

IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI
BEFORE SMT BEENA PILLAI, JUDICIAL MEMBER
ITA No.1363/M/2024
Assessment Year: 2014-15

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| Empire Multitrade Private Limited A/4, Chandrika CHS Ltd., Shankar Lane, Kandivali (W.), Mumbai- 400067. PAN: AABCE0444J | Vs. | DCIT- 12(2)(1) Room No. 642, 6 th Floor, Aaykar Bhavan Maharishi Karve Road, Mumbai- 400020. |
| Appellant | : | Respondent |

Present for:

Assessee by Revenue by

: Shri. Ajay R. Singh
: Ms. Pradnya Gholap (Sr. DR)

Date of Hearing : 02.12.2024

Date of Pronouncement : 12.12.2024

ORDER

Per Beena Pillai, JM:

Present appeal arises out of order dated 24/01/2024 passed by LdCIT (A)-1 Vadodara for assessment year 2014-15 on following grounds of appeal:

- 1.1. *“The order passed u/s.250 on 24-01-2024 by ADDL/JCIT (A)-1, Vadodara (herein after referred as "Appellate Authority") upholding the transaction of purchases & sales on High Seas Sales basis (HSS) as speculation transactions and any loss incurred therein is as speculation loss instead of normal business loss is wholly illegal and unlawful.*



- 1.2. *The Ld. Appellate Authority has grievously erred in law and or on facts in not considering fully and properly the submissions made and judicial precedents relied upon by the appellant with regard to the impugned transactions.*
- 2.1. *The Ld. Appellate Authority has grievously erred in law and on facts in confirming the action of AO in considering the loss of Rs.10,05,28,283/- incurred in the business of trading in commodities on HSS as speculation loss instead of business loss declared by the appellant and accepted by department in the scrutiny assessments year after year.*
- 2.2. *The AO as well as Ld. Appellate Authority failed to appreciate that in case of purchase & sale on HSS, delivery of the underlying commodities are respectively taken & given by endorsement of Bill of Lading acknowledging the carriage of goods through ship.*
- 2.3. *That in the facts and circumstances of the case as well as in law, the Ld. Appellate Authority ought not to have upheld the impugned loss incurred in the business of trading in commodities on HSS as speculation loss instead of business loss.*
- 3.1. *The Ld. Appellate Authority, although rightly held that other income of Rs. 3,11,142/- has been considered by the appellant while arriving at loss but, has erred in law and on facts in confirming the action of AO in considering the same as income from other sources.*
- 3.2. *The AO as well as Ld. Appellate Authority failed to appreciate that impugned other income mainly comprises of the export incentives & excess provision written back which are part & parcel of the business.*
- 3.3. *That in the facts and circumstances of the case as well as in law, the Ld. Appellate Authority ought not to have upheld the impugned other income as Income chargeable under other sources.*
4. *The Appellant craves, to consider each of the above grounds of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal.”*

Brief facts of the case are as under:

2. The assessee is a company engaged in the business of trading of edible oils and soya and filed its return of income for your under



consideration declaring loss of ₹ 10, 05, 28, 283/-on 18/09/2014. It is submitted that the return was processed under section 143 (1) of the act, and subsequently selected for scrutiny. Thereafter notice under section 142 (1) of the act was issued to the assessee along with notice under section 143(2). In response to the statutory notices, assessee filed requisite details as called for.

2.1. From the details filed by the assessee, the Ld.AO noted that assessee is trading in commodities like edible oil and soya DOC and that the assessee had shown huge losses against the purchases and sales. It was submitted that, the assessee undertakes high seas purchases and sales and shown 14 purchases made to corresponding 14 sales during the year under consideration. The Ld.AO noted that, the transaction of the sale value was less than the purchase value and thereby the assessee booked loss.

2.2. The Ld.AO called upon the assessee to show cause to why the nature of activities undertaken by the assessee during the year under consideration not be treated as speculative business and the loss earned by the assessee should not be treated as speculation loss.

2.3. In response to the show cause notice, the assessee vide letter dated 12/02/2016 submitted that the commodities in which assessee dealt with were high-value case is high seas transaction. It was submitted that, profitability depends upon the international market and the rate of the dollar in the international market always fluctuate owing to the demand and supply in the local market. The



assessee further submitted that, it thus entered into forward contract for purchase/sale of commodities with the parties to whom these are to be delivered within a prescribed period at a predetermined price. It is submitted that, profit or loss earned by the assessee depends on the difference between the predetermined price and the prevailing market price which is very volatile due to the market conditions including the demand and supply position in the local market as well as international market, fluctuation in commodity market and exchange rates.

2.4. The Ld. AO after considering the submissions of the assessee was of the opinion that, the purchase and sales shown by the assessee are one of a forward contract and that the assessee do not take actual delivery of the goods from its vendor's nor gives actual delivery to its purchaser. The Ld. AO thus held that assessee is indulged in speculative transaction based on future contracts, wherein, there is no delivery of goods at all. He thus disallowed the business loss earned by the assessee to be speculative and the same was allowed to be carry forwarded to the next year to set-off against any speculative profit.

2.5. The Ld. AO also treated the income declared by the assessee under the head other income mainly comprising of export incentives and excess provision written of which were part and parcel of the activities of the assessee, as income from other sources.

Aggrieved by the order of the Ld.AO, assessee preferred appeal before the Ld.CIT(A)



3. The Ld.CIT(A) upheld the observations of the Ld.AO holding that, the assessee traded in edible oil on high seas under which delivery of goods is taken and given by the endorsement of document acknowledging the shipment of the goods, before it reaches the destination. The Ld.CIT(A) observed that in case of purchase by the assessee, the delivery of the goods by way of endorsement of bill of lading in its favour and in case of sales the assessee gives delivery of goods by transfer of documents.

3.1. The Ld.CIT(A) was of the opinion that the assessee thus has not shown any evidence of any physical purchase and sales of goods and that the transactions are on paper only. The Ld.CIT(A) thus relying on coordinate bench decision of this *Tribunal observed and held as under:*

“6.2.6 Further as per decision of ITAT, Mumbai in the case of Araska Diamond (P.) Ltd. vs Assistant Commissioner of Income-tax, 5 (1), Mumbai, in ITA NO. 5631 (MUM.) OF 2012, rendered on OCTOBER 17, 2014, whether in order that forward transactions in commodities may fall within proviso (a) to section 43(5), it is necessary that raw materials or merchandise, in respect of which forward transactions have been made by assessee, must have a direct connection with goods manufactured or merchandise sold by him - Held, yes

6.2.7 Thus, it is evident that the appellant is indulging in speculative transaction based on future contracts wherein there is no delivery of goods. In view of the same, the grounds of the appellant that the loss is of business loss and not speculative loss fails.

These grounds of the appellant Dismissed.”

Aggrieved by the order of the Ld. CIT(A), assessee is in appeal before the *Tribunal.*

4. The Ld.AR submitted that **Ground No1.1-1.2** are general in nature and therefore do not require any adjudication.

5. He submitted that **Ground No. 2.1-2.3** are raised by the assessee in respect of treating the business loss of ₹10,05,28,283/- as speculative loss.

5.1. The Ld.AR was called upon by this *Tribunal* to explain the modus operandi in high seas sales transaction. In lieu of the same he submitted that in the context of high seas transactions, the original seller being the exporter transfer possession of the commodity by parting with the commodity at the time of uploading on the vessel to be delivered to the original buyer that at the specified port. Such transfer is the same acknowledged by a document called 'Bill of lading'.

5.2. He submitted that, during the course of transit, the buyer enters into a contract with the subsequent buyers for sale of commodity loaded on the vessel and deliver the same by endorsing the bill of lading in favour of subsequent buyer.

5.3. Once a vessel reaches the port, the ultimate subsequent buyer takes physical delivery of the commodity, after payment the customs duty. The Ld.AR thus submitted that, in case of high seas transaction there is physical delivery of goods by the original seller to the ultimate buyer, and therefore such transactions does not fall within the sweep of the definition under section 43 (5) of the act.



5.4. The Ld.AR drew our attention to the definition of “documents to the title of goods” as per section 2 (4) of The Sale of Goods Act 1930, that reads as under:

“document of title to goods include a bill of lading, warehouse receipt, warehouse keepers certificate, wharfinger’s certificate, railway receipt, warrant order for the delivery of goods and any other documents used in the ordinary course of the business as a proof to the possession or control of goods, or purporting to authorise, either by endorsement or by delivery, the possessor of the document to the transfer received goods thereby represented”

5.5. He submitted that, as per the dictionary meaning, “document of title” is a document that enable the possessor to deal with the property described in it, as if, he were an owner. Placing reliance on the commentary on Central Sales Tax Laws by K.Chaturvedi at page 847, the Ld.AR submitted that, *“A bill of lading is a writing signed on behalf of the owner of the ship in which the goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage subject to such conditions as the mentioned in the bill of lading”*

The Ld.AR then referring to provisions of section 43 (5) of the act submitted that, the Legislature has in specific terms excluded such transaction by using the words “actual delivery, as well as transfer” of commodity.

5.6. The Ld.AR submitted that, in the present facts the assessee buys the goods from one party and sales the goods to other parties. He had relied on the statements showing the parties from whom the assessee purchase the goods on high seas basis and the parties to

whom the assessee sold the goods on high seas basis which has been annexed paper book at page 19-20.

5.7. The Ld.AR submitted that, in the present facts of the case it is not disputed that the assessee traded in edible oil on high seas, wherein the delivery of goods are taken and given by way of endorsement of bill of lading in favour of the parties to the transaction much before the goods reach its destination. He submitted that, the assessee purchased and sold the goods on the high seas basis. It is submitted that, the assessee gave delivery of goods from the seller by way of endorsement of the documents for purchase consideration and gave the delivery of goods to the buyer for transfer of documents on the sale consideration. It is submitted that the transaction of purchase and sale entered into by the assessee can never be settled without delivery of goods vis-à-vis a situation that would fall under the mischief of subclause 5 of section 43 of the act.

5.8. The Ld.AR further submitted that the assessee's turnover of sale and purchase are accepted under the state VAT act. In support, he filed sales tax assessment order in the paper book placed at page 21-30. He also relied on the assessment order for assessment year 2012-13 wherein, the assessing officer himself after verifying the claim of high seas transaction by assessee accepted the to be business transaction.

5.9. On the contrary the Ld.AR DR placed reliance on the orders passed by authorities below.



We have perused submissions advanced by both sides in the light of records placed before us.

6. High Seas Sale is a common trade practice where the original importer sells the goods to the buyer before the goods are entered into customs clearance of the port where the voyage ends i.e. before filing the first bill of entry, either for home consumption or for warehousing, as the case may be.

6.1. The relevant provisions for deciding this appeal are extracted as under:

Definitions of certain terms relevant to income from profits and gains of business or profession.

43. In sections 28 to 41 and in this section, unless the context otherwise requires—

.....

(5) "speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

Provided that for the purpose of this clause:

.....

(e) an eligible transaction in respect of trading in commodity derivatives carried out in a recognised stock exchange, which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013),

shall not be deemed to be a speculative transaction:

Provided further that for the purposes of clause (e) of the first proviso, in respect of trading in agricultural commodity derivatives, the requirement of chargeability of commodity transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013) shall not apply.

.....

Explanation 2.—For the purposes of clause (e), the expressions—

(i) "commodity derivative" shall have the meaning as assigned to it in Chapter VII of the Finance Act, 2013;

(ii) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through member or an intermediary, registered under the bye-laws, rules and regulations of the recognised stock exchange for trading in commodity derivative in accordance with the provisions of the



Forward Contracts (Regulation) Act, 1952 (74 of 1952) and the rules, regulations or bye-laws made or directions issued under that Act on a recognised stock exchange; and

(B) which is supported by a time stamped contract note issued by such member or intermediary to every client indicating in the contract note, the unique client identity number allotted under the Act, rules, regulations or bye-laws referred to in sub-clause (A), unique trade number and permanent account number allotted under this Act;

(iii) "recognised stock exchange" means a recognised stock exchange as referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed and notified by the Central Government for this purpose;

6.2. Under the Act, the term 'speculation' focuses on whether the transactions involves actual delivery, transfer, or settlement. Even if the goods or commodities involved are inherently speculative, the crucial factor remains to establish actual delivery. Thus it is clear that, when delivery of the goods are not taken, the transaction is treated as speculative in nature.

6.3. But in assessee's case the entire transaction is going through a process where delivery of goods take place and documents evidencing delivery of goods related to high sea sale are Bill of Lading which has not been disputed by the revenue authorities.

6.4. The Ld.AR has submitted that, in the present facts of the case actual delivery took place, though there was successive sales of the same commodity which is also delivered physically to the ultimate purchaser. He placed reliance on the decision of *Hon'ble Rajasthan High Court* in case of *Sripal Satyapal vs ITO* reported in (2008) 217 CTR 337 and the decision of *Hon'ble Andhra Pradesh High Court* in case of *CIT vs Lakshminarayanan Trading Company* reported in

(1995) 82 taxman 301 in support of the argument that the case would not fall under the category of speculative transaction.

6.5. *Hon'ble Andhra Pradesh High court in case of CIT vs Lakshminarayanan Trading Company(supra)* dealt with identical situation where there was successive sales of same commodity coupled with delivery or transfer of the commodity and the physical delivery is only taken by the ultimate purchaser, the transaction does not fall within the sweep of speculative transaction and the *Hon'ble High Court* observed as under: -

"For example, if A sells certain commodity to B and transfers possession of the commodity by parting with the commodity either by putting the commodity on the carrier, rail or any other transport, and on the way B, the purchaser, sells the commodity to some third party C, the purchase by the first purchaser B cannot, in our view, be treated as speculative transaction for the simple reason that the delivery or transfer of the commodity contemplated under clause (5) of section 43, has taken place."

6.5.1. Further, the *Hon'ble High Court* held that, under the sale of goods Act the delivery of goods can be made either by physical delivery of commodity directly to the purchaser or to the carrier for him or by transferring the documents of title to the commodity. The relevant extract reads as under: -

9. In view of the above discussion of case law with regard to the provisions of section 43(5), we may now revert to consider the scope of that section under general principles. Any trader in commodities generally intends to buy and sell the commodity with a stipulation that the delivery of the commodity by the seller to the purchaser is an essential ingredient of that transaction. Under the Sale of Goods Act such delivery can be made either by physical delivery of the commodity directly to the purchaser or to the carrier for him or by transferring the document of title to the commodity."

6.5.2. It is further held by *Hon'ble High Court* that speculative as defined under section 43(5) is such transaction where the parties

never contemplate the delivery of the commodity but trade in the documents of title and the relevant part of para 9 reads as under:

"In the expression "otherwise than by actual delivery or by transfer of the commodity" these two modes of delivery must be contemplated. Taking this expression along with the previous phrase "settled periodically or ultimately", it would mean that in such a settlement of the contract delivery of the commodity was never contemplated at all. In other words, speculative transactions are such that the parties never contemplate delivery of the commodity but only trade in the documents of title."

6.6. *Hon'ble Rajasthan High Court SripalSatyapal vs ITO (supra)* while dealing with the provisions of section 43(5) held that there is no requirement in the provisions of section 43(5) for actual delivery or the transfer of commodity by the assessee or is agent but the emphasis is on that whether transactions entered into by the parties were settled by delivery of goods, (and for determining the speculative transaction in terms of 43(5) is that whether the transactions entered into by the assessee has been settled otherwise by way of actual delivery of the goods). The relevant part of the judgment is reproduced as under: -

"8. that where the nature of transaction entered into between the parties is such that under the contract the seller parts with the possession of the ' goods and while the goods were in transit the buyer enters into subsequent transaction, then so far as the first seller and the first buyer - are concerned, there would be actual delivery of the goods as the first seller and having parted with the possession of the goods and handed them over to the carrier which would amount to delivery to the buyer, the transaction cannot be regarded as speculative transaction."

6.7. The Ld.AR, also relied on the decision of *Hon'ble Amritsar Bench* of this Tribunal, in case of *DCIT vs. GH Corp Science Pvt. Ltd* reported in (2024) 265 taxmann.com 172, for assessment year



20117-18, where on identical facts the issue has been decided in favor of the assessee.

6.8. In the present facts of the case we find that the chain of events as laid down by the assessee, supported by documentary evidences, has not been disputed by the AO. The only point of dispute is there is no evidence of actual delivery and merely because the assessee entered into a forward contract, the transaction was considered to be speculative in nature.

6.9. It is not a case, where delivery of the goods were not contemplated at all, but it is a case where goods were physically purchased by the importer from the foreign seller, who loaded the goods on the ship, and thereafter, the assessee has purchased the goods from the importer while on the high seas in transit, and thereafter, the assessee sold the goods by handing over and transfer of title documents, in favour of the ultimate buyer, which includes handing over the sale invoice, High Seas sales agreement, copy of original import invoice, and copy of bill of lading to the purchaser, while the goods were still on high seas in transit and finally, the ultimate buyer has taken delivery and physical possession of the goods by filing the bill of entry at the port of delivery in India, and complied with all the custom formalities.

6.10. The authorities below do not disputed the factual sequence of events stated above, and has also not disputed the veracity of documentary evidence on record, regarding the ultimate delivery of goods being taken by the last buyer. Therefore respectfully following



the ratios laid down by the decisions refer to and relied upon hereinabove we do not agree with the findings of the authorities below that the transaction of purchase and sale undertaken by the assessee amounts to be speculative in nature.

Accordingly the grounds raised by the assessee stands allowed.

In the result, appeal filed by the assessee stands allowed.

Order pronounced in the open court on 12-12-2024.

**Sd/-
BEENA PILLAI
JUDICIAL MEMBER**

Place: Mumbai,

Dated: 12.12.2024

Snehal C. Ayare, Stenographer/ Dragon

Copy of the order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai