

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH MUMBAI
BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.1613/MUM/2024
Assessment Year: 2012-13

Rajesh Bhujanga Shetty S A-10, Rudraksh CHS, Sector 7, Navi Mumbai, Thane Airoli S.O., Navi Mumbai – 400708 (PAN : BALPS6351L)	Vs.	Ward -28(2)(5), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee : Shri Ramesh D. Khona, C.A
Revenue : Smt. Mahita Nair, Sr. DR

Date of Hearing : 04.07.2024
Date of Pronouncement : 18.07.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, vide order no. ITBA/NFAC/S/250/2023-24/1060914472(1), dated 14.02.2024 passed against the assessment order by Income Tax Officer, Ward 28(2)(5), Mumbai, u/s. 143(3) r.w.s. 147 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 12.12.2019 for Assessment Year 2012-13.

2. Grounds taken by the assessee are reproduced as under:

“Ground No. 1- The learned CIT Appeal erred in confirming addition of Rs.49,98,755/- as non speculative business income instead of speculative loss of Multi Commodity Exchange and NCDEX of Rs.5,816/- and MCX of Rs.91,304/- makes total loss of Rs.97,120/- as per IT Return.

Ground No. 2 - The learned CIT Appeal erred in not considering Contract Summary of Vertex Commodities And Finpro Private Limited statements for FY 2011-12 in respect of speculative transaction of multi commodity exchange and NCDEX Exchange Contract Summary of transaction value were incurred in FY 2011-12 in which assessee has incurred loss of Rs.97,120/-.

Sr No.	Exchange Name	Purchase Value	Sale Value	Loss
1	NCDEX	29,17,228	29,11,413	5,816
2	MCX	5,22,23,781	5,21,32,477	91,304
				97,120

Ground No. 3 - The learned ITO erred in not considering detail submission mailed letter dated 05/11/2019, 09/12/2019 and 10/12/2019 during the assessment proceeding hence assessment order dated 12/12/2019 is bad in law.

Ground No. 4 - The learned ITO erred in charging interest U/s 234A of RS.1,02,935/- and U/s 234B Rs.13,67,656/- is charge on assessed income instead of Return income as held by Patna High Court and Ranchi Tribunal also Mumbai Tribunal.

3. In the present appeal, assessee is contesting the confirmation of addition of Rs.49,98,755/- as non-speculative business income on share transaction undertaken by the assessee which in fact pertains to speculative loss of Rs.97,120/- incurred on Multi Commodity Exchange (MCX) and National Commodity Derivatives Exchange (NCDEX) duly reported in his return of income. Details of NCDEX and MCX commodity transactions undertaken by the assessee during the year is summarised as under:

Sr No.	Exchange Name	Purchase Value	Sale Value	Loss
1	NCDEX	29,17,228	29,11,413	5,816
2	MCX	5,22,23,781	5,21,32,477	91,304
	TOTAL	Rs.5,51,41,009	Rs.5,50,43,890	97,120

3.1. Assessee did not file his return of income for the year under consideration. Ld. Assessing Officer noted from the Department's data that assessee had done transaction at MCX and income to the tune of Rs.5,10,01,656/- chargeable to tax which has escaped assessment by reason of failure on the part of the assessee to make return u/s. 139 of the Act. Accordingly, notice u/s. 148 was issued on 28.03.2019 on the assessee asking him to file return of income which was filed on 05.11.2019 reporting total income at Rs.2,90,360/-. In the return filed, assessee reported income from salary, house property income and did not claim carry forward of the speculative business loss incurred by him on MCX and NCDEX.

3.2. In the course of assessment, ld. Assessing Officer noted that assessee has not shown income/loss in respect of share transaction done at MCX. Ld. Assessing Officer issued notice u/s.133(6) on MCX for documents and details pertaining to the transactions executed by the assessee. According to him, details and documents received from MCX authenticated the transactions. Ld. Assessing Officer issued show cause notice on the assessee as to why income from the transactions with MCX has not been offered in the return. Assessee vide his reply dated 09.12.2019 submitted that he has not done any such high value transaction during the year. Assessee further asked for the details, in this respect, to share with him. Copy of the said letter is placed at page 20 of the paper book containing 41 pages. Assessee further explained before the ld. Assessing Officer vide letter dated 10.12.2019 that he had made commodity trading transactions through Vertex Commodities and FinPro Pvt. Ltd. on the commodity exchange namely MCX and NCDEX, wherein he incurred a financial loss of Rs.97,120/- which is not shown in the income computation while filing the return. Details relating to the

commodity transactions were furnished by the assessee which are extracted below:

VERTEX COMMODITIES AND FINPRO PRIVATE LIMITED
ERNAKULAM, COCHIN - 682018

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CONTRACT SUMMARY (MCX)
Date Range: 01/04/2011 - 31/03/2012

Report Date : 15/11/2019
Report Time : 04:18 PM

Contract Description	Multi.	<--Your Purchase-->		<--Your Sales-->		<-----Net----->		Avg. Rate
		Qty.	Value	Qty.	Value	Qty.	Value	
Branch : MUM013 MUMBAI NARIMAN POINT E Group : MAHA MAHARASHTRA								
Client Code : CORP1C044-RAJESH B SHETTY (MAHA)								
ALUMINIUM 28/04/11	1	35000	4141484.64	35000	4135267.66	0	-6216.98	.00
COPPER 29/04/11	1	2000	862559.12	2000	859091.95	0	-3467.17	.00
COPPER 30/06/11	1	1000	427053.07	1000	422148.61	0	-4904.46	.00
CRUDEOIL 18/04/11	1	200	961072.64	200	957528.51	0	-3544.13	.00
CRUDEOIL 19/05/11	1	100	503480.42	100	499820.76	0	-3659.66	.00
GOLD 04/06/11	1	600	12694849.16	600	12689149.63	0	-5699.53	.00
GOLDM 05/05/11	1	80	1698557.13	80	1693334.42	0	-5222.71	.00
LEAD 28/04/11	1	120000	14956631.44	120000	14925877.40	0	-30754.04	.00
LEADMINI 31/05/11	1	1000	114791.11	1000	114608.90	0	-182.21	.00
NICKEL 28/04/11	1	250	296256.17	250	298542.94	0	2286.77	.00
NICKEL 31/05/11	1	250	296406.23	250	293844.64	0	-2561.59	.00
SILVER 05/05/11	1	180	10775931.52	180	10747455.92	0	-28475.60	.00
SILVERM 30/04/11	1	10	558870.27	10	558399.76	0	-470.51	.00
SILVERM 30/06/11	1	10	565572.67	10	562673.22	0	-2899.45	.00
ZINC 28/04/11	1	30000	3268729.17	30000	3275518.38	0	6789.21	.00
ZINCMINI 30/06/11	1	1000	101536.44	1000	99214.39	0	-2322.05	.00
Client Total			52223781.20		52132477.09		-91304.11	

VERTEX COMMODITIES AND FINPRO PRIVATE LIMITED
ERNAKULAM, COCHIN - 682018

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CONTRACT SUMMARY (NCDEX)
Date Range: 01/04/2011 - 31/03/2012

Report Date : 15/11/2019
Report Time : 04:22 PM

Contract Description	Multi.	<--Your Purchase-->		<--Your Sales-->		<-----Net----->		Avg. Rate
		Qty.	Value	Qty.	Value	Qty.	Value	
Branch : MUM013 MUMBAI NARIMAN POINT E Group : MAHA MAHARASHTRA								
Client Code : CORP1C044-RAJESH B SHETTY (MAHA)								
CHARJDEL 20/05/11	10	10	233386.53	10	231813.99	0	-1572.54	.00
GARSEDJDR 20/05/11	10	10	304314.08	10	305885.24	0	1571.16	.00
JEERAUNJHA 20/05/11	10	6	981004.16	6	974967.97	0	-6036.19	.00
PPRMLGKOC 20/05/11	10	2	571317.21	2	572252.36	0	935.15	.00
RMSEED 20/05/11	10	30	827206.67	30	826493.44	0	-713.23	.00
Client Total			2517228.65		2511413.00		-5815.65	



4. Despite the assertions made by the assessee, that no share transactions had been undertaken by the assessee as alleged by the Id. Assessing Officer in the assessment made by him, Id. Assessing Officer

concluded that income from transactions in shares at MCX has not been offered by the assessee having transaction value of Rs.4,99,85,780/- and thus made an addition of Rs.49,98,578/- by adopting 10% of the total transaction value as business income. Ld. CIT(A) upheld the addition so made by the ld. Assessing Officer.

5. Before us, ld. Counsel asserted the fact that in the reasons to believe recorded by the ld. Assessing Officer for re-opening the case, it is noted that assessee had done transaction at MCX for which income has escaped assessment. In this respect, he referred to para 1 of the impugned assessment order. The same is reproduced as under for ready reference.

“In this case, the assessee has not filed return of income for A.Y 2012-13. As per the I.T. Department's CIB/26AS data, it is seen that assessee has done transaction at Multi Commodity Exchange at Rs. 4,99,85,780/- 26AS Receipts is shown at Rs. 10,15,876/-. Hence, the assessment was re-opened for the reason that income to the tune of Rs.5,10,01,656/- (4,99,85,780 + 10,15,876) chargeable to tax has escaped assessment for A.Y. 2012-13 by reason of the failure on the part of the assessee to make a return under section 139 of the Income Tax Act, within the meaning of Section 147 of the Income Tax Act, 1961. Thereafter, Notice u/s. 148 dated 28/03/2019 was issued to the assessee requesting to file Return of Income. In response of notice u/s 148, the assessee filed ROI for AY-2012-13 on 05/11/2019 declaring total income of Rs.2,90,360/-. The Notice u/s. 142(1) dated 28/09/2019 calling for certain details/documents was also issued.”

5.1. According to him, in contradiction of the reasons to believe so recorded, addition has been made on account of share transaction by adopting 10% of the transaction value undertaken on MCX. In this respect, he referred to para 4 of the impugned order which is also reproduced as under:

“4. Addition on account of Share Transaction

During the course of scrutiny proceedings, on perusal of Return of income filed in response of notice u/s 148 of IT Act, it is noted that the assessee has not shown income /loss in respect of share transaction done at Multi Commodity Exchange of India Ltd (MCX). In this regards, the notice u/s 133(6) dated 22-10-2019 was issued to MCX calling details/documents pertaining to transaction executed by the assessee during the F.Y 2011-12 relevant to A.Y 2012-13. The details

/ documents received from the MCX authenticated the transaction. With regards to share transaction, the assessee intimated that he has not done any high value transaction. Thereafter, a show cause letter dated 06-12-2019 was issued. The main content of the Show cause is as below.”

5.2. Ld. Counsel thus, submitted that since no addition has been made on the issue for which proceedings u/s.148 were initiated, no new addition can be made and therefore the addition of Rs.49,98,578/- is bad in law and ought to be deleted. Ld. Counsel thus, made out a case that reassessment proceedings have been initiated on the issue relating to transactions at MCX which has escaped assessment whereas the assessment has been completed by making an addition in respect of share transaction. Reliance was placed on the decision of Hon'ble Jurisdictional High Court of Bombay in the case of CIT vs. Jet Airways Ltd. [331] ITR 236 which covers the case of assessee.

6. We have heard the rival contentions and perused the case records. This issue has been dealt with by the Hon'ble High Court of Bombay in the case of Jet Airways India Ltd. (supra) in favour of the assessee, the relevant extract from the judgment is reproduced as under:

"Explanation 3 to section 147 of the Income-tax Act, 1961, was inserted by the Finance (No.2) Act of 2009, with effect from April 1, 1989. The effect of the Explanation is that even though the notice that has been issued under section 148 containing the reasons for reopening the assessment does not contain a reference to a particular issue with reference to which income has escaped assessment, the Assessing Officer may assess or reassess the income in respect of any issue which has escaped assessment, when such issue comes to his notice subsequently in the course of the proceedings. Parliament having used the words "assess or reassess" such income and also any other income chargeable to tax which has escaped assessment", the words "and also" cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word "or". The Legislature did not rest content by merely using the word "and". The words "and" as well as "also" have been used together and in conjunction. Evidently, what Parliament intends by use of the words "and also" is that the Assessing Officer, upon the formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess: (i) such income; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. Explanation 3 does not and cannot override the necessity of fulfilling

the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and 'cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepts the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a notice under section 148 would be necessary in the event of challenge by the assessee. The effect of section 147 as it now stands after the amendment of 2009 can therefore, be summarised as follows: (i) the Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year; (ii) upon the formation of that belief and before he proceeds to make an assessment, reassessment or recomputation, the Assessing Officer has to serve on the assessee a notice under sub-section (1) of section 148 ; (iii) the Assessing Officer may assess or reassess such income, which he has reason to believe, has escaped assessment and also any other income, chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section; and (iv) though the notice under section 148(2) does not include a particular issue with respect to which income has escaped assessment, he may none the less, assess or reassess the income in respect of any issue which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section."

7. Thus, in the facts and circumstances of the present case and respectfully following the above referred judicial precedent, we hold that the impugned assessment order passed u/s. 143(3) read with section 147 of the Act is bad in law. We are of considered view that when the very foundation of reopening is knocked out, further proceedings undertaken would not survive. Assessment order is thus quashed. Since the impugned assessment order is held to be bad in law, the grounds taken on merit in the memo of appeal have become academic in nature and, therefore, are not adjudicated upon.

8. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 18 July, 2024

Sd/-
(Satbeer Singh Godara)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 18 July, 2024

MP, Sr.P.S.

Copy to :

- 1 The Appellant
- 2 The Respondent
- 3 DR, ITAT, Mumbai
- 4 Guard File
- 5 CIT

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai