

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

BEFORE SHRI PRASHANT MAHARISHI, VICE PRESIDENT
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA No.798/Bang/2024
Assessment year : 2016-17

Alok Gyanchand Kothari, Plot No.866, Ferns Paradise, Nakundi Circle, Outer Ring Road, Bengaluru – 560 037. PAN: AFWPK 4089E	Vs.	The Assistant Commissioner of Income Tax, Circle 5[3][2], Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Ravi Shankar, Advocate
Respondent by	:	Shri V. Parithivel, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	11.11.2024
Date of Pronouncement	:	18.11.2024

ORDER

Per Prashant Maharishi, Vice President

1. This appeal is filed by Shri Alok Gyanchand Kothari (the assessee/appellant) for the assessment year 2016-17 against the appellate order passed by the Addl./Jt.CIT(A)-1, Coimbatore [Id. CIT(A)] dated 28.02.2024 wherein the appeal filed by the assessee against the assessment order passed u/s. 143(3) of the

Income-tax Act, 1961 (the Act) passed by the ACIT, Circle 5(3)(2), Bengaluru [ld. AO] was partly allowed.

2. However, the assessee is aggrieved with the same and has preferred this appeal raising the following grounds:-

- “1. The appellate order passed by the learned Commissioner of Income-tax [Appeals], NFAC, Delhi, passed under Section 250 of the Act dated 28/02/2024, in so far as it is against the Appellant is opposed to law, weight of evidence, probabilities, facts and circumstances of the Appellant's case.

2. The learned Commissioner of Income-tax [Appeals] and the learned assessing officer were not justified in not allowing the loss incurred by the appellant of Rs. 36,27,638/- from trading in derivatives as business loss, eligible for set-off against income from other sources amounting to Rs. 17,22,245/-, on the facts and circumstances of the case.

3. The learned Commissioner of Income-tax [Appeals] erred in not allowing the set-off of loss derived from trading in derivatives against the income from other sources, by holding that since the appellant has not claimed the in the return of income, the same is not allowable and placed reliance on the decision of the Hon'ble Apex Court in the case of Goetz [India] Ltd., Vs. CIT [2006] reported in 284 ITR 323 [SC], on the facts and circumstances of the case.

4. The learned Commissioner of Income-tax [Appeals] ought to have appreciated that in accordance with the Board Circular and based on parity of reasoning of several case judicial precedents, even though if the assessee has inadvertently not claimed any eligible deduction in its return of income, it is incumbent on the officers of the department to grant eligible deduction available in the statute, on the facts and circumstances of the case.

5. The learned Commissioner of Income-tax [Appeals] is not justified in not considering the additional evidence filed by the appellant along with the application filed under Rule 46A of the

Income-tax Rules, which is against the principles of natural justice, on the facts and circumstances of the case.

6. The appellant craves leave to add, alter, amend, substitute or delete any or all of the grounds of appeal urged above.

7. For the above and other grounds to be urged during the course of hearing of the appeal the Appellant prays that the appeal be allowed in the interest of equity and justice.”

3. On reading the grounds of appeal, the solitary grievance of the assessee is that the Id. AO was not justified in not allowing the loss incurred by the appellant of Rs.36,27,638 from trading in derivatives as business loss, which is eligible for set off against the income from other sources of Rs.17,22,245 for the same year.
4. The brief facts of the case show that assessee is an individual, who filed his return of income for Rs.1,10,76,100 on 29.7.2016. The case was selected for limited scrutiny to verify the issue of genuineness of capital gain and loss incurred by the assessee relating to securities transaction. The Id. AO found that a loss of Rs.59,92,732 is a speculative loss which cannot be set off against the capital gain as per provisions of section 73 of the Act. He further found that loss from equity transactions cannot be clubbed with loss from speculative transactions. Hence, loss of Rs.20,67,550 cannot be set off against any income as the same is exempt from tax. It was further found that short term capital loss of Rs.61,36,403 and Rs.5,54,267 cannot be allowed to be

clubbed or set off against any speculative business. Accordingly, assessment order was passed u/s. 143(3) of the Act.

5. The assessee, aggrieved with the assessment order, preferred appeal before the Id. CIT(A). The assessee also raised additional ground of appeal that the AO should have considered the loss on derivative trading of Rs.36,27,638 as business loss and further should have allowed to set off the same against income from other sources of Rs.17,22,245. The Id. CIT(A) considered the additional ground in para 5.4 of his order and held that this ground has not been out of the claim made by the assessee in the income-tax return. Therefore, relying upon the decision in the case of *Goetze India Ltd. v. CIT*, [2006] 284 ITR 323 (SC), he held that appellant has not made any such claim in the return of income and further such claim was also not made by filing of revised return. Therefore, he did not allow the additional ground and dismissed it.
6. The assessee is aggrieved with the appellate order. The only ground of the assessee is that Id. CIT(A) should have allowed the claim of assessee to set off loss of Rs.36,27,638 from trading in derivatives as business loss to be set off against income from other sources of Rs.17,22,245. The Id. AR, Mr. Ravi Shankar, Advocate, submitted that the decision relied by the Id. CIT(A) is applicable in case of claim before the AO and not before the

appellate authorities. Therefore, the order of the Id. CIT(A) is not sustainable.

7. The Id. DR, Mr. V. Parithivel, JCIT, vehemently supported the order of the Id. CIT(A) stating that when the assessee has not made any claim in the return of income, assessee could not have made any such claim before the Id. CIT(A) and therefore it is rightly rejected.
8. We have carefully considered the rival contentions and perused the order of the Id. CIT(A). In this case, the assessee has raised an additional ground before the Id. CIT(A) wherein assessee made a claim that loss incurred by the assessee of Rs.36,27,638 from trading in derivatives should be considered as a business loss and same shall be allowed to be set off against income from other sources of Rs.17,22,245. We find that Id. CIT(A) has not allowed the claim of the assessee for the reason that no such claim was made in the original or revised return of income and thereby relied on the decision of Hon'ble Supreme Court in the case of *Goetze India Ltd. v. CIT*, [2006] 284 ITR 323 (SC). However, we find that the issue before the Hon'ble Supreme Court was, whether the AO could have entertained a fresh claim before him without there being any claim in the return of income. The decision of the Hon'ble Supreme Court does not deal with the power of the first appellate authority. Therefore, the Id. CIT(A) was incorrect in throwing the claim of the

assessee raised before him for the first time, without examining on merits. We find that the decision of Hon'ble Supreme Court was first considered by the Hon'ble Delhi High Court in 306 ITR 42 wherein it was held in para 17 that the above decision of Hon'ble Supreme Court was limited to the power of assessing authority, but did not impinge on the power of the Tribunal. The Hon'ble Karnataka High Court in *Pr.CIT v. Karnataka State Co-operative Federation Ltd.* in *128 taxmann.com 1* has held that there is no prohibition on the powers of appellate authorities to entertain an additional claim. Therefore, we reverse the order of the Id. CIT(A) and hold that he was unjustified in not examining the claim of the assessee.

9. Ld. AR states that claim may be restored to the file of Id. AO, however we are not inclined to restore this to the file of Id. AO because, then we would be directing Id. AO to decide the claim which was not in the ROI of the assessee.
10. However, as the claim was not examined by any authority, we restore this issue back to the file of the Id. CIT (A) to decide whether the loss incurred by the assessee of Rs.36,27,638 from trading business in derivatives stated to be a business loss is eligible for set off against income from other sources amounting to Rs.17,22,245 or not. The assessee is directed to submit necessary details before the Id. CIT (A) who may examine the

claim and decide the issue on merits, after giving proper opportunity of hearing to the assessee.

11. Accordingly ground No.2 of the appeal of the assessee is allowed with the above directions.
12. As all other grounds were not pressed before us, the same are dismissed.
13. In the result, the appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on this 18th day of November, 2024.

Sd/-
(KESHAV DUBEY)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
VICE PRESIDENT

Bangalore,
Dated, the 18th November, 2024.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. Pr. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.