



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
MANISH AGARWAL, ACCOUNTANT MEMBER**

ITA Nos.44 & 45 /CTK/2024
Assessment Years : 2015-16 & 2016-17

Ganesh Ores Pvt Ltd., Civil Township, Rourkela	Vs.	Asst. Commissioner of Income Tax, Rourkela Circle, Rourkela
PAN/GIR No.AALDCG 2639 K		
(Appellant)	..	(Respondent)

Assessee by : Shri S.K.Agrawalla, CA
Revenue by : Shri S.C.Mohanty, Sr DR

Date of Hearing : 11/07/2024
Date of Pronouncement : 11/07/2024

ORDER

Per Bench

These are appeals filed by the assessee against the separate orders of the Id CIT(A), NFAC, Delhi both dated 8.12.2023 in Appeal No.CIT(A), Sambalpur/10158/2017-18 and No.CIT(A),Sambalpur/10130/2018-19 for the assessment years 2015-16 & 2016-17, respectively.

2. Shri S.K.Agrawalla, Id AR appeared for the assessee and Shri S.C.Mohanty, Sr. DR appeared for the revenue.

3. It was submitted by Id AR that for both the assessment years under consideration, a common issue involved was in regard to the action of the Assessing Officer in disallowing the set off of the loss in respect of derivative transaction by treating the same as speculative transaction. It was the submission that for the assessment year 2015-16, the assessee had claimed a loss of Rs.98,04,793/- and for the assessment year 2016-17, the assessee had claimed a loss of Rs.2,01,94,788/-. It was the submission that for the assessment year 2015-16, a sum of Rs.96,04,793/- comprised of loss representing Rs.82,05,368/- being loss in trading of derivatives and Rs.15,99,425/- representing the loss on account of foreign currency transaction. For the assessment year 2016-17, the amount of Rs.2,01,94,788/- represented entirely foreign currency transaction loss. It was the submission that the Assessing Officer had treated the loss claimed by the assessee as speculation loss in view of the provisions of section 73 of the Income Tax Act. It was the submission that before the Assessing Officer and before the Id CIT(A), the assessee had specifically claimed that the same could not be treated as speculation loss in view of the provisions of section 43(5)(d) of the Act. It was the submission that in view of the provisions of section 43(5)(d) of the Act, the loss was liable to be treated as business loss and allowed for being carried forward/set off. It was the

submission that the order of the Assessing Officer and that of Id CIT(A) is liable to be reversed.

4. It was further submitted that for the assessment year 2015-16, the Assessing Officer had also disallowed unsecured credit to an extent of Rs.35 lakhs representing the creditor Outram Properties Pvt Ltd., It was the submission that the assessee had taken loan of Rs.35 lakhs and the same has also been repaid on 12.8.2015 alongwith interest and after deducting TDS. It was the submission that the Assessing Officer had issued notice u/s.133(6) of the Act to various unsecured loan creditors of the assessee. It was the submission that as the assessee had already repaid the loan to Outram Properties Pvt Ltd., the said company did not respond to the notice issued by the Assessing Officer. It was the submission that as the loan had also been repaid and TDS had also been deducted on the interest paid, the addition as made by the AO is liable to be deleted.

5. It was also the submission that the Assessing Officer having made the addition during the assessment year 2015-16, did not consider the corresponding effect in the assessment year 2016-17, when the same had been repaid by the assessee.

6. In reply, Id Sr DR submitted that the Id CIT(A) has considered the claim of the assessee in regard to section 43(5)(d) of the Act in para 6.1.1 of his order. It was the submission that the disallowance as made by the

AO and confirmed by the Id CIT(A) is liable to be upheld in regard to speculative transaction and unsecured loans.

7. We have considered the rival submissions. In the present case, it would be worthwhile to extract the provisions of section 43(5)(d) of the Act, which reads as follows:

“(d)[an eligible transaction in respect of trading in derivatives referred to in clause] [Inserted by Act 18 of 2005, Section 14 (w.e.f. 1.4. 2006).] [(ac)] [Substituted by Act 21 of 2006, Section 11, for " (aa)" (w.e.f. 1.4. 2006).]

8. The said provisions provides that trading in derivatives through recognised Stock Exchange as being not a speculative transaction. In the present case, admittedly, for the assessment year 2015-16, the assessee has claimed the transaction generating a loss of Rs.82,05,368/- as transaction relating to derivatives and transaction which has been done through recognised Stock Exchange. However, it must be mentioned here that no evidence whatsoever has been produced before us by the assessee to show that the transaction generated a loss of Rs.82,05,368/- was in respect of derivatives only and that it was transacted through the recognised Stock Exchange. Though Id AR has pointed out that the evidences were before the AO, still there is no mention of the Assessing Officer in the assessment order that the transactions were exclusively of derivatives and the transactions are through recognised Stock Exchange.

9. It would also be worthwhile to extract the provisions of section 43(5)(e) of the Act, which reads as follows:

“(e)an eligible transaction in respect of trading in commodity derivatives carried out in a [recognised stock exchange][Sub. for "recognised association" by the Act No. 12 of 2020, w.e.f. 1-4-2020], which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013),”

10. The provisions of section 43(5)(e) of the Act has been brought into the Statute book w.e.f. 1.4.2014. Section 43(5)(e) of the Act talks of commodity derivatives. Foreign currency transaction admittedly is commodity derivatives. Here also, the requirement of section 43(5)(e) of the Act is that the transactions are to be made through recognised Stock Exchange. Further, a perusal of the order of the Id CIT(A) clearly shows that even though the assessee has made the claim of Rs.43(5)(d) of the Act before the Id CIT(A), cunningly, the Id CIT(A) switched over his findings by relying upon the provisions of section 43(5)(a) of the Act, which was not a claim before him. In these circumstances, as the evidences in regard to nature of the transaction and the recognised stock exchange, if any, through whom the transactions have been carried out by the assessee are not before us, the issues in these appeals are restored to the file of the Assessing Officer for the relevant assessment years to specifically examine

whether the derivatives have been dealt with by the assessee for the assessment years 2015-16 and whether such derivatives are transacted through the recognised stock exchange as defined in Section 43(5)(d) of the Act. In respect of foreign exchange loss in both the years, the issue is restored to the file of the Assessing Officer to examine and give a clear finding in regard to the compliance of provisions of section 43(5)(e) of the Act. If in both the years, the transactions carried out by the assessee are found in order in terms of section 43(5)(d) and 43(5)(e), the same is to be treated as normal business transactions and not as speculative transaction.

11. Coming to the issue of unsecured loans raised in assessment year 2016-17, admittedly, the account confirmation as has been shown in the paper book contains the PAN No. of Outram Properties Pvt Ltd. This being so, this issue is restored to the file of the Assessing Officer for re-adjudication and verification as to whether Outram Properties Pvt Ltd have filed their return of income for the relevant assessment year. The Assessing Officer shall examine the financial capacity of Outram Properties Pvt Ltd., and decide the issue after granting the assessee adequate opportunity of being heard to the assessee.

12. The Assessing Officer is directed to adjudicate the above issues in terms of the direction given above after allowing adequate opportunity of hearing to the assessee.

13. In the result, appeals of the assessee stand partly allowed for statistical purposes.

Order dictated and pronounced in the open court on 11/07/2024.

(Manish Agarwal)
ACCOUNTANT MEMBER

(George Mathan)
JUDICIAL MEMBER

Cuttack; Dated 11/07/2024
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Ganesh Ores Pvt Ltd., Civil Township, Rourkela
2. The Respondent: Asst. Commissioner of Income Tax, Rourkela Circle, Rourkela
3. The CIT(A)- NFAC, Delhi
4. Pr.CIT, Sambalpur
5. DR, ITAT,
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack