- that was allegedly assessed by the A.O under [Sec.68](#) of the Act. The Ground of appeal No. 2 raised by the revenue is dismissed."*

5. In the instant year, there is no allegation that the profit earned by the assessee in F & O transactions in commodities were accounted for by way of journal entries. The assessee has placed copy of ledger account of M/s Kaynet Commodities P Ltd at pages 107 and 108 of paper book. A perusal of the same would show that the assessee has received payments from M/s Kaynet Commodities P Ltd on various days by way of cheques. In this year also, the AO did not make any enquiry with the corresponding buyer of commodities sold by the assessee. Since the transactions in commodities, even though off-market, are duly supported by the contract notes, we are of the view that the profit declared by the assessee, even if it may be illegal, is liable to be taxed under the Income tax Act. Hence the question of treating the said profit as unexplained cash credit does not arise in the facts of the present case. Since the facts available in the instant year is identical with the facts that existed in AY 2013-14, following the decision rendered by the co-ordinate bench in that year, we hold that the profit from off market F & O transactions in commodities declared by the assessee cannot be considered as unexplained cash credit. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to assess the income of Rs. 1,09,38,870/- as speculative profit, since the profit was not earned out of transactions carried in stock exchange platform.

6. The next issue relates to set off of loss against the above said profit. Since the above said profit is not assessable as cash credit u/s 68 of the Act, there will not be any bar in set off of the loss incurred in F & O transactions in shares against the above said profit. The Income tax Act does not bar setting off of business loss against speculation profit.

Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to allow set off claimed by the assessee.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 29 April, 2024.

Sd/-

[Justice (Retd) C V Bhadang]  
President

Sd/-

(B.R. Baskaran)  
Accountant Member

Mumbai, Date : 29 April, 2024

VM.

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The PCIT/CIT concerned
- 4) The D.R, "C" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai