

**THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E" DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.5181/DEL/2013
Assessment Year 2008-09

Simbhaoli Sugars Limited C-11, Connaught Place, New Delhi	Vs.	Dy. Commissioner of Income Tax (HQ) Central-III New Delhi
TAN/PAN: AABCS9972P		
(Appellant)		(Respondent)

Appellant by:	None		
Respondent by:	Shri Subhra Jyoti Chakraborty, CIT-DR		
Date of hearing:	20	03	2024
Date of pronouncement:	19	06	2024

ORDER

PER PRADIP KUMAR KEDIA-AM:

The captioned appeal has been filed by the Assessee against the first appellate order passed by the Commissioner of Income Tax (Appeals)-XXXIII, New Delhi [‘CIT(A)’ in short] dated 23.05.2013 under Section 250 of the Act arising from the assessment order dated 31.12.2010 passed by the Assessing Officer (AO) under section 143(3) of the Income Tax Act, 1961 (the Act) concerning A.Y. 2008-09.

2. The Grounds of Appeal raised by the Assessee read as under:

“1. The Ld. Commissioner of Income-Tax (Appeals) has erred in upholding the assessment by the Assessing Officer in treating the loss of Rs.1,07,51,230/- in respect of forex derivative contracts entered into by the company to hedge against the foreign currency fluctuation risk relating to the business transactions undertaken by

the company and claimed by the assessee as business loss, as a speculative loss.”

3. Briefly stated, the assessee filed return of income for A.Y. 2008-09 in question declaring loss of Rs.53,43,04,285/- which was further revised to loss of Rs.66,80,11,373/-. The return filed by the assessee was subjected to scrutiny assessment. In the course of assessment, the Assessing Officer *inter alia* observed that the assessee has claimed expenses of Rs.1,07,51,230/- on account of derivative transactions. The assessee submitted that it has incurred losses in the nature of ‘mark to market’ losses on forex derivative contracts outstanding as on 31.03.2008, i.e., on the closing date of the F.Y. 2007-08. It was pointed out that increase in liability due to foreign exchange fluctuation is to be considered in the year in which the increase takes place. The derivative options were booked to hedge against the foreign currency fluctuation risk relating to business transaction and such hedge cover is incidental to business of the company. The loss arising there from is liable on Revenue account. It was also pointed out before the AO that as per ‘Notes to Account’ in the balance-sheet filed, category-wise quantum data and derivative instrument is reflected which makes it evident that no loan for capital asset acquisition has been hedged. The derivatives are either for currency conversion or hedged for export recoverable in revenue field and thus causing a Revenue loss. The AO however referred to Section 43(5) of the Act and observed that the forex derivative contracts are not covered in the proviso to Section 43(5) and consequently falls within the definition of Section 43(5) of the Act. The AO accordingly treated the aforesaid amount as ‘speculative loss’ in the hands of the assessee-company.

4. Aggrieved, the assessee preferred appeal before the CIT(A).

The CIT(A) also endorsed the action of the AO as under:

“I have considered the assessment order, written submission & arguments of Ld. AR. The Ld. AR is arguing that the loss is not on account of transaction related to commodity or stocks or share hence the same would not fall within the definition of speculative transaction u/s 43(5) of I.T. Act, 1961.

The Ld. AR is arguing strongly that even the assessing officer has commented that the loss represents loss on for exchange of derivative. The only issue appears to be whether transaction of derivative is covered under speculative transaction u/s 43(5) of I.T. Act.

A perusal of section 43(5) reveals that the definition of speculative transaction has been defined as a transaction for purchase or sale of commodity including stock & shares without delivery or transfer. Though, speculative transaction is defined completely, the commodity has been defined inclusively by stocks & shares. Issue to be decided whether derivative can be classified as commodity.

Below the operative portion clause (5) of section 43, certain exceptions has been provided in clause (a), (b), (c) & (d) of proviso that such transaction shall not be deemed to be speculative transaction. Perusal of clause (d) of proviso to section 43(5) exempts eligible transaction in respect of trading in derivative referred in respect of trading in derivative referred in clause of section 2 of the security contracts Act, 1956 carried out in a recognized stock exchange. A perusal of above clause (d) reveals that the transaction of derivative is normally covered under the definition of speculative transaction, except the same is referred in clauses of section 2 of security transaction Act. In the instant case, Ld. AR has not proved that the derivative transacted is covered in clause of section 2 of Securities Transaction Act. Therefore, I hold the transaction as speculative & confirm the action of the assessing officer. As a result, this ground of appeal is dismissed.”

5. Further aggrieved by the denial of relief, the assessee preferred appeal before the Tribunal.

6. When the matter was called for hearing, none appeared on behalf of the assessee. It is seen from the record that multiple opportunities have been given in the past to the assessee but none was present on its behalf on any occasion. It is apparent from the case record that assessee has evaded appearance and continued to

remain defiant to the notices issued by the Tribunal. Owing to such alienating behavior on behalf of the assessee and proverbial negligence in attendance, we are constraint to proceed *ex-parte*.

7. The Id. DR for the Revenue relied upon the first appellate order and the assessment order.

8. We have carefully considered the submissions made on behalf of the assessee as well as the case records.

9. On perusal of the case record, it is observed that the AO has treated the loss of Rs.1,07,51,230/- which is in the nature of 'Mark to Market Loss' on forex derivative contracts entered by the company, as speculative loss. It is the contention of the assessee before lower authorities that such forex derivative contracts were entered into by the company to hedge against the foreign currency fluctuation risk relating to the business transactions undertaken by the company and such loss are revenue in character and cannot be regarded as speculative transaction within the meaning of Section 43(5) of the Act.

10. In this regard, we observe that accrual of loss is not disputed by the Assessing Officer. What has been disputed is whether the loss arising from derivative contracts seeking to hedge the foreign exchange fluctuation risk on transactions undertaken by the assessee in the normal course of business is speculative loss or a normal business loss. The contention of the assessee as borne out is that such transactions only seek to cover the business liability by hedging in foreign currency. It is further contention of the assessee that it is trite that the deductibility of exchange fluctuation depends on the purpose of utilization of foreign exchange. Where the exchange loss on forex cover taken to hedge against foreign

currency risks relating to business transactions undertaken by the assessee incidental to the business of the assessee, such exchange loss is allowable on revenue account as normal business loss.

11. We concur with the plea raised on behalf of the assessee before the lower authorities. The factual position being uncontroverted, the decision rendered by the Hon'ble Supreme Court in the case of *Woodward Governor (P.) Ltd.*, [2009] 312 ITR 254 (SC) clinches the issue. It is trite that if the funds in foreign exchange held in trading asset is in the ordinary course of trade, loss arising due to fluctuation of rate would be trading loss allowable as deduction. A reference may be made to the judgment in the case of *Sutlej Cotton Mills Ltd. vs. CIT*, (1979) 116 ITR 1 (SC). If however the foreign exchange funds is held on capital account, then the loss due to fluctuation could be capital loss and not allowable as deduction from business profits as held in *CIT vs. Mehboob Productions Pvt. Ltd.*, (1969) 74 ITR 676 (Bom). The relevant factor for determining whether loss due to fluctuations in exchange rate is trading loss is the purpose for which the foreign exchange fund was to be utilized. If the said fund was used as 'circulating capital', the loss would be trading loss as held in *Groz-Beckret Saboo Ltd. vs. CIT*, (1986) 160 ITR 743 (P & H). In the instant case, exchange loss incurred is on hedge instruments by way of derivative contract which is a normal and ordinary loss and cannot be equated with loss on speculative transactions.

12. We now advert to Section 43(5) of the Act which defines 'Speculative Transaction'. In a closure look of the definition, it is observed that following conditions have to be fulfilled to treat the transaction as speculative transaction (i) there should be a contract; (ii) it is purchase or sale of any commodity including shares and

stocks and; (iii) periodically or ultimately settled otherwise than by actual delivery or transfer. The impugned transaction of the assessee is neither related to commodity or stocks or shares nor such losses arises from deliverable contract. Manifestly, the hedging transactions to cover foreign currency risk as a business transaction in ordinary course and the loss arising from such hedging transaction is an ordinary business expenditure allowable under Section 37 of the Act. We thus see discernible merit in the case of the assessee. The view taken by the CIT(A) is thus palpably incorrect and has emanated from misconstruction of facts and law.

13. We thus set aside the order of the CIT(A) and direct the AO to allow such claims as made by the assessee.

14. In the result, the appeal of the assessee is allowed *ex-parte*.

Order pronounced in the open Court on 19/06/2024

Sd/-

**[KUL BHARAT]
JUDICIAL MEMBER**

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**

DATED: **/06/2024**

Prabhat